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Recruiting "Super Talent": The New World of Selective Migration Regimes

AYELET SHACHAR* AND RAN HIRSCHL**

ABSTRACT

The desire to be great, to make a lasting mark, is as old as civilization itself. Today, it is no longer measured exclusively by the size of a polity's armed forces, the height of its pyramids, the luxury of its palaces, or even the wealth of its natural resources. Governments in high-income countries and emerging economies alike have come to subscribe to the view that in order to secure a position in the pantheon of excellence, it is the ability to draw human capital, to become an "IQ magnet," that counts. Across the globe, countries are vying to outbid one another in an effort to attract highly-skilled migrants, aggressively recruiting those at the top of the talent pyramid who possess what we might call super talent. This spiraling race for talent is one of the most significant developments in recalibrating international migration and mobility in today's globalizing world. Yet it has received only scant attention in academic circles despite its growing prominence in the real world of law and policy-making. In this article*, we begin to close the gap. Our discussion highlights the increasingly common practice of governments "picking winners" through fast-tracked, strategic grants of citizenship for those with exceptional skills and extraordinary talent, while at the same time holding other categories of "standard" immigration applicants (those entering on the basis of family reunification, humanitarian reasons, and so on) to ever stricter admission and permission-to-stay requirements. We chart and explain these developments before turning to identify the core ethical and legal challenges they raise. The discussion concludes by exploring whether,*

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and if so, how, these striking developments may transform the concepts of citizenship and migration in the twenty-first century.

INTRODUCTION

The desire to be great, to make a lasting mark, is as old as civilization itself. Today, it is no longer measured exclusively by the size of a nation's armed forces, the height of its pyramids, the luxury of its palaces, or even the wealth of its natural resources. Governments in high-income countries and emerging economies alike have come to subscribe to the view that something else is required in order to secure a position in the pantheon of excellence: it is the ability to draw human capital, to become an "IQ magnet," that counts.[1] In this article, we develop an account of the significance—both practical and conceptual—of the rise of talent-centered selective migration regimes, exploring their innovative streak as well as the weighty ethical and legal puzzles they raise.[2]

Just as they introduce restrictions on most other categories of entrants,[3] governments are proactively "picking winners" who are

1. This is a common thread in the defense of selective skills-based migration regimes. *See e.g.*, ORG. FOR ECON. COOPERATION AND DEV., THE GLOBAL COMPETITION FOR TALENT: MOBILITY OF THE HIGHLY SKILLED 9 (2008) [hereinafter GLOBAL COMPETITION] ("[M]obility of human resources in science and technology (HRST) has become a central aspect of globalisation.").

2. In a world of global inequality like our own, desired destination countries have far more applicants for admission than visas to allot annually, thus leading to a situation whereby all countries must define selection criteria for whom to admit, and on what basis. In the immigration literature, global migration flows and national admission streams are typically defined as falling into three main categories: family-based admission (allowing immediate family members of citizens and permanent residents to enter the destination country); employment-based/skills-selective streams (providing individuals with specialized human capital access to employment visas or permanent residence status on the basis of their potential to bring benefits to the receiving state); and humanitarian migration (guaranteeing a temporary or permanent safe haven to individuals who have fled their home country due to persecution and related violations of their basic human rights). Of these various migration streams our focus is on the highly skilled. For an overview of recent trends in international migration, see generally ORG. FOR ECON. CO-OPERATION AND DEV., INTERNATIONAL MIGRATION OUTLOOK: SOPEMI 2012.

3. *See generally* CATHERINE DAUVERGNE, MAKING PEOPLE ILLEGAL: WHAT GLOBALIZATION MEANS FOR MIGRATION AND LAW (2008) (discussing how "illegal" migration is constructed by the law and the restrictions imposed); Christian Joppke, *Comparative Citizenship: A Restrictive Turn in Europe?*, 2 LAW & ETHICS HUM. RTS. 6 (2008) ("This paper reviews the causes and features of restrictiveness in the heartland of previous liberalization, north-west Europe."); Valsamis Mitsilegas, *Immigration Control in an Era of Globalization: Deflecting Foreigners, Weakening Citizens, Strengthening the State*, 19 IND. J. GLOBAL LEGAL STUD. 3 (2012) (exploring how "the law of immigration control has been transformed in a globalized world"); Ayelet Shachar, *Citizenship*, *in* THE

