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## The Point of a Points System: Attracting Highly Skilled Immigrants the United States Needs and Ensuring Their Success

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# The Point of a Points System: Attracting Highly Skilled Immigrants the United States Needs and Ensuring Their Success

## ABSTRACT

*In a globalizing world, labor is an increasingly mobile and competitive resource. Responding to this changing labor market, countries like Canada, the United Kingdom, and Australia have adopted points systems with the goal of attracting talented, highly skilled immigrants. In the United States, however, much of the national focus on immigration remains on deterring illegal immigration rather than attracting immigrants that the United States needs to remain competitive in a globalized world. But attracting skilled immigrants is only one ingredient to a successful points system; a country must also ensure those immigrants are successful and use their talents to the fullest potential post-entry. This Note proposes the United States enact its own points system, but with a narrower goal than other systems: attracting highly skilled immigrants, while ensuring their success in the United States.*

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## I. POINTS SYSTEMS: AN IMMIGRATION INNOVATION

Traditionally, sovereign nations have enjoyed wide latitude in determining whom to welcome into their lands. After all, drawing lines in the sand to delineate “us” from “them” is one of the most important rights that make up sovereign power.<sup>1</sup> How nations decide to exercise this sovereign power, however, has undergone a dramatic change in the past quarter century—changing both the means and the ends of immigration policy.<sup>2</sup>

The “globalizing” world now views humans as a form of capital to be captured like any other resource.<sup>3</sup> In response, countries have begun implementing immigration points systems to better capture this potential resource.<sup>4</sup> Canada, the United Kingdom, and Australia have developed their points systems to attract skilled migrants.<sup>5</sup> In

1. See HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 5 (2006) (“[A] democracy must have the power to shape and preserve itself . . . [and] to grant or refuse membership to newcomers.”); Joy M. Purcell, *A Right To Leave, but Nowhere To Go: Reconciling an Emigrant’s Right To Leave with the Sovereign’s Right To Exclude*, 39 U. MIAMI INTER-AM. L. REV. 177, 178 (2007) (noting that the right to control who enters a country goes to the very heart of sovereign autonomy).

2. See Paschal O. Nwokocha, *American Employment-Based Immigration Program in a Competitive Global Marketplace: Need for Reform*, 35 WM. MITCHELL L. REV. 38, 59–61 (2008) (noting that a globalizing world has changed the way countries utilize immigration policies).

3. See *id.* at 59–60 (“In the contemporary global economy, human capital is also increasingly mobile so both states and companies must now compete for talent in a worldwide market.”).

4. See Chris Gafner & Stephen Yale-Loehr, *Attracting the Best and the Brightest: A Critique of the Current U.S. Immigration System*, 38 FORDHAM URB. L.J. 183, 187 (2010) (noting that since 2000, nearly two dozen countries have implemented serious immigration reforms to capture human capital).

5. See *id.* at 187–91 (discussing Canada’s and the United Kingdom’s immigration points systems); see also Stephen Yale-Loehr & Christoph Hoashi-Erhardt, *A Comparative Look at Immigration and Human Capital Assessment*, 16 GEO. IMMIGR. L.J. 99, 118–19 (2001) (discussing Australia’s “skilled migration” system).

contrast, the United States has stood still, choosing to retain its old employment-based immigration regime.<sup>6</sup>

Points systems all share a similar goal of attracting human capital in a procedurally simple manner that, in theory, increases the overall wealth of the receiving country.<sup>7</sup> As the name suggests, points systems use a rubric of point categories to determine an immigrant's eligibility for entry.<sup>8</sup> Predetermined amounts of points are awarded for attributes that the receiving country determines are indicators of human capital, such as advanced degrees, work experience, and language proficiency.<sup>9</sup>

In addition to enhancing a country's wealth, points systems also offer procedural simplicity and transparency.<sup>10</sup> The receiving country benefits from the efficiency and reduced costs of a simplified admissions procedure, while the prospective immigrant avoids a costly expenditure of time and effort navigating a bureaucratic maze of immigration policy.<sup>11</sup>

This new focus on human capital marks a major shift in immigration policy that has traditionally been dominated by family reunification, humanitarian, and other noneconomic goals.<sup>12</sup> This immigration innovation, however, also raises new concerns. Points systems may be in tension with both human rights and free-market ideals, which generally advocate for less restrictive immigration policies.<sup>13</sup> There is also concern that points systems are harmful to the receiving country's labor market if the systems are conceived of as a device for human-capital accumulation without regard to the

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6. Yale-Loehr & Hoashi-Erhardt, *supra* note 5, at 129–31 (noting the United States considered adopting a points system, but the idea was not legislated).

7. *See id.* at 100 (“[T]he purpose of selecting economic-stream migrants is to increase the host country's wealth and to achieve a net economic gain for the entire population.”).

8. *See* Nwokocha, *supra* note 2, at 50–55 (explaining how the points system works in the United Kingdom and Canada).

9. *See id.* at 50–51 (“Applicants score points based on their attributes, including age, education, qualifications, previous earnings, and experience in the United Kingdom; their English language abilities; and their funds available for fiscal self-maintenance.”).

10. *See* Yale-Loehr & Hoashi-Erhardt, *supra* note 5, at 108 (noting that a points system enhances transparency and simplicity “in that it allows the migrant to assess his or her own chances of being able to immigrate” and allows policymakers and voters to be “better able to understand how immigrants are being selected”).

11. *See id.* (providing a table of “the composition of Canada's immigrant stream as well as the planned levels of immigration”).

12. *See id.* at 100 (discussing how the goals of points systems are distinct from family reunification and humanitarian immigration systems).

13. *See* Tomer Brode, *The Most-Favoured Nation Principle, Equal Protection, and Migration Policy*, 24 GEO. IMMIGR. L.J. 553, 556–63 (2010) (discussing the interaction between economic theory and human rights in immigration policy).

receiving country's labor needs.<sup>14</sup> Ultimately, however, a points system is effective in increasing the number of skilled immigrants, who not only fill labor shortages, but also start new businesses and generate new jobs and wealth.<sup>15</sup>

First, this Note outlines examples of points systems as implemented in Canada, Australia, and the United Kingdom, and then briefly introduces the current economic-immigration scheme in the United States as a counterpoint to those systems. This Note then analyzes potential problems that a points system can create. Finally, this Note concludes the United States should implement a points system of its own and makes suggestions for implementing a successful points system that could avoid some of the pitfalls of points systems abroad.

## II. GETTING THE "IN" IN CANADA, AUSTRALIA, THE UNITED KINGDOM, AND THE UNITED STATES

Employment-based immigration is controlled through points systems in Canada, Australia, and the United Kingdom.<sup>16</sup> While these point systems share similar characteristics,<sup>17</sup> their differences are important. This Part introduces each of these countries' points systems and contrasts those systems with the employment-based immigration system of the United States.

### A. Canada's Points System

Canada led the world in adjusting its immigration policies to better capture human capital by implementing its points system.<sup>18</sup>

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14. See *infra* note 181 and accompanying text (suggesting that a points system can create underemployment if the immigrant's skills and the receiving country's labor needs do not coincide).

15. See AnnaLee Saxenian, *Brain Circulation: How High-Skill Immigration Makes Everyone Better Off*, BROOKINGS (2002), <http://www.brookings.edu/research/articles/2002/12/winter-immigration-saxenian> (using Silicon Valley as an illustration of how economic openness and a large population of skilled immigrants may foster transnational entrepreneurship, improve communication across borders, and enhance trade and investment flow).

16. See *supra* note 5 and accompanying text (discussing points systems in Canada, Australia, and the United Kingdom).

17. See *infra* Part II.A–C (discussing points systems in Canada, Australia, and the United Kingdom).

18. See Gafner & Yale-Loehr, *supra* note 4, at 187–88 (citing DEMETRIOS G. PAPADÉMETRIOU, WILL SOMERVILLE & HIROYUKI TANAKA, MIGRATION POLICY INST., HYBRID IMMIGRATION-SELECTION SYSTEMS: THE NEXT GENERATION OF ECONOMIC MIGRATION SCHEMES 17 (2008), available at <http://www.migrationpolicy.org/transatlantic/HybridSystems.pdf>) (noting that Canada was the first to implement a

Points are awarded to prospective immigrants for various factors.<sup>19</sup> Many of these factors directly relate to the prospective immigrant's impact on the labor market, such as whether an applicant has arranged employment and the applicant's prior work experience.<sup>20</sup> Canada awards several points for human-capital attributes, including education, language proficiency, and age.<sup>21</sup>

Prospective immigrants must obtain sixty-seven points to be eligible for a visa.<sup>22</sup> An applicant gains points under various points categories that have a maximum point value.<sup>23</sup> For example, completion of secondary school earns an applicant five points out of a possible twenty-five under the education category.<sup>24</sup> Other major points categories include education and training factors, language proficiency, work experience, age, and adaptability factors.<sup>25</sup>

Using this straightforward rubric, a prospective immigrant can easily evaluate his or her chances for admittance with a high degree of certainty.<sup>26</sup> Canada even offers a simple form on its immigration website that the applicant accesses to answer a few short questions about age, net worth, education, and if he or she has a Canadian job offer.<sup>27</sup> The applicant receives a response regarding his or her eligibility for a visa within twenty-four hours.<sup>28</sup>

Canada's points system also emphasizes transparency by being straightforward as to what characteristics it values in prospective economic immigrants.<sup>29</sup> The point categories and their relative values

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points system in 1967, and has remained an "aggressive player" in attracting human capital).

19. See, e.g., Nwokocha, *supra* note 2, at 54 (explaining that within the Canadian system, "[p]oints are assessed on six selection factors: education, ability in English or French, experience, age, arranged employment, and adaptability").

20. See *id.*

21. See Gafner & Yale-Loehr, *supra* note 4, at 188 ("Points are awarded based on criteria indicative of a foreign national's potential contribution to the country.").

