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IMMIGRATION RESTRICTION AS REDISTRIBUTIVE
TAXATION: WORKING WOMEN AND THE COSTS OF
PROTECTIONISM IN THE LABOR MARKET

*Howard F. Chang**

ABSTRACT

In this article, I argue that tax and transfer policies are more efficient than immigration restrictions as instruments for raising the after-tax incomes of the least skilled native workers. Policies to protect these native workers from immigrant competition in the labor market are no better at promoting distributive justice and are likely to impose a greater economic burden on natives in the country of immigration than the tax alternative. These immigration restrictions are especially costly given the disproportionate burden that they place on households with working women, a burden that discourages female participation in the labor force. This burden runs contrary to the teachings of optimal tax theory and introduces excessive distortions in the labor market because the supply of female labor is more elastic than the supply of male labor. Thus, the best response to concerns about the effect of immigration on the distribution of income among natives is to increase the progressivity of the tax system.

* Earle Hepburn Professor of Law, University of Pennsylvania Law School. Copyright © 2009 by Howard F. Chang. This article is based on a previously published article by Howard F. Chang, *The Disadvantages of Immigration Restriction as a Policy to Improve Income Distribution*, 61 SMU L. REV. 23 (2008). Reprinted with permission from the *SMU Law Review* and the Southern Methodist University Dedman School of Law. I would like to thank Daniel Griswold, Gillian Hadfield, Jacob Hornberger, Henrik Lando, Matthew Lister, Edward McCaffery, Chris Sanchirico, David Weisbach, symposium participants at George Mason University, conference participants at the 2008 meeting of the American Law and Economics Association at Columbia University, and seminar participants at the University of Chicago, Boston University, and Loyola Marymount University for helpful comments.

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I. INTRODUCTION

To an economist, the international migration of workers is one facet of globalization, which economists understand to mean the development of a global common market, that is, our evolution toward a world economy that is integrated across national boundaries. Our progress in this direction has been especially dramatic in the liberalization of international trade in goods. Economists generally welcome this development, prescribing free trade as the regime that maximizes global economic welfare. Economists also recommend liberalized trade as a policy that is likely to produce gains for each national economy.

Economists also recognize that the same theory that applies to goods also applies to international trade in other markets. Nations can gain through not only the free movement of goods across national boundaries but also the free movement of labor across national boundaries.¹ The basic intuition for this result derives from the gains from international trade in the labor market. We would expect labor to migrate from low-wage countries to high-wage countries in pursuit of higher wages. As a result of this mi-

¹ See Howard F. Chang, *Liberalized Immigration as Free Trade: Economic Welfare and the Optimal Immigration Policy*, 145 U. PA. L. REV. 1147, 1148-50 (1997).

gration, world output rises. Higher wages in the host country imply that the marginal product of labor is higher there than in the source country. In other words, 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 global wealth because labor flows to the country where it has the higher-value use.² For this reason, economic theory raises a presumption in favor of the free movement of labor. Migration 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.

Despite these considerations, many observers favor immigration restriction as a policy designed to protect native workers from foreign competition.³ In the United States, these protectionists claim that the entry of immigrant workers has increased income inequality among natives substantially.⁴ Protectionists concerned about distributive justice among citizens often infer that we should restrict immigration insofar as the entry of alien workers causes such an increase in income inequality among natives.⁵ In this article, I will focus on this concern regarding income inequality in particular, setting aside the other reasons that restrictionists may have for opposing more liberal immigration policies.

Concerns for the labor market prospects of the least skilled natives in the United States lead protectionists to urge restrictions on the immigration of the least skilled immigrant workers in particular.⁶ The economist George

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

³ See, e.g., Steven A. Camarota, *Immigrant Employment Gains and Native Losses, 2000-2004*, in *DEBATING IMMIGRATION* 139, 156 (Carol M. Swain ed., 2007) (presenting evidence that "immigration has adversely impacted natives" and concluding that "reducing the levels of immigration may be helpful for the job prospects of native-born Americans").

⁴ See, e.g., GEORGE J. BORJAS, *HEAVEN'S DOOR: IMMIGRATION POLICY AND THE AMERICAN ECONOMY* 99 (1999) (claiming that immigration "transfers a substantial amount of wealth away from the workers who compete with immigrants to the natives who have skills or physical resources that benefit from the presence of immigrants" and that "it is the less-skilled natives who pay the price of immigration"); Peter Brimelow, *Economics of Immigration and the Course of the Debate Since 1994*, in *DEBATING IMMIGRATION*, *supra* note 3, at 157, 158, 164 (claiming that "immigration does cause a substantial redistribution of income among the native-born" such that "it is distributed among a diminishing number of the native-born at the expense of their fellow countrymen").

⁵ See, e.g., Stephen Macedo, *The Moral Dilemma of U.S. Immigration Policy: Open Borders Versus Social Justice?*, in *DEBATING IMMIGRATION*, *supra* note 3, at 63, 64, 68 (worrying that liberal immigration policies "involve injustice toward poorer native-born Americans" and arguing that "if high levels of immigration have a detrimental impact on our least well-off fellow citizens, that is a reason to limit immigration").

⁶ See, e.g., BORJAS, *supra* note 4, at 17 (assuming that the United States "does not want immigration to greatly increase the amount of inequality in the society" and concluding that the evidence supports "a strong case that the United States would be better off by adopting an immigration policy that favored skilled workers"); VERNON M. BRIGGS, JR., *MASS IMMIGRATION AND THE NATIONAL INTEREST*

Borjas, for example, proposes that the United States adopt a “point system” to select skilled workers for admission.⁷ In fact, when the U.S. Senate considered comprehensive immigration reform in 2007, the bill at the center of those deliberations would have replaced existing employment-based admissions and some family-sponsored immigration with such a point system.⁸

In this article, however, I suggest that proposals to reduce relatively unskilled immigration are inappropriate responses to concerns about the distribution of income among natives. I argue that the appropriate response to these concerns would be to increase the progressivity of our tax system rather than to restrict the entry of relatively unskilled alien workers. In Part II of this article, I briefly summarize the literature on the economic effects of labor migration, including some recent estimates of the magnitude of these effects.⁹ In particular, this review focuses on the effects that migration produces for participants in national labor markets, assuming that fiscal policies do not change the distribution of costs and benefits among individuals. This background information lays the foundation for the analysis that follows in Part III of this article, which introduces the option of redistribution through the public sector and focuses on a comparison of immigration restrictions with a set of tax reforms that has the same expected impact on the distribution of income among natives.

This comparison evaluates policy alternatives in terms of the economic welfare of natives alone. I assume a strictly nativist measure of national economic welfare, not because I believe that immigration policy should be guided solely by the interests of natives, but because their interests have in fact played a dominant role in the public debate over immigration policy. Borjas adopts this nativist perspective, for example, when he builds his case for tighter restrictions on the immigration of relatively unskilled alien workers,¹⁰ noting that “many participants in the immigration debate” assume that “the United States should be concerned only with the economic well-being of the native population.”¹¹

Thus, I adopt this perspective for the sake of argument, not because I believe that it is morally defensible, but because this nativist welfare objective is commonly thought by influential protectionists to provide a strong

247 (1992) (arguing that “[w]ith job prospects for unskilled and semiskilled workers becoming dimmer” in the United States, “[l]egal entry should be restricted to skilled and educated immigrants”).

⁷ BORJAS, *supra* note 4, at 192-94.

⁸ See S. 1639, 110th Cong. § 502 (2007); THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 460-62 (6th ed. 2008).

⁹ For a more comprehensive survey of the empirical literature, 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).

¹⁰ BORJAS, *supra* note 4, at 17 (assuming that “the goal of immigration policy is . . . to maximize the economic well-being of the native population,” which “depends both on per capita income and on the distribution of income in the native population”).

