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THE IMMIGRATION PARADOX: ALIEN WORKERS AND DISTRIBUTIVE JUSTICE

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ABSTRACT

The immigration of relatively unskilled workers poses a fundamental problem for liberals. While from the perspective of the economic welfare of natives, the optimal policy would be to admit these aliens as guest workers, this policy would violate liberal ideals. These ideals would treat these workers as equals, entitled to access to citizenship and to the full set of public benefits provided to citizens. If the welfare of incumbent residents determines admissions policies, however, and we anticipate the fiscal burden that the immigration of the poor would impose, then our welfare criterion would preclude the admission of relatively unskilled workers in the first place. Thus, our commitment to treat these workers as equals once admitted would cut against their admission and make them worse off than they would be if we agreed never to treat them as equals.

A liberal can avoid this "immigration paradox" by adopting a cosmopolitan perspective that extends equal concern to all individuals, including prospective immigrants and other aliens, which suggests liberal immigration policies for relatively unskilled workers. I argue that liberal ideals require a global view of distributive justice and that attempts to defend more limited conceptions of distributive justice that apply only within nations are ultimately question-begging. The problem with policy prescriptions based on global justice is the failure of most citizens to adopt such a cosmopolitan perspective. As long as citizens are reluctant to bear the fiscal burdens that cosmopolitan liberalism would impose, constraints of political feasibility may imply that guest-worker programs are the best policies that cosmopolitan liberals can obtain with respect to many aliens.

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HOWARD F. CHANG[*]

With the number of unauthorized immigrants living in the United States estimated to be about 12 million, accounting for four percent of our total population, and growing at a rate of more than 500,000 per year,[1] it seems apparent that we need immigration reform. The country, however, is bitterly divided over what we must do. For those who advocate comprehensive immigration reform, the changes in our immigration laws must include expanded opportunities for relatively unskilled alien workers to gain legal access to our labor markets.

President George W. Bush proposed a large-scale guest-worker program that would not only allow unauthorized immigrants to legalize their status as guest workers but also attempt to satisfy the large and persistent demand for relatively unskilled labor in the United States that attracts so many unauthorized immigrants. The Senate passed a comprehensive immigration reform bill in 2006 that would establish such a guest-worker program and also expand opportunities for legal immigration and permanent residence. After the failure of the House of Representatives to pass that bill, the Senate considered another comprehensive immigration reform bill in 2007 that would have created such a guest-worker program. Thus, recent reform proposals debated in Congress would have brought large numbers of relatively unskilled alien workers into the United States on non-immigrant visas rather than on immigrant visas.

I argue in this paper that the immigration of relatively unskilled workers poses a fundamental problem for liberals. While from the perspective of the

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[1] *See* JEFFREY S. PASSEL, PEW HISPANIC CENTER, THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANTS POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY 2 (2006).

economic welfare of natives, the optimal policy would be to admit these aliens as guest workers, as I explain In Part I of this paper, this policy would also violate liberal ideals. These ideals would treat these workers as equals, entitled to access to citizenship and to the full set of public benefits provided to citizens. If the welfare of incumbent residents determines admissions policies, however, and we anticipate the fiscal burden that the immigration of the poor would impose, then our welfare criterion would preclude the admission of relatively unskilled workers in the first place. Thus, our commitment to treat these workers as equals once admitted would cut against their admission and make them worse off than they would be if we agreed never to treat them as equals.

In Part II, I outline how a liberal can avoid this "immigration paradox" by adopting a cosmopolitan perspective that extends equal concern to all individuals, including prospective immigrants and other aliens. This cosmopolitan perspective suggests liberal immigration policies for relatively unskilled workers. I argue that the liberal ideals espoused by countries like the United States require a global view of distributive justice, and I respond to some of the alternative conceptions advanced by critics of this cosmopolitan perspective. Finally, in Part III, I conclude with normative implications for immigration reforms in liberal states given the constraints of political feasibility.

I. THE PROBLEM OF THE RELATIVELY UNSKILLED ALIEN WORKER

First, I will suggest that if we concern ourselves only with the economic welfare of natives, then the optimal policy with respect to relatively unskilled alien workers would be to admit them as guest workers only. Furthermore, if we seek not only to maximize real income for natives but also to seek an equitable income distribution among natives, then we have an even greater interest in denying these workers access to public benefits and to citizenship. Second, however, I note that once we introduce considerations of justice, the exclusion of these aliens from the benefits of full membership in our society becomes troubling, in light of the claims that aliens could make under liberal theories of justice. Third, I argue that if such a theory of distributive justice fails to give the welfare of aliens the same consideration in the formulation of admissions policies, then this notion of justice proves to be hollow, because it implies that it would be best to exclude the alien from our territory. This

result would be perverse from the perspective of the alien excluded, the supposed beneficiary of the proposed obligations of distributive justice.

A. The Welfare of Natives

From the perspective of the economic interests of natives, guest-worker programs may be an optimal response to concerns regarding the impact of relatively unskilled alien workers on the public treasury. Natives of a host country, taken together, will gain from the entry of alien workers in the labor market.[2] In the case of relatively unskilled alien workers, however, the cost that they impose on the public treasury may outweigh the economic benefits that natives derive from these workers in the labor market. Empirical evidence suggests that relatively unskilled immigrants on average have a net negative fiscal impact on natives in the United States. The National Research Council (NRC), for example, found in 1996 that the average immigrant with less than a high-school education imposed a net fiscal cost of $13,000, even after taking into account the fiscal benefits that the immigrant's descendants would confer in the future.[3]

Through guest-worker programs, natives can enjoy the gains from trade with these workers in the labor market without bearing the fiscal burden of providing the full set of public benefits that these workers would receive if they had access to permanent residence and, ultimately, citizenship. In the United States, we generally exclude not only unauthorized immigrants but also non-immigrants, including temporary workers, from a broad range of public benefits. With only narrow exceptions, these aliens are ineligible for "any Federal public benefit."[4] Although immigrants can gain full access to public benefits upon naturalization, only aliens "admitted for permanent residence" may naturalize as U.S. citizens.[5] Aliens admitted on non-immigrant visas only, including temporary guest workers, are not admitted as permanent

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[2] *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].

[3] *See id.* at 334.

[4] 8 U.S.C. § 1611(a) (2000).

[5] *Id.* § 1427(a).

residents and are thus not eligible for most public entitlements and not eligible to naturalize.