22. See Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 N.Y.U. L. REV. 148, 172-73 (2006) (providing a chart of the cumulative points categories).

23. See *id.*

24. See *id.*

25. See *id.*

26. See Gafner & Yale-Loehr, *supra* note 4, at 187-88 ("The point system allows potential immigrants to easily compute whether they qualify for Canadian immigrant status. Canada even offers a calculator to help potential immigrants determine eligibility.").

27. See *Come to Canada*, CITIZENSHIP & IMMGR. CAN., <http://www.cic.gc.ca/app/ctcvac/english/qc100> (last updated Mar. 16, 2012).

28. See *id.*

29. See Yale-Loehr & Hoashi-Erhardt, *supra* note 5, at 116 (quoting E-mail from Mark Davidson, Acting Dir., Econ. Policy & Programs Div., Citizenship and Immigration Can., to Christoph Hoashi-Erhardt (Nov. 1, 2000, 4:11 PM) (on file with Hoashi-Erhardt) (discussing objectives of Canada's system, one of which is transparency)).

make it clear, for example, that Canada prefers younger immigrants because its points system calls for a point deduction for applicants over forty-five years of age.<sup>30</sup>

Despite these advantages, Canada's point system is not completely free from discretion and uncertainty. Canada amended its immigration law in 2008 to state that "the visa *may* be issued" upon meeting certain criteria, rather than "the visa *shall* be issued."<sup>31</sup> This change makes visa issuance more subjective, since an applicant that obtains the requisite points and meets the other criteria for a visa may nonetheless be passed over for an equally qualified applicant. This change has been criticized as "'politicization' of the immigration system."<sup>32</sup>

There are also special classifications of immigrants that have much lower point thresholds for entry.<sup>33</sup> Immigrants classified as "entrepreneurs," for example, must obtain only twenty-five points to be eligible for entry.<sup>34</sup> Classification in these special categories relies on less objective criteria than the points rubric itself because it depends on specific definitions that are open to interpretation. An "entrepreneur" is one "who intends and has the ability to establish . . . business or commercial venture in Canada *that will make a significant contribution to the economy.*"<sup>35</sup> The latter part of this definition lends itself to far more discretion than the more objective criteria, such as whether or not an applicant has an advanced degree. Immigration officials, therefore, still possess a degree of discretion to place an applicant in these special categories.

Canada's system has produced mixed results. While its points system has been effective in increasing the overall number of skilled immigrants entering Canada, not all of those skilled immigrants have been able to contribute to Canada's labor market to their fullest potential.<sup>36</sup> Because Canada admits many highly skilled immigrants

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30. See *id.* at 117 (explaining that two points are deducted for every additional year of age over forty-four.).

31. See George Jordan Ashkar, Note, *Oh Canada! We Stand on Guard for Thee: Bill C-50 and the Negative Impact It "May" Have on Immigrant Hopes, Immigration Objectivity, and the Immigration and Refugee Act of 2002*, 17 SW. J. INT'L LAW 143, 145 (2011) (discussing the 2008 amendment).

32. *Id.* at 170 (quoting Vancouver immigration lawyer, Richard Kurland).

33. See *Applying for Permanent Residence—Business Class Applicants: Investors, Entrepreneurs, Self-Employed Persons*, CITIZENSHIP & IMMGR. CAN., <http://www.cic.gc.ca/english/information/applications/guides/4000ETOC.asp> (last visited Nov. 05, 2012) (discussing the three categories of business-class applicants).

34. See *id.* Similarly, immigrants who are deemed "investors" need only obtain twenty-five points. However, these classifications carry other requirements, such as an agreement to invest a certain amount of money.

35. See *id.* (emphasis added) (defining *entrepreneur*).

36. See Lucy Trevelyan, *Immigration: The U.K. Introduces Points-Based Systems*, 62 INT'L B. NEWS 13, 15 (2008) (discussing the difficulty of having educational qualifications and work experiences recognized in Canada).

without ensuring that they were likely or able to find a job, many of these immigrants face unemployment or underemployment.<sup>37</sup> Thus, Canada's points system may not effectively enhance wealth or entice skilled immigrants, because they may worry about underemployment post-entry.<sup>38</sup>

One final, but not unsubstantial, criticism of Canada's point system is that it implicitly disadvantages applicants from lower socioeconomic backgrounds.<sup>39</sup> The system explicitly prefers skilled workers and professionals,<sup>40</sup> who tend to be wealthier.<sup>41</sup> While scholars often gloss over the disparate results based on an immigrant's socioeconomic status,<sup>42</sup> they do exist.<sup>43</sup> Thus, while outright class discrimination is not likely Canada's goal, the practical burden on immigrants from lower socioeconomic backgrounds should be noted, especially given that the majority of Canada's immigrants enter through the points system.<sup>44</sup>

Overall, however, Canada's points system benefits from its simplicity and efficiency.<sup>45</sup> The points system has been considered a success in attracting valuable human capital and has served as a

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37. *See id.* ("In most cases, their educational qualifications and work experience are not recognised in Canada and immigrants holding PhD degrees can be found driving taxis, working in factories or grocery stores." (internal quotation marks omitted)).

38. *See id.* (discussing how skilled immigrants are frustrated by underemployment and "the government's post-immigration indifference" (internal quotation marks omitted)).

39. The points system disadvantages lower-skilled immigrants. Nwokocha, *supra* note 2, at 55 (discussing the Canadian system's preference for skilled workers). "Lower-skilled immigrants," however, is another way of saying poorer immigrants.

40. *See id.*

41. *See Canada Prefers Rich Immigrants*, CANADAUPDATES.COM (June 10, 2012), <http://www.canadaupdates.com/content/canada-prefers-rich-immigrants-18300.html> ("Canadians prefer an immigrant with a heavy pocket than one with a degree from a reputed University.").

42. Gafner and Yale-Loehr do not mention the possibility of economic immigration in their article at all. *See generally* Chris Gafner & Stephen Yale-Loehr, *Attracting the Best and the Brightest: A Critique of the Current U.S. Immigration System*, 38 *FORDHAM URB. L.J.* 183 (2010). Nwokocha only briefly observes that Canada's points system "limits" lower-skilled workers' immigration options. *See* Nwokocha, *supra* note 2, at 55 ("It is a simplified system without annual quotas that helps to provide the country with highly skilled workers, yet it limits the immigration options of lower-skilled workers.").

43. *See* Xuelin Zhang, *The Wealth Position of Immigrant Families in Canada*, 197 *ANALYTICAL STUD. BRANCH RES. PAPER SERIES 1* (finding Canadian immigrants, married and single, possess more wealth than their married and single Canadian-born counterparts).

44. *See infra* note 199 and accompanying text.

45. *See* Nwokocha, *supra* note 2, at 55 (suggesting that Canada's points system is a "simplified system" and is efficient, with applications for temporary work visas being processed in as short as three weeks with preapproval).



model for other countries' points systems.<sup>46</sup> Its weaknesses include certain definitional vagueness, the discretion still vested in visa officers, the lack of tailoring to Canada's labor market, and the disproportionately adverse effect on immigrants from lower socioeconomic backgrounds.

### B. Australia's General-Skills-Migrants System

Australia followed Canada's lead two decades later, launching its own revised immigration program in 1989.<sup>47</sup> Economic migrants are grouped into one of three main categories: General-Skills Migrants, Employer-Sponsored Migrants, and Business-Skills Migrants.<sup>48</sup> General-Skills Migrants make up the majority of immigrants entering Australia<sup>49</sup> and are assessed through a points system.<sup>50</sup> The other two categories are subject to separate requirements, so this analysis will focus on the General-Skills-Migrants category.

To qualify under the General-Skills category, migrants must meet certain bright-line criteria: they must be less than forty-five years of age, speak "vocational English," and must elect an occupation listed in the "Skilled Occupation List" (SOL).<sup>51</sup> Once they meet these criteria, migrants must obtain at least 110 out of 150 possible points to be eligible to immigrate to Australia.<sup>52</sup> The point categories are similar to those in Canada and the United Kingdom, and award points for younger age, occupational experience, and English-language ability.<sup>53</sup> The most important attribute Australia looks for

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46. See Gafner & Yale-Loehr, *supra* note 4, at 188 (noting that Canada's success in attracting needed human capital has led to highly skilled noncitizens representing 7 percent of the Canadian workforce and other countries emulating its system); see also Nwokocha, *supra* note 2, at 54 (noting that immigration under its points system accounted for two-thirds of Canada's annual population growth in 2007).

47. See Demetrios G. Papademetriou, *Migration Fundamentals: Selecting Economic Stream Immigrants Through Points Systems*, MIGRATION INFO. SOURCE (May 2007), <http://www.migrationinformation.org/usfocus/display.cfm?ID=602> (outlining the emergence and benefits of points systems).

48. See Yale-Loehr & Hoashi-Erhardt, *supra* note 5, at 119 ("Australia's migrant selection scheme groups economic-stream migrants into three broad categories: General Skills Migrants, Employer Sponsored Migrants, and Business Skills Migrants.").

49. See Nwokocha, *supra* note 2, at 56 ("The majority of immigrants entering Australia (133,500 or 70 percent) are skilled workers."); see also Yale-Loehr & Hoashi-Erhardt, *supra* note 5, at 119 (noting that 68 percent of all planned economic migration into Australia comes from the General-Skills category).

50. See Yale-Loehr & Hoashi-Erhardt, *supra* note 5, at 119 ("General Skills migrants are those who are selected using a points system . . .").

51. See *id.* at 121 (outlining the prerequisites for General-Skills applicants).

52. See *id.* at 122-23 (noting that out of a total of 150, "[i]ndependent migrants must score 110 points on the points test to be eligible to immigrate").