fast-tracked to citizenship based on their skills, innovation, and potential contribution to the country's stature, economic growth, and international reputation.[4] From the wealthy and highly educated, to top scientists, elite athletes, world-class artists, and successful entrepreneurs and innovators, a citizenship-for-talent exchange—what we might call *Olympic citizenship*—is on the rise. Recent years have seen the proliferation of competitive and selective migration regimes that are tuned to facilitate the admission and retention of the "best and the brightest," a term of art regularly used by policymakers from London to Singapore, Ottawa to Brussels, to mention but a few examples. As the demand for highly-skilled migrants has intensified, a global race for talent has emerged. Across the world, countries are trying to outbid one another to attract migrants with extraordinary talent. They are promoting strategic citizenship grants, whereby membership is invested in exceptionally talented individuals with the expectation of a return. Legal strategies play a significant role in today's global race for talent by turning national goals onto actionable plans, and cogently manifesting the strategic interactions among the key contenders in today's fierce inter-jurisdictional competition for the best and brightest. These developments, which have received only scant attention in the literature despite their prevalence in the real world of law and policy, are the vanguard for larger changes relating to the ways in which countries are willing to redraw their membership boundaries in order to gain the presumed benefits associated with attracting an increasingly important subgroup of highly mobile professionals: those with super-talent, the crème de la crème of highly-skilled migrants.[5]

Just like the space race during the Cold War, Olympic citizenship—today's fast-paced arms race to recruit the world's most creative and brightest minds—represents the frontier of a new era: the upsurge of a more calculated approach to citizenship, whereby both sending and receiving countries place a premium on individuals with extraordinary ability and treat it as a basis for access to and eventual membership in the body politic. These emergent patterns represent a significant shift in the understanding of citizenship—turning an institution steeped in notions of equality, identity, and perhaps even

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OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1002 (Michel Rosenfeld & András Sajó eds., 2012) (examining citizenship in a world of increasing mobility and diversity).

4. Ayelet Shachar, *Picking Winners: Olympic Citizenship and the Global Race for Talent*, 120 YALE L.J. 2088 (2011).

5. The top of the talent pyramid is by definition small in absolute numbers, but the potential contribution of super-talent highly-skilled migrants to the recruiting nation is perceived as disproportionately high, either in terms of actual economic and scientific innovation, or in symbolic and reputation-enhancing value. *See infra* Part IV.

sacrifice, into a recruitment tool used to bolster a nation's standing relative to its competitors. Countries entangled in the global race for talent are seeking to boost their relative advantage, positioning themselves as centers of excellence and gateways of innovation in a rapidly changing world. The significance of this new reality—the opportunities it creates and the risks it poses—remains largely unnoticed and under-theorized in the literature.[6]

In this article we begin to close this gap. The discussion is divided into four parts. Part I provides an abbreviated history of the global race for talent, tracking the rise of targeted and selective migration streams as sophisticated tools adopted by policymakers as part of a long-term economic strategy for human-capital accretion that is seen as increasingly important for countries competing in a more globalized environment. Here we will ascertain the significance of inter-jurisdictional "borrowing" in the form of policy emulation and explore the various new legal modalities adopted by governments locked in a competitive scramble to lure and attract those with "extraordinary talent" (which is the technical term used by American immigration law), or what we will refer to more generically as "*super talent*."[7] Part II traces the actual practices of "picking winners"—identifying how countries target and lure individuals who belong to this elite group of value-added migrants—through a comparative study of specialized skills-based migration relating to two high-demand categories of recipients: acclaimed scientists and elite athletes. In contrast with the traditional reliance on birthright citizenship or increasingly culturally-loaded naturalization requirements and citizenship tests, both sports and science crisply encapsulate the use of merit as the basis for membership.[8] Part III turns from a positive to a normative

6. Despite the dearth of analysis in the academic literature, law and policymakers are well aware of the proliferation of skilled migration and the intensification of the global race for talent. As a recent study concludes, "more and more countries are redesigning their immigration systems to make them more skills-selective." *See* Herbert Brücker et al., *Understanding Highly Skilled Migration in Developed Countries: The Upcoming Battle for Brains*, *in* BRAIN DRAIN AND BRAIN GAIN: THE GLOBAL COMPETITION TO ATTRACT HIGH-SKILLED MIGRANTS, 17 (Tito Boeri et al, eds., 2012).