¹¹ *Id.* at 182.

case in favor of immigration restriction. My goal in this article is to take the objective commonly adopted by protectionists like Borjas and to argue that, even if we take this objective seriously, it does not support the restrictionist conclusions they seek to derive. With this goal in mind, I adopt his assumption that we seek “to maximize the economic well-being of the native population,” defined as a measure of social welfare that “depends both on per capita income and on the distribution of income in the native population.”¹²

My analysis suggests that even from this narrow perspective, which “stacks the deck” against the immigrant, immigration restrictions that protect the least skilled native workers from foreign competition are a costly response to concerns about income distribution. These restrictions are especially costly given the disproportionate burden they place on households with working women, a burden which discourages female participation in the labor force. As the supply of female labor is more elastic than the supply of male labor, the burden that immigration restrictions impose on working women runs contrary to the teachings of optimal tax theory and introduces excessive distortions in the labor market. I conclude that progressive tax reforms would be more efficient than immigration restrictions as instruments for raising the after-tax incomes of the least skilled native workers.¹³

In Part IV, I discuss the normative implications of my economic analysis. I relax the assumption that our sole concern is the welfare of natives and address the welfare of immigrants and of aliens outside of the United States. I conclude that protectionist immigration policies are not only likely to be relatively costly as an instrument for redistribution among natives but also perverse from the standpoint of global justice. Thus, considerations of economic efficiency and distributive justice both militate against immigration restrictions.

II. THE ECONOMIC IMPACT OF INTERNATIONAL LABOR MIGRATION

To evaluate the use of immigration restrictions to achieve a desirable distribution of income, we must first understand both the economic costs that these restrictions impose and the benefits they generate for some work-

¹² *Id.* at 17.

¹³ These progressive fiscal policies would also compensate many native workers who may be harmed by liberalized immigration policies. I do not, however, take compensation to be the goal of these policies. Instead, I take at face value the claims of protectionists who express concerns about income inequality among natives and argue against immigration restrictions within that framework of distributive justice. Progressive fiscal policies nevertheless may as an incidental matter compensate native workers for the adverse effects of liberalized immigration. If these progressive reforms are explicitly linked to liberalized immigration, then the prospect of compensation may also reduce the political opposition to liberalization.

ers. Therefore, I begin my analysis of immigration restrictions with a review of the impact of labor migration on the private sector, setting aside the impact immigrants may have on the public sector. For the time being, I will assume that fiscal policies do not offset the effects in the labor market by shifting costs and benefits among individuals in the country of immigration. Later, in Part III of this article, I will introduce the possibility of redistribution through the public sector.

First, I review some of the latest estimates of the magnitude of the gains that the world could enjoy by liberalizing international migration. These estimates indicate that even partial liberalization would not only produce substantial increases in the world's real income but also improve its distribution by reducing international inequality. Second, I turn to the question of the effects of immigration on the distribution of income among natives in the United States. In particular, I review recent estimates of the impact of immigration on the least skilled native workers. I suggest that, under a fair reading of this economic literature, the best evidence available indicates that the adverse effect of immigration on the least skilled native workers is small.

A. *The Gains from International Trade in the Labor Market*

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 degree of wage inequality in the world today,¹⁴ it should be apparent that the gains from liberalized migration are huge. In fact, some economists have attempted to estimate the gains that the world could enjoy by liberalizing migration.

The World Bank, for example, has recently studied the potential gains from a modest increase in international migration.¹⁵ The World Bank economists considered the effects of an increase in migration from "developing" countries to "high-income countries" sufficient to increase the labor force in the host countries by 3% by the year 2025.¹⁶ They concluded that this scenario "would generate large increases in global welfare,"¹⁷ increasing the world's real income by \$356 billion in 2025.¹⁸ The gains from lib-

¹⁴ See *Mexican Deportees Report Good Treatment*, United Press International, Apr. 21, 1996, available at LexisNexis Library, UPI File (reporting the results of a survey of deported Mexican immigrants, who received an average of \$278 per week in the United States, compared with \$30.81 per week in Mexico).

¹⁵ See WORLD BANK, GLOBAL ECONOMIC PROSPECTS 2006: ECONOMIC IMPLICATIONS OF REMITTANCES AND MIGRATION (2006).

¹⁶ *Id.* at 25.

¹⁷ *Id.* at 26.

¹⁸ See *id.* at 31.

eralization would be distributed such that if we examine the effects on natives in the countries of immigration, on the migrants, and on those left behind in the countries of emigration, we find that each group would enjoy significant gains. Furthermore, "the relative gains are much higher for developing-country households than high-income country households."¹⁹ Thus, liberalization would not only increase the world's real income but also reduce international income inequality.

First consider the effects of immigrant workers on natives in the country of immigration. If we examine the impact of immigrants in the labor market, we find that the natives of the host country, taken together, will gain from the immigration of labor.²⁰ 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.²¹ Furthermore, natives gain from employing immigrant workers: they gain surplus in excess of what they pay immigrants for their labor. Thus, natives as a group enjoy a net gain from employing immigrants. In fact, the World Bank economists estimate that the high-income countries receiving immigrants in their liberalization scenario would enjoy an increase of \$139 billion in their real income.²²

In theory, migration may make those left behind in the source countries worse off insofar as they no longer enjoy the gains from trade that they used to enjoy from employing the workers who have emigrated. Although workers left behind would enjoy an increase in wages as a result of the departure of competing workers, employers would lose more than the workers left behind would gain. As long as the migrants allowed to move under the liberalization analyzed by the World Bank send the same proportion of their income to those left behind as that sent by existing migrants, however, the World Bank estimates that with these remittances, those left behind would enjoy a gain of \$143 billion.²³

It is the migrants themselves, however, who gain by far the most from their own migration. They obtain much higher wages in their host countries than they did in their source countries. In the scenario analyzed by the World Bank, the additional migrants allowed to move under liberalized immigration policies nearly tripled their own real income on average, enjoying a gain of \$162 billion, even after subtracting remittances sent back to

¹⁹ *Id.* at 35.

²⁰ 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].

²¹ See *id.* at 138-39.

²² See WORLD BANK, *supra* note 15, at 34.

²³ See *id.* at 33-34.

those left behind in their countries of origin.²⁴ In this sense, labor migration represents a form of international trade in which the source country exports labor to the host country. Like international trade in goods, labor migration allows foreign suppliers to sell their services to domestic buyers, allowing both parties to gain from trade.

B. *Income Distribution Among Natives*

Nevertheless, countries often restrict immigration to protect native workers from the unemployment or the wage reductions that the entry of foreign workers would supposedly entail. In this sense, immigration barriers, like trade barriers, are protectionist: they are designed to protect natives from foreign competition.²⁵ Protectionists often defend these barriers as policies that promote a more equal distribution of income among natives, pointing to the adverse effects of immigration on the welfare of the least skilled native workers in particular. Although the economic effects of immigration on native workers and distributive justice are often advanced as reasons to reduce immigration, these concerns for distributive justice do not provide a sound justification for restrictive immigration laws.

First, concerns regarding income inequality among natives 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.²⁶ Skilled immigrants 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 among natives would at most justify concerns regarding relatively unskilled immigration, which could have an adverse effect on the real wages of relatively unskilled native workers.²⁷

²⁴ See *id.* at 34-35. This gain of \$143 billion would represent an increase of migrants' real income by 199%. *Id.* at 38.

²⁵ In the United States, we have designed some of our immigration restrictions explicitly in terms of this objective. For example, we require "labor certification" for most categories of employment-based immigration visas, including even those for skilled workers holding advanced degrees. See 8 U.S.C. §§ 1153(b)(2)-(3), 1182(a)(5)(D) (2000). Labor certification requires the employer show that "there are not sufficient workers who are able, willing, qualified . . . and available" to perform the work in question and that the employment of the alien "will not adversely affect the wages and working conditions of workers in the United States similarly employed." *Id.* § 1182(a)(5)(A)(I), (II). We also impose quantitative restrictions on immigration visas, in part, to protect native workers from foreign competition. See *id.* §§ 1151-1153.

²⁶ See Howard F. Chang, *Immigration and the Workplace: Immigration Restrictions as Employment Discrimination*, 78 CHI.-KENT L. REV. 291, 308-09 (2003).

²⁷ Few relatively unskilled workers can obtain employment-based immigration visas to enter the United States: of the 140,000 visas allocated to employment-based immigration per year, only 10,000 may go to relatively unskilled workers. See 8 U.S.C. §§ 1151(d)(1)(A), 1153(b)(3)(A)(iii), (B) (2000).

