Free Trade and Free Immigration: Why Domestic Competitive Injury Should Never Influence Government Policy

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INTRODUCTION

There is little doubt that two of the hot button issues of our time involve, first, international trade of goods and services and, second, the movement of people from one country to another, sometimes for short periods but sometimes with the intention of acquiring either rights of citizenship or permanent occupation in their new destination country.[1] The central choice in both areas is whether nations, in particular the United States, should adopt parallel regimes of free trade and free immigration. It has long been clear that the case for free immigration is harder to make out than the case for free trade.[2] That difference cannot be chalked up solely to nativism or improper racial sentiment. Those forces are surely at work in some cases, but not in all. What can be shown, however, is that a comprehensive and unified approach to these two areas, and to the relationship between them, justifies that initial assessment, even if it does *not* justify many of the restrictions commonly found in dealing with immigration and naturalization. It is best to start with a brief description of the pros and cons of free trade before tackling the thornier issue of free immigration of individuals across borders.

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1 In general, immigration deals with the arrival of people who intend to make their destination a new homeland, and naturalization concerns the ways in which they become citizens. See *Black's Law Dictionary* 817, 1126 (West 9th ed 2009) (defining "immigration" as "[t]he act of entering a country with the intention of settling there permanently," and defining "naturalization" as "[t]he granting of citizenship to a foreign-born person under statutory authority").

2 For a very early account, see Emily Greene Balch, et al, *Restriction of Immigration—Discussion*, 2 Am Econ Rev 63, 63–66 (Supp 1912) (addressing the concerns with free immigration and noting the need for some limitations). It is instructive that this debate took place during the peak of immigration into the United States in the run-up to World War I, when free immigration policies seemed on balance to work well.

I. FREE TRADE PRINCIPLES

A. The Domestic Context

The topic of free trade asks how to apply in the international context the principle of freedom of contract that often governs ordinary transactions between two individuals or firms in a domestic setting. In examining these freedom of contract issues in ordinary private law, no one cares whether the two parties are citizens or aliens.[3] Indeed, the earliest defenses of freedom of contract arose in the natural law tradition, which drew no distinction between citizens and aliens, for the simple reason that the set of natural law entitlements were widely understood to precede the creation of the state.[4] That general way of looking at interpersonal arrangements resonates with any philosophy that requires all persons, not just citizens, to have equal entitlements. Think only of the various versions of Kant's categorical imperative: "Act only according to that maxim whereby you can at the same time will that it should become a universal law."[5] Or in its second formulation: "Act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always at the same time as an end."[6]

The point here is not to explain, attack, or defend either of these formulations. It is only to note that their insistent move toward universalization is inconsistent with giving any preferences to citizens over other individuals. The argument in favor of freedom of contract is that these persons only enter into vol-

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[3] The situation is obviously different as a matter of constitutional law. Under the Fourteenth Amendment, a broader class of "privileges or immunities" was extended to citizens than were given to all persons under the Due Process and Equal Protection Clauses. US Const Amend XIV, § 1. The easiest way to cash out the difference was that all persons were protected against arbitrary arrest and confiscation, but only citizens had the right to enter into lawful occupations and to acquire property. These rules mirror the common practice today. For an explication, see Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 NYU J L & Liberty 334, 340–42, 346–49 (2005); Richard A. Epstein, *Further Thoughts on the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 NYU J L & Liberty 1096, 1096–98 (2005). Oddly enough, in recent Fourteenth Amendment cases, the distinction carries less weight. See, for example, *Sugarman v Dougall*, 413 US 634, 642–43 (1973) (subjecting the citizen-alien distinction in New York City's hiring policies to strict scrutiny).

[4] See Richard A. Epstein, *The Natural Law Bridge between Private Law and Public International Law*, 13 Chi J Intl L 47, 53–55 (2012).

[5] Immanuel Kant, *Grounding for the Metaphysics of Morals* 421 (Hackett 3d ed 1993) (James W. Ellington, trans) (originally published 1785).

[6] Id at 429.

untary exchange to the extent that each one is left better off than before. Any issue relating to the use of improper techniques in securing consent is a sideshow in dealing with free trade. What matters to the free trade issue is whether the gains from the parties to a particular transaction should be overridden by the costs that these transactions impose on third parties.

A defense of freedom of contract does not rest on the premise that any transaction that produces gains for the parties to it should necessarily receive public imprimatur of its legitimacy. Instead two types of external effects should be taken into account, but a third one should not. The first sort of externality involves the use of force or fraud against third persons.[7] Included in this case are contracts to kill or maim third persons or to destroy their reputations so that they are not able to compete in the market. More concretely, it is perfectly consistent with the principle of freedom of contract to punish private parties for (falsely) passing off their inferior goods as if a competitor made them, or to (falsely) disparage the goods of a competitor.

The logic here is clear enough. Each of these actions done by an individual constitutes a wrong, not only because of the adverse consequences to the victim, but because of the systematic losses they impose on third persons who are no longer in a position to trade or associate with those individuals whose bodies have been damaged or whose reputations these false statements have left in tatters.[8] At this point, the contract that generates gains for the transacting parties does so only by magnifying the losses through their cooperation that are suffered by the victims. The negatives to third parties are likely to grow more rapidly than the gains to the transactors, which leads to a well-nigh universal inversion of the basic rule. These arrangements are now called conspiracies because of their large external effects, and the only question is the set of civil and criminal sanctions that should be imposed upon them.

The second set of external losses that need special reference are those which relate to contracts or combinations in restraint

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[7] See Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 Va L Rev 2305, 2315–16 (1995).