7. We use the term "super talent" to refer to those at the top of the talent pyramid, taking our cues from the legal criteria for assessing such talent as developed by recruiting destination countries and repatriating countries of origin. These include: the applicant's proven track record, international reputation, specialized skills and acumen, and so on. *See infra* Part II.

8. For a discussion of the various policy choices and legal procedures that countries have adopted in order to assess such merit and extraordinary talent, *see infra* Part II. A comprehensive analysis of culturally-loaded citizenship tests is offered by Liav Orgad, *Illiberal Liberalism: Cultural Restrictions on Migration and Access to Citizenship in Europe*, 58 AM. J. COMP. L. 53 (2010).

assessment, identifying the core theoretical insights to be drawn from the rise of these competitive immigration regimes, including the statist motives they reflect.[9] Here, we also articulate the main ethical dilemmas associated with the rise of the global race for talent. In Part IV we will identify and assess the new challenges posed by the global race for talent and its unique mixture of allegiance and commodification, conflation of state and market influences, and innovation and selective mobility for those charting the terrain of the new knowledge economy. We conclude the discussion by speculating as to whether, and if so, how, these striking developments will transform the concepts of membership and access to citizenship in the twenty-first century.

I. A THUMBNAIL HISTORY OF THE GLOBAL RACE FOR TALENT

People with specialized and high-demand expertise have always enjoyed greater mobility across borders.[10] From the Hellenic world to China's Golden Age under the Tang dynasty to Renaissance Florence, highly skilled migrants—be they brilliant artists, well-connected merchants, or visionary architects—have always been eagerly sought. Europe's feudal moguls, city rulers, and royal courts attracted skilled craftsmen and virtuous musicians from near and far in exchange for patronage-based protection.[11] Likewise, in nineteenth century America, skilled artisans and craft workers were seen as invaluable additions to

9. A recent Department of Homeland Security press release succinctly captures this last point: "the [American] President supports legislative measures that would attract and retain immigrants who create jobs and boost competitiveness here in the U.S. . . . [T]hese actions would help attract new businesses and new investment to the U.S. and ensure that the U.S. has the most skilled workforce in the world." *See* Press Release, U.S. Dept. of Homeland Sec., DHS Reforms to Attract and Retain Highly Skilled Immigrants (Jan. 31, 2013), *available at* http://www.dhs.gov/news/2012/31/dhs-reforms-attract-and-retain-highly-skilled-immigrants.

10. *See* Terri Kim, *Shifting Patterns of Transnational Academic Mobility: A Comparative and Historical Approach* 45 COMP. EDUC. 387, 388 (2009) (examining medieval Europe); JOHN AGNEW, GEOPOLITICS: RE-VISIONING WORLD POLITICS (2d ed. 2003) (examining world politics and country boundaries from the rise of modern European powers).

11. The literature on the history of patronage of the arts and the sciences is too vast to cite. Notable examples include: MARY HOLLINGSWORTH, PATRONAGE IN RENAISSANCE ITALY: FROM 1400 TO THE EARLY SIXTEENTH CENTURY (1994); PATRONAGE IN ANCIENT SOCIETY (Andrew Wallace-Hadrill ed., 1989); PATRONAGE AND INSTITUTIONS: SCIENCE, TECHNOLOGY, AND MEDICINE AT THE EUROPEAN COURT, 1500-1750 (Bruce T. Moran ed., 1991); Meyer Schapiro, *On the Relation of Patron and Artist: Comments on a Proposed Model for the Scientist*, 70 AM. J. SOC. 363 (1964).

the body politic.[12] As historian John Ferrie observes, the specific set of desired skills and occupations defining the highly skilled has changed "according to the time period, location, and nature of the technologies in use."[13] Today's focus has shifted to targeting and recruiting the sharpest minds, the greatest innovators, and other top performers in the arts, science, and sports.