The exclusion of alien workers from these programs leaves the host country free to use these programs to transfer income among natives without also shifting wealth to aliens in the process. This freedom may be especially important if host countries rely on such programs to address any adverse effects that the entry of alien workers may have on the distribution of income among natives. In particular, some economists claim that immigration has had a significant adverse impact on the least skilled native workers.[6] Estimates of the impact of immigration on native workers in the United States, however, indicate that only the least skilled native workers suffer adverse effects and that these effects are small.[7] In any event, even if present levels of immigration have little effect on the wages of the least skilled natives, a more liberal immigration policy might produce more significant effects, especially if relatively unskilled workers were to make up an increasingly large fraction of the flow of immigrants. Thus, the exclusion of alien workers from transfer programs permits a host country to adopt more liberal admissions policies without an adverse effect on either the public treasury or the distribution of income among natives. If instead the host country could not exclude these aliens from these programs, then the fiscal burden of liberal admissions policies would jeopardize the political support either for liberal admissions polices or for the amount of redistribution effected by those transfer programs.[8] Because guest-worker programs can give relatively unskilled

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[6] *See, e.g.*, GEORGE J. BORJAS, HEAVEN'S DOOR: IMMIGRATION POLICY AND THE AMERICAN ECONOMY 99 (1999).

[7] *See* George J. Borjas, *The Economics of Immigration*, 32 J. ECON. LIT. 1667, 1697-98 (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 2, at 223. For a survey of some of the recent empirical evidence on this question, see Howard F. Chang, *The Economic Impact of International Labor Migration: Recent Estimates and Policy Implications*, 16 TEMP. POL. & CIV. RTS. L. REV. 321 (2007).

[8] Nolan McCarty, Keith T. Poole, and Howard Rosenthal argue that the immigration of relatively unskilled aliens into the United States in recent decades may help explain the failure of the United States to adopt policies to curtail the growth in income inequality during this period. *See* NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES 117-38 (2006). This immigration would have such an effect, they suggest, not only by moving citizens (and thus the median

aliens access to our labor markets without necessarily providing full access to the benefits provided to citizens, these programs may allow the most liberal admissions policies possible for these aliens.[9]

B. Justice and Social Cooperation

Critics of guest-worker programs commonly object that these programs violate principles of justice. The communitarian political theorist Michael Walzer, for example, argues that the disenfranchisement of guest workers violates the "principle of political justice" in a "democratic state."[10] "Political justice is a bar to permanent alienage" for guest workers, according to Walzer, "either for particular individuals or for a class of changing individuals."[11] Walzer claims that a society that relies on guest workers to meet its labor needs is "a little tyranny,"[12] in which guest workers "are ruled ... by a band of citizen-tyrants."[13]

We might derive a similar conclusion from the liberal theory of justice developed by John Rawls, who asks what principles individuals would choose behind a "veil of ignorance."[14] In this "original position," individuals know nothing about their own personal circumstances or traits and thus "they 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

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voter) up the income distribution but also because voters are "less eager to redistribute if that redistribution has to be shared with the noncitizen poor." *Id.* at 138.

[9] Empirical evidence indicates that immigrant access to public assistance generates significant political opposition to immigration. *See* GORDON H. HANSON, WHY DOES IMMIGRATION DIVIDE AMERICA? PUBLIC FINANCE AND POLITICAL OPPOSITION TO OPEN BORDERS (2005); Gordon H. Hanson, Kenneth Scheve & Matthew J. Slaughter, *Public Finance and Individual Preferences over Globalization Strategies*, 19 ECON. & POL. 1 (2007).

[10] MICHAEL WALZER, SPHERES OF JUSTICE 60 (1983).

[11] *Id.* at 61.

[12] *Id.* at 52.

[13] *Id.* at 58.

[14] JOHN RAWLS, A THEORY OF JUSTICE 136-42 (1971).

considerations."[15] This condition ensures that the parties are "fairly situated and treated equally as moral persons," because "a knowledge of particulars" would produce an "outcome ... biased by arbitrary contingencies."[16] Rawls includes all persons within a single "society," which he describes as "a cooperative venture for mutual advantage," as participants in the original position.[17] Rawls concludes that principles of distributive justice would require members of this society to maximize the welfare of those who are least advantaged.[18]

A liberal might conclude that our obligations of distributive justice extend to all workers who participate in a scheme of social cooperation with us. From this perspective, we cannot limit these obligations to natives alone. This perspective suggests that if we admit workers to our labor market, we must extend the benefits of full membership to them as well. From this perspective, by admitting relatively unskilled alien workers, we make them objects of our concern and thus worthy recipients of the full set of public benefits that we provide to natives. We would then take a broader view of national economic welfare: our welfare objectives would include the welfare of not only natives but also guest workers. From this perspective, we must treat guest workers as equals, providing them the access to citizenship that those admitted as immigrants would enjoy.

By the same token, however, by excluding aliens from our labor market and our society, we can avoid the obligations that we would incur by admitting them. Rawls assumes that the "boundaries" of his principles of justice "are given by the notion of a self-contained national community."[19] In fact, both Rawls and Walzer defend the right of a nation to exclude prospective immigrants free of the obligations of justice that would apply among members of the national community.[20]

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[15] *Id.* at 136-37.

[16] *Id.* at 141.

[17] *Id.* at 4.

[18] *Id.* at 75-80.

[19] *Id.* at 457.

[20] *See* JOHN RAWLS, THE LAW OF PEOPLES 39 (1999); WALZER, *supra* note 10, at 35-48.

C. The Immigration Paradox

This view of justice, however, produces an anomaly. If our admission policies are based on the welfare of natives and immigrants already here, then we would refuse to admit poor immigrants because we would anticipate the public benefits that they would consume and the fiscal burden that they would impose on incumbent residents. Thus, our commitment to treat them as equals once admitted would cut against their admission and make them worse off than they would be if we rejected such a commitment. That is, by agreeing to obligations of distributive justice toward them if admitted, we harm them. Our promise of justice and equality for these aliens proves to be hollow. These aliens would be better off if we agreed never to care about their welfare and never to treat them as equals.