[8] The emphasis on falsity is critical because true information that reduces the desirability of a trader in the eyes of customers improves market efficiency, which is why claims of privacy in business contexts usually receive a rocky reception. See, for example, Cory Franklin, *Does a CEO Deserve Privacy?*, Chi Trib C27 (Oct 27, 2011) (discussing the controversy surrounding Apple's decision to keep Steve Jobs's illness private from the public, arguing that shareholders deserved greater disclosure given the likely effect of such information on Apple stock).

of trade. The simplest illustration of this practice is those cartels that rig prices or divide markets. But in other cases the merger of two firms could have external negative consequences that are larger than the gains to the transacting parties. Indeed the standard economic demonstration of the loss of social welfare in the move from competitive to monopoly pricing makes the point in vivid fashion.[9] The major question, which I shall not attempt to answer here, is whether the cost of dealing with the monopoly practices, including both administrative and error costs, is of larger magnitude than the allocative distortion that the remedial measures try to correct. That empirical question is subject to much dispute; consequently, there is much disagreement on the choice of remedy.[10] Is it sufficient not to enforce the illicit horizontal agreement, thereby allowing the cartel to disintegrate through cheating, or is it necessary to lodge civil and criminal sanctions against it in order to block its formation or hasten its demise?

Most critical is the third element: the viable case for freedom of contract *necessarily* rests on the emphatic rejection of all efforts to legally protect competitors whose expectations are dashed by the superior performance of a successful firm.[11] Accordingly, any firm that is driven from business by a superior competitor has no claim against its victorious opponent who relies on lower prices and superior services to achieve its objectives. In this analysis, overall social gains remain the test of a sound set of institutional arrangements, and the gains to the consumers under competition are systematically larger than the losses to competitors—who of course remain free to alter their mix of products and prices if they choose not to exit the market.

Traditional legal analysis rightly called these distinctive harms *damnum absque injuria*—harm without legal injury—while the modern view of the subject describes them as pecuniary externalities.[12] Unfortunately, neither term quite captures the intellectual process that justifies the key policy recommendation, which is that any competitive losses sustained by domes-

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[9] See Steven E. Landsburg, *Price Theory and Applications* 344–45 (South-Western 5th ed 2002).

[10] Compare Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex L Rev 1, 39–40 (1984), with Jonathan B. Baker, *The Case for Antitrust Enforcement*, 17 J Econ Persp 27, 42–46 (Fall 2003).

[11] See Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 66–68 (Free Press 2d ed 1993).

[12] See Richard A. Epstein, *Heller's Gridlock Economy in Perspective: Why There Is Too Little, Not Too Much Private Property*, 53 Ariz L Rev 51, 66–68 (2011).

tic rivals to foreigners should not be taken into account by the legal system. The use of either of these two expressions—*damnum absque injuria* or pecuniary externality—does not mean that these losses are ignored in working out the social calculus. What they are intended to capture is this: *even after* they are *fully* taken into account, the net benefit of gains over losses points strongly in favor of the competitive solutions that are reached under a regime of freedom of contract. The reason, therefore, that these admitted losses are systematically ignored by the legal system in individual cases is that any effort to protect them will increase error costs and administrative costs simultaneously. The per se rule for their exclusion thus rests not on any blindness to the importance of these losses to the party that suffers them, but on the clear sense that building them into the decisional calculus will produce massive errors that no case-by-case method of adjudication will be able to eliminate. To put the point differently, in cases of force and fraud we know that the effects between the parties and to third parties are both negative, so that there is no need to measure them to justify their enforcement—at of course the lowest possible cost. But in cases of competitive harm we know that third party gains tip the balance in favor of the successful seller in all cases, so that again, the per se rule is appropriate.[13]

Within the ordinary domestic context, the single greatest threat to freedom of contract lies in the elevation of these competitive externalities, which are now described as a form of "ruinous competition" against which intelligent government regulation can provide needed protection for the victims of that dog-eat-dog structure.[14] The bottom line in these cases, which is well illustrated by the endless set of agricultural marketing orders, is the creation of "stable" cartels guarded by the watchful eye of the Department of Agriculture.[15] In ordinary business arrangements, the willingness to treat competitive harms as a source of legal relief is, without question, the single greatest threat to social welfare short of violence or corruption. It manifests itself in many ways, which involve both the use of restraints on entry and output on the one hand, and the provision of state subsidies

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[13] See Bork, *The Antitrust Paradox* at 136–37 (cited in note 11).

[14] See C. Paul Rogers III, *Consumer Welfare and Group Boycott Law*, 62 SMU L Rev 665, 684–86 (2009).

[15] See, for example, Agricultural Marketing Agreement Act of 1937, Pub L No 75-137, ch 296, 50 Stat 246, codified as amended at 7 USC § 601 et seq. For one expression of the dominant sentiment, see *Block v Community Nutrition Institute*, 467 US 340, 347–48 (1984) (denying consumers standing to protest high rates for fluid dairy products).

in the form of cash payments and in-kind grants that keep these programs alive. These tactics have been discredited countless times since Adam Smith wrote his *Wealth of Nations*. But these claims have received huge institutional accolades everywhere around the globe.[16]

The argument thus far has ignored any and all distributional consequences associated with the regime of freedom of contract. There are two reasons why this approach is correct. The first of these is that it is not possible in dealing with the full range of these transactions to find any clear distributional vector.[17] All too often those individuals who seek insulation from competitive loss, or compensation for its occurrence, need not be systematically poorer or otherwise worse off than their successful competitors. The effort to introduce a distributional constraint in this prospect thus adds mischief and uncertainty to the process, but it affords no directional assistance toward an equitable distribution of wealth, assuming one could define what such a distribution looks like and how it should be achieved.

That basic argument is then reinforced by the observation that any system of redistribution that is desired is *not* done best on a transactional basis, but should be tied to overall levels of income and wealth that persons have regardless of the particular mode by which that wealth has been acquired. Indeed, the programs of protection and assistance will reduce the level of mobility in labor markets, which will only intensify the adverse consequences for those dislocated by market forces. Open markets allow disappointed competitors in both product and labor markets to take private steps to mitigate their losses by repackaging their tangible and human capital, which in turn only increases overall competitiveness. If some form of redistribution is desired, use of progressive taxation—how much, if any, is an open question—will dominate any effort to offer piecemeal competition for people who claim (often falsely) that their losses stemmed from excessive competition, as opposed to their own business ineptness.[18] The overall system in its proper formation exhibits a basic simplicity: Block the use of force and fraud in all

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16 See, for example, Paul Krugman, *The Age of Diminished Expectations: U.S. Economic Policy in the 1990s* 131 (MIT 1990).