It is common knowledge that top scientists who fled Europe stood at the heart of the United States-led Manhattan Project. Less well known is that between 1901 and 2010, the most coveted honor in scientific research, the Nobel Prize, was awarded to over 300 researchers in the United States—almost a third of whom were foreign-born.[14] A similar pattern exists in the United Kingdom, with thirty-two of eighty-four total Nobel Prizes awarded to internationally-recruited academics who were working in UK universities and research institutes when that magical call came from Stockholm.[15]

As the definition of talent and valued skills has changed, so too has the scale and intensity of the competition, which now includes more countries and more regions, all the while soaring to new heights and ever increasing stakes. As the International Migration Outlook summarily discerned: the "competition for talent [now] goes well beyond the OECD [Organization for Economic Cooperation and Development] area."[16] Highly-skilled migrants now have more destination countries from which to choose—each country offering its own set of targeted benefits.[17] The race for talent has further intensified with the introduction of "repatriation" incentives designed to entice emigrant

12. Joseph P. Ferrie, *A Historical Perspective on High-Skilled Immigrants to the United States, 1820-1920*, *in* HIGH-SKILLED IMMIGRATION IN A GLOBAL LABOR MARKET 15, 16 (Barry R. Chiswick ed., 2010).

13. Barry R. Chiswick, *Introduction and Overview of the Chapters*, *in* HIGH-SKILLED IMMIGRATION IN A GLOBAL LABOR MARKET 1, 1 (Barry R. Chiswick ed., 2010).

14. *See Facts and Lists,* NOBELPRIZE.ORG, http://www.nobelprize.org/nobel_prizes/lists/ (last visited Jan. 3, 2013) (follow "Create a List" hyperlink; then select "USA" in "Affiliation" dropdown box and then click "Submit" to return 323 results).

15. *Id.* (changing the "Affiliation" to "United Kingdom").

16. John P. Martin, *Editorial* to ORG. FOR ECON. CO-OPERATION AND DEV., INTERNATIONAL MIGRATION OUTLOOK: SOPEMI 2011, 30 (2011) [hereinafter MIGRATION OUTLOOK 2011].

17. In addition to the various immigration and settlement policy measures undertaken recently by admitting countries to facilitate the international recruitment of the highly skilled, countries offer fiscal incentives to attract foreign talent. For example, several "recruiting" jurisdictions have introduced special tax exemptions for highly-skilled immigrants. *See* ORG. FOR ECON. CO-OPERATION AND DEV., TRENDS IN INTERNATIONAL MIGRATION 133-134 (2004).

professionals abroad, especially leading scientists, to return to their countries of origin.[18]

The ability to recruit and mobilize the most creative and brightest minds has become the new mantra of economic growth, innovation, and competitiveness.[19] The details vary; yet even countries that have experienced a backlash against immigrants and multiculturalism tend to open their doors to those who possess extraordinary talent and a proven track record of success in their fields of expertise.[20] A significant amount of attention has been paid to the "restrictive turn" in citizenship and migration, which has placed already vulnerable, low-skilled, undocumented, and temporary migrants at ever more precarious positions, and has stiffened access to membership to those deemed culturally or religiously "too different."[21] What has gone almost

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18. India and China are also fostering return migration of their highly-skilled emigrants and encouraging the participation of "immigration entrepreneur networks" in building the national high-tech sectors. These changes may in turn have a significant impact on immigration countries, like the United States. *See, e.g.*, Migration Policy Inst., *Highly Skilled Migrants Seek New Destinations as Global Growth Shifts to Emerging Economies*, MIGRATION INFO. SOURCE (Dec. 2011), http://www.migrationinformation.org/Feature/display.cfm?id=865; NAT'L SCI. BD., SCIENCE AND ENGINEERING INDICATORS O-3 (vol. 1, 2004), *available at* http://www.nsf.gov/statistics/seind04/pdf/overview.pdf; Vivek Wadhwa, *A Reverse Brain Drain*, ISSUES IN SCI. AND TECH., Spring 2009, at 45, 46, *available at* http://www.issues.org/25.3/wadhwa.html.

19. *See* GLOBAL COMPETITION, *supra* note 1, at 10. There is no universally accepted definition for "highly skilled" in the academic literature or among policymakers operating at the national or supranational level. *See* INT'L ORG. FOR MIGRATION, WORLD MIGRATION 2008: MANAGING LABOUR MOBILITY IN THE EVOLVING GLOBAL ECONOMY, 52-53 (2008). However, almost all talent-recruiting countries rely on a combination of educational credentials, international reputation, and occupational or professional experience in selecting or admitting the highly skilled. Numerous studies now emphasize the role of talent in the new economy. They range from technical economic analysis to more spatial and sociological accounts of the clustering of talent and the rise of the "creative class." On the latter, see, e.g., RICHARD FLORIDA, THE RISE OF THE CREATIVE CLASS: AND HOW IT'S TRANSFORMING WORK, LEISURE, COMMUNITY AND EVERYDAY LIFE (2002).