Second, studies of the effects of immigration in labor markets in the United States and in other countries have shown little evidence of any significant effects on native wages or employment, even for the least skilled native workers.²⁸ Given the small effects of immigration on native wages and employment, protectionist policies seem particularly misguided. David Card's influential study of the effect of the Mariel Cubans on the Miami labor market, for example, produces fairly typical results for this literature: he found that the arrival of 125,000 Cubans in 1980, which increased the supply of labor in Miami by 7% almost overnight, had virtually no effect on the wages and employment opportunities for workers in Miami, including the least skilled whites and the least skilled blacks.²⁹

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 but also demand goods and services. This demand translates into greater demand for locally supplied labor. Furthermore, an influx of labor will create a profit opportunity for investors, which in turn will attract capital to the economic activities employing the immigrant labor. This expansion in the sector of the economy employing this labor will also increase the demand for that labor, which in turn would tend to offset the effect of increased supply.³⁰

Finally, the empirical evidence indicates that immigrants and natives are not perfect substitutes in the labor market, so they often do not compete for the same jobs.³¹ For example, immigrants are likely to have different language skills than natives do. Therefore, employers may find natives to be better suited than immigrants are for some tasks. In fact, labor markets are highly segregated, with immigrant labor concentrated in some occupations and natives concentrated in others.³² Immigrants compete with one

²⁸ See George J. Borjas, *The Economics of Immigration*, 32 J. ECON. LITERATURE 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 42; NRC, *supra* note 20, at 223. Estimates of these effects are small, whether we consider the effect on native wages, native unemployment rates, or native participation in the labor force. See *id.* at 222.

²⁹ See David Card, *The Impact of the Mariel Boatlift on the Miami Labor Market*, 43 INDUS. & LAB. REL. REV. 245, 256 (1990).

³⁰ Thus, by shifting resources to the sectors of the economy employing immigrants, an economy can mitigate or even eliminate the adverse effects that immigrant workers may have on the wages of competing native workers. See Noel Gaston & Douglas Nelson, *Immigration and Labour-Market Outcomes in the United States: A Political-Economy Puzzle*, 16 OXFORD REV. ECON. POL'Y 104, 108 (2000) (noting that "some of the adjustment . . . will occur via a change in the output mix, reducing the . . . costs to the competing factor (i.e. domestic unskilled labour)").

³¹ See Jean Baldwin Grossman, *The Substitutability of Natives and Immigrants in Production*, 64 REV. ECON. & STAT. 596 (1982).

³² See NRC, *supra* note 20, at 218 (concluding that the data suggest that "the jobs of immigrant and native workers are different").

another far more than they compete with natives.³³ Indeed, some 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 wages.

Nevertheless, some economists claim that immigration has a significant adverse impact on the least skilled native workers.³⁴ It is important, however, to interpret these claims carefully in light of the positive effects of immigration on the demand for native labor. Recent work by George Borjas, in particular, is widely cited by restrictionists for his large estimates of the effect of immigrants on native wages.³⁵ In a recent study, for example, he attempts to estimate the effects of all immigration between 1980 and 2000 on native workers in the United States, concluding that the large influx of workers over these two decades reduced the wage of the average native worker by 3.2% and the wage of high-school dropouts by 8.9% during this period.³⁶ These results, however, are based on a simulation that makes two extreme assumptions. First, he assumes that immigrants are *perfect* substitutes for natives as long as the workers have the same number of years of education and of experience.³⁷ Second, he assumes that the capital stock is fixed and does not respond to this immigration by increasing the supply of capital to the economic activities employing immigrant labor.³⁸ Given these restrictive assumptions, his simulation is inherently biased in favor of finding large adverse effects on natives.³⁹

³³ Thus, immigration does have a more substantial adverse effect on the wages of other immigrants, who are much closer substitutes for new immigrants. *See id.* at 223 (“The one group that appears to suffer significant negative effects from new immigrants are earlier waves of immigrants, according to many studies.”).

³⁴ *See, e.g.,* BORJAS, *supra* note 4, at 99.

³⁵ *See* Brimelow, *supra* note 4, at 164 (citing Borjas); Macedo, *supra* note 5, at 66 (same); Carol M. Swain, *The Congressional Black Caucus and the Impact of Immigration on African American Unemployment*, in *DEBATING IMMIGRATION*, *supra* note 3, at 175, 182, 185 (same).

³⁶ *See* George J. Borjas, *The Labor Demand Curve Is Downward Sloping: Reexamining the Impact of Immigration on the Labor Market*, 118 Q.J. ECON. 1335, 1368 (2003).

³⁷ *See id.* at 1360 (assuming an “aggregate production function for the national economy” that draws no distinction between native workers and immigrant workers).

³⁸ *See id.* at 1368 (“[a]ssuming that the capital stock is constant”).

³⁹ In a more recent simulation George Borjas and Lawrence Katz allow the capital stock to adjust and produce much better results for native workers. *See* George J. Borjas & Lawrence F. Katz, *The Evolution of the Mexican-Born Workforce in the United States* 39 (Nat’l Bureau of Econ. Research, Working Paper No. 11281, 2005). After the capital market adjusts to the influx of immigrants between 1980 and 2000, the wage of the average worker *rises* slightly, and the wages of high-school dropouts falls by only 4.8%. *See id.* at 39-40, 63. Borjas and Katz have since reduced their estimate of this adverse effect on the wages of high-school dropouts down to 3.6%, “acknowledging that the original analysis used some statistically flimsy data.” Eduardo Porter, *Cost of Illegal Immigration May Be Less Than Meets the Eye*, N.Y. TIMES, Apr. 16, 2006, § 3, at 3. This “small impact . . . was likely swamped by all the other things that hit the economy,” including “the revolution in technology.” *Id.* Furthermore, all of these simulations maintain the restrictive assumption that immigrants and natives are perfect substitutes within each class of labor.

A more recent study by Gianmarco Ottaviano and Giovanni Peri uses a simulation that instead allows the supply of capital to adjust and allows immigrants and natives with the same number of years of education and experience to be imperfect substitutes.⁴⁰ By relaxing the restrictive assumptions used by Borjas, they produce dramatically different results. Once they allow the capital stock to adjust fully, they estimate that all immigration into the United States from 1990 to 2004 increased the average wage of native workers by 1.8% and decreased the wage of native high-school dropouts by only 1.1%.⁴¹ Indeed, they find that all native workers with at least a high-school education enjoy increased wages as a result of this immigration rather than reduced wages. Thus, this influx of immigrants had only a small adverse effect on the shrinking minority of native workers with less than a high-school education.⁴²

III. PROTECTIONISM AND DISTRIBUTIVE JUSTICE

On the other hand, 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. Indeed, restrictionists often cite the need to protect the least skilled native workers from relatively unskilled immigrant competition in the labor market. Like trade barriers, however, immigration barriers sacrifice gains from trade and thus reduce the total wealth of natives as a group. In this sense, protectionism is a costly way to redistribute wealth from some natives to others.

This observation brings me to my main thesis: we could redistribute the same wealth through tax policies and transfer programs rather than through protectionism and probably would thereby make all classes of natives better off than they are under restrictive immigration policies because

⁴⁰ See Gianmarco I.P. Ottaviano & Giovanni Peri, *Rethinking the Effects of Immigration on Wages* 3-4 (Nat'l Bureau of Econ. Research, Working Paper No. 12497, 2006).

⁴¹ See *id.* at 4. These results are based on their median estimate for the "elasticity of substitution" between immigrants and natives. See *id.* at 18, 45 (Table 7). Ottaviano and Peri report the results of 40 different regressions estimating this elasticity, and these results are uniformly inconsistent with the null hypothesis of perfect substitution. See *id.* at 41-12. But see George J. Borjas et al., *Immigration and African-American Employment Opportunities: The Response of Wages, Employment, and Incarceration to Labor Supply Shocks* 11 (Nat'l Bureau of Econ. Research, Working Paper No. 12518, 2007) (testing the hypothesis that immigrants and natives are perfect substitutes and finding "no evidence to support the hypothesis that immigrants and natives are imperfect substitutes").

⁴² See BORJAS, *supra* note 4, at 27 (noting that "by 1998, only 9 % of natives lacked a high school diploma" and showing how this percentage declined steadily over the preceding four decades); NRC, *supra* note 20, at 228 (noting that "[b]y 1995, high school dropouts represented less than 10 % of the American workforce" and were "a declining group of American workers").

immigration produces net gains for natives as a group.⁴³ Thus, concerns about the distribution of income among natives do not imply that protectionist immigration restrictions are in order. Instead, the appropriate response to these concerns is redistribution through progressive reforms of tax and transfer policies.

In the United States, for example, we could make Social Security and income taxes more progressive or increase the earned income tax credit and liberalize its eligibility requirements. These progressive tax reforms can supplement the income of the least skilled native workers if relatively unskilled immigration drives down their real wages. This alternative could reduce deadweight loss while still redistributing the same amount of wealth that we currently transfer through costly protectionism.