17 For a defense of insulating domestic workers against international competition, see Vernon M. Briggs Jr, *Immigration Policy and the U.S. Economy: An Institutional Perspective*, 30 J Econ Issues 370, 385–87 (1996); Lester C. Thurow, *The Zero-Sum Society: Distribution and the Possibilities for Economic Change* 77, 82 (Basic Books 1980).

18 See Louis Kaplow and Steven Shavell, *Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income*, 23 J Legal Stud 667, 677 (1994).

its manifestations and control monopoly, but ignore competitive injury regardless of its asserted distributional consequences. Short, clean, easy, and productive.

B. The International Context

One reason for this free trade approach is that it makes it easier to organize and apply principles of free trade in an international context. Let there be claims for relief from domestic competition, and the chorus will surely be louder to provide similar protection against foreign competition, which could include the now-familiar insistence that goods be kept out of the United States unless their nations of origin provide suitable protections for organized labor and domestic environmental interests.[19] That protectionist approach is doubly dangerous. First, it reduces the pressures that foreign nations can impose on counterproductive domestic policies that receive an undeserved boost.[20] One great advantage of a free trade regime is that it imposes a diffuse but insistent set of institutional pressures on all nations with inefficient domestic policies, which is why unions consistently oppose market liberalization that makes them vulnerable in export or import markets.[21] This indirect pressure can lead to domestic reforms of union and wage restrictions, for example, that no outsider could help to attack. There are no enforcement costs to this policy, which strikes across the full range of protected enclaves. Second, the protectionist approach denies the receiving nation of cheaper inputs that would improve its position in both its domestic and export market. Recall that the nation that does not free all imports will find it more difficult to produce competitive goods and services in the export markets. One policy thus works desirable liberalization on both sides of the market. In the end, therefore, it becomes much easier to formulate a coherent international policy on free trade if the baseline of analysis is a sound account of the principles of free exchange within domestic markets.

The world of politics, however, does not have the luxury of conforming in full to any universalist command like the various

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[19] See Benn Steil, *'Social Correctness' Is the New Protectionism*, 73 Foreign Aff 14, 14 (Jan/Feb 1994).

[20] See Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition among Jurisdictions in Environmental Law*, 14 Yale L & Pol Rev 67, 91–94 (1996).

[21] See Thomas J. Manley and Ambassador Luis Lauredo, *International Labor Standards in Free Trade Agreements of the Americas*, 18 Emory Intl L Rev 85, 95–96 (2004).

Kantian imperatives. Just as the owner of private property is entitled to exclude all others from his possessions, so the government in charge of a nation is entitled as a matter of principle to exclude all other individuals, and the goods and services of all other individuals, from within its borders. This exclusive right to the use of force within the territory marks the creation of separate nations under international law, to which their citizens owe some measure of allegiance. These nations remain separate because the questions of scale, and of the ethnic and geographical diversity of populations, make any system of single, worldwide governance implausible.[22] There is no question, therefore, that as a political matter citizens are necessarily distinguished from outsiders in the organization of the state on key issues of voting and protection. But how should governments exercise their power with regard to issues of free trade?

In one sense, many people can regard this as an illegitimate question. Insiders have full rights, and outsiders have none, so outsiders cannot complain if excluded and, therefore, have to accept admission on whatever terms and conditions a sovereign state wishes to give them. But even if one accepts this brute description of the distribution of sovereign power, it gives no guidance on how the state should exercise its powers in ways that work for the benefit of its citizens as a whole. On this point, the wholesale exclusion of outsiders from the trade in goods and services not only imposes costs upon them for their loss of opportunities for gains from trade, but it also imposes *like losses* on citizens who now do not have the opportunity to purchase these goods and services, be it for consumption or further use in business or trade.[23] In addition, it also exposes citizens to loss of opportunities to trade outside the homeland should the domestic policy embolden other nations to follow the same exclusionary strategy.[24]

Once the matter moves from the question of sovereign entitlement to the question of sound policy, the same conclusion that holds domestically applies internationally. If the issue is trade in goods and services: use internationally the same regime of freedom of contract, subject to the same limitations applied domestically. The corollaries thus follow from the basic premise.

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[22] See Anne-Marie Slaughter, *A New World Order* 8 (Princeton 2004).

[23] See Rudiger Dornbusch, *The Case for Trade Liberalization in Developing Countries*, 6 J Econ Persp 69, 74, 76 (Winter 1992).

[24] See David M. Driesen, *What Is Free Trade?: The Real Issue Lurking behind the Trade and Environment Debate*, 41 Va J Intl L 279, 325 (2001).

Prevent those actions that pose threats of the use of force and fraud against local inhabitants by keeping, for example, contaminated goods from being sold in domestic markets. Enforce the antitrust laws against foreign monopolistic practices. Resist cartelization efforts by foreign nations.

It turns out, however, that it is exceedingly difficult to put these simple prohibitions in place. It has, for example, been official US policy since 1918 for the United States to insulate from the application of American antitrust law export cartels in commodities under the Webb-Pomerene Act.[25] Indeed, even within a federal system, individual states have been blessed in organizing export cartels that exploit citizens in other states. Exhibit A is *Parker v Brown*,[26] which held that a government-run California raisin cartel was immune from prosecution under the Sherman Act.[27] That decision rests on the judicial philosophy of the New Deal, still highly influential today, which rejects any systematic commitment toward market competition over market cartelization. The same worldview holds with respect to taxation, as in *Commonwealth Edison Co v Montana*,[28] which let Montana impose heavy taxes on its low-sulfur coal, knowing that most of it was destined for the export market.[29] Local political groups can then exercise that same clout against foreign goods and services. Occasionally some sufficient political counterpressure secures a selective release from such cartelization. In *Blomkest Fertilizer, Inc v Potash Corp of Saskatchewan, Inc*,[30] an (unsuccessful) antitrust action proceeded solely because the United States had negotiated a special treaty under which the Canadian Potash Exporters (Canpotex) could not sell potash in the United States below a price set by the US government.[31]

That same ambivalence toward competitive practices is evident in the full range of tariffs and antidumping rules that dominate modern trade law. As a matter of first principle, it is clear that no private firm should ever be allowed to block by force trades entered into by its competitors. In like fashion, no nation should act as an agent for domestic groups by imposing similar restrictions, for the forcible interference with advantageous rela-

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25 Pub L No 65-126, ch 50, 40 Stat 516 (1918), codified at 15 USC §§ 61–66.

