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Immigration Restrictions as Employment Discrimination

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IMMIGRATION AND THE WORKPLACE: IMMIGRATION RESTRICTIONS AS EMPLOYMENT DISCRIMINATION

HOWARD F. CHANG*

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The liberalization of our immigration laws in the United States appeared to be a priority on the political agenda while President George W. Bush weighed proposals to expand access to visas,¹ until

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1. See Dan Eggen & Helen Dewar, *Bush Weighing Plan for Mexican Guest Workers*, WASH. POST, July 25, 2001, at A3; Eric Schmitt, *Bush Panel Backs Legalizing Status of Some*

terrorist attacks placed these plans on hold.² Democrats in Congress urged even broader liberalization than that contemplated by the Bush administration.³ Support from both labor unions and business interests may make liberalizing reforms politically feasible in the near future,⁴ as the Bush administration has resumed negotiations with Mexico on immigration policy with the support of Democrats in Congress.⁵ This retreat from the overwhelmingly restrictionist politics of recent years has been a welcome development, as considerations of not only national economic welfare but also social justice militate in favor of liberalized access for aliens seeking employment in the United States.

After all, our immigration restrictions are a form of government mandated employment discrimination against aliens. Our immigration statute prohibits the hiring of aliens not authorized to work in the United States and imposes sanctions on employers violating this prohibition.⁶ Aliens are authorized to work here, for the most part, only if they have a "green card," that is, are legal immigrants, or are temporary workers with nonimmigrant visas.⁷ Our immigration laws not only impose quantitative restrictions on the number of these visas issued but also impose requirements for access to those visas that no native would have to meet in order to work in the United States.⁸ Even if our laws did not include an explicit ban on the hiring of unauthorized immigrants, the threat of enforcement of our immigra-

Migrants, N.Y. TIMES, July 24, 2001, at A1; Eric Schmitt, *Bush Says Plan for Immigrants Could Expand*, N.Y. TIMES, July 27, 2001, at A1; Eric Schmitt, *U.S.-Mexico Talks Produce Agreement on Immigration Policy*, N.Y. TIMES, Aug. 10, 2001, at A4.

2. See Alfredo Corchado, *Immigration Talks Between U.S., Mexico on Hold*, DALLAS MORNING NEWS, Sept. 19, 2001, at 5A; Mike Dorning, *Mexico Border Issue on Hold*, CHI. TRIB., Sept. 21, 2001, at 16; Greg Miller & Nick Anderson, *Mood Swiftly Changes on Immigration Borders: Legislators and White House to Seek Tighter Restrictions*, L.A. TIMES, Sept. 18, 2001, at A12; James Sterngold, *Legal Residency Hopes of Millions Dashed*, N.Y. TIMES, Oct. 7, 2001, § 1A, at 33.

3. See Jonathan Peterson, *Democrats Up Ante to Reform Immigration: Split Families, Worker Rights Addressed*, L.A. TIMES, Aug. 3, 2001, at A1; Eric Schmitt, *Democrats Counter Administration on Immigrants*, N.Y. TIMES, Aug. 3, 2001, at A19; Cheryl W. Thompson, *Democrats to Offer Plan to Reform Immigration*, WASH. POST, Aug. 2, 2001, at A2.

4. See Thomas B. Edsall & Cheryl W. Thompson, *Alliance Forms on Immigrant Policies: Business, Church, Labor Groups Unite on Liberalization*, WASH. POST, Aug. 7, 2001, at A1.

5. See Mary Jordan & Kevin Sullivan, *U.S. and Mexico to Resume Talks on Immigration Policy: Issue Will Be Recast as One of National Security; Daschle, Gephardt to Meet With President Fox*, WASH. POST, Nov. 15, 2001, at A40; Ginger Thompson, *Top Democrats Politick Through Rural Mexico*, N.Y. TIMES, Nov. 19, 2001, at A12.

6. See 8 U.S.C. § 1324a (2000).

7. See *id.* § 1324a(h)(3).

8. See *id.* §§ 1151-1153.

tion laws, through the exclusion and deportation of aliens, would prevent or curtail alien access to employment opportunities in our labor markets. Thus, our immigration laws are a substantial barrier to the free flow of alien labor into the United States.

For example, we require "labor certification" for most categories of employment-based immigration visas, including those for skilled workers, even workers holding advanced degrees.⁹ Labor certification requires, among other things, that the employer show that "there are not sufficient workers who are able, willing, qualified . . . and available" to perform the work in question.¹⁰ By "qualified," our immigration laws generally mean minimally qualified.¹¹ Thus, our laws mandate that employers choose any minimally qualified U.S. worker over any better qualified alien.¹² Through our immigration laws, we deny aliens access to valuable employment opportunities that are open to natives. At a fundamental level, these laws are at odds with antidiscrimination principles we take for granted in other contexts.¹³

This government mandated employment discrimination is especially striking given the basis for the discrimination. Most aliens are born aliens because our nationality laws deem them to be aliens based on immutable characteristics, including the geographic location of their birth and the citizenship of their parents at the time of their birth.¹⁴ For a liberal society that declares that "all men are created equal,"¹⁵ this discrimination, based explicitly on circumstances of

9. *Id.* §§ 1153(b)(2)–(3), 1182(a)(5)(D).

10. *Id.* § 1182(a)(5)(A)(i).

11. The statute requires the U.S. worker to be "equally qualified" only in the case of an alien who "is a member of the teaching profession" or "has exceptional ability in the sciences or the arts." *Id.* § 1182(a)(5)(A)(ii).

12. See STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 185 (2d ed. 1997) ("[T]he employer ordinarily must hire a minimally qualified American over a more qualified alien (or hire no one at all).").

13. See 42 U.S.C. § 2000e-2 (2000).

14. See U.S. CONST. amend. XIV, § 1 ("All persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . ."); 8 U.S.C. § 1401 (2000) (setting forth categories of "citizens of the United States at birth").

15. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). As the focus of this article is an evaluation of U.S. immigration policies, my analysis examines the tension between these policies and the ideals of equality and neutrality that we generally espouse in the United States within our liberal political philosophy. I do not address the question of whether other societies must also live by the same principles to which we are committed, as that issue is beyond the scope of this article. See Joseph H. Carens, *Migration and Morality: A Liberal Egalitarian Perspective*, in *FREE MOVEMENT: ETHICAL ISSUES IN THE TRANSNATIONAL MIGRATION OF PEOPLE AND OF MONEY* 25, 36–40 (Brian Barry & Robert E. Goodin eds., 1992) [hereinafter

birth, is at odds with ideal principles of social justice.¹⁶ Our liberal ideals raise a presumption in favor of equal treatment and place the burden on those who defend discrimination to come forward with a justification for discriminatory laws.

The discrimination based on nativity in our nationality laws would be less important if it were a simple matter for an alien to gain permanent residence in the United States and then naturalize. Once an alien immigrates and gains lawful permanent residence, the alien becomes a U.S. worker with access to the U.S. labor market and eventually access to U.S. citizenship.¹⁷ Our immigration laws, however, raise significant barriers to immigration and thereby deny the vast majority of aliens access to the employment opportunities provided to U.S. natives as a birthright. Insofar as these hurdles prevent most aliens who desire such access from enjoying the opportunities open to U.S. natives, they discriminate against those who are born aliens in favor of those natives. The more restrictive our immigration and naturalization policies, the more significance they confer on nationality at birth, and the more our laws discriminate based on circumstances of birth.

In Part I of this Article, I examine our immigration restrictions in light of our liberal ideals of equality. I argue that these ideals require us to extend equal concern to all individuals and that this cosmopolitan perspective makes it difficult to justify our immigration restrictions. This violation of the principle of equal concern represents one sense in which immigration restrictions violate our liberal ideals.

In Part II, I assume a less demanding moral theory, which allows us to give the interests of natives priority over the interests of aliens. I argue that even from this parochial perspective, it is difficult to justify the employment discrimination implied by our immigration restrictions as ideal policies unless we count the satisfaction of segregationist preferences as a justification. The role of intolerance in explaining the adoption of immigration restrictions underscores the second sense in which the employment discrimination implied by our immigration policies violates our liberal ideals.

FREE MOVEMENT] (asking whether other countries are obliged to have the same immigration policies as the United States).

16. See Howard F. Chang, *Immigration Policy, Liberal Principles, and the Republican Tradition*, 85 GEO. L.J. 2105, 2112–15 (1997).

17. See 8 U.S.C. § 1427(a) (2000) (providing for naturalization of permanent resident aliens).

In Part III, I explore the normative implications of my analysis for the reform of our immigration policies. I conclude that it is difficult for us to justify employment discrimination against aliens from a liberal perspective, whether we adopt the cosmopolitan perspective or a less egalitarian perspective that allows us to favor the interests of natives over those of aliens. The interests of natives, however, may justify some restrictions on alien access to public benefits and to citizenship, which would suggest liberalized guest-worker programs as a component of immigration reform. These programs would not be ideal from the cosmopolitan liberal perspective, but then neither would our current immigration restrictions. I argue that guest-worker programs would represent a non-ideal, second-best improvement over the status quo from a cosmopolitan perspective, given constraints that make more ideal policies politically infeasible. Finally, in Part IV, I offer some concluding remarks.

I. THE LIBERAL IDEAL AND THE COSMOPOLITAN PERSPECTIVE

Consider the liberal theory of justice developed by John Rawls, who asks what principles people would choose behind a “veil of ignorance.”¹⁸ In this “original position,” people know nothing about their own personal circumstances or traits and thus “do not know how the various alternatives will affect their own particular case and they are obliged to evaluate principles solely on the basis of general considerations.”¹⁹ This condition ensures that the parties are “fairly situated and treated equally as moral persons,”²⁰ or as Ronald Dworkin describes, extends “equal concern and respect” to each individual.²¹

Using Rawls’ theory, Joseph Carens addresses the issue of immigration restrictions as a question of social justice.²² In seeking a justification for the exclusion of aliens, “we don’t want to be biased by self-interested or partisan considerations” and instead “can take it as a basic presupposition that we should treat all human beings, not just members of our own society, as free and equal moral persons.”²³

18. See JOHN RAWLS, *A THEORY OF JUSTICE* 136–42 (1971).

19. *Id.* at 136–37; see *id.* at 141 (“If a knowledge of particulars is allowed, then the outcome is biased by arbitrary contingencies.”).

20. *Id.* at 141.

21. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 180–81 (1977).

22. See Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 *REV. POL.* 251, 255 (1987).

23. *Id.* at 256.