If concern for the welfare of poor immigrants motivates generous fiscal policies toward them, then it seems perverse to cite these policies as a reason to exclude the very immigrants whose welfare we would seek to improve through these policies. This moral stance is unsatisfactory from the standpoint of human welfare. The liberal who prevents a poor alien from escaping poverty while citing principles of justice and equality for that alien seems vulnerable to the charge of "superstitious 'rule worship,'" that is, "the charge of heartlessness, in his apparently preferring abstract conformity to a rule to the prevention of avoidable human suffering."[21] If we pursue such a perverse notion of justice, without serving the welfare of those on whose behalf we would invoke its principles, then our concern for equality among the inhabitants of our country looks more like a fetish than the product of a coherent theory of justice.

It seems incoherent public policy to turn away the poor immigrant, citing a negative effect on the welfare of current residents, given that we always have the option of admitting the poor immigrant subject to restrictions on access to public benefits and to citizenship. This option would improve the welfare of both the poor immigrant and the welfare of current residents. This admission would also transform the poor immigrant into a resident, however, and if our social welfare criterion includes the welfare of all residents, then the same distributive concerns that justified generous policies for other poor residents would apply to the poor immigrant as well. In short, no measure of social

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[21] J.J.C. Smart, *An Outline of a System of Utilitarian Ethics*, *in* J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST 3, 6 (1973).

welfare that counts an individual's welfare if and only if the individual is a resident can provide a coherent criterion for immigration policies, because these policies determine the identity of the population of residents.

This moral stance harms the very individuals whose welfare we would invoke as the basis for their access to citizenship and public benefits. This paradox lies at the heart of immigration policy. A commitment to treat the immigrant as an equal can backfire against the alien seeking to immigrate, because the immigrant's access to equal status does not arise unless we admit the immigrant. If the act of admission triggers obligations of justice, then we can avoid these obligations by choosing to exclude. Indeed, if admission polices are determined by the welfare of incumbent residents, then we would be obliged to exclude relatively unskilled alien workers. This stance begs the question of whether we can legitimately base admission policies on the interests of incumbent residents alone.

Unless the admission decision itself also respects the alien as an equal, the result is perverse. Thus, the source of the immigration paradox is the contingent nature of the obligation to treat the alien as an equal. That is, this problem is inherent in making obligations of justice contingent on voluntary acts of cooperation. If we refuse to admit alien workers, then we owe them no explanation within the framework that Rawls proposes for deriving principles of justice. This approach reconciles the exclusion of aliens with egalitarian principles of social justice only by fiat: it assumes the result rather than deriving it.

We cannot begin our normative analysis by *assuming* that we do not admit the aliens in question. 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 admit them in the first place, then this normative framework becomes a function of our admissions policies and cannot work as an independent standard that we can use to evaluate these policies.

That is, if admission to our labor market implies status as a constituent and as a member of our society, then the set of individuals whose welfare we seek to promote becomes endogenous. By choosing our members, we also choose our moral obligations and our welfare objectives. If our obligations depend on our admission policies, however, then our analysis becomes circular: we are justified in discriminating against aliens in employment precisely because our refusal to hire them relieves us of the obligations of justice that we would owe

equals. Such a theory begs the question of whether our choice of partners is itself justifiable.

This immigration paradox is quite general: the problem arises regardless of what act of admission we deem sufficient to trigger the alien's claim to justice. For example, if admission to our labor market triggers this claim, then we have a reason to exclude relatively unskilled aliens from our labor market, even if they seek to work only temporarily as guest workers. This approach allows us to avoid obligations of justice by refusing to employ these aliens, even if these aliens would be better off as guest workers with no claim to distributive justice.

If instead it is admission to permanent residence that triggers the alien's claim to justice, then we have a reason to prevent poor aliens from residing permanently within our borders. We might admit guest workers on a strictly temporary basis, for example, and invest significant resources in efforts to ensure that these workers depart at the end of their authorized stay. Again, we avoid the burdens that obligations of distributive justice would impose on us, but only by expelling aliens who may be better off if allowed to enjoy access to our labor market for a more extended period of time, even without access to public benefits or citizenship.

The immigration paradox arises even if *de facto* permanent residence is sufficient to trigger claims of justice. If unauthorized immigrants have claims to justice based on long-term residence, for example, then these claims do not derive from formal admission as a legal immigrant. Nevertheless, such claims would generate a reason for host countries to exclude, to hunt down, and to deport such immigrants before they can acquire the rights of a long-term resident. Thus, even unauthorized immigrants may be better off if we rejected notions of justice granting their claims to legal permanent residence or to public benefits, because we might then tolerate their presence more readily and invest fewer scarce resources in draconian efforts to drive them out.

II. Global Distributive Justice and Its Critics

To avoid the immigration paradox, we need a normative criterion that is independent of our immigration policies and thus avoids the circularity that underlies the immigration paradox. A cosmopolitan theory of distributive justice that extends equal concern to all individuals, including aliens, regardless of their immigration status, could provide such a solution by

granting all persons the same claim to distributive justice. Some cosmopolitan theorists argue that a world in which nations engage in international trade in goods, services, capital, and labor is a "cooperative venture for mutual advantage" sufficient to trigger Rawlsian obligations of distributive justice worldwide. In light of this international cooperation, Charles Beitz and others have argued that the entire world is a "society" in which all individuals would be parties to the original position.[22] Beitz suggests that "we should not view national boundaries as having fundamental moral significance" and that "principles of justice" should "therefore apply globally."[23]

Others, however, dispute the claim that the world is a "cooperative venture for mutual advantage" within the meaning of the theory of justice developed by Rawls.[24] For critics of the cosmopolitan perspective, the obligations of distributive justice among residents of one nation are more extensive than those that apply across national borders. Thus, for those who stress cooperation as the basis for obligations of distributive justice, "the salience of global justice is increasing in the density of interactions across borders."[25] Andrea Sangiovanni calls such a claim "relational," because it asserts that "the content and scope of distributive equality" depends on "the current extent and degree of interaction."[26]

Any theory of justice that makes obligations of distributive justice contingent on the actual degree of cooperation between parties, however, creates a problem analogous to the immigration paradox. If voluntary acts of cooperation trigger obligations of distributive justice, then wealthy societies have a reason to avoid cooperating with poor societies. The wealthy would seek to avoid the burdens that such obligations impose by shunning

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[22] *See* CHARLES R. BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS 143-53 (1979); THOMAS POGGE, REALIZING RAWLS 257 (1989); Thomas M. Scanlon, Jr., *Rawls' Theory of Justice*, 121 U. PA. L. REV. 1020, 1066-67 (1973).