If we wish to protect relatively unskilled native workers from adverse distributive effects, redistribution through fiscal policies 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 natives who gain from an expanded demand for their own labor, capital, or real property, or by paying lower wages to employees, or by buying products and services at lower cost can afford to pay enough to compensate those who find their wages have fallen relative to prices. Through redistribution, we can attempt to shift the costs of liberalized immigration to the many beneficiaries of liberalization.

For example, if the immigration of relatively unskilled workers reduces the wages of the least skilled 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.⁴⁴ Those income classes that would pay higher taxes to compensate the least skilled 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 and reduces the real incomes of more skilled natives. Protectionist policies currently impose an implicit tax on natives that probably costs them more than the explicit tax that would be necessary to offset the adverse effects of liberalized immigration policies on the least skilled native workers. 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.⁴⁵

⁴³ See Chang, *supra* note 26, at 309-11.

⁴⁴ See Barry R. Chiswick, *Illegal Immigration and Immigration Control*, J. ECON. PERSP., Summer 1988, at 101, 107.

⁴⁵ Similarly, insofar as liberalized immigration were to cause any increase in unemployment among natives, alternative policies are likely to prove to be more efficient responses than immigration

A. *The Double Distortion*

Redistribution through the tax system would produce some costly distortions in the behavior of taxpayers because income taxes reduce the incentives to earn income either by working or by saving and investing. The deadweight loss of protectionism, however, is likely to be greater than the deadweight loss from taxes with the same effect on the overall distribution of real after-tax income. In other words, protectionism is likely to be 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.

This reasoning is a specific application in the immigration context of a claim advanced more generally by Louis Kaplow and Steven Shavell, who 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.⁴⁶ Kaplow and Shavell 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.”⁴⁷ In the immigration context, protectionist restrictions are the inefficient legal rules, and liberalization is the efficient alternative.

The “double-distortion argument” advanced by Kaplow and Shavell, however, is subject to a number of important qualifications.⁴⁸ In particular,

restrictions. Macroeconomic fiscal policies or monetary policies, for example, could increase the demand for labor and restore full employment if unemployment rises above the long-run equilibrium level due to inadequate aggregate demand. If minimum wage laws, however, keep not only wages but also unemployment above equilibrium levels, then economists would generally urge the use of tax alternatives instead of minimum wage laws to increase the after-tax incomes of the working poor. See, e.g., MILTON FRIEDMAN & ROSE FRIEDMAN, *FREE TO CHOOSE* 110-14, 226-28 (Avon Books 1981) (1979). For an extended discussion addressing concerns regarding unemployment, see Chang, *supra* note 1, at 1181-85.

⁴⁶ 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).

⁴⁷ Kaplow & Shavell, *supra* note 46, at 667-68.

⁴⁸ Chris William Sanchirico, *Deconstructing the New Efficiency Rationale*, 86 CORNELL L. REV. 1003, 1008 (2001); see Richard S. Markovits, *Why Kaplow and Shavell's "Double-Distortion Argument" Articles Are Wrong*, 13 GEO. MASON L. REV. 511 (2005); Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653 (1998). This article will focus on the objections raised by Chris Sanchirico. Christine Jolls has raised other objections from the perspective of behavioral economics. For an evaluation of the objections raised by Jolls in the context of immigration restrictions, see Howard F. Chang, *The Disadvantages of Immigration Restrictions as a Policy to Improve Income Distribution*, 61 SMU L. REV. 23, 34 (2008).

Chris Sanchirico points out that in certain circumstances we may have reasons to believe that a particular legal rule is superior to redistribution through income taxes. Nevertheless, the various objections raised by Sanchirico do not suggest that protectionist immigration restrictions are a better response to income inequality than fiscal policies under existing conditions in the United States.

B. *Heterogeneous Individuals*

Sanchirico notes that individuals may be heterogeneous in ways that make some legal rules superior to taxes because these two policy alternatives may direct transfers from different parties and to different beneficiaries.⁴⁹ Note that I have suggested that, in the United States, we could achieve redistribution more efficiently by expanding programs already in use under the existing U.S. tax system. I do not suggest that we identify workers displaced by immigrant competition in the labor market and target subsidies to those individuals, as we direct trade “adjustment assistance” to those harmed by import competition in goods markets.⁵⁰ As Raj Bhala notes, trade adjustment programs have proven “nightmarishly complex” and “ineffectual.”⁵¹ A similar program for workers displaced by immigrant competition would require a new bureaucracy and additional administrative costs.⁵² Instead, the measures that I propose would only modify existing tax policies to ensure that immigration liberalization does not increase overall after-tax income inequality.

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 such a Pareto improvement over the status quo sets too high a hurdle for reform. Such a requirement would prevent us from implementing virtually any reform in any public policy.

⁴⁹ Sanchirico, *supra* note 48, 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).

⁵⁰ See JOHN J. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 669-75 (4th ed. 2002) (discussing trade adjustment assistance programs); RAJ BHALA, INTERNATIONAL TRADE LAW 1580-89 (2d ed. 2000) (same).

⁵¹ Bhala, *supra* note 50, at 1582.

⁵² Furthermore, if we compare the administrative costs of alternative policies, then we must recall that the enforcement of immigration restrictions has proven to be costly. See DOUGLAS S. MASSEY, BACKFIRE AT THE BORDER: WHY ENFORCEMENT WITHOUT LEGALIZATION CANNOT STOP ILLEGAL IMMIGRATION 7-8 (2005); Alan O. Sykes, *The Welfare Economics of Immigration Law: A Theoretical Survey with an Analysis of U.S. Policy*, in JUSTICE IN IMMIGRATION 158, 191 (Warren F. Schwartz ed., 1995) (noting that “considerable resources are devoted to . . . apprehension and deportation . . . along the Mexican border and to the detection of undocumented workers in the workplace”).

1. Equity

Not only is it infeasible as a practical matter to replicate exactly the redistribution produced by protectionism but it is also not desirable as a normative matter. We can generally 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.

Sanchirico, however, suggests that some legal rules may enable us to target transfers in ways that taxes cannot and that are more appealing from the perspective of distributive justice. For example, if immigration restrictions were to target transfers disproportionately to black natives rather than white natives, we might regard this effect as desirable given the disadvantages that blacks face relative to whites in our society.⁵³ At the same time, legal constraints imposed by constitutional law in the United States may prevent explicit discrimination in favor of blacks and against whites in tax rates.

In fact, a recent study by George Borjas, Jeffrey Grogger, and Gordon Hanson suggests that immigration drives down black employment rates to a greater extent than white employment rates.⁵⁴ Their study, however, indicates that this effect derives only from a greater elasticity of labor supply among blacks than among whites so that a given wage impact from immigration has a greater employment effect among blacks.⁵⁵ Their results suggest that immigration does not have a greater wage effect on black workers than on white workers after they control for education and experience. Given this evidence, even if we take all their results to be true, tax reforms that yield the same after-tax wage for each income class of native workers as protectionist immigration restrictions yield would be just as effective in

⁵³ Some observers express concern about the impact of immigration on black workers in particular. See, e.g., BORJAS, *supra* note 4, at 93-94; BRIGGS, *supra* note 6, at 213-15; Swain, *supra* note 35, at 180-87.

⁵⁴ See Borjas et al., *supra* note 41, at 37.

⁵⁵ *Id.* (explaining that their results suggest "the 1980-2000 immigrant influx had roughly similar impacts on wages by race, but had a bigger impact on both employment rates and incarceration rates for blacks"). Their proposed explanation for their results is that blacks shift more readily out of legitimate employment and into criminal activity than whites in the face of the same drop in wages. See *id.* at 17 (noting that "if the demand for labor in the crime sector is more elastic for blacks than for whites, immigration will have a larger negative impact on black market employment and a larger positive impact on black crime employment").

preventing this adverse effect on black employment as the protectionist alternative.

Thus, the study by Borjas, Grogger, and Hanson provides no reason to believe that protectionist immigration restrictions provide an advantage over the tax system from the standpoint of equity. Their results are better understood as a reason to adopt progressive tax reforms than as a reason to restrict immigration. Protectionism still derives no apparent justification from the fact that the transfers it accomplishes do not fall on precisely the same individuals targeted by transfers through the tax system.