53. See *id.* at 121-23 (providing a clear chart of the points rubric for General-Skills migrants).

is the level of skill the applicant's occupation requires; this accounts for 55 percent of an applicant's potential score.<sup>54</sup> An applicant's potential support system in Australia is also considered: migrants who are sponsored either by an employer or a family member are awarded an additional fifteen points.<sup>55</sup>

One notable difference between Australia's point category and other points systems is the lack of a separate point category for education.<sup>56</sup> Education is instead subsumed into the "Skill" category.<sup>57</sup> This difference arose because Australia determined that it is the specificity of education to occupation, rather than the quantity of education, that best predicts an immigrant's success in the labor market.<sup>58</sup> This approach, however, might reduce the amount of immigrants who lack occupation-specific education, but who nonetheless possess "generic, broad, and readily transferable skills."<sup>59</sup> While this might burden more generally skilled immigrants, it is a good means to tailor the points system to Australia's need for occupation-specific skilled immigrants.

Another difference between Australia's point systems and other countries' point systems is that economic migrants receive additional points for obtaining a degree from an Australian institute.<sup>60</sup> Again, this difference arises from the determination that Australian-trained immigrants fair better in the Australian labor market than those who receive their education abroad.<sup>61</sup> This idiosyncratic preference places otherwise skilled immigrants that are trained abroad at a

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54. See *id.* at 122 (noting that "[o]ccupations requiring an educational degree specific to the occupation" earn sixty points).

55. See *id.* at 123 ("The pass mark for SAS migrants is also 110 points, though they also receive 15 points for having a family sponsor and an assurer.").

56. See *id.* at 124 ("It is noteworthy that unlike Canada's point system, Australia does not have a separate assessment category for education.").

57. See *id.* ("Australia has opted to retain occupation-based, rather than education-based, points assessment. This emphasis reflects the research cited in DIMA's review. The research concluded that it is the *specificity* of education, not the *quantity* of education, that leads to labor-market success.").

58. See *id.* (citing DEPT OF IMMIGRATION AND MULTICULTURAL AFFAIRS, REVIEW OF THE INDEPENDENT AND SKILLED-AUSTRALIAN LINKED CATEGORIES 4 (1999)) ("The study concludes that migrants trained in job-specific fields such as nursing, computing and accountancy were more likely to obtain professional employment than those with qualifications in more generalist fields such as 'society and culture,' natural and physical sciences and economics.").

59. See *id.* ("This conclusion seems reasonable, but nevertheless startling in a climate in which having generic, broad, and readily transferable skills is often considered most desirable.").

60. See *id.* at 122 (noting that there is a separate "Australian Qualifications" point category).

61. See *id.* at 127 ("DIMA's review cites evidence that migrants who have been trained in Australia are more successful in the labor market than those who obtain their professional qualifications overseas.").

disadvantage, but it is another means to tailor the points system to the Australian labor market.

Overall, the Australian points system has been successful at increasing the number of skilled workers entering the country.<sup>62</sup> Under its points system, a majority of immigrants entering Australia are skilled workers.<sup>63</sup> However, despite this apparent success, Australia faced a shortage of skilled laborers in the early 2000s.<sup>64</sup> To address this, Australian officials revised the program in the late 2000s, shortening the SOL and imposing stricter regulation of temporary visa programs.<sup>65</sup> This effectively made it more difficult for immigrants to enter through the Skilled-Migrant category.<sup>66</sup> And although the measures decreased the number of skilled migrants in total, they increased the likelihood that the immigrants that did enter through the Skilled-Migrant category were likely to fulfill a specific labor need.<sup>67</sup> Perhaps this reactionary measure ignored the possibility of transferable skills—meaning that a migrant, while not initially selecting an occupation from the SOL, might have sufficient transferable skills to later enter one of the SOL occupations. However, this possibility is not too concerning because the labor skills shortages occur in areas of science, technology, engineering, and mathematics (STEM),<sup>68</sup> making it unlikely that a highly educated immigrant, with multiple advanced degrees in, say history, would later fill such a shortage.

Though Australia's revisions to its points system may not be completely successful at alleviating the skills shortage, perhaps there would be an even greater skills shortage without the points system.

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62. NWOKOCHA, *supra* note 2, at 56 (noting that 70 percent of immigrants entering Australia are skilled workers).

63. *See id.*

64. *See id.* ("Australia still faces a skills shortage. As of 2008, its booming economy is in its seventeenth year of uninterrupted growth with unemployment at a thirty year low . . ."); *see also Australian Skilled Immigration Reforms and Western Australia*, OZVISA.COM (June 22, 2010), <http://www.ozvisa.com/news/2010-06-22/australia/skilled-immigration-reforms-western-australia.htm> [hereinafter *Australian Reforms*] (discussing shortages in the local labor market).

65. *See Australian Reforms, supra* note 64 ("Recent changes to the Australian immigration system include the following: A new shorter skilled occupation list; Tougher regulations covering the temporary worker 457 visa; New State and territory migration plans.").

66. *See id.* ("Overall, it has become more difficult to come under the Australian skilled migration scheme.").

67. *See id.* (noting that the reforms are intended to create a "demand-driven migration system which targets the skills [Australia] need[s] to meet the shortages in the local labour market").

68. RUSSEL TYTLER ET AL., OPENING UP PATHWAYS: ENGAGEMENT IN STEM ACROSS THE PRIMARY-SECONDARY SCHOOL TRANSITION, at vii (2008) ("Australia has a serious STEM skills shortage.").

Overall, Australia's points system is regarded as efficient and sufficiently flexible to address Australia's labor needs.<sup>69</sup>

### C. *The United Kingdom's Points-Based System*

In 2008, the United Kingdom adopted the Points-Based System (PBS) in an overhaul of its employment-based immigration system,<sup>70</sup> structuring the PBS with five tiers.<sup>71</sup> Lawmakers touted the PBS as the means to attract highly skilled and talented workers "to contribute to growth and productivity" through its Tier I General category.<sup>72</sup> The PBS also provides for admission of skilled workers with job offers to "fill gaps" in the UK labor force through its Tier II category.<sup>73</sup> The last tiers provide for (III) admission of low-skilled workers in order to fill temporary labor shortages, (IV) students, and (V) youth and temporary workers who enter the United Kingdom on a temporary basis primarily to fulfill noneconomic objectives.<sup>74</sup>

Like Canada's points system, the PBS awards points to prospective immigrants for characteristics it views as indicative of high potential value to the United Kingdom's labor market. Many of the PBS's point categories for the first two tiers are similar to Canadian categories—job qualifications, age, earnings, etc.<sup>75</sup> Applicants must obtain seventy-five points or more to qualify for a work permit under Tier I.<sup>76</sup>

While the PBS is similar to Canada's points system, it does vary in a few important aspects. Unlike Canada, the PBS places a cap on the number of immigrants that can enter through Tier I.<sup>77</sup> The cap worries those concerned with human-capital accumulation because it

69. See NWOKOCHA, *supra* note 2, at 59 (noting that Australia's points system has rapid visa processing and flexibility to address Australia's economic needs).

70. See Gafner & Yale-Loehr, *supra* note 4, at 189 (describing the United Kingdom's immigration points system).

71. See *id.*

72. See Alan C. Neal, *Migrant Workers and the United Kingdom Labor Market: Some Trends and Implications of Twenty-First Century International Labor Migration Flows*, 31 COMP. LAB. L. & POL'Y J. 91, 100 (2009) (describing tier qualifications).

73. See *id.* (defining Tier II as "[s]killed workers with a job offer, to fill gaps in United Kingdom labor force").

74. See *id.* (defining Tiers III, IV, and IV as: "Tier 3: Limited numbers of low skilled workers needed to fill temporary labor shortages"; "Tier 4: Students"; and "Tier 5: Youth mobility and temporary workers, who are allowed to work in the United Kingdom for a limited period of time to satisfy primarily non-economic objectives").

75. See generally Laura Devine, *Not So Good Migrations: The New UK Points Based System Has Poor Vibrations for Immigration*, 2010 EMERGING ISSUES 4825, 4825 (2010) (describing Tier I and II point criteria under the United Kingdom's PBS).

76. See *id.* (noting Tier I requirements).

77. See Gafner & Yale-Loehr, *supra* note 4, at 190. This cap was put in place from July 19, 2010, until March 31, 2011. *Id.*

could lead to a backlog of desirable immigrants.<sup>78</sup> But perhaps this cap is necessitated by the fact that the United Kingdom is subject to the “free movement” obligations as a member of the European Union and must establish the right of free movement for workers within the European Union.<sup>79</sup> At any rate, the United Kingdom has unique obligations affecting its immigration policies with respect to other EU member nations, which may explain the cap.

Another notable deviation from the Canadian model, at least until recently,<sup>80</sup> was a civil-penalty component for employers.<sup>81</sup> Employers caught employing illegal migrant workers can face a civil penalty of up to £10,000 for each illegal worker.<sup>82</sup> Thus, the United Kingdom seeks to admit only immigrants it deems to be beneficial to the country on the front-end, and imposes civil penalties as an enforcement measure on the back-end. While this could help deter illegal immigration, it increases the overall costs of implementing immigration policy because it places compliance burdens on employers and law enforcement officials.<sup>83</sup>

While objectivity and transparency are the primary objectives behind the PBS,<sup>84</sup> critics also point out that the use of strict categories and points removes the discretion necessary to differentiate applicants who will truly benefit the United Kingdom.<sup>85</sup> However, the excessive discretion and subjectivity that characterized the former system was precisely what Parliament was aiming to

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78. See *id.* (“Whether the recent cap will create a backlog is yet to be seen. Further, if a backlog is created, it is unknown how (or if) the United Kingdom will differentiate between highly skilled workers and the truly best and brightest.”).