[23] BEITZ, *supra* note 22, at 151.

[24] *See, e.g.*, Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFF. 113, 137-40 (2005).

[25] A.J. Julius, *Nagel's Atlas*, 34 PHIL. & PUB. AFF. 176, 187 (2006); *see* Joshua Cohen & Charles Sabel, *Extra Rempublicam Nulla Justitia?*, 34 PHIL. & PUB. AFF. 147, 164-75 (2006).

[26] Andrea Sangiovanni, *Global Justice, Reciprocity, and the State*, 35 PHIL. & PUB. AFF. 3, 7 (2007).

interactions with the poor, to the detriment of the very individuals whose welfare we would seek to improve through those obligations. This "cooperation paradox" is simply a more general version of the immigration paradox.

We can avoid the cooperation paradox only if we instead adopt a normative criterion that is independent of all of our policy choices. For example, we could include a prospective party in the Rawlsian original position in any case where cooperation with that party is feasible, regardless of whether we are actually engaged in such cooperation. Sangiovanni would call such a theory of justice "nonrelational," because its obligations do not depend on the degree of current interaction.[27] Under this approach, the mere feasibility of cooperation should be sufficient to trigger obligations of distributive justice.

Another nonrelational alternative would be to base the claim to distributive justice simply on an individual's status as a human being. After all, place of birth would appear to be a circumstance that Rawls should deem "arbitrary from a moral point of view."[28] Pogge notes that nationality based on such a circumstance "is just one further deep contingency (like genetic endowment, race, gender, and social class), one more potential basis of institutional inequalities that are ... present from birth."[29] "Within Rawls's conception," Pogge suggests, "there is no reason to treat this case differently from the others."[30] Thus, Pogge and others argue in favor of globalizing Rawls's principles of justice.[31]

Citing Beitz and others, Joseph Carens addresses the issue of immigration restrictions in particular as a question of social justice using a global

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[27] *Id.*

[28] RAWLS, *supra* note 14, at 72; *see* Sangiovanni, *supra* note 26, at 6 (describing theories of "distributive justice that are grounded on the basic intuition that no one should be worse off than anyone else through no fault of their own, whether or not they share in any practices or institutions" as "nonrelational").

[29] POGGE, *supra* note 22, at 247.

[30] *Id.*; *see* PETER SINGER, ONE WORLD 177 (2002).

[31] *See* POGGE, *supra* note 22, at 240-80; MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP 264 (2006).

interpretation of Rawls's original position.[32] In seeking a justification for the exclusion of aliens, he suggests, "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."[33] Carens identifies this premise as a basic feature of all liberal political theories, concluding that we should "take a global, not a national view of the original position."[34]

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. 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 (that is, national origin) and the citizenship of their parents at the time of their birth.[35] This discrimination based explicitly on circumstances of birth is at odds with liberal ideals. 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."[36] Similarly, in a utilitarian calculation of global welfare, "current citizens would enjoy no privileged position."[37] Carens concludes from these liberal premises that "we have an obligation to open our borders much more fully than we do now."[38] Carens condemns our immigration restrictions: "Like feudal barriers to mobility, they protect unjust

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[32] Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251, 255, 272 n.8 (1987).

[33] *Id.* at 256.

[34] Carens, *supra* note 32, at 256.

[35] *See* U.S. CONST. amend. XIV, § 1; 8 U.S.C. § 1401 (2000).

[36] Carens, *supra* note 32, at 261.

[37] *Id.* at 263.

[38] *Id.* at 270.

privilege."[39] Thus, from a cosmopolitan perspective, principles of justice require us not only to grant immigrant workers liberal access to public benefits and to citizenship but also to grant aliens liberal access to our labor market and to permanent residence in our territory.

Nevertheless, some liberals defend immigration restrictions and reject the extension of our principles of distributive justice to prospective immigrants. Critics of cosmopolitan liberalism propose various alternative theories that limit obligations of distributive justice to members of the same national community. I next review the reasons advanced by these critics for more limited theories of distributive justice and argue that these theories do not offer a satisfactory alternative to the cosmopolitan liberalism. I suggest instead that the liberal ideals expressed in our declaration that "all men are created equal"[40] require a cosmopolitan perspective.

A. State Coercion

Although Michael Blake concedes that liberalism is "committed to moral equality, so that the simple fact of humanity is sufficient to motivate a demand for equal concern and respect,"[41] he defends "distinct principles of distributive justice applicable only within the national context."[42] In particular, he argues that "a concern for specifically economic egalitarianism is only morally required within the context of a domestic legal system,"[43] where "distinct burdens of justification" apply "between individuals who share liability to the coercive power of the state."[44] He claims that it is only in the "search for the

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[39] *Id.* Others have reached similar conclusions regarding immigration restrictions in liberal political theory. *See, e.g.*, BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 93 (1980); PHILLIP COLE, PHILOSOPHIES OF EXCLUSION: LIBERAL POLITICAL THEORY AND IMMIGRATION 202 (2000).

[40] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[41] Michael Blake, *Distributive Justice, State Coercion, and Autonomy*, 30 PHIL. & PUB. AFF. 257, 257 (2002).

[42] *Id.* at 258.

[43] *Id.* at 265.

[44] *Id.* at 264.

justification of state coercion" that "egalitarian distributive justice becomes relevant."[45]

Although Blake seeks to distinguish the domestic context from the international context based on the presence of state coercion, his suggestion that we focus on state coercion does not distinguish the prospective immigrant coerced by our immigration laws from incumbent residents. After all, we exclude prospective immigrants through the use or threat of force applied by the state. In this sense, all aliens are subject to exclusion under the immigration laws enforced by our state, and they may demand that we justify this coercive exclusion within a framework of equal concern and respect for all.

Blake recognizes this problem, but asserts that "each distinct form of coercion requires a distinct form of justification."[46] Without elaborating, he claims that the justification that we owe to a prospective immigrant "would be significantly different from that offered to a present member for the web of legal coercion within which she currently lives" and that only inequality among "current" members of our society "gives rise to a legitimate concern for relative deprivation."[47] This limit on the justification owed the prospective immigrant seems at odds with Blake's broad claim that "Rawls's ... theory of justice might profitably be viewed as a theory by which the coercive force of the state might be justified to free and equal persons who have a prima facie moral entitlement to be free from *all* coercion."[48] Blake does not qualify this claim based on the nature or the scope of the coercion to be justified. Blake's treatment of immigration begs the question: Why should the prospective immigrant accept a justification for our immigration laws that does not offer the alien the equal concern embodied in the Rawlsian original position, including a concern for relative deprivation?

