

# RETHINKING THE LAW AND ECONOMICS OF IMMIGRATION POLICY FOR HIGH-SKILLED MIGRANTS IN THE GLOBAL KNOWLEDGE ECONOMY

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## I. INTRODUCTION

### A. *Globalization—Immigration in Context*

Richard Baldwin, in his book *The Great Convergence*, describes globalization as several stages of removing the constraints on the movement of goods, ideas, and people, which he refers to as “unbundlings.”<sup>1</sup> In the days where wind power by sea and animal power by land were the best means of transportation, goods were largely only able to be produced in relatively close proximity to their consumers. The first “unbundling” came with the technological advances in the early 1800s when the invention of the steam engine lowered the costs of moving goods far from where they were produced, unbundling production from consumption. As Baldwin comments, “From the early nineteenth century, falling trade costs fueled a cycle of trade, industrialization, and growth that produced one of history’s most dramatic reversals of fortune. The ancient civilizations in Asia and the Middle East—which had dominated the world economy for four millennia—were displaced in less than two centuries by today’s rich nations.”<sup>2</sup>

The second “unbundling,” which Baldwin identifies as the revolution in information and communication technology, lowered the cost of moving ideas and involved the international separation of factories. In this phase of globalization, “radically better communications made it possible to coordinate complex activities at a distance.”<sup>3</sup> As Baldwin continues, “once this sort of offshoring was feasible, the North-South wage gap that had arisen during the first unbundling made it profitable.”<sup>4</sup> This led to a convergence, diminishing the distance separating developed and developing countries. According to Baldwin, “a century’s worth of rich nations’ rise has been reversed in just two decades,” and their share of global wealth has returned to levels not seen since the early twentieth century.<sup>5</sup> This explains the outsourcing phenomenon whereby manufacturing jobs in the developed world move offshore to foreign states where the costs of production—mainly labor—were much lower. However, the outsourcing phenomenon was not widespread, but rather concentrated to a handful of states within the production networks created by developed-country firms. Baldwin’s explanation for why the benefits of the unbundlings have been concentrated and not shared evenly across the world is that while the costs of moving goods greatly diminished, followed by the cost ideas in the subsequent phase, the costs of moving people has remained prohibitively high.<sup>6</sup>

As the forces of globalization continue to reshape international economies, making the world more and more interconnected, there has been a dramatic

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1. RICHARD E. BALDWIN, *THE GREAT CONVERGENCE* 1–15 (2016).

2. *Id.* at 1.

3. *Id.* at 5.

4. *Id.*

5. *Id.* at 1.

6. *Id.* at 4–5.

liberalization in the movement of goods, services, and capital, but very little growth in the international movement of people.<sup>7</sup> Michael Trebilcock, in his foundational work *The Law and Economics of Immigration Policy*, has attributed the movement of labor's lag behind the other external economic indicators to the relatively restrictive policies found in developed states.<sup>8</sup> Trebilcock provides data that shows this disparity:

From 1950 to 1999, the average annual growth rate of world real GDP was 3.8%; the average annual growth rate in the trade of goods over the period was 6.2%; from 1980 to 1999 the average annual growth rate in the trade of services was 7.0%; from 1982 to 1999 the average annual growth rate in the stock of FDI was 13%. In contrast, the annual growth rate in the number of immigrants worldwide between 1965 and 2000 was only 1.77%, which does not differ significantly from the rate of growth in world population of approximately 1.72% annually over the same period. In fact, the proportion of the world's population that is made up of migrants has actually decreased since 1965 from 2.4 to 1.97%.<sup>9</sup>

According to research done by the United Nation's Department of Economic and Social Affairs, the number of international migrants worldwide has continued to grow rapidly in the first fifteen years of the twenty-first century.<sup>10</sup> The years from 2000 to 2015 saw a 41% increase in international migrant populations—persons living in a country other than where they were born—reaching a total of 244 million in 2015.<sup>11</sup> Furthermore, international migration is concentrated and not evenly dispersed. In 2015, 67% of all international migrants were living in just twenty different countries, with the United States housing 47 million foreign-born residents, or about one fifth of the world's total population of international migrants.<sup>12</sup>

### 1. *Benefits of Immigration*

Strict immigration laws that curtail the entry of high-skilled workers deplete the available human capital for start-ups as well as for well-established corporations. Rather than impose unduly burdensome restrictions on employers and entrepreneurs, immigration policy choices should build upon the already business-friendly legal framework of the U.S. and aim to facilitate the acquisition of high-skilled immigrant workers who can contribute to

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7. Michael J. Trebilcock, *The Law and Economics of Immigration Policy*, 5 AM. L. & ECON. REV. 271 (2003).

8. *Id.*

9. *Id.* at 272.

10. *Population Facts: Trends in International Migration, 2015*, UNITED NATIONS, DEP'T OF ECON. & SOC. AFFAIRS, POPULATION DIV. 1 (Dec. 2015), [https://www.un.org/en/development/desa/population/publications/pdf/popfacts/PopFacts\\_2015-4.pdf](https://www.un.org/en/development/desa/population/publications/pdf/popfacts/PopFacts_2015-4.pdf).

11. *Id.*

12. *Id.*

innovation and growth within the U.S. economy. Current policies fail to appreciate the changing identity of the entrepreneur in the U.S. and the rising trend of immigrants starting companies. As the *New York Times* reports, “about a quarter of engineering and technology companies founded between 2006 and 2012 had at least one founder who was born abroad.”<sup>13</sup> The data available indicates that immigrants are overrepresented when it comes to America’s business founders and innovators, meaning that we see higher business formation rates among immigrants than American-born citizens.<sup>14</sup> With immigrants more likely to start companies, they are in turn more likely to hire employees and more likely to contribute to economic growth.<sup>15</sup>

In addition to business start-up rates, another sign of the innovation and entrepreneurship among immigrants is the disproportionately high number of patents awarded to foreign-born inventors. According to studies from the Kauffman Foundation, a private foundation focused on entrepreneurial philanthropy, and the Partnership For A New American Economy, a nonprofit cofounded by Michael Bloomberg, foreign nationals residing in the United States were listed as inventors or co-inventors in almost a quarter of international patent applications filed from the U.S. in 2006 and were named in more than three quarters of patents at the top ten American research universities.<sup>16</sup> Given the reality of immigrants’ important impact on U.S. innovation, the policies of the Trump administration which seek to curtail immigration appear misguided and economically inefficient. Political or social considerations are driving the administration’s decision making, rather than consideration of economic consequences.