Carens identifies this premise as a basic feature of all liberal political theories,²⁴ concluding that we should “take a global, not a national, view of the original position.”²⁵

If we begin with equal concern for all persons, then immigration barriers are morally suspect and demand justification. All immigration restrictions discriminate against individuals based on their alienage, which in turn derives from immutable characteristics such as birthplace (that is, national origin) and other circumstances of birth such as parentage.²⁶ National origin would appear to be a trait that Rawls should deem “arbitrary from a moral point of view.”²⁷ Carens concludes that we cannot justify restrictions “on the grounds that those born in a given territory or born of parents who were citizens were more entitled to the benefits of citizenship than those born elsewhere or of alien parents.”²⁸ Nor can we justify restrictions “on the grounds that immigration would reduce the economic well-being of current citizens.”²⁹ Similarly, in a utilitarian calculation of global welfare, “current citizens would enjoy no privileged position.”³⁰

A. *Immigration Restrictions and Global Economic Welfare*

Suppose we adopt the perspective of a global utilitarian and thus give equal weight to the welfare of each individual in the world. Can we then justify the employment discrimination mandated by our immigration laws? Perhaps this unequal treatment for aliens is somehow consistent with equal concern for the interests of each individual.³¹ An economic analysis of the welfare effects of immigra-

24. See *id.* at 265 (claiming that “our social institutions and public policies must respect all human beings as moral persons,” which “entails recognition . . . of the freedom and equality of every human being”); see also *id.* at 269 (“No moral argument will seem acceptable . . . if it directly challenges the assumption of the equal moral worth of all individuals.”).

25. *Id.* at 256.

26. See Roger Nett, *The Civil Right We Are Not Ready For: The Right of Free Movement of People on the Face of the Earth*, 81 ETHICS 212, 224 (1971) (“May we expect the lesson which the Negro has taught his fellow Americans about denial of fair opportunities to be repeated on a broader scale, with the underprivileged of the earth demanding ‘desegregation’ of nation states?”).

27. RAWLS, *supra* note 18, at 72.

28. Carens, *supra* note 22, at 261.

29. *Id.* at 262.

30. *Id.* at 263 (“[T]he utilitarian commitment to moral equality is reflected in the assumption that everyone is to count for one and no one for more than one when utility is calculated.”).

31. As Dworkin explains, “the right to *treatment as an equal*” does not necessarily imply a “right to *equal treatment*” in the allocation of a particular opportunity. DWORKIN, *supra* note 21, at 227.

tion restrictions, however, indicates that these barriers to labor migration not only reduce global wealth but also increase inequality in its distribution worldwide. These barriers are neither economically efficient nor equitable.

Consider the economic effects of labor migration in world labor markets. We would expect labor to migrate from low-wage countries to high-wage countries in pursuit of higher wages. As a result of this migration, world output rises. Higher wages in the host country imply that the marginal product of labor is higher there than in the source country. That is, higher wages for the same worker mean that the worker produces more value in the host country than in the source country. Labor migration generally leads to net gains in wealth for the world as a whole, because labor flows to the country where it has the higher value use.³² An efficient global labor market would allow labor to move freely to the country where it earns the highest return. Market forces would thus direct labor to the market where its marginal product is highest. For this reason, economic theory raises a presumption in favor of the free movement of labor.

Immigration barriers interfere with the free flow of labor internationally and thereby cause wage rates for the same class of labor to diverge widely among different countries.³³ For any given class of labor, residents of high-wage countries could gain by employing more immigrant labor, and residents of low-wage countries could gain by selling more of their labor to employers in high-wage countries. Immigration restrictions distort the global labor market, producing a misallocation of labor among countries, thereby wasting human resources and creating unnecessary poverty in labor-abundant countries.

The larger the inequality in wages between countries, the larger the distortion of global labor markets caused by migration restrictions, and the larger the economic gains from liberalizing labor migration. Given the large international differences in wages, it should be apparent that the potential gains from liberalized labor migration (and the costs that the world bears as a result of immigration barriers) are huge. In fact, some economists have attempted to

32. See PAUL R. KRUGMAN & MAURICE OBSTFELD, *INTERNATIONAL ECONOMICS: THEORY AND POLICY* 158–59 (2d ed. 1991).

33. See *Mexican Deportees Report Good Treatment*, UPI, April 21, 1996, available at LEXIS, Nexis Library, UPI File (reporting that Mexican immigrants received an average of \$278 per week in the United States, compared with \$30.81 per week in Mexico).

estimate the gains that the world could enjoy by liberalizing migration. These studies suggest that the gains to the world economy from removing immigration barriers could well be enormous and greatly exceed the gains from removing trade barriers. For example, Bob Hamilton and John Whalley provide a range of estimates based on various assumptions about critical parameters, but all of their estimates suggest that the potential gains are large.³⁴ Many of their estimates suggest that the gains from free migration of labor would *more than double* worldwide real income.³⁵ Even their most conservative estimate suggests that the gains would be a significant fraction (more than 13 percent) of worldwide real income.³⁶ Furthermore, their analysis indicates that the free migration of labor would also greatly improve the global distribution of income by raising real wages dramatically for the world's poorest workers.³⁷

Given these welfare effects, the employment discrimination implied by immigration restrictions are difficult to defend in terms of the cosmopolitan liberal ideal. This ideal would extend the principle of equal concern expressed by Rawls' original position to all persons. Carens and others conclude from these liberal premises that "we have an obligation to open our borders much more fully than we do now."³⁸

B. *Justice and the Alien*

Some theorists have questioned the application of Rawls' original position to the international context. Rawls himself assumes that the "boundaries" of his principles "are given by the notion of a self-contained national community."³⁹ James Woodward argues in favor of applying Rawls' framework to inhabitants of a particular country rather than globally.⁴⁰ Similarly, Stephen Perry notes that the scope of the original position is limited to persons within a single society,

34. See Bob Hamilton & John Whalley, *Efficiency and Distributional Implications of Global Restrictions on Labour Mobility*, 14 J. DEV. ECON. 61 (1984).

35. See *id.* at 70.

36. See *id.* at 71-72.

37. See *id.* at 73-74.

38. Carens, *supra* note 22, at 270. Carens condemns immigration restrictions: "Like feudal barriers to mobility, they protect unjust privilege." *Id.* Similarly, Bruce Ackerman concludes that immigration barriers are inconsistent with liberal principles: "I cannot justify my power to exclude you without destroying my own claim to membership in an ideal liberal state." BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 93 (1980).

39. RAWLS, *supra* note 18, at 457.

40. James Woodward, *Commentary: Liberalism and Migration*, in *FREE MOVEMENT*, *supra* note 15, at 59, 75; see *id.* at 75-81.

which Rawls defines as “a cooperative venture for mutual advantage.”⁴¹ Citing Rawls’ definition, Perry argues that “[t]he original position is not appropriately employed [to create a situation in which] the parties all live in different countries or societies and do not know which one is theirs.”⁴²

The first problem with Perry’s argument is that it raises the question of whether a world in which countries engage in international trade in goods, services, capital, and labor is a “cooperative venture for mutual advantage.”⁴³ If so, then the world is a “society” in which all individuals would be parties to the original position.⁴⁴ Under this theory, by choosing to cooperate, we take on obligations of justice toward one another.

There is, however, a deeper problem inherent in making obligations of justice contingent on voluntary acts of cooperation. This approach allows us to avoid obligations of justice by refusing to cooperate with disfavored groups. If we impose a boycott or embargo against aliens, then we owe them no explanation in terms of justice. This approach reconciles discrimination against aliens with egalitarian principles of social justice only by fiat: it assumes the result rather than deriving it.⁴⁵

We cannot begin our normative analysis by *assuming* that we do not cooperate with aliens. As the example of immigration policy demonstrates, the question of which individuals we choose as partners in cooperation is itself an open question of public policy that we may want to answer using our principles of justice. If we make obligations of justice contingent on whether we cooperate in the first place, then this normative framework becomes a function of our policies and cannot work as an independent standard that we can use to evaluate these policies. Our analysis becomes circular: we are justified in discriminating against aliens in employment precisely because our

41. Stephen R. Perry, *Immigration, Justice, and Culture*, in JUSTICE IN IMMIGRATION 94, 107 (Warren F. Schwartz ed., 1995) (quoting RAWLS, *supra* note 18, at 4).

42. *Id.*

43. See CHARLES BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* 143–53 (1979) (arguing that sufficient cooperation and interaction exists among nations to justify a global view of the original position).

44. See Thomas M. Scanlon, Jr., *Rawls’ Theory of Justice*, 121 U. PA. L. REV. 1020, 1066–67 (1973) (arguing that “considerations of justice apply at least wherever there is systematic economic interaction” and therefore Rawls’ principles of justice “apply to the world economic system taken as a whole”).

45. Thus, critics of this approach complain that it is “an arbitrary move which cannot be defended within the theory.” BRIAN BARRY, *THE LIBERAL THEORY OF JUSTICE* 129 (1973).

refusal to hire them relieves us of obligations of justice. Such a theory begs the question of whether our choice of partners is itself justifiable.⁴⁶

Only the global interpretation of the original position offers a satisfactory framework for the evaluation of our immigration policies under a liberal egalitarian theory of justice. This cosmopolitan perspective is the only interpretation of the original position that is faithful to “the underlying spirit of Rawls’ theory,” which “is animated by the underlying idea of eliminating or compensating for ‘morally arbitrary’ differences between people.”⁴⁷ Cosmopolitan liberals note that “the fact that one is an inhabitant of one particular country rather than another . . . is a paradigmatic example of the sort of ‘morally arbitrary’ fact that the method of the original position is designed to abstract from.”⁴⁸ To restrict the scope of our theory of justice based on such morally arbitrary facts undermines our claim to a liberal egalitarian theory of justice.

Nevertheless, Woodward seeks to justify this restriction on the original position by pointing to “real world facts about people’s actual motivation and non-ideal behaviour.”⁴⁹ He notes that “very extensive immigration rights . . . are not rights that people in affluent countries would be motivated to act in accordance with or to respect, once they take up their places in such societies” and concludes that “[r]ecognizing this, the parties to a global contract would not agree to such rights.”⁵⁰ These political realities, Woodward argues, constrain the theory of justice that emerges from the original position.

Woodward’s appeal to realism, however, confuses the ideal and non-ideal parts of a theory of justice. Rawls explains that his “main concern” is with the ideal theory, which “assumes strict compliance” and describes “a perfectly just basic structure” under “favorable circumstances.”⁵¹ “Existing institutions are to be judged in light of

46. Thus, the fact that cooperation is feasible should be sufficient to require the inclusion of a prospective party to the original position. See Charles Beitz, *Cosmopolitan Ideals and National Sentiment*, 80 J. PHIL. 591, 595 (1983) (arguing that otherwise, “limiting the scope of the principles to national societies on the grounds that international cooperation does not exist today . . . would arbitrarily favor the status quo”).

47. Woodward, *supra* note 40, at 80–81. In this sense, Rawls’ failure to extend his principles globally is “an *ad hoc* move . . . inconsistent with the underlying egalitarian spirit” of his theory. *Id.* at 76.

48. *Id.* at 76.