26 317 US 341 (1943).

27 Id at 350–52.

28 453 US 609 (1981).

29 Id at 614, 636–37.

30 203 F3d 1028 (8th Cir 2000) (en banc). By way of full disclosure, I was the losing appellate counsel in that case, which I still regard as the worst antitrust decision in decades.

31 Id at 1031–32, 1038.

tions is as questionable in international relations as it is when done by private individuals. The key private law decision of *Tarleton v M'Gawley*[32] arose in connection with an international transaction in which a private trader sought to block trades between the plaintiffs and local "natives,"[33] but the principles of interference by force carry over analytically to those cases where government actors interfere. Indeed, the antidumping laws that depend on some critical finding that certain sales were completed at below cost just bring into international law the same theories of economic predation that have been discredited domestically.[34]

Foreign subsidies for goods destined for sale in the export market represent a far more difficult problem. On reflection, the correct policy for the recipient nation is to accept any ill-conceived subsidies by refusing to erect trade barriers against their creation. To be sure, the direct competitors of the subsidized firms will reel from these losses, but no more so than they would if domestic producers received private subsidies for the provision of their goods—domestic government subsidies raise different issues. But at this point the response to subsidies should parallel the response to predation. The aggrieved competitor can shift its own business plan. Indeed it can even take advantage of the low prices by purchasing at below cost the goods sold by the predator. Should the foreign suppliers back off their position, the domestic entities that stayed on the sidelines can reenter the market in stronger shape than their depleted rivals. The key point throughout is not to invoke state force when private responses are cheaper and more targeted. The imposition of countervailing duties hurts domestic consumers and, oddly enough, prolongs the period over which subsidies could be offered from abroad by reducing their financial drain. Refusing to interfere internationally will in turn spark domestic competitors to revise their own businesses without hesitation or delay.

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32 170 Eng Rep 153 (KB 1793).

33 Id at 154.

34 For an example of American courts' reluctance to find price-fixing without ample evidence, see *Matsushita Electric Industrial Co v Zenith Radio Corp*, 475 US 574, 593–98 (1986) (reversing the lower court's denial of summary judgment for the defendants on the ground that no evidence explained how the supposed scheme could produce long-term gains to offset short-term losses).

II. FREE MOVEMENT OF LABOR

A. Special Problems of Labor Markets

The next question is the extent to which the policies in favor of open markets carry over to labor markets. As a first approximation, there is much to be said for having open borders with respect to labor mobility to promote the same form of competition in labor markets that is found in product markets. Indeed the "logic of efficiency drives the unwavering conviction of most economists that immigration produces net gains up until the point at which the marginal productivity of labour is equalised globally."[35] There are of course powerful domestic forces that fight open labor markets at every turn, precisely because free labor markets will never insulate all domestic wages from competitive pressures.[36] But for the same reasons mentioned above in connection with free trade, any concentration on short-term distributional consequences not only ignores the short-term winners from market liberalization, but also the long-term pattern of growth that it can generate. Those nations that, in response to powerful domestic political pressures, impose restrictions on the efficient deployment of labor risk a brain drain that they can best combat by opening their domestic labor markets to foreign competition.

One advantage of this system is that it reduces the pressure on labor to move across borders and thus eases the pressure of immigration policy to respond to the manifold logistical and governance challenges of admitting foreign workers. It is no accident, for example, that the recent slowdown in growth in India is a direct consequence of the new set of taxes and restrictions whose sole purpose is to hamper entry of foreign firms into domestic markets.[37] The single most dangerous aspect of this problem is the constant drumbeat that glorifies the distinctive culture and history of each nation in the hope that its unique

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[35] Gary P. Freeman and Alan E. Kessler, *Political Economy and Migration Policy*, 34 J Ethnic and Migration Stud 655, 660 (2008).

[36] See Briggs, 30 J Econ Issues at 380–84 (cited in note 17) (explaining why the adverse effects of mass immigration on income and job opportunities of employees in the United States have spurred domestic resistance to free entry).

[37] See Jim Yardley and Vikas Bajaj, *India's Economy Slows, with Global Implications*, NY Times A1 (May 30, 2012). It is a case of rounding up the usual suspects: "Indian corporations, unable to obtain governmental licenses or permissions for projects, are investing overseas instead. Foreigners also are pulling back; their investment in Indian stocks and bonds totaled only $16 billion in the last fiscal year, compared with $30 billion the year before." Id.

position affords suitable reasons—that is, excuses—to deviate from the only policies that promise the long-term amelioration of the human condition.[38] Distinctive cultures there will always be, but these differences should be reflected in the operation of local markets for labor and goods—not through a regulatory and tax structure that wreaks havoc in all cultures, no matter how distinctive, to which they are applied. Even if capital were fully mobile, however, the case remains strong for free immigration in labor within the tripartite framework that was developed above: it could well be that in some instances it is easier to move labor to existing facilities in other countries than to locate new facilities by current labor markets. The initial impulse toward this point is that competition in global markets will tend to move labor to its highest value use.[39] But the tripartite framework raises more urgent concerns in labor markets.

