

Radical Markets or Conventional Politics? An Ambitious Guide to Reforming American Immigration Policy

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INTRODUCTION

Immigration laws invent scarcity. In modern states, immigration laws restrict access to a nation's territory, placing limits on who is permitted to enter the territory and who is forced to leave. (They also restrict access to the nation's political community by regulating access to citizenship.) Thus, the right to reside in a state and work in its labor markets can be conceptualized as a valuable and scarce property right—a property right created by sovereign decisions to erect legal barriers to human mobility.

For all immigration systems, a central question is how best to allocate these scarce rights.¹ The centrality of this question makes immigration policy a natural fit for the project that co-authors Eric Posner and E. Glen Weyl pursue in their important new book, *Radical Markets: Uprooting Capitalism and Democracy for a Just Society*. As they explain in their introduction, their basic aim is to identify markets that are broken and make them work better.² Taking William Vickrey's pathbreaking work on auctions as the guiding light for the book, they lay out ingenious mechanisms designed to overcome a host of classic market dilemmas—like hold-up, asymmetric information, and free riding—in order to better allocate scarce goods.

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¹ For a discussion of how best to conceptualize and allocate labor migration rights, see generally Adam B. Cox and Alessandra Casella, *A Property Rights Approach to Temporary Work Visas*, 47 *J Legal Stud* 196 (2018).

² Eric A. Posner and E. Glen Weyl, *Radical Markets: Uprooting Capitalism and Democracy for a Just Society* 16–24 (Princeton 2018).

True to this core agenda, *Radical Markets* is a book with a near unflinching focus on allocative efficiency. In chapters on housing markets, capital markets, political markets, and data markets, the goal is always the same: to promote efficient exchange, getting goods and resources into the hands of those who value them the most. Moreover, the book generally refuses to compromise on its ambitious market designs for the sake of political feasibility.

Curiously, however, Posner and Weyl jettison this approach when they turn to tackle immigration policy. In a chapter proposing a radical new way of regulating labor migration, they flip the basic approach of the book on its head—focusing on distributive fairness over allocative efficiency, and on politics over markets.

But the proposal’s real ambition is not to make markets more “radical” in the sense that term is used throughout most of the book. Instead, its appeal lies in its potential to break the political logjam that has, for generations, blocked more open immigration policies. If it realizes this potential, that would count as an enormous success. Unfortunately, the politics of immigration policy are likely not what the book seems to assume. For that reason, the proposal is unlikely to succeed as a matter of conventional politics.

I. ALLOCATING SCARCE MIGRATION RIGHTS

Posner and Weyl (PW) propose a sweeping overhaul of the way we allocate scarce labor migration rights.³ Today in the United States, migration entitlements (what we might call “visa rights”) are generally given out on a first-come, first-served basis to employers, as well as to US citizens with close family members abroad. These employers and citizens then play a central role in deciding who can come to the country, because they must sponsor a prospective employee or family member in order for that person to receive a visa. While some other nations (and sometimes the United States) allocate visas directly to migrants themselves, without intermediaries like firms or families playing a role in the process of screening prospective migrants, this transfer of valuable visa rights to domestic constituencies is a core feature of modern American immigration policy.⁴

³ Id at 127–67.

⁴ T. Alexander Aleinikoff, et al, *Immigration and Citizenship: Process and Policy* 309–71 (West 8th ed 2016).

PW argue that we should allocate visa rights to a different domestic constituency. Rather than allocating labor visas to employers, they contend, we should distribute them to domestic workers by giving every adult citizen in the United States the right to sponsor an overseas worker for a visa. Their proposal has a few other details, but that is its core, defining feature: the allocation of this valuable visa right to domestic workers, putting them in the driver's seat in the selection of new labor migrants, and allowing them to capture the value associated with migration rights.⁵ This transfer of value is what motivates their proposal. By assigning valuable visa rights to the domestic workers most likely to be hurt by increases in labor migration, PW argue, we ensure that domestic workers garner more of the migration surplus than they do under today's system (where employers capture much of the surplus). And changing the distributive consequences of labor migration, they argue, will reduce opposition by domestic workers to labor migration, making more open labor migration policies politically feasible.⁶