20. Shachar, *supra* note 3, at 1012-16 (examining entrance requirements to multiple countries for the those who are not highly skilled as compared to immigrants who are highly skilled).

21. *See, e.g.*, Bridget Anderson, *Migration, Immigration Controls and the Fashioning of Precarious Workers*, 24 WORK, EMP. & SOC'Y 300, 314 (2010) ("Immigration restriction and enforcement are not only insufficient to reduce migrant precarity, but actively produce and reinforce it."); DAUVERGNE, *supra* note 3 (discussing the effects globalization has had on migration law and what it means to be "illegal"); Don Flynn, *New Borders, New Management: The Dilemmas of Modern Immigration Policies*, 28 ETHNIC & RACIAL STUD. 463 (2005) (discussing UK immigration law and policies since the beginning of the New Labour government in 1997); Christian Joppke, *The Inevitable Lightening of Citizenship*, 51 ARCHIVES EUROPENNES DE SOCIOLOGIES 9 (2010) (identifying a tension between the rise of neoliberalism and culturally-loaded citizenship tests); Mitsilegas, *supra* note 3 (discussing the transformation of immigration control due to globalization, and the

unnoticed, however, is that governments are simultaneously engaging in a whole new enterprise of turning selective and skills-based migration streams at the top end of the international migration ladder into sophisticated tools for human capital accretion and engines for growth and innovation.[22]

These developments reveal the surprising resilience of states as actors in the field of international migration, and their ability to expand and contract certain migration streams—traits that undermine vogue proclamations by postnationalists and others that states have lost control over borders and membership boundaries.[23] The proactive measures adopted by countries seeking to lure international talent reveal a competitive desire by governments to come out on top compared with relevant counterparts, whether regionally or globally, in the drive to secure extraordinary talent. Indeed, the increasingly vigorous scramble to lure the best and the brightest displays not a "cartelization" of international migration flows but rather the rise of a high-stakes

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development of measures aimed at strengthening border controls); Orgad, *supra* note 8 (arguing that a "moral panic" helps explain the rise of culturally-loaded citizenship tests in the post-9/11 era); Shachar, *supra* note 3, at 1012-15 (discussing current trends in entrance exams and procedures); Ronen Shamir, *Without Borders? Notes on Globalization as a Mobility Regime*, 23 SOC. THEORY 197 (2005) (discussing the mobility restrictions and containment created due to "suspicion").

22. *See* Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 N.Y.U. L. REV. 148, 158 (2006) [hereinafter Shachar, *The Race for Talent*]; ANDRÈS SOLIMANO, INTERNATIONAL MIGRATION IN THE AGE OF CRISIS AND GLOBALIZATION: HISTORICAL AND RECENT EXPERIENCES 14 (2010). This bifurcation is also partly facilitated through bilateral and multilateral agreements that offer different regulation regimes for low-skilled and high-skilled migration. For a concise overview, see Panel: *Labor and Migration in International Law: Challenges of Protection, Specialization and Bilateralism*, 105 AM. SOC'Y INT'L L. PROC. 407 (2011). To provide but one illustration, consider the message broadcasted to potential highly-skilled recruits by Canada's immigration minister at a recent international appearance: "The Government of Canada is committed to building an immigration system that *actively* recruits talent rather than passively processing all applications that we receive." *Canadian Immigration Minister Visits Ireland to Recruit Workers*, DAILY COM. NEWS, Oct. 5, 2012, http://www.dcnonl.com/article/id52207/--canadian-immigration-minister-visits-ireland-to-recruit-workers [hereinafter *Canadian Immigration Minister*] (emphasis added) (quoting Jason Kennedy, Canada's Citizenship, Immigration and Multiculturalism Minister).

23. For some of the most influential contributions to the postnationalism literature, see, e.g., DAVID JACOBSON, RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP (1997) (discussing the devaluation of citizenship); YASEMIN NUHOĞLU SOYSAL, LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE 3 (1995) ("national citizenship is losing ground to a more universal model of membership, anchored in deterritorialized notions of persons' rights"). The predictions of postnationalists have thus far proven exaggerated and received extensive criticism in recent years. *See e.g.,* Randall Hansen, *The Poverty of Postnationalism: Citizenship, Immigration, and the New Europe*, 38 THEORY AND SOC'Y 1 (2009).