49. *Id.*

50. *Id.*

51. RAWLS, *supra* note 18, at 245.

this conception and held to be unjust to the extent that they depart from it without sufficient reason.”⁵² The non-ideal theory “is worked out after an ideal conception of justice has been chosen; only then do the parties ask which principles to adopt under less happy conditions.”⁵³ The non-ideal theory takes account of “historical contingencies” and “injustice” in existing social arrangements.⁵⁴ Thus, if we understand our project as the formulation of an ideal theory, then the popularity of policies deemed unjust under that theory is no reason to revise our theory to uphold those policies instead.

If we apply Woodward’s approach to our ideal theory of justice, then we make the theory vulnerable to capture by popular prejudice and undermine its capacity for a critical evaluation of the status quo. By taking actual non-ideal behavior as given, Woodward imparts a conservative bias to the original position. Carrying this approach to its logical conclusion, we would conclude that the parties to the original position could only endorse existing arrangements. Such an ideal theory would fail to serve its function, which is to provide a standard by which to judge existing institutions.

Carens suggests that a “realistic” approach to morality in seventeenth-or eighteenth-century America “would perhaps have led one to articulate a morality for slaveholders, rather than calling into question the institution of slavery and demanding its abolition.”⁵⁵ He notes that “any moral view of slavery was flawed and inadequate if it did not start from the recognition that slavery was fundamentally evil and unjust” and that “[a]ny satisfactory moral view had to have abolition as its ultimate goal.”⁵⁶ A realist account would be flawed and unsatisfactory in two possible senses. First, Carens may mean that it would simply fail to describe moral truth and therefore would be a false moral theory. Second, a realist account might be inadequate because it would fail to advance the cause of justice over the long term. That is, by legitimating the status quo, the realist would fail to promote more enlightened attitudes and thus would stall progress toward more just policies.⁵⁷ In contrast, “[a]pproaching

52. *Id.* at 246.

53. *Id.* at 245–46.

54. *Id.* at 246.

55. Joseph H. Carens, *Realistic and Idealistic Approaches to the Ethics of Migration*, 30 INT’L MIGRATION REV. 156, 164 (1996).

56. *Id.* at 165.

57. In the immigration context, for example, Louis Michael Seidman urges us to “avoid further strengthening the hand of those who would defend exclusion and bounded caring.”

moral questions from an idealistic perspective avoids legitimating policies and practices that are morally wrong and gives the fullest scope to our critical capacities.”⁵⁸

If we allow the realist perspective to displace our ideals, then we breed complacency regarding the morality of the status quo. Robert Goodin suggests that morality may sometimes require us to advocate “unrealistic” options:

[I]f the only reason the options are unrealistic is that people are unwilling to make sacrifices that they could and arguably should in pursuit of morally important goals, then those options should be very much on the table. The proper role of politics, in such circumstances, is precisely not to ‘be realistic’ and accept uncritically people’s unwillingness to make morally proper sacrifices. It is, rather, to persuade them that moral ideals are worth pursuing.⁵⁹

In this sense, according to Carens, “ideal theory holds up the principle of free migration as an essential part of the just social order toward which we should strive.”⁶⁰

Woodward objects that “as we abstract away from real world facts . . . the relevance of the (ideal) principles and institutions that would emerge from such an idealized original position to what we should do in the actual non-ideal world . . . becomes progressively less clear.”⁶¹ He asks what this ideal theory implies “about how nations should behave in the actual world, which is very far from conforming to these ideal arrangements?”⁶² Woodward is right to ask what practical implications this ideal theory has for our non-ideal world even if he is wrong to suggest that we should reject an ideal theory because it is unrealistic. What good are the prescriptions of ideal theory if there is no real chance that we would actually adopt the prescribed policies? With Woodward’s question in mind, let us next turn to the perspective that he might consider more relevant from a realist perspective.

Louis Michael Seidman, *Fear and Loathing at the Border*, in JUSTICE IN IMMIGRATION, *supra* note 41, at 140; see *id.* at 141 (criticizing arguments that “provide ammunition for defenders of exclusion and apologists for the status quo.”).

58. Carens, *supra* note 55, at 167.

59. Robert E. Goodin, *Commentary: The Political Realism of Free Movement*, in FREE MOVEMENT, *supra* note 15, at 248, 254.

60. Carens, *supra* note 22, at 262.

61. Woodward, *supra* note 40, at 77.

62. *Id.*

II. IMMIGRATION RESTRICTIONS AND NATIONAL ECONOMIC WELFARE

Our immigration laws are usually justified based on an assumption that we may privilege individuals born into those favored classes entitled to U.S. citizenship upon birth under our nationality laws.⁶³ Thus, the discrimination explicit in our laws derives from an implicit assumption regarding the unequal status of persons based on nativity. This assumption is one sense in which our immigration and nationality laws violate our ideals of equal concern for all persons.

There is also a second sense, however, in which these laws violate our liberal ideals. To illustrate this point, consider the following thought experiment. For the sake of argument, suppose we grant the premise that we are entitled to favor the interests of natives over those we designate as aliens based on circumstances of birth. I adopt this nativist perspective strictly as a theoretical exercise, not because I believe that our immigration policies should be guided solely by the interests of natives, but because such concerns have in fact played a dominant role in the public debate over immigration policy and are commonly thought to provide the strongest case in favor of restrictive immigration laws.

We might adopt this nativist perspective as a concession to political realities.⁶⁴ National governments, including that of the United States, will likely continue to deem the promotion of the interests of natives as the paramount objective of immigration policies. It may be politically infeasible to ask natives to set aside their collective self-interest in formulating our immigration laws. This non-ideal feature of the real world may impose a constraint on the set of policy alternatives open to us as a practical matter.

Furthermore, many observers believe that the pursuit of national self-interest is justified as a moral matter. "Realists find it morally acceptable that we should prefer the interests of our own collective to

63. See, e.g., S. REP. NO. 98-62, at 3 (1983) ("[T]he paramount obligation of any nation's government, indeed the very reason for its existence and the justification for its power, is to promote the national interest—the long-term welfare of the majority of its citizens and their descendants.").

64. As Seidman observes, the limitations imposed by "bounded caring [are] like it or not, . . . facts that exist in the world" and "unlikely to change more than marginally in the near future," so that any "real-world immigration policy must . . . take account of these facts and work around them." Seidman, *supra* note 57, at 140.

those of mankind in general”⁶⁵ From this standpoint, an analysis of the effects of immigration restrictions on the interests of natives is directly relevant to the determination of the ideal immigration policy. This perspective need not ignore the interests of aliens entirely, but may justify some discrimination against aliens by giving priority to natives. Perry, for example, argues that “[t]here is . . . an upper limit on the self-sacrifice that liberal states can demand of their citizens, and . . . this limit will apply to the treatment of outsiders.”⁶⁶ Specifically, he suggests that “[s]tates may demand that . . . immigrants not be a burden on society, and even that they be capable of making a positive contribution.”⁶⁷

Can we justify our immigration restrictions using this criterion? In particular, does the exclusion of aliens mandated by our immigration laws actually promote the economic interests of natives, as restrictionists claim? Does the promotion of the economic welfare of natives call for these immigration restrictions? The following analysis suggests that the answer to these questions, as they are normally understood, is no. We would deem our immigration restrictions to be ideal public policies from the perspective of natives only if we are prepared to count the satisfaction of segregationist preferences as elements of social welfare. It is in this sense that immigration restrictions violate our liberal ideals even if we assume *arguendo* that national welfare is appropriate as our policy objective.

A. *Effects of Immigration in the Labor Market*

If we examine the impact of immigrants in the labor market, we find that the natives of the host country, taken together, will gain

65. David C. Hendrickson, *Migration in Law and Ethics: A Realist Perspective*, in FREE MOVEMENT, *supra* note 15, at 213, 214–15; see *id.* at 223 (“[T]he collective well-being of our own state, and of the individuals who compose it, ought to have a greater weight in our moral accounting than the well-being of those outside the community.”).

66. Perry, *supra* note 41, at 105.

67. *Id.* at 109. Thus, Perry does not suggest that we seek to maximize the benefits derived by natives from immigrants. Natives could extract the maximum benefit from immigrants by imposing a tariff on them and thereby raising extra tax revenue from immigrants. See Howard F. Chang, *Liberalized Immigration as Free Trade: Economic Welfare and the Optimal Immigration Policy*, 145 U. PA. L. REV. 1147, 1157–85 (1997) (analyzing the optimal tariff on immigrants, assuming that natives seek to maximize their own economic welfare). The criterion Perry suggests would not go so far as to demand the maximum contribution from an immigrant; he only asks that the contribution be positive.

from the immigration of labor.⁶⁸ Wages may fall for native workers who compete with immigrant labor, but this loss for workers is a pure transfer among natives: it is offset by an equal gain for those who employ labor, and ultimately for consumers, who obtain goods and services at lower cost.⁶⁹ Furthermore, natives gain from employing immigrant workers: they gain surplus in excess of what they pay immigrants for their labor.⁷⁰ If they did not gain any surplus from employing immigrants, they would not hire them. Thus, natives as a group enjoy a net gain.⁷¹ Labor migration represents a form of international trade in which the source country exports labor to the host country.⁷² Like international trade in goods, labor migration allows foreign suppliers to sell their services to domestic buyers, allowing both parties to enjoy gains from trade as a result of the transaction.

1. Effects on Native Workers: Empirical Evidence

We may be concerned, of course, with the distribution of income among natives. Immigration not only expands wealth, but also can have important distributive effects. Those natives who must compete with immigrants in the labor market may find that immigration reduces their real income.⁷³ Thus, countries often restrict immigration to protect native workers from the unemployment or the wage reductions that the entry of foreign workers would supposedly entail.

Studies of the effects of immigration in U.S. labor markets, however, have shown little evidence of effects on native wages or em-

68. See NATIONAL RESEARCH COUNCIL, *THE NEW AMERICANS: ECONOMIC, DEMOGRAPHIC, AND FISCAL EFFECTS OF IMMIGRATION* 135-53 (James P. Smith & Barry Edmonston eds., 1997) [hereinafter NRC].

69. See *id.* at 138-39.

70. See *id.*

71. George Borjas has attempted a rough calculation of the size of the surplus enjoyed by natives in the United States as a result of immigration using a variety of assumptions. See George J. Borjas, *The Economic Benefits from Immigration*, J. ECON. PERSP., Spring 1995, at 3, 5. Assuming a homogeneous supply of labor, for example, Borjas estimates that immigration into the United States has produced a surplus of \$7 billion per year. See *id.* at 7. Borjas describes this amount as "relatively small" compared to the size of the U.S. economy. *Id.* As the NRC notes, however, this benefit "remains a significant positive gain in absolute terms" and remains large compared to the economic effects of most other public policies: "Not many changes in policies would produce benefits as large as that number." NRC, *supra* note 68, at 153. Furthermore, if these benefits seem too small, then we can enjoy larger gains by taking in more immigrants and thereby increasing the immigration surplus.

72. See Howard F. Chang, *Migration as International Trade: The Economic Gains from the Liberalized Movement of Labor*, 3 UCLA J. INT'L L. & FOREIGN AFF. 371 (1998-99).

