

THE RACE FOR TALENT: HIGHLY SKILLED MIGRANTS AND COMPETITIVE IMMIGRATION REGIMES

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The United States has long been the ultimate “IQ magnet” for highly skilled migrants. But this trend has changed dramatically in recent years. Today, the United States is no longer the sole—nor the most sophisticated—national player engaged in recruiting the “best and brightest” worldwide. Other attractive immigration destinations, such as Canada, Australia, and the United Kingdom, have created selective immigration programs designed to attract these highly skilled migrants. Professor Shachar analyzes this growing competition among nations, referring to it as the “race for talent.” Whereas standard accounts of immigration policymaking focus on domestic politics and global economic pressures, Professor Shachar highlights the significance of interjurisdictional competition. This new perspective explains how and why immigration policymakers in leading destination countries try to emulate—or, if possible, exceed—the skilled-stream recruitment efforts of their international counterparts. These targeted migration programs increasingly serve as a tool to retain or gain an advantage in the new global economy. Indeed, countries are willing to go so far as to offer a “talent for citizenship” exchange in order to gain the net positive effects associated with skilled migration. Such programs are clearly successful, as evidenced by the increase in the inflow of highly skilled migrants to those countries. Simultaneously, emigrants’ home nations have engaged in efforts to reap a share of the welfare-enhancing contributions generated by their highly skilled emigrants, including redefinition of the nation’s membership boundaries. This consequence of the race for talent raises significant questions about the relations between citizenship and justice, as well as mobility and distribution, on a global scale. For the United States, which has traditionally enjoyed an unparalleled advantage in recruiting global talent, these new global challenges come at a difficult time. They compound long-standing problems in America’s immigration system, which have only become more pronounced in the post-9/11 era.

* Copyright © 2006 Ayelet Shachar, Faculty of Law, University of Toronto. I greatly benefited from the comments and criticisms I received on earlier drafts, particularly from Ran Hirschl, Lou Pauly, and Peter Schuck. My interest in the topic of competitive immigration regimes has undoubtedly been influenced by my own personal experience as an international “knowledge migrant,” but it has been equally shaped by my professional experience as a professor of immigration law at Toronto. I owe a debt of gratitude to Ron Daniels for entrusting me with this responsibility. I also thank Alex Aleinikoff, Michael Walzer, and Michael Trebilcock, each of whom has influenced my thinking on this topic. I would like to acknowledge the outstanding research and production assistance of Helena Likornik, Ben Fishman, James Hunter, and Meredith Stead. This research was generously supported by grants from the Cecil A. Wright Foundation for Legal Scholarship, the Jean Monnet Center for International and Regional Economic Law & Justice at New York University School of Law, and the University of Toronto’s Connaught Research Fellowship in the Social Sciences.

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"The United States' status as 'the IQ magnet of the world' [is] threatened as a result of . . . tougher immigration rules"¹

INTRODUCTION

Between 1901 and 1991, the most coveted honor in scientific research, the Nobel Prize, was awarded to one hundred researchers in the United States. Less well-known is that almost half of these Nobel Prizes were won by foreign-born researchers or first-generation immigrants.² These Nobel Prize winners, along with many other highly

¹ See *Gates Laments Visa-Related Brain Drain*, UNITED PRESS INT'L, Jan. 31, 2005 (reporting comments made by Microsoft Chairman, Bill Gates, at World Economic Forum, Davos, Switzerland).

² See ROB PARAL & BENJAMIN JOHNSON, IMMIGRATION POLICY CTR., MAINTAINING A COMPETITIVE EDGE: THE ROLE OF THE FOREIGN-BORN AND U.S. IMMIGRATION POLI-

skilled immigrants, have provided the United States with a rare pool of talent, ambition, and expertise that are the *sine qua non* for maintaining a competitive advantage in the knowledge-based global economy.³ The United States has traditionally relied on a combination of world-class universities and research institutes, the promise of greater personal freedom and political stability, and relatively lax immigration policies to attract the best international “knowledge migrants.”⁴ But at the beginning of the twenty-first century, the United States is no longer the sole—nor the most sophisticated—national player engaged in this global race for talent.⁵

CIES IN SCIENCE AND ENGINEERING 2 (2004), available at <http://www.aifl.org/ipc/ipf081804.pdf>. In addition to these Nobel laureates, the foreign-born and foreign-educated are disproportionately represented among individuals making exceptional contributions to science and engineering, as indicated, for example, by their significantly high representation among recipients of highly cited patents and innovator awards. See ORG. FOR ECON. COOPERATION & DEV., INTERNATIONAL MOBILITY OF THE HIGHLY SKILLED 88 (2001) [hereinafter OECD 2001]; see also ANNALEE SAXENIAN, SILICON VALLEY'S NEW IMMIGRANT ENTREPRENEURS (Pub. Pol'y Inst. of Cal. ed., 1999), available at http://www.ppic.org/content/pubs/R_699ASR.pdf (analyzing role of Chinese and Indian immigrants in entrepreneurship in Silicon Valley).

³ In the knowledge-based global economy, “the resource that is in greatest scarcity is human capital.” Stephen Moore, *A Strategic U.S. Immigration Policy for the New Economy*, in BLUEPRINTS FOR AN IDEAL LEGAL IMMIGRATION POLICY 69, 69 (Richard D. Lamm & Alan Simpson eds., 2001), available at <http://www.cis.org/articles/2001/blueprints/blueprints.pdf>. The importance of human capital to growth is now widely accepted. See, e.g., GARY S. BECKER, HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS, WITH SPECIAL REFERENCE TO EDUCATION (3d ed., 1993); THEODORE W. SCHULTZ, THE ECONOMIC VALUE OF EDUCATION (1963); Theodore W. Schultz, *Investment in Human Capital*, 51 AM. ECON. REV. 1 (1961). In 2003, a comprehensive study by the National Science Board found that “[s]cience and technology have been and will continue to be engines of US economic growth.” NAT'L SCI. BD., THE SCIENCE AND ENGINEERING WORKFORCE: REALIZING AMERICA'S POTENTIAL 1 (2003), available at <http://www.nsf.gov/nsb/documents/2003/nsb0369/nsb0369.pdf> [hereinafter NSB, REALIZING AMERICA'S POTENTIAL]. Similarly, a comprehensive review by the Canadian government concludes that “[c]ountries that succeed in the 21st century will be those with citizens who are creative, adaptable and skilled.” GOV'T OF CAN., KNOWLEDGE MATTERS: SKILLS AND LEARNING FOR CANADIANS 5 (2002), available at <http://www11.sdc.gc.ca/sl-ca/doc/knowledge.pdf>.

⁴ I use the terms “knowledge migrants” and “highly skilled migrants” interchangeably throughout this piece. In the immigration literature, global migration flows are typically defined as falling into three main categories: family migration (allowing immediate family members of citizens and permanent residents to enter the destination country); employment-based/skilled migration (providing individuals with specialized human capital access to employment visas or permanent residence status on the basis of their potential to bring benefits to the receiving state); and humanitarian migration (guaranteeing a temporary or permanent safe haven to individuals who have fled their original home country due to persecution and related violations of their basic human rights). Of these various streams of international migration, I will focus only on skilled migrants.

⁵ Numerous reports and articles demonstrate the inefficiencies of the current U.S. “alphabet soup” of immigrant and nonimmigrant visas as set out in Section 101(a)(15) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101(a)(15) (2000 & Supp. I

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Over the last few decades, other attractive immigration destinations, such as Canada and Australia, have created selective immigration programs designed to attract the “best and the brightest” worldwide, based on an immigrant’s ability to contribute to the receiving country’s knowledge-based economy.⁶ More recently, France, Germany, Ireland, Sweden, the United Kingdom, and other European Union nations have introduced fast-track admission processes for highly skilled professionals, especially those working in information technology (IT).⁷ These programs are designed to allow those endowed with specialized human capital to immerse themselves quickly in the receiving country’s workforce. In addition, there is the promise of ultimately acquiring permanent residence and secure membership status (and thereby entering the EU free-movement zone).⁸

Recent migration reports by the Organization for Economic Cooperation and Development (OECD) confirm that these selective immigration policies are bearing fruit. Countries that have adopted them have seen a significant increase in their recruitment of highly skilled migrants.⁹ The data also show that those countries that have

2001–02). For a comprehensive overview, see DEMETRIOS G. PAPADEMETRIOU & STEPHEN YALE-LOEHR, *BALANCING INTERESTS: RETHINKING U.S. SELECTION OF SKILLED IMMIGRANTS* (1996); *see also* Charles B. Keely, *Nonimmigrant Visa Policy of the United States*, in *FOREIGN TEMPORARY WORKERS IN AMERICA: POLICIES THAT BENEFIT THE U.S. ECONOMY* 95 (B. Lindsay Lowell ed., 1999) [hereinafter *FOREIGN TEMPORARY WORKERS*]. Highly skilled workers can be admitted to the United States either as permanent residents with green cards, or as “temporary” professional and specialty workers, under the H-1B visa. Those admitted under the H-1B program may later apply for an adjustment to permanent residency (“green card” status). *See* OECD 2001, *supra* note 2, at 272. Nevertheless, the existing immigration system is not geared towards skills-based selection for permanent residency. *See* Stephen Yale-Loehr & Christoph Hoashi-Erhardt, *A Comparative Look at Immigration and Human Capital Assessment*, 16 *GEO. IMMIGR. L.J.* 99 (2001) (criticizing current American immigration law and policy for not introducing “point-based” system for selecting skilled-stream migrants, and comparing United States with Canada and Australia). In the post-9/11 era, the United States has significantly increased the security screening of visa applicants, which has caused delays and bureaucratic backlogs. This has made the recruitment of international students for advanced degrees in science and engineering more difficult for American universities. The United States seems to be losing at least some of these international students to competing programs in Europe and Asia. *See infra* text accompanying notes 11–13.

⁶ *See infra* Part II. In 1967, Canada was the first country to introduce the then-innovative point-system matrix for selecting skilled migrants. Individuals entering as skilled migrants are granted an immigration visa for permanent residence in Canada on the basis of their point-system performance, which primarily rewards post-secondary education and acquired professional skills. *See infra* Part II.A.2.

⁷ OECD 2001, *supra* note 2, at 7.

⁸ These policies not only facilitate initial entry into the destination country, but also make it easier for foreign students and skilled professionals to find work and establish permanent residency.

⁹ *See* OECD 2001, *supra* note 2, at 29.

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selective admission procedures, such as Australia, Canada, Ireland, and the United Kingdom, have the highest proportion of well-educated persons among immigrants (30% to 42%).¹⁰ And whereas the United States has traditionally been the “IQ magnet” for talented foreign students, its reign in this area too is increasingly being challenged.¹¹ Between 2001 and 2003, for example, the inflow of foreign students to top universities and research institutes increased by more than 36% in the United Kingdom, 30% in France, and 13% in Australia.¹² During the same period, inflows of foreign students declined steeply in the United States, dropping by 26%.¹³ Evidently, America’s competitors are making significant advances in targeting, attracting, and retaining highly skilled migrants.

With the rise of the knowledge economy, the premium placed by OECD countries on the skilled migrant’s talent (measured, for example, through post-secondary educational attainment and cutting-edge technological skills) has grown dramatically. It has gained such prominence because “[t]alent is different from other sources of competitive advantage. Talent is encapsulated in individuals”¹⁴ As such, it cannot be codified, duplicated, sold, or easily transferred from one person to another. In other words, it is the *human* in “human capital” that makes it a unique, distinct, and irreplaceable resource. Add to this the fact that highly skilled workers generate substantial economic value and wealth and it is not surprising that we are now witnessing a growing competition among industrialized nations to attract highly skilled migrants. This *race for talent* is the subject of my inquiry. Whereas standard accounts of immigration policymaking focus on domestic politics and global economic pressures, my analysis

¹⁰ Org. for Econ. Co-Operation & Dev., Migration Flows to Major OECD Countries Seem to Be Stabilizing, Data Show (Mar. 22, 2005), http://www.oecd.org/document/28/0,2340,en_2649_201185_34606364_1_1_1_1,00.html [hereinafter OECD Migration Flows]. In Canada, forty-six percent of immigrants in 2002 had at least a university education. ORG. FOR ECON. CO-OPERATION & DEV., TRENDS IN INTERNATIONAL MIGRATION 170 (2005) [hereinafter OECD 2005].

¹¹ See Victoria Gilman & William G. Schulz, *U.S. Schools Losing Foreign Talent*, CHEMICAL & ENGINEERING NEWS, Apr. 5, 2004, at 67.

¹² See OECD Migration Flows, *supra* note 10. Countries in the European Union, Japan, and Canada are also engaged in this competition for talented foreign students. See OECD 2005, *supra* note 10, at 36–37, 105–06, 215.

¹³ OECD Migration Flows, *supra* note 10; PARAL & JOHNSON, *supra* note 2, at 2. This trend, which began prior to 9/11, only strengthened in its aftermath due to lengthy delays in visa processing and security screenings. See Gilman & Schulz, *supra* note 11, at 67; William J. Broad, *U.S. Is Losing Its Dominance in the Sciences*, N.Y. TIMES, May 3, 2004, at A1.

¹⁴ See L.E.K. CONSULTING, NEW ZEALAND TALENT INITIATIVE: STRATEGIES FOR BUILDING A TALENTED NATION 3 (2001), available at <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN004863.pdf>.

highlights the significance of interjurisdictional interaction. This new perspective, which I call *competitive immigration regimes*, explains how and why immigration policymakers in leading destination countries try to emulate—or if possible exceed—the skilled-stream recruitment efforts of their international counterparts.

The evidence presented here shows that national immigration policymakers engaged in the global talent hunt are increasingly operating under the assumption that unless their governments proactively “match” the offers of admission and settlement extended to the “best and the brightest” by other nations, their country will lose out in the global race for talent. Under such conditions, rational immigration policymakers must take into account the selective migration initiatives adopted by their competitors in designing their own initiatives to attract world-class talent.¹⁵ The crucial point about state action here is that it takes place in the context of a competitive scramble *among* jurisdictions, where each talent-recruiting country is influenced by the immigration initiatives adopted by its main rivals. This interjurisdictional influence has permeated deeply into the practical world of immigration law and policy.¹⁶ It is evident, among other places, in the many reports and public declarations made by top government immigration officials.¹⁷

These findings profoundly challenge the standard analysis of immigration law as a relatively insulated and domestic-centered policy arena.¹⁸ Instead, my analysis shows (1) that there is growing international competition for skilled immigrants; (2) that leading countries do learn from, and emulate, each other; and (3) that all of this is relatively new, having begun with the U.S. policy changes under President Lyndon Johnson. This interjurisdictional policy emulation is fueled by the perception that “targeted” or “managed” skilled migration programs serve as an important tool for retaining or gaining a competitive advantage in the new global economy. To illuminate these dramatic changes in the world of immigration law and policy, I trace the manifold ways in which changes to policies designed to lure the highly skilled to one country lead other jurisdictions to adjust their behavior to ensure that their countries remain a viable choice for the most tal-

¹⁵ See GOV'T OF CAN., *ACHIEVING EXCELLENCE: INVESTING IN PEOPLE, KNOWLEDGE AND OPPORTUNITY 57* (2001), available at [http://innovation.gc.ca/gol/innovation/site.nsf/vDownload/Page_PDF/\\$file/Achieving.pdf](http://innovation.gc.ca/gol/innovation/site.nsf/vDownload/Page_PDF/$file/Achieving.pdf).

¹⁶ See *infra* Part I.C, I.D.

¹⁷ The most dramatic changes in this regard are found in the recent reversal by European countries of their prior “zero immigration” policies. I elaborate on this last point in the analysis of Germany’s new Immigration Act. See *infra* Part II.C.1.

¹⁸ For the standard view and its limitations, see *infra* Part I.

ented migrants.¹⁹ This competitive rationale is at the core of the new global race for talent, which immigration theorists have neither identified nor explained.²⁰

In the following pages, I develop a new framework for understanding the rise of this interjurisdictional competition for talent. I argue that in this race, advanced industrial countries are trying to outbid one another in an effort to attract highly skilled migrants to their domestic industries in order to gain (or retain) a relative advantage over their international competitors in the knowledge-based

¹⁹ Attracting the highly skilled to a given country is perceived not only as strengthening its economy, but also as decreasing the supply of individuals with marketable skills to other countries. Industrial nations wish to ensure that they do not suffer negative consequences as a result of their competitors' relative gain. See *infra* Part II.B. From the perspective of the individual skilled migrant, this competitive pattern represents a race-to-the-top. From the perspective of the emigration country, however, it is harder to assess the long-term economic development and welfare consequences of the outflow of skilled migration. The assumption of a "brain drain" loss that has been prevalent in the 1960s and 1970s has recently been challenged by the "brain circulation" thesis, which emphasizes the many ways in which skilled emigrants can contribute to their home country, for instance, through investment of financial resources, entrepreneurial activities, networking, return migration, and so on. See Bimal Ghosh, *Economic Effects of International Migration: A Synoptic Overview*, in INT'L ORG. FOR MIGRATION, *WORLD MIGRATION: COSTS AND BENEFITS OF INTERNATIONAL MIGRATION* 163, 173–77 (2005), available at http://www.iom.int/documents/publication/wmr_sec02.pdf. Several recent studies have tried to weigh the effects of "brain loss" versus "brain circulation," but no conclusive answers have been found. See, e.g., William J. Carrington & Enrica Detragiache, *How Big Is the Brain Drain?* (Int'l Monetary Fund (IMF), Working Paper No. WP/98/102, 1998), available at <http://www.imf.org/external/pubs/ft/wp/wp98102.pdf>; Frédéric Docquier & Hillel Rapoport, *Skilled Migration: The Perspective of Developing Countries* (World Bank, Working Paper No. WPS 3382, 2004), available at http://wdsbeta.worldbank.org/external/default/WDSContentServer/IW3P/IB/2004/09/22/000160016_20040922151739/Rendered/PDF/WPS3382.pdf.

²⁰ Several theories emphasize the various "push" and "pull" factors that shape international migration flows: network and clustering patterns; the impacts of economic globalization on creating a mobile population; and the lingering effects of colonial, cultural, and linguistic ties, as well as geographic proximity, on the choice of destination countries. See SASKIA SASSEN, *THE MOBILITY OF LABOR AND CAPITAL: A STUDY IN INTERNATIONAL INVESTMENT AND LABOR FLOW* (1988) (analyzing impact of economic internationalization and organization of labor markets in both emigration and immigration countries on formation and direction of international migration flows); Everett S. Lee, *A Theory of Migration*, 3 *DEMOGRAPHY* 47 (1966) (analyzing push-pull factors); Peggy Levitt, *Transnational Migration: Taking Stock and Future Directions*, 1 *GLOBAL NETWORKS* 195 (2001) (describing new patterns of transnational migration and their effects on home and diaspora communities); Douglas S. Massey et al., *Theories of International Migration: A Review and Appraisal*, 19 *POPULATION & DEV. REV.* 431, 448–50 (1993) (applying network theories to migration); Jeannette Money, *No Vacancy: The Political Geography of Immigration Control in Advanced Industrial Countries*, 51 *INT'L ORG.* 685, 685 (1997) (studying clustering patterns in international migration); Alejandro Portes & József Böröcz, *Contemporary Immigration: Theoretical Perspectives on its Determinants and Modes of Incorporation*, 23 *INT'L MIGRATION REV.* 606, 608–09 (1989) (highlighting importance of prior contact between sending and receiving countries in explaining international migration flows). To the best of my knowledge, none of the existing theories have explored the role and impact of interjurisdictional competition on national immigration law and policymaking.

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global economy. Arguably, adopting a selective immigration strategy is valuable in its own right: It allows each destination country to capture the benefits of knowledge migrants' enhanced skills and capacities.²¹ However, once the race for talent has begun, the pressure to engage in targeted recruitment increases, as no country wants to be left behind.²² As a result, a nation's immigration policy can no longer be understood as insulated from or oblivious to the actions of other countries. When it comes to luring the highly skilled, modern states "cannot live in splendid isolation."²³ Instead, they must take into account the selective migration initiatives of other countries. Immigration policymaking has thus become a multiplayer and multilevel game.