competitive, multiplayer and multilevel game *among* jurisdictions.[24] As such, the global race for talent is rippled with domestic and international inputs, a mixture of employer- and government-led initiatives, and considerable interdependence to the extent that the behavior of states is influenced by the actions of others. It thus displays the ferment and fervor of an experimental lab writ large, where talent-recruiting nations seek to respond to (and preferably preempt) the offers other countries make to attract this scarce and coveted resource.[25]

The exponential growth of the race for talent means that it is no longer necessarily tied to, or motivated by, cyclical domestic skills shortages. Rather, it is about "building . . . [a] future through the well-managed entry and settlement of people."[26] Once the race for talent has begun, the pressure to engage in targeted recruitment increases, as no country wants to be left behind. Indeed, countries are willing to go so far as to reconfigure the boundaries of political membership, proactively using their exclusive control over the grant of citizenship to gain the net positive effects associated with the recruitment of super talent.

Leading countries are increasingly learning from and emulating one another in the international competition for skilled immigrants. Immigration policymakers tend to engage in transnational "borrowing"—or simply "importing"—of the innovations of their counterparts.[27] These emulation patterns result from *non*cooperation among fiercely competitive jurisdictions, rather than from a coordinated global effort to harmonize immigration policies or delegate such policy-making to international expert bodies.[28]

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24. We owe the term "cartelization" here to Michael Trebilcock. On multilevel games, see Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 434 (1988).

25. *See* DEVESH KAPUR & JOHN MCHALE, GIVE US YOUR BEST AND BRIGHTEST: THE GLOBAL HUNT FOR TALENT AND ITS IMPACT ON THE DEVELOPING WORLD 39 (2005) (discussing the decision on what a country must consider before making an offer); Shachar, *The Race for Talent*, *supra* note 22, at 153.

26. *Annual Report 2009-10: Portfolio and Departmental Overview*, AUSTL. GOV'T: DEP'T OF IMMIGR. AND CITIZENSHIP, http://www.immi.gov.au/about/reports/annual/2009-10/html/overview/portfolio-and-departmental-overview.htm (last visited Nov. 24, 2012).

27. The concept of "borrowing" between legal systems has received significant attention in recent years in the field of comparative constitutional law. It covers a variety of legal mechanisms of inter-jurisdictional learning, ranging from subtle conceptual influences to direct citations of major court decisions from foreign jurisdictions. On the methodological complexities associated with comparative constitutionalism, see Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125 (2005).

28. On competitive (noncooperative) immigration regimes, see Shachar, *The Race for Talent, supra* note 22. International migration is part of today's globalization process to

If we wish to trace the origins of today's spiraling race for talent, with its focus on skills-based admission categories, we can identify America's 1965 amendments to the Immigration and Nationality Act (INA) of 1952 as the formative event.[29] These landmark amendments opened up a number of skills-based admission categories, in addition to various family-based preferences. In signing the 1965 amendments, Lyndon Johnson famously stated, "from this day forth, those wishing to emigrate into America shall be admitted on the basis of their skills."[30] This designated skills-based admission route, along with a traditionally lax approach that permitted adjustment from temporary to permanent ("green card") status with relative ease, has for years served as a tremendously successful formula for attracting the best international "knowledge migrants."[31] But at the beginning of the twenty-first century, the United States is no longer the sole, or even the most sophisticated, national player engaged in this global race for talent.[32]

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which cross-border flows are integral. Despite recent initiatives, there is still a dearth of international cooperation on migration. For an overview, see José Antonio Alonso, *International Migration and Development: A Review in Light of the Crisis* (United Nations CDP Background Paper No. 11(E), ST/ESA/2011/CDP/11(E) (2011), *available at* http://www.un.org/en/development/desa/policy/cdp/cdp_background_papers/bp2011_11e.pdf.

29. Our goal in this section is not to provide an exhaustive comparative or per country account, but rather to sketch an overview of the most salient features and trajectories of skills-based migration policies. Each country has its own specific mixture of government-, immigration-, and employer-driven selection processes. We also witness significant variations in the balance between skills-based permanent residence streams and skills-based temporary admission visas. Another variance refers to admission for the highly skilled in top management and professional occupations, academic and research institutions as well as knowledge-based industries. Recent years have also seen a growing competition for international students, who, upon completion of their graduate studies, are offered an opportunity to adjust their status and ease the transition to the admitting country's labor market.

30. The statement also mentioned the other major route for migration to the United States: family-based preferences. Or, in President Johnson's words, individuals would be admitted on the basis of "their close relationship to those already here." THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 55 (7th ed. 2011).