79. See Martin Kahanec & Klaus F. Zimmermann, *Migration in an Enlarged EU: A Challenging Solution?*, 363 *ECON. PAPERS* 1, 2–3 (2009) (referring to the free movement of workers as a core principle of the European Union); Neal, *supra* note 72, at 103 (explaining the “common labour market” obligations of the European Union).

80. See *New Changes Affecting the Temporary Foreign Worker and Live-In Caregiver Programs*, IMMIGRATION.CA, <http://www.immigration.ca/tempent-work-fworker.asp> (last visited Dec. 21, 2012) (noting new reforms taking effect April 1, 2011, which impose employer penalties).

81. See Neal, *supra* note 72, at 112–13 (discussing employer sanctions).

82. See *UKBA Report Names Employers Penalized for Violations of Employment Authorization Rules*, FRAGOMEN (Feb. 14, 2012), <http://www.fragomen.com/united-kingdom-02-14-2012/> (discussing £10,000 employer civil penalties).

83. See Neal, *supra* note 72, at 102, 112 (noting the added burden of compliance on employers).

84. See *id.* (“Points are awarded based on . . . ‘objective and transparent criteria . . .’”).

85. See Devine, *supra* note 75, (“The simplicity and objectivity . . . whil[e] laudable in principle, have resulted in turning a refined immigration system into a rather crude, blunt instrument which neither allows entry for those who will most benefit the UK, nor restricts entry of these [sic] who will not.”).

reduce by implementing the PBS.<sup>86</sup> While a bright-line approach may create inequities in some cases, many have applauded the PBS's objectivity and predictability goals,<sup>87</sup> though some question whether the PBS actually achieves those goals.<sup>88</sup>

#### D. *The United States' Employment-Based System*

In contrast is the U.S. employment-based system. Though the United States classifies economic immigrants into one of five categories by desirability, the classification is not accomplished with a points system.<sup>89</sup> The central goal of the system is also different. Rather than focusing on long-term human-capital accumulation, the United States largely uses its economic immigration system to meet the immediate needs of its labor market without permanent residency.<sup>90</sup> As such, the United States makes permanent residency a difficult and uncertain task.

The United States first implemented its modern economic immigration system with the Immigration Act of 1990, creating a system of five categories (colloquially referred to as EB1 through EB5).<sup>91</sup> The following table outlines these categories and what kind of immigrant it includes.<sup>92</sup>

Employment-Based Category	Includes . . .
EB1	Priority Workers
EB2	Immigrants with Advanced Degrees
EB3	Skilled Workers & Other Works
EB4	Special Immigrants
EB5	Employment Creation

86. See *id.* (noting that when enacted, the British government lauded the PBS as a simple, transparent, and objective system).

87. See *id.* (noting that when enacted, the national press and UK government lauded the PBS for its objectivity and simplicity); Gafner & Yale-Loehr, *supra* note 4, at 187 (describing the United Kingdom's PBS as "objective and systematic").

88. See Devine, *supra* note 75 (discussing how the PBS sometimes restricts entry of those who would benefit the United Kingdom, and allows entry of those who would not benefit the United Kingdom).

89. See Nwokocha, *supra* note 2, at 42–43 (discussing the five preference categories for economic immigrants created by the Immigration Act of 1990); Yale-Loehr & Hoashi-Erhardt, *supra* note 5, at 129 (indicating that the United States has not adopted a points system).

90. See Yale-Loehr & Hoashi-Erhardt, *supra* note 5, at 101 (noting the immigration system's sole goal of meeting immediate labor needs rather than long-term realities).

91. See Nwokocha, *supra* note 2, at 42–43 (discussing the method and effects of the Immigration Act of 1990); see also Gafner & Yale-Loehr, *supra* note 4, at 185 (stating the colloquial terminology).

92. See Nwokocha, *supra* note 2, at 43 (illustrating the categories with a more detailed table).

The EB1 category is further broken down into two subcategories—one for applicants with “extraordinary” ability in business, the arts and sciences, athletics, or education (EB-1-1), and the other for “outstanding” applicants in education and research (EB-1-2).<sup>93</sup> Congress caps the number of individuals able to enter through each of these categories.<sup>94</sup> Presumably, the EB1 and EB2 categories are for the most desirable immigrants, as these categories have the highest annual minimum visas available.<sup>95</sup>

Though this scheme looks similar to a points system, it is unlike a points system because the United States provides no objective framework for determining which immigrants should be classified in the preferred categories of immigrants.<sup>96</sup> The statute only provides that an individual possesses “extraordinary” ability when his or her ability has been “demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation.”<sup>97</sup> Because the statute and applicable rules do not further define ambiguous terms, like “sustained,” “acclaim,” or “achievements,” the statute presumably leaves this determination to the discretion of the immigration official reviewing the application. This case-by-case determination by immigration officials is much different than the more objective use of a detailed points rubric to guide immigration officials in making such determinations.

Relying on vague definitions to sort through prospective immigrants makes it difficult for the United States to identify those immigrants that would be most beneficial to its labor market.<sup>98</sup> This imposes uncertainty and loss of efficiency, both for the United States in implementing its immigration policy and for the prospective immigrant. There is a high degree of uncertainty for the prospective immigrant because vague definitions and categories make it difficult for him or her to determine with any confidence whether he or she will qualify for a visa under a particular category.

Lastly, despite the United States’ focus on current labor market needs, there is a long-standing and increasing skills shortage in

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93. Gafner & Yale-Loehr, *supra* note 4, at 185.

94. *Id.* at 193 (noting the current cap for all economic immigration is set at 140,000).

95. See Nwokocha, *supra* note 2, at 43 (showing that the EB1 and EB2 categories each have an annual minimum of 40,040, while the remaining categories have successively lower minimums).

96. See Gafner & Yale-Loehr, *supra* note 4, at 194–95 (asking the tough question of what exactly constitutes “extraordinary” or “outstanding” ability).

97. 8 U.S.C. § 1153(b)(1)(A) (2006).

98. Indeed, the Immigration and Naturalization Service admitted in its proposed revisions to IMMACT90 in 1995 that “confusion [had arisen] over the role of various types of evidence [for categorization].” Gafner & Yale-Loehr, *supra* note 4, at 199.

STEM areas.<sup>99</sup> The annual caps on the EB1 and EB2 categories have created a backlog of skilled immigrants waiting to be admitted and have done nothing to help alleviate this shortage.<sup>100</sup> Thus, the employment-based system does not accumulate human capital, because that is not its intended goal, and it does not accomplish its stated goal of filling short-term labor market needs.

### III. DISSECTING THE DOWNSIDES OF POINTS SYSTEMS

Despite the potential benefits of points systems, not every country that has considered adopting a points system has done so.<sup>101</sup> The United States is a prominent example.<sup>102</sup> Points systems present their own set of challenges and shortcomings, which this Part addresses.

These potential challenges include both human rights and economic concerns,<sup>103</sup> which will likely be raised in the policy debates surrounding the implementation of a points system in the United States.<sup>104</sup> This Part identifies some of the worries critics may have with points systems. These issues, however, should inform the design of a U.S. points system, rather than defeat one altogether.

#### A. Human Rights Concerns

Sovereign nations enjoy broad authority when determining immigration policy.<sup>105</sup> Modern immigration policymakers, however,

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99. See Andrew J. Rotherham, *The Next Great Resource Shortage: U.S. Scientists*, TIME (May 26, 2011), <http://www.time.com/time/nation/article/0,8599,2074024,00.html> (discussing the underproduction of STEM graduates in the United States); see also Danielle Kurtzleben, *STEM Shortage a Symptom of Broader National, Cultural Problems*, U.S. NEWS (June 28, 2012), <http://www.usnews.com/news/blogs/stem-education/2012/06/28/stem-shortage-a-symptom-of-broader-national-cultural-problems> (noting that there has been a shortage of STEM workers in the United States for the past fifty years).

100. See Rotherham, *supra* note 99 (stating that U.S. companies advocate for expanding workers allowed under the “H-1B” visa program because of the difficulty of finding qualified American workers).

101. See Yale-Loehr & Hoashi-Erhardt, *supra* note 5, at 129 (“The U.S. Congress has considered but rejected a point system.”).

102. *Id.*

103. See generally Tomer Broude, *The Most-Favoured Nation Principle, Equal Protection, and Migration Policy*, 24 GEO. IMMIGR. L.J. 553 (2010) (addressing human rights and economic concerns in a different immigration-policy context).

104. See Yale-Loehr & Hoashi-Erhardt, *supra* note 5, at 130 (noting a discrimination concern that was raised when the United States previously attempted to implement a points system).

105. See *supra* text accompanying note 1.



should seek to comport with basic human rights ideals.<sup>106</sup> This subpart examines the human rights goals of freedom of movement and nondiscrimination.<sup>107</sup>

The freedom of movement is a modern human rights goal.<sup>108</sup> Some liberal-leaning scholars suggest easing immigration restrictions to achieve this goal.<sup>109</sup> Points systems, however, eschew freedom of movement, as their very design is intended to restrict economic immigration to those immigrants that policymakers have deemed to have high human-capital potential.<sup>110</sup>

This should not be concerning, however, because the express language in the Universal Declaration of Human Rights defines the right narrowly; it is a right to move freely *within* a nation, not a right to move freely *among* nations.<sup>111</sup> The right to *leave* a sovereign nation is considered a part of the right of freedom of movement, but there is no corresponding right to enter a sovereign nation.<sup>112</sup> Concededly, the two are logically tied because restricting a person from entering a country naturally limits his or her ability to exercise the right to leave,<sup>113</sup> but the right of freedom of movement should not necessitate abandoning restrictive immigration policies because of the important sovereignty and self-determination aspects of immigration policy.<sup>114</sup>

A more poignant human rights concern for points systems is discrimination.<sup>115</sup> The most obvious potential for discrimination is

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106. See Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 566 (1990) (quoting T. Alexander Alienikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9, 19 (1990)) (discussing an emerging model of immigration law that is “based on [the] ‘notion of fundamental human rights that protects individuals regardless of their status’”).

107. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 13, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR] (declaring the right to “freedom of movement”); Broude, *supra* note 103, at 553 (mentioning the nondiscrimination goal of immigration policy).

108. See UDHR, *supra* note 107 (creating a right to freedom of movement within a country and the right to leave and return to one’s country).

109. See *generally* MIGRATION WITHOUT BORDERS: ESSAYS ON THE FREE MOVEMENT OF PEOPLE (Antoine Pécoud & Paul de Guchteneire eds., 2007) (advocating for open borders by exploring international perspectives on, and successful approaches to, migration and free movement).

110. See Yale-Loehr & Hoashi-Erhardt, *supra* note 5, at 102 (noting that the points system is designed to evaluate “[a] person’s potential for economic contribution”).

111. See UDHR, *supra* note 107 (discussing “the right to freedom of movement and residence within the borders of each State”).

112. See *id.* (stating no corresponding right of entry into a foreign country).

113. See Purcell, *supra* note 1, at 178 (noting the conundrum created by expressing a right to leave a country without any corresponding right to enter another).

114. See *supra* note 1 and accompanying text.

115. See Yale-Loehr & Hoashi-Erhardt, *supra* note 5, at 130 (referring to complaints of discrimination by immigrants’ rights groups).

socioeconomic discrimination.<sup>116</sup> The goal of a points system is to identify and select immigrants with the most “human capital”;<sup>117</sup> this logically favors immigrants with greater wealth that are more likely to have higher education and other skills.<sup>118</sup> The PBS, for example, explicitly requires applicants to possess a specified amount of money as evidence of maintenance ability.<sup>119</sup> While socioeconomic status is not an immutable attribute, it is one that may be far more difficult to change than other mutable traits, like language ability, which can be learned. Indeed, it is often economic aspirations that compel people to immigrate in the first place.<sup>120</sup>

This concern, however, is reduced if a points system is only a single component of an overall immigration scheme.<sup>121</sup> If there are other immigration systems that address different goals, like family reunification and asylum, the concern for socioeconomic discrimination is reduced.<sup>122</sup> So long as there are noneconomic options for legal immigration, the fact that a points system’s goal may necessitate disparate results depending on an immigrant’s socioeconomic background is less concerning because there are other options for entry.

Of course, points systems are increasingly accounting for the majority of immigrants entering countries like Australia and Canada.<sup>123</sup> This might very well mean that while there are alternatives in theory, there are few real options for legal entry for immigrants from lower socioeconomic backgrounds. Policymakers considering adopting a points system should bear this challenge in mind and retain other means of legal entry as a viable alternative for immigrants from nonwealthy backgrounds.

116. See *supra* note 39 and accompanying text (pointing out that Canada’s system “limits” lower-income immigrants).

117. See Yale-Loehr & Hoashi-Erhardt, *supra* note 5, at 102 (discussing the “human capital” test that evaluates the “work experience, education, and language ability” of applicants).

118. See generally *Canada Prefers Rich Immigrants*, *supra* note 41 (noting Canada’s preference for more educated and wealthier immigrants).

119. See Devine, *supra* note 75. The United Kingdom requires applicants for Tier-I to have “a minimum of £2,800 in addition to £1,600 for each accompanying dependant.” *Id.* While these maintenance figures are not outrageously high, it is a much heavier burden for applicants from lower socioeconomic backgrounds. See *id.* (“Is the point simply that UKBA aims to keep less affluent migrants out and leave an open door to wealthier migrants?”).

120. See Nwokocha, *supra* note 2, at 61 (“[F]or all migrants, the vast majority move for economic incentives.”); see also Kahanec & Zimmermann, *supra* note 79, at 12–13 (noting that an array of employment-related factors are key reasons why people choose to immigrate).

121. See Yale-Loehr & Hoashi-Erhardt, *supra* note 5, at 132 (noting that economic considerations cannot be the only factors considered when designing immigration systems).

122. See *id.* (“Economic enhancement is just one of many worthy goals.”).

123. See *infra* note 199 and accompanying text.

Another discrimination concern is racial or ethnic discrimination. For example, when the United States contemplated enacting a points system, Hispanic activists criticized the language component as racist.<sup>124</sup> Under this line of reasoning, language is so inextricably tied to racial or ethnic identity that language requirements or language preferences equate to discrimination towards those racial or ethnic groups that have a different primary language.

Again, this concern should inform a proposed points system, not defeat it. Language components exist because immigrants with certain language proficiencies are more likely to succeed in the labor market than those who do not have the same proficiency.<sup>125</sup> There is no apparent and affirmative intent to discriminate against particular racial or ethnic groups.<sup>126</sup> Preferring a mutable characteristic that is rationally tied to economic success is far less concerning than active discrimination against immutable characteristics that are not related to economic success.

Policymakers should include a language component only where there is evidence that language is tied to immigrants' economic success. When language components are justifiable, policymakers can also set language point values so that they are not so high as to be virtually determinative of entry. In this way, considering human rights can improve a points system.

### B. *Economic Concerns*

According to the scholar Tomer Broude, "most of international migration is economic in nature."<sup>127</sup> Economic theory, then, is another important way to inform immigration policy. An economic prospective concerns itself primarily with utilitarian and welfare-

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124. See Yale-Loehr & Hoashi-Erhardt, *supra* note 5, at 130 ("Hispanic and other immigrants' rights groups argued that including an English language component was racist and discriminatory.").

125. See *id.* at 116 (citing CITIZENSHIP & IMMIGRATION CAN., SKILLED WORKER IMMIGRANTS: TOWARDS A NEW MODEL OF SELECTION 20 (1998)) ("[T]here is a very close correlation between language ability and economic success.").

126. Admittedly, language components are potential tools that racist policymakers could use to implement racial or ethnic discrimination. This possibility, however, is mitigated when policymakers have empirical evidence justifying the language component. See CITIZENSHIP & IMMIGRATION CAN., SKILLED WORKER IMMIGRANTS: TOWARDS A NEW MODEL OF SELECTION 20 (1998) 20-21 (discussing empirical data that reflects benefits of language proficiency to both immigrant and country).

127. Broude, *supra* note 103, at 553-54.

maximizing goals.<sup>128</sup> This subpart addresses whether or not economic points systems are welfare-maximizing.

One possible way to approach immigration policy through an economic lens is to apply economic principles to immigration policy.<sup>129</sup> Applying free-market principles to immigration policy should be “welfare-enhancing.”<sup>130</sup> Take, for example, the Most-Favored-Nation (MFN) principle.<sup>131</sup> The MFN principle holds that an importing country should not discriminate among imports based on country of origin.<sup>132</sup> By treating all goods equally, a receiving country eliminates market inefficiencies created by preferential treatment.<sup>133</sup>

Analogized and applied broadly to immigration policy, free-market principles would, in theory, proscribe points systems’ preferential treatment of certain economic immigrants. The goal is the liberalization of the movement of goods and people, which “ensur[es] the proper functioning of market forces.”<sup>134</sup> If this is true, the opposite—restriction on the movement of human capital—should have the converse effect.

This rough approximation of economic principles to immigration policy, however, is hardly accepted truth. Henry Simons, a founder of the “Chicago School” of free economics and proponent of free-market ideas, specifically stated that these principles do not apply to immigration policy: “Wholly free immigration, however, is neither attainable nor desirable. To insist that a free trade program is logically or practically incomplete without free migration is either disingenuous or stupid. Free trade may and should raise living standards everywhere . . . Free immigration would level standards, perhaps, without raising them anywhere.”<sup>135</sup> While Simons’s assessment reflects some assumptions about immigration, such as the effect of immigration “level[ing] standards,” which may not comport

128. See *id.* at 556 (“From an economic perspective, the evaluation of [Most-Favored Nation] in migration policy is guided by utilitarian considerations.”).

129. See *id.* at 556–59 for a discussion of the MFN principle as applied to immigration policy.

130. See *id.* at 556 (noting that the MFN principle may promote liberal movement, and thereby enhance welfare, when applied to migration).

131. See *id.* (describing the goals of the principle in international trade law).

132. See Rep. of the Int’l Law Comm’n, 59th Sess., May 7–June 8, July 9–Aug. 10, 2007, ¶ 3, U.N. Doc. A/CN.4/L.719 (July 20, 2007) (explaining that an MFN clause is one through which a state consents to providing a contracting partner state “treatment that is no less favourable” than the treatment of other states).

133. See Broude, *supra* note 103, at 557 (“MFN at entry would seem to be the most efficient general rule.”).

134. *Id.* at 556.

135. Vernon M. Briggs, Jr., *The State of U.S. Immigration Policy: The Quandary of Economic Methodology and the Relevance of Economic Research To Know*, 5 J.L. ECON. & POL’Y 177, 180 (2009) (quoting HENRY C. SIMONS, ECONOMIC POLICY FOR A FREE SOCIETY 251 (1948)).

with empirical findings,<sup>136</sup> it does indicate that even the fathers of free-market principles never intended them to apply to immigration policy.<sup>137</sup>

Simplistic application of free-market principles to immigration policy raises other concerns. First, immigrants themselves, unlike goods, endure costs of moving among nations, such as the expense of moving and assimilating into a new land.<sup>138</sup> Second, there is a distinction between “at the border” treatment and “behind the border” treatment.<sup>139</sup> The MFN principle, for example, only looks at “at the border” policies.<sup>140</sup> Even if immigrants are afforded equal treatment “at the border,” this does not necessitate equal treatment “behind the border.”<sup>141</sup> Yet the treatment of immigrants after entry necessarily affects a prospective immigrant’s choice whether to relocate just as much as “at the border” considerations.<sup>142</sup> It is likely that a prospective immigrant would find it relevant if, for example, immigrants were treated equally at the border, but then subjected to systematic discrimination once they arrived. Thus, simply applying economic principles to immigration policy is crude at best.<sup>143</sup>

Even if these free-market principles can be applied to immigration policy, careful parsing of the principles themselves might reveal that they do not necessitate the rejection of restrictive policies like points systems. The MFN principle dictates equal treatment of imports no matter the *origin* to ensure that less efficient exporters are not arbitrarily favored over more efficient ones.<sup>144</sup>

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136. See Kahanec & Zimmermann, *supra* note 79, for labor studies in the effects of immigration within the European Union, finding little support for common assumptions of the negative impacts of immigration, such as welfare shopping, job depletion, and wage reduction. See also Don J. DeVoretz & Samuel A. Laryea, *Canadian Immigration Experience: Any Lessons for Europe?*, in EUROPEAN MIGRATION: WHAT DO WE KNOW? 573 (K.F. Zimmermann ed., 2005), for studies in Canadian labor markets that suggest there is no detrimental displacement of Canadian workers by immigrants.