A. Valuing Visas

Given the book's focus on using markets to better allocate resources like housing, or data created on social media platforms, PW's proposal is initially perplexing. It does not seem to make much sense as a first-best strategy for allocating visa rights and screening prospective immigrants. Given their focus on international *labor* migration (the chapter is titled "Uniting the World's Workers," after all), you would think that a primary goal in the face of restrictions on access to overseas workers would be to allocate the right to hire an overseas worker (as opposed to a domestic worker) to the domestic firms that place the highest value on that right. The current US system does a terrible job at that task: labor visas are given away to firms basically for free, on a first-come, first-served basis, subject to the overall quota.⁷ Replacing quotas and queues with a mechanism to price and sell these visas to employers seems like a surefire way to improve the allocation of this scarce resource. Such an approach would fit squarely within the intellectual tradition at the core of the book.

⁵ Posner and Weyl, *Radical Markets* at 151–57 (cited in note 2).

⁶ *Id.* at 159–67.

⁷ For an overview of the quota system, see Aleinikoff, *Immigration and Citizenship* at 1 (cited in note 4).

Yet a market for this valuable property right is not what the book proposes. Instead it proposes a uniform distribution of the right, regardless of each recipient's private valuation.

B. Information and Matching Markets

While PW focus principally on the distributive consequences of giving valuable visa rights to domestic workers, these rights are more than just stores of value, like some financial instrument. They determine who exercises immigration law's core screening function. In other writing, Eric Posner and I have explained the way in which American immigration rules pervasively delegate the power to screen migrants to people and entities outside the federal government—like employers, families, and state and local governments.⁸ There are alternatives to this delegation of screening authority, like an immigrant “point” system that PW criticize on the ground that it is a poor instrument to picking among prospective migrants. But their approach similarly seems like a poor strategy for matching employers with the overseas workers who are the best fits for those workers.

Under our current labor migration rules, employers typically have the power to pick which prospective migrants should be sponsored for work visas. As Eric Posner and I have argued, this delegation of screening authority to employers takes advantage of their informational advantages. Employers are better able to screen workers partly because evaluating prospective employees is something they do all the time and on which their success depends. Moreover, employers have more information about their own needs and about what sorts of employees are good matches for their workplaces.

PW are clearly aware that ordinary citizens will often be ill-equipped to screen prospective immigrants as effectively as employers. Perhaps for that reason, the book devotes substantial attention to one exception to this general rule—the existing immigration law provisions permitting families to sponsor au pairs. Under those provisions, American parents are given the power to pick which prospective overseas au pairs will receive work visas to care for their children. But the au pair example, by its exceptional nature, only serves to highlight the general screening problem. Parents looking for an au pair are unique in several ways:

⁸ See generally Adam B. Cox and Eric A. Posner, *Delegation in Immigration Law*, 79 U Chi L Rev 1285 (2012).

they will be the employer for the migrant; they have the best information about their own childcare preferences; and after the au pair arrives, they have powerful incentives to quickly weed out poor matches for their children and family.

Under PW's scheme, there will surely be some new situations in which the citizen sponsor is also the ultimate employer. But unless we plan to induce every domestic worker to become an entrepreneur running a small business, most sponsors in their system will simply be selecting overseas workers who will then go work for someone else.

Under the PW proposal, therefore, most domestic workers would become labor brokers, new intermediaries in the labor market. While intermediaries can sometimes improve the functioning of labor markets by supplying information or reducing transaction costs, the PW proposal seems likely to both increase transaction costs and decrease the quality of migrant screening decisions. Maybe other labor brokers could take up some of these roles, and PW suggest that many domestic sponsors would outsource the screening of prospective migrants to other firms.⁹ But the more citizens outsource the screening decisions, the less it is clear why you would include the citizen sponsors in the system at all—except as a way to distribute resources to them.