The first point to note is that an open market in labor raises all the issues found in connection with contaminated goods, only more so. One critical question in labor markets is whether new arrivals will carry with them various kinds of diseases that can then spread in the new host country. Of equal concern is that they might bring in animals, foods, or parasites that could cause major harm to indigenous plants and animals as well as people. In some instances, free movement across borders could allow spies and saboteurs to enter a country.[40] Without question these are legitimate concerns that a government ought to be allowed to guard against. It is instructive on this score to note that the movement of both persons and goods within the United States has received explicit constitutional protection through the Privileges and Immunities Clause of Article IV of the Constitution. Yet inspection laws are surely appropriate for the movement of goods.[41] And without question nations can use various devices, including a wide range of surveillance, investigative, and report-

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[38] See, for example, *Trends in American Values: 1987–2012; Partisan Polarization Surges in Bush, Obama Years* 25–33 (Pew Research Center June 4, 2012), online at http://www.people-press.org/files/legacy-pdf/06-04-12%20Values%20Release.pdf (visited Mar 3, 2013) (reporting that 46 percent of Americans believe that immigration is destroying American customs and values).

[39] See Philippe Legrain, *Immigrants: Your Country Needs Them* 61–88 (Princeton 2007).

[40] See Jan C. Ting, *Immigration and National Security*, 50 Orbis 41, 41–46 (2006) (claiming that illegal immigration poses the greatest risk to the security of the United States, due to the risk of terrorists entering the country).

[41] See *Maine v Taylor*, 477 US 131, 151 (1986) (upholding Maine's ban on the importation of live baitfish for health reasons against a dormant Commerce Clause challenge).

ing requirements, to keep out foreign spies and operatives, no matter how they seek to gain entry.

Yet by the same token, these real concerns will not typically warrant blanket prohibitions of foreign entry. It is instructive to note of course that these various contagion risks are as large for tourists as they are for potential long-term entrants, who seek to enter either under work visas or as permanent residents. Indeed, even in earlier days when these contagion risks were far greater, they did not pose an absolute bar to entry. Both the American and Canadian practices for arriving immigrants in the early part of the twentieth century had specific procedures that called for medical inspections followed by quarantine of those persons with infectious diseases, so as to give them a chance to be cured in ways that would then permit delayed entry.[42] In addition, it was understood that the shippers who brought these individuals to the United States had a statutory obligation to take them home again at their own expense, which gave them a sensible incentive to prescreen these persons before taking them on long seaward voyages.[43] These issues are largely irrelevant today. But even if they were not, they would not pose a serious obstacle to a principled open market policy.

The enduring issue with respect to the arrival of foreign persons involves the complex interaction between labor and political markets. On the former, there is little danger that recent arrivals pose a monopolization risk. Quite the opposite, they are an additional source of both labor and capital in the relevant market, which improves rather than hampers their effectiveness.[44] But the political concerns are of a different fabric entirely. Goods that enter a nation under a free trade regime do not vote in national local elections; they do not consume or use public services; they do not get sick; they do not commit crimes. Yet taking in anyone as a potential worker gives rise to the prospect that the influx of new individuals as citizens will alter the distribution of political power in the nation so that incumbents cannot keep control of their home institutions.

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[42] See Pascal James Imperato and Gavin H. Imperato, *The Medical Exclusion of an Immigrant to the United States of America in the Early Twentieth Century: The Case of Cristina Imparato*, 33 J Community Health 225, 229 (2008).

[43] See id (discussing an 1891 law that "held steamship companies responsible for the return travel costs of deported immigrants").

[44] See Daniel Trefler, *Immigrants and Natives in General Equilibrium Trade Models*, in James P. Smith and Barry Edmonston, eds, *The Immigration Debate: Studies on the Economic, Demographic, and Fiscal Effects of Immigration* 206, 229 (National Academy 1998) (showing how increases in immigrant labor increases overall productivity).

This precise situation exists, of course, within a federal system, where the American response is to allow individuals to become citizens of another state simply by taking up residence there, without formalities of any sort. That free movement of persons within a nation is of incalculable benefit because the exercise of exit rights within a federal system is one of the cheapest and most effective ways to combat the effect of local monopolies.[45] But it is doubtful that this system would work in the international arena, where the number of potential entrants is far greater at a time when their loyalty may be far less. One hundred years ago, wide oceans and slow steamers made an open immigration policy possible in a nation like the United States. Jet planes and vast differentials of wealth make that impossible. No nation should be asked to take in sufficient numbers of people in ways that could spell the end to its distinctive institutions.

None of this should suggest that immigration by persons seeking citizenship should be sealed off in major countries, where sensible limits, politically determined, may make more sense. But smaller, wealthier nations could be vulnerable to just this kind of takeover. The situation in the United Arab Emirates (including Abu Dhabi, where NYU has a second campus) illustrates that risk.[46] No entrant into the nation is ever allowed to obtain citizen status. All come in under short visas, rigorously controlled, subject to quick expulsion for many reasons.[47] Work entry does not create a path to citizenship,[48] and marriage between a foreigner and a citizen does not confer citizenship status to the foreign spouse.[49] Native citizens run the government, leaving most businesses to foreigners who enter the country at their sufferance.[50]

These policies strike me as precisely correct for any nation that thinks that its political identity is in danger through open

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45 For my views, see Richard A. Epstein, *Exit Rights under Federalism*, 55 L & Contemp Probs 147, 149–50 (1992) (discussing how federalism checks state monopoly power by allowing exit rights).

46 See K.C. Zacharia, B.A. Prakash, and S. Irudaya Rajan, *Indian Workers in UAE: Employment, Wages and Working Conditions*, 39 Econ & Polit Weekly 2227, 2227–29 (2004).

47 See id at 2229.

48 See Neha Vora, *Unofficial Citizens: Indian Entrepreneurs and the State-Effect in Dubai, United Arab Emirates*, 79 Intl Labor & Working Class Hist 122, 134 (2011).

49 For an assessment of Emirati law concerning citizenship, see *United Arab Emirates* 4 (Human Rights Watch Jan 2012), online at http://www.hrw.org/sites/default/files/related_material/uae_2012.pdf (visited Mar 3, 2013).