73. See NRC, *supra* note 68, at 138-40.

ployment.⁷⁴ A survey of this empirical literature indicates that immigration has a weak effect on the employment of natives.⁷⁵ Furthermore, the evidence indicates a weak relationship between native wages and immigration across all types of native workers, white or black, skilled or unskilled.⁷⁶

Why do immigrants have so little adverse impact on the wages and employment of natives? One reason is that the demand for labor does not remain fixed when immigrants enter the economy. Immigrant workers not only supply labor, for example, they also demand goods and services, and this demand will translate into greater demand for locally supplied labor. This increase in demand can offset the effect of increased supply.

Furthermore, the empirical evidence indicates that immigrants and natives are not perfect substitutes in the labor market.⁷⁷ Thus, immigrants often do not compete for the same jobs as natives. Indeed, immigrant labor can be a complement rather than a substitute for native labor, so that an increase in the supply of immigrant labor will increase the demand for native labor and thus have positive effects on native workers rather than negative effects. In fact, labor markets are highly segregated, with immigrant labor concentrated in some occupations while natives are concentrated in others.⁷⁸

If only immigrant workers take certain jobs, then natives can gain from immigration in these markets without any adverse effect on the wages of native workers. Moreover, if native workers can move into jobs where their competitive advantage (in English language skills, for example) provides a natural barrier to competition from immigrants, then they can enjoy the benefits of immigration and still avoid any adverse effects of immigration in the labor market. Thus, segmented labor markets imply that immigration can produce gains for natives in the labor market without necessarily producing adverse effects for native workers.

74. *See id.*

75. *See, e.g.,* George J. Borjas, *The Economics of Immigration*, 32 J. ECON. LIT. 1667, 1698 (1994); Rachel M. Friedberg & Jennifer Hunt, *The Impact of Immigrants on Host Country Wages, Employment and Growth*, J. ECON. PERSP., Spring 1995, at 23, 42; NRC, *supra* note 68, at 223.

76. *See, e.g.,* George J. Borjas, *supra* note 75, at 1697; Friedberg & Hunt, *supra* note 75, at 42; NRC, *supra* note 68, at 223.

77. *See* Jean Baldwin Grossman, *The Substitutability of Natives and Immigrants in Production*, 64 REV. ECON. & STAT. 596 (1982).

78. *See* NRC, *supra* note 68, at 218.

It is important to interpret claims in the literature in light of the empirical evidence of segmented labor markets. For example, George Borjas, Richard Freeman, and Lawrence Katz produce one of the largest estimates of the effect of immigrants on native wages.⁷⁹ They estimate that immigration between 1980 and 1995 accounted for 44 percent of the 11 percent decline in the relative wages of high school dropouts in the United States during this period.⁸⁰ Those who advocate restrictive immigration policies have seized upon this study to support their claims of adverse effects on unskilled native workers, and its conclusions have therefore been widely cited by restrictionists in current debates over immigration reform.⁸¹ Yet at most, the study suggests that immigration restrictions benefit the shrinking minority of native workers with less than a high school education.⁸²

More important, this study uses a questionable methodology. Borjas, Freeman, and Katz derive their estimates from a *simulation* that *assumes* that unskilled immigrants are *perfect* substitutes for unskilled natives.⁸³ That is, this simulation makes an extreme assumption regarding the single most important fact in dispute. Therefore, simulations based on this assumption are biased in favor of finding large effects on natives, and thus at best provide only an upper bound on the potential effect of immigration on the wages of unskilled natives.⁸⁴

79. See George J. Borjas et al., *How Much Do Immigration and Trade Affect Labor Market Outcomes?*, in BROOKINGS PAPERS ECON. ACTIVITY, No. 1, at 1 (William C. Bradland & George C. Perry eds., 1997).

80. See *id.* at 53, 62.

81. The restrictionist Center for Immigration Studies ("CIS"), for example, cites this study in its own paper criticizing immigration from Mexico. See STEVEN A. CAMAROTA, IMMIGRATION FROM MEXICO: ASSESSING THE IMPACT ON THE UNITED STATES 22 (2001) (citing the estimates by Borjas, Freeman, and Katz to support his conclusion that "immigration had a significant adverse impact on the wages of natives without a high school education"). In turn, the media widely reported the conclusions of this CIS paper. See, e.g., Joe Cantlupe, *Guest-worker Program Called Misguided*, SAN DIEGO UNION-TRIB., July 13, 2001, at A16; Alfredo Corchado, *Studies Conflict on Benefits, Costs of Mexican Influx: Both Sides Presses Issue Before Fox, Congress Debates*, DALLAS MORNING NEWS, July 13, 2001, at 10A; Jerry Kammer, *Mexican Immigrants Sap Citizens, Report Says*, ARIZ. REPUBLIC, July 13, 2001, at A8; Patrick J. McDonnell, *Dim View of Mexico Migration; Study: Group Backing Tight Limits Says Influx Brings Huge Costs But Few Benefits*, L.A. TIMES, July 13, 2001, pt. 2, at 1.

82. See NRC, *supra* note 68, at 228 (noting that "[b]y 1995, high school dropouts represented less than 10 percent of the American workforce" and were "a declining group of American workers").

83. See Borjas et al., *supra* note 79, at 56. Thus, this approach "does not truly estimate the actual impact of immigration on the labor market." NRC, *supra* note 68, at 227.

84. See Friedberg & Hunt, *supra* note 75, at 39.

Furthermore, Borjas, Freeman, and Katz simulate what would have happened if we had cut off all immigration *and* all increases in trade flows since 1980.⁸⁵ We cannot infer from their study that immigration restrictions alone could have prevented the drop in wages that they identify, because they do not attempt to simulate that counterfactual. Given that immigration and international trade are substitutes, a decrease in immigration would probably cause an increase in trade flows, which would have a similarly depressing effect on the wages of unskilled natives. This trade effect is a second reason that their results overstate the actual effect that immigration policies standing alone would have upon native wages.

2. Income Distribution and the Costs of Protectionism

Even if present levels of immigration have little effect on native wages in the United States, a more liberal immigration policy might produce more significant effects. Indeed, much of the support for current immigration restrictions is protectionist in nature. Restrictionists often cite the need to protect U.S. workers from immigrant competition in the labor market.⁸⁶

Like trade barriers, however, immigration barriers sacrifice gains from trade and thus reduce the total wealth of natives as a group.⁸⁷ In this sense, protectionism is a costly way to redistribute wealth from some natives to others. It is likely that we could redistribute this same wealth through tax policies and transfer programs rather than through protectionism and thereby make all classes of natives better off, because liberalized immigration produces net gains for natives as a group. Thus, concern for the distribution of income among natives does not imply that restrictive immigration laws are in order.

First, concerns regarding income inequality do not justify any restrictions on skilled immigration, because skilled immigrants not only increase total wealth for natives but also promote a more equitable distribution of income among natives. They are likely to have an adverse effect only on competing skilled natives and increase the real wages of everyone else, including less skilled natives, who enjoy the benefits of a greater supply of skilled labor. Therefore, the pursuit of a more equal distribution of income would at most justify concerns

85. See Borjas et al., *supra* note 79, at 61.

86. See, e.g., George J. Borjas, *HEAVENS DOOR: IMMIGRATION POLICY AND THE AMERICAN ECONOMY* (1999).

87. See NRC, *supra* note 68, at 135–53.

regarding unskilled immigration, which could have an adverse effect on real wages of unskilled native workers.

Second, even with respect to unskilled immigration, the appropriate response to these distributive concerns is redistribution through progressive reforms of tax and transfer policies, not immigration restrictions. If we wish to protect unskilled native workers from adverse distributive effects, redistribution is likely to be a less costly solution than protectionism. If so, then optimal policies would liberalize immigration insofar as it increases the total wealth of natives. As long as immigration increases total wealth, then those who gain from immigration can compensate those who lose and still be better off. That is, those who gain by paying lower wages, or by buying products and services at lower cost, can afford to pay enough to compensate those who find their wages fall relative to prices. Through redistribution, we can attempt to shift the costs of liberalized immigration to the beneficiaries of liberalization.

This redistribution would produce some costly distortions, but the deadweight loss of protectionism would presumably be greater than the deadweight loss from taxes with the same effect on the overall distribution of income. That is, protectionism is presumptively less efficient than the tax system in producing a desirable distribution of income, because protectionism not only produces the distortions associated with redistribution, but also sacrifices the gains from immigration in the labor market.⁸⁸ For example, if the immigra-

88. Louis Kaplow and Steven Shavell suggest that we can always replace an economically inefficient rule with an efficient rule without making any income class worse off provided that we make the appropriate adjustments in income taxes. See Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 669 (1994); Steven Shavell, *A Note on Efficiency vs. Distributional Equity in Legal Rulemaking: Should Distributional Equity Matter Given Optimal Income Taxation?*, 71 AM. ECON. REV. PAPERS & PROC. 414 (1981). They argue that "using legal rules to redistribute income distorts work incentives fully as much as the income tax system—because the distortion is caused by the redistribution itself—and also creates inefficiencies in the activities regulated by the legal rules." Kaplow & Shavell, *supra*, at 667–68. Critics have objected to this "double-distortion argument" by pointing out that legal rules are not always less costly than income taxes. See, e.g., Chris William Sanchirico, *Deconstructing the New Efficiency Rationale*, 86 CORNELL L. REV. 1003, 1008 (2001). It seems fair to conclude, however, that the double-distortion argument still raises a presumption in favor of taxes rather than inefficient legal rules, subject to a possible rebuttal in any particular case along the lines suggested by these critics.

The objections raised by these critics do not imply that protectionism is superior to redistribution through taxes. Chris Sanchirico, for example, notes that a double distortion may be less costly than a single distortion, because "[d]istortions may counteract one another." *Id.* at 1017. There seems to be no reason to think, however, that the distortions associated with protectionism mitigate the distortions in work incentives associated with redistribution. Similarly, Christine Jolls suggests that legal rules may achieve redistribution with less distortion in work incentives if individual workers bear the cost imposed by the legal rule with only low probability

tion of unskilled workers reduces the wages of unskilled natives, then raising taxes on those workers with higher incomes and reducing taxes on native workers with the lowest incomes could leave all classes of natives better off than they would be in the absence of immigration.⁸⁹ That is, those classes that would pay higher taxes to compensate unskilled native workers are likely to bear a still heavier burden under the protectionist alternative, which raises the prices of goods and services for all consumers. That is, protectionist policies currently impose an implicit tax on these consumers that probably costs them more than the explicit tax that would be necessary to compensate unskilled native workers for the effects of liberalized immigration policies. Once we recognize that protectionism is merely a disguised tax-and-transfer program, it should be apparent that there is no good reason to favor protectionism over less costly and more efficient transfer policies.