C. Monopsony

Of course, visa rights are not like many other property rights, like spectrum licenses or pollution trading permits. Once they are exercised, they are no longer anonymous commodities; they are associated with an individual human being, entitling that person to reside in the receiving state. In labor migration contexts, this has led to perennial concern about the exploitation of foreign workers, particularly when a worker's right to remain in the country is held by her employer. Once the worker enters the coun-

⁹ To some extent this happens already today, when US firms enter into consulting contracts with outsourcing firms, like Tata Consultancy, who employ large numbers of H-1B visa holders who are placed in domestic firms. See Haeyoun Park, *How Outsourcing Companies Are Gaming the Visa System* (NY Times, Jan 25, 2015), online at <http://www.nytimes.com/interactive/2015/11/06/us/outsourcing-companies-dominate-h1b-visas.html> (visited on May 5, 2019) (Perma archive unavailable).

try under such an arrangement, her employer enjoys monopsonistic power over her. If it decides to stop purchasing her labor, she must leave the country.¹⁰

In chapters on real property markets and institutional investing, PW are centrally concerned with the social cost of monopoly. But the sister problem of monopsony would, if anything, be exacerbated by their proposal to give visa sponsorship rights to individuals. Individual US citizens, rather than large firms, would now hold each migrant's right to remain in the United States. It is hard to see how this would not raise the risk of exploitation associated with this monopsonistic power. Along the dimension of market power as well, therefore, the PW proposal seems to move away from the ideal rather than toward it.

II. THE POLITICS OF SECOND-BEST

All of this should make clear that PW's goal is not to design an optimal mechanism for allocating visas or for screening prospective migrants. Instead, their proposal is best understood as a second-best solution to those problems that is desirable for political reasons, not economic ones.

PW's ultimate goal is to reduce the scarcity of visa rights. More open immigration policies, they argue, will bring large benefits to a large number of people. Producers will profit from access to more (and different) workers. Consumers will benefit from reduced prices and higher rates of innovation. Migrants themselves will reap enormous rewards, making many multiples of what they previously made in their home countries. Global inequality will shrink. But for domestic workers who compete most closely with the new migrants, the diffuse benefits of a more robust economy may be offset by reduced wages. And even if domestic workers are not net losers in the bargain, the downside of wage reductions or stagnation will be much more salient than the upside of cheaper goods and services.

On PW's account, political opposition from domestic workers is what prevents the government from accepting higher rates of migration. But this opposition will dissolve, they believe, if visa

¹⁰ For one effort to measure the wage and employment effects of this monopsonistic power, see generally Suresh Naidu, Yaw Nyarko, and Shing-Yi Wang, *Worker Mobility in a Global Labor Market: Evidence from the United Arab Emirates*, 124 *J Pol Econ* 1735 (2016).

sponsorship rights typically awarded to employers were given instead to domestic workers. Those workers would then be able to capture much of the immigration surplus that currently is captured mostly by employers and the migrants themselves. These personal benefits will fuel support for more open immigration policies. And even if these workers were already being made better by migration, allocating sponsorship rights to them makes the benefits they receive more concrete and salient, again increasing their likely support for higher rates of labor migration.

From one perspective, this is conventional politics: if a group of people with political clout stand in the way of a socially valuable policy, you can pay them off to diffuse their opposition or garner their support. Of course, this is not the sort of solution typically preferred by economists. Economists are often more likely to argue that governments should adopt policies that are efficient or maximize social welfare. Distributive goals, it is often contended, should be advanced using the tax-and-transfer system, rather than regulatory policy. Moreover, elsewhere in *Radical Markets* PW explicitly eschew this sort of conventional solution to problems of political economy. In a chapter on “Radical Democracy,” they argue that politics itself should be restructured so that socially valuable projects cannot be blocked by a less-intensely-interested numerical majority. If we were to adopt their Radical Democracy proposal and it worked, would the immigration proposal be superfluous?

More striking, however, is the way in which this approach to reform seems methodologically the obverse of the rest of the book. Their focus is in the first instance on the distributive rather than allocative consequences of immigration policy. And political feasibility is a central factor driving their policy proposal, rather than feasibility being largely irrelevant.