2. Economic Efficiency and Interacting Distortions

Sanchirico suggests that some legal rules may target transfers more efficiently than redistributive tax policies can. This suggestion might apply to immigration restrictions if such policies happen to change the real wages of those with the least elastic supply of labor. According to principles of optimal taxation, redistribution should target workers with the least elastic supply of labor so as to minimize the distortions in labor supply associated with a given amount of redistribution. There seems to be no reason, however, to think that protectionism targets its transfers in a way that reduces the distortions associated with those transfers.

Sanchirico also notes that, although redistribution through legal rules may produce a second distortion in addition to the distortion produced by redistribution itself, a double distortion may be less costly than a single distortion because “[d]istortions may counteract one another.”⁵⁶ There seems to be no reason, however, to think that the distortions specific to protectionist immigration restrictions mitigate the distortions in work incentives associated with redistribution. Indeed, the empirical evidence gives us ample reason to think that protectionist immigration restrictions introduce additional distortions that instead aggravate the distortion in work incentives associated with redistribution.

a. Optimal Tax Theory and Working Women

Specifically, the costs of protectionist immigration restrictions in the United States may fall disproportionately on working women, whose labor supply is more elastic than that of men.⁵⁷ The decision of women to participate in the labor force is particularly sensitive to economic incentives

⁵⁶ Sanchirico, *supra* note 48, at 1017.

⁵⁷ See EDWARD J. MCCAFFERY, *TAXING WOMEN* 180-83 (1997) (surveying the empirical evidence of labor supply elasticities for men and women).

compared to the same decision for men.⁵⁸ When taxation induces women to stay home and out of the labor market, society bears the costs of the depreciation of their labor market skills and of a less efficient allocation of labor in the economy.⁵⁹ Therefore, optimal tax principles suggest that redistribution should target male workers rather than female workers so as to achieve a given quantity of redistribution with the minimum distortion in labor supply.

According to optimal tax theory, we should tax women at lower rates than men, given the greater deadweight loss that results from the taxation of women.⁶⁰ Insofar as legal constraints—such as those imposed by constitutional law in the United States—prevent explicit sex discrimination in tax rates, other policies that achieve similar results in effect would increase social welfare. For example, favorable tax treatment or explicit subsidies for child-care expenses may reduce the distortion in female labor participation flowing from the taxation of women.⁶¹ This reduction in behavior distortion would allow us to accomplish either the same redistribution with less deadweight loss or a more equal income distribution with the same deadweight loss.

b. Immigration Restrictions and Working Women

When protectionist immigration restrictions reduce the supply of immigrant workers and thereby raise the cost of relatively unskilled labor, the result is precisely the opposite of what optimal tax theory recommends, driving up the cost of services demanded disproportionately by households

⁵⁸ The decision to participate in the labor market is more sensitive to economic incentives than the choice of how many hours to work conditional on having accepted employment. See James J. Heckman, *What Has Been Learned About Labor Supply in the Past Twenty Years?*, 83 AM. ECON. REV. 116, 117 (1993) (“Participation (or employment) decisions generally manifest greater responsiveness to wage and income variation than do hours-of-work equations for workers.”). A survey of the empirical literature reveals that “the strongest empirical effects of wages and nonlabor income on labor supply are to be found at the extensive margin—at the margin of entry and exit.” *Id.* at 118.

⁵⁹ See Janet C. Hunt et al., *Taxation and the Wife's Use of Time*, 34 INDUS. & LAB. REL. REV. 426, 432 (1981) (noting that “higher marginal tax rates reduce the amount of specialization in the economy” by reducing the labor supplied by wives outside the home, causing “a fall in real income,” and that a “real loss may occur in the form of human capital depreciation of wives because of reduced labor-time attachment and lower hours of market work”).

⁶⁰ See HARVEY S. ROSEN, PUBLIC FINANCE 337 (3d ed. 1992) (noting that “econometric studies suggest that the husband’s supply of labor is considerably less elastic than that of the wife” and that “[e]fficiency could therefore be gained if the current tax law were modified to give husbands higher marginal tax rates than wives”); Michael J. Boskin & Eytan Sheshinski, *Optimal Tax Treatment of the Family: Married Couples*, 20 J. PUB. ECON. 281, 296 (1983) (estimating that the optimal “tax rate on husbands would be roughly twice that on wives”).

⁶¹ See MCCAFFERY, *supra* note 57, at 278 (noting that “optimal tax” principles support “a more generous child-care deduction or credit”).

with working women. In the United States, for example, the National Research Council (“NRC”) ranked low-education occupations in terms of the share of hours worked by immigrants. Among the top twenty such occupations, the NRC listed the following: cooks, kitchen workers, bakers, and others who work in food preparation; housekeepers, maids, and others who clean private households; child-care workers; and waiters, waitresses, and their assistants.⁶² Similarly, given the concern expressed by many restrictionists regarding low levels of education among Mexican immigrants in the United States, George Borjas and Lawrence Katz rank occupations according to the share of employment in the United States accounted for by Mexican immigrants in 2000. Among the top ten occupations in this ranking, Borjas and Katz list cooks, gardeners, and those employed in private households.⁶³ Borjas reports that, in the United States in 1995, immigrant workers were more than four times as likely as native workers to work in private households.⁶⁴ The NRC observed that “[t]he degree to which immigrants dominate some of these fields is remarkable,” concluding that “[t]hese services would not exist on the same scale without immigrants, and the main economic impact may well be in the form of lower prices.”⁶⁵

The NRC also calculated the share of the cost of different goods and services that went to pay for immigrant labor. The NRC found that “[t]he categories that have relatively high immigrant labor-cost shares include household services (18.2%)” and “laundry, cleaning, and garment services (10.9%).”⁶⁶ The NRC also found that “[s]ingle (childless) males and couples in which both spouses work have the highest fraction of expenditures attributable to immigrant labor – 5.1%,” precisely “because these households spend a greater proportion of their income on services, in particular household services and food consumption away from home, both expenditure categories with relatively high immigrant labor shares.”⁶⁷ The NRC concluded that “those who would be expected to have less time to spend inside the household . . . consume fractionally higher proportions of commodities produced using relatively high proportions of immigrant labor.”⁶⁸

Thus, immigrant workers provide services, such as child care, housekeeping, and food preparation, which are consumed by many households that would otherwise rely on a woman staying out of the work force to supply these services at home. By reducing the supply and driving up the cost of these services, protectionist restrictions on the immigration of relatively

⁶² See NRC, *supra* note 20, at 213-14 (Table 5.18).

⁶³ See George J. Borjas & Lawrence F. Katz, *The Evolution of the Mexican-Born Workforce in the United States*, in MEXICAN IMMIGRATION TO THE UNITED STATES 13, 23 (George J. Borjas ed., 2007).

⁶⁴ See BORJAS, *supra* note 4, at 80 (Table 4-3).

⁶⁵ NRC, *supra* note 20, at 215.

⁶⁶ *Id.* at 232.

⁶⁷ *Id.* at 233-34.

⁶⁸ *Id.* at 235.

unskilled foreign workers impose an implicit tax on working women, increasing their incentives to leave the labor force and the incentives of other women to stay at home.⁶⁹ By imposing the burden of redistribution disproportionately on working women, protectionist immigration restrictions distort labor supply more than necessary, contrary to the teachings of optimal tax theory.

Consider, for example, the effect of the cost of child care on labor supply. Numerous studies confirm that mothers reduce their labor supply as the price of child care rises. Patricia Anderson and Phillip Levine survey the empirical evidence and conclude that “studies do virtually uniformly find a negative relationship between child care costs and maternal employment.”⁷⁰ Rachel Connelly also surveys this evidence and reports “evidence of a negative effect of child care costs on hours worked in the labor market.”⁷¹

The adverse effect of child care costs on maternal employment seems especially large for households with the lowest incomes.⁷² These costs have a disproportionate effect on the poor because a given increase in the cost of child care represents a larger burden as a fraction of income for a household with less income. Connelly reports that “[t]he percent of family income devoted to child care increases as incomes decline.”⁷³ To avoid the high cost of child care, many mothers with low incomes choose to stay home and out of the labor market.⁷⁴ In this sense, when immigration restrictions increase the cost of child care, the implicit tax that they impose on

⁶⁹ See WORLD BANK, *supra* note 15, at 50 (noting that “the beneficial effect of immigration” would include any “expansion in the supply of native labor [as more parents can afford child care and workers have more time to devote to their jobs]” resulting from “reductions in the prices of services”).