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[45] *Id.* at 265. Walzer also stresses that the threat of state coercion gives rise to claims of justice, declaring: "Men and women are either subject to the state's authority, or they are not; and if they are subject, they must be given a say, and ultimately an equal say, in what that authority does." WALZER, *supra* note 10, at 61.

[46] Blake, *supra* note 41, at 280 n.30.

[47] *Id.*

[48] *Id.* at 271 (emphasis added).

It is unclear why we should limit our concern for relative deprivation to those currently living within our "web of legal coercion." If the claim is that prospective immigrants are burdened in only a minor way by our immigration laws, which therefore require little justification, then this empirical claim is questionable, given the significant harm suffered by those excluded from our labor market. Although prospective immigrants do not currently live under all our laws, this fact does not diminish the coercion they suffer and the costs they bear under our immigration laws. This fact may change the law in question that requires justification, but it should not change what counts as a justification. That is, a defense of our immigration laws must give the aliens coerced by our state the same equal concern extended to citizens coerced by our state, including a concern for relative deprivation.

Even if we grant Blake's claim that one must live within our web of coercive laws to be entitled to a concern for relative deprivation, we must extend such concern to the unauthorized immigrant who also lives within this web. If we seek to deport the unauthorized immigrant as a means of enforcing our immigration laws, for example, then the immigrant may demand that we justify those laws in terms that reflect concern for the relative deprivation that we impose through those laws. This right to distributive justice may well block deportation in the case of an immigrant excludable at the border in the absence of such a right.

Yet it seems perverse and unfair to give the unauthorized immigrant a right to distributive justice that we do not extend to the prospective immigrant who obediently complies with our immigration laws. Such a stance invites prospective immigrants to enter illegally so that they may obtain the right to distributive justice that we grant to immigration lawbreakers. On the other hand, if we cite the unauthorized immigrant's violation of our immigration laws as the reason to deny that immigrant a right to distributive justice, then how are we to respond to that immigrant's demand that we justify those immigration laws first? After all, we owe even criminals a justification for the laws we invoke to punish them, and Blake agrees that "a concern for relative deprivation" is relevant in such a demand for justification.[49]

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[49] Blake, *supra* note 41, at 276.

B. Collective Self-Governance

If we deny the unauthorized immigrant a right to distributive justice in the justification of our immigration laws, then we must be requiring something more than simply living under our web of coercive laws to generate such a right. One response to this problem might be to distinguish both prospective and unauthorized immigrants from citizens by pointing to some other feature of citizens. Thomas Nagel, for example, suggests that "the objection to arbitrary inequalities" arises only among "fellow participants in a collective enterprise of coercively imposed legal and political institutions that generates such arbitrary inequalities."[50] He claims that "[i]t is only from such a system, and from our fellow members through its institutions, that we can claim a right to democracy, equal citizenship, nondiscrimination, equality of opportunity, and the amelioration through public policy of unfairness in the distribution of social and economic goods."[51] Similarly, Stephen Macedo asserts that we should confine "the extensive obligation of distributive justice to self-governing and self-responsible political communities: peoples who share a common political life and who exercise extensive authority over one another."[52]

Like Blake, Nagel notes that a regime's "requirements claim our active cooperation, and this cannot be legitimately done without justification."[53] By participation in such a collective enterprise, however, Nagel means more than mere cooperation through obedience. The law-abiding prospective immigrant, after all, cooperates with us by complying with our immigration laws. Nagel stresses that "we are both putative joint authors of the coercively imposed system, and subject to its norms, i.e., expected to accept their authority."[54] Prospective and unauthorized immigrants are not putative joint authors of our

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[50] Nagel, *supra* note 24, at 128.

[51] *Id.* at 127.

[52] Stephen Macedo, *What Self-Governing Peoples Owe to One Another: Universalism, Diversity and* The Law of Peoples, 72 FORDHAM L. REV. 1721, 1731 (2004).

[53] Nagel, *supra* note 24, at 129.

[54] *Id.* at 128.

immigration laws. Furthermore, Nagel claims, "the laws are not imposed in their name, nor are they asked to accept and uphold those laws."[55]

It is obscure, however, in what sense prospective immigrants are not "asked to accept and uphold those laws," given that we threaten criminal penalties for aliens who enter illegally.[56] Nagel's claim would come as a surprise to the unauthorized immigrant sentenced to imprisonment for violating our immigration laws. If we do not ask immigrants to "accept and uphold" these laws, then why do we punish violators? It is certainly difficult to perceive any respect in which we do not ask aliens to "accept and uphold" our immigration policies, given the way that we treat violators under our laws and in our public discourse, which seems to regard unauthorized immigrants simply as lawbreakers deserving of punishment.

Furthermore, Nagel's observation that our immigration laws "are not imposed in their name" merely begs the question of whether we *should* instead impose immigration laws that we can justify in the name of *all* those affected. His observation provides no persuasive defense for immigration laws that are too restrictive to be justified in such terms. If Nagel intends to cite our failure to give equal consideration to the interests of prospective immigrants as a defense for immigration laws that fail to give their interests equal consideration, then his reasoning would seem to prove too much.

Consider a society that permits slavery. Suppose it seeks to defend its laws by noting that the slaves do not participate in that society's collective enterprise of self-governance and are thus not "putative joint authors of the coercively imposed system," adding that "the laws are not imposed in their name." We would not find this proposed justification persuasive, precisely because the very fact that the laws exclude them from participation and are *not* imposed in their name is a reason to deem them unjust. Thus, a person's participation in the collective enterprise of self-governance as a putative joint author of the "coercively imposed system" cannot be a necessary condition for that person's right to distributive justice in that system. Therefore, it would not be an adequate defense of guest-worker programs, for example, to declare

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[55] *Id.* at 130.

[56] *See* 8 U.S.C. §§ 1325, 1326 (2000). In the United States, criminal prosecutions of such aliens under these provisions have increased dramatically in recent years. *See* Spencer S. Hsu, *Immigration Prosecutions Hit New High: Critics Say Increased Use of Criminal Charges Strains System*, WASH. POST, June 2, 2008, at A1.

that guest workers are not putative joint authors of the "coercively imposed system."