Evidence suggests a selection bias within immigrant populations, that means that those inclined to migrate in the first place are more innovative, industrious, and entrepreneurial than those that choose to remain where they are.<sup>17</sup> Immigrants have been involved in the founding of companies such as Google, Intel, PayPal, eBay and Yahoo.<sup>18</sup> By some estimates, “skilled immigrants account for over half of Silicon Valley start-ups and over half of patents, even though they make up less than 15% of the population . . . [t]here have been three times as many immigrant Nobel Laureates, National

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13. Catherine Rampell, *Immigration and Entrepreneurship*, N.Y. TIMES (July 1, 2013), <https://economix.blogs.nytimes.com/2013/07/01/immigration-and-entrepreneurship/>.

14. *Id.*

15. *Id.*

16. *Id.*

17. See, e.g., Peter Vador & Nikolaus Frank, *Why Are Immigrants More Entrepreneurial*, HARVARD BUS. REVIEW (Oct. 27, 2016), <https://hbr.org/2016/10/why-are-immigrants-more-entrepreneurial>.

18. Ian Goldin, *How Immigration Has Changed The World – For The Better*, WORLD ECONOMIC FORUM (Jan. 17, 2016), <https://www.weforum.org/agenda/2016/01/how-immigration-has-changed-the-world-for-the-better/>.

Academy of Science members, and Academy Award film directors than the immigrant share of the population would predict.”<sup>19</sup>

## 2. *Globalization and Immigration Pushback*

The economic benefits of globalization have not been universal or evenly shared, resulting in significant global inequality; “[a]ggregate average income in the wealthiest twenty countries is more than thirty-seven times greater than the average income in the world’s twenty poorest countries.”<sup>20</sup> The rise of nationalism and anti-immigration sentiment can be interpreted as a push-back to the global capitalist system, growing inequality, and the feeling that the economic benefits of globalization are not reaching everyone, especially those adversely affected by its inevitable economic consequences. The many benefits of globalization are diffuse and intangible, while the costs bite hard and hit closer to home. For example, consumers throughout a nation may enjoy cheaper products, but the local, low-skill textile workers lose their job as it is sent to another country where labor is cheaper.

On a national level, there are two broad classes of fears that drive the political backlash against immigration: first, that increased immigration will adversely affect labor markets, depressing wages or displacing domestic workers; and second, that increased immigration will add to the fiscal burden borne by natives paying taxes for social assistance programs and the “welfare state.” Additionally, arguments against immigration contend that it results in a “brain drain” from the migrant’s home country.<sup>21</sup>

Regardless, the focus of this Note is on high-skilled workers, to whom all of these arguments apply less so than for low-skilled immigrant workers. While some of the proposals in this Note that call for a more liberalized immigration policy will likely increase unskilled immigrant admissions as well, they are only tangential to narrow, targeted policies for high-skilled immigrants. Low-skilled immigration, refugees, and illegal immigration are separate issues within the broader immigration discussion that merit their own tailored policy approach.

### B. *The New Knowledge Economy and Increased Global Competition for Talent*

The global competition for top talent and specialized human capital is similar to the space race during the Cold War. Today’s race is to recruit the best and the brightest through a more calculated approach to citizenship, in a way that is politically feasible and spreads out the benefits to those adversely affected by increased immigration. The steady progression of globalization and the next “unbundling” will continue to increase the importance of the

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19. *Id.*

20. Trebilcock, *supra* note 7, at 6.

21. *Id.* at 13–15.

scarce resource that fuels economic growth and technological development in a knowledge-based economy: specialized human capital. Highly-skilled, specialized human capital is what leads to innovation, economic growth, and competitive advantage in the new knowledge-based global economy.<sup>22</sup> Though the movement of labor remains relatively constrained, there has been a marked shift by many countries that now engage in active recruiting of high-skilled, specialized human capital.<sup>23</sup> Countries have recognized the potential economic gains that come from attracting high-skilled migrants with several countries at the vanguard for larger institutional changes to how states conceive immigration policy.

Historically, the United States has been the global leader in attracting foreign talent offering a mix of a dynamic economy, world-class universities and research institutes and “the promise of greater personal freedom and political stability.” Illustratively, from 1901 to 2010, the Nobel Prize was awarded to three hundred researchers from the United States.<sup>24</sup> Almost one-third of the winners were either foreign-born or first-generation immigrants.<sup>25</sup> However, at the end of the twentieth century, the United States’ dominance started to subside, as competitors in the global race for talent began to catch up to the United States.

Other developed nations, such as Canada, Australia, and New Zealand, created selective immigration programs with the explicit intent of attracting the best and the brightest from around the world. These countries designed immigration programs allowing for migrants possessing the education or experience valuable in a knowledge-based economy to quickly integrate into the receiving country’s labor market, as well as quickly secure membership status. Countries following this model have created a relatively open, speedy, and “as-of-right” naturalization procedure that allows admitted migrants a quick transition to permanent residence and even citizenship.<sup>26</sup> For example,

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22. The “knowledge economy” refers to two emerging, defining economic forces: “the rise in *knowledge intensity* of economic activities, and the increasing *globalization* of economic affairs.” John Houghton & Peter Sheehan, *A Primer on the Knowledge Economy*, Ctr. for Strategic Economic Studies, Victoria Univ. of Tech. (Feb. 2000). As described, “[c]apitalism is undergoing an epochal transformation from a mass production system where the principle source of value was human labor to a new era of ‘innovation-mediated production’ where the principle component of value creation, productivity and economic growth is knowledge.” Richard Florida & Martin Kenney, *The New Age of Capitalism*, FUTURES (July 1993), [https://www.creativeclass.com/rfcgdb/articles/1993-Futures-The\\_New\\_Age\\_of\\_Capitalism.pdf](https://www.creativeclass.com/rfcgdb/articles/1993-Futures-The_New_Age_of_Capitalism.pdf).