Indeed, countries are willing to go so far as to reconfigure the boundaries of political membership in order to gain the net positive effects associated with skilled migration.²⁴ Specifically, I consider how national governments are proactively using their exclusive control over the property of citizenship to attract highly skilled migrants, showing that the promise of acquiring citizenship in the receiving country has itself become a competitive tool used to attract and retain knowledge migrants.²⁵

In this new and highly competitive global environment, national policymakers must increasingly engage in a *multilevel* game in devising their immigration policies. They must address *domestic* interest groups, as well as respond to (or preferably preempt) the

²¹ A recent OECD document describes the benefits of these policies as follows: "[T]here are several net positive effects for the main host countries, notably, the stimulation of innovation capacity, an increase in the stock of available human capital and the international dissemination of knowledge. . . . Skilled migrants are also a source of high-tech entrepreneurship." ORG. FOR ECON. CO-OPERATION & DEV., POLICY BRIEF: INTERNATIONAL MOBILITY OF THE HIGHLY SKILLED 4 (July 2002), available at <http://www.oecd.org/dataoecd/9/20/1950028.pdf> [hereinafter OECD POLICY BRIEF]; see also OECD 2001, *supra* note 2, at 4.

²² The competitive race for talent identified here operates as a two-level game, with both international and domestic factors shaping it and interacting with each other. I highlight, however, the competitive interjurisdictional dimension, in part because this global race can operate almost irrespective of the domestic "skills shortage" debate in each receiving country. The reason for this is that, once the global race begins, there is pressure to compete even if the destination country is initially "self-sufficient" (i.e., enough skilled workers are educated and trained domestically to satisfy labor demands). Despite self-sufficiency, that country may become disadvantaged when a competing jurisdiction is significantly strengthened by the recruitment of overseas knowledge migrants who can immediately enter its high-tech industries.

²³ See *Morguard Inv. Ltd. v. De Savoye*, [1990] S.C.R. 1077, 1095 (Can.).

²⁴ See *infra* Part III.

²⁵ See, e.g., *infra* Part I.C.

competitive recruitment efforts by their *international* counterparts.²⁶ In this dynamic interaction, immigration policymakers tend to engage in transnational “borrowing,” learning from—or simply “importing”—the innovations of their counterparts.²⁷ But this policy emulation pattern, in which one country attempts to copy the success of another, is not informed by an international attempt to coordinate national policies or reach harmonization of admission standards.²⁸ Rather, it exemplifies *non-cooperative* action taken by fiercely competitive jurisdictions.²⁹ In the long run, this cross-jurisdictional fertili-

²⁶ On two-level games, see Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988); see also Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167 (1999).

²⁷ “Borrowing” between legal systems has become a key concept in comparative constitutional law, referring to a variety of legal mechanisms of interjurisdictional learning, ranging from subtle conceptual influences to direct citations of major court decisions from foreign jurisdictions. On the methodological complexities associated with comparative constitutionalism, see Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125 (2005).

²⁸ There is a rich literature in international relations on cooperation among states and the coordination of national policies. For some of the most influential contributions, see ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984); HELEN V. MILNER, *INTERESTS, INSTITUTIONS, AND INFORMATION: DOMESTIC POLITICS AND INTERNATIONAL RELATIONS* (1997); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); ORAN R. YOUNG, *INTERNATIONAL COOPERATION: BUILDING REGIMES FOR NATURAL RESOURCES AND THE ENVIRONMENT* (1989). My analysis emphasizes competitive rather than cooperative behavior among destination countries.

²⁹ Legal and political economy scholars have offered comprehensive analyses of jurisdictional or regulatory competition within federal units, such as the United States or Canada. This regulatory competition may occur among co-equal subunits, such as states or provinces (horizontal federalism), or between different levels of jurisdictional authority, such as local, state, and federal regulators (vertical federalism). The classic contribution that sparked much of the debate over the welfare effects of jurisdictional competition remains Charles Tiebout's 1956 article. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (theorizing relationship between jurisdictional choices and changes in local regulatory climates). See also ALBERT BRETON, *COMPETITIVE GOVERNMENTS: AN ECONOMIC THEORY OF POLITICS AND PUBLIC FINANCE* 228–63 (1996) (describing and offering evidence for various forms of intergovernmental competition). For a discussion of interjurisdictional competition in the context of corporate law, see ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* (1993); William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L. J. 663 (1974); Douglas J. Cumming & Jeffrey G. MacIntosh, *The Role of Interjurisdictional Competition in Shaping Canadian Corporate Law*, 20 INT'L REV. L. & ECON. 141 (2000); Ronald J. Daniels, *Should Provinces Compete? The Case for a Competitive Corporate Law Market*, 36 MCGILL L.J. 130 (1991); Klaus Heine & Wolfgang Kerber, *European Corporate Laws, Regulatory Competition, and Path Dependence*, 13 EUR. J.L. & ECON. 47 (2002). Scholars have also explored jurisdictional competition in other fields of law. See AYELET SHACHAR, *MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS* (2001) (jurisdictional competition between state and religious courts); Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277 (1990) (conflicts of law); Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005) (constitutional law); Richard L. Revesz, *Rehabilitating Interstate Competition:*

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zation may nevertheless lead to a significant policy convergence among rival economies. This replication or domino effect is illustrated, for example, by the recent revival in most OECD countries of temporary employment-based visas, which, in several variations, can later be adjusted to permanent immigration status in the host society.³⁰

Importantly, this competitive behavior has not resulted in nations losing control over their own immigration policies. Rather, it has created a more complex playing field on which immigration agencies are taking a more active role. They must increasingly design human capital recruitment policies that extend *across* borders, while engaging in *interjurisdictional* competition with other talent-recruiting nations.

To bear out these theoretical claims, I systematically examine the design and redesign of selective skilled migration categories by immigration policymakers of the leading OECD destination countries, showing that these frequent policy changes follow the logic of competitive immigration regimes. My discussion is informed by the “targeted” national immigration policies adopted by the United States, Canada, Australia, New Zealand, Germany, the United Kingdom, and Sweden. This case selection is designed to provide both a diachronic and comparative perspective that captures the scope and depth of the now-global race for talent as well as its implications for our traditional understandings of citizenship.

My approach shares several important insights with Kim Barry’s compelling account in *Home and Away: The Construction of Citizenship in an Emigrant Context*.³¹ In that Article, Barry argues that in recent years emigrant states have begun to re-embrace their nonresident nationals as heroic members of the “imagined” home commu-

Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation, 67 N.Y.U. L. REV. 1210 (1992) (environmental law). Note that my analysis of jurisdictional competition focuses on the international arena, where different countries are trying to outbid one another in their competition over highly skilled would-be immigrants. This framework of analysis raises a complex set of questions regarding the definition of a polity’s national identity (i.e., who it admits as a future member and on what basis), questions that do not typically arise in the regulatory competition analysis.

³⁰ In the United States, for example, a significant percentage of foreign students, researchers, and H-1B skilled workers adjust their temporary study/work visas to permanent residency status. See *infra* Part II.B. Other examples of transnational borrowing in this field include initiatives to retain foreign graduate students who have obtained post-secondary degrees in the host country. See OECD 2001, *supra* note 2, at 45; OECD 2005, *supra* note 10, at 105–06. More recently, the trend in countries such as Canada and Australia is to encourage the migration of highly skilled professionals in dual career families. In the latter case, both spouses can contribute to the human capital of the receiving state. See *infra* text accompanying notes 88–89 (Canada), 152–53 (Australia).

³¹ See Kim Barry, *Home and Away: The Construction of Citizenship in an Emigration Context*, 81 N.Y.U. L. REV. 11 (2006).

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nity.³² “Sending” countries in the poorer regions of the world have been especially eager to extend membership in the home community to a subset of their international emigrant population—those who have settled in wealthier polities.³³ Barry sees this development as being driven primarily by interest-based, economic motivations, which are then intermingled with the language of national membership and affiliation. This process of “re-incorporating” emigrants into the home society—despite their continued physical presence outside its territory—permits the extraction of various financial benefits from them, such as remittances and foreign-capital investment inflows.³⁴ In return for their economic contribution, the emigrants’ social and political image is reconstructed. No longer are they treated as absent and suspect ex-members of the national society. Instead, they are seen as “heroic citizens contributing to the national project by undertaking the great sacrifice of living abroad.”³⁵

My analysis establishes that a similar “realist” willingness on the part of states to selectively expand the boundaries of membership in return for talent and innovation informs the skills-stream recruitment strategies of receiving countries. In addition to conceptualizing the rise of a global race for talent, focusing on *competitive* immigration regimes permits us to add a *political* dimension to the typically economics-focused and domestic-centered analysis of the international migration of highly skilled workers. Specifically, I treat the goal of gaining citizenship in the destination state as an independent factor that may affect the choices of knowledge emigrants in choosing a destination country, no less than considerations of pure professional advancement. Indeed, I will argue that immigration and settlement agencies in OECD countries have come to recognize that highly skilled migrants from the rest of the world view the acquisition of political membership in a stable and affluent country as a valued good in itself. In exchange for their specialized knowledge and labor-

³² *Id.* at 14. The reference to the “imagined” nation or political community is drawn from the influential work of Benedict Anderson. *See, e.g.*, BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (rev. ed. 1991).

³³ *See* Barry, *supra* note 31, at 43.

³⁴ *Id.* at 28–31, 35–42.

³⁵ *Id.* at 34. Barry’s interest-based account of why emigration states in the South rediscovered the well-to-do members of their diasporic communities in the North recognizes the complexity of the matter, but concludes: “Given the current disparities in economic development between North and South . . . it seems clear that emigration states’ interest in their emigrant nationals is driven primarily by economic considerations.” *Id.* at 28. Barry is critical of states that welcome the economic contributions of their emigrant communities, but fail to respond to these nonresident nationals’ demands for full political inclusion from abroad, in the form, for example, of direct electoral participation. *Id.* at 51–58.

market contributions, a select echelon of professionals gain not only access to cutting edge research and development work (and other professional advantages) but also the invaluable prize of establishing citizenship for themselves and their families in a stable, democratic, and affluent polity.³⁶

My discussion proceeds in three parts. In Part I, I briefly explain why we need a new theoretical framework for understanding the rise of competitive immigration regimes governing highly skilled workers. I go on to show how governments in smaller economies are now offering “incentive packages” that are tailored to attract this new brand of advanced-degree knowledge migrant.³⁷ The packages typically include as the ultimate prize the right to establish permanent residency and eventually full citizenship. I will call this the *talent-for-citizenship* exchange.

Part II provides a legal and comparative account of the rise and expansion of the global race for talent, tracing the major turning points in the development of selective immigration programs in the competing destination states. We can easily pinpoint the beginning of this race: It started in the mid-1960s in the United States, with the adoption of the landmark 1965 amendments to the Immigration and Nationality Act (INA),³⁸ followed just two years later by Canada’s introduction of a novel and influential admission criterion—the “point system”—for attracting the highly skilled.³⁹ Similar programs were later introduced by Australia,⁴⁰ and then New Zealand.⁴¹ Together, these four countries represent the world’s traditional immigrant-receiving destinations. Over the last decade, however, the race for talent has expanded to include most of the countries of the European Union, which now aggressively recruit talented foreign students and highly skilled workers from outside Europe.⁴² The race further accelerated when some of the more dynamic Asian economies, such as

³⁶ It should be noted that, while the current race for talent bestows ever greater rewards on those deemed most skilled and insightful, the less-skilled are consigned to ever-tightening regulations of cross-border flows. See, e.g., Peter Andreas, *The Escalation of U.S. Immigration Control in the Post-NAFTA Era*, 113 POL. SCI. Q. 591 (1998); Don Flynn, *New Borders, New Management: The Dilemmas of Modern Immigration Policies*, 28 ETHNIC & RACIAL STUD. 463 (2005). For further discussion, see *infra* Part III.

³⁷ Nations typically extend these packages based on the assessment that skilled workers will create a net benefit to the receiving political community. See OECD 2001, *supra* note 2, at 81–84; OECD 2005, *supra* note 10, at 133–34.

³⁸ Immigration and Nationality Act 1965 Amendments, Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified as amended in scattered sections of 8 U.S.C.).

³⁹ See *infra* Part II.A.2.

⁴⁰ See *infra* Part II.A.3.

⁴¹ See *infra* Part II.A.4.

⁴² See *infra* Part II.C.

Singapore,⁴³ Taiwan,⁴⁴ and South Korea,⁴⁵ also began to recruit globally. These once-emigration countries are also trying to lure back home their most eminent national scientists, many of whom have studied and worked abroad for many years, by offering them generous resettlement offers upon their return.⁴⁶

In Part III, I reflect on the changing conceptions of citizenship that have accompanied the rise of the global race for talent. I then raise the ethical concerns associated with the surge of outflows of skilled migrants from poorer to richer nations, highlighting the need to find bold and substantive solutions to the unbalanced welfare and distributive effects of the global race for talent, especially on source countries. Finally, I reflect on the relationship between my analysis and Kim Barry's account of the recent extension of membership-

⁴³ Singapore encourages the admission of highly skilled professionals with a number of incentives, including the granting of permanent residence status. See Robyn Iredale, *Balancing the Benefits and Costs of Skilled Migration in the Asia-Pacific Region*, in INT'L ORG. FOR MIGRATION, *WORLD MIGRATION: COSTS AND BENEFITS OF INTERNATIONAL MIGRATION* 221, 226 (2005), available at http://www.iom.int/documents/publication/wmr_sec02.pdf.

⁴⁴ Taiwan relies on a mixed government-business partnership to allow skilled workers to enter the country. The government issues visas to those who hold the relevant formal qualifications after they have been selected for work by a Taiwan-based employer. *Id.* at 226.

⁴⁵ South Korea recently amended its Immigration and Emigration Law so as to allow for an almost unlimited stay for skilled professionals. See ORG. FOR ECON. CO-OPERATION & DEV., *MIGRATION AND THE LABOUR MARKET IN ASIA: RECENT TRENDS AND POLICIES* 222 (2001).

⁴⁶ As part of a broader effort to build their national technological and innovation infrastructure, these countries have introduced programs to repatriate scientists and engineers from abroad; for instance, through heavy investment in public research and development capacity. See OECD 2001, *supra* note 2, at 92. The phenomenal economic growth and infrastructure development in China and India may also affect the race in the years to come, especially in light of the crucial role played by emigrant entrepreneur networks in helping their home countries to capture some of the benefits of the knowledge and expertise of their highly skilled overseas population. See SAXENIAN, *supra* note 2, at 28, 53. Whereas China is fast becoming the computer hardware giant of the high-tech industry, India is emerging as a leader on the software side. See *China, India: Rule Global Tech?*, WIRED, Apr. 10, 2005, <http://www.wired.com/news/business/0,1367,67181,00.html>. Between 1995 and 2000, the Indian information technology (IT) industry recorded a compounded annual growth rate of 42.4%. The bulk of this growth is attributed to software development revenues. See Nirupam Bajpai & Jeffrey D. Sachs, *India in the Era of Economic Reforms—From Outsourcing to Innovation*, THINK ON, May 2005, at 32, 36, available at <http://www.earthinstitute.columbia.edu/about/director/documents/altana.pdf>. In light of these developments, many high-tech businesses in the United States are threatening to “outsource” large contracts overseas, especially to India's technology hubs. The debate over outsourcing or offshore “capital flight” has always lurked in the background of the debate over skilled migration in the United States, but is beyond the scope of this piece. See Demetrios G. Papademetriou, *Skilled Temporary Workers in the Global Economy: Creating a Balanced and Forward-Looking Selection Process*, in FOREIGN TEMPORARY WORKERS, *supra* note 5, at 29, 31.

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related rights to emigrants by their original home communities. Barry's account identifies how in recent years emigration countries are rewarding their overseas populations for financial (and related) investment in the home nation.⁴⁷ They increasingly do so by reformulating citizenship in ways that permit the nonresident emigrant to enjoy the rights of a full stakeholder in the home society.⁴⁸ In a complementary fashion, my analysis shows how advanced industrial countries are using the lure of citizenship as a recruitment tool in the global race for talent. Herein lies an illuminating connection to Barry's work: Despite operating under very different economic circumstances, governments in *both* emigrant *and* immigration states are deploying their control over access to full membership in the political community as a means to selectively admit (or re-admit) those individuals from whom the state can extract valuable benefits. The cumulative result is that each side in the triangulated interaction between emigrants, their home nations, and destination countries has come to treat its counterparts as potential "resources" for advancing long-term economic and/or membership aspirations.

I

THE THEORETICAL FRAMEWORK: COMPETITIVE
IMMIGRATION REGIMES

The recent surge in demand for highly skilled migrants is commonly explained by citing the rise of the global information economy and the corresponding labor shortage (or "skills shortage") experienced in most OECD countries.⁴⁹ These factors—so goes the standard narrative—typically lead advanced industrialized countries to increase foreign recruitment intakes, especially in response to lobbying efforts by well organized domestic interest groups such as the information technology industry.⁵⁰ This focus on labor needs and

⁴⁷ Barry, *supra* note 31, at 31, 35–36.

⁴⁸ *Id.* at 34.

⁴⁹ For an excellent overview of the literature on labor shortages in OECD countries, see ORG. FOR ECON. CO-OPERATION & DEV., TRENDS IN INTERNATIONAL MIGRATION 103–23 (2002). On skills shortages in the United States, see NAT'L ASS'N OF MFRS., THE SKILLS GAPS 2001: MANUFACTURERS CONFRONT PERSISTENT SKILLS SHORTAGES IN AN UNCERTAIN ECONOMY (2001), available at http://www.nam.org/s_nam/bin.asp?TrackID=&SID=1&DID=227473&CID=201501&VID=2 (analyzing shortage of skilled labor in U.S. manufacturing sector); U.S. GEN. ACCOUNTING OFFICE, WORKFORCE CHALLENGES AND OPPORTUNITIES FOR THE 21ST CENTURY: CHANGING LABOR FORCE DYNAMICS AND THE ROLE OF GOVERNMENT POLICIES (2004), available at <http://www.gao.gov/new.items/d04845sp.pdf> (highlighting gap between skills needed by employers and skill level of U.S. workers as posing challenge for U.S. labor market in twenty-first century).

⁵⁰ In the United States, the 1990s saw extensive lobbying by IT businesses, which were pushing for an increase in the intake of highly skilled migrants. For example, companies

“clential politics” is important, but it treats national immigration policy as a purely economic and domestic affair.⁵¹ What is more, these explanations assume that designers of national immigration policy operate in a vacuum and are not influenced by equivalent processes of preference setting that occur in other similarly situated polities.

A. *The Missing Dimension: Interjurisdictional Competition*

To provide a more complete and comprehensive account, we must also examine how the interaction *between* competing nations influences immigration policy setting. By adding this interjurisdictional dimension to our analysis, it becomes possible to account for instances of reciprocal causation (how the admission policies adopted by one country affect the recruitment policies of another) and to explore the complicated and dynamic set of interactions in which the domestic policies of several countries become entangled.⁵² To capture this multidimensional interaction, we need to move beyond the traditional single-country study of immigration, and adopt instead a multi-jurisdictional perspective. This new perspective, *competitive immigration regimes*, allows us to complement the familiar domestic-focused and economics-centered explanation for the rise of the worldwide competition for skilled migration.