50 See Jasim Al-Ali, *Emiratisation: Drawing UAE Nationals into Their Surging Economy*, 28 Intl J Soc & Soc Pol 365, 365–68 (2008).

immigration ending in citizenship. What the program does is separate out the economic issues from the political issues by allowing extensive activity on the former without making any commitments on the latter. It is possible to run the partition system in ways that disentangle economic competition from political issues, such that the question remains how best to address those competitive issues.

B. The American H-1B Visa Program

The confluence of all these political crosscurrents is found in the United States in the H-1B visa, which deals with short-term employment in the United States.[51] The most dominant feature of this system is that it is riddled with massive restrictions that pay all too much attention to the competitive effects that new entrants will have on employment of American citizens.[52] The common justification offered for this complex program is that it is needed to protect the competitive wages of American professionals in many industries.[53] One essential element of that claim is that the domestic economic markets function well in major areas because there are no perceived labor shortages in these markets, given the large number of American workers who are in them. The point is put bluntly in this exceedingly hostile attack on foreign workers:

> When the government supplies non-U.S. workers to an industry, that's a subsidy. When those workers accept minor-league wages, that's a big subsidy. When those outsiders want a benefit that can be supplied only by the government, like a green card, even regulations intended to protect U.S. workers can skew the labor market against citizens. American workers won't support a minor league that runs against their interests.[54]

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[51] See Immigration and Nationality Act (INA) § 101(a)(15)(H)(i)(b), 8 USC § 1101(a)(15)(H)(i)(b) (authorizing entry of aliens of "distinguished merit and ability" to fill temporary positions).

[52] See, for example, American Recovery and Reinvestment Act of 2009 § 1611, Pub L No 111-5, 123 Stat 115, 305 (temporarily barring, until 2011, certain financial institutions from hiring H-1B workers without first offering the position to qualified American workers as part of the embedded Employ American Workers Act).

[53] See, for example, Jonathan Todres, *Lessons from the Trade Arena: A Proposal to Change U.S. Immigration Law for the Benefit of U.S. Workers*, 1 San Diego Intl L J 49, 55–57 (2000).

[54] Paul Donnelly, *H-1B Is Just Another Gov't. Subsidy* (Computerworld July 22, 2002), online at http://www.computerworld.com/s/article/72848/H_1B_Is_Just_Another_Gov_t._Subsidy (visited Mar 3, 2013).

The confusion in this argument lies in the deceptive use of the term "supply," which is given an implicit meaning that is found nowhere else in the law.

The initial point here is that the government as sovereign has the power to exclude any and all outsiders from the United States. No one contests that power. But the key issue is whether a relaxation of that power will improve overall conditions. The government here is not, therefore, in a position of offering government funds to industries to hire government workers. It is only asked to reduce the barriers to entry that are now blocking the efficient deployment of foreign labor in domestic markets. That labor, if properly deployed, *should* result in a decline in the wages of domestic labor. But as noted earlier, that decline is no more objectionable than declining wages from any other competitive source because the particular loss is always inevitably offset by the overall gains that only a competitive economy should supply. To say that the current market is in equilibrium in the sense that there are no observed shortages misses the point. The market is still reasonably competitive, and we should therefore see wages come into equilibrium given current supply and demand conditions. But once those are relaxed, the influx of new labor will also result in no labor shortages (or for that matter gluts) in light of the readjustment in employment levels once market forces are allowed to do their work.[55]

Unfortunately, the public choice story is clear enough:[56] Direct competitors have political clout that tends to short-circuit the process by creating a convoluted program so complex that it defies short summarization.[57] A brief recapitulation of some of its many lowlights should suffice. In order to be effective, any restriction on short-term workers must combat the charge that it is ineffective because it displaces American workers from their jobs.[58]

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55 Consider Peter J. Neary, *Immigration and Real Wages*, 30 Econ Letters 171 (1989).

56 For an exploration of US immigration policy from the perspective of public choice theory, see F.H. Buckley, *The Political Economy of Immigration Policies*, 16 Intl Rev L & Econ 81, 96–99 (1996); Fritz Söllner, *A Note on the Political Economy of Immigration*, 100 Pub Choice 245, 245–51 (1999).

57 For some sense of the complexity, see *Work Authorization for Non-U.S. Citizens: Workers in Professional and Specialty Occupations (H-1B, H-1B1, and E-3 Visas)* (Department of Labor Sept 2009), online at http://www.dol.gov/compliance/guide/h1b.htm (visited Mar 3, 2013) (describing how INA subjects the hiring of nonimmigrant foreign workers to "local prevailing wage" requirements and a "bona fide inquiry" into whether that nonimmigrant worker would displace a similarly situated American worker).

58 See Donna S. Galchus, *The H-1B Visa Program: A Band-Aid Remedy?*, 34 Ark Lawyer 20, 21–22 (Fall 1999).

The first casualty of this approach is any sensible system that allows new laborers to come into the United States, with no promise of citizenship, so long as they have proof that they can support themselves while here. That condition should not limit these foreign persons to serving as employees for a sponsoring employer. Letting foreign entrepreneurs enter the country could easily expand job opportunities for other workers in firms organized, funded, or staffed in whole or in part by foreign entrepreneurs. Open labor markets are not anything close to a zero-sum game, in which domestic workers lose out because foreign workers win. The positive-sum nature of the process can be defended on theoretical grounds,[59] without having to make case-by-case calculations or findings that typically overlook the indirect benefit to a local economy when foreigners participate both in labor and consumer markets. Here, what is needed is a per se rule on the use of foreign laborers. If there is need for any aggregate limitation, it is better done by a bid system than a case-by-case allocation. What is true of the allocation of frequencies in communications is true in these labor markets as well.[60]

The heavy hand of labor protectionism is, however, built into the very fabric of the H-1B visa. The point becomes evident in looking at the Department of Labor's own statements of the requirements for short-term—three to six years with various periods of renewal—entrance into the United States.[61] Here are some of the relevant pronouncements:

> The employer must state that it will:
>
> - Pay the nonimmigrant workers at least the local prevailing wage or the employer's actual wage, whichever is higher; pay for non-productive time in certain circumstances; and offer benefits on the same basis as for U.S. workers;
> - Provide working conditions for H-1B, H-1B1, or E-3 workers that will not adversely affect the working conditions of workers similarly employed;

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[59] See, for example, Neary, 30 Econ Letters at 171–74 (cited in note 55).