⁷⁰ Patricia M. Anderson & Phillip B. Levine, *Child Care and Mothers' Employment Decisions*, in FINDING JOBS: WORK AND WELFARE REFORM 420, 440 (David E. Card & Rebecca M. Blank eds., 2000); see Rachel Connelly, *The Importance of Child Care Costs to Women's Decision Making*, in THE ECONOMICS OF CHILD CARE 87, 111 (David M. Blau ed., 1991) (surveying the empirical evidence and finding “general agreement that higher costs of child care lead to lower levels of labor force participation for both married and unmarried women”). For a more recent survey of this evidence, see David M. Blau, *Child Care Subsidy Programs*, in MEANS-TESTED TRANSFER PROGRAMS IN THE UNITED STATES 443, 481-93 (Robert A. Moffitt ed., 2003).

⁷¹ Connelly, *supra* note 70, at 114.

⁷² See Anderson & Levine, *supra* note 70, at 438-40 (Table 10.5, showing multiple studies demonstrating that the elasticity of employment with respect to the price of child care may differ across groups, all of which show larger elasticities for low-income groups).

⁷³ Connelly, *supra* note 70, at 95 (“Families who pay for care,” she finds, “with incomes of less than \$10,000 devoted more than 25% of family income to child care,” which “is over 30% of the mother’s labor earnings.”); see *id.* at 97 (reporting data in Table 3). See also Anderson & Levine, *supra* note 70, at 454 (“The least skilled workers who use child care” pay “more for child care, even when the youngest child is of school age,” calculated “as a percentage of income.”).

⁷⁴ Thus, Anderson and Levine suggest that “[t]he lack of low-cost child care may be a crucial determinant of the employment decisions of the less skilled,” whose potential market wages are more likely to be outweighed by the costs of child care. Anderson & Levine, *supra* note 70, at 420.

households tends to be regressive, undercutting efforts to increase the real income of the poor.

To some extent, a working mother can mitigate the costs of child care by turning to a relative to care for her children, or in unusual cases, by caring for her children while at work. Indeed, David Blau reports that “[i]n almost half of all primary child care arrangements for young children of employed mothers, the caregiver is the mother, the father, or another relative.”⁷⁵ In fact, the lower the income of the household, the more likely the mother is to turn to a relative for child care.⁷⁶ In these cases, the effect of child care costs on labor supply takes a different form. Rather than reducing the mother’s participation in the labor market, the costs of child care inhibit the participation of the mother’s relative, who stays home to provide the needed child care. Thus, the existing empirical literature, which estimates the effect of child care costs on maternal employment, actually understates the effect of these costs on labor supply, especially for families with low income.

Similarly, as Connelly observes, a working mother can mitigate the costs of child care by choosing less expensive child care with “a lower level of quality.”⁷⁷ In these cases, rather than distorting the decision to participate in the labor market, the high cost of child care distorts the choice of quality. Less costly child care, Connelly notes, would allow mothers “to choose high quality care for their children” with a corresponding “positive effect on their children.”⁷⁸ Higher costs and a less attractive set of options for child care, on the other hand, may persuade a mother to stay out of the labor market.

Once we consider the cumulative effect of immigration restrictions on the cost of all services consumed by households with working women, including not only child care but also food preparation and housekeeping, the total impact on female labor supply is likely to be even greater. Furthermore, the impact of these restrictions in costs may prove to be less progressive than one might think, given that, as consumers, the poor as well as the rich enjoy the benefits of immigrant labor. In fact, the NRC found that the “consumption of immigrant-intensive commodities is spread rather evenly across different groups of consumers,” albeit with somewhat greater benefits going to “those with relatively high incomes” and “those with high levels of education.”⁷⁹

⁷⁵ Blau, *supra* note 70, at 460.

⁷⁶ *See id.* at 461 (“Loosely speaking, center and family day care and babysitters appear to be normal goods, substituted for relative care as income rises.”). In a similar vein, Anderson and Levine report that “the use of relative care drops sharply with mother’s education.” Anderson & Levine, *supra* note 70, at 429; *see id.* at 454 (reporting that “children of the least skilled mothers are about twice as likely as children of the most skilled to be cared for by a relative”).

⁷⁷ Connelly, *supra* note 70, at 114.

⁷⁸ *Id.*

⁷⁹ NRC, *supra* note 20, at 235.

On the other hand, immigration restrictions may also encourage female participation in the labor market by increasing the wages that working women may expect to receive. Recall, however, that we can replicate the after-tax wages paid to native workers through the appropriate adjustments in income or payroll taxes. Therefore, optimal tax considerations would favor restrictions on the immigration of relatively unskilled workers as a device for redistribution only if these restrictions somehow increased the wages of poor working women relative to poor working men. This immigration might have such a disparate impact, for example, if labor markets are segregated by sex and these immigrant workers were predominantly female rather than male. If these immigrant workers were therefore better substitutes for native women in the labor force than for native men in the labor force, then restrictions on the entry of those workers generally would confer benefits on working women disproportionately.

The empirical evidence, however, suggests that just the opposite is true: if there is any disparate impact of the immigration of relatively unskilled aliens on the wages of native workers, this impact is likely to be more adverse for native male workers than for native female workers. A recent study by the Urban Institute finds that, in the United States, men dominate the low-wage immigrant labor force, while the low-wage native labor force is mainly female.⁸⁰ Given this pattern, a typical influx of relatively unskilled immigrants is likely to cause a larger percent increase in the supply of low-wage male workers than in the supply of low-wage female workers in the United States. If labor markets are segregated by sex, then this influx would have a correspondingly greater adverse effect on the wages of male native workers than on female native workers. In this sense, restrictions imposed on this immigration are generally more likely to benefit men than women. Furthermore, the Urban Institute also finds that, among low-wage immigrant workers, “women . . . are better educated than their male counterparts.”⁸¹ Insofar as immigration restrictions exclude relatively unskilled workers based on education, these restrictions are more likely to exclude men than women, with correspondingly greater benefits

⁸⁰ See RANDY CAPPS ET AL., A PROFILE OF THE LOW-WAGE IMMIGRANT WORKFORCE I (2003), http://www.urban.org/UploadedPDF/310880_lowwage_immig_wkfc.pdf (reporting that 56% of the low-wage immigrant labor force is male, whereas 59% of the low-wage native labor force is female). This pattern is even more pronounced among those immigrant workers who may be those most likely to take advantage of liberalized opportunities for legal immigration. The Urban Institute reports that only “37% of low-wage undocumented workers are women,” reflecting “very high labor-force participation among undocumented men and relatively low labor participation among undocumented women,” who “are far more likely to be married” and “have more children on average than native-born women.” *Id.* at 6.

⁸¹ *Id.* at 6 (reporting that 76% of “female low-wage immigrant workers hold at least a high school diploma, compared with 66% of male low-wage immigrant workers,” and are “also more likely to be proficient in English than foreign-born male workers: 59 versus 50%”).

for male natives in the labor market.⁸² Thus, restrictions on the immigration of relatively unskilled immigrant workers not only burden working women disproportionately as consumers but also seem likely to benefit male natives disproportionately as workers.⁸³

Given this disparate impact on households with working women, redistribution through protectionist immigration restrictions is inferior to the tax alternative not only from the standpoint of economic efficiency but also from the perspective of the feminist who would like to remove artificial obstacles to female participation in the labor force.⁸⁴ Protectionism in this context raises another hurdle for many women entering the labor market by implicitly taxing working women and discriminating in favor of families organized along more traditional lines. For the feminist opposed to public policies that are biased in favor of traditional gender roles, the tendency of protectionist immigration laws to keep women at home should militate against those laws and in favor of transfers through the tax system instead.

On the other hand, there may also be those conservatives who believe that public policies that promote the traditional family, with women staying at home, increase social welfare.⁸⁵ For example, these policies may produce benefits for children, whose interests might not receive the consideration

⁸² Current immigration restrictions in the United States often favor more educated aliens for immigration visas. See, e.g., 8 U.S.C. § 1153(c)(2) (2000) (requiring either “at least a high school education or its equivalent” or “at least 2 years of work experience in an occupation which requires at least 2 years of training or experience” for a “diversity” immigrant visa); *id.* § 1182(a)(4) (requiring consideration of “education and skills” in determining whether an alien is “likely at any time to become a public charge” and thus “inadmissible”). Similarly, the point system proposed in the U.S. Senate in 2007 would have awarded points to prospective immigrants based on education and proficiency in the English language. See S. 1639, 110th Cong. (2007); ALEINIKOFF ET AL., *supra* note 8, at 461.