23. Across the varied immigration policies of major immigration destination countries such as the U.S., Canada, and Australia, there are typically three primary classes of immigrants: a family class, an independent class, and a refugee class. These separate classes are subject to a strict quota system that limits admission to these countries and creates a backlog with more demand for immigration than these policies permit. See Suzy Khimm, *How Long is the Immigration Line? As long as 24 years*, WASH. POST (Jan. 31, 2013), [https://www.washingtonpost.com/news/wonk/wp/2013/01/31/how-long-is-the-immigration-line-as-long-as-24-years/?utm\\_term=.db807f4a3baf](https://www.washingtonpost.com/news/wonk/wp/2013/01/31/how-long-is-the-immigration-line-as-long-as-24-years/?utm_term=.db807f4a3baf).

24. Ayelet Shachar & Ran Hirschl, *Recruiting Super Talent: The New World of Selective Migration Regimes*, 20 IND. J. GLOBAL LEGAL STUD. 71 (2013); see THE NOBEL PRIZE ORG., [http://nobelprize.org/nobel\\_prizes/lists](http://nobelprize.org/nobel_prizes/lists) (last visited May 17, 2019).

25. *Id.*

26. *Id.* at 165 n.61.

in Canada, a highly-skilled immigrant can apply for citizenship after only three years of permanent residence.<sup>27</sup> OECD data shows that selective immigration policies have been effective. Australia, Canada, Ireland, and the United Kingdom, all countries with these kinds of immigration programs, have the highest proportion of well-educated immigrants (30%-42%) in the world.<sup>28</sup> Used as a tool to gain an advantage in the new global economy, offering a quicker and easier path to citizenship makes destination countries more attractive versus countries that do not, such as the United States.

While countries begin to embrace this form of activist immigration policy as an engine for economic growth, the United States has implemented harsher, more restrictive immigration policies that stifle the influx of highly-skilled migrants bolstering its economy. While other countries are removing administrative barriers and expediting the process of hiring foreign students from their own universities, the U.S. decided to impose “cumbersome security-motivated tracking systems (such as the Student and Exchange Visitor Information System, or SEVIS)” on all foreign students, researchers, and skilled workers.<sup>29</sup> As Shachar notes, “these developments fit within a broader trend whereby America—the birthplace of the race for talent—has now fallen behind its international rivals.”<sup>30</sup>

In addition, the U.S. is also being challenged when it comes to talented foreign students. OECD data shows that between 2001 and 2003, the inflow of foreign students to top universities and research institutes increased by more than 36% in the U.K., 30% in France, and 13% in Australia.<sup>31</sup> During that same time period, the inflow of foreign students to the U.S. dropped by 26%.<sup>32</sup>

### C. *Argument for a More Liberalized Approach to High-Skilled Immigration*

Restrictive immigration policies represent inefficient constraints on the potential benefits to global economic welfare.<sup>33</sup> These policies impede opportunities that would lead to increased world economic output from the liberalization of the movement of people at large. That said, simply opening national borders would very likely create an unsustainable sudden influx of new migrants that would overcrowd and overburden the existing institutions of

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27. *Id.*

28. *Migration Flows to Major OECD Countries Seem to be Stabilizing, Data Show*, ORG. FOR ECON. CO-OPERATION & DEV., (Mar. 22, 2005), <http://www.oecd.org/els/mig/migrationflowstomajoroecdcountriesseemtobestabilizingdatashow.htm>.

29. Shachar, *supra* note 24, at 169.

30. *Id.*

31. *Id.*

32. *Id.*

33. Trebilcock, *supra* note 7. Economic studies have estimated that the removal of all global restrictions on the free movement of people could result in up to a net doubling of worldwide annual GNP. See, e.g., Bob Hamilton & John Whalley, *Efficiency and Distributional Implications of Global Restrictions on Labor Mobility: calculations and policy implications*, 14 JOURNAL OF DEV. ECONOMICS 61 (1984).

developed countries, leading to economic collapse and undermining the very appeal of developed nations that drew immigrants to them in the first place. Too many immigrants at once could negatively impact domestic labor markets, social assistance programs, and the provision of public goods. Additionally, blind liberalization, without considering the economic consequences against natives, could produce political pushback that would defeat any attempts for further immigration liberalization.

In light of these concerns, some consideration of the impact of immigration on domestic populations is certainly legitimate in order to create sustainable policy. With this understanding, this Note calls for a measured approach to immigration policy that encourages more immigration than prevailing levels today in a way that realizes the economic benefits while managing and mitigating the challenges and costs.

In an increasingly interconnected world, many industries are already facing fierce global competition, particularly in the recruitment of a workforce possessing high-skilled human capital.<sup>34</sup> Given the nature of agglomeration economics—the tendency for specialized clusters of complementary industries to coalesce in a single location and be self-perpetuating (for example, Silicon Valley)—there is an important first-mover advantage available to the countries that are able to attract highly-skilled immigrants who can build the industries of the future within a country's borders.<sup>35</sup> States should view immigration as a tool within this context—a way to take advantage of the inevitable forces of globalization and the movement of people for their national betterment. Liberalized immigration policies have implications for economic growth, innovation, and strategic technological development. To maximize the economic benefit on a national level, and without impairing the viability of the welfare state to provide for all citizens, this Note calls for eliminating the rigidity of the current quota system and instead decentralizing and privatizing much of immigration policy to improve overall welfare and efficiency. As globalization continues to reshape national economies, developed countries would be well served to liberalize their immigration policies aligning them with other external economic policies regarding the movement of goods, services, and capital, and taking immigration policy out of “the largely

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34. See Shachar & Hirschl, *supra* note 24.