B. *Control over Membership Rights*

The competitive immigration framework further enriches the conventional study of citizenship by focusing less on the “ought,” and more on the “is.” For instance, whereas the prevailing scholarship

such as Microsoft, Intel, Motorola, Sun Microsystems, and Texas Instruments joined together to form the American Business for Legal Immigration Coalition. See JAMES G. GIMPEL & JAMES R. EDWARDS, JR., *THE CONGRESSIONAL POLITICS OF IMMIGRATION REFORM* 46–47 (1999); see also David Moschella, *Foreign IT Workers? The More the Merrier*, *COMPUTER WORLD*, Mar. 23, 1998, at 38, 38 (“Just as the U.S. needs low-wage foreign workers to keep it competitive in agriculture and to fill jobs Americans don’t want, so do we need more high-tech professionals to keep us ahead in IT.”). In 2001, the National Association of Manufacturers (the largest industrial trade association in the United States) also weighed in on this debate, recommending that immigration policy be more attuned to the skill levels of admitted immigrants. See Ctrs. for Applied Competitive Tech., *Major Survey Shows Skilled Production Worker Shortage Persists Despite Economic Slowdown* (Nov. 30, 2001), <http://www.cact.org/news/102nam.htm>.

⁵¹ On “clential politics” in immigration, see the influential contribution by Gary P. Freeman, *Modes of Immigration Politics in Liberal Democratic States*, 29 *INT’L MIGRATION REV.* 881 (1995), which argues that immigration policy is disproportionately influenced by special interests such as the business lobby or high-tech industries, rather than unorganized bearers of diffused costs.

⁵² On such interdependency, see Putnam, *supra* note 26, at 433–34.

treats entitlement to citizenship as an idealized expression of collective identity and belonging,⁵³ we must also acknowledge the fact that membership in a wealthy and stable polity represents a valuable resource that affects our well-being, freedom, and level of opportunity in a world of severe inequality across national and regional borderlines.⁵⁴ Securing full membership in the political community remains the only “good” that even the mightiest economic conglomerate cannot offer to the skilled migrant; only governments can allocate the precious property of citizenship. And a growing number of OECD countries are willing to use this control power as part of their recruitment strategy to attract the “best and the brightest.” To wit, states, and only states, can offer secure and permanent membership rights, and they are increasingly willing to do so in order to support their domestic industries. From this vantage point, the study of competitive immigration regimes provides us with a new lens through which to observe the continued centrality of the regulatory state—the fashionable alarm about its decline notwithstanding⁵⁵—in controlling and allocating the scarce resource of full political membership or citizenship.⁵⁶ This is true even in circumstances where immigration officials are fast adopting an economic rationale for privileging skilled migrants over other candidates for admission.⁵⁷

⁵³ See, e.g., ROGERS BRUBAKER, *CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY* 73–178 (1992); JOSEPH H. CARENS, *CULTURE, CITIZENSHIP, AND COMMUNITY: A CONTEXTUAL EXPLORATION OF JUSTICE AS EVENHANDEDNESS* 166 (2000); PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP* 161 (1998); MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 61–63 (1983).

⁵⁴ For a detailed discussion, see Ayelet Shachar, *Children of a Lesser State: Sustaining Global Inequality through Citizenship Laws*, in *CHILD, FAMILY, AND STATE* 345 (Stephen Macedo & Iris Marion Young eds., 2003).

⁵⁵ Scholars of international relations sharply disagree on whether the nation-state is in decline, or whether it has enough resources to reinvent itself in the current era of globalization. This debate is also reflected in the subfield of immigration and citizenship studies. For examples of this vibrant debate, see CHRISTIAN JOPPKE, *IMMIGRATION AND THE NATION-STATE: THE UNITED STATES, GERMANY, AND GREAT BRITAIN* (1999); SASKIA SASSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION* (1996); YASEMIN NUHOGLU SOYSAL, *LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE* (1994); Virginie Guiraudon & Gallya Lahav, *A Reappraisal of the State Sovereignty Debate: The Case of Migration Control*, 33 *COMP. POL. STUD.* 163 (2000); Randall Hansen, *Globalization, Embedded Realism, and Path Dependence: The Other Immigrants to Europe*, 35 *COMP. POL. STUD.* 259 (2002).

⁵⁶ Even access to European citizenship relies on prior membership in one of the Union’s Member States. Ulf Bernitz & Hedvig Lokrantz Bernitz, *Human Rights and European Identity: The Debate about European Citizenship*, in *THE EU AND HUMAN RIGHTS* 505, 506 (Philip Alston ed., 1999).

⁵⁷ A word of caution is needed before we proceed. I am not arguing that countries have made citizenship into a commodity that is tradable or sold to the highest bidder. Technically, any such activity is strictly prohibited in all advanced industrial countries.

C. *The Talent-for-Citizenship Exchange*

The willingness to grant secure membership rights to the highly skilled has become a crucial component for attracting talent in the current global race. Assuming that highly skilled migrants act rationally and will, all else being equal, choose to immigrate to a destination country that best improves their living conditions and professional options, it is clear that it will be difficult for smaller jurisdictions to compete with the economic might of the United States.⁵⁸ Given this asymmetry, smaller jurisdictions have had to devise “incentive packages” that provide an added value to knowledge migrants. This added value is found in the *talent-for-citizenship exchange*. The assumption of this exchange is as follows: Although skilled migrants seek improved employment and development opportunities in the destination state (the economic factor), they are also motivated by something else. This “something else” is the search for a new home country that will permit them and their families to enjoy the security and prosperity that is attached to membership in a stable, democratic, and affluent polity (the citizenship factor). The premium placed on the citizenship factor is higher for those migrants moving from poorer and less stable emigration countries. Many of those admitted to the OECD region under the various skilled migrant categories fit this pro-

Morally, it is deeply unjustifiable, in light of the shared risk and responsibility that citizenship bonds entail in a world of regulated membership boundaries. We are therefore not discussing the sale of passports or the “corruption” of membership. Rather, we are exploring how the state, as the sole purveyor of citizenship, is using this control selectively to advance the economic interests of certain domestic industries while at the same time competing against other nations in the global race for talent, in the process reasserting its centrality and control over the regulatory field of immigration.

⁵⁸ I use the terms “smaller jurisdictions” or “small-economy jurisdictions” here not to refer to geographic size or political importance but rather to highlight the interdependence of these jurisdictions with major economic powers, resembling the notion of “follower states” in the study of economic globalization. Canada is a classic example of such a “smaller jurisdiction” given that its economy is highly interdependent with the United States; currently eighty-seven percent of Canada’s foreign trade is with this one country. Louis W. Pauly, *Monetary Power and Political Autonomy: Exchange Rate Policymaking in Follower States* 5 (Institute on Globalization and the Human Condition, Working Paper No. GHC 05/2, 2005). Despite certain economic problems (e.g., the post-dot-com economic downturn and a heavy national debt and fiscal deficit), the United States is still the world’s leading economy and remains a major destination country for a significant number of skilled migrants entering the OECD area. See OECD 2005, *supra* note 10, at 287–89; see also Docquier & Rapoport, *supra* note 19, at 7.

file.⁵⁹ This makes the citizenship factor an important recruitment tool for all advanced industrial polities.⁶⁰

Precisely because the citizenship factor can provide them with a competitive advantage, smaller-economy jurisdictions such as Canada and Australia have not only created selective immigration streams for the highly skilled, but have also established relatively open, swift, and as-of-right naturalization procedures, which guarantee the highly skilled a quick and smooth transition to full membership.⁶¹ That is, to

⁵⁹ The main increase in migration flows of scientists, engineers, computer programmers, and other high-tech professionals has been from low-income countries to North America and Europe, with a notable increase of highly skilled migration from Asian countries. See Docquier & Rapoport, *supra* note 19, at 7–8; see also Carrington & Detragiache, *supra* note 19, at 6 (“In absolute terms, the largest flows of highly educated migrants [to OECD countries] are from Asia . . .”). In the race for talent, India has emerged as the largest “exporter” of highly skilled migrants to the United States in recent years, especially in the high-tech industries. For example, approximately fifty percent of the H-1B visas in fiscal year 1999 were issued to skilled professionals born in India. See OECD 2001, *supra* note 2, at 27. Highly skilled immigrants from China represented the second largest national group of H-1B visa holders, and approximately one-third of the foreign-born scientists and engineers in the United States in 2000 were born in India or China. See PARAL & JOHNSON, *supra* note 2, at 6–7; U.S. GEN. ACCOUNTING OFFICE, H-1B FOREIGN WORKERS: BETTER TRACKING NEEDED TO HELP DETERMINE H-1B PROGRAM’S EFFECTS ON U.S. WORKFORCE 18 (2003), available at <http://www.gao.gov/new.items/d03883.pdf>. The GAO study further found that the majority of H-1B visa recipients were younger and better educated than the equivalent population of U.S. citizen workers. See *id.* at 12. In Canada, Statistics Canada data shows related trends: Highly skilled immigrants to Canada tend to be younger and more educated than the Canadian-born population and are twice as likely as the Canadian-born population to be employed in high-technology occupations. See John Zhao et al., *Brain Drain and Brain Gain: The Migration of Knowledge Workers from and to Canada*, 6 EDUC. Q. REV. 8, 22–24 (2000).

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⁶⁰ The premium placed by the skilled migrant on gaining full membership status in a democratic and affluent society appears to increase in correlation to the poverty and instability of the home country, as is evidenced by data on the naturalization rates of migrants from poorer and less stable countries. A recently released study by Statistics Canada confirms these trends: “Data from the [2001] Census of Population shows that newly eligible immigrants from Africa or Asia are more likely to become Canadian citizens than those from Europe and the United States.” The study further establishes that “immigrants who came from countries with developing economies, and political and social systems different from Canada’s, are becoming Canadians at a higher rate.” See Kelly Tran et al., *Becoming Canadian: Intent, Process, and Outcome*, CANADIAN SOCIAL TRENDS, Spring 2005, at 8, 11–12. Similar trends are recorded in the United States. See, e.g., U.S. DEP’T OF HOMELAND SEC., 2003 YEARBOOK OF IMMIGRATION STATISTICS 134, 138–41 tbl.32 (2004), available at <http://uscis.gov/graphics/shared/aboutus/statistics/2003Yearbook.pdf> (indicating trends in naturalizations).

⁶¹ In Canada, a landed immigrant can apply for citizenship after three years of permanent residence within the four years immediately following the date the application for naturalization was filed. See Citizenship Act, R.S.C., ch. C-29, § 5(1) (1985) (Can.), available at <http://laws.justice.gc.ca/en/c-29/34586.html>. For a lucid analysis of the Canadian Citizenship Act and its naturalization requirements, see J. Donald Galloway, *The Dilemmas of Canadian Citizenship Law*, 13 GEO. IMMIGR. L.J. 201, 202–05 (1999). In Australia, the naturalization procedures are even more liberal, allowing a lawful immigrant to apply for citizenship after two years of permanent residency (in addition to standard requirements

overcome the economic asymmetry they face in competing with the United States, countries that treat knowledge migration as an asset have come to exploit the attractive power of citizenship.

D. *The Spiraling Race*

As a greater number of competitors enter the global race for talent, each is seeking to devise selective skilled-migration policies to attract the knowledge migrant. And, as a result, immigration policy-makers in these countries are fiercely trying to outbid each other in the effort to attract international knowledge migrants whose specialized human capital and talent can boost technological innovation and economic growth. The fact that the knowledge-based sector is increasingly using English as the new *lingua franca* provides an advantage to English-speaking countries.⁶² But even immigration officials in these countries are feeling pressure from growing international competition.⁶³ If other countries provide greater incentives that better respond to the needs of the highly skilled, this will undermine the effectiveness of the managed-migration policies of countries that have not adapted. This helps explain why national policymakers can no longer simply look at domestic factors in shaping their selective immigration policy. They must instead stay attuned to, and often “retaliate” against, the new policy initiatives and experiments undertaken by competing jurisdictions. This pattern of mutual causality and interdependency is multiplied as a greater number of national players enter the already tight global race for talent.⁶⁴

for naturalization, such as lawful permanent residence status, basic knowledge of the English language, and understanding of the rights and responsibilities of citizenship). See Citizenship Act, 1948, § 13 (Austl.), available at [http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/894EE9440ED55DE0CA256F71004DDA6F/\\$file/AusCitizenship1948.pdf](http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/894EE9440ED55DE0CA256F71004DDA6F/$file/AusCitizenship1948.pdf). These naturalization procedures are among the most liberal in the world, designed explicitly to “ease the process for immigrants to become citizens.” Gianni Zappalà & Stephen Castles, *Citizenship and Immigration in Australia*, in FROM MIGRANTS TO CITIZENS: MEMBERSHIP IN A CHANGING WORLD 32, 47 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2000). In 2005, a new Citizenship Act was tabled before the Australian parliament. If enacted, it will extend the residence requirement to a period of three years (instead of two years) in the five years immediately before applying for citizenship. See Australian Citizenship 2005 § 22(1)(b), 2005, Bill (Austl.).

⁶² See Philippe Van Parijs, *The Ground Floor of the World: On the Socio-Economic Consequences of Linguistic Globalization*, 21 INT’L POL. SCI. REV. 217, 221–23 (2000).

⁶³ See *infra* Part II.

⁶⁴ For an excellent exposition of this argument, see Deborah A. Cobb-Clark & Marie D. Connolly, *The Worldwide Market for Skilled Migrants: Can Australia Compete?*, 31 INT’L MIGRATION REV. 670 (1997).

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II

THE LEGAL AND COMPARATIVE FRAMEWORK: THE
GLOBAL RACE FOR TALENT⁶⁵

How have we come to this? Initially, the United States enjoyed the lion's share of international knowledge migration; there was little competition in attracting and retaining foreign-born professionals.⁶⁶ But the trend has changed dramatically in recent years. We are now witnessing a growing reliance on competitive migration policies by leading industrialized countries. Over the last decade, policy changes by most OECD countries have led to the establishment of specific and often fast-track entry streams designed to encourage the recruitment of knowledge migrants.⁶⁷ In other words, unlike in the past, highly skilled migrants now have more destination countries to choose from. Even better, from the perspective of a prospective knowledge migrant, each of these destination countries is eager to attract talent and willing to provide a host of generous benefits.⁶⁸

The global race for talent has further intensified with the introduction of "repatriation" incentives for emigrant professionals abroad, especially leading scientists, to return to their countries of origin.⁶⁹ The biggest success stories on this front are Taiwan and South Korea, which have invested heavily in infrastructure development and generous economic compensation for their returning highly skilled emigrants.⁷⁰ Ireland too has become a magnet for returning emigrants based on its impressive economic performance—which

⁶⁵ My account of this race is somewhat stylized as it assumes that there are equal transaction costs for the skilled migrant in moving to the competing OECD destination countries. It also assumes that each country is equally successful in distributing information about its "incentive packages" to the relevant pool of potential applicants. The latter (information symmetry) assumption is supported by the fact that most OECD countries market their skilled-migration packages through familiar channels, such as consular services overseas, professional employment fairs, advertisement by immigration lawyers, online applications for employment or immigration visas via official government websites, targeted recruitment by firms or universities, and the like.

⁶⁶ See Docquier & Rapoport, *supra* note 19, at 7–8.

⁶⁷ See generally OECD 2001, *supra* note 2.

⁶⁸ In addition to the various immigration and settlement policy measures undertaken recently by OECD countries for facilitating the international recruitment of the highly skilled, discussed below in this Part, countries offer fiscal incentives to attract foreign talent. For example, several "recruiting" jurisdictions have introduced special tax exemptions for highly skilled immigrants. See OECD 2005, *supra* note 10, at 133–34.

⁶⁹ See OECD 2001, *supra* note 2, at 256–63; see also Shirley L. Chang, *Causes of Brain Drain and Solutions: The Taiwan Experience*, 27 *STUD. COMP. INT'L DEV.* 27 (1992); Anne Marie Gaillard & Jacques Gaillard, *The International Circulation of Scientists and Technologists: A Win-Lose or Win-Win Situation?*, 20 *SCI. COMM.* 106 (1998).

⁷⁰ See Hahzoong Song, *From Brain Drain to Reverse Brain Drain: Three Decades of Korean Experience*, 2 *SCI. TECH. & SOC'Y* 2 (1997); SAXENIAN, *supra* note 2, at 57–59, 74.

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itself is largely driven by Ireland's flourishing knowledge-based industries.⁷¹ Another pattern is emerging in high-tech centers such as Israel where many of the local knowledge-industry workers engage in transnational networking and "brain circulation" through temporary migration, involving a number of years of studying and working outside Israel, typically in the United States.⁷² These highly skilled and high-earning individuals typically retain their home citizenship and upon return provide world-class experience and important networking connections for domestic start-up businesses. Add to these existing patterns the fact that no one can fully assess the extent to which the rapid economic and infrastructural developments in China and India will generate new opportunities for return migration and entrepreneurial investment by highly skilled migrants from around the world, further raising the bar of the race for talent.⁷³ The

⁷¹ In the late 1990s, Ireland experienced the highest growth rate in the OECD area, at more than eight percent of the GDP. See TINA MACVEIGH, *EU AND US APPROACHES TO THE MANAGEMENT OF IMMIGRATION: IRELAND 1* (Jan Niessen et al. eds., 2003). Much of this growth is attributed to Ireland's robust IT and pharmaceutical industries. *Id.* For detailed analysis of the role of government policies in endangering the economic miracle of the "Celtic tiger," see SEÁN Ó RIAIN, *THE POLITICS OF HIGH-TECH GROWTH: DEVELOPMENTAL NETWORK STATES IN THE GLOBAL ECONOMY* (2004).

⁷² See OECD 2001, *supra* note 2, at 172-74. The Israeli high-tech industry has also benefited significantly from the large inflow of highly skilled immigrants who entered the country in the 1990s as part of the mass migration wave from the former Soviet Union. Many of these immigrants were professionals trained as engineers, physicians, technicians, and the like. *Id.*

⁷³ These countries are fostering return migration of their highly skilled emigrants and encouraging the participation of "immigration entrepreneur networks" in building the national high-tech sectors. In China, for example, the Ministry of Science and Technology estimates that returning overseas students have started the majority of Internet-based ventures in the country. See Mario Cervantes & Dominique Guellec, *The Brain Drain: Old Myths, New Realities*, OECD OBSERVER, May 2002, http://www.oecdobserver.org/news/fullstory.php/aid/673/The_brain_drain:_Old_myths,_new_realities.html. In order to capture these and related benefits of returnees' talent, China has recently launched an ambitious program aimed at developing one hundred select universities into world-class research centers, a move which may help attract eminent emigrant professionals, entrepreneurs, and graduate students studying abroad. See OECD 2001, *supra* note 2, at 93. India too has singled out universities such as the Indian Institute of Technology (IIT) as centers of excellence to be promoted accordingly. The private sector in Bangalore, the "hub" of India's software development boom, has also built high-tech campuses and massive infrastructure in Electronics City, the local variant of "Silicon Valley." See *Special Report: Outsourcing and IT in India: The Bangalore Paradox*, THE ECONOMIST, Apr. 23, 2005, at 68. These changes may, in turn, have significant impact on immigration countries, such as the United States: India and China are the two main "sending" countries that supply the U.S. market with large numbers of advanced-degree international students and skilled professionals who are employed in the science and engineering sectors. See NAT'L SCI. BD., *1 SCIENCE AND ENGINEERING INDICATORS 3-34* (2004), available at <http://www.nsf.gov/statistics/seind04/>.

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overall trend, however, is indisputable: We are witnessing a dramatically increased worldwide competition for knowledge migrants.

This new openness towards skilled migrants in many parts of the world stands in sharp contrast with the stricter post-9/11 entry regulations and cumbersome security-motivated tracking systems (such as the Student and Exchange Visitor Information System, or SEVIS) now imposed by the United States upon foreign students, researchers, and other skilled workers.⁷⁴ This comes at a time when other countries have been removing administrative barriers to hiring foreign-born students after they have completed their advanced degrees (a trend that in recent years has swept the leading EU destination countries, such as France, Germany, and the United Kingdom).⁷⁵ In a global competitive environment, this implies that leading European countries are “experiencing somewhat of a ‘windfall’ . . . as a result of the U.S. pre-occupation with security screenings and the less welcoming attitude toward nationals from a large number of countries.”⁷⁶ These developments fit within a broader trend whereby America—the birthplace of the race for talent—has now fallen behind its international rivals.