⁸³ In an effort to raise the wages of female native workers in particular, we could target female aliens for exclusion, but insofar as labor markets are segregated by sex, the result in the market for goods and services could be perverse. These aliens may provide many of the services consumed disproportionately by households with working women.

⁸⁴ A welfarist might object to these obstacles based on gender equity if the welfarist believes that the following two conditions hold. First, women are worse off than men as a general matter. See MCCAFFERY, *supra* note 57, at 237 (describing the status quo as “a world in which [women are] disproportionately poor, marginal, unhappy, overworked, underappreciated, and stressed”). Second, female participation in the labor market improves the welfare of women relative to men so that removing obstacles to this participation would promote a more equitable distribution of welfare between the sexes. See *id.* at 268 (“Many women really do want to work outside as well as inside the home—they want the satisfaction, stimulation, prestige, engagement, and financial rewards of paid work, and they don’t want to spend all of their time in the often exhausting, frustrating, underappreciated, and unpaid domestic sphere.”). According to Edward McCaffery, for example, women “who stay at home full time wish that they could get out of the house more . . . to share some of the joys of the working world, to experience more diversity in their lives, and to earn some money and independence.” *Id.* at 212.

⁸⁵ Some observers believe “that traditional families with stay-at-home wives were good for society, for children, for men, even for women.” *Id.* at 166.

that they deserve from parents.⁸⁶ Perhaps child care provided by a parent at home increases human capital, raising children who will become more productive workers as adults, thereby generating benefits for society as a whole. These benefits may include positive externalities in the form of tax revenue for the public treasury, which may be a social benefit neglected by parents making private decisions regarding child care and participation in the labor market.

In any event, I do not intend to enter that debate here, other than to suggest that, even if we were to decide to promote the traditional family, immigration restrictions would be a poor choice as an instrument with which to do so. It would probably be more efficient to do so through the tax system for the same reason that it would probably be more efficient to transfer income from the rich to the poor through the tax system: immigration restrictions needlessly destroy gains from trade in the labor market. We can subsidize traditional families directly through the tax system without the additional distortions in the labor market that are specific to immigration restrictions. Given this observation, I will set aside the promotion of the traditional family as a possible objective for immigration policy. Instead, I focus on an equitable distribution of income as the policy objective and maintain the standard assumption that we would like to achieve the desired income distribution with as little distortion in labor supply as possible.

c. Immigration Restrictions Versus the Tax Alternative

How can we be sure that immigration restrictions are less efficient than the current tax system in shifting income from the rich to the poor in the United States? As Edward McCaffery has explained, the current tax system in the United States also includes several features that tend to discourage female participation in the labor market. Given these features, the existing tax system causes more distortions than a system conforming to the principles of optimal tax theory.

For example, McCaffery notes how the U.S. system of joint filing for married couples discourages female participation in the workforce.⁸⁷ Suppose we refer to the spouse who earns less or is otherwise less committed to the labor market as the “secondary earner” in the household.⁸⁸ This spouse

⁸⁶ Therefore, some may believe that it is “a good thing” if we encourage “parents to stay at home with their children . . . because children benefit from being cared for at home.” *Id.* at 126, 201. To the extent that this encouragement takes the form of an implicit or explicit tax on the use of professional child care, however, the claim that this encouragement produces net benefits for children seems dubious because such a tax reduces the wealth of many households with children.

⁸⁷ *See id.* at 12-23.

⁸⁸ *Id.* at 21.

is more often the wife rather than the husband.⁸⁹ “For the most part, women are second earners simply because they earn less than their husbands,” as McCaffery explains, noting that “[m]arried women make about 60 percent of what married men do.”⁹⁰ When contemplating entry into the labor market, the secondary earner takes the participation of the primary earner as given, and therefore often faces a higher marginal tax rate. In many cases, the income of the primary earner has already pushed the household out of the lower tax brackets. The secondary earner does not enjoy the low marginal tax rates applied to the income brought in by the primary earner.

Thus, much of McCaffery’s critique of the current tax system objects to its tendency to extend equal treatment to households with the same total income, whether that income is earned by one worker or two workers in the family. He points out how the secondary earner does not produce the same social security benefits⁹¹ or fringe benefits⁹² that the primary earner does for a family because the tax system fails to double these benefits when a secondary earner adds income to the household. In essence, he observes that the tax system must treat a household with a secondary earner better than a household without one, even if these households have the same total income, in order to give the secondary earner the same incentive to participate in the labor market that the primary earner faces.

In this respect, restrictions on the immigration of relatively unskilled workers are even worse than the tax alternative as an instrument for income transfers. Whereas the tax system tends to treat the household with a secondary earner the same as the household without one, provided that the households have the same total income, immigration restrictions tend to treat the household with a secondary earner worse. This disparate impact on households with working women implies that immigration restrictions cause greater distortions than tax reforms with the same effect on income distribution among natives would cause.

There is one respect, however, in which the current tax system may treat households with a secondary earner worse than those without: housework performed by a woman for her own household in her own home avoids taxation whereas the government would tax the same work performed by an employee or independent contractor that she hires as well as any income that she earns in the labor market.⁹³ As McCaffery notes, this feature of the tax system places a burden on working women and provides an implicit exemption for the woman who stays at home and does her own

⁸⁹ *Id.* (noting that “there is apt to be a secondary earner in most families, and it is overwhelmingly likely to be the wife”).

⁹⁰ *Id.*

⁹¹ *See id.* at 94-96.

⁹² *See id.* at 126-29.

⁹³ *See id.* at 120-21.

housework. Thus, the tax system may burden a household with a secondary earner compared to a household with the same total income but without a secondary earner insofar as it taxes the income earned by the worker performing housework for compensation. The incidence of this tax falls at least in part on the household employing that worker.⁹⁴ Thus, this tax increases the cost of going to the labor market for those services.

Nevertheless, restrictions on the immigration of relatively unskilled workers are still likely to place a greater burden on households with secondary earners than the tax alternative. Whereas restrictions on the immigration of relatively unskilled workers drive up the cost of services demanded by households with secondary earners, progressive tax reforms with the same impact on the distribution of income among natives are likely to reduce the cost of those services. After all, those tax reforms would cut taxes on the least skilled natives. By cutting taxes on those natives most likely to supply the services demanded by households with secondary earners, these reforms would tend to bring down the cost of those services rather than drive them up. Thus, despite the defects in the current tax system that discourage female participation in the labor market, immigration restrictions are likely to cause greater distortions than tax reforms producing the same improvement in the distribution of income among natives.

The available empirical evidence bolsters confidence in this conclusion. This evidence suggests that even immigration restrictions focused on excluding relatively unskilled foreign workers would produce surprisingly small benefits for the least skilled native workers because these immigrants and natives are imperfect substitutes in the labor market, because immigration tends to increase the demand for labor, and because immigration restrictions increase prices paid by the poor as well as the rich. These disadvantages make immigration restrictions relatively ineffectual as instruments for redistribution compared to income taxes, which are not subject to these disadvantages. Given the small adverse effects of immigration and the small number of native workers who find their wages reduced by the influx of immigrant labor, a correspondingly small increase in the progressivity of

⁹⁴ Although public finance economists commonly assume that the incidence of income and payroll taxes falls on the employee and not on the employer, the elasticity of labor supply would have to be zero rather than positive for the employee to bear the full tax burden. Zero elasticity of labor supply may be a reasonable approximation for male workers or for hours of work conditional on employment but it is not a reasonable assumption for labor supply in general. See Heckman, *supra* note 58, at 118 (surveying the empirical evidence and concluding that, although labor supply elasticities may be close to zero “for hours-of-work equations . . . estimated for those who are working,” these “elasticities are definitely not zero” if we look “at the extensive margin – at the margin of entry and exit”). Furthermore, if we nevertheless assume that the employer bears none of this tax burden, then this assumption implies that the tax system treats the household with a secondary worker no worse than the household with the same total income but with no secondary worker. In this case, immigration restrictions impose a greater burden on the household with a secondary worker than the tax system does and are therefore less efficient as a means to transfer income from the rich to the poor.

our taxes would suffice to compensate the few who lose real income as a result of competition from immigrant workers. If only a small change in tax rates is required to replicate the redistribution effected by protectionist immigration restrictions, then this change would cause only correspondingly small distortions in the labor market. By the same token, protectionist immigration restrictions can improve the welfare of the least skilled natives by only a small amount compared with the costs that those restrictions would impose on other natives.