To see the sharp contrast in approach, consider the book’s first chapter. “Property as Monopoly,” that chapter’s title, captures the problem the chapter seeks to tackle—the inefficient allocation of real property. Hold-out problems and asymmetric information keep property out of the hands of those who value it most. In the chapter’s opening vignette, a valuable high-speed rail project is blocked because it proves impossible to assemble land for tracks; needed parcels are in the hands of too many small farmers and landowners. PW’s solution is to adapt an old idea—

predating Vickrey—to force owners to truthfully reveal their private property valuations, as well as to prevent them from refusing to sell to anyone who values the property more greatly.

Imagine what this first chapter might have looked like had PW taken an approach more like that in their discussion of immigration policy. If a high-speed rail line is socially valuable but is blocked by self-interested farmers who won't fork over their land, there's a simple solution: offer those farmers large side payments in order to induce them to sell their land. Sure, this would allocate more of the social surplus from the rail project to those farmers, but that is exactly what PW are proposing in the context of immigration policy.

III. CONVENTIONAL POLITICS, OR UTOPIAN?

Even if it stands in sharp methodological contrast to the rest of the book, maybe the PW proposal is just the political medicine needed to spur the United States and other countries to adopt more open immigration policies. Unfortunately, I think it is unlikely that PW's proposal would produce the change in immigration politics that they predict. There is one banal reason for this, and one that is more interesting.

The banal reason is this: the Visas Between Individuals Program (VIP) that PW propose would give *every adult citizen* in the nation the right to sponsor an immigrant. As PW note, “[t]here are about 250 million adults in the United States. In principle, they could sponsor 250 million migrants every year under the VIP program.”¹¹ Today there are 22 million noncitizens living in the United States. Each year, about a million new noncitizens are admitted as green card holders.¹² Fewer enter on temporary work visas each year. Adopting the VIP system would mean that, overnight, the number of visa sponsorship rights might be expanded by two orders of magnitude. Because the VIP visas are not structured in the same way as conventional permanent or temporary labor visas in the United States, it is a tough to make direct comparisons. But even if we accept PW's estimate of the magnitude of the change, their system would still increase the number of mi-

¹¹ Posner and Weyl, *Radical Markets* at 160 (cited in note 2).

¹² See Yesenia D. Acosta, Luke J. Larsen, and Elizabeth M. Grieco, *Noncitizens under Age 35: 2010–2012* (US Census Bureau, Feb 2014), archived at <http://perma.cc/WS73-TPK8>.

grant workers “from 24 million to 100 million.” It is hard to imagine any political environment in which American voters would agree to policy changes that would create a country where more than one-third of all people were foreign born. The foreign-born population in the United States has never been higher than about 15 percent.¹³ And the last time it approached that percentage—in the first two decades of the last century—the politics of immigration policy became increasingly restrictive, culminating in the passage of the infamous national origins quota system.¹⁴

There’s also a deeper, more interesting reason to be skeptical—one that points to a tension in the political dynamics that PW implicitly assume drive immigration law. As I explained earlier, they argue that domestic workers who might compete with migrant workers will become more supportive of admitting those migrant workers if we re-jigger immigration policy to accomplish two objectives: first, to increase the economic benefits domestic workers receive from migration; second, to heighten the *salience* of the benefits received by domestic workers. The assumption underlying this political logic is that opposition to more open immigration policies is driven, at least for the relevant set of the electorate, principally by the economic consequences of immigration for those voters.

Nearly all the research trying to understand the determinants of voters’ preferences over immigration policy suggests that we should be skeptical about this assumption. Many papers find that voter preferences are largely unresponsive to economic factors. Cultural factors tend to be much more predictive of voters’ preferences over immigration policy.¹⁵ To be clear, there’s never been a policy reform remotely like the one PW propose. So one can’t rule out the possibility that the salience of the cash transfer produced by their proposal would shape voter preferences more than all of the other economic changes that have previously been studied by political scientists.