To understand the novelty of this situation, we must step back in time. In the following section, I discuss the dramatic changes in the immigration policies of the major destination countries over the last few decades, changes which have reshaped the landscape of highly skilled migration. I focus on how interjurisdictional competition is shaping the race, highlighting processes of mutual influence, transnational policy emulation, and retaliatory moves among leading destination states.

⁷⁴ SEVIS implements section 641 of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208. Under the SEVIS regulations, the Department of Homeland Security (DHS) collects information, on an ongoing basis, regarding nonimmigrant foreign students (those holding F and M visas) and exchange visitors (those holding J visas) during the course of their stay in the United States. U.S. Dep’t of State, The Student and Exchange Visitor Information System, <http://exchanges.state.gov/education/jexchanges/about/sevis.htm>. See, e.g., 22 C.F.R. § 41.61–41.62 (2005) (requiring that students enroll full time in specified type of academic institution and know English; also requiring that both students and exchange visitors have sufficient knowledge of English and that their acceptance documentation be verified by consular officials).

⁷⁵ See *infra* Part II.C. Recruitment of talented students is important because it can serve as a precursor for immigration recruitment of highly qualified individuals who are already in possession of a local degree, the cultural “know-how” of the receiving society, and linguistic mastery that can assist them in securing professional advancement in the domestic labor force. See OECD 2001, *supra* note 2, at 42–46.

⁷⁶ See DEMETRIOS G. PAPADEMETRIOU & KEVIN O’NEIL, EFFICIENT PRACTICES FOR THE SELECTION OF ECONOMIC MIGRANTS 9 (2004), available at http://europa.eu.int/comm/employment_social/employment_analysis/docs/select_econ_migr1.pdf.

A. *The Initial Players*

1. *The United States: Recruiting Talent*

In 1965, the U.S. Congress passed the landmark amendments to the Immigration and Nationality Act of 1952.⁷⁷ These amendments removed the much criticized national-origin formula that discriminated against emigrants from the so-called “Eastern Hemisphere.”⁷⁸ The Amendments also opened up a number of “preferences” for Professional, Technical and Kindred (PTK) immigrants, as well as those with “exceptional ability” and needed skills.⁷⁹ In signing the 1965 Amendments, Lyndon Johnson famously stated that “from this day forth, those wishing to emigrate into America shall be admitted on the basis of their skills.”⁸⁰ The 1965 Amendments thus opened the door for qualified foreign applicants from the Eastern Hemisphere, many of them specializing in science and engineering, to immigrate to the United States.⁸¹

⁷⁷ See Immigration and Nationality Act 1965 Amendments, Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified as amended in scattered sections of 8 U.S.C.).

⁷⁸ *Id.* § 2 (codified at 8 U.S.C. § 1152) (2000).

⁷⁹ *Id.* §§ 3(3), 3(6) (codified at 8 U.S.C. § 1153) (2000). The 1965 Amendments also instituted the cumbersome labor certification process, which required approval by the Secretary of Labor before a labor-related immigration visa could be issued. See *id.* § 3(8) (codified at 8 U.S.C. § 1153) (2000). This has led to America’s increased reliance on non-immigrant entry categories such as the various H subclasses (temporary worker), *id.* § 101(a)(15)(H) (codified at 8 U.S.C. § 1101(a)(15)(H) (2000 & Supp. I 2001–02)), as well as the F (academic student), *id.* § 101(a)(15)(F)(i) (codified at 8 U.S.C. § 1101(a)(15)(F)(i) (2000 & Supp. I 2001–02)); J (exchange visitor), *id.* § 101(a)(15)(J)(i) (codified at 8 U.S.C. § 1101(a)(15)(J) (2000 & Supp. I 2001–02)); and L (intra-company transferee), *id.* § 101(a)(15)(L) (codified at 8 U.S.C. § 1101(a)(15)(L) (Supp. I 2001–02)), admission visas. See Charles B. Keely, *Nonimmigrant Visa Policy of the United States*, in FOREIGN TEMPORARY WORKERS, *supra* note 5, at 96; see also Jacqueline Hagan and Susana McCollom, *Skill Level and Employer Use of Foreign Specialty Workers*, in FOREIGN TEMPORARY WORKERS, *supra* note 5, at 150–52. The creation of the L visa for intracompany transfer employees in 1970 did away with the labor certification process for those seeking such a visa. Immigration and Nationality Act 1970 Amendments, Pub. L. No. 91-225, 84 Stat. 116 (1970) (codified at 8 U.S.C. § 1101(a)(15)(L) (2000 & Supp. I 2001–02)). Many of these so-called nonimmigrant visas can later be adjusted toward permanent residency status (“green card”). B. Lindsay Lowell, *Introduction and Summary*, in FOREIGN TEMPORARY WORKERS, *supra* note 5, at 7–9.

⁸⁰ The statement also mentioned the other major route for migration to the United States: family-based preferences. Or, in President Johnson’s words, individuals would be admitted on the basis of “their close relationship to those already here.” THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 162 (5th ed. 2003).

⁸¹ As one author put it at the time: “The immediate effects of this change in the law were to increase the percentage of immigrants who were professionals, . . . and secondly to increase the percentage of Asians among immigrant professionals.” Judith Fortney, *Immigrant Professionals: A Brief Historical Survey*, 6 INT’L MIGRATION REV. 50, 55–56 (1972).

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2. Canada: Rationalizing Selection

The next major step in the genesis of the current race for talent occurred in 1967, when Canada introduced its “point system,” a novel and influential set of admission criteria for the highly skilled. The point system grants admission to “a person who by reason of his [or her] education, training, skills or other special qualifications is likely to become successfully established in Canada.”⁸² The point system was explicitly designed by the Canadian government as a “selective immigration policy . . . [that] must be planned as a steady policy of recruitment based on long-term considerations of economic growth.”⁸³ The new economic/skilled migrant category⁸⁴ granted admission to foreign nationals “on the basis of their ability to become economically established in Canada,”⁸⁵ thus providing immigration officials with a relatively objective tool for selecting among a pool of potential entrants.⁸⁶

Under the point system, each applicant is assessed based on his or her score on a cumulative test, which presently consists of the following categories: education (the largest number of points is awarded for a Master’s or Ph.D. degree), language proficiency (in English or French), work experience (points are calculated on the basis of the number of years of full-time employment), age (the highest number of points is awarded to those in the “productive” age group of twenty-one to forty-nine), arranged employment in Canada (a category that provides additional points, but is not a mandatory requirement for

⁸² NINETTE KELLEY & MICHAEL TREBILCOCK, *THE MAKING OF THE MOSAIC: A HISTORY OF CANADIAN IMMIGRATION POLICY* 358 (1998). The point system was introduced as part of the new and influential immigration regulations adopted in 1967. *Id.* at 358–61.

⁸³ JEAN MARCHAND, *CAN. MINISTER OF MANPOWER AND IMMIGRATION, WHITE PAPER ON IMMIGRATION* 12 (1966).

⁸⁴ For the current legal framework governing the economic/skilled migrant category, see Immigration and Refugee Protection Act, 2001 S.C., ch. 27, § 12 (Can.), available at <http://laws.justice.gc.ca/en/I-2.5/64755.html>; Immigration and Refugee Protection Regulations SOR/2002-227 §§ 361–63 (Can.), available at <http://laws.justice.gc.ca/en/I-2.5/SOR-2002-227/134117.html>.

⁸⁵ Immigration and Refugee Protection Act § 12(2).

⁸⁶ The point system is “relatively objective” in the sense that it treats all those assessed under its guidelines in a similar fashion. It is not value neutral, however. It seeks to attract individuals who are most likely to integrate quickly into the labor market and become net assets to the economy, rather than becoming recipients of social assistance programs. Arguably, the point-system assessment scheme privileges the breadwinner over the homemaker, the professional over the non-professional, the “productive” over the “dependent,” and so on. These binary oppositions historically traced gender-based distinctions, which favored the full-time wage (male) earner over the stay-at-home (female) spouse who did not formally engage in the paid labor market. This perception only recently changed with the recognition of spousal skills, which can provide additional points for members of a dual-career family. See *infra* text accompanying notes 88–89.

potential immigrants), and a bonus category of “adaptability.”⁸⁷ The latter category accounts for previous study or work experience in Canada, recognized as contributing to long-term economic success and settlement. The system also grants bonus points to dual career families, by allotting points to the principal applicant based on the work or study experience of his or her spouse (or common-law partner).⁸⁸ This innovative policy breaks down traditional and gendered assumptions that migrant families are constituted by a sole breadwinner and a primary homemaker, and finds its origins in a competition with Australia’s skilled-migration program, which also seeks to attract such dual career families.⁸⁹

TABLE 1⁹⁰
CANADA SKILLED MIGRANT CATEGORY
SELECTION FACTORS AND PASS MARK

Factor One: Education	Maximum 25
You have a Master’s Degree or Ph.D. and at least 17 years of full-time or full-time equivalent study.	25
You have two or more university degrees at the bachelor’s level and at least 15 years of full-time or full-time equivalent study.	22
You have a three-year diploma, trade certificate or apprenticeship and at least 15 years of full-time or full-time equivalent study.	22
You have a university degree of two years or more at the bachelor’s level and at least 14 years of full-time or full-time equivalent study.	20
You have a two-year diploma, trade certificate or apprenticeship and at least 14 years of full-time or full-time equivalent study.	20
You have a one-year university degree at the bachelor’s level and at least 13 years of full-time or full-time equivalent study.	15
You have a one-year diploma, trade certificate or apprenticeship and at least 13 years of full-time or full-time equivalent study.	15
You have a one-year diploma, trade certificate or apprenticeship and at least 12 years of full-time or full-time equivalent study.	12
You completed high school.	5
[hyperlink omitted]	

⁸⁷ See *infra* p. 174 tbl.1.

⁸⁸ Citizenship & Immigration Can., Application for Permanent Residence: Federal Skilled Worker Class 12 (2004), available at <http://www.cic.gc.ca/english/pdf/kits/guides/EG7.pdf> [hereinafter Canadian Skilled Worker Residence Application].

⁸⁹ See *infra* text accompanying note 152.

⁹⁰ Citizenship & Immigration Can., Six Selection Factors and Pass Mark, <http://www.cic.gc.ca/english/skilled/qual-5.html> (last visited Aug. 25, 2005).

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Factor Two: Official Languages	Maximum 24
1st Official Language	
High proficiency (per ability)	4
Moderate proficiency (per ability)	2
Basic proficiency (per ability)	1 to maximum of 2
No proficiency	0
Possible maximum (all 4 abilities)	16
2nd Official Language	
High proficiency (per ability)	2
Moderate proficiency (per ability)	2
Basic proficiency (per ability)	1 to maximum of 2
No proficiency	0
Possible maximum (all 4 abilities)	8
[hyperlink omitted]	
Factor Three: Experience	Maximum 21
1 year	15
2 years	17
3 years	19
4 years	21
[hyperlink omitted]	
Factor Four: Age	Maximum 10
21 to 49 years at time of application	10
Less 2 points for each year over 49 or under 21	
[hyperlink omitted]	
Factor Five: Arranged Employment In Canada	Maximum 10
You have a permanent job offer that has been confirmed by Human Resources and Skills Development Canada (HRSDC).	10
You are applying from within Canada and have a temporary work permit that was:	
issued after receipt of a confirmation of your job offer from HRSDC; or	10

you have a temporary work permit that was exempted from the requirement of a confirmed job offer from HRSDC on the basis of an international agreement (e.g., NAFTA), a significant benefit to Canada (e.g., intra-company transfer) or public policy on Canada's academic or economic competitiveness (e.g., post-graduate work).	10
[hyperlink omitted]	
Factor Six: Adaptability	Maximum 10
Spouse's or common-law partner's education	3 - 5
Minimum one year full-time authorized work in Canada	5
Minimum two years full-time authorized post-secondary study in Canada	5
Have received points under the Arranged Employment in Canada factor	5
Family relationship in Canada	5
[hyperlink omitted]	
Total	Maximum 100
Pass Mark	67

The maximum score that an applicant can obtain on the Canadian point-system grid is one hundred. The current pass mark is sixty-seven points.⁹¹ The Minister of Citizenship and Immigration Canada (CIC) may amend the pass mark from time to time to “reflect the changes in [the] Canadian labour market and in the broader economy and in society.”⁹² No less important, the flexibility of the point system permits Canada’s immigration policymakers to change the pass mark in order to better respond to the needs of foreign-born professionals that the country is seeking to attract. Such a change occurred most recently in 2003, when the pass mark was reduced from seventy-five to sixty-seven in response to concerns that the initial pass mark was set too high.⁹³ In announcing this adjustment, the Minister of Citizenship

⁹¹ See Immigration and Refugee Protection Regulations SOR/2002-227, § 85.3 (Can.), available at <http://laws.justice.gc.ca/en/I-2.5/SOR-2002-227/132941.html>. If the applicant’s score is the same or higher than the pass mark and the candidate has successfully passed the mandatory security and medical examinations, the immigration official will issue a Confirmation of Permanent Residence, which permits the skilled migrant and her family to enter Canada as landed immigrants (a status similar to resident aliens, or “green card” holders, in the United States). See Canadian Skilled Worker Residence Application, *supra* note 88, at 25.

⁹² Press Release, Citizenship & Immigration Can., Minister Adjusts Skilled Worker Passmark and Proposes Changes for Economic Class Immigration Applicants Affected by IRPA Transitional Rules (Sept. 18, 2003), available at <http://www.cic.gc.ca/english/press/03/0333-pre.html> [hereinafter Minister Adjusts Passmark].

⁹³ *Id.* The pass mark of seventy-five points was part of an overhaul of the point system, which supplemented the traditional reliance on specific occupation qualifications with an

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and Immigration Canada stated that “[a]n important objective of [the Immigration and Refugee Protection Act] IRPA was to create a system that is flexible. . . . Today’s changes to IRPA reflect this flexibility and our ongoing commitment to listen to the views of all stakeholders.”⁹⁴ What is remarkable about this statement is that the “stakeholders” here are overseas professionals who may never have set foot in Canada, and have neither formal ties nor voting rights in the country. Yet, as *potential* entrants under the skilled-migration category, they are the relevant audience to whom Canada’s top immigration official must communicate the message that by adjusting the point-system pass mark, Canada “continues to encourage skilled immigration.”⁹⁵

In every year since 1995, the economic/skilled immigrant category accounted for at least fifty percent of the annual intake of new immigrants entering Canada.⁹⁶ These skilled migrants and their accompanying family members receive lawful permanent residency (“landed” status) immediately upon their arrival in Canada.⁹⁷ In other words, the intake of skilled migrants is designed for the *long term*, not as a temporary relief for labor shortages.

This provides an important advantage to international highly skilled workers, who, in Canada, unlike in the United States, are not subject to the constant threat of changing visa regulations, or the insecurity of temporary employment status. Instead, as permanent residents, they are granted access to and protection by Canada’s comprehensive set of rights and entitlements.⁹⁸ Equally important, this status automatically sets them on the road towards citizenship. In

emphasis on “adaptability,” i.e., general attributes associated with market success. *See supra* 172–74 tbl. 1.

⁹⁴ Minister Adjusts Passmark, *supra* note 92.

⁹⁵ *Id.*

⁹⁶ Official data on Canada’s immigration numbers is collected by Citizenship and Immigration Canada and is made available in annual public reports available on the CIC website, at <http://www.cic.gc.ca>. For example, in 2000, the economic/skilled category accounted for 59.9% of the annual intake; in 2001, 62.1%; in 2002, 60.4%; in 2003, the latest reported year, the economic/skilled category accounted for 54.7% of the total annual intake of immigrants to Canada. *See* CITIZENSHIP & IMMIGRATION CAN.: FACTS AND FIGURES 2003: IMMIGRATION OVERVIEW, PERMANENT AND TEMPORARY RESIDENTS 3 (2004), available at <http://www.cic.gc.ca/english/pdf/pub/facts2003.pdf> [hereinafter CIC, FACTS AND FIGURES].

⁹⁷ Immigration and Refugee Protection Act, 2001 S.C., ch. 27, § 21 (Can.), available at <http://laws.justice.gc.ca/en/I-2.5/64755.html>.

⁹⁸ Note that in most countries, including Canada, permanent residents are excluded from political participation at the national level before naturalization. After they become citizens, they gain the right to vote and run for office as full members of the polity. *See* Canada Elections Act, 2000 S.C., ch. 9, § 3 (Can.), available at <http://laws.justice.gc.ca/en/E-2.01/text.html>.

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fact, the naturalization clock begins to tick as soon as they settle permanently in the country. This means that a skilled migrant can become eligible for citizenship in Canada as soon as four years after her arrival, if at least three of these four years were spent in continuous residence in Canada.⁹⁹ With ascent to citizenship, the skilled migrant and her family are granted the security, freedom, and opportunity attached to full membership in one of the world's most affluent and open democratic societies.

Precisely because of its transparency, the Canadian point system offers one of the most illuminating examples of the talent-for-citizenship exchange. It represents an almost ideal example of how a smaller-economy jurisdiction can use immigration policy to establish a significant share of the overall worldwide intake of highly skilled migrants, even when it must directly compete with a neighboring economic giant like the United States.¹⁰⁰ Canada's success in attracting highly skilled migrants has not gone unnoticed by other immigration-receiving countries' policymakers.

3. *Australia: Tightening the Race*

Australia quickly followed Canada's lead. In 1973, in a classic example of transjurisdictional borrowing, Australia's immigration services introduced a new selection system for skilled migrants.¹⁰¹ This new system, as many researchers have acknowledged, "was similar to that adopted by Canada in 1967" and was "[d]esigned to make selection more objective and less open to the discretion of officials."¹⁰² In fact, in introducing to the House of Representatives a "new uniform, detailed, structured selection assessment procedure," the Australian Minister of Immigration stated that the new selection procedure had "taken the best from the points rating system such as that used by

⁹⁹ See *supra* note 61.

¹⁰⁰ The skilled-migration stream to Canada has thrived even during times of great economic demand for highly skilled foreign born workers in the United States, such as during the dot-com craze of the 1990s. In fact, these were also prime years for Canada's skilled-migration admission, which hovered at around sixty percent of the annual immigration intake. See CIC, *FACTS AND FIGURES*, *supra* note 96, at 3.

¹⁰¹ The 1973 changes were part of a larger process of removing racial and national-origin discrimination against non-Europeans. Such discrimination persisted until the late 1960s and early 1970s in Australia's immigration and citizenship policy, which received the notorious "White Australia" title. See generally CHARLES A. PRICE, *THE GREAT WHITE WALLS ARE BUILT: RESTRICTIVE IMMIGRATION TO NORTH AMERICA AND AUSTRALASIA, 1836-1888* (1974) (recounting history of Australian immigration policy).

¹⁰² See Patrick Ongley & David Pearson, *Post-1945 International Migration: New Zealand, Australia and Canada Compared*, 29 *INT'L IMMIGR. REV.* 765, 772 (1995).

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Canada.”¹⁰³ These selection principles were formalized six years later into a full-blown point system, which combined key elements from Canada’s selection criteria with new requirements, such as attaching importance to the assessment of “personal suitability.”¹⁰⁴

As in Canada, highly skilled migrants are admitted to Australia on the basis of core selection criteria, which include language proficiency, age, specific work experience, and occupational skills.¹⁰⁵ The latter are defined as “skills that meet Australian requirements for an occupation that requires a degree, diploma or trade-level qualifications and at least twelve months recent employment in a skilled occupation at the time of application.”¹⁰⁶ While it has been subject to occasional political criticism, the “skilled-independent” category, which admits highly skilled migrants solely on the basis of their performance on the point system test (without requiring them to ensure a secure job offer from an Australian employer), accounted for approximately one-third of Australia’s immigration intake in 2001, “reflecting the government’s desire to enhance the economic benefits of migration.”¹⁰⁷ Australia, in short, has developed a carefully crafted selection system to bolster the national policy of seeking skilled migration as a mechanism for human capital accretion, innovation, and the fueling of productivity and economic growth.¹⁰⁸

¹⁰³ Anthony Richmond & G. Lakshmana Rao, *Recent Developments in Immigration to Canada and Australia: A Comparative Analysis*, 17 INT’L J. COMP. SOC. 183, 193 (1976).