35. See, e.g., REMCO ZWETSLOAT ET AL., KEEPING TOP AI TALENT IN THE UNITED STATES: FINDINGS AND POLICY OPTIONS FOR INTERNATIONAL GRADUATE STUDENT RETENTION, CENTER FOR SECURITY AND EMERGING TECHNOLOGY (CSET), December 2019 (International graduate students are a large source of high-skilled, specialized talent in the United States. Student retention has historically been a strength for the U.S., but the steady growth of obstacles to immigration along with other countries heavily investing in attractive talent, that strength is being weakened); ZACHARY ARNOLD ET AL., IMMIGRATION POLICY AND THE U.S. AI SECTOR: A PRELIMINARY ASSESSMENT, CENTER FOR SECURITY AND EMERGING TECHNOLOGY (CSET), September 2019 (“The United States’ ability to attract foreign talent is a unique and crucial national security advantage. Historically, immigrants have helped American lead the world in technological innovation.”).



protectionist, inefficient bureaucratic backwater in which it has languished in most developed countries for much of their history.”<sup>36</sup>

From the U.S.’s perspective, immigration policy should focus on creating programs that attract *and* integrate immigrants who can make positive contributions to the U.S. economy. Particularly, given pending demographic pressures from “baby boomers” starting to retire, there is an economic need for additional labor to support an aging population.<sup>37</sup> Compounding the issue is that fertility levels are declining across the developed world, in many cases to an extent below replacement levels, resulting in a rapid increase in dependency ratios as smaller and smaller cohorts of working age people are expected to support larger retirement populations.<sup>38</sup> Fortunately, international migrants provide a younger labor supply to alleviate this trend.<sup>39</sup> Without increased immigration, populations in North America are predicted to start declining in only a matter of decades.<sup>40</sup>

The United States must change course and create attractive policies for immigrants or risk losing out in the global race for talent. The U.S. should take into account the selective migration policies successfully used by competing countries and design its own initiatives to attract world-class talent. It is crucially important to its economic future for U.S. policy makers to recognize that their policy choices will be made within the context of intensifying competition with other talent-recruiting countries. Other countries have made significant strides in making themselves more appealing to immigrants;<sup>41</sup> it is imperative that the U.S. does not miss its opportunity to remain a leader in the fields of scientific development, intellectual innovation, and economic growth.

## II. THE U.S. APPROACH TO HIGH-SKILLED IMMIGRATION

The global shift in competition for talented migrants, with many countries opening their borders more, stands in sharp relief against the U.S. which, if anything, has gone in the opposite direction. For example, while other countries are removing administrative barriers and expediting the process of hiring foreign students from their own universities, the U.S. has imposed

36. Trebilcock, *supra* note 7, at 48.

37. See Arian Eunjung Cha, *The U.S. Fertility Rate Just Hit a Historic Low. Why Some Demographers are Freaking Out*, WASH. POST, June 30, 2017; Nicole Maestas et. Al, *The Effect of Population Aging on Economic Growth, the Labor Force, and Productivity*, THE NAT’L BUREAU OF ECONOMICS, July 2016.

38. Andrew Miller, *America’s Demographic Crisis: The United States is struggling with low fertility and falling birth rates*, THE TRUMPET (Aug. 6, 2017), <https://www.thetrumpet.com/16131-america-demographic-crisis>.

39. Dep’t of Econ. and Soc. Aff., *The International Migration Report 2017* (Highlights), U.N. Doc. ST/ESA/SER.A/404 (Dec. 18, 2017).

40. Miller, *supra* note 38.

41. See, e.g., United Kingdom Entrepreneur Visa – Tier 1, CARIB INT’L, <http://www.caribint.org/united-kingdom-entrepreneur-visa-tier-1/>; Blue Card EU for Germany, BLUECARD.EU.DE, <http://bluecard-eu.de/eu-blue-card-germany> (last visited May 18, 2013) (the EU’s blue card, a scheme started in Germany that grants permanent residence to talented migrants under the program).

“cumbersome security-motivated tracking systems [SEVIS]” on all foreign students, researchers, and skilled workers.<sup>42</sup> As Shachar notes, “these developments fit within a broader trend whereby America—the birthplace of the race for talent—has now fallen behind its international rivals.”<sup>43</sup>

The current immigration regime in the U.S. is long overdue for a major overhaul. The current system is a bureaucratic quagmire of legal categories, subcategories, quotas and lotteries which add unnecessary complexity to an already contentious and polarizing issue. One commentator referred to the immigration bureaucracy as “a lower level of Dante’s Hell.”<sup>44</sup>

The National Foundation for American Policy (NFAP), a public policy research organization focusing on trade, immigration, and related issues, has identified a number of shortcomings with respect to current U.S. immigration and its impact on entrepreneurship, including: (i) the lack of a “start-up visa” that would allow a foreign national to become a legal permanent resident through founding a business, attracting investment, and/or employing U.S. workers; (ii) too many restrictions placed on many high-skilled foreign nationals that make them unable to start businesses because they do not have a green card that would grant them and their investors assurances of their ability to stay in the U.S. while the business grows, particularly in the face of the need for increased startup activity to fuel future economic growth; (iii) significant barriers to entry for high-skilled individuals starting a business in the form of long wait times for employment-based green cards; (iv) the unreliability of temporary visa categories like the H-1B visa, particularly given the increased scrutiny of applications; and (v) increased rejection of applicants, which “makes it precarious for individuals currently in H-1B status to change employers, particularly to start a new venture”.<sup>45</sup>

High-skill, employment-based immigration law is largely derived from the Immigration Nationality Act (INA), and regulatory control comes from Titles 8, 20, and 22 of the Code of Federal Regulations (CFR).<sup>46</sup> Though there have been minor changes to the statutory and regulatory scheme since the 1990 legislation, there has not been the kind of comprehensive immigration reform that is sorely needed.

Highly-skilled workers have essentially two visa paths for entry into the United States: either as permanent residents with a green card (E-visa

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42. Shachar, *supra* note 24, at 169.

43. *Id.*

44. Doug Bandow, *Immigration Benefits the U.S., So Let's Legalize All Work*, FORBES (Sep. 16, 2013), <https://www.forbes.com/sites/dougbandow/2013/09/16/immigration-benefits-the-u-s-so-lets-legalize-all-work/#2236d6304d12>.