137. See Briggs, *supra* note 135, at 180 (“[T]he reciprocal of free trade policies is not free labor mobility.”).

138. See Broude, *supra* note 103, at 557 (asserting that the immigrants who should migrate are “those for whom the opportunity cost of migration is lowest”).

139. See *id.* at 557–58 (discussing treatment of migrants at entry and after entry).

140. See *id.* at 554–55 (describing the MFN-inspired General Agreement on Labor Migration, which advocates for equal “at the border” treatment of immigrants).

141. See *id.* at 557 (“MFN at entry would not be sufficient . . . if it were not supported by MFN ‘behind the border.’”).

142. See *id.* (explaining the potential for disparate treatment “behind the border” that may undercut the effects of MFN at entry).

143. See *id.* at 559 (“[T]he transfer of the economic and political rationales of MFN from trade in goods to migration is not a smooth one.”).

144. See *id.* at 556 (describing the economic purpose of MFN to avoid trade diversion where differential treatment of goods leads to discrimination against goods from the most efficient exporters).

Thus, if narrowly applied to immigration policy, the MFN principle implies that a policy that discriminates based on the country of origin of an immigrant is inefficient. This does not mean, however, that the system that discriminates along some other metric is necessarily inefficient. Origin-based preferences may be largely arbitrary, but the economic preferences of points systems are based on empirical evidence and rational assumptions; the two are not analogous.

In fact, points systems can be used to remedy the potential market failures that completely unrestricted immigration could create.<sup>145</sup> Where a country's own citizens prove inadequate to fill a labor shortage, as is the case in the United States for workers with engineering and other technical backgrounds,<sup>146</sup> economic immigration policies can address these kinds of labor shortfalls.<sup>147</sup> Thus, while free-market principles may be helpful for goods and services to eliminate market inefficiencies, restrictive and carefully tailored immigration policies may be needed to eliminate those same labor market inefficiencies. Points systems do just that.

### C. Points Systems Results

Points systems should be judged ultimately by the results they produce. Points systems, when properly designed and implemented, can identify and admit highly skilled immigrants.<sup>148</sup> The bigger question is whether doing so benefits the receiving country. While the intuitive answer is yes, the results are mixed, indicating that a points system itself is not the magic bullet to a successful economic immigration regime. Both the points structure of a points system and corresponding immigration policy should be used to maximize the utilitarian benefit of admitting highly skilled immigrants.

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145. See Gafner & Yale-Loehr, *supra* note 4, at 208 (discussing how the goals of the United States' employment-based immigration system "must ensure the inclusion of immigrant workers who are capable of contributing to the U.S. national interest"); see also James J. Orlow, *America's Incoherent Immigration Policy: Some Problems and Solutions*, 36 U. MIAMI L. REV. 931, 932 (advocating a restriction on the flow of immigration to prevent a large influx of immigrants that would threaten the domestic job market).

146. See Nwokocha, *supra* note 2, at 46 (noting that in 2004, there was a continued demand for workers in the technology and high-skill-industries sector and an "obvious shortage").

147. See *id.* at 65 (asserting the employment-based immigrants can help fill specific labor shortages).

148. See *infra* Part IV.A (proposing that the United States would benefit from ensuring the success of its immigrants in the U.S. labor force).

## 1. Highly Skilled Immigrants Can Benefit the Receiving Country

First, highly skilled immigrants make a valuable, if somewhat intangible contribution to a nation's intellectual pool of resources.<sup>149</sup> More importantly, though, is the economic contribution of highly skilled immigrants. As George Borjas, an economist at Harvard University explained, "Skilled immigrants earn more, pay higher taxes, and require fewer social services than less-skilled immigrants."<sup>150</sup> Thus, immigrants that enter through the highest categories of points systems—those most skilled and human-capital rich—not only increase economic output and contribute to the tax base, they also start businesses, thereby generating jobs and increasing wealth for the receiving country.<sup>151</sup>

Many of the worries a receiving country has regarding immigration in general often are economic concerns.<sup>152</sup> Countries may worry that immigrants will harm labor markets by increasing unemployment, depressing wages, or becoming burdens of social welfare programs.<sup>153</sup> However, these concerns are largely inapplicable when immigrants are employed and economically successful.

There are also protectionist concerns that immigrants take jobs from domestic workers.<sup>154</sup> Again, these concerns can be managed through the structure of a points system, which would ideally admit a large portion of immigrants that will fill labor shortages left by the domestic labor workforce.<sup>155</sup> In short, many of the common concerns

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149. See Nwokocha, *supra* note 2, at 63–64 (noting employment-based immigrants pay taxes and add to the intellectual wealth of the receiving country).

150. Yale-Loehr & Hoashi-Erhardt, *supra* note 5, at 101 (quoting GEORGE J. BORJAS, HEAVEN'S DOOR: IMMIGRATION POLICY AND THE AMERICAN ECONOMY 190–91 (1999)).

151. See Saxenian, *supra* note 15 (asserting that the most successful immigrant entrepreneurs are those whose start-ups draw on ethnic networks for support while integrating into mainstream technology and business networks, thereby creating links between high-tech communities around the world).

152. See Kahanec & Zimmermann, *supra* note 79, at 2 (noting the "apprehension" within the European Union regarding migration); see also Neal, *supra* note 72, at 105 (reporting that after the 2004 enlargement of the European Union, many original member states engaged in restrictive transitional arrangements to guard against inundation of domestic labor markets by workers from new member states).

153. See Nwokocha, *supra* note 2, at 64 (discussing unemployment and wage suppression concerns); see also Kahanec & Zimmermann, *supra* note 79, at 8 (mentioning the "welfare tourism" concern).

154. See Neal, *supra* note 72, at 124 (discussing the British Prime Minister's call for "British jobs for British workers").

155. See Yale-Loehr & Hoashi-Erhardt, *supra* note 5, at 101 ("[S]killed immigrants earn more, pay higher taxes, and require fewer social services than less-skilled immigrants." (quoting GEORGE BORJAS, HEAVEN'S DOOR: IMMIGRATION POLICY AND THE AMERICAN ECONOMY 190–191 (1999))).

regarding immigration in general are simply inapplicable to points systems, which bring in human-capital-rich immigrants who are likely to succeed in the domestic labor market.

## 2. Caveats: When Point Systems Do Not Produce Advantages

First, point systems, despite the greater procedural simplicity and clarity, can still produce long delays between the time an immigrant applies for a visa and the time his or her application is approved,<sup>156</sup> as is the case with Canada's points system.<sup>157</sup> The long delay is attributed to Canada's lack of an occupations list like Australia's SOL, which forces employers to prove that the immigrant will fill a position that the employer cannot fill with domestic workers.<sup>158</sup> This results in duplication and delay.<sup>159</sup>

Further, Canada's long waiting period often means that the incoming supply of skilled immigrants lags behind the labor demands.<sup>160</sup> Labor demand can change significantly over the course of six to seven years.<sup>161</sup> Even if an immigrant applies for a visa in 2012, with the intent to enter an occupational field that is experiencing a labor shortage, when that immigrant's application is approved in 2018, the labor demand could be vastly different; there could even be a labor surplus. The immigrant would then experience difficulty finding a job in his or her field of choice.<sup>162</sup> This not only produces potential difficulty for the immigrant post-entry, it also means that the immigrant is not producing to his or her fullest potential, to the detriment of the receiving country. Long delays, therefore, result in less effectiveness.

Another way that a points system can fail even when it successfully identifies and admits highly skilled immigrants is by failing to ensure the success of those immigrants post-entry.<sup>163</sup>

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156. See Trevelyan, *supra* note 36, at 15 (noting the wait time in Canada can be up to six or seven years).

157. See *id.*

158. See *id.* (explaining further that the Canadian government provides no guidelines to show employers what criteria they must fulfill when they seek to hire foreign workers).

159. See *id.* ("This is a cumbersome process that results in duplication and delay.").

160. See *id.* (listing drawbacks of Canada's lengthy immigration process, including shifts in available jobs within the labor market).

161. See *id.* ("The negative effect of this delay is that the new immigrants coming to Canada, who had applied six or seven years before under the skilled worker class, do not meet the local labour market demand." (internal quotation marks omitted)).

162. See *id.* (discussing the problems that arise when highly skilled immigrants cannot find employment in their fields of choice).

163. See *id.* (concerning the lack of assistance programs for new immigrants in Canada).



Canada, for example, admitted 2.5 million skilled immigrants through its points system from 1993 to 2006.<sup>164</sup> However, in many cases, the immigrant's educational qualifications and work experience were not recognized in Canada, resulting in immigrants with Ph.D. degrees working as taxi drivers and in other low-skill occupations.<sup>165</sup>

Underemployment post-entry is a concern not only for the prospective immigrant, but also for the receiving country. The wealth-producing benefits of skilled immigrants are only realized if those immigrants are employed and using their talents to their fullest potential.<sup>166</sup> This is why a U.S. points system should not be solely focused on acquiring human capital; it should also ensure that the immigrants admitted through the points system could be successful in the job market post-entry so that their talent is not wasted.