If we reject the proposed defense of slavery on the ground that the exclusion of slaves from political participation and from the sphere of equal concern is unjust and a violation of human rights, then we beg the question of whether restrictive immigration laws are also unjust because they exclude both prospective and unauthorized immigrants from full participation in our society. Before we cite participation in self-governance as a basis for the right to distributive justice, we must first demonstrate that the restrictions we impose on this participation, including immigration restrictions, are themselves justified. The implicit assumption is that we are justified in discounting the welfare of prospective immigrants when we formulate our immigration laws.[57] This proposed justification for our immigration laws would suffer from circular reasoning if it ultimately relies on an assumption that these laws are just.

C. Reciprocity

In an effort to avoid such objections to Nagel's theory, Sangiovanni attempts to defend obligations of distributive justice that are limited to residents of the same state without requiring "the 'state' (or for that matter any of its officials) taking a certain kind of attitude toward us."[58] For Sangiovanni, what matters instead is "reciprocity among those who support and maintain the state's capacity to provide the basic collective goods necessary to protect us from physical attack and to maintain ... a stable system of property rights."[59] This reciprocity applies among "citizens and residents" of a state,

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[57] This assumption requires us to reject a principle of global equality of opportunity, for example, but Nagel offers no reason to reject such a principle. As Simon Caney observes, even if "the ideal of citizenship" provides "a reason *for* domestic equality of opportunity, ... it does not give us an argument *against* global equality of opportunity." Simon Caney, *Cosmopolitan Justice and Equalizing Opportunities*, 32 METAPHILOSOPHY 113, 126 (2001). That is, even if "the ideal of citizenship" provides "*one* grounding for equality of opportunity," it does not follow that "the ideal of citizenship" is "the *only* grounding for equality of opportunity." *Id.*

[58] Sangiovanni, *supra* note 26, at 16.

[59] *Id.* at 19-20.

who "maintain the state through taxation, through participation in ... political activity, and through simple compliance" with the state's laws.[60]

This theory of reciprocity, however, does not provide much of a defense of restrictive immigration laws. Like Blake's theory based on coercion, a theory based on reciprocity does not distinguish the unauthorized immigrant from the slave as residents entitled to distributive justice. After all, laws can exclude both residents from the electorate and thus from voting, one form of political participation. The unauthorized immigrant may pay taxes and generally obey most laws, as other residents do. Most residents, after all, will violate some laws, such as speed limits. Furthermore, even the law-abiding prospective immigrant supports the state through compliance with the state's immigration laws. Do these forms of support for the state allow unauthorized or prospective immigrants to raise objections to the relative deprivation imposed on them by the state's immigration laws? If not, then why not?

Ultimately, Sangiovanni does not offer a persuasive reason to limit the requirements imposed by "equality as a demand of justice" to "fellow citizens or residents."[61] He asserts that the parties behind the Rawlsian "veil of ignorance should be citizens and residents," because "those who have submitted themselves to a system of laws and social rules in ways necessary to sustain our life as citizens, producers, and biological beings are owed a fair return for what those who have benefitted from their submission have received."[62] If this logic is the rationale for inclusion in the Rawlsian original position, however, then why not include the aliens abroad who sustain the status quo through their compliance with our immigration laws? Those aliens would be making as much of a contribution as citizens who "are able but unwilling to work," who Sangiovanni says are "contributing to the maintenance of the state" as long as "they continue to comply with the laws" and "continue to pay taxes, *assuming they have any to pay*."[63] One could say the same of aliens abroad who comply with our immigration laws and owe us no taxes.

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[60] *Id.* at 20.

[61] *Id.* at 4.

[62] *Id.* at 26-27.

[63] *Id.* at 28 n.45 (emphasis added).

Indeed, if the basis for the egalitarian claim to distributive justice is the way in which anyone's enjoyment of "social advantages" inevitably "depends on the contributions of others,"[64] as Sangiovanni suggests, then why not include everyone who participates in the world economy and thereby contributes to our affluence? Why privilege those who happen to contribute to our affluence by supporting our state? Sangiovanni asserts that this type of contribution is "more fundamental than mutual contribution to economic production,"[65] but his assertion begs the question: Why should the form of the contribution rather than the magnitude of the contribution matter? After all, an alien abroad who supplies a resource essential to our standard of living (like oil, for example) may make a greater contribution to our affluence than a relatively unskilled citizen who pays little in taxes. Why should the citizen who contributes less have a greater claim to distributive justice than the alien abroad who contributes more?

D. Involuntary Residence

We might distinguish all immigrants from natives on the ground that they seek to associate with us voluntarily whereas natives are born into our society and have no choice. Nagel, for example, stresses "the contingency of involuntary rather than voluntary association," claiming that "[a]n institution that one has no choice about joining must offer terms of membership that meet a higher standard" than voluntary associations.[66] Similarly, Joseph Heath notes that "being born into society is a *circumstance*, while moving into one is a *choice*,"[67] arguing that "involuntarily incurred obligations must meet a much higher standard in order to be considered binding."[68] In particular, Heath claims that "[t]he conditions under which immigrants secure admittance ... are

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[64] *Id.* at 26.

[65] *Id.* at 29.

[66] Nagel, *supra* note 24, at 133.

[67] Joseph Heath, *Immigration, Multiculturalism, and the Social Contract*, 10 CAN. J.L. & JURISPRUDENCE 343, 350 (1997).

[68] *Id.* at 351.

not involuntary," and therefore, "the strict criterion of equality ... need not apply."[69]

This distinction would allow us to justify not only laws discriminating against unauthorized or prospective immigrants but also nativist laws that fail to extend equal concern to *legal* immigrants after admission. This nativist theory of distributive justice favors the interests of natives and discounts the interests of immigrants. Like the cosmopolitan theory of distributive justice, this nativist theory can provide a normative criterion that is independent of our admission policies and thus avoids the circularity that underlies the immigration paradox. As we saw, this nativist perspective suggests guest-worker programs as the optimal immigration policies for relatively unskilled aliens.