¹⁰⁴ See Ongley & Pearson, *supra* note 102, at 772. The Australian government decided to abolish the “personal suitability” requirement in a revision of their point system. See Yale-Loehr & Hoashi-Erhardt, *supra* note 5, at 112.

¹⁰⁵ For a concise overview of Australia’s skilled-migration policy, see Paul W. Miller, *Immigration Policy and Immigrant Quality: The Australian Points System*, 89 AM. ECON. REV. 192 (1999). The strengthened selection criteria in the General Skilled Migration (GSM) categories (introduced in 1999) “have been overwhelmingly successful in ensuring highly skilled migrants.” DEP’T OF IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS (DIMIA), POPULATION FLOWS: IMMIGRATION ASPECTS 23 (2004) (Austl.), available at http://www.immi.gov.au/statistics/publications/popflows2002_3/pop_flows02_3.pdf [hereinafter DIMIA, POPULATION FLOWS]. Importantly, new onshore point-tested visa categories introduced in 2001 enable recently graduated students to be granted a General Skilled Migration visa without the need to leave Australia at the end of their studies. This has led to a significant rise in the number of GSM applicants with Australian educational qualifications. In 2002–03, for example, more than fifty percent of successful GSM applicants claimed points for an Australian qualification. *Id.*

¹⁰⁶ Yale-Loehr & Hoashi-Erhardt, *supra* note 5, at 120.

¹⁰⁷ *Id.* at 118–19.

¹⁰⁸ PAPADEMETRIOU & YALE-LOEHR, *supra* note 5, at 130–34.

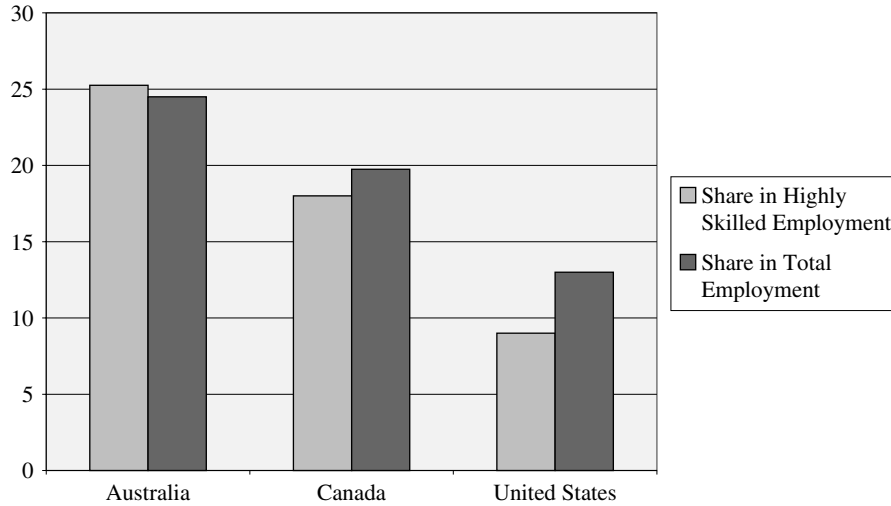
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TABLE 2
SHARE OF FOREIGN-BORN IN HIGHLY SKILLED EMPLOYMENT
(LAST YEAR AVAILABLE)



Source: Trends in International Migration, OECD 2001

Like Canada, Australia proactively attracts highly skilled migrants by offering them a transparent and predictable talent-for-citizenship exchange. Highly skilled migrants entering Australia in the skilled-independent category are entitled to *permanent* residency status.¹⁰⁹ This means that these new immigrants automatically and immediately embark on the road towards naturalization. Since the mid-1970s, when it adopted its proactive skilled-migration intake policy, Australia has invested heavily in settlement programs for new immigrants.¹¹⁰ It has encouraged, more than any other destination country, the adoption of citizenship among its immigrants.¹¹¹ These programs have borne fruit: In 1991, seventy percent of eligible overseas-born residents had become Australian citizens by way of naturalization.¹¹² The Australian Citizenship Act of 1948, which was amended in 1984, 1986, and 1994, now provides the most generous and open naturalization policy in the world: Two years of consecutive

¹⁰⁹ See Austl. Gov't, Dep't of Immigration and Multicultural & Indigenous Affairs (DIMIA), Applying for a Permanent Visa as a Skilled Person, <http://www.immi.gov.au/extend/permanent-skilled.htm> (last visited Oct. 12, 2005).

¹¹⁰ See Zappalà & Castles, *supra* note 61, at 48.

¹¹¹ See *id.*

¹¹² In a country that receives immigrants from more than one hundred countries, and whose foreign-born population accounts for more than twenty percent of the population, many of them originating from poorer and once-authoritarian regimes, this is a phenomenal achievement. See *id.* at 34.

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and lawful residence (out of the five years preceding the application) are all that is required to apply for citizenship.¹¹³

4. *New Zealand: Innovating Admission*

In 1991, New Zealand joined the global competition for talent. Learning from the experiences of Canada and Australia, it developed its own variant of the point system,¹¹⁴ which offers “opportunities for skilled migrants, particularly in industries and regions experiencing growth.”¹¹⁵ The point system is designed to attract the highly qualified migrant “who wants to come to live and work in New Zealand, and who has the skills that New Zealand needs to help it prosper nationally and internationally.”¹¹⁶ As the New Zealand Immigration Minister explains: “We are looking for skills that will help us achieve sustainable economic growth and encourage innovation.”¹¹⁷

To qualify as a skilled migrant, an applicant must pass a threshold of accumulated points, which are calculated on the basis of criteria such as work experience, professional and educational qualifications, and age.¹¹⁸ Following in the footsteps of Canada and Australia, New Zealand also grants bonus points for the qualifications attained by the applicant’s spouse or partner.¹¹⁹ But unlike Canada and Australia, New Zealand puts greater emphasis on attracting skilled migrants who are already working (or have recently worked) in New Zealand in their specialized occupations.¹²⁰ It further grants significant points for educational qualifications attained in New Zealand, assuming that those who have familiarized themselves with the New Zealand

¹¹³ See Citizenship Act, 1948, § 13 (Austl.), *supra* note 61.

¹¹⁴ Te Ara: The Encyclopedia of New Zealand: Immigration Regulation: 1986–2003: Selection on Personal Merit, <http://www.teara.govt.nz/NewZealanders/NewZealandPeoples/ImmigrationRegulation/5/en> (last visited Oct. 12, 2005). The point system was later adjusted in 1995 and then again in 2002 and 2003. *Id.*

¹¹⁵ See N.Z. IMMIGRATION SERV., SKILLED MIGRANT CATEGORY: EXPRESSION OF INTEREST GUIDE 2 (2003), available at <http://www.immigration.govt.nz/NR/rdonlyres/E741D6F6-7670-48E1-B824-69B3959461D4/0/1101AMarch8FINAL.pdf> [hereinafter NZIS, SKILLED MIGRANT CATEGORY].

¹¹⁶ *Id.* at 33.

¹¹⁷ N.Z. Immigration Serv., We Welcome New Talent and Skill [hereinafter NZIS, New Talent], <http://www.workingin-newzealand.com/info/262> (last visited Oct. 9, 2005).

¹¹⁸ Applicants who can claim at least one hundred points are eligible to register their Expression of Interest with the New Zealand Immigration Service, which will enter that registration into a selection pool of potential skilled migrants. These applications are then ranked by the NZIS and subject to background checks. The applicants in the selection pool with the highest number of points are invited to submit a full application for permanent residency. If approved, the skilled migrant and his or her family will receive a Residence Visa to New Zealand. See NZIS, SKILLED MIGRANT CATEGORY, *supra* note 115, at 3.

¹¹⁹ *Id.* at 4.

¹²⁰ *Id.*

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“brand” will settle more quickly in the country and be able to match the salary levels and living standards of its domestic population.¹²¹

This pattern of targeted and selective admission streams for the highly skilled should sound quite familiar by now. Yet New Zealand, like Canada before it, has left a distinct mark on the global race for talent in the form of a new initiative, which became law with the passage of the Immigration Amendment Act 2003,¹²² representing a shift in government policy, “from passively accepting and processing . . . applications, to being an active recruiter of talent.”¹²³ This initiative generated the creation of the “talent visa” under the work-to-residence program.¹²⁴ This new visa is based on an unprecedented partnership between government and business in selecting skilled migrants.¹²⁵ This partnership works as follows: Employers who seek to recruit specialized workers may petition the government for “accredited” status, which, once granted, permits these employers to recruit talent from overseas to fill skill shortages in high-demand sectors (such as the IT industry).¹²⁶ In recruiting skilled workers overseas, these select employers are able to offer a complete package to potential candidates, namely, a job offer *and* an employment visa.¹²⁷ For an individual with specialized and marketable skills, the talent visa opens the door of immigration based on a specific job offer—without

¹²¹ *Id.*

¹²² See NZIS, *New Talent*, *supra* note 117.

¹²³ *Id.*

¹²⁴ See *id.* For more on the work-to-residence program launched in 2002, see N.Z. IMMIGRATION SERV., TEMPORARY ENTRY, <http://www.immigration.govt.nz/NR/rdonlyres/0ADBFD3-EFEB-4638-B6AB-896C7851C36B/0/temporaryentry.pdf> (Nov. 28, 2005).

¹²⁵ I discuss some of the ethical concerns raised by these policy changes in Part III.

¹²⁶ The talent visa (accredited employer) work policy therefore requires coordination and cooperation among employers and a number of government agencies, including the Employment Relations Service, Immigration Service, Occupational Safety and Health Service, Accident Compensation Corporation, and the relevant trade union. See N.Z. IMMIGRATION SERV., APPLICATION FOR EMPLOYER ACCREDITATION UNDER THE TALENT (ACCREDITED EMPLOYERS) WORK POLICY, <http://www.immigration.govt.nz/NR/rdonlyres/06EF88F0-E183-48AA-A035-55D8D1A8A1F9/0/1090Oct6.pdf> (November 2004). Today, merely three years after the launch of the Talent Visa, the Accredited Employers List includes 216 employers. See N.Z. IMMIGRATION SERV., ACCREDITED EMPLOYERS LIST, <http://www.immigration.govt.nz/migrant/stream/work/worktoresidence/linkadministration/toolboxlinks/accreditedemployerslist.htm> (last visited Nov. 18, 2005). With this new visa program, the government significantly improves the ability of accredited employers to “actively recruit talented individuals to . . . New Zealand.” See NZIS, *New Talent*, *supra* note 117.

¹²⁷ See DEP’T OF LABOUR, IMMIGRATION NEW ZEALAND, EMPLOYING OVERSEAS WORKERS, http://www.immigration.govt.nz/NR/rdonlyres/88636396-4BCE-4C7B-A0A6-1CA6E0B83E24/0/imm_overseas_workers2.pdf (Sept. 2005); Worksite/PaeMahi, *Get Accredited Employer Status Under the Talent Work Policy for Recruiting Specialist Staff from Overseas*, <http://www.worksite.govt.nz/en/looking-for-staff/metalogue/?urn=urn:nzxls-sn:000108:1000000> (last visited Nov. 18, 2005).

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requiring the skilled worker to then go through an additional bureaucratic and often lengthy process of attaining a separate employment approval, as is the case in most other advanced industrial countries.¹²⁸ In the context of a fierce interjurisdictional competition for talent, this expedited procedure provides an advantage to New Zealand in its talent-recruiting efforts since it provides assurances to foreign skilled workers that, unlike in the United States, they will not have to wait several months after a job offer before their employment or immigration visa is approved. Instead, New Zealand allows the freshly recruited employee to enter the country immediately, based on a genuine job offer from an accredited employer in highly specialized or in-demand fields. After two years of employment and residence in New Zealand, the holder of a talent/work-to-residence visa can apply for permanent residence status, which, in turn, serves as the basis for naturalization.¹²⁹ This means that merely twenty-four months after the overseas-recruited skilled worker sets foot in New Zealand, she is well on her way towards the fulfillment of the coveted talent-for-citizenship exchange.¹³⁰

The New Zealand talent visa thus represents one of the most far reaching responses by a small-economy jurisdiction to the challenges presented by the tight global competition for talent and the proliferation of national players at the international market for the highly

¹²⁸ For the immigration official, this expedited procedure opens up an additional route (beyond the standard skilled-migration stream) to admit skilled individuals as “prospective Kiwis,” allowing them a “major opportunity to make New Zealand their home.” See NZIS, New Talent, *supra* note 117. That said, the talent visa represents a rather dramatic example of power-sharing between government and employers in recruiting immigrants. It is too early to assess the full implications of this move, but important to note that other countries have resisted a similar delegation of authority to accredited employers, preferring instead to keep the government involved in the process of individual pre-approval of overseas applicants.

¹²⁹ The talent visa holder may apply for permanent residency in New Zealand after a two-year period, subject to standard security, character, and health checks. The applicant must further demonstrate employment by an accredited employer for at least two years. See NZIS, New Talent, *supra* note 117.

¹³⁰ Naturalization or “citizenship by grant” is governed by the requirements set out in the New Zealand Citizenship Act of 1977. See Citizenship Act 1977, § 8, 1977 S.N.Z. 61 (N.Z.) (as amended). In order to be granted citizenship, the immigrant must have been a permanent resident of New Zealand (i.e., a holder of a residence visa or permit) and must have been physically present in New Zealand during the three years prior to applying for naturalization (unless the migrant was granted permanent residence on or after April 21, 2005, in which case five years are required). The applicant must also be of good character, have sufficient knowledge of the responsibilities and privileges attaching to New Zealand citizenship, have sufficient knowledge of English, and express intent to continue to ordinarily reside in New Zealand. N.Z. Dep’t of Internal Affairs, General Requirements for a Grant of New Zealand Citizenship, http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Services-Citizenship-General-Requirements-for-a-Grant-of-New-Zealand-Citizenship?OpenDocument (last visited Aug. 26, 2005).

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skilled:¹³¹ It essentially permits accredited employers to act as “talent hunters” for the nation.¹³²

The vigor of New Zealand’s talent initiative, which is based on *actively* recruiting skilled migrants, highlights perhaps better than any other example the dramatic shift in recent years in the landscape of highly skilled migration. Immigration officials in other jurisdictions have taken note of New Zealand’s strategy in the worldwide talent hunt. In 2005, for example, Canada’s Citizenship and Immigration Minister announced that, in the same spirit of aggressive and proactive recruitment, Canada would, in the coming year, fast-track the admission of more than 100,000 skilled-migration applicants.¹³³ Canada will also invest heavily in pilot initiatives for international students to enhance the competitiveness of Canada’s higher-education industry in the fierce contest over attracting talented overseas students.¹³⁴ The government further announced the creation of an “in-Canada” application procedure that will permit temporary skilled migrants to adjust their status to permanent residence, allowing them to embark on a path to the “promised land” of citizenship.¹³⁵ These legal reforms are part of a larger redefinition of the government’s immigration services: “We have to turn ourselves from a risk-management system into a recruitment system,” stated Canada’s Immigration Minister in recently announcing these new measures. “We have to rethink how we do business and attract people.”¹³⁶

This domino effect, whereby one country essentially emulates the policy innovations generated by another in the global race for talent,

¹³¹ The need for the government to address these international challenges is explicitly spelled out in a report on the New Zealand Talent Initiative. See L.E.K. CONSULTING, *supra* note 14, at 5.

¹³² In addition to allotting talent visas to accredited employers, the government itself is engaged in direct marketing of New Zealand’s highly-skilled migration program. It has placed in the United States a number of immigration officials—known, appropriately, as “marketing directors” of the skilled-migration program—to conduct interviews at IT international work fairs and related events with potential migrants to ensure that they qualify for admission under the point-system. See Adam Gifford, *Skilled Migrants Welcome*, N.Z. HERALD, Sept. 3, 2005, http://www.nzherald.co.nz/section/story.cfm?c_id=5&objectid=10114229.

¹³³ See Jim Brown, *Feds to Ease Immigration Rules for Families and Students, Speed Citizenship Process*, CAN. PRESS NEWSWIRE, Apr. 17, 2005.

¹³⁴ Press Release, Citizenship & Immigration Can., *An Immigration System for the 21st Century (2005)*, available at <http://www.cic.gc.ca/english/press/05/0509-e.html> [hereinafter CIC, Immigration System]. These initiatives will make it easier for foreign degree candidates to study, work, and eventually apply for skilled-migrant status in Canada.

¹³⁵ Press Release, Citizenship & Immigration Can., *Immigration Minister Announces Significant Investment in Fixing Canada’s Immigration System (2005)*, available at <http://www.cic.gc.ca/english/press/05/0531-e.html>.

¹³⁶ See Brown, *supra* note 133.

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offers an example of how immigration officials are constantly trying to outbid their international rivals. The phenomenon reflects a strong commitment to making adjustments and refinements to existing admission policies in order to ensure that no international competitor gets further ahead without an appropriate response. This acute awareness of the fast-accelerating global race for talent is well captured in the following remarks by the Minister: “Canada’s immigration system is a model for the world and today’s measures allow us to maintain and enhance our position.”¹³⁷

B. *The U.S. Response*

After more than two and a half decades of stagnation on the knowledge-migration policy front, the U.S. Congress passed a series of amendments to the Immigration and Nationality Act, collectively referred to as the Immigration Act of 1990.¹³⁸ It is widely recognized that the 1990 Act was “[r]esponding to fears concerning the U.S. work force’s ability to compete in the global economy.”¹³⁹ The Act established and streamlined various admission categories specially designed to attract highly skilled knowledge migrants from around the world. These include the so-called “priority workers” category, which permits annual admission of up to 40,000 persons with extraordinary potential for contribution to their fields, such as noted professors and researchers, as well as other individuals who have attained widespread acclaim.¹⁴⁰ The 1990 Act also permits entry for other professionals with advanced degrees and exceptional ability in science, the arts, or business.¹⁴¹ Like Canada’s and Australia’s skilled-migration stream, these post-1990 employment-based admission procedures prioritize educational and professional attainment and excellence. The new Act also defined the parameters of temporary admission for skilled workers in “specialty occupations,” such as engineers, mathematicians, physical scientists, medical and health professionals, and computer specialists, under the (in)famous H-1B category.¹⁴² Technically,

¹³⁷ See CIC, Immigration System, *supra* note 134.

¹³⁸ See Immigration Act of 1990 (INA), Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified as amended in various sections of 8 U.S.C.).

¹³⁹ See DAVID WEISSBRODT, IMMIGRATION LAW AND PROCEDURE 34 (3d ed. 1992).

¹⁴⁰ INA § 121(b), 8 U.S.C. 1153 (2000).

¹⁴¹ *Id.*

¹⁴² INA § 205(c), 8 U.S.C. §§ 1101(a)(15)(H)(i), 1184 (2000). “Specialty occupation” is defined in § 214(i), 8 U.S.C. § 1184. The H-1B category allows U.S. employers to recruit foreign-born professionals with practical knowledge and at least a baccalaureate degree to perform services in a “specialty occupation” after they have filed for a Labor Condition Application (LCA), also known as “attestation,” with the Department of Labor (DOL). *Id.*; see also ALEINIKOFF ET AL., *supra* note 80, at 402–03; Papademetriou, *supra* note 46, at

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the H-1B is a temporary three-year employment visa that can, and often is, extended for up to six years. The knowledge migrant may then apply for an adjustment of status from temporary admission to permanent residence (or “green card” status).¹⁴³ In other words, the H-1B visa can serve as a stepping stone towards establishing long-term legal residency and eventually citizenship in the United States.¹⁴⁴

Although the 1990 Act initially allotted an annual cap of 65,000 H-1B visas,¹⁴⁵ changes in the international race for talent and domestic pressures to respond to these new challenges—the most significant of which was the determination of many European countries to develop new recruitment procedures¹⁴⁶—have led Congress to amend its immigration policy and raise that numerical limit.¹⁴⁷ In 2000, American businesses successfully argued that without an immediate increase in the influx of knowledge migrants, they risked losing their competitive advantage, especially in the IT sector.¹⁴⁸ Congress then again adjusted the admission numbers, raising them to 195,000

37–38. This complex petition process is loathed by both employers and immigration lawyers. It has been described by its critics as “a Byzantine rule that is hamstringing employers and keeping them from conducting business in the way companies normally do in this day and age.” Angelo A. Paparelli, *LCA's/H-1B Nonimmigrant Visas*, in 32 ANN. IMMIGR. & NATURALIZATION INST. 81, 107 (1999).