45. NFAP Policy Toolkit on Immigration Entrepreneurs, NAT'L FOUND. FOR AM. POLICY (2019), <https://nfap.com/wp-content/uploads/2019/03/Immigrant-Entrepreneurs-and-US-Immigration-Policy.NFAP-Policy-Toolkit.2019.pdf>. An H-1B denial, depending on the timing, could leave a foreign-born professional out of status and forced to leave the United States.

46. Key regulatory provisions are contained in the following: Temporary Employment of Foreign Workers in the United States, 20 C.F.R. § 655 (2017); Immigrant Petitions, 8 C.F.R. § 204 (2012); Labor Certification Process for Permanent Employment of Aliens in the United States, 20 C.F.R. § 656 (2004); and Nonimmigrant Classes, 8 C.F.R. § 214 (2001).

program), or as “temporary” workers under the H-1B visa program. Despite these two separate avenues for talent to come to the U.S., the prevailing immigration system is not set up for the purpose of skill-based selection for permanent residence, at least not in as favorable of a way as other countries who have had more success with their policies in attracting talented foreign workers.

#### A. *Trump Administration—Full Steam in the Wrong Direction*

Despite being an issue of national importance for so many years, the underlying legal framework of the U.S. immigration regime is largely taken from the Immigration Nationality Act of 1990.<sup>47</sup> However, that is not to say that U.S. immigration policy has been unchanged since then. Immigration law is governed by statutes and regulations—while legislation has demarcated the outer limits of immigration policy, most changes have happened at the regulatory or sub-regulatory level. Immigration law is governed by statute and by regulation.<sup>48</sup> Practical changes made through the sub-regulatory action, such as policy guidance memoranda and agency adjudication policies, can have significant effects on policy outcomes.

Despite the lack of new statutes or regulations, the Trump administration has been effective by acting at a sub-regulatory level proceeding with “a combination of sub-regulatory actions, such as the issuance of executive orders, rescissions of long-standing policy memoranda of the United States Citizenship and Immigration Services (USCIS) and changes to adjudication policy.”<sup>49</sup> This is important because sub-regulatory guidance must be consistent with current statutes and regulations, as they are not issued through the notice and comment provisions of the Administrative Procedure Act (APA).<sup>50</sup> In theory, one would suppose that there is a limit to how much a single presidential administration can affect policy without changing the governing statutes or regulations. As the Trump administration has shown, such ostensible limitations leave plenty of room for the particular policy preferences of those currently in power to be implemented.

Several actions in particular are worth noting for their potential impact on the U.S. economic growth, entrepreneurship, and innovation, as well as for how they illustrate the specifics of how the Trump administration has implemented its anti-immigration agenda: (i) greater scrutiny of H-1B visas;

47. Immigration Act of 1990 (Immigration and Nationality Act of 1990), Pub.L. 101-649, 104 Stat. 4978 (1990).

48. Jennifer Chacon, *Who is Responsible for U.S. Immigration Policy?*, 14 INSIGHTS ON L. & SOC'Y 3 (Spring 2014), [https://www.americanbar.org/publications/insights\\_on\\_law\\_and\\_society/14/spring-2014/who-is-responsible-for-u-s-immigration-policy-.html](https://www.americanbar.org/publications/insights_on_law_and_society/14/spring-2014/who-is-responsible-for-u-s-immigration-policy-.html) [<https://perma.cc/Q8LU-F2C6>].

49. Kevin Miner & Sarah K. Peterson, *High Stakes for High-Skilled Immigrants: An analysis of changes made to high-skilled immigration policy in the first year of the trump administration in comparison to changes made during the first year of previous presidential administrations*, 44 MITCHELL HAMLINE L. REV. 970 (2018).

50. Administrative Procedure Act, 5 U.S.C. § 555 (2006).

(ii) rescission of the Obama-era International Entrepreneurship rule; and (iii) heightened screening and vetting of immigration program regulations and adjudications.<sup>51</sup>

### 1. *Actions Affecting the H-1B Visa Program*

Several actions have been taken by the Trump administration that affect different aspects of the H-1B visa program—the main visa program for high-skilled workers. These actions have significantly reduced the number of H-1B petitions accepted by the United States Citizenship and Immigration Services (USCIS).<sup>52</sup> At the beginning of the Trump administration, in the spring of 2017, the USCIS temporarily suspended premium processing of petitions for H-1B visas, though it reversed course after a short time period.<sup>53</sup>

Another action narrowing the visa program was the Rescission of the Computer Programmer Specialty Occupation Policy Memorandum issued by the USCIS on March 31, 2017.<sup>54</sup> Some have argued that the timing of the policy memorandum was important, signaling a political message, as it was issued the day before the beginning of the filing period for H-1B visa petitions.<sup>55</sup>

### 2. *Attempted Rescission of the Obama-era International Entrepreneur Parole Program*

The attempted rescission of the Obama-era International Entrepreneur Parole Program is another example of the Trump administration working at the sub-regulatory level through the blocking of a rule going into effect altogether.<sup>56</sup> The rule would allow certain qualifying foreign national entrepreneurs to be “paroled” into the U.S., which would give them work authorization and allow them to start businesses in the United States. The finalized rule provided a means of legal migration for individuals who did not meet the requirements for a traditional nonimmigrant visa, but were able to “demonstrate through evidence of . . . potential for rapid business growth and job creation that [. . .] would provide a significant public benefit.”<sup>57</sup> This entrepreneur parole rule was widely praised by the technology industry,

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51. Miner & Peterson, *supra* note 49.

52. Trisha Thadani, *More H-1B Hopefuls Denied Under Trump, Data Show*, SF CHRONICLE (Dec. 18, 2017), <https://www.sfchronicle.com/business/article/More-H-1B-hopefuls-denied-under-Trump-data-show-12437578.php>.

53. USCIS, *USCIS Will Temporarily Suspend Premium Processing for H-1B Petitions* (Apr. 3, 2017), <https://www.uscis.gov/archive/uscis-will-temporarily-suspend-premium-processing-all-h-1b-petitions>; USCIS, *USCIS to Resume H-1B Premium Processing for Certain Cap-exempt Petitions* (July 24, 2017), <https://www.uscis.gov/news/uscis-resume-h-1b-premium-processing-certain-cap-exempt-petitions>.