The welfare objective that is consistent with liberal ideals, however, is cosmopolitan rather than nativist. The nativist theory turns liberalism on its head insofar as it entitles natives in rich countries to advantages based on immutable circumstances of birth. "We do not deserve to have been born into a particular society any more than we deserve to have been born into a particular family," Nagel concedes, yet he maintains that only natives enjoy a presumption against arbitrary inequality, "so an arbitrary distinction is responsible for the scope of the presumption against arbitrariness."[70] This suggestion seems to fly in the face of reality when those born in rich countries cite the circumstances of their birth as if it were some sort of disadvantage justifying privileges not extended to those born in poor countries who seek to move "voluntarily" into those rich countries. After all, those born into poor countries involuntarily incur poverty and the legal obligation to comply with the immigration laws of rich countries. Given those realities, why not impose the same standard of distributive justice to bind prospective immigrants under our immigration laws as we apply to natives under other laws? A view more sensitive to social, legal, and economic realities would recognize the claims of prospective immigrants based on all the burdens they have involuntarily incurred.

The claims advanced by Nagel and Heath assume that natives are not free to emigrate and therefore reside involuntarily in their country of origin. They may base their assumption on a realistic evaluation of the feasibility of

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[69] *Id.* at 355.

[70] Nagel, *supra* note 24, at 128.

emigration under current conditions. Insofar as they base this assumption on the immigration barriers raised by other countries, however, they make our right to distributive justice curiously contingent on the immigration policies of other countries. If another country opens its borders to some, most, or all prospective migrants from our country, do those who are free to emigrate thereby become voluntary residents who are therefore not entitled to distributive justice?

Nagel and Heath may invoke not only legal barriers to migration but also those barriers raised in practice by the social or economic costs of migration for the individual migrant. Heath, for example, suggests that "the costs associated with emigration are so high that nationality is *de facto* involuntary," conceding that "the distinction between voluntary and involuntary is determined by some notion of which options an individual could *reasonably* be expected to exercise."[71] Often, however, these costs are quite low, as when a native of the United States contemplates migration to Canada, or when a native of Australia contemplates migration to New Zealand. If such emigration is quite easy for the native, then does this option undermine that native's claim to distributive justice? Furthermore, once we recognize that the difference between "involuntary" residence and "voluntary" migration is not only a matter of degree but also a question of what options we should deem "reasonable," then the claims advanced by Nagel and Heath beg the question: Should we regard residence in a poor country to be so costly as to make it unreasonable for us to expect the prospective migrant to refrain from migration to a rich country?

E. The Absence of a Cosmopolitan State

Macedo rejects claims of cosmopolitan distributive justice, finding it "hard to understand the reasonableness of making people responsible for the welfare of others without also making them responsible for their governance."[72] "Cosmopolitan distributive justice," he concludes, "makes no sense absent a cosmopolitan state."[73] Even if we assume that the absence of a cosmopolitan

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[71] Heath, *supra* note 67, at 351 n.25.

[72] Macedo, *supra* note 52, at 1731.

[73] *Id.*

state implies some limits on obligations of distributive justice, however, this absence would not justify immigration restrictions that neglect principles of global distributive justice.[74] After all, the admission of any given set of immigrants *would* make us "responsible for their governance" as well as responsible for their welfare. Upon joining our society, the immigrant could agree to the same terms of the social contract as the native born into our society. Why should our inability to govern them prior to admission justify our failure to consider their welfare in the admission decision, as long as we can govern them after admission?

Perhaps the concern is that immigrants may not have paid their fair share of tax revenues and could thereby unfairly exploit the public treasury in the country of immigration. Heath, for example, worries that "if states lifted immigration controls in the current global context, they would open themselves up to a variety of forms of harmful predation."[75] "No welfare state could survive," he notes, "if people chose to spend their childhood and retirement in a welfare state, yet their working lives in a low-taxation state with minimal public services."[76] These concerns, however, only justify policy responses tailored to those specific concerns, not general restrictions on immigration. We might address such concerns, for example, with fiscal policies that impose appropriate conditions on immigration. To ensure that immigrants do not unfairly drain the public treasury, we might restrict the access that immigrants enjoy to the particular public entitlements raising such concerns, for example, or impose special taxes on immigrants as a form of admission fee in appropriate cases. These policies would be less restrictive than immigration restrictions that exclude the prospective immigrant from our country entirely and thereby needlessly destroy gains from trade in the labor

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[74] Sangiovanni appears to adopt such a position. He argues that "we have special obligations of egalitarian justice to fellow citizens and residents," Sangiovanni, *supra* note 26, at 4, yet also "agrees that immigrants have a prima facie claim to open borders," *id.* at 38. Sangiovanni claims that his theory "offers no reason to grant states and their citizens an unrestricted right to close their borders." *Id.* at 37. Instead, his theory is "compatible with a prima facie claim in favor of open borders, subject to the proviso that an open immigration policy not undermine the capability of both the receiving and the sending state to provide those basic goods and services necessary to develop and act on a plan of life." *Id.*

[75] Heath, *supra* note 67, at 347.

[76] *Id.* at 348.

market. More important, any such concern would seem to raise questions only regarding the particular policies that could be justified within a framework of equal concern. Fiscal concerns would not seem to provide much of a reason to question the basic premise that any law is morally justified only if its rationale extends equal concern to all those affected, including a concern for relative deprivation.

We might say the same regarding suggestions that liberal immigration policies would pose various other problems. For example, Heath worries about the possibility that liberal immigration would undermine the incentives for "the provision of public goods for future generations, by such measures as encouraging a high rate of savings, controlling public debt, preventing long-term environmental degradation, [and] implementing population control measures."[77] Rawls expresses similar concerns, worrying that people may be tempted to "make up for their irresponsibility in caring for their land and its natural resources ... by migrating into other people's territory."[78] If Heath and Rawls are worried about the incentives to invest in local public goods in countries of emigration, then two considerations suggest that their concerns provide little support for immigration restrictions.

First, we should recognize that it is entirely appropriate for a country of emigration to take future emigration into account in deciding how much to invest in local public goods. Insofar as emigration implies a smaller population in the future than would otherwise exist, the benefits derived from a local public good will be smaller, and a reduced investment in such a good would be socially optimal. A legitimate concern arises only if the prospect of future emigration leads some residents in the country of emigration to withdraw support for even this optimal level of investment because they anticipate their own future emigration.

Second, even if the prospect of emigration distorts investment below the optimal level, there are probably better policy responses available to the country of immigration than immigration restrictions. If the country of immigration is actually concerned about local public goods in countries of emigration, then the country of immigration can always use its jurisdiction over immigrants to collect tax revenue from them to finance subsidies for investments in public goods in countries of emigration. Such subsidies would

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[77] Heath, *supra* note 67, at 348.