#### IV. SUGGESTIONS FOR A U.S. POINTS SYSTEM

A points system offers many benefits, as discussed above, but it must be properly designed and implemented to achieve those benefits.<sup>167</sup> This Note suggests that the goal of a U.S. points system should be not only to accumulate highly skilled immigrants, but also to ensure those immigrants' talents are not wasted. This can be accomplished by designing points categories with education and occupational need in mind. This Note also suggests that there are two important corollaries to a successful points system: (1) an immigration assistance program that will help immigrants assimilate post-entry and (2) other noneconomic immigration systems that offer *viable* means for legal entry outside of the points system.

##### *A. Tweaking Points: Designing Points Categories with Labor Demand in Mind*

In addition to accumulating human capital, a points system should meet the actual needs of the U.S. labor force. Building human-capital accumulation is certainly a laudable goal, but ensuring that immigrants are successful in the labor force is important not only for

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164. *Id.*

165. *See id.* (reporting foreign workers' frustration over "the government's post-immigration indifference").

166. Economic immigration is wealth enhancing because economic immigrants contribute to the tax base, while requiring fewer social services on average, and creating jobs by starting new businesses. *See generally* Saxenian, *supra* note 15 (describing entrepreneurship among immigrants). This is only true, however, if the economic immigrant can find employment post-entry.

167. Yale-Loehr & Hoashi-Erhardt, *supra* note 5, at 102 (noting that a points system can benefit a country if properly designed).

the individual immigrants themselves, but also for the United States.<sup>168</sup> A country can accumulate as many scientists, engineers, or doctors as it wants, but if there are no jobs for those immigrants after entry, the accumulation is neither beneficial for the immigrants or the United States. Therefore, a U.S. points system must ensure that it is identifying immigrants that are likely to succeed post-entry.

One way to identify immigrants who are likely to succeed is to determine what the country's labor needs are and award more points for economic immigrants that will fill those needs. Australia accomplishes this with its SOL prerequisite for skilled immigration—only immigrants entering certain listed occupations can gain entry through that system.<sup>169</sup> The SOL is flexible; it can be adjusted based on labor market changes, which Australia has done.<sup>170</sup>

The United States can create its own version of a SOL, but unlike Australia's SOL, the U.S. version should be a list of *preferred* occupations, used to award more points for those immigrants entering occupations where there is a need for workers, rather than a prerequisite for entry. Some of these occupations might include scientific researchers, engineers, and other occupations with labor needs that are not currently being met by domestic workers.<sup>171</sup> The list of preferred occupations would allow the points system to give greater preference to immigrants that will fill a real need in the labor force, but would not foreclose the entry of highly skilled immigrants that could contribute human capital outside of temporary labor shortages, like a prerequisite would do.<sup>172</sup>

While this is ultimately a utilitarian idea—maximizing immigrants' human capital for the benefit of the country—it also aligns with the individual immigrants' welfare. If a point system blindly admits any and all immigrants that are educated, have capital, and are proficient in the language, without regard to what the labor market needs or can absorb, then a country runs the risk of frustrating those talented immigrants post-entry when they experience unemployment or underemployment.<sup>173</sup>

Another way the United States can better ensure immigrants' success with its points system is by awarding more points to

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168. See discussion *supra* Part III.C.2.

169. See Yale-Loehr & Hoashi-Erhardt, *supra* note 5, at 121 (describing the SOL, associated point values, and experience requirements).

170. See *generally Australian Reforms*, *supra* note 64 (explaining changes to Australia's skilled migration system, including a shortened SOL).

171. See Kurtzleben, *supra* note 99 ("At the U.S. News Stem Summit 2012, [Rick Stephens, senior vice president of human resources and administration at Boeing] described a 50-year decline in U.S. STEM performance . . .").

172. See Yale-Loehr & Hoashi-Erhardt, *supra* note 5, at 101–02 (criticizing the restraint of human-capital accumulation).

173. See Trevelyan, *supra* note 36, at 15 (describing the frustration of highly qualified foreign workers whose skills are underutilized).

prospective immigrants with an existing job offer, regardless of whether it is in a preferred occupation. This would be beneficial for two reasons. First, the existence of a job offer indicates a labor need. Though it doesn't necessarily mean the employer could not have filled it with a domestic worker, there is at least a need. Second, depending on the relative point value for a job offer, it alleviates the concern that a country could accumulate skilled immigrants but have no jobs for them to fill.<sup>174</sup> By merely awarding more points, rather than making a job offer a prerequisite, the United States can give preference to those economic immigrants that will be employed and therefore more likely to succeed in the labor force, but not completely bar jobless skilled immigrants that contribute human capital.

Second, the United States should award more points for certain advanced degrees that are specific and useful to the immigrant's prospective occupation. Many point systems do not discern between the relative economic value of advanced degrees, but this is an important predictor of the immigrant's economic success.<sup>175</sup> Volume of education is not necessarily indicative of economic success.<sup>176</sup> Several advanced degrees in liberal arts, for example, may not make a prospective immigrant any more likely to succeed than an immigrant with just one advanced degree in a STEM area of study.<sup>177</sup> A U.S. points system should identify the relative economic values of advanced degrees and award points accordingly.

Likewise, the United States should award more points for the specificity of education to occupation. For example, if Immigrant A has an advanced degree in nursing and will work as a nurse post-entry, and Immigrant B also has an advanced degree in nursing but wants to pursue a career in entertainment, the U.S. points system should award more points to Immigrant A for education because his or her advanced degree is specific and useful to his or her prospective work in nursing.

Such a system necessitates research into the relative value of education. However, the United States could save the cost of such research by looking at Australia's points system, which takes a similar approach.<sup>178</sup> Additionally, the United States could create

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174. *See id.* (listing careers that require a Canadian license and are therefore unavailable to many highly skilled foreign workers).

175. *See supra* note 58 and accompanying text.

176. *See* Yale-Loehr & Hoashi-Erhardt, *supra* note 5, at 124 (stating that specificity of education to occupation is more indicative of economic success than volume of education).

177. *See id.* (explaining why Australia has opted to retain an occupation-based points system rather than an education-based system).

178. *See supra* Part II.B (noting that the most heavily weighted factor in the Australian points system is the level of skill required by the applicant's occupation).

certain bright lines whereby advanced technical degrees are assigned more point value than general liberal arts degrees.

Finally, it should be noted that awarding more points, rather than banning immigrants with certain degrees, strikes a compromise between the two goals for the U.S. points system: addressing the U.S. labor needs by awarding more points for certain degrees that will assist a prospective immigrant in filling a labor need, without completely foreclosing other economic immigrants with less occupation-specific and nontechnical degrees.

#### *B. A Helping Hand: Offering Immigrant Assistance Post-Entry*

Another way the United States can ensure the immigrants admitted through a points system are successful and use their talents post-entry is by implementing an immigrant assistance program.<sup>179</sup> Assistance could come in various forms, including offering simple job search support for immigrants that do not have an existing job offer. Job search requirements could vary vastly from an immigrant's departure country—even simple résumé assistance could be helpful.<sup>180</sup> For immigrants entering a profession, guidance in navigating the credential requirements of the particular profession could also prove helpful.<sup>181</sup>

Administering immigration assistance would certainly create its own costs, and the range and depth of services offered would have to be balanced with budget concerns. Perhaps an application under the points system could require a small administrative fee to cover the cost of such a program. The benefit of reducing unemployment or underemployment for immigrants post-entry could outweigh the costs.

Of course, the necessity of an immigrant-assistance program needs to be judged by the structure of the points system. For example, state assistance would be superfluous if the United States required immigrants admitted through the points system to have a current job offer.<sup>182</sup> A requirement that an immigrant have family sponsorship could also reduce the necessity of an assistance program, as the idea

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179. See Trevelyan, *supra* note 36, at 15 (criticizing Canada's lack of immigration assistance post-entry).

180. See *CV—USA*, IAGORA, [http://www.iagora.com/iwork/resumes/cv\\_usa.html](http://www.iagora.com/iwork/resumes/cv_usa.html) (last visited Dec. 28, 2012) (discussing the different expectations for résumés in the United States).

181. Underemployment can result when skilled immigrants are admitted, but their experience and degrees do not meet the professional credential requirements of the receiving country. See Trevelyan, *supra* note 36, at 15 (noting instances when immigrants with Ph.D.s in Canada become taxi drivers post-entry).

182. See Part IV.A. (suggesting a U.S. points system should award more points for a current job offer, rather than require a job offer).

behind family sponsorship is that the family will provide that assistance rather than the state.<sup>183</sup> But because this Note recommends that an immigrant be awarded more points for a job offer or family sponsorship in the application process, rather than requiring those criteria, an assistance program would be a necessary component for ensuring an immigrant's success.

### C. Reducing Socioeconomic Discrimination

Lastly, a points system should not be the only means of lawful immigration for a country, and the points system should also have some socioeconomic-neutral criteria built into the point categories. One of the strongest criticisms of points systems is that points systems discriminate along socioeconomic lines.<sup>184</sup> This concern can be reduced if the United States retains *viable* means for entry outside of the points system.