¹⁴³ INA § 205(a), 8 U.S.C. § 1184(g); American Competitiveness in the Twenty-First Century Act of 2000 § 106(b), Pub. L. No. 106-313, 114 Stat. 1251 (codified at 8 U.S.C. § 1184 (Note)) (2000).

¹⁴⁴ INA § 205(a), 8 U.S.C. § 1184(g); American Competitiveness in the Twenty-First Century Act of 2000 § 106(b).

¹⁴⁵ *Id.*; see also INA § 214(g)(1)(A), (g)(2); 8 C.F.R. § 214.2(h)(8). The 65,000 cap was reached for the first time in fiscal year 1997. ALEINIKOFF ET AL., *supra* note 80, at 404. In the subsequent years, the number of H-1B visas has fallen short of U.S. employers' demand in six out of eight years. The annual cap is “typically . . . filled within the first few months or even weeks of the fiscal year”; for example, in fiscal year 2005, “the cap of 65,000 H-1B visas was depleted on October 1, 2004, the first day of the fiscal year.” See Migration Policy Institute, *A New Century: Immigration and the US*, Migration Info. Source, Feb. 2005 (updated by Kevin Jernegan), <http://www.migrationinformation.org/Profiles/display.cfm?ID=283>. For fiscal year (FY) 2006, the 65,000 cap on H-1B visas was reached on August 10, 2005, roughly six weeks before FY 2006 even began (the fiscal year begins on October 1). Press Release, U.S. Citizenship & Immigration Serv., USCIS Reaches H-1B Cap (Aug. 12, 2005), available at http://uscis.gov/graphics/publicaffairs/newsrels/H-1Bcap_12Aug05.pdf [hereinafter USCIS Reaches Cap].

¹⁴⁶ See *infra* Part II.C.

¹⁴⁷ In the late 1990s, the debate surrounding the H-1B visas proved contentious because of concerns about the potentially negative impacts of the massive influx of overseas professionals on domestic wages and the employability of some in the domestic work force. Technology-based companies, for their part, claimed that they had problems fulfilling their fast-growing needs for highly skilled workers. *Immigration and America's Workforce for the 21st Century: Hearing Before the H. Subcomm. on Immigration and Claims*, 105th Cong. 3–4 (1998) (opening statement of Rep. Lamar S. Smith, Chairman, H. Subcomm. on Immigration and Claims).

¹⁴⁸ See *id.*

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per year, through the enactment of the American Competitiveness in the Twenty-First Century Act of 2000.¹⁴⁹ The title of this Act, as well as the fact that it exempted certain categories of employers (e.g., universities and research institutions) from numerical migration limits, reflect America's growing anxiety that, without adjusting the admission ceiling for knowledge migrants, it will be left behind.

At least some of America's skilled-migration gains in the 1990s led to losses for competing nations. For example, an Australian study released in 1997 showed that "increases in the number of skilled immigrants arriving in the United States from a particular sending country are related to a reduction in the number of skilled individuals from that country applying for an Australian visa."¹⁵⁰ No similar negative effects on Canada's skilled-migration stream were recorded.¹⁵¹ To overcome this setback, Australia's immigration officials revamped their efforts to attract two subcategories among the highly skilled. First, Australia now awards points for the attainment of a post-secondary degree at an Australian university (thereby targeting foreign graduate students who have gained "Australian qualifications").¹⁵² Second, it lures dual-career couples by providing additional points in recognition of the advanced degrees or professional qualifications of the principal applicant's spouse (the "spouse skills" category).¹⁵³ Australia further permits both spouses to engage immediately in employment upon landing, in this way offering a significant advantage for dual-career families relative to migrants admitted under the American H-1B program, which does not automatically allow holders' spouses (many of whom are professionals as well) a right to work in the United States.¹⁵⁴ These combined efforts appear to have been fruitful. From 1997-98, the percentage of skilled migration into Australia rose back to fifty percent of the annual immigration intake.¹⁵⁵

The underlying concern that "[t]here simply may not be enough individuals with the desired characteristics wishing to immigrate,"¹⁵⁶

¹⁴⁹ American Competitiveness in the Twenty-First Century Act of 2000 § 102(a). This Act created a much-needed extension system to respond to administrative backlogs that affected the status of H-1B visa holders who were awaiting approval of their adjustment of status to a permanent residency status. *Id.* § 106(b).

¹⁵⁰ See Cobb-Clark & Connolly, *supra* note 64, at 689.

¹⁵¹ *Id.*

¹⁵² See DIMIA, POPULATION FLOWS, *supra* note 105, at 24.

¹⁵³ *Id.* at 41.

¹⁵⁴ Special Requirements for Admission, Extension, and Maintenance of Status, 8 C.F.R. § 214.2(a) (2004).

¹⁵⁵ See OECD 2001, *supra* note 2, at 296.

¹⁵⁶ See Cobb-Clark & Connolly, *supra* note 64, at 688.

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along with the growing worldwide competition for qualified knowledge migrants, eventually led Canada to revisit its point system. Following Australia, Canada now provides “bonus” points for post-secondary education attained at a Canadian university.¹⁵⁷ The new point system also provides points for the educational qualification of a spouse of the skilled-migrant applicant.¹⁵⁸ But it goes further than Australia’s system by providing similar bonus points not only for married couples but also for those engaged in common-law partnership, and tries to cater to highly skilled migrants in the United States who are increasingly frustrated that their temporary employment visas (e.g., H-1Bs) do not secure their partners any employment or related benefits and opportunities.¹⁵⁹

But the competition for the highly skilled is no longer limited to the traditional destination countries. The rapid rise of the knowledge economy in recent years has led many European countries, most notably Germany, to abandon their previous zero-admission policies. In 2000, the German government, which has long opposed any new initiatives for labor migration,¹⁶⁰ launched with much fanfare its fast-track “green card” scheme that allows up to 20,000 IT specialists from non-European countries to enter the country as skilled migrants on the basis of their specialized knowledge and experience.¹⁶¹ Similar steps to attract talent have been taken in Austria,¹⁶² France,¹⁶³ the

¹⁵⁷ See Citizenship & Immigration Can., Six Selection Factors and Pass Mark, <http://www.cic.gc.ca/english/skilled/qual-5.html> (last visited Aug. 25, 2005).

¹⁵⁸ See *id.*

¹⁵⁹ 8 C.F.R. § 214.2(a) (2004).

¹⁶⁰ The ban on labor recruitment of foreign workers was introduced by the German government in 1973, following a period of significant reliance on “guest workers” (*Gastarbeiter*) as part of the dramatic economic recovery of Germany in the post-WWII period. For a concise overview, see Veysel Oezcan, *Germany: Immigration in Transition*, MIGRATION INFORMATION SOURCE, July 2004, <http://www.migrationinformation.org/Profiles/display.cfm?ID=235>.

¹⁶¹ See INDEP. COMM’N ON MIGRATION TO GERMANY, STRUCTURING IMMIGRATION, FOSTERING INTEGRATION 63 (2001), available at http://www.bmi.bund.de/Internet/Content/Common/Anlagen/Broschueren/2001/Structuring_Immigration_-_Fostering_Id_14625_en,templateId=raw,property=PublicationFile.pdf/Structuring_Immigration_-_Fostering_Id_14626_en.pdf; THOMAS BAUER & ASTRID KUNZE, THE DEMAND FOR HIGH-SKILLED WORKERS AND IMMIGRATION POLICY 8 (2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=500902.

¹⁶² See RYSZARD CHOLEWINSKI, THE LEGAL STATUS OF MIGRANTS ADMITTED FOR EMPLOYMENT 44 (2004).

¹⁶³ See OECD 2001, *supra* note 2, at 28.

United Kingdom,¹⁶⁴ Sweden,¹⁶⁵ Norway,¹⁶⁶ the Netherlands,¹⁶⁷ and Ireland,¹⁶⁸ to mention a few leading examples.

C. Recent Developments: The Europeans Join the Race

At the beginning of the new century, European leaders reached agreement on the 2000 Lisbon Agenda, committing their nations and the EU as a whole to the goal of becoming “the most competitive and dynamic knowledge-based economy in the world” by 2010.¹⁶⁹ Recognizing that “[t]he key element of global competition is no longer the trade of goods and services or flows of capital, but the competition for people,”¹⁷⁰ European countries—led by Germany—have introduced radical changes to their immigration policies, replacing the traditional culture of restriction with a competitive and market-oriented approach that is specifically targeted at attracting highly skilled migrants.

In recent years, almost every country in the EU has seen the introduction of specialized fast-track entry streams for knowledge migrants, especially those working in the IT sector.¹⁷¹ But some have gone further still. A few countries have taken giant leaps in their “managed” immigration strategies by devising selective migration streams that provide privileged entry and settlement conditions to international students, workers, and researchers—the very same

¹⁶⁴ See OECD 2005, *supra* note 10, at 286.

¹⁶⁵ See CHOLEWINSKI, *supra* note 162, at 77.

¹⁶⁶ See OECD 2005, *supra* note 10, at 35.

¹⁶⁷ See GAIL McLAUGHLAN & JOHN SALT, MIGRATION POLICIES TOWARDS HIGHLY SKILLED FOREIGN WORKERS 122 (2002); see also CHOLEWINSKI, *supra* note 162, at 30. In 2004, the Dutch government facilitated the admission process of highly skilled migrants by accepting many of the recommendations set forth in a recent report of the Innovation Platform, including the abolishment of the work permit for knowledge migrants with specialized skills. See JURGEN GEELHOED & FRANS NAUTA, GRENZELOZE MOBILITEIT KENNISMIGRANTEN [HIGH-MOBILITY MIGRANTS] 6 (2003) (recommending one-step procedure for admission of highly skilled migrants), available at http://www.innovatieplatform.nl/assets/binaries/documenten/2004/int_kenniswerkers/Advies_Kenniswerkers.pdf; Follow up advies Internationale kenniswerkers, http://www.innovatieplatform.nl/nl/actueel/nieuws/brief/2004/6/Follow_up_advies_Internationale_kenniswerkers.html (last visited Aug. 25, 2005) (announcing government decision to institute this recommendation).

¹⁶⁸ See McLAUGHLAN & SALT, *supra* note 167, at 104.

¹⁶⁹ See Presidency Conclusions 12, Lisbon European Council (Mar. 23–24, 2000), available at <http://www.europarl.eu.int/bulletins/pdf/1s2000en.pdf>. The EU Justice and Internal Affairs Council plans to adopt a recommendation to facilitate the admission of top researchers from non-EU countries, by requiring member states to issue residence permits either automatically or through a fast-track procedure. See OECD 2005, *supra* note 10, at 103–04.

¹⁷⁰ RICHARD FLORIDA & IRENE TINAGLI, EUROPE IN THE CREATIVE AGE 12 (2004), available at <http://www.demos.co.uk/catalogue/creativeeurope>; see also *supra* note 3.

¹⁷¹ See generally CHOLEWINSKI, *supra* note 162.

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talent pool that is already the target of fierce competition, as each country tries to grow its talent base to face the challenges and opportunities of the new knowledge-based economy.

1. Germany's Transformation from "Zero-Tolerance" to "Managed Migration"

The first and most dramatic move occurred in 2000, when Germany—which has long had an official recruitment ban on labor migration¹⁷²—introduced its path-breaking “green card” program.¹⁷³ This program provided work permits for highly qualified foreign specialists in the fields of information and communication technology.¹⁷⁴ The green card initiative focused primarily on recruiting computer experts from overseas, many of whom eventually arrived from India.¹⁷⁵ It was launched “in order to cope with the necessities of a globalised economy and labour shortages in particular sectors,” by changing Germany’s immigration law so as to provide “a wide range of opportunities for the temporary and sometimes unlimited admission of third country nationals.”¹⁷⁶

The green card program proved to be the precursor of a broader transformation. In the same year that the IT initiative came into life, the Independent Commission on Migration to Germany began its work. The Commission released a comprehensive and much-anticipated report in 2001. In it, the Commission came to the unequivocal conclusion that Germany must permit selective and managed migration in order to advance its economic growth and global competitiveness.¹⁷⁷ The Report’s call for a new and bold approach to “managed migration” led to the drafting of a new Immigration Act.¹⁷⁸

¹⁷² *Id.*

¹⁷³ See BAUER & KUNZE, *supra* note 161, at 8.

¹⁷⁴ See Verordnung über die Arbeitsgenehmigung für hoch qualifizierte ausländische Fachkräfte der Informations- und Kommunikationstechnologie [Ordinance on the Granting of a Residence Permit for Highly-Qualified Foreign Skilled Workers in Information and Communication Technology], July 11, 2001, BGBl.I at 1146. The green card program came into effect in August 2000. See Oezcan, *supra* note 160.

¹⁷⁵ See BAUER & KUNZE, *supra* note 161, at 21 tbl.7.

¹⁷⁶ NORBERT CYRUS & DITA VOGEL, EU AND US APPROACHES TO THE MANAGEMENT OF IMMIGRATION: GERMANY 13 (Jan Niessen et al. eds., 2003), available at <http://www.migpolgroup.com/uploadstore/Germany.pdf>.

¹⁷⁷ See INDEP. COMM’N ON MIGRATION TO GERMANY, *supra* note 161, at 11 (“Germany needs immigrants. . . . [I]t has not yet become sufficiently clear in the political debate how important an active international exchange of labour is for enabling countries to meet the challenge of global competition.”).

¹⁷⁸ See Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (Zuwanderungsgesetz) [Act to Control and Restrict Immigration and to Regulate the Residence and Integration of EU Citizens and Foreigners (Immigration Act)], June 20, 2002, BGBl.I at 1946

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This proposed law introduced for the first time in Germany's history the opportunity for highly skilled foreign-born individuals to migrate to the country *without* applying for a particular job. Instead, we find in the 2002 legislation a proposal to adopt a selection procedure hitherto unknown in the German juridical system, but one that is quite familiar to us from the world of competitive immigration regimes: the point system. As in Canada, Germany's proposed point system rests on selection criteria that award points on the basis of education, age, language proficiency, and professional skills. Bonus points are awarded for linkages with Germany.¹⁷⁹

The new version of the Immigration Act, passed in 2004, significantly liberalizes the admission of highly skilled migrants,¹⁸⁰ recognizing that Germany "already compete[s] on a global scale for the best minds, and this competition will only become more intense in the future."¹⁸¹ These "best minds," once admitted, are eligible "to receive permission to work and settle in Germany."¹⁸² The new law specifically targets scientists and senior academic researchers, as well as top-level managers in business and industry, immediately granting them a settlement permit.¹⁸³ Unlike the American H-1B program, the

(F.R.G.), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/rsd/rsddocview.pdf?tbl=RSDLEGAL&id=3d89aa2d4>; see also Oezcan, *supra* note 160. The implementation of this Act was later halted following a legal challenge to the validity of the voting procedure. *Id.* A revised version of this legislation was passed in 2004. See Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern [Act to Control and Restrict Immigration and to Regulate the Residence and Integration of EU Citizens and Foreigners (Immigration Act)], July 30, 2004, BGBl.I at 1950 (F.R.G.), available at http://www.bmi.bund.de/nn_174390/Internet/Content/Common/Anlagen/Gesetze/Zuwanderungsgesetz__englisch,templateId=raw,property=PublicationFile.pdf/Zuwanderungsgesetz_englisch [hereinafter German Immigration Act 2004].

¹⁷⁹ See German Immigration Act 2002 § 20.

¹⁸⁰ Under the Act, highly skilled migrants become eligible for a permanent settlement permit immediately upon entering Germany. German Immigration Act 2004 § 39. See also FED. MINISTRY OF THE INTERIOR, IMMIGRATION LAW AND POLICY 30–31 (Mar. 2005), available at http://www.bmi.bund.de/cln_012/nn_148138/Internet/Navigation/EN/Publications/publications__node.html_nnn=true (follow hyperlink to "Immigration Law and Policy," then follow hyperlink to pdf file) [hereinafter GERMAN IMMIGRATION LAW AND POLICY] (listing significant changes from prior law). The ban on recruiting unskilled and semi-skilled migrants remains in place, however. See Fed. Ministry of the Interior, The Immigration Act, http://www.zuwanderung.de/english/2_zuwanderungsgesetz.html (last visited Aug. 26, 2005) (summarizing Act).

¹⁸¹ GERMAN IMMIGRATION LAW AND POLICY, *supra* note 180, at 6.

¹⁸² German Embassy, New Immigration Law Offers Prospects for Skilled Workers, Students, July 12, 2004, http://www.germany-info.org/relaunch/politics/new/pol_immigration_law_2004.html.

¹⁸³ German Immigration Act 2004 § 19(2); Oezcan, *supra* note 160. Unlike the original 2002 law, the final draft did not include a formalized point system mechanism, *id.*, but the core principles in selecting highly skilled migrants remain.

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spouses or same-sex partners of highly skilled migrants entering Germany are automatically permitted to take up employment in their field, if they so wish.¹⁸⁴ The new law further encourages foreign students who have successfully completed their studies in Germany to remain in the country for employment purposes.¹⁸⁵

With this new law, “a shift in paradigm is initiated from the zero immigration policy of the past thirty years to becoming an immigration country like Canada, for example.”¹⁸⁶ This interjurisdictional learning is openly admitted by top functionaries in Germany. For instance, the former President of the German Federal Parliament and a Member of the Independent Commission on Migration explained that: “In Germany when I make public speeches on immigration, I say ‘We need more Canada.’”¹⁸⁷ The reason for such transnational borrowing soon becomes clear: “We admire the Canadian approach because . . . you follow certain criteria to select [skilled migrants].”¹⁸⁸ Along with its main competitors, Germany now treats the selective admission of highly skilled immigrants as a tool to advance its economic interests and boost global competitiveness. As Germany’s Interior Minister, the architect of the new Immigration Act, asserted: “There’s competition among the industrialized countries for the best minds. That’s why we have to direct our immigration law more strongly toward our own economic interests.”¹⁸⁹ But unlike Canada or the United States, Germany is a country that long resisted the idea of becoming a “nation of immigrants.”¹⁹⁰ Still, between sealing the boundaries of the nation by preserving a *Völkisch* conception of membership, and responding to long-term demographic and economic interests, the latter prevailed.

¹⁸⁴ See Fed. Ministry of the Interior, Glossary Immigration A-Z, “Highly Skilled Worker,” http://www.zuwanderung.de/english/2_neues-gesetz-a-z/hochqualifizierte.html (last visited Nov. 18, 2005).

¹⁸⁵ German Immigration Act 2004 § 16(4).

¹⁸⁶ See INT’L REFORM MONITOR, NEW IMMIGRATION LAW 4 (2005), available at http://www.reformmonitor.org/pdf-cache/doc_reports_2-id-2522.pdf.

¹⁸⁷ See Marina Jimenéz, *Is the Current Model of Immigration the Best One for Canada?*, GLOBE AND MAIL (Toronto), Dec. 12, 2005, at A7 (quoting Rita Suessmuth, former President of German Federal Parliament and member of Federal Commission on International Migration).

¹⁸⁸ *Id.*

¹⁸⁹ *Germany: Schily Proposal*, MIGRATION NEWS (last visited Sept. 14, 2005), http://migration.ucdavis.edu/mn/more.php?id=2450_0_4_0.

¹⁹⁰ The Federal Minister of the Interior, Otto Schily, opens his foreword to a federal document that details the various changes introduced by the new Immigration Act with the following words: “For many years, the statement ‘Germany is not a country of immigration’ summed up our country’s basic policy towards foreigners.” GERMAN IMMIGRATION LAW AND POLICY, *supra* note 180, at 2.