[78] RAWLS, *supra* note 20, at 39.

be better than the exclusion of prospective immigrants insofar as a policy of exclusion needlessly destroys gains from trade in the labor market.

Heath may also be worried about incentives to invest in public goods in the country of *immigration*. Immigrants may congest local public goods and thereby reduce the return that natives enjoy on their investment in these public goods. Again, these concerns arise even within a framework of distributive justice for all, and we could address these concerns through measures more narrowly tailored than general immigration restrictions. We could, for example, charge immigrants an appropriate fee for access to any public good subject to congestion without imposing other immigration restrictions. Such fees can internalize negative externalities from immigration, deter inefficient immigration, and compensate natives for any congestion of local public goods arising from immigration. We can weigh all of these concerns against the claims of the immigrant in deciding what policy responses are appropriate.

After all, similar concerns also arise within a society in the absence of any international migration. We may worry that redistribution from the rich to the poor, for example, undermines the incentives of poor families to save or to have fewer children. I do not deny that analogous problems may arise with liberal immigration policies. My only claim is that our policy response to these concerns in the immigration context should extend equal concern to all those affected, just as our policy response to similar concerns in the domestic context should be based on equal concern. If we understand in the domestic context that it is unfair for a native born into a large and poor family to suffer as a result of circumstances beyond that person's control, for example, then we should also understand in the immigration context that it is unfair for an alien born into a poor and populous country to suffer as a result of similar circumstances. I have suggested that the attempts by some liberal theorists and philosophers to distinguish immigration policies from laws in the domestic context in this regard are all ultimately question-begging.

III. Political Feasibility and the Second Best

I have suggested that liberal ideals require a global view of distributive justice, and I have outlined critiques of some of the alternative conceptions of justice advanced by critics of this cosmopolitan perspective. I conclude that considerations of global justice militate in favor of liberalized migration. Considerations of justice suggest that liberal states should seek to liberalize

their immigration policies, thereby reducing global inequalities in economic opportunity. It is incumbent upon liberal states to pursue such liberalizing reforms if they are to remain faithful to the egalitarian ideals that they espouse.

Given the failure of most citizens to adopt this cosmopolitan perspective, however, cosmopolitan liberals face a constraint of political feasibility that prevents realization of all their ideals. As a matter of political reality, the interests of citizens have in fact played a dominant role in the public debate over immigration policies. National governments, including that of the United States, will likely continue to deem the promotion of the interests of its own citizens to be the paramount objective of its immigration policies. This feature of the real world may impose a constraint on the set of policy alternatives open to us as a practical matter.

The cosmopolitan liberal would prefer that aliens have access to both our labor market and ready access to public benefits and to citizenship. As a matter of political reality, however, incumbent citizens are unlikely to admit relatively unskilled aliens under those generous conditions in the numbers that cosmopolitan ideals would require, given the fiscal burden that those liberal policies would entail. As long as citizens are limited in their willingness to bear this burden, they are likely to restrict alien access to immigrant visas.

The self-interest of citizens is bound to impose constraints of political feasibility on the availability of immigrant visas. These constraints are likely to exclude many relatively unskilled aliens from labor markets in wealthy countries unless these aliens are willing to immigrate illegally or have access to guest-worker visas. Given these constraints, cosmopolitan liberals face a trade-off: significantly liberalized access to our labor markets for relatively unskilled alien workers will likely require some restrictions on access to public benefits and citizenship to have a realistic chance of enactment.[79] Under these circumstances, guest-worker programs may represent the only alternative to exclusion for many aliens.

If so, then cosmopolitan liberals must settle for second-best policies that fall short of their ideals. For many relatively unskilled alien workers, guest-worker programs may be the best one can achieve under current circumstances. These programs may be incompatible with liberal ideals, but as Carens and others have argued, the exclusion of aliens is also incompatible

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[79] Gordon Hanson finds empirical evidence that recent restrictions on immigrant access to public benefits have softened political support for immigration restrictions. *See* HANSON, *supra* note 9, at 54-57.

with these ideals. If political realities require us to choose between these two departures from our liberal ideals, then how can we justify the choice that inflicts the greater harm on the alien as well as on natives? Exclusion is the more costly response for both natives and aliens, because it excludes aliens not only from our public benefits but also from our labor market and thereby sacrifices the gains that we and they would otherwise derive from trade in that market.

James Woodward 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."[80] 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.[81]

Woodward advances this claim 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."[82] 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. If we seek to maximize an appropriate measure of global economic welfare, taking not only global wealth but also its distribution into account, then a guest-worker program represents

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[80] James Woodward, *Commentary: Liberalism and Migration*, *in* FREE MOVEMENT: ETHICAL ISSUES IN THE TRANSNATIONAL MIGRATION OF PEOPLE AND OF MONEY 78 (Brian Barry & Robert E. Goodin eds., 1992).

[81] *Id.* at 77.

[82] *Id.* at 79.

the lesser of two evils when compared with the alternative of exclusion. Exclusion not only decreases global wealth but also worsens its distribution, whereas a guest-worker program would improve social welfare on both counts by increasing labor mobility.[83]

In this sense, from a consequentialist perspective that extends equal concern to aliens and natives, expanded guest-worker programs represent an improvement over the status quo alternative of exclusion. Therefore, I suggest, 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.[84] While it would be a mistake to pretend that this compromise is ideal from a liberal perspective, it would also be a mistake to sacrifice worthwhile reforms because they fall short of the ideal.

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[83] *See* WORLD BANK, GLOBAL ECONOMIC PROSPECTS 2006: ECONOMIC IMPLICATIONS OF REMITTANCES AND MIGRATION 25-35 (2006); Bob Hamilton & John Whalley, *Efficiency and Distributional Implications of Global Restrictions on Labour Mobility*, 14 J. DEV. ECON. 61, 70-74 (1984).

[84] These rights may include, for example, the worker's freedom to change employers, to move from one sector of the economy to another, to bring the worker's immediate family to live in the host country, and to naturalize as a citizen after a sufficient period of alienage has passed. A host country can grant these rights even to relatively unskilled alien workers without generating a net fiscal burden. *See* Howard F. Chang, *Liberal Ideals and Political Feasibility: Guest-Worker Programs as Second-Best Policies*, 27 N.C. J. INT'L L. & COM. REG. 465, 470-73 (2002).