Yet elsewhere in the chapter, PW themselves appear to agree that something more than simple side payments will be necessary

¹³ See *US Immigrant Population and Share Over Time, 1850–Present*, (Migration Policy Institute 2017), archived at <http://perma.cc/Q7FM-LHVD>.

¹⁴ See generally, for example, Daniel J. Tichenor, *Dividing Lines: The Politics of Immigration Control in America* (Princeton 2002).

¹⁵ See generally, for example, Charles R. Chandler and Yung-mei Tsai, *Social Factors Influencing Immigration Attitudes: An Analysis of Data from the General Social Survey*, 38 *J of Soc Sci* 177 (2001).

to build support for more open immigration policies. Social contact, they suggest, may be the real key. Their Visas between Individual Persons (VIP) system structures the sponsorship process to generate more interactions between citizens and migrants. This is a deliberate design choice. They write: “Nor is money the only factor that is important to sustaining political support for migration. Positive cultural, social, and economic interactions at a personal level between migrants and natives is critical.”¹⁶ “Such mutually beneficial contact,” they argue in their conclusion, “is likely on average . . . to build the sort of positive relationship between hosts and migrants necessary to soften political opposition to migration.”¹⁷

This is a very optimistic account about the power of personal interactions to promote social cohesion and reduce prejudice. Unfortunately, American history suggests that this optimism may not be well-founded. Rising rates of immigration have historically been much more likely to lead to a nativist backlash. This was the pattern for Irish Catholics during 1830s and 1840s, for Chinese immigrants a little later in that century, for migrants from southern and Eastern Europe during the first decade of the twentieth century, and for Mexican migrants not long after that.¹⁸ In fact, it is hard to think of a time in American history when the social contact hypothesis worked as PW suggest it will—at least over any time frame shorter than a couple of generations.

PW argue that their immigration proposal will, by making the contacts citizens have with immigrants more intimate, generate a very different sort of political response. Putting aside the chicken-and-egg problem—the question of how the proposal would garner political support *in advance of* those more intimate social contacts—the possibility of such a dynamic turns on the plausibility of PW’s assumptions about the political and social outlook of those most opposed to immigration today. Discussing those voters, “workers in rural and economically depressed regions where few migrants reside,” PW say the following:

¹⁶ Posner and Weyl, *Radical Markets* at 149 (cited in note 2).

¹⁷ *Id.* at 157. This is a version of the contact hypothesis, long-proposed by social psychologists and others as a possible mechanism for reducing intergroup prejudice. See generally Gordon W. Allport, *The Nature of Prejudice* (Addison-Wesley 1954). Of course, it is also possible that increased contact will increase prejudice, as V.O. Key famously argued. See generally V.O. Key Jr, *Southern Politics in State and Nation* (Tennessee 1949).

¹⁸ See generally Aristide R. Zolberg, *A Nation by Design: Immigration Policy in the Fashioning of America* (Harvard 2008).

Workers in such areas see immigration adding to economic vibrancy in other communities, but not in their own. They gain none of the ancillary social and cultural benefits that dynamic city-dwellers gain from migration, of increased variety of food, color in urban life, or exposure to other cultures that can expand career opportunities. Instead, they see the rest of the country moving in directions that distance it from their experience in ways that increase their isolation and consignment to the cultural periphery.¹⁹

This passage suggests that workers in these rural, depressed areas are longing for immigration to bring economic benefits to their communities and are upset because they feel left out; that they are hoping for cultural change in their own communities and are frustrated by the feeling of being left behind. But this account is at odds with the conventional political wisdom. The standard story told about these voters (indeed, the story told by PW themselves in other parts of the chapter) is that workers in these communities don't believe that migrants bring economic vibrancy or benefits; they see migrants instead as a drain on society. Nor, on the conventional account, do workers in these communities see cultural change as a benefit. They see it instead as a threat.

If this conventional wisdom is right, the political economy of immigration policy may be dramatically different than PW imagine. Even reimaged as conventional politics, therefore, *Radical Markets* seems unlikely to supply the fix for today's broken immigration policies.

¹⁹ Posner and Weyl, *Radical Markets* at 146 (cited in note 2).