We could achieve redistribution more efficiently and equitably by expanding programs already in use under the existing U.S. tax system. We could make Social Security taxes more progressive, for example, or we could increase the earned income tax credit and liberalize its eligibility requirements.⁹⁰ These progressive reforms can

and are unduly optimistic. See Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653 (1998). Insofar as protectionism ultimately transfers wealth through the same channel as the income tax, by changing the worker's after-tax income, Jolls' critique offers no defense for protectionism. Jolls also suggests that if workers treat the cost of a legal rule as an expenditure out of income "rather than direct charges against income," this mental accounting may reduce distortions in work incentives. *Id.* at 1670. Insofar as this claim is true about the costs of protectionism, however, at most it would militate in favor of taxes on luxury goods as our redistributive policy, not in favor of protectionist policies that needlessly sacrifice gains from immigration in the labor market.

Finally, Sanchirico also suggests that individuals may be heterogeneous in ways that make legal rules superior to taxes. Sanchirico, *supra*, at 1057-64; see Chris William Sanchirico, *Taxes Versus Legal Rules as Instruments for Equity: A More Equitable View*, 29 J. LEGAL STUD. 797 (2000). This objection might suggest a defense of immigration restrictions if such policies happened to change the incomes, for example, of those with the least elastic supply of labor. There is no reason, however, to think that protectionism targets its transfers in ways that reduce distortions in work incentives. Nor is there any reason to believe that protectionism targets its transfers in ways especially appealing from the perspective of equity. See *infra* note 91.

89. See Barry R. Chiswick, *Illegal Immigration and Immigration Control*, J. ECON. PERSP., Summer 1988, at 101, 107.

90. Thus, I do not propose that we identify workers displaced by immigrant competition and target subsidies to those individuals as we direct "adjustment assistance" to those harmed by import competition. See RAJ BHALA, *INTERNATIONAL TRADE LAW* 1580-89 (2d ed. 2000) (discussing trade adjustment assistance programs); JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 660-65 (3d ed. 1995) (same). Trade adjustment programs have proven "nightmarishly complex" and "ineffectual." BHALA, *supra*, at 1582. Instead, the measures proposed here would only seek to ensure that immigration liberalization does not increase after-tax income inequality.

supplement the income of unskilled native workers if unskilled immigration drives down their real wages. This alternative could reduce deadweight loss while still redistributing the same amount of wealth that we currently redistribute through costly protectionism. Evidence that immigration has only mild effects upon the wages of unskilled natives suggests that modest changes in the tax system may be sufficient to offset the distributive effects of liberalized U.S. immigration policies.

These measures would not seek to compensate precisely every single individual affected adversely by liberalization so that immigration reform would make literally *no one* worse off. To insist that these reforms effect a Pareto improvement over the status quo is to set too high a hurdle for reform. Such a requirement would prevent us from implementing virtually any reform in any public policy.

Not only is it infeasible as a practical matter to replicate exactly the redistribution produced by protectionism, it is also not desirable as a normative matter that we do so. We can design progressive tax and transfer policies so that they redistribute income on the basis of morally relevant criteria, whereas the alternative of protectionism distributes its subsidy on a morally arbitrary basis. Protectionism subsidizes the unskilled native who happens to face immigrant competition in the labor market but not the similarly unskilled native who does not. In this sense, protectionism is inferior to tax and transfer policies from the perspective of not only economic efficiency but also horizontal equity.⁹¹

B. Fiscal Effects of Immigration

The presence of transfer policies, however, may raise concerns about the effect of immigrants upon the public treasury. Much of the debate over the effects of immigration upon the welfare of natives has focused on the possibility of negative fiscal effects.⁹² Even if concerns about the fiscal costs of immigration were to justify restrictions on unskilled immigration, however, these concerns would not justify any restrictions on the immigration of skilled workers, who tend to have higher incomes and pay more in taxes than they cost in terms of public benefits. The empirical evidence confirms that educated

91. Thus, protectionism derives no justification from the fact that the transfers that it achieves do not fall on precisely the same individuals as redistributive transfers through the tax system. See *supra* note 88.

92. See, e.g., CAMAROTA, *supra* note 81, at 35–41, 53–54; NRC, *supra* note 68, at 254–362.

immigrants will on average have a net positive effect on natives, taking into account their effects on the public treasury.⁹³ It would be in the economic interests of U.S. natives to admit skilled workers without protectionist "labor certification" requirements or quantitative restrictions. The United States should eliminate or liberalize these restrictions.

1. Fiscal Policies as Less Restrictive Alternatives to Exclusion

Even for unskilled immigrants, the optimal response to fiscal concerns would not be exclusion, but less restrictive alternatives designed to eliminate the fiscal burden that these immigrants impose on natives. That is, if some immigrants have a negative effect on the public sector, the optimal response is not quantitative or other protectionist restrictions on immigration. Rather, the appropriate response is fiscal. Restrictions on alien access to public benefits, for example, can improve the fiscal impact of immigration without excluding unskilled immigrants from the U.S. labor force. Exclusion is the more costly response for both natives and immigrants, because it excludes immigrants not only from our public benefits but also from our labor market and thereby sacrifices the gains from trade that they and we would otherwise enjoy.

The objective of reducing the burden that immigrants impose on natives through the public sector underlies restrictions on the access

93. The NRC, for example, found that the average immigrant with more than a high school education pays enough in taxes to produce a net fiscal benefit. *See* NRC, *supra* note 68, at 334 (Table 7.5). In fact, once the NRC economists take the positive fiscal effect of the immigrant's descendants into account, they find that the average immigrant with a high school education produces a net surplus of \$51,000, and the average immigrant with more than a high school education produces a net surplus of \$198,000. *See id.* (reporting net present value of average fiscal impacts in 1996 dollars). Although these figures "do not take into account indirect fiscal effects of immigrants arising from any consequences of immigration for the earnings or employment of the existing labor force," the NRC notes that labor market effects on native workers "are likely to be quite small and . . . could even be positive." *Id.* at 305.

As long as the NRC calculations "contain no feedbacks through the general economy," however, "they do not reflect diminishing returns to immigrants as a result of their hypothetically increasing numbers." *Id.* at 333. An incremental immigrant might drive down the wages of prior immigrants, for example, which would reduce the taxes paid by those prior immigrants. Taking this effect into account, however, would not change our conclusion that skilled immigrants confer a net economic benefit on natives. Any such reduction in taxes paid by immigrants would be outweighed by the benefit natives enjoy in the labor market by reducing the cost of immigrant labor. A wage reduction of one dollar, for example, would represent a gain to natives as employers or consumers, and the resulting loss of tax revenues would offset only a fraction of this gain. If a drop in wages of one dollar could reduce tax payments by more than one dollar, then immigrants would enjoy a net benefit from wage reductions and would have already demanded lower wages in order to enjoy this fiscal benefit.

of aliens to various entitlement programs. Current U.S. laws, for example, generally exclude nonimmigrants, including temporary workers, and unauthorized immigrants from a broad range of public benefits: with only narrow exceptions, these aliens are ineligible for “any Federal public benefit.”⁹⁴ Current law also includes restrictions on the access of other aliens, including even legal permanent residents, to federal entitlement programs.⁹⁵

The National Research Council (“NRC”) estimates that by excluding immigrants from various means-tested benefits for their first five years in the United States, welfare legislation enacted in 1996 improves the total fiscal impact of the average immigrant by \$8,000 in net present value in 1996 dollars.⁹⁶ Moreover, if the new welfare law has the effects predicted by its proponents, then the positive net fiscal impact of immigration will increase still more: the new restrictions would not only reduce the transfers paid to individual immigrants but also discourage the immigration of low-income aliens and thereby raise the income of the average immigrant.⁹⁷ Thus, the NRC’s estimates of the fiscal impact of immigration likely understate the fiscal benefits of future immigrants, given the legislation passed by Congress in 1996. Therefore, liberalized immigration is now even more likely to produce net economic benefits for natives.

If immigration liberalization is coupled with expanded redistribution of income, however, then it may be necessary to exclude immigrants from these increased transfers. Otherwise, transfers to immigrants could dissipate the economic gains to natives.⁹⁸ Thus, unskilled immigrants may have a net positive effect on the welfare of natives only if we restrict their access to transfer programs.

2. Nonimmigrants and Access to Citizenship

Although immigrants can gain full access to public benefits upon naturalization, only aliens “admitted for permanent residence” may naturalize as U.S. citizens.⁹⁹ Aliens admitted on nonimmigrant visas only, including temporary workers, are not admitted as permanent

94. 8 U.S.C. § 1611(a) (2000).

95. *See id.* §§ 1612–1613.

96. *See NRC, supra* note 68, at 339.

97. *See* 8 U.S.C. § 1601(2)(B) (2000) (stating the objective of ensuring that “the availability of public benefits not constitute an incentive for immigration to the United States”).

98. *See Chang, supra* note 67, at 1210.

99. 8 U.S.C. § 1427(a) (2000).

residents and are thus not eligible for most public entitlements and not eligible to naturalize.¹⁰⁰ Therefore, even if fiscal concerns justify restrictions on access to permanent residence for unskilled workers, these concerns cannot justify restrictions on their access to nonimmigrant visas. A truly temporary worker, for example, would remain in the United States only while employed and would then return home, imposing even less of a burden on the public treasury than a permanent resident.¹⁰¹ The empirical evidence indicates that immigrants are likely to make a positive contribution to the public treasury through the taxes they pay during their working years and impose a burden only if they remain in the United States for their retirement years and gain access to public benefits.¹⁰² Thus, temporary workers admitted on nonimmigrant visas, even if unskilled, are likely to have a net positive economic impact on natives, and there is little reason to restrict their entry.

Under current U.S. law, unskilled workers may enter temporarily on H-2A visas for agricultural workers or on H-2B visas for other workers,¹⁰³ but both visas are subject to labor certification requirements and other protectionist restrictions.¹⁰⁴ For example, H-2B visas are limited to 66,000 per year,¹⁰⁵ and require workers to come “temporarily to the United States to perform . . . temporary service or labor.”¹⁰⁶ This “double requirement of ‘temporariness’” requires the H-2B alien not only to enter temporarily but also to fill a temporary job.¹⁰⁷ The liberalization or elimination of these requirements could greatly increase use of these programs.¹⁰⁸ As long as we retain the requirement of employer sponsorship, we can ensure that these guest

100. See LEGOMSKY, *supra* note 12, at 99 (distinguishing immigrants from nonimmigrants).

101. See Alan O. Sykes, *The Welfare Economics of Immigration Law: A Theoretical Survey with an Analysis of U.S. Policy*, in JUSTICE IN IMMIGRATION, *supra* note 41, at 158, 189.

102. See NRC, *supra* note 68, at 315 (Figure 7.9).

103. See 8 U.S.C. § 1101(a)(15)(H)(ii) (2000).

104. See *id.* § 1188(a)(1); 8 C.F.R. § 214.2(h)(6)(iv) (2001).

105. See 8 U.S.C. § 1184(g)(1)(B) (2000).

106. *Id.* § 1101(a)(15)(H)(ii)(b).

107. THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 395 (4th ed. 1998).

108. Admissions under H-2B visas have remained below one-third of the quota limit in recent years, and admissions under H-2A visas have been similar. See *id.* at 393; see also *id.* at 395 (noting that the demand for H-2B visas “would be much higher but for the double ‘temporariness’ requirement”); Sykes, *supra* note 101, at 189 (noting that “because of the transaction costs of obtaining a visa coupled with the limited certifications for labor shortages in the agricultural sector, employers often find that [H-2A] visas are not worth the effort to procure”).

workers will be gainfully employed and likely to confer a net economic benefit on natives.¹⁰⁹

The alternative to a liberalized guest-worker program for many migrant workers is probably entry as an unauthorized immigrant. In fact, employment-based immigration of unskilled workers into the United States has largely taken the form of illegal rather than legal immigration.¹¹⁰ Given that unauthorized immigrants have little access to public entitlements for as long as their presence remains unauthorized, they may make a positive contribution to public coffers under the fiscal policies currently applied to them. Without distinguishing between legal and illegal immigrants, the NRC found that once we take the positive fiscal effect of the immigrant's descendants into account, an immigrant with less than a high school education imposes a net fiscal cost of only \$13,000 in net present value in 1996 dollars.¹¹¹ If the 1996 welfare legislation excludes immigrants from seven specified means-tested benefits for only their first five years in the United States, then the total fiscal impact of the average immigrant would improve by \$8,000.¹¹² These NRC figures suggest that if an immigrant *never* has access to such benefits, as would be the case for an unauthorized immigrant who never obtains legal status, then such an immigrant would probably have a positive fiscal impact even if the immigrant were unskilled.

If unauthorized immigrants produce benefits for natives through not only the labor market but also the public sector, then natives have little to gain by imposing sanctions on those who employ unauthorized immigrants. The repeal of these sanctions would promote the interests of both natives and unauthorized immigrants. Indeed, not only has President Bush recently called for repeal,¹¹³ but so has organized labor, in a dramatic reversal of its support for employer sanctions since lobbying for their enactment in 1986.¹¹⁴

Instead, legalization of unauthorized immigrants through a liberalized guest-worker program would serve the interests of these

109. See Chang, *supra* note 67, at 1181–83.

110. See *id.* at 1197.

111. See NRC, *supra* note 68, at 334.

112. See *id.* at 339.

113. See Bill Sammon, *Bush Urges Legalizing Aliens*, WASH. TIMES, Sept. 7, 2001, at A1.

114. See Nancy Clelland, *AFL-CIO Calls for Amnesty for Illegal U.S. Workers*, L.A. TIMES, Feb. 17, 2000, at A1. Labor leaders cited the need to protect unauthorized immigrants from exploitation by employers. See *id.*; Steven Greenhouse, *Labor Urges Amnesty for Illegal Immigrants*, N.Y. TIMES, Feb. 17, 2000, at A26.

immigrants as well as the interests of natives. The workers would gain from having a legal alternative to illegal entry and life as an unauthorized immigrant, which leaves them vulnerable to deportation by the government and abuse by employers. Furthermore, admission as a guest worker need not entail permanent status as an alien. NRC estimates indicate that the United States could allow even an unskilled immigrant to naturalize without generating a net fiscal burden if a sufficient period of alienage without access to public benefits has passed. In fact, as the Bush administration considers proposals to liberalize our immigration policies, it is currently discussing an expanded guest-worker program that would eventually allow aliens to adjust their status to permanent residence and ultimately naturalize as citizens.¹¹⁵

C. Intolerance

So how can we justify our current restrictions on the entry of immigrant workers? It is difficult to see a principled justification for imposing quotas or labor certification requirements upon their immigration. These protectionist barriers do not serve the economic interests of natives as a group.

Perhaps immigration barriers are a second-best response to the concerns of natives when the first-best response is politically infeasible.¹¹⁶ In this appeal to realism, as Goodin notes, “realism serves as an excuse rather than as a justification,” and “appealing to that excuse imposes a further obligation, namely, to make very certain that the constraints on doing better really are immutable.”¹¹⁷ If they are not, then our duty is to seek to change those constraints so that what was previously considered politically infeasible becomes possible. “Focusing too tightly on second- and third-best options makes us not look closely enough to see whether and how the first-best option might actually be pursued.”¹¹⁸

The question then becomes: why is the first-best policy less popular than the more costly policy of immigration restriction? Why are

115. See Marcus Stern, *New Immigration Plan Raises New Issues: U.S.-Mexican Strategy Goes Beyond Amnesty, Guest-Worker Program*, SAN DIEGO UNION-TRIB., Aug. 12, 2001, at A1.

116. Woodward makes this type of claim. See Woodward, *supra* note 40, at 80 (“Restrictions on entry, in my argument, have the status of non-ideal, second-best solutions . . . in an imperfect world.”).

117. Goodin, *supra* note 59, at 249.

118. *Id.* at 256.

we so quick to blame immigration for our problems and eager to seize upon immigration restriction as the appropriate response? For example, why do advocates for unskilled native workers lobby successfully for immigration restrictions rather than for more redistribution through the tax system? If opposition to redistribution makes expanded transfers politically infeasible, then why is this opposition any less vocal or any less effective against immigration restrictions that achieve the same redistribution at higher cost? Immigration restrictions, after all, do a worse job of serving the interests of natives than more efficient transfer policies.¹¹⁹

We can find at least part of the explanation for the popularity of immigration restrictions in the preferences of natives regarding the ethnic or racial composition of the U.S. population and thus its labor force. Almost since their inception, federal immigration restrictions have reflected concerns regarding the race and ethnicity of immigrants.¹²⁰ Soon after Congress began to regulate immigration in 1875,¹²¹ it enacted the Chinese Exclusion Act,¹²² only the first in a series of laws restricting the immigration of Chinese laborers.¹²³ Subsequent laws reflected anxiety regarding not only Asian immigration but also immigration from eastern and southern Europe. In 1921, Congress enacted the first quantitative restrictions on immigration, creating a national origins quota system that skewed the allocation of visas toward aliens from northern and western Europe.¹²⁴ Given this history of racism and xenophobia, it would be naive to assume that intolerance does not continue to provide political support for immigration restrictions in general. Indeed, restrictionist authors like Peter Brimelow are quite explicit in their expressions of alarm regarding the racial complexion of the immigrant stream into the United States.¹²⁵ The U.S. Supreme Court recognized the pervasive influence of xenophobia in the formulation of our public policies in

119. *See supra* note 88.

120. *See* U.S. COMM'N ON CIVIL RIGHTS, *THE TARNISHED GOLDEN DOOR: CIVIL RIGHTS ISSUES IN IMMIGRATION 7-12* (1980) (reviewing the history of discrimination in U.S. immigration policies).

121. *See* Act of Mar. 3, 1875, ch. 141, 18 Stat. 477.

122. Act of May 6, 1882, ch. 126, 22 Stat. 58 (repealed 1943).

123. *See, e.g.*, Act of May 5, 1892, ch. 60, 27 Stat. 25; Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504; Act of July 5, 1884, ch. 220, 23 Stat. 115.

124. Act of May 19, 1921, ch. 8, § 2(a), 42 Stat. 5. Congress modified this system in the Immigration Act of 1924, ch. 190, § 11(a), 43 Stat. 153, 159 (repealed 1965).

125. *See* PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER 58-73* (1995) (describing white America as caught between the "pincers" of Hispanic and Asian immigration).

Graham v. Richardson, when the Court declared that “classifications based on alienage, like those based on . . . race, are inherently suspect.”¹²⁶

Does this explanation for the popularity of immigration restrictions provide a justification? We might seek to interpret the “interests” of natives broadly to include the satisfaction of their preferences regarding the ethnic or racial composition of the U.S. population.¹²⁷ It is telling, however, that we normally reject intolerant preferences as justifications for employment discrimination.¹²⁸ A reliance on preferences for the ethnic status quo to justify our immigration laws would underscore the second sense in which our immigration laws violate our liberal antidiscrimination principles.

Restrictionists might respond that their preference is neither racist nor xenophobic, but simply a preference for associating with workers most like themselves. Perhaps the restrictionist simply prefers to be surrounded by workers who share the same culture and the same values and fears becoming surrounded by those who seem foreign and unfamiliar. But can we distinguish this associational preference from intolerance—the desire not to encounter those who are different? Would the desire of an employer or its employees to maintain a white workplace, because they prefer its homogeneous culture or simply value the familiar status quo, justify the exclusion of racial minorities?

126. 403 U.S. 365, 372 (1971). The author of the *Graham* opinion would later explain that “aliens often have been the victims of irrational discrimination” and “historically have been disabled by the prejudice of the majority,” which led “the Court to conclude that alienage classifications ‘in themselves supply a reason to infer antipathy’ . . . and therefore demand close judicial scrutiny.” *Toll v. Moreno*, 458 U.S. 1, 20–21 (Blackmun, J., concurring) (quoting *Personnel Adm’r v. Feeney*, 442 U.S. 256, 272 (1979)). The *Graham* Court struck down state laws conditioning access to welfare benefits on either U.S. citizenship or residence in the United States for a specified number of years. Recognizing the tension between the *Graham* reasoning and federal immigration restrictions, however, the Court would later refuse to apply the same scrutiny to federal laws discriminating against aliens. *See Mathews v. Diaz*, 426 U.S. 67, 81–87 (1976).

127. *See Chang, supra* note 67, at 1210–21. We might count the satisfaction of these racist or xenophobic preferences an element of the welfare of these natives. If our objectives include the regulation of the racial complexion of the labor force, then immigration restrictions serve that objective well by excluding most people of color in the world from access to our labor market. If the exclusion of foreigners is itself our objective, then a policy of exclusion yields a perfect fit with that objective. From this perspective, immigration restriction would be a first-best policy, not merely a second-best policy.

128. *See DWORKIN, supra* note 21, at 234–38 (arguing that a calculation of social welfare should exclude intolerant preferences if it is to justify a public policy); Howard F. Chang, *A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle*, 110 YALE L.J. 173, 179–96 (2000) (same).

If we would reject such associational preferences as a reason to exclude minorities from a single workplace, then why should we accept them as a reason to exclude people from all the workplaces in the entire country, where the claim of an impact on one's personal associational interests seems far more remote and tenuous? Even if we identify legitimate associational interests that do not derive from intolerance, it seems difficult to explain why we must protect these interests through employment discrimination mandated by the government on a national scale rather than through the less restrictive alternative of voluntary employment discrimination. If we consider these associational preferences to be legitimate, then why not simply allow employers to discriminate on the basis of national origin rather than mandating such discrimination by law?