[60] For an explanation of why bidding systems are more efficient than government regulation, see Ronald H. Coase, *The Federal Communications Commission*, 2 J L & Econ 1, 17–19 (1959).

[61] 8 CFR § 214.2(h)(9)(iii)(A)(1), (15)(ii)(B)(1).

- Not employ an H-1B, H-1B1, or E-3 worker at a location where a strike or lockout in the occupational classification is occurring, and notify [the Employment and Training Administration] of any future strike or lockout

. . .

H-1B dependent employers . . . must attest to the following three elements addressing non-displacement and recruitment of U.S. workers:

- The employer will not displace any similarly employed U.S. worker within 90 days before or after applying for H-1B status, or an extension of status for any H-1B worker;
- The employer will not place any H-1B worker employed pursuant to the [Labor Condition Application (LCA)] at the worksite of another employer unless the employer first makes a bona fide inquiry as to whether the other employer has displaced or intends to displace a similarly employed U.S. worker within 90 days before or after the placement of the H-1B worker; and
- The employer, before applying for H-1B status for any alien worker pursuant to an H-1B LCA, took good faith steps to recruit U.S. workers for the job for which the alien worker is sought, at wages at least equal to those offered to the H-1B worker. Also, the employer will offer the job to any U.S. worker who applies and is equally or better qualified than the H-1B worker. This attestation does not apply if the H-1B worker is a "priority worker."[62]

The anticompetitive nature of these restrictions starts with the phrase "prevailing wage," taken straight from the Davis-Bacon Act of 1931,[63] which represents a high-water mark in an-

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[62] *Work Authorization for Non-U.S. Citizens* (cited in note 57) (emphasis omitted), quoting INA § 203(b)(1)(A)–(C), 8 USC § 1153(b)(1)(A)–(C) and citing INA § 101(a)(15)(H)(i)(b)–(b1), 8 USC § 1101(a)(15)(H)(i)(b)–(b1); INA § 202(n), 8 USC § 1182(n); INA § 202(t), 8 USC § 1182(t); INA § 214(g), 8 USC § 1184(g); 20 CFR §§ 655.700–665.855.

[63] Pub L No 71-798, ch 411, 46 Stat 1494, repealed and reenacted by Pub L No 107-217, 116 Stat 1063, 1150 (2002), codified as amended at 40 USC § 3142(b):

> The minimum wages shall be based on the wages the Secretary of Labor determines to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there.

ticompetitive legislation in the United States. Only in this instance, it does not only apply to work that is done in a limited class of government contracts for laborers and mechanics but to virtually all workers, including those of the highest skill levels.[64] If that principle were applied to private employees in all occupations who sought to move across state lines, it would cripple our labor markets. It also has profound effects on foreign workers seeking employment inside the United States.

Once the door is opened to foreign employees, however, the regulatory system prevents circumvention of the basic statutory command. One collateral restriction requires employers to pay the *higher* of the actual wages that they pay to other workers in that job category or the prevailing wages in the industry.[65] The only reason why these anticompetitive restrictions are not as harmful in the context of H-1B visas is that the domestic markets in most high-skilled labor markets are already reasonably competitive,[66] which makes it impossible to adopt the union (monopoly) benchmark that measures prevailing wages under Davis-Bacon. Yet the H-1B visa program attempts the impossible, which is to add supply of labor without lowering the overall prices—which translates into a conscious effort to impose major restrictions on the supply of foreign labor.

The efforts to cartelize these labor markets cannot succeed if the system of government regulation only addresses the wages that employers pay their nonimmigrant foreign employees. The drafters of these statutes understand these basic propositions as well as the most ardent defender of free markets. Accordingly, they astutely impose additional statutory requirements that ostensibly equalize the employer's overall cost structure for all employees. The requirement, for example, that employers pay for some "nonproductive time"[67] applies inefficient local restrictions to immigrant workers. The equal-benefits require-

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For discussion of the recodification, see Wage and Hour Division, *The Davis-Bacon Act, as Amended* nn 1–2 (Department of Labor April 2009), online at http://www.dol.gov/whd/regs/statutes/dbra.htm (visited Mar 3, 2013).

64 See Philip Martin, *Policies for Admitting Highly Skilled Workers into the United States*, in *International Mobility of the Highly Skilled* 271, 272–84 (Organisation for Economic Co-operation and Development 2001).

65 See 20 CFR § 655.731(a)(3).

66 See Neil G. Ruiz, Jill H. Wilson, and Shyamali Choudhury, *The Search for Skills: Demand for H-1B Immigrant Workers in U.S. Metropolitan Areas* 7–14 (Brookings July 2012), online at http://www.brookings.edu/~/media/research/files/reports/2012/7/18%20h1b%20visas%20labor%20immigration/18%20h1b%20visas%20labor%20immigration (visited Mar 3, 2013).

67 20 CFR § 655.731(c)(5)–(7).

ment[68] for foreign workers necessarily reduces their effective wages, given the high probability that they will be unable to participate on equal terms with American workers in such key programs as Social Security and Medicare.[69] Likewise, the prohibition against the use of H-1B workers to replace striking workers,[70] which consciously reverses the rule that lets domestic firms hire replacement workers (often referred to as scabs) during an ongoing strike,[71] has an obvious pro-union slant.