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The historical significance of Germany's new immigration law is perhaps best reflected in the tone of a parliamentary speech delivered by the Minister of the Interior prior to the final vote in the Bundestag that passed the Act: "This legislation is a victory above all for our country, for Germany. It strengthens our position in the global competition for the brightest minds and serves our country's economic interests."¹⁹¹ What is fascinating about this narrative is not just the fact that a leading, yet traditionally highly restrictive ("zero immigration"), OECD country has opened its doors towards the "best and the brightest" worldwide, but also that Germany is now committed to granting these skilled migrants a *permanent* settlement permit upon their arrival.¹⁹²

In other words, Germany acknowledges the need to cater to the dual economic and citizenship motivations of the highly skilled by offering them *both* financial rewards *and* the opportunity to establish themselves in the heart of the EU. By delivering the security of establishing permanent residency in Germany, the new legislation overcame the major shortcoming of the previous IT "green card" program, which provided a nonrenewable five-year *temporary* work permit and thus failed to address the "citizenship factor" in attracting the highly skilled from outside Europe.¹⁹³ The new Act, in contrast, grants highly skilled migrants an opportunity to establish Germany as their new permanent home. This is the familiar talent-for-citizenship exchange, here manifested in a European variant that emphasizes permanent settlement as the core guarantee of inclusion for the newcomer.¹⁹⁴

In entering the global race for talent, Germany not only admitted that its economy requires more skilled migrants to remain competitive,¹⁹⁵ but also that it had learned from the selective migration programs developed by competing jurisdictions, including traditional

¹⁹¹ Otto Schily, Minister of the Interior, Speech in the Final Bundestag Debate of 1 July 2004 on the Proposed Act to Control and Restrict Immigration and to Regulate the Residence and Integration of EU Citizens and Foreigners (July 1, 2004), *available at* http://www.bmi.bund.de/chn_012/nn_122730/Internet/Content/Nachrichten/Archiv/Reden/2004/07/Schily_Zuwanderungsgesetz_ist_ein_Id_95157_en.html.

¹⁹² See Oezcan, *supra* note 160.

¹⁹³ The "green card" program failed to meet the target of attracting 20,000 foreign IT specialists. See BAUER & KUNZE, *supra* note 161, at 9.

¹⁹⁴ Whereas the United States, Canada, Australia, and New Zealand follow the "as-of-right" model of naturalization, European countries generally follow a more discretionary process. See, e.g., WILLIAM ROGERS BRUBAKER, *Citizenship and Naturalization: Policies and Politics*, in IMMIGRATION AND THE POLITICS OF CITIZENSHIP IN EUROPE AND NORTH AMERICA 99, 108–16 (William Rogers Brubaker, ed., 1989) (comparing the "discretionary" and "as-of-right" systems of naturalization).

¹⁹⁵ See INDEP. COMM'N ON MIGRATION TO GERMANY, *supra* note 161, at 11.

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immigration-recruiting countries such as Canada. This is despite the fact that Canada and Germany each have a different history of migration, not to mention a different conception of nationhood. For the skilled migrant, this new development expands the traditional scope of choices beyond the classic immigration-receiving countries of the so-called New World, by making accessible the heart of the Old World. While it is too early to assess the long-term success of these new “recruitment” policies in Europe, their introduction clearly puts additional strain on all competitors in the already tight international race for talent.

2. *The United Kingdom’s Highly Skilled Migrant Program*

But the story doesn’t end here. Germany’s decision to hop on the skilled-migration bandwagon was merely the first in a frenzy of proactive moves among Europe’s leading economic performers. Recognizing the benefits of a “proactive approach to immigration, in which immigrants are recruited specifically for the economic benefits they bring,”¹⁹⁶ European governments are increasingly using their exclusive and powerful control over immigration, as well as the ultimate prize of legal permanent residence, to attract and retain highly skilled migrants. Recognizing that competition for such talent is fierce, the United Kingdom unveiled in 2002 its Highly Skilled Migrant Programme,¹⁹⁷ which relies on an elaborate point system. Again, we find a similar emphasis on educational qualifications and work experience, although the U.K. program also assesses the applicant’s past earnings and achievement in her field.¹⁹⁸ This program implements some of the key recommendations of a Home Office 2002 White Paper,¹⁹⁹ which maps a new path for Britain’s immigration policy that extends beyond setting the initial conditions of entry to the United Kingdom, “through to eventual ‘integration’ and the attainment of citizenship.”²⁰⁰ In other words, the U.K. government is also actively using its control over the property of citizenship to advance its national economic interests under conditions of accelerated global competition.

¹⁹⁶ PAPADEMETRIOU & O’NEIL, *supra* note 76, at 3.

¹⁹⁷ See Immigration & Nationality Directorate, U.K. Home Office, Immigration Rules (2005), http://www.ind.homeoffice.gov.uk/ind/en/home/laws___policy/immigration_rules.html [hereinafter U.K. Immigration Rules].

¹⁹⁸ See Detailed Guide to Points System, http://www.workpermit.com/uk/highly_skilled_migrant_program3.htm (last visited Sept. 14, 2005).

¹⁹⁹ See U.K. HOME OFFICE, *SECURE BORDERS, SAFE HAVEN: INTEGRATION WITH DIVERSITY IN MODERN BRITAIN* (2002), available at <http://www.archive2.official-documents.co.uk/document/cm53/5387/cm5387.pdf> [hereinafter *SECURE BORDERS, SAFE HAVEN*].

²⁰⁰ See Flynn, *supra* note 36, at 475.

The White Paper further suggests that Britain’s relatively open economy is well positioned to benefit from the international mobility of skilled migrants: “Our strong labour market acts as a magnet for those seeking better jobs and lives for themselves and their families.”²⁰¹

Building on changes to the work-permit economic-migration stream that were already implemented in 2000,²⁰² the Highly Skilled Migrant Programme launched in 2002 now officially exempts those selected under its point system from the standard U.K. requirement of establishing a specific job offer prior to entering the country.²⁰³ These changes generated a steep increase in the number of economic-migration entrants to the United Kingdom, which hovered around 30,000 a year in the mid-1990s and has jumped to over 100,000 in 2002.²⁰⁴ This fits perfectly within the competitive immigration framework to which the U.K. government has committed itself, i.e., the recruitment of greater numbers of highly skilled migrants to sustain economic growth and innovation.

As a recent government document puts it, this modern approach to immigration is designed “to ensure that visitors, businessmen, students and others whose activities benefit the UK feel encouraged to come.”²⁰⁵ As with Germany’s new Immigration Act, the Highly Skilled Migrant Programme “aims to attract high human capital individuals, who have the qualifications and skills required by UK business to compete in the global marketplace.”²⁰⁶ Those entering the United Kingdom under the program receive an initial one-year resi-

²⁰¹ See SECURE BORDERS, SAFE HAVEN, *supra* note 199, at 24.

²⁰² See OECD 2001, *supra* note 2, at 333–38.

²⁰³ Compare U.K. Immigration Rules, *supra* note 197, § 135A (entry requirements for highly skilled workers) with *id.* § 128 (requirements for ordinary work permit employment). The U.K. government has also established a comprehensive “temporary” work-permit admission stream, which is similar to the American H-1B category. As the Government’s White Paper states, these work permits are “primarily designed to address recruitment of people outside the EU with medium and high skill levels, and to fill specific ‘shortage occupations.’” SECURE BORDERS, SAFE HAVEN, *supra* note 199, at 39.

²⁰⁴ See Flynn, *supra* note 36, at 477.

²⁰⁵ U.K. HOME OFFICE, FAIRER, FASTER AND FIRMER—A MODERN APPROACH TO IMMIGRATION AND ASYLUM 8 (1998), available at <http://www.archive.official-documents.co.uk/document/cm40/4018/4018.htm>.

²⁰⁶ ANNELIESE BALDACCINI, EU AND US APPROACHES TO THE MANAGEMENT OF IMMIGRATION: THE UNITED KINGDOM 19 (Jan Niessen et al. eds., 2003), available at <http://www.migpolgroup.com/uploadstore/UK.pdf>. In 2003, the U.K. government made several revisions to the Highly Skilled Migrants Programme, such as increasing opportunities for skilled migrants in dual career families by allowing the principal applicant to claim points for partner/spouse qualifications—following the pattern we have already observed in Australia, Canada, and New Zealand. See Press Release, U.K. Home Office, UK Welcomes More High Fliers to Boost Economy (Oct. 31, 2003), available at http://www.homeoffice.gov.uk/n_story.asp?item_id=668.

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dency permit, which can then be extended for up to three years. The spouse or unmarried partner of the skilled migrant, as well as children under eighteen, are also welcomed to the country as part of the program. After four years, they can all apply to settle permanently in the United Kingdom.²⁰⁷ Again we see a government taking action to access international talent by mobilizing the most precious resource that national entities can utilize in the global race for talent—the allocation of entitlement for permanent residence and eventual citizenship in their jurisdiction—not just to match major international competitors, but to surpass them.

3. Sweden’s “Sweet Deal” Admission Policy

In this multi-party competition, no one wants to be left behind. Sweden, for its part, has recently unveiled its new selective admission procedure designed to attract highly skilled migrants from outside the EU region. For those who qualify for its “highly skilled employment category,” Sweden offers a sweet deal: As in Canada and Australia, the skilled migrant and accompanying family are automatically granted permanent residency status from the moment of entry into this vibrant and bullish Northern European economy.²⁰⁸ Additional programs for attracting the highly skilled have been introduced in recent years by the Netherlands,²⁰⁹ France,²¹⁰ Norway,²¹¹ and Ireland.²¹² The latter is among the most creative jurisdictions, luring talented emigrant nationals to return home in light of its economic boom, much of which is credited to the country’s strong performance in knowledge-based industries.²¹³

²⁰⁷ See U.K. Immigration Rules, *supra* note 197 (providing indefinite leave to remain for highly skilled migrants); *id.* § 281 (spouse’s right to remain); *id.* § 297 (child’s right to remain). After four years, the skilled migrant can apply for an “indefinite leave to remain” in the United Kingdom. Once leave has been granted, the skilled migrant can apply for naturalization as a U.K. citizen, so long as the relevant requirements for naturalization (i.e., five years of residence, good character, proficiency in English, and an intention to live in the United Kingdom) have been met. See *id.* § 135G (indefinite leave to remain for highly skilled migrants).

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²⁰⁸ See CHOLEWINSKI, *supra* note 162, at 77–78. The absolute number of immigrants entering Sweden under the highly skilled employment category remains relatively low. However, what makes this an interesting case for the purposes of our analysis is the fact that Swedish immigration policymakers found it important to introduce such a category of admission in the first place and, in so doing, sought to attract skilled migrants by offering them the opportunity to gain permanent residence upon arrival. *Id.*

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²⁰⁹ See *supra* note 167.

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²¹⁰ See OECD 2001, *supra* note 2, at 28.

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²¹¹ See OECD 2005, *supra* note 10, at 35.

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²¹² See McLAUGHLAN & SALT, *supra* note 167, at 104.

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²¹³ Between 1995 and 2000, approximately fifty percent of 250,000 immigrants to Ireland were returning Irish nationals. A significant number of them are highly skilled workers.

As a result of this frenzy of targeted “immigration talent hunt” policies,²¹⁴ available statistics reveal that recruiting European countries have seen a significant increase in the number of entering highly skilled migrants and overseas students. As a recent study concludes: “Not surprisingly, perhaps, this increase has been most marked in the larger economies, where the demand for specialists and particular skills is likely to be greatest, although steady increases have also been recorded in some of the other countries”²¹⁵ In contrast to the decreasing hospitality towards foreign-born students, scientists, and high-tech workers in the United States, in most European countries, these “highly skilled migrants are more likely to receive a more privileged employment status, which also gives them the best opportunity to integrate and settle in the host country.”²¹⁶

D. The Effects of International Competition: Does the American Dream Still Reside in the United States?

The competitive race for talent has led to some unexpected results, such as New Zealand attracting Americans to its IT industry through the aggressive marketing and recruiting of skilled migrants in the United States.²¹⁷ But the more persistent trends are those identified by the National Science Board of the United States (NSB), which in 2003 completed a much-anticipated comprehensive study on the growing global competition for members of the science and engineering (S&E) workforce.²¹⁸ The study, which addresses America’s prospects for preserving its traditional competitive edge in recruiting international talent, reaches sobering results. It reports that:

Governments throughout the world recognize that a high-skill S&E workforce is essential for economic strength. Countries beyond the United States have been taking action to increase the capacity of their higher education systems, attract foreign students and workers, and raise the attractiveness to their own citizenry of staying home or returning from abroad to serve growing national economies and research enterprises.²¹⁹

See OECD 2001, *supra* note 2, at 76. In addition, in 2000 alone, almost 1400 fast track work visas were granted to allow foreign professionals to bring their families into Ireland. *See id.* at 77.

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²¹⁴ This term is drawn from a report on the New Zealand Talent Initiative. L.E.K. CONSULTING, *supra* note 14, at 7.

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²¹⁵ CHOLEWINSKI, *supra* note 162, at 82.

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²¹⁶ *Id.* at 83.

²¹⁷ See Gifford, *supra* note 132.

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²¹⁸ See NSB, REALIZING AMERICA’S POTENTIAL, *supra* note 3. The National Science Board provides advice to the President and the Congress on matters of national science and engineering policy. *Id.* at iv.

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²¹⁹ *See id.* at 11.

The study further recognizes that “[i]ncreased competition for S&E workers comes at a time when demand for their skills is projected to rise significantly—both in the United States and throughout the global economy.”²²⁰

Whereas the United States traditionally enjoyed an unparalleled advantage in recruiting global talent, the NSB study cautions that major industrial countries in Europe and beyond are “aggressively recruiting graduate students from countries with growing student populations, in competition with the United States.”²²¹ Today, opportunities for outstanding students and highly skilled workers are “growing in other nations, many of which have developed strategies to attract and retain scientists and engineers who might otherwise be drawn to U.S. education and careers.”²²² The global competition for talent, in short, has become steep and intense. No player, not even the United States, can any longer expect to reap without effort the significant benefits associated with drawing the best foreign talent to its shores.

For the United States, these new global challenges come at a difficult time. They compound long-standing problems in America’s immigration system, which have only become more pronounced in the post-9/11 era. As leading experts in the field have acknowledged, “the current employment-based immigration system . . . can no longer guarantee that the United States will attract the kind of permanent and temporary foreign workers it needs now and in the future. The system has become a bureaucratic nightmare and is only haphazardly related to broad U.S. interests.”²²³

Over the last decade, many advanced-degree-holding foreign-born professionals that have entered the United States have been admitted on temporary employment-based visas, such as the H-1B.²²⁴ As mentioned earlier, the H-1B visa can be extended for up to six years, after which the foreign applicant can request an adjustment to permanent residency (green card) status.²²⁵ But the system of adjustment is overburdened with massive backlogs, creating “temporary” visas that extend to seven or more years of insecurity for the applicant and the employer before the status adjustment is approved.²²⁶

²²⁰ See *id.* at 12.

²²¹ See *id.* at 11.

²²² See *id.* at 22.

²²³ PAPADEMETRIOU & YALE-LOEHR, *supra* note 5, at xiii.

²²⁴ See Evelyn Iritani, *U.S. Firms Lament Cutback in Visas for Foreign Talent*, L.A. TIMES, Feb. 16, 2004, at C1.

²²⁵ See *supra* text accompanying notes 141–43.

²²⁶ See S. Mitra Kalita, *For Green Card Applicants, Waiting is the Hardest Part: Backlog Has Put Immigrant Workers in the Dark Longer About Their Status*, WASH. POST, July 23,

As the citizenship prize becomes relatively harder to attain, the United States is gradually losing its crown as the “IQ magnet” of the world.²²⁷ America has more to lose from an intensified global race for talent than any of its competitors.²²⁸ For many years, the United States possessed an unsurpassed competitive advantage in attracting the best and the brightest from around the world precisely because it provided these skilled migrants with a win-win solution to *both* their economic *and* citizenship aspirations: It adopted relatively lax immigration policies that granted foreign-born professionals permission to work, study, or establish permanent residency in the United States.²²⁹ This benefited both these immigrants and the receiving economy.²³⁰ As a recent study notes, “[t]he research and development divisions of U.S. corporations continue to develop new technologies and remain internationally competitive in part because immigration provides them with the best talent in the world.”²³¹ But new centers of excellence are emerging quickly in other national and regional clusters, primarily in Europe, but also in Asia.²³² And under such conditions, established players risk losing their traditional competitive advantage.

In 1990, when these pressures began to arise, the United States took swift action to restore its dominance in the worldwide market for highly skilled migration by substantially relaxing the admission quota for college-educated professionals entering the country on either permanent or temporary employment visas.²³³ Many of these entrants have remained in the country. This brought a significant surge in the

2005, at D1; Jessica M. Vaughan, *Some Lost Jobs Never Leave Home: Skilled Foreigners Flow in to Fill Them*, WASH. POST, May 2, 2004, at B2.

²²⁷ See *supra* note 1 and accompanying text.

²²⁸ See NSB, REALIZING AMERICA’S POTENTIAL, *supra* note 3, at 9 (“[T]he U.S. [sales and engineering] workforce has become increasingly dependent on the Nation’s ability to attract scientists and engineers from other countries. . . . [Because] [g]lobal competition for S&E talent is intensifying . . . the United States may not be able to rely on the international S&E labor market to fill unmet skill needs . . .”).

²²⁹ See Jagdish Bhagwati & Milind Rao, *Foreign Students in Science and Engineering Ph.D. Programs: An Alien Invasion or Brain Gain?*, in FOREIGN TEMPORARY WORKERS IN AMERICA: POLICIES THAT BENEFIT THE U.S. ECONOMY 239, 251 (B. Lindsay Lowell ed., 1999).

²³⁰ See NSB, REALIZING AMERICA’S POTENTIAL, *supra* note 3, at 7, 36.

²³¹ PARAL & JOHNSON, *supra* note 2, at 2.

²³² Familiar examples in Asia include the massive economic growth of centers of excellence in Japan, Taiwan, Korea, Singapore, and Hong Kong, as well as the more recent rise of India’s Bangalore technology “hub,” or the “innovation cluster” of Northern European nations—Finland, Sweden, Denmark, the Netherlands, and Belgium—which have emerged as top performers in technology- and knowledge-based industries. See FLORIDA & TINAGLI, *supra* note 170, at 5.

²³³ See *supra* Part II.B.

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number of skilled migrants employed in the United States.²³⁴ But today, things look quite different. In 2004, Congress rolled back the H-1B quota to 65,000 visas, its lowest cap since 1998.²³⁵ Recent attempts to respond to growing international competition by increasing the H-1B cap (for instance, by adding 30,000 temporary-admission visas and permitting the use of 90,000 employment-based green cards) were initially adopted by the Senate in 2005, but were eventually dropped,²³⁶ though opponents of skilled migration have asserted that “efforts to increase this visa program are certain to resume next year.”²³⁷ The failure to increase the inflow of skilled migrants to the United States disappointed high-tech firms and industry groups, such as the National Association of Manufacturers, whose vice president stated: “What’s distressing about this [failure to add more skilled migration visas], and what the Senate clearly understood, is there is a real global competition for this work and for these employees”²³⁸ Similar sentiments were expressed by senior officials at the Information Technology Association of America (ITAA): “Other countries are realizing that talent does not recognize geographic borders or country of origin. If we want to be competitive on the world stage, our policymakers need to understand that too and raise the H-1B cap.”²³⁹ These calls for revamping America’s tradi-

²³⁴ It is estimated that in 2000, as many as fifty percent of the total skilled migrant population in the OECD region resided in the United States. Docquier & Rapoport, *supra* note 19, at 7. Note, however, that these figures need to be treated with some caution. It is difficult to make accurate cross-country assessments of the number of skilled migrants in each country (or percentage out of the total inflow of skilled migrants into the OECD area) because of differing reporting and categorizing systems in the different countries. See Carrington & Detragiache, *supra* note 19, at 10.