Indeed, our liberal ideals impose principles of neutrality on the state that do not apply to the individual. Under this political theory, a liberal state cannot justify discriminatory laws by endorsing one particular conception of the good, for example, by favoring one particular religion, whereas individuals are left free to pursue their own conceptions of the good using their own private resources.¹²⁹ Thus, even if we consider individuals free to discriminate within some private sphere based on ethnicity or cultural traits, these preferences cannot provide a justification within our liberal framework for discrimination imposed by the coercive powers of the state.¹³⁰

129. See ACKERMAN, *supra* note 38, at 11 (suggesting that in a liberal state, no one can justify a legal regime by claiming that "his conception of the good is better than that asserted by any of his fellow citizens"); RAWLS, *supra* note 18, at 448 (suggesting that in "a well-ordered society, . . . the plans of life of individuals are different in the sense that these plans give prominence to different aims, and persons are left free to determine their good").

130. See Carens, *supra* note 22, at 268 ("When the state acts it must treat individuals equally."). Ackerman suggests that the only legitimate reason for a liberal state to restrict immigration is to protect the liberal state itself. See ACKERMAN, *supra* note 38, at 95 ("The only reason for restricting immigration is to protect the ongoing process of liberal conversation itself."). Similarly, Perry notes that the admission of "a large number of persons from groups espousing illiberal or undemocratic principles . . . might, if admitted on a sufficiently large scale, pose a real risk to the existence or character of a liberal democracy." Perry, *supra* note 41, at 114. This observation, however, fails to justify the restrictions we currently impose on immigration. See *id.* ("[I]t would presumably take a manyfold increase in the levels of immigration to . . . the United States or Canada before such a risk could be regarded as anything more than a theoretical possibility."). Furthermore, we reduce this risk if we admit aliens as guest-workers with restricted access to citizenship rather than as permanent residents who will ultimately naturalize and vote. Will Kymlicka, on the other hand, argues that "some limits on immigration can be justified if we recognize that liberal states exist, not only to protect standard rights and opportunities of individuals, but also to protect people's cultural membership." WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* 125 (1995). For insightful critiques of the cultural argument for the exclusion of aliens, see JEAN HAMPTON, *POLITICAL PHILOSOPHY* 230-46 (1997); Perry, *supra* note 41, at 110-21.

Instead, we are reluctant to satisfy these preferences explicitly through regulation by the state. Indeed, in 1965 we abolished the infamous national origins quota system because we recognized the illegitimacy of preferences for particular ethnic groups.¹³¹ How then can the preservation of the ethnic or cultural status quo be any more acceptable as a reason for us to restrict immigration generally? Unless we consider the ethnic purity of our labor force to be a public good, it is hard to rationalize the employment discrimination mandated by our immigration restrictions as serving the national interest. Thus, this employment discrimination against aliens, like the forms of discrimination traditionally considered invidious, not only denies the victims of discrimination equal concern but is also difficult to justify as an ideal practice unless we appeal to illiberal preferences. To the extent that these intolerant preferences help explain the enduring popularity of immigration restrictions despite the costs of these policies, this explanation underscores the illiberal nature of the discrimination produced by these restrictions.

Intolerant preferences, however illegitimate, can impose real constraints on the feasibility of liberalized immigration policies, just as the general self-interest of natives may impose such constraints. Nevertheless, we might plausibly view these preferences as more amenable to reform than the tendency of natives to pursue their own self-interest. The evolution of attitudes in the United States toward ethnic groups once greeted with hostility offers hope that more tolerant attitudes will eventually prevail with respect to those who currently dominate the immigrant flow. Perhaps the process of immigration itself will promote acceptance of these newer waves of immigrants, much as integration ultimately brought more enlightened attitudes regarding Irish, Italian, and Jewish immigration. Indeed, spurred in part by the increasing political influence of the Hispanic immigrant population in the United States, current discussions of immigration reform have raised hopes for more open policies in the near future, further underscoring the feasibility of liberalization.¹³²

131. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 120, at 11 ("The national origins immigration quota system generated opposition from the time of its inception, condemned for its attempts to maintain the existing racial composition of the United States.").

132. See Mark Benjamin, *Parties in Competition for Hispanic Vote*, UPI, July 24, 2001, available at LEXIS, News Library, UPI File: Thomas B. Edsall, *Amnesty Proposal Is Huge Gamble for Bush; President Could be Rewarded With Hispanic Vote but Risks Angering GOP's Conservative Wing*, WASH. POST, July 17, 2001, at A2; Eric Schmitt, *Open Door, Open Questions; This Way Up*, N.Y. TIMES, July 22, 2001, § 4, at 1.

There may be other factors contributing to the popularity of immigration restrictions and standing in the way of reform. For example, part of the problem may simply be the failure of the public to understand the costs of protectionism, which imposes an implicit tax on natives hidden as increases in the prices of goods and services. This failure to appreciate the economic effects of misguided policies, however, does not offer a justification for such policies. If these popular misconceptions were immutable, it could also impose constraints on the feasibility of liberalized immigration policies, just as the general self-interest of natives may restrict the set of politically feasible immigration policies. It seems plausible, however, to assume that these misconceptions are more amenable to change through education than the constraints imposed by the self-interest of natives. It is especially the role of scholars and educators not to take popular myths as given but instead to seek to promote a more enlightened understanding of the effects of public policies.

III. POLITICAL FEASIBILITY AND SECOND-BEST POLICIES

So what are we to make of the foregoing analysis? What are the normative implications for immigration policy? Cosmopolitan liberal ideals generally condemn discrimination against aliens. Even theories that allow us to privilege the interests of natives over those of aliens cannot justify employment discrimination against aliens as ideal policy,¹³³ unless we count the satisfaction of illiberal preferences as a reason to adopt immigration restrictions.

Excluding the satisfaction of segregationist preferences from our notion of social welfare, the welfare of natives would at most justify discrimination against unskilled alien workers in fiscal policies, such as restricted access to public benefits, and in terms of access to citizenship. There is little justification for employment discrimination against aliens, given the alternative of redistribution among natives through taxes and transfer programs. From the narrow perspective of the economic interests of natives, temporary worker visas may be an optimal response to fiscal concerns regarding alien access to public benefits. Through guest-worker programs, natives enjoy the benefits

133. Thus, President Bush defends suggestions for immigration reform with a focus on a liberalized labor market, stating: "[W]hen we find willing employer and willing employee, we ought to match the two. We ought to make it easier for people who want to employ somebody, who are looking for workers, to be able to hire people who want to work." Edwin Chen & Jonathan Peterson, *Bush Hints at Broader Amnesty*, L.A. TIMES, July 27, 2001, at A1.

of unskilled alien workers in the labor market but do not bear the fiscal burden of providing the full set of public benefits that these workers would enjoy if they were to gain access to permanent residence and ultimately citizenship.

From the perspective of the interests of aliens, or from the perspective of cosmopolitan liberal principles of social justice, however, these guest-worker programs are only second-best policies. From these perspectives, the ideal policy may be legal permanent residence, access to citizenship, and access to all public benefits. The self-interest of natives, however, is bound to impose constraints of political feasibility on the availability of immigrant visas. The empirical evidence suggests that unskilled alien workers are likely to have a net negative fiscal impact if granted ready access to permanent residence and ultimately citizenship. As long as natives are limited in their willingness to bear these fiscal burdens, they are likely to restrict alien access to permanent residence, either through quantitative restrictions or through qualitative restrictions that establish demanding criteria for eligibility.¹³⁴ These constraints are likely to exclude many unskilled aliens from the U.S. labor market unless they either are willing to immigrate illegally or have access to guest-worker visas.

134. See Ronald Brownstein, *Residency at Core of Immigrant Debate; Policy: Dispute is Likely to Focus on the Number of Undocumented Workers in U.S. Allowed to Seek Permanent Status*, L.A. TIMES, July 29, 2001, at A1. Conservative Republicans like Senator Phil Gramm adamantly oppose any access to permanent residence for guest workers. Gramm has said that any such program would have to pass "over my cold, dead political body." Michelle Mittelstadt, *Senators Call for Giving Residency to Immigrants; Bush Weighs Legalization Idea Pushed by Fox*, DALLAS MORNING NEWS, July 19, 2001, at 1A. Some observers have described guest-worker programs as "more politically viable" without access to permanent residence. Jonathan Peterson, *Amnesty's the Road Bump in Debate on Immigration*, L.A. TIMES, Aug. 9, 2001, at A1. The Bush administration has shifted its energies toward a program for temporary workers, which it regards as "more acceptable politically." Jonathan Peterson, *Immigration Emphasis on Guest Visas*, L.A. TIMES, Aug. 18, 2001, at A1.

In a recent Gallup poll, 67% of respondents rejected easier access to U.S. citizenship for unauthorized immigrants, while only 28% supported this proposal. See Steve Sailer, *Analysis: Why Bush Blundered on Immigrants*, UPI, Sept. 10, 2001, available at LEXIS, News Library, UPI File. Recognizing the political controversy generated by proposals to grant access to citizenship, Mexico has also emphasized an expanded guest-worker program in its negotiations with the Bush administration and has been careful not to press the issue of citizenship. By maintaining flexibility on this issue, Mexico seeks, as the Mexican foreign minister Jorge Castaneda puts it, "as many rights as possible, for as many Mexicans (in the United States) as possible, as soon as possible" within the constraints of political feasibility. Robert Collier, *Momentum Grows to Legalize Migrants; Collapse of Compromise Deal on Bill Adds Pressure on Bush, Congress, Mexico's Fox*, S.F. CHRON., July 16, 2001, at A1. As one Mexican negotiator explained, "we . . . have to be very realistic." Alfredo Corchado, *Fox Pushes for a More Open Border; Call for Freer Migration Stops Short of Request for Amnesty*, DALLAS MORNING NEWS, July 16, 2001, at 1A. Castaneda has explained that access to citizenship "is not something of huge significance to us." Sergio Munoz, *Jorge Castaneda: Mexico's Man Abroad*, L.A. TIMES, Aug. 12, 2001, at M3.

Given such political constraints on access to permanent residence, guest-worker programs may represent the only alternative to illegal immigration for aliens otherwise excluded from the U.S. labor market.¹³⁵ Thus, such programs promote the welfare of not only natives but also aliens, compared to the politically feasible alternatives; we should liberalize access to these programs by liberalizing or eliminating labor certification requirements, quotas, and restrictions on the duration of guest workers' employment or on their stays in the United States. We should also remove restrictions on the types of employment that these guest workers may take, so that aliens are free to seek any job in the United States, and all sectors of the U.S. economy can benefit from hiring them. Current discussions of an expanded guest-worker program envision liberalization beyond the agricultural sector,¹³⁶ which would represent at least a step in the right direction.