Yet the restrictive practices against foreign entry do not end here. One key feature of an effective labor market is free movement of labor across jobs, which is facilitated by the contract at will that normally allows workers to quit at will. Yet one key design feature of the H-1B visa program is to throttle labor mobility. In the original H-1B program, the nonimmigrant foreign worker could only take employment with the firm that sponsored his arrival.[72] Yet there are all sorts of sensible reasons why it might make sense for that worker to move somewhere else. One simple story is that the worker participates in a joint venture operated by his employer and some other firm, only to discover that his skills are better suited for the other firm once that joint venture is over. It could well be that this shift in jobs makes perfectly good sense even from the point of view of the former employer if it has some continuing supply relationship with the foreign worker's new firm. These shifts of course tend to undermine the anticompetitive structure of the entire visa program, so that domestic protectionists are alert to ensure that the nondisplacement rules of the current law extend to situations where the foreign employee works at the site of another employer, who must now make assurances that it does not violate any of the conditions needed to bring the worker into the United States.[73]

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68 See 20 CFR § 655.732(a).

69 See Sabrina Underwood, Comment, *Achieving the American Daydream: The Social, Economic, and Political Inequalities Experienced by Temporary Workers under the H-1B Visa Program*, 15 Georgetown Immig L J 727, 738 (2001).

70 See 20 CFR § 655.733.

71 For the origin of the rule that allows domestic firms to hire replacement workers, see *NLRB v Mackay Radio & Telegraph Co*, 304 US 333, 345 (1938). The *Mackay Radio* decision is widely condemned by most labor law scholars, for whom the protection of unions against domestic competition is the *summum bonum*. See, for example, Julius G. Getman and Thomas C. Kohler, *The Story of* NLRB v. Mackay Radio & Telegraph Co*.: The High Cost of Solidarity*, in Laura J. Cooper and Catherine L. Fisk, eds, *Labor Law Stories* 13, 13–15 (Foundation 2005).

72 8 CFR § 214.2(h)(1)–(2).

73 See 20 CFR § 655.738(d).

In similar fashion, there are now in place extensive regulations that are intended to make sure that foreign workers do not take jobs as independent contractors,[74] which in turn impose yet another set of regulatory burdens on the operation of the system. The law in question suffered some degree of liberalization with the passage of the American Competitiveness in the Twenty-First Century Act of 2000[75]—yet another statute with a bombastic title. This Act allows workers who entered under an H-1B visa with one employer to switch jobs—at least as long as the new employer shows that all the conditions that were attached to the original H-1B visa continue to apply to the new job, which again imposes a barrier to free mobility of labor and makes each H-1B visa less efficient than it ought to be.[76]

Similar restrictions are present elsewhere. One portion of the American Recovery and Reinvestment Act of 2009[77] is the Employ American Workers Act[78] (EAWA), which prevents key banks and other financial institutions from hiring workers on H-1B visas without first offering these positions to equally or better qualified American workers—a determination that is notoriously difficult to make given the difficulty of giving objective rankings to all high-level employees. EAWA goes on to provide that the employer must also stipulate that it has not laid off an American employee in the area of intended employment within ninety days of the hire in question, and will not do so for the next ninety days.[79] It does not seem that the two workers in question have to be able to do the same job. The effect therefore of the provision is to starve out foreign workers in critical areas

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74 See 8 CFR § 214.2(h)(4)(ii).

75 Pub L No 106-313, 114 Stat 1251, amending INA § 202 et seq, codified as amended at 8 USC § 1152 et seq.

76 See American Competitiveness in the Twenty-First Century Act § 105(a), 114 Stat at 1251, amending INA § 214(n)(1), codified as amended at 8 USC § 1184(n)(1) ("A nonimmigrant alien . . . who was previously issued a visa or otherwise provided nonimmigrant status under section 1101(a)(15)(H)(i)(b) is authorized to accept new employment upon the filing by the prospective employer of a new petition on behalf of such nonimmigrant as provided under subsection (a).").

77 Pub L No 111-5, 123 Stat 115.

78 American Recovery and Reinvestment Act § 1611, 123 Stat at 305.

79 American Recovery and Reinvestment Act § 1611, 123 Stat at 305 (making it unlawful "for any recipient of funding under" the Troubled Asset Relief Program "to hire any nonimmigrant . . . unless the recipient is in compliance with the requirements for an H-1B dependent employer" as defined in INA § 212(n)). INA § 212(n) in turn prohibits an employer from displacing a "United States worker . . . employed by the employer within the period beginning 90 days before and ending 90 days after the date of filing of any visa petition." INA § 212(n)(1)(E)(i), 8 USC § 1182(n)(1)(E)(i). See also 20 CFR 655.738(c).

of risk management, where the differences between workers could have critical effects on overall firm management.

Much of the work in question, moreover, may be work that could be done in whole or in part overseas, at which point the better strategy for the regulated firm is to rely on work from their foreign affiliates, or indeed outsource that work entirely. And for what?

CONCLUSION

In this Article I have presented a unified framework for dealing with the vexing issues of free trade and free immigration, with special emphasis on the United States. In all these cases, there are many reasons to think that freedom of contract will have many shortcomings in dealing with both goods and labor markets, especially the latter. But it seems clear that relatively little of American immigration law is devoted to dealing with these important issues, compared to the full-time effort to exclude foreign workers from domestic markets for the sole reason that they present an undeniable competitive threat to domestic workers in that same market niche. That view is utterly shortsighted insofar as it looks only at part of one segment of the market to find those individuals who are hurt, without asking whether the process of competition in goods and labor markets produces benefits to third persons that outweigh those short-term competitive losses. I believe that those gains are present in just about every case and the futile effort to make case-by-case assessments of competitive injury expends enormous resources in order to increase the total sum of human unhappiness both in the host country and worldwide.

Yet the questions of free trade and free entry into labor markets should not be regarded as a vast prisoner's dilemma game in which efforts by one nation to liberalize its domestic policies will be thwarted unless all other nations adopt the same approach to competitive injury. Quite the opposite. It is only the dysfunctional public choice dynamic within virtually all countries that leads to the same suboptimal approach for the same reason. The nation that liberalizes its policies along the lines suggested here will do well no matter what policies other nations adopt on their own. As the European Union teeters on the edge of disintegration, and the United States remains mired in a slow-growth economy, big changes are needed. The problems with foreign goods and labor are an excellent place to start.