54. USCIS, POLICY MEMORANDUM PM-602-0142, RESCISSION OF THE DEC. 22, 2000 “GUIDANCE MEMO ON H1B COMPUTER RELATED POSITIONS” (Mar. 31, 2017).

55. Miner & Peterson, *supra* note 49, at 996.

56. *Id.*; International Entrepreneur Rule: Delay of Effective Date, 82 Fed. Reg. at 31,887 (July 11, 2017).

57. International Entrepreneur Rule: Delay of Effective Date, 82 Fed. Reg. at 31,887 (July 11, 2017).

particularly Silicon Valley.<sup>58</sup> However, the DHS under Trump issued a notice delaying the effective date of the rule, which has been challenged in court.<sup>59</sup> On January 17, 2017, the DHS published the International Entrepreneur final rule:

which amended DHS regulations to include criteria to guide the Secretary’s discretionary parole authority for international entrepreneurs who can demonstrate that their temporary parole into the U.S. under INA 212(d)(5) would provide a significant public benefit to the United States by showing that, among other things, the start-up entity in which he or she is an entrepreneur received signify capital investment from U.S. investors with established records of successful investments, or obtain significant awards or grants from certain federal state or local government entities.<sup>60</sup>

The U.S. District Court for the District of Columbia issued a preliminary injunction directing DHS to begin accepting applications under the program, though there has been little word on the processing of applications under the rule since there is ongoing litigation and efforts to repeal the rule.<sup>61</sup> This rule’s support from the technology industry and the larger business community suggest that the Trump administration’s efforts to curb this type of immigration and repeal this rule are misguided and are negatively impacting the U.S. entrepreneurial ecosystem.

### 3. *Heightened Screening and Vetting of Immigration Program Regulations and Adjudications*

Another area where there have been changes to adjudication practices is employment-based immigration petitions, where there have been significant slowdowns due to agency policy decisions. The processing of employment authorization petitions—which, at the start of the Trump administration had a regulatory requirement for processing within ninety days—now takes as long as five months.<sup>62</sup> On October 23, 2017, the USCIS issued another policy memorandum titled “Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrants.”<sup>63</sup> The previous USCIS guidance memo from 2004 called for deference to “a prior determination by an adjudicator that the alien is

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58. See Jenifer Elias, *Obama Administration Proposing ‘Startup Visa,’* SILICON VALLEY BUS. J. (Aug. 26, 2016).

59. National Venture Capital Ass. v. Duke, No. 17-1912, 2017 WL 5990122 (D.D.C. Dec. 1, 2017).

60. *International Entrepreneur Rule: Delay of Effective Date*, 82 Fed. Reg. 31,887 (July 11, 2017).

61. *Id.*

62. *Id.*

63. USCIS Policy Memorandum, *Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status* (Oct. 23, 2017), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-10-23Rescission-of-Deference-PM6020151.pdf> [<https://perma.cc/9Y4Z-NJF8>].

eligible for the particular nonimmigrant classification sought.”<sup>64</sup> The rescission of this policy of deference means that there will be increased scrutiny for all extension petitions for nonimmigrants across the board. Another procedural change that creates additional burdens for immigrants is the USCIS expansion of the in-person interview requirement for certain permanent residency applicants.<sup>65</sup> These are just a few examples of the Trump administration orchestrating significant policy outcome changes through mere alteration of adjudication practices.

### III. RETHINKING IMMIGRATION POLICY — PROPOSALS FOR THE GLOBAL KNOWLEDGE ECONOMY

#### A. *Policy Ideas — Decentralization and Privatization*

This Note focuses on the national response to the global phenomenon of migration. Rather than mere expansions of current visa categories or increasing the quotas for particular skillsets, this Note advocates for a complete overhaul of the system on the broadest level. This requires rethinking the role of the state and the relationship between employment and citizenship, as well as integrating immigration policies with other external economic policies relating to the movement of goods, services, and capital. Rather than call for specific policy outcomes, such a reimagination simply lays out what creative responses to global migration may look like, identifying several tools in the immigration policy maker’s tool kit.

To start, the United States should rethink the terms by which it classifies immigrants, emphasizing their potential to contribute to the economy and to integrate socially, as well as their risk of burdening the host state, either through congestion effects or by drawing upon the welfare state. From this starting point, the U.S. can then separate immigrants categorically into those who are financially independent and those who are at risk of becoming a financial burden to the state.

One proposal entails a reorientation towards decentralized mechanisms of immigration policymaking, taking admission choices away from the State, with its inefficient bureaucracy, and placing them in the hands of those more closely aligned with the needs of both the labor market and immigrant hopefuls.<sup>66</sup> There are two main mechanisms in this vein that would work to lower transaction costs and increase efficiency in the process of evaluating and admitting applicants that both maximize economic impact while limiting social costs to the welfare state.

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64. *Id.*

65. Press Release, USCIS, USCIS to Expand In-Person Interview Requirements for Certain Permanent Residency Applicants (Aug. 28, 2017), <https://www.uscis.gov/news/news-releases/uscis-to-expand-in-person-interview-requirements-for-certain-permanent-residency-applicants>.

66. Audrey Macklin, *Freeing Migration from the State: Michael Trebilcock on Migration Policy*, 60 UNIV. TORONTO L. J. 315 (2010); Trebilcock, *supra* note 7.