²³⁵ See H-1B Visa Reform Act of 2004 (codified in scattered sections of 8 U.S.C. 1182, 1184, 1356, & 1381, 29 U.S.C. 2916a, and 42 U.S.C. 1869c; Press Release, U.S. Citizenship & Immigration Serv., USCIS to Implement H-1B Visa Reform Act of 2004 (Dec. 9, 2004), available at http://uscis.gov/graphics/publicaffairs/newsrels/H-1B_12_9_04.pdf; George N. Lester IV, *H-1B Series: The H-1B “Cap,”* IMMIGR. DAILY, <http://www.ilw.com/articles/2002,0812-lester.shtm> (last visited Oct. 9, 2005). For fiscal year 2006, the 65,000 cap on H-1B visas was reached on August 10, 2005, roughly six weeks before FY 2006 even began (the fiscal year begins on October 1). USCIS Reaches Cap, *supra* note 145.

²³⁶ See Andrew Taylor, *Key Features of Budget Measure*, ASSOCIATED PRESS, Dec. 19, 2005.

²³⁷ JOHN MIANO, CTR. FOR IMMIGRATION STUDIES, *THE BOTTOM OF THE PAY SCALE: WAGES FOR H-1B COMPUTER PROGRAMMERS* (Dec. 2005), <http://www.cis.org/articles/2005/back1305.pdf> (reporting that H-1B workers are paid less than U.S. workers despite wage rules).

²³⁸ Erica Werner, *Plan to Add Visas for High-Tech and Skilled Workers Dropped*, ASSOCIATED PRESS, Dec. 19, 2005 (quoting Sandy Boyd, vice president at National Association of Manufacturers).

²³⁹ Grant Gross, *US H-1B Visa Limits Already Reached for 2006*, InfoWorld, Aug. 12, 2005, available at http://www.infoworld.com/article/05/08/12/HNh1-bvisas_1.html (quoting Bob Cohen, senior vice president at Information Technology Association of America).

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tionally welcoming approach to the bright and accomplished, have, at least for now, remained unanswered.

The current reality represents a strikingly different attitude: In addition to establishing strict quotas, the United States is imposing mounting restrictions on access to scientific information on the basis of a researcher's national origin and enforcing cumbersome and unwelcoming procedures for foreign students and skilled workers' visa applications.²⁴⁰ At the same time, America's major competitors are crafting new immigration policies that specifically target these very same populations, increasingly providing them with incentives to remain by offering them permanent residency and the opportunity to gain citizenship.²⁴¹ When faced with these competing alternatives, it is only rational for skilled migrants with abundant *human* capital—people with dreams and hopes and proven adaptability to new challenges—to redirect their patterns of international movement.

One thing is clear at present: Rather than maintain its competitive advantage in attracting skilled workers, the United States has undermined its own incredibly successful and longstanding strategy of recruiting world-class talent. For a country famous for success in integrating brainy emigrants into its domestic industry, universities, entrepreneurial class, and cultural iconography (think of Albert Einstein, perhaps the most familiar U.S. knowledge migrant), this shift is a very risky move.

III

THE NEW FRONTIER: CITIZENSHIP THEORY AND GLOBAL DISTRIBUTIVE JUSTICE

As we have seen, the global race for talent has generated unparalleled dynamism and innovation in the national immigration policies

²⁴⁰ See, e.g., NAT'L SCI. BD., 1 SCIENCE AND ENGINEERING INDICATORS O-12 to O-14 (2004), available at <http://www.nsf.gov/statistics/seind04/> (stating that U.S. reliance on foreign-born scientific talent grew throughout 1990s but that since terrorist attacks of 9/11 number of visas issued to high-skill visitors and students has dropped and continues to drop).

²⁴¹ These competitive pressures are well recognized by America's IT trade and lobbying groups, which have utilized the argument about interjurisdictional competitive immigration regimes as part of their domestic strategy to advocate higher levels of skilled migration intakes. An illustrative example is found in the response by the Information Technology Association of America (ITAA) to the government's announcement that the H-1B cap for 2006 was reached in August 2005, almost a month and a half before the beginning of FY 2006: "Other countries are realizing that talent does not recognize geographic boundaries or country of origin. If we want to be competitive on the world stage, our policymakers need to understand that too and raise the H1-B [sic] cap." Grant Gross, *US H1-B Visa Limits Already Reached for 2006*, INFOWORLD, Aug. 12, 2005, available at http://www.info-world.com/article/05/08/12/HNh1-bvisas_1.html.

of the major competitor countries. It has also fostered an unprecedented number of choices for individual knowledge migrants (and their families). These individuals can now select the destination country most suitable to them in terms of earning economic and citizenship rewards in exchange for contributing to the global competitiveness of the receiving nation's economy. Equally important, as the cross-border mobility of the highly skilled has risen, so has the sophistication of the major players. Immigrant-receiving countries are no longer passive gatekeepers. Instead, they operate as savvy recruiters of talent and human capital. Emigrant-sending countries, for their part, have also come to see migration as a route for extracting certain benefits for the home society, especially from emigrants that have settled in the richer regions of the world.

The highly skilled immigrants themselves have also become more worldly. Whereas in the past the United States served as the most sought-after destination for ambitious foreign students and professionals, it no longer stands as the sole, nor even the most attractive, destination country of choice for many of them. Faced with a new panoply of options, the current generation of knowledge migrants is voting with its feet. Increasing numbers of advanced-degree foreign students enroll in European universities instead of American ones.²⁴² Emigrating professionals with marketable skills, especially those in high-demand sectors, find that larger welcome mats await them in smaller economy jurisdictions or back home in their countries of origin. And with the forceful entry of Europe's economic powerhouses into the race for talent, new doors that had long been shut have opened for the best and the brightest from around the world. As a result, we face an unprecedented moment in the modern history of skilled migration: The United States—the original initiator and inventor of the global IQ-talent hunt—is on the verge of losing its standing as *the* place for knowledge emigrants to fulfill their “American Dream.”

The conventional approach to the study of citizenship focuses on the intangible dimension of political membership, with its emphasis on questions of national identity and belonging.²⁴³ The rise of competitive immigration regimes discussed here cannot be explained in these traditional terms. It relies instead on a more calculated, competition-induced, and interest-based approach to immigration, as a means of advancing the host society's economic and development ends. We have seen how governments in advanced industrial countries are

²⁴² See OECD POLICY BRIEF, *supra* note 21, at 5.

²⁴³ See *supra* note 53.

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actively marketing their polities to a select subset of potential migrants—those with the skill sets and work experience deemed to benefit the economic needs of the knowledge-based sectors in the admitting state. At the same time, destination countries often try to reduce the number of immigrants falling into the “net burden” category.²⁴⁴ In this managed-migration era, governments have reformed and revised the terms of admission for the highly skilled without restraint, believing that such changes are both necessary and urgent in order to boost economic performance and maintain a competitive edge.

Interestingly, related reconfigurations of citizenship are simultaneously occurring in emigrant-sending countries themselves. Whereas in the past skilled emigrants were regarded as lost causes who had “exited” the home national community, the new era of competitive immigration regimes has changed a country’s attitudes towards its own emigrants. Given their newfound material success, these individuals are now courted as long-lost sons and daughters of the home nation, whose “literal ‘worth’ to the state is invoked, conjuring a vision of citizenship-by-economic-contribution.”²⁴⁵ These emigration countries are adopting more flexible approaches to dual citizenship and are designing foreign investment rules that allow successful emigrants to maintain their membership ties with their original home nations. This new endorsement of skilled emigrants by the source countries is not interest-free. In deploying the language of membership towards them, the anticipation is that once welcomed back into the fold, the emigrants will “invest at home economically.”²⁴⁶

Resembling the changing legal landscape in immigrant-destination countries, emigrant-sending countries are thus engaging in the same game of trying to reap the benefits of migration—in their case, those generated by the emigration of their national citizens.²⁴⁷ This represents an unexpected mirror image of the talent-for-citizenship exchange in the receiving state: The sending country is offering the

²⁴⁴ See generally PAPADEMETRIOU & O’NEIL, *supra* note 76; Flynn, *supra* note 36.

²⁴⁵ Barry, *supra* note 31, at 36.

²⁴⁶ *Id.*

²⁴⁷ Recent research has highlighted the importance of remittance transfers as well as investments by skilled emigrants in information-technology start-ups, bonds, and foreign currency accounts in the home country, not to mention the skills and knowledge transferred through “diaspora” or “expatriate” networks. Several of these phenomena are described by Barry, whose account focuses on emigration countries’ responses to outflows of migration. See Barry, *supra* note 31, at 46 (describing amendment of Mexican Constitution to include “no loss of nationality” provision to “secur[e] the status” of Mexicans in United States); see also Jean-Baptiste Meyer, *Network Approach Versus Brain Drain: Lessons from the Diaspora*, 39 INT’L MIGRATION 91 (2001); Jagdish Bhagwati, *Borders Beyond Control*, FOREIGN AFF., Jan.–Feb. 2003, at 98; see generally SAXENIAN, *supra* note 2.

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emigrant (who, despite leaving the home community, may still feel attached to it) what we might call a “preservation of membership entitlement” as the price to be paid for the “goal of increasing economic inflows from emigrant citizens.”²⁴⁸ Put differently, we are seeing the emigration state use its control over the definition of membership in its polity as a tool to ensure greater talent and related inflows from those highly skilled emigrants who seek to retain their citizenship ties with the home country.

This pattern of change in the very definition of a nation’s membership boundaries should not surprise us. Citizenship and immigration—the foundational legal categories that define a nation and its members—are no longer merely shaped by domestic factors or in terms of a one-dimensional supply and demand matrix. To understand the new forces at work, we must take into account the dynamic ways in which interjurisdictional interaction molds a given polity’s immigration law and policy, and in turn, its demarcation of membership boundaries. By focusing on the ways in which interaction between competing states influences national immigration policy setting, I have identified and conceptualized the new terrain of a fast-accelerating global race for talent. Challenging the prevalent view that globalization will lead to the demise or “retreat” of state control over immigration, the recent changes shown here illuminate a more nuanced and complicated picture: Immigration-destination countries and emigrants’ home nations are actively engaged in a surprisingly rich multilevel game. In this game, each seeks to extract a share of the welfare-enhancing contributions generated by the highly skilled in an era of increased cross-border mobility, even if this requires a reconception of the nation’s membership boundaries.

Perhaps the most dramatic transformation of all, which cannot be understood using the old vocabulary of citizenship as “identity” and “belonging,” is found in the willingness of receiving states, especially in Europe, to relax the conditions for establishing permanent residency for the skilled migrant. These recent policy changes touch upon the most delicate and contentious issues of citizenship: defining who may gain access to membership in the political community, and on what basis. Skilled migrants clearly have much to contribute to destination countries through their ingenuity, creativity, and hard work; but by no stretch of the imagination are they part of the traditional *ethnos* or *demos*. Instead, the permission granted them to settle permanently in a previously “zero immigration” country like Germany,

²⁴⁸ Barry, *supra* note 31, at 122.

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for example, relies on a more market-oriented and calculated rationale.²⁴⁹

In this new landscape of competitive immigration regimes, national governments proactively use their exclusive control over the allocation of membership and citizenship to attract highly skilled migrants. The promise of acquiring secure and permanent membership rights in the receiving country has itself become a competitive tool used to attract and retain knowledge migrants. The “value” to the receiving economy of their admission is perceived to be sufficiently high to merit, under certain circumstances, the reconceptualization of traditional understandings of citizenship in the receiving polity. This utilization by admitting states of their exclusive control of “membership resources,” which I have called the talent-for-citizenship exchange, relies on a shrewd yet realistic logic: It treats the goal of gaining permanent and secure membership in the destination state as an *independent* factor that can influence the destination choices of the highly skilled. This factor can be just as powerful as the pure economic rewards of immigration, which are the standard focus in the literature. By identifying and isolating the citizenship factor, we gain a more complete understanding of the logic of competitive immigration regimes. In particular, the talent-for-citizenship exchange can help improve the attractiveness of small-economy destination countries in the fast-accelerating race for talent.

In this new and dynamic global environment, where sending and receiving states are constantly revising the boundaries of a citizenry far less fixed and geographically concentrated than in the past, we can expect to find many more individuals who will bear dual or multiple citizenships, leading to the question of how they might renegotiate their economic and political ties to more than one membership community. But if the present trend continues, this new class of plural-citizenship holders will be open only to an elite: Those with greater marketable skills will partake in plural citizenship as a result of the rise of selective migration programs at the receiving end.

The race for talent also has notable distributive justice implications. Although we cannot read the tea leaves of skilled migration, we can safely conclude that this new political economy of citizenship favors those who can take advantage of the talent-for-citizenship

²⁴⁹ These changes have not proceeded without resistance, especially in Germany, where there have been protests under the slogan “*Kinder statt Inder*,” which translates as “children, not Indians.” See Mark C. Regets, *Impact of Skilled Migration on Receiving Countries* (2003), <http://www.scidev.net/dossiers/index.cfm?fuseaction=printarticle&dossier=10&policy=21>. But, at least for now, these are minority voices in Germany’s public debate over the adoption of the Immigration Act. See Oezcan, *supra* note 160.

exchange. For those with the right skill set, investment in higher education in their home country or abroad can lead to exponential returns; these individuals can take advantage of burgeoning opportunities to secure employment and citizenship in a stable and affluent democracy.²⁵⁰ This is both encouraging and disheartening. It is encouraging for the individual skilled migrant who, by no choice or fault of her own, was born on the “wrong” side of the border of wealth and freedom. The current global race for talent greatly enhances her chances of pulling herself up through hard work and responsiveness to the global demand for refined skills and raw talent. While providing great opportunities for this new brand of migrant—the college-educated, professional with marketable skills—the race for talent offers a far less rosy prospect for those who do not fit its overly narrow definition of “talent.” It is also disturbing to witness the eagerness with which governments engage in the business of “managed” migration. In the short term, the process puts the state at the center of regulating the polity’s membership boundaries. In the long run, however, these processes may infect with market-based values the state’s role in fairly and equally distributing the entitlement of citizenship—a responsibility that would be deeply deformed if it were reduced to mere economic or efficiency considerations.

Furthermore, from a global justice perspective, it seems problematic to permit the wealthier countries to use their economic and citizenship rewards as a way to further advance their relative advantage by drawing in the talent and energy from poorer regions of the world. In this respect, the rise of the race for talent raises significant ethical questions about the relationship between citizenship and justice, as well as mobility and distribution, on a global scale.²⁵¹ Even the World

²⁵⁰ It is far less clear whether sending countries are well equipped to deal with the potential downside of highly skilled migration, if such migration creates a sustained pattern of “brain drain” rather than a more complicated networking and “circulation of knowledge” effect. If such negative externalities are empirically verifiable, is there a duty for members of affluent societies, those who benefit from the fruits of the labor of the incoming skilled migrants, to compensate the emigrants’ home community? These questions are at the heart of heated contemporary debates. See, e.g., Thomas Straubhaar, *Why Do We Need a General Agreement on Movements of People (GAMP)?*, in *MANAGING MIGRATION: TIME FOR A NEW INTERNATIONAL REGIME?* 117, 122–23 (Bimal Ghosh ed., 2000); Patrick Weil, *Towards a Coherent Policy of Co-Development*, 40 *INT’L MIGRATION* 41 (2002); Dhananjayan Sriskandarajah, *Migration and Development: A New Research and Policy Agenda*, *WORLD ECON.*, Apr.–June 2005, at 141.

²⁵¹ This raises a number of important normative issues that are beyond the scope of this Contribution, including the fairness of a polity extending membership rights to newcomers on the basis of their potential economic contributions, rather than assisting those who have become more vulnerable as a result of the globalization process; state autonomy from the market when an economic-based rationale drives immigration policy; a clash between an identity-based conception of membership and an economic conception; greater coopera-

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Bank, surely less a bastion of redistribution than of free-market economy, has weighed in on the debate over the accelerated recruitment of skilled migrants to the OECD area from the rest of the world, trying to ascertain the scope and depth of the effects of the recent surge in cross-border human capital flows.²⁵²

In the World Bank's data on skilled migration, the pessimist sees a "brain drain," whereas the optimist sees a pattern of "brain circulation" between rich and poor countries, developed and developing nations, emigrant and immigration societies. While the jury is still out on these empirical studies, international organizations have finally begun to explore the political and economic significance of the global race for talent. These organizations are now examining new possibilities for increased bilateral, multilateral, or transnational cooperation in the regulation of international labor migration flows.²⁵³ This has been done with an eye to a more equitable sharing of the risks and rewards that accompany cross-border human capital movements. At this early stage in the development of such initiatives, it is extremely hard to predict how these bilateral, multilateral, or transnational approaches will be designed, and how they might interact (or clash) with the logic of competitive immigration regimes as well as the more traditional conceptions of nationality and sovereignty. Furthermore, I believe that two additional factors must be taken into account in thinking prospectively about the unfolding of the interjurisdictional competition for talent: Will the United States "strike back" against its competitors for highly skilled immigrants, thus reversing its self-inflicted weakened position in the post-9/11 era? And will emigration-sending countries find viable ways to persuade immigration-receiving countries to share the spoils (or "surplus gains") generated by their skilled emigrants as partial compensation for their temporary or long-term loss of scarce talent? The unfolding of these two major narratives will dramatically shape the future of the global race for talent, the contours of which I have outlined here.

tion between immigration and emigration countries; and the need for institutions at the transnational level for regulating cross-border human capital flows.

²⁵² See generally Docquier & Rapoport, *supra* note 19.

²⁵³ See generally OECD 2001, *supra* note 2 (collecting papers from transnational conference on skilled labor migration); INT'L ORG. FOR MIGRATION, WORLD MIGRATION: COSTS AND BENEFITS OF INTERNATIONAL MIGRATION (2005), *supra* note 19 (discussing global migration trends and costs and benefits to various regions); GLOBAL COMM'N ON INT'L MIGRATION, MIGRATION IN AN INTERCONNECTED WORLD: NEW DIRECTIONS FOR ACTION (2005) (proposing formulation of coherent, comprehensive and global response to challenges of international migration).

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CONCLUSION

On the previous pages, I recounted the vigor and zeal of the multiple participants in the fast-growing worldwide competition for skilled migrants. Assuming that the race is here to stay—at least for the foreseeable future—we must develop creative ways to address its welfare and distributive effects, especially on the source countries. As we have seen, these dramatic changes in domestic immigration law and policy represent an *uncoordinated* response by competing nations to the perception that in the knowledge-based global economy, “the resource that is in greatest scarcity is human capital.”²⁵⁴ Counterintuitively, and under conditions of uncertainty, national immigration agencies have reasserted themselves as significant players in the global market for the highly skilled. This has been accomplished by developing the logic of competitive immigration regimes, by maintaining tight control over their power to govern legal entry, and by exercising their authority to confer citizenship on the highly skilled in the new home country.

In perhaps its most far reaching implication, the rise of the race for talent can encourage sending and receiving countries—both of which inevitably share a stake in the future of these competitive immigration regimes—to engage in a constructive discussion on how to envision a more just distribution of the wealth and opportunity generated by highly skilled migrants *across* the multiple membership communities to which they belong. This plural-citizenship privilege is itself connected, as I have shown, to the new matrix of skilled migration in which emigration-sending countries are trying to reap the welfare benefits of their successful high-skilled emigrants, while immigration-destination countries are trying to attract and retain these very same individuals by offering them the talent-for-citizenship exchange.²⁵⁵ No country, not even the United States, can persistently ignore these trends or unilaterally harness the dynamics unleashed by the worldwide competition for talent.

²⁵⁴ See Moore, *supra* note 3, at 69.

²⁵⁵ I address at length the issue of reconciling expanded conceptions of citizenship with global justice in AYELET SHACHAR, *CITIZENSHIP AS INHERITED PROPERTY: THE NEW WORLD OF BOUNDED MEMBERSHIP COMMUNITIES* (forthcoming 2006).