Finally, there is no principled reason why we cannot reform the tax system to conform more closely to optimal tax principles.⁹⁵ If we can increase tax rates to effect more redistribution, then we can also make the tax system more efficient by eliminating those features that needlessly burden working women in particular. The costly features of the current tax system noted by McCaffery are neither immutable nor inherent in the notion of taxation. Indeed, McCaffery proposes various reforms that would eliminate or mitigate the problems that he identifies. For example, he suggests that we allow spouses to file separately so that the secondary earner in a household would face the same marginal tax rates that the primary earner does when deciding whether to enter the labor market.⁹⁶ He also suggests favorable tax treatment for the secondary earner's income or for child care expenses as possible responses to the failure to tax work done at home for one's own household.⁹⁷ Ultimately, the ideal for which we should strive is redistribution through an optimal tax system rather than through protectionist immigration restrictions.

We could also make immigration restrictions more efficient by tailoring them more narrowly so as to reduce the burden that they place on

⁹⁵ Moreover, if we are taking the current tax system as given, then the distortions caused by protectionist immigration restrictions are even more costly than they would be in the absence of that system. In general, the more distorted behavior is, the more costly further distortions in that behavior would be. As we move further away from the social optimum, the marginal cost of the distortion increases. Therefore, to the extent that women or men work less than would be economically efficient, any policy that aggravates that distortion is especially costly. We should keep in mind that this observation would be true of not only further increases in tax rates but also the use of protectionist immigration restrictions in addition to the existing tax system. This interaction between immigration restrictions and income taxes also implies that more progressive taxes are likely to become socially optimal as we liberalize our immigration policies. Liberalized immigration would reduce the distortions in labor supply caused by restrictive policies, which would reduce the social costs of more redistribution through the tax system. Thus, if we wish to reduce income inequality, then it will be appropriate to make tax rates more progressive as we ease immigration restrictions.

⁹⁶ See MCCAFFERY, *supra* note 57, at 278 (suggesting "a system of separate filing under the income tax" for spouses). He also suggests that we solve "[t]he problem with fringe benefits . . . by allowing secondary earners to opt out of certain coverage and get cash instead." *Id.* at 134. As a response to the problem with social security benefits, he suggests a "secondary-earner exemption" from social security taxes, *id.* at 102, or "earnings sharing" between spouses, *id.* at 103.

⁹⁷ See *id.* at 133-34; *id.* at 278 (suggesting "greater secondary-earner relief" and "a more generous child-care deduction or credit").

households with working women. For example, we could restrict the immigration of relatively unskilled workers but create exceptions for workers entering the United States to accept employment in food preparation, housekeeping, or child care. Insofar as labor markets are segregated by sex, however, these exceptions might also have the perverse effect of driving down the wages of women relative to men, for example, if native women work disproportionately in child care or housekeeping. Such an effect would tend to undercut the advantage that we would seek through such exceptions, which would be to reduce the burden that redistributive policies place on working women.

Furthermore, these exceptions would simultaneously make our immigration restrictions less effective at protecting the least skilled native workers from foreign competition. Native workers who remained in those particular occupations would find immigration driving down their real wages. Those native workers who instead turn from those occupations to seek other lines of work requiring modest levels of skill would tend to drive down real wages for similarly skilled natives employed in those other lines of work. Given these effects, the impact of immigration policy on income distribution would be greatly reduced, and it remains likely that we could achieve the same modest impact at lower cost through the tax system. After all, even if we tailored immigration restrictions so as to eliminate the disparate impact that they have on households with working women, these immigration restrictions would still destroy gains from trade in the labor market, whereas progressive tax reforms would not.

IV. CONCLUSION

On the merits, protectionist immigration restrictions have little to recommend themselves as a policy to improve income distribution among natives, given the option of superior tax alternatives. My economic analysis indicates that tax and transfer policies are more efficient than immigration restrictions as instruments for raising the after-tax incomes of the least skilled native workers. Policies to protect these workers from immigrant competition in the labor market are no better at promoting distributive justice among natives and are likely to impose a greater economic burden on natives in the country of immigration than the tax alternative. These immigration restrictions are especially costly given the disproportionate burden that they impose on households with working women, a burden that discourages female participation in the labor force. This burden runs contrary to the teachings of optimal tax theory and introduces excessive distortions in the labor market because the supply of female labor is more elastic than the supply of male labor. Thus, the best response to concerns about the effect of immigration on the distribution of income among natives is to increase the progressivity of the tax system.

The preceding discussion of the effects of immigration on native workers has assumed that the welfare of immigrants is of no concern to us. Thus, this discussion has ignored the benefits that the immigrants themselves enjoy from their access to our labor markets. This nativist assumption also implies that we would exclude immigrants from the same access to transfer programs that natives enjoy so as to ensure that immigrants do not impose a net cost on natives through the public sector.⁹⁸ Restrictions on immigrant access to public benefits can ensure that natives continue to enjoy the economic gains from employing immigrant workers without the fiscal burden that full access to transfers would impose on the public treasury.⁹⁹

We can relax this nativist assumption and instead assume that our objectives reflect concern for the welfare of immigrants. This shift in our welfare objectives would imply greater immigrant access to public benefits than the nativist would favor, which in turn might well imply that the least skilled immigrants impose a net burden on natives. Once we drop the nativist assumption, however, we may consider this reduction in the welfare of natives a burden worth bearing. After all, we would only expand immigrant access to transfer programs if we thought the benefit to immigrants outweighed the cost to natives in the first place.

If concern for the welfare of immigrants militates in favor of more liberal access to transfer programs, then it should also militate in favor of more liberal admissions policies. If we care about the welfare of the aliens whose immigration is under consideration, then we should respond by liberalizing our immigration laws.¹⁰⁰ Indeed, we might also care about the welfare of aliens abroad who are not seeking admission to our country, which should lead us to consider the impact of our immigration policies on those aliens as well.

Once we give any weight at all to the interests of those born outside our borders, then we have yet another reason to liberalize immigration.

⁹⁸ Congress has in fact restricted immigrant access to a broad range of public benefits. See 8 U.S.C. §§ 1611-1613 (2000); Chang, *supra* note 1, at 1178-80 (describing various restrictions on alien access to public benefits in the United States).

⁹⁹ See Chang, *supra* note 9, at 313 ("Otherwise, transfers to immigrants could dissipate the economic gains to natives.").

¹⁰⁰ In my prior work, I have argued against theories of distributive justice that extend concern to immigrants only after we have decided to admit them. "If our admission policies are based only on the interests 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." Howard F. Chang, *The Immigration Paradox: Poverty, Distributive Justice, and Liberal Egalitarianism*, 52 DEPAUL L. REV. 759, 769 (2003). "This moral stance . . . produces an anomaly" because the exclusion of poor aliens implies that, "by agreeing to obligations of distributive justice toward them if admitted, we harm them." *Id.* I suggest that we should avoid this "immigration paradox" by adopting "a cosmopolitan perspective that extends equal concern to all individuals, including aliens." *Id.* at 772.

Once we recognize any moral obligation to reduce poverty abroad and to reduce global inequality, we must confront the significant economic harm we inflict on those we exclude under our restrictive immigration laws.¹⁰¹ Given adverse effects of restrictive immigration policies on the poor abroad, considerations of global justice militate in favor of progressive fiscal policies and against protectionism as a method of addressing any concerns regarding the distribution of income among natives.

¹⁰¹ I have argued elsewhere in favor of liberal immigration policies based on a cosmopolitan theory of global distributive justice that extends equal concern to all individuals worldwide. See *id.*, at 769-73; Howard F. Chang, *The Economics of International Labor Migration and the Case for Global Distributive Justice in Liberal Political Theory*, 41 CORNELL INT'L L.J. 1, 11-25 (2008); see also Gillian K. Hadfield, *Just Borders: Normative Economics and Immigration Law*, in JUSTICE IN IMMIGRATION, *supra* note 52, at 201, 205 (arguing that “[i]f economists are to participate in the normative debate over immigration . . . there can be no starting point other than a global social welfare function” because only that perspective “avoids the question begging raised by a national social welfare function”).