The first mechanism is a mandatory social insurance program as proposed by Michael Trebilcock, a law professor at the University of Toronto.<sup>67</sup> This social insurance device would work as a legally enforceable obligation on the part of some sponsor—either a family member, employer, or other private organization—to pay premiums that would insure the immigrant against any drawing he or she may make against the amenities of the welfare state.<sup>68</sup> Essentially, the scheme works as an indemnification for the state, where the sponsored immigrant will still be free to turn to social assistance if needed, but the insurance company underwriting the insurance policy held by the sponsor will pay the government the extent of any welfare drawings.<sup>69</sup> Sponsors will continue to pay premiums for the duration of the insurance contract or could assign the contract to someone else, such as when a sponsored employee changes jobs.<sup>70</sup> If a sponsor is no longer able to pay the premiums, then the sponsored immigrant would become responsible for taking over the contract payments or else would default on the conditions for permanent residence under the sponsor-based immigration program and would be subject to deportation.<sup>71</sup>

With both sponsorship and a program of mandatory social insurance in place, the idea is that the need for bureaucratic control and the quota system would largely disappear.<sup>72</sup> Of course, there will still be the need for screenings for health, criminality, and national security, which are not conducive to decentralization.<sup>73</sup> However, reducing the immigration bureaucracy to that narrowly limited function would likely reduce massive administration costs and allow for labor market demand to replace arbitrary determinations in deciding how many immigrants should be admitted into the country. Trebilcock hopes “[u]nder a decentralized approach the labor market would regulate the inflow of persons congruently with demand. Employers would sponsor immigrant workers as frequently as is deemed to be cost justified.”<sup>74</sup>

There are several reasons why a decentralized approach that does away with the quota system is desirable for high-skilled immigration. First, the quota system restricts immigration such that there are a vast number of immigrants—as demonstrated by the multi-year backlog in the system—who are denied admission despite their ability to not be a burden to the receiving country, as proven through a showing of sufficient personal

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67. Trebilcock, *supra* note 7.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* Quotas are generally justified on the basis that open borders would present negative externalities such as congestion effects, and that the political and fiscal stresses imposed by the newcomers would overburden the redistributive programs of the welfare state. Quotas limit the number of immigrants who may enter a country, although they may otherwise qualify. An additional problem associated with quota systems is that they must be set in advance, placing the responsibility of predicting labor market needs in the hands of a centralized bureaucracy.

73. Trebilcock, *supra* note 7.

74. *Id.* at 332.

resources, pre-arranged employment, or sponsorship by citizen relatives. The quota system denies the U.S. economy a significant amount of skilled-labor and human capital each year.<sup>75</sup> Another inefficiency associated with the quota system is the need to set quotas in advance, which requires the perhaps impossible task of accurately predicting the needs of the labor market. In lieu of putting that decision in the hands of a centralized bureaucracy, doing away with the quota system and decentralizing the process allows market actors like employers to determine their own needs and seek foreign employees as needed. As Trebilcock describes it, as “[a] result of the stochastic nature of economic outcomes, an ideal immigration policy would take into account the ever-changing dynamic state of the economy and the national labor market in determining the appropriate number of immigrants to admit on a yearly, monthly, or even weekly basis.”<sup>76</sup> A reorientation away from centralized bureaucracy to decentralized free-market mechanisms will allow for freer and more efficient movement of goods, services, capital, and labor.

Under the social program insurance model, individuals who are unable to pay the sum required for entry would not be admitted, even if high-skilled and talented. Limiting immigration to only sponsored migrants limits the labor talent pool. This fact supports the idea of a hybrid approach that incorporates the social insurance benefits and creates alternative paths for those who meet specified criteria but cannot afford the insurance premiums or cannot find a sponsor, be it an employer, a family member, or a civil society organization. These independent immigrants could be admitted via a separate immigration program that is not subject to mandatory social insurance and could function as a supplement to the sponsor-based regime envisioned by Trebilcock.<sup>77</sup> This parallel admissions process could employ a points system, like those observed in Canada and Australia, to ensure that the process is meritorious and to reduce the prevailing concern of admitting migrants who will become fiscal burdens upon the receiving country. Of course, such a parallel program would reconstitute the current bureaucracy and quota system, requiring both administration and limits. In that sense, such a two-tiered approach would allow for a transition to the more efficient regime of purely sponsorship and mandatory social insurance.

#### B. *Students — Retaining the Best and the Brightest*

A cornerstone of immigration reform, as far as it concerns high-skilled immigrants, has to address foreign students who come to the world-class university system in the United States. Bhagwati best addresses this issue, remarking:

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75. *See id.* at 29; Shachar & Hirschl, *supra* note 24, at 80.

76. Trebilcock, *supra* note 7, at 33.

77. *Id.*



intelligent and highly motivated foreign students who come to this country for scientific education and then stay on in large numbers assimilate readily, becoming indistinguishable from native-born Americans. The scientific eminence of the United States thus reflects a virtuous circle: the best and the brightest from around the world are attracted to our universities, and they in turn help make our universities world-class.<sup>78</sup>

The main visa open to foreign students who wish to stay in the U.S. following graduation (the investor class notwithstanding for its impractical wealth requirements with respect to students) is the limited H-1B visa, which is subject to an annual 65,000 cap and demands a lot from the student, such as an offer from a U.S. employer and a degree from a qualifying U.S. institution in a qualifying specialty field.<sup>79</sup> Examples of specialty occupations include computer systems analysts, computer programmers, professors, engineers, and physicians.<sup>80</sup> There are also an additional 20,000 H-1B visas excepted from the 65,000 cap for migrants with master's degrees from U.S. based public or non-profit institutions accredited by a nationally recognized agency.<sup>81</sup> Unfortunately for foreign students wishing to remain in the U.S., obtaining an H-1B visa is like winning the lottery, as the visa cap has been filled within the first couple of days that petitions are accepted almost every year.<sup>82</sup> Without expanding opportunities for students to remain in the U.S. upon graduating from an American college or university, the United States will lose valuable foreign minds who will either return to their home countries or emigrate to countries more welcoming to highly-educated migrants. Understanding the global race for talented and specialized human capital, it seems foolish to educate young people only to then make them leave, likely resulting in them working for a foreign competitor. Sound reform proposals with respect to students in the U.S. should extend permanent residence to foreign students. If that simple and effective policy is unpopular, a secondary option would be to increase the annual cap on H-1B visas and exempt all applicants with U.S. masters or graduate degrees from the new annual cap.<sup>83</sup>

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78. Trebilcock, *supra* note 7, at 35 n.77 (citing Jagdish Bhagwati, *A Stream of Windows: Unsettling Reflections on Trade, Immigration, and Democracy*, (Cambridge, MA: MIT Press, 1998) at 368).