The protection of the interests of natives does not require many of the restrictions currently imposed on guest workers.¹³⁷ There is no need, for example, to restrict the alien's freedom to move from one employer to another or from one sector of the economy to another. Like immigration restrictions, restrictions on mobility between jobs are economically inefficient as well as unduly burdensome for the worker subject to the restriction. Freedom to leave an employer and to take employment elsewhere would give workers greater power to assert their rights against employers and thus prevent abuses, without destroying the gains from trade that natives enjoy from employing alien workers. Thus, both Mexico and Democrats in Congress have urged that a reformed guest-worker policy include the freedom to change employers.¹³⁸ A proposal including at least this reform appears likely to emerge from ongoing negotiations between the United States and Mexico.¹³⁹ We can also fortify the guest worker's incentives to complain about abuses with protections against em-

135. See JULIAN L. SIMON, *THE ECONOMIC CONSEQUENCES OF IMMIGRATION* 302-03, 310 (1989) (arguing that a guest-worker program is better than a policy of exclusion); Chang, *supra* note 67, at 1192-94 (same); see also Seidman, *supra* note 57, at 143 ("Why should anyone believe that a guest worker is 'exploited' when he receives higher wages and more protection in the program than he would receive if he remained in his home country?").

136. See Diane Lindquist, *Guest-worker Plan Offers Jobs Beyond Farms*, SAN DIEGO UNION-TRIB., Aug. 10, 2001, at A26.

137. Democrats in Congress have stressed that guest workers should enjoy the same rights in the workplace as citizens. See Peterson, *supra* note 3, at A1.

138. See Corchado, *supra* note 2, at 1A; Thompson, *supra* note 3, at A2.

139. See Stern, *supra* note 115, at A1.

ployer retaliation for whistleblowers, or even bounties or other rewards for those who make meritorious claims that their employers are violating the rights of employees.¹⁴⁰

At the same time, we must reduce or eliminate the protectionist barriers that we currently impose on employer sponsorship, such as labor certification. These liberalizing reforms are especially essential if we make the employee's visa more portable. Employers will be reluctant to invest much time or money in sponsoring a worker's visa if the worker is then free to leave to work for a competing employer who can thereby take a free ride on the sponsoring employer's investment in the visa.

We might also allow unskilled guest workers to adjust their status to permanent residence without imposing a net burden on natives if appropriate conditions are met. Mexico has urged the United States to allow guest workers to remain permanently, and a proposal including some sort of access to permanent residence may yet emerge from negotiations between the two countries.¹⁴¹ The conditions for adjustment of status might include, for example, a sufficiently lengthy period of residence and employment as a guest worker without a criminal record, as well as payment of a sufficient amount in taxes over this period.¹⁴²

In any event, a guest-worker program would not produce a hereditary class of alien residents in the United States because the Fourteenth Amendment of the U.S. Constitution gives U.S. citizenship to anyone born in the United States, including the children of nonimmigrants.¹⁴³ Thus, guest-worker programs in the United States cannot create the type of caste society that they might in countries that do not provide this birthright citizenship. Furthermore, citizenship for the children of immigrants has proven to be consistent with the national economic interest, as the available evidence indicates

140. The AFL-CIO has urged whistle-blower protections and amnesty for unauthorized immigrants who complain about substandard working conditions or other violations. See Cleeland, *supra* note 114, at A1; Frank Swoboda, *Unions Reverse on Illegal Aliens; Policy Seeks Amnesty, End to Sanctions*, WASH. POST, Feb. 17, 2000, at A1.

141. See Stern, *supra* note 115, at A1.

142. See Laurie Goering, *Bush Considering Green Card "Points" Mexicans Paying Taxes Could Stay*, CHI. TRIB., Aug. 22, 2001, at 1; Eric Schmitt, *No Agreement Yet with Mexico on Immigration Plan, U.S. Says*, N.Y. TIMES, Sept. 1, 2001, at A1.

143. See U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

that the descendants of even unskilled immigrants have a positive fiscal impact, even taking into account the cost of public education.¹⁴⁴

Once we lift restrictions on the duration of a guest worker's residence and employment in the United States, however, the program raises the prospect of *de facto* permanent residents with only restricted access to citizenship.¹⁴⁵ Liberal objections to this prospect help explain some of the political resistance to expansion of these guest-worker programs. Woodward objects that "[t]he creation of a class of permanent residents who are restricted from becoming citizens (if they should wish to do so) or any similar system of differential status among a state's permanent inhabitants is fundamentally incompatible with liberal egalitarian ideals."¹⁴⁶ As Carens and others have argued, however, the exclusion of aliens is also incompatible with these ideals.¹⁴⁷ If political realities require us to choose between these two departures from our liberal egalitarian ideals, then how can Woodward justify the choice that inflicts the greater harm on the alien as well as on natives?

Ironically, Woodward himself notes that if we act against a "background of non-ideal institutions and behaviour" in a world "in which large numbers of people and institutions fail to do what justice requires," we may "acquire obligations which are different from those [we] would acquire under more perfectly just institutional arrangements."¹⁴⁸ As Woodward states the theory of the second-best:

It is not in general a defensible moral principle that if it is obligatory (or even a good thing) to do P under ideal, utopian circumstances, then it is also obligatory (or even a good thing) to do P under the actual circumstances, no matter how far they may differ from the ideal.¹⁴⁹

Goodin notes that "[t]here is much to be said for the realist argument that insists upon "the importance of not making a fetish of moral ideals," because "doing the best you can in an imperfect world may well require you to compromise any (indeed, all) of your moral

144. See NRC, *supra* note 68, at 329 ("[T]he present value of the descendants of a current immigrant . . . is always positive, regardless of the immigrant's age at arrival and education level.").

145. See Munoz, *supra* note 134, at M3.

146. Woodward, *supra* note 40, at 82.

147. See *supra* note 38.

148. Woodward, *supra* note 40, at 78.

149. *Id.* at 77; see Carens, *supra* note 15, at 45 ("Ideals do not always translate directly into prescriptions for practice because of the second-best problems familiar from economic theory which have their analogue in moral theory.").

ideals" and a "[f]ailure to take due account of the probable reactions of others can . . . have consequences that are truly catastrophic."¹⁵⁰

Woodward advances realist claims in defense of immigration restrictions, but as we have seen, they could more plausibly justify restrictions on alien access to public benefits and to citizenship. Indeed, Woodward himself notes that "it is far from obvious that it would be wrong . . . to limit eligibility for social welfare programmes to citizens or long-term residents, if failure to do so would jeopardize the continued existence of such programmes."¹⁵¹ We might say the same about restrictions on alien access to public benefits and citizenship if these restrictions are necessary to make politically feasible the alien's access to our labor market and the alien's admission in the first place.

These second-best arguments require us to rank two non-ideal alternatives, both of which fall short of our moral ideals. In this regard, teleological moral theories have an advantage over deontological theories. Under a teleological theory, "those institutions and acts are right which of the available alternatives produce the most good."¹⁵² Once we specify the good, then a teleological theory can provide a complete ranking of all alternatives, including non-ideal alternatives.¹⁵³ Deontological theories, which do not maximize a good specified in advance,¹⁵⁴ may not readily provide a ranking of non-ideal alternatives.¹⁵⁵

We might, for example, specify the good as an appropriate measure of social welfare, one based on the satisfaction of preferences but excluding those preferences that violate our liberal principles of equality. Ronald Dworkin, for example, has proposed such a teleological theory.¹⁵⁶ If we apply this type of consequentialism and adopt a cosmopolitan perspective, then a guest-worker program represents the lesser of two evils when compared with the alternative of exclusion. Exclusion not only decreases global wealth but also worsens its

150. Goodin, *supra* note 59, at 255.

151. Woodward, *supra* note 40, at 79.

152. RAWLS, *supra* note 18, at 24.

153. See ROBIN BODWAY & NEIL BRUCE, WELFARE ECONOMICS 34 (1984) (defining a "complete" ordering); JOHN VON NEUMANN & OSKAR MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR 26 (3d ed. 1953) (same).

154. See RAWLS, *supra* note 18, at 30.

155. See *id.* at 303 (suggesting that "we may be able to find no satisfactory answer at all" in "instances of nonideal theory").

156. See DWORKIN, *supra* note 21, at 234–38. I have outlined a similar theory, which I call "liberal consequentialism." See Chang, *supra* note 128, at 195–96.

distribution, whereas a guest-worker program would improve social welfare on both counts. From this perspective, liberal opposition to guest-worker policies is harmful and misguided, because the alternative of exclusion raises even worse moral problems from the perspective of our liberal principles of equality.

Exclusion may benefit some workers in the country of immigration, but only at the expense of others in the country of immigration and at the expense of alien workers who are even worse off than the beneficiaries of the policy of exclusion. Thus, the employment discrimination implied by a policy of exclusion is difficult to justify from a cosmopolitan perspective because its primary victims are poorer than the workers who are privileged by this discriminatory regime. From this perspective, redistribution designed to compensate the workers adversely affected by immigration may itself bring about a desirable reduction in global inequality or may be necessary to soften the political opposition to liberalized immigration, but this redistribution is not strictly necessary for immigration liberalization to be an improvement over the status quo. In terms of cosmopolitan liberal ideals, the increase in global welfare and the improvement in its distribution created by liberalization itself would be sufficient to justify liberalization whether or not transfers compensate native workers for the erosion of the privileged status conferred by restrictionist policies.

CONCLUSION

The employment discrimination against aliens implied by our immigration restrictions is difficult to justify, whether we adopt the cosmopolitan perspective or instead embrace less egalitarian liberal ideals and favor the interests of natives over those of aliens. Considerations of both global economic welfare and national economic welfare militate in favor of liberalized alien access to our labor markets. In the case of skilled aliens, the United States can lift restrictions on the employment of aliens consistent with the national interest by liberalizing access to employment-based immigrant visas for skilled workers. In the case of unskilled aliens, however, the optimal policy from the perspective of the interests of natives departs significantly from the policy prescribed by cosmopolitan ideals. While the employment discrimination implied by our immigration restrictions remains difficult to justify, some discrimination against unskilled aliens in the distribution of public benefits and in access to

citizenship may serve the interests of natives. These considerations militate in favor of guest-worker programs as policies that provide access to our labor markets without necessarily providing full access to the transfers provided to citizens.

While guest-worker programs may be ideal from the perspective of the economic welfare of natives, they are only second-best policies from the cosmopolitan perspective. The cosmopolitan liberal would prefer that aliens have access to both our labor market and ready access to public benefits and citizenship. As a matter of political reality, however, natives are unlikely to admit aliens under those generous conditions in the numbers that cosmopolitan ideals would require, given the fiscal burden that those liberal policies would entail. Given this constraint of political feasibility, cosmopolitan liberals face a trade-off: significantly liberalized access to our labor markets for unskilled alien workers will likely require some restrictions in access to public benefits and citizenship to have a realistic chance of enactment. From a consequentialist perspective that extends equal concern to aliens and natives, guest-worker programs are less unjust than the status quo alternative of exclusion. Reforms that reduce employment discrimination against aliens should prove feasible, even while eliminating all discrimination against aliens remains an unrealistic ideal. Therefore, I have suggested, cosmopolitan liberals should support liberalizing reforms that include guest-worker programs, even while seeking the broadest rights possible for aliens within the constraints of political feasibility. While it would be a mistake to pretend that this compromise is ideal from a liberal egalitarian perspective, it would also be a mistake to sacrifice worthwhile reforms because they fall short of the ideal.