The United States should retain family unification, amnesty provisions, and opportunities for temporary study as means for entry.<sup>185</sup> All of the immigration systems detailed above do this, and set target immigration levels.<sup>186</sup> But increasing caps or bans on these other modes of entry creates viability concerns because countries no longer offer a meaningful opportunity to immigrate outside of the points system.<sup>187</sup>

These immigration alternatives should be viable options—noneconomic immigrants should have a true opportunity to gain lawful entry—and should not be mere lip service. With economic immigration increasingly accounting for the majority of immigrants entering Canada and Australia,<sup>188</sup> there is a valid concern that these important alternatives are slowly being squeezed. The United States should remain committed to these other, noneconomic immigration goals. Its overall immigration scheme should serve a multitude of

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183. See Loehr & Hoashi-Erhardts *supra* note 5, at 106 (listing the two primary benefits of family sponsors as aiding migrants' assimilation and minimizing the short-term economic risk new migrants poses to the government).

184. See generally *id.* ("Yet economic considerations alone cannot drive an immigration policy in a democracy.").

185. See *id.* at 100 (distinguishing economic immigration from other immigration policy goals).

186. See Ashkar, *supra* note 31, at 148 ("[Canada] recognize[s] four categories of individuals eligible for landed-immigrant status: (1) family class; . . . (2) humanitarian class; . . . (3) independent class, which comprises applicants who . . . are selected on the basis of the points system; and (4) assisted relatives . . ."); see also Yale-Loehr & Hoashi-Erhardt, *supra* note 5, at 118-19 (noting Australia's other immigration categories).

187. The United Kingdom, for example, suspended its Tier-III category for unskilled workers needed to fill temporary labor shortages, and it is unknown when this suspension will be lifted. See Neal, *supra* note 72, at 101.

188. See *infra* note 199.

goals, with economic and labor needs being just one of those goals.<sup>189</sup> While noneconomic immigration policy is outside the scope of this Note, it is a prerequisite for implementing a points system in the United States.<sup>190</sup>

Another way policymakers could lessen the inherent advantage for wealthier immigrants is by designing point criteria with some socioeconomic-neutral criteria. Preference can be given to certain intangible factors that also contribute to economic success, but are less likely to be possessed solely by wealthy immigrants.<sup>191</sup> For example, points could be awarded for attributes like creativity, motivation, and resourcefulness, which are also important for success in the job market, but are not possessed exclusively by wealthier immigrants.<sup>192</sup>

Another wealth-neutral option is to offer points for family sponsorship, a component that Australia has incorporated in its points system.<sup>193</sup> There could be emotional and financial advantage for immigrants that have family support in the receiving country because it helps them adjust to their new country.<sup>194</sup> These advantages could increase the likelihood that immigrants with a sponsoring family member already in the United States will succeed post-entry.<sup>195</sup>

Of course venturing into this new territory raises its own problems. Intangible characteristics, like creativity and motivation, raise measurability concerns.<sup>196</sup> These characteristics are also subjective, giving the officials that are applying the system more discretion. Subjectivity is something a points system is designed to reduce.<sup>197</sup>

Additionally, more research would have to be conducted to understand if these criteria actually contribute to immigrants' economic success and benefit the receiving country. At least with family sponsorship, the current research does not show a strong link

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189. See Yale-Loehr & Hoashi-Erhardt, *supra* note 5, at 132 (recognizing that immigration policy serves many purposes in a democracy).

190. See *id.* (“[E]conomic considerations alone cannot drive an immigration policy in a democracy.”).

191. See *id.* at 102 (listing alternative criteria for points).

192. *Id.*

193. See *id.* at 105–06 (considering the benefits of family sponsors).

194. See *id.* (noting some points systems award extra points for the presence of family members in the host country who are available to sponsor the applicant).

195. See *id.* (reasoning that the positive effects of a family connection could counteract an applicant's shortcomings in other areas measured by the points test).

196. See *id.* at 102 (noting the “limited predictive power” of intangible characteristics).

197. See *supra* note 88 and accompanying text.

between family sponsorship and post-entry economic success.<sup>198</sup> However, it is at least a starting point for policymakers to incorporate some non-socioeconomic dependent criteria when designing point rubrics. No matter through what means non-socioeconomic-based immigration is accomplished, it is important that immigrants from a variety of backgrounds have a meaningful opportunity for entry through the points systems, especially considering that economic immigration is becoming the primary mechanism of immigration.<sup>199</sup>

The proposed system also has important implications for illegal immigration,<sup>200</sup> which is a large component of current immigration debate in the United States.<sup>201</sup> According to the scholar, Charles Kuck, overly restrictive immigration policies might have the unintended effect of increasing unlawful immigration and the associated problems with undocumented immigrants.<sup>202</sup> If a large group of prospective immigrants have no meaningful mechanism of legal entry, they might very well turn to illegal means of entry instead.<sup>203</sup> Therefore, maintaining the opportunity for legal immigration for immigrants from varied backgrounds is important

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198. See Yale-Loehr & Hoashi-Erhardt, *supra* note 5, at 106 (noting that the effects of family sponsorship are unclear).

199. In Canada, a majority of immigrants are now economic immigrants. See Gafner & Yale-Loehr, *supra* note 4, at 187. Similarly, economic immigration has grown steadily in comparison to other forms of immigration in the past fifteen years in Australia. See Yale-Loehr & Hoashi-Erhardt, *supra* note 5, at 118.

200. See Charles H. Kuck, *How Current Law Discourages, Rather than Encourages, Legal Migration*, 2008 EMERGING ISSUES 1421 (2007), for argument that the tight restriction on lawful immigration into the United States has actually led to “the unprecedented rise” in illegal immigration.

201. Illegal immigration, or enforcement, receives much more media attention at the expense of debate of legalization policy. See, e.g., Andrew O’Reilly, *Undocumented or Illegal: Media Outlets Battle over Immigration Terms*, FOX NEWS LATINO (Sept. 25, 2012), <http://latino.foxnews.com/latino/news/2012/09/25/undocumented-or-illegal-media-outlets-battle-over-immigration-terms/> (discussing the problem of terminology in the “controversial” debate over enforcement immigration policy); Rinku Sen, *Immigrants Are Losing the Policy Fight. But That’s Besides the Point*, COLORLINES (Sept. 17, 2012, 9:50 AM), [http://colorlines.com/archives/2012/09/immigrants\\_are\\_losing\\_the\\_political\\_fight\\_but\\_thats\\_beside\\_the\\_point.html](http://colorlines.com/archives/2012/09/immigrants_are_losing_the_political_fight_but_thats_beside_the_point.html) (noting legislation in Congress has focused more on enforcement and less on legalization since 2007); Dan Stein, *Tighten Up: Eliminate Incentives for Illegal Immigration*, CHRISTIAN SCI. MONITOR (Sept. 24, 2012), <http://www.csmonitor.com/Commentary/One-Minute-Debate/2012/0924/3-views-on-how-US-should-combat-illegal-immigration/Tighten-up-Eliminate-incentives-for-illegal-immigration-Improve-detection-and-removal> (offering elimination of employment opportunities for illegal immigrants as a strategy to eliminate the incentive for illegal immigration).

202. See Kuck, *supra* note 200 (connecting the three and ten-year bars on immigration to the United States for those who have previously lived there illegally to a rise in undocumented immigration).

203. See *id.* (explaining that the choice between complying with the law and leaving family in the United States or “being forced underground but remaining united with their families” leads many undocumented immigrants to stay illegally).

not only for human rights concerns, but also to avoid exacerbating illegal immigration.

V. A MEANS TO AN END: A U.S. POINTS SYSTEM CAN HELP  
THE UNITED STATES BETTER COMPETE IN  
A GLOBALIZED WORLD

A points system offers an array of potential benefits, both procedural and substantive, for the U.S. economic immigration scheme.<sup>204</sup> However, the United States should learn from the shortcomings of other countries' points systems and adopt a points system that is informed of the potential human rights, economic, and pragmatic concerns.<sup>205</sup>

It is clear that a points system is a highly effective means to an end, but not an end itself.<sup>206</sup> Though human-capital accumulation from highly skilled immigrants is important in ensuring the continued vitality of the United States,<sup>207</sup> a points system must be tied to the actual needs of the labor market to be effective and ensure that the talents of these individuals are not wasted once they are admitted to the United States.<sup>208</sup> This is important not only to the country as a whole, but also to the individual immigrants themselves, who would likely be frustrated if they faced unemployment or underemployment post-entry.<sup>209</sup>

The United States can connect its points system with the domestic labor market by identifying labor sectors that are experiencing worker shortages and designing point categories so that highly skilled immigrants that intend to work in those labor sectors are given more points.<sup>210</sup> In addition to improving the structure of the points system, the United States can also better ensure immigrant success by having a corollary immigrant-assistance program post-

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204. See Nwokocha, *supra* note 2, at 55 (acknowledging similar "costs and benefits" of the United Kingdom's PBS and Canada's points system).

205. See *supra* Part III (describing the downsides of points systems and suggesting how the United States might structure a successful points system).

206. See *supra* Part III.C.2 (examining when points systems fail to produce advantages).

207. See Nwokocha, *supra* note 2, at 65 (noting the need to supplement domestic workers in STEM fields in order to continue U.S. leadership in industry).

208. See *supra* Part IV.A (suggesting that labor demand influences the design of a U.S. points system).

209. See *supra* Part IV.A (noting that when labor demand informs immigration policy, the result is an alignment of the country's human-capital needs and immigrants' welfare).

210. See *supra* Part IV.A.



entry.<sup>211</sup> Finally, it is also important for the United States to retain viable alternatives to economic immigration through the points system to ensure that the overall immigration scheme reduces the possibility for discrimination and advances other, noneconomic goals of immigration.<sup>212</sup>

So long as the points system is carefully designed to advance a dual goal of human-capital accumulation and fulfillment of domestic labor needs, a points system can go a long way to improve the United States' economic immigration system. It would also allow the United States to better compete for human capital in a globalized world.

*Carla Tabag\**

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211. *See supra* Part IV.B (suggesting such immigrant-assistance programs as job-search support and credential-requirements guidance).

212. *See supra* Part IV.C (listing alternative means for entry, including family reunification, amnesty provisions, and temporary study).

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