79. Immigration and Nationality Act, 8 U.S.C. § 1184(g)(1)(A)(i).

80. Katherine L. Porter, *Retain the Brains: Using a Conditional Residence Requirement to Keep the Best and the Brightest Foreign Students in the United States*, 40 HOFSTRA L. REV. 593 (2011).

81. *H-1B Masters Quota 2020: Cap Eligibility, Lottery – The Complete Guide*, SGM LAW GROUP (Feb. 4, 2019), <https://www.immi-usa.com/h1b-masters-quota/>.

82. *Id.*

83. There are other international student retention programs that could likewise be expanded. One such example is the Optional Practical Training (OPT) program that allows a number of foreign students with an F-1 visa to work up to 12 months in relation to their major of study. See, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, OPTIONAL PRACTICAL TRAINING (OPT) FOR F-1 STUDENTS, <https://www.uscis.gov/opt> (last updated 05/06/2019).

#### IV. CONCLUSION

The case for reforming U.S. immigration policy to attract more high-skilled migrants rests upon the fact that this class of immigrants (1) has the greatest potential to contribute economically and (2) poses the lowest risk of burdening the welfare state. As far as those immigrants are concerned, immigration policy should be dramatically liberalized due to the potential economic benefit. The main issue is making the idea politically palatable to the American people, among whom widespread anti-immigration sentiments have been stirring.

The advocated approach of decentralization and privatization of immigration policy can appeal to both the Democrats and Republicans in this polarized political climate. The “Left” can be sold on the liberalization of immigration policy, the doing away of the rigid quota system, and the expansion of the paths to citizenship. The “Right” will appreciate removing much of the costly bureaucratic oversight and leaving to the market the decision regarding how many immigrants to admit on a yearly basis. This both increases opportunity for immigrants and benefits national welfare in creating a less-costly, economically beneficial system that protects native workers and spreads the benefits of increased high-skilled immigrants to the entire economy.

Concerns over the economic consequences of increased immigration, like wage depression and job displacement, affect those who are already most impacted by the disruptive forces of globalization. Low-skilled, uneducated workers are already in economic dire straits due to having to compete with foreign workers willing to work for a fraction of their wages. This implicates non-immigration issues like wealth-redistribution policies and the retraining of workers with obsolete skills, which are beyond the scope of this Note. However, along those lines, immigration must be understood as a tool that can be used to alleviate the economic consequences of globalization. Poorly tailored policy could just as well exacerbate those same issues.

Immigration does not take a single form. It is therefore necessary to tailor policies to be specifically targeted through the use of varied approaches and mechanisms. What works for addressing legal immigration does not work for illegal immigration. Different approaches are needed for sponsored, employment-based, and independent migrants. There is no one right answer, but as this Note has demonstrated, there are several policy innovations that would provide countries receiving immigrant flows with ways to maximize the economic benefits in an efficient, intelligent manner that mitigate the social disruptions and welfare costs.

The economics of immigration encourage a broader acceptance of the movement of people than the prevailing policies of the world today would suggest. Some countries have recognized this and have created selective immigration policies that harness the forces of global migration to their economic benefit by attracting migrants capable of being economic assets. However, it is equally important to understand that economics is just one part of the immigration calculus. This Note hopes that in clarifying the economics

of immigration, it clears the way ahead in order to address the other reasons for the pushback against immigration and globalization, which often go hand in hand. Concerns over cultural identity and xenophobia that are driving anti-immigration sentiment throughout developed countries should not be allowed to turn nations away from the substantial long-term domestic and global welfare gains available from less restrictive and more liberal immigration policies. Short-term protectionist instincts should not overwhelm the long-term economic need for increased immigration, particularly in the case of high-skilled and specialized human capital.

As political philosopher Michael Walzer said, “Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination.”<sup>84</sup> That is a position that elevates nation-state sovereignty. And if so, the continued evolution and growth of international human rights as a legal concept, which exposes sovereignty to not be as absolute as once thought given the idea of widely shared human values that take precedence over national jurisdiction boundaries, may implicate immigration and the right to migration for economic opportunity. The point of this Note is that once those complex, normative conundrums are upon us, at least we will be guided by the economic considerations of our immigration policy choices.

This Note has chosen to focus on legal high-skilled immigrants, as opposed to other immigrant demographics, because of their more visibly-beneficial impact on the U.S. economy<sup>85</sup> and their generally wider political acceptance compared to illegal, low-skilled immigrants.<sup>86</sup> It does not seem too contentious to assert that there are many of those who, despite being staunchly anti-illegal immigration, would still support the economic advantages afforded by the right type of legal immigration for which this Note advocates, meaning those with clear economic impact and minimal risk of financial burden. A coherent economic analysis of the current immigration law regime and policy choices made under the Trump administration as it concerns high-skilled immigration suggests the need for policy changes or improvements. The Note concludes that the Trump administration’s anti-immigration policies and rhetoric have likely negatively affected the U.S. economy, limiting growth and innovation while imposing additional burdens on entrepreneurs in the entrepreneurial ecosystem of the U.S., and questions whether there is a better way forward, harnessing the potential economic boost of targeted immigration.

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84. Trebilcock, *supra* note 7, at 25 (citing Michael Walzer, SPHERES OF JUSTICE (1983)).

85. See Ben Kessler, *Immigrants Innovate at Higher Rate than U.S. Citizens, Study Shows*, NBC NEWS (Feb. 20, 2019), <https://www.nbcnews.com/news/amp/ncna973391>; Giovanni Peri, *The Economic Benefits of Immigration*, BERKELEY REV. OF LATIN AM. STUD. (2013), <https://clas.berkeley.edu/research/immigration-economic-benefits-immigration>.

86. See, e.g., Steven Malanga, *How Unskilled Immigrants Hurt Our Economy: A handful of industries get low-cost labor, and the taxpayers foot the bill*, CITY J. (2006), <https://www.city-journal.org/html/how-unskilled-immigrants-hurt-our-economy-12946.html>.