31. We use the terms "knowledge migrants" and "highly-skilled migrants" interchangeably throughout this piece.

32. Numerous reports and articles demonstrate the inefficiencies of the current U.S. "alphabet soup" of immigrant and nonimmigrant visas under the definition of "immigrant" in Immigration and Nationality Act of 1952, 8 U.S.C. § 1101(a)(15) (2000 & Supp. I 2001-2002). For a comprehensive overview, see DEMETRIOS G. PAPADEMETRIOU & STEPHEN YALE-LOEHR, BALANCING INTERESTS: RETHINKING U.S. SELECTION OF SKILLED IMMIGRANTS (1996). *See also* 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, 207 (2010) (criticizing current American immigration law and policy for not introducing a "point-based" system for selecting skilled-stream migrants, and comparing United States with Canada and Australia); HIGH-SKILLED IMMIGRATION IN A GLOBAL

Other countries have joined the game. Across the seven seas, from Australia to China, from Canada to Denmark to Singapore, nations are already taking bold steps to ease the admission process at various levels of the talent pyramid. From freshly minted international students all the way up to industry leaders, these countries are working to leverage individuals' energy, dreams, and innovations in order to maintain or gain a relative advantage in the competitive knowledge-based global economy.[33]

The next major step in the genesis of the current race for talent occurred in 1967, when Canada introduced its pioneering "point system," a novel and influential set of admission criteria for the highly skilled.[34] The point system grants admission to "a person who by reason

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LABOR MARKET (Barry R. Chiswick ed., 2010); Charles B. Keely, *Nonimmigrant Visa Policy of the United States*, *in* FOREIGN TEMPORARY WORKERS IN AMERICA: POLICIES THAT BENEFIT THE U.S. ECONOMY 95 (B. Lindsay Lowell ed., 1999); Stephen Yale-Loehr & Christoph Hoashi-Erhardt, *A Comparative Look at Immigration and Human Capital Assessment*, 16 GEO. IMMIGR. L.J. 99, 99 (2001) ("[T]he United States should enact a points-based system for selecting economic-stream migrants."). As Senator Charles E. Schumer (D-New York) succinctly put the point: "There is too broad a consensus in favor of this policy to settle for gridlock." Julia Preston, *Bill to Keep Graduates in the U.S. Fails in the House*, N. Y. TIMES, Sept. 20, 2012, *available at* http://www.nytimes.com/2012/09/21/us/bill-to-keep-graduates-in-us-fails-in-the-house.html. This proposal was later included in the President's 2013 key principles for immigration reform: "'Staple' green cards to advanced STEM diplomas. The proposal encourages foreign graduate students educated in the United States to stay here and contribute to our economy by 'stapling' a green card to the diplomas of science, technology, engineering and mathematics (STEM) PhD and Master's Degree graduates from qualified U.S. universities who have found employment in the United States. It also requires employers to pay a fee that will support education and training to grow the next generation of American workers in STEM careers." White House, Office of the Press Secretary, *Fact Sheet, Fixing our Broken Immigration System so Everyone Plays by the Rules*, January 29, 2013, *available at* http://www.whitehouse.gov/the-press-office/2013/01/29/fact-sheet-fixing-our-broken-immigration-system-so-everyone-plays-rules. For an overview of recent congressional efforts on this subject and a transcript of Senators Schumer, McCain, Durbin, Graham, Menendez, Rubio, Bennet, and Flake's proposal, *Bipartisan Framework for Immigration Reform*, see Julia Preston, *Senators Offer a Bipartisan Blueprint for Immigration*, N.Y. TIMES, Jan. 28, 2013, *available at* http://www.nytimes.com/2013/01/28/us/politics/senators-agree-on-blueprint-for-immigration.html.

33. For a detailed analysis of the "talent pyramid" in selective and competitive skills-based migration, see Ayelet Shachar, *The Global Race for Talent: Core Conceptual and Ethical* Puzzles, *in* MIGRATION IN POLITICAL THEORY: THE ETHICS OF MOVEMENT AND MEMBERSHIP (Sarah Fine & Lea Ypi, eds.) (forthcoming). In the maze of skilled-migration policies adopted, attention must also be paid to outlier cases, such as the United Kingdom, which has witnessed dramatic policy swings on immigration matters over the last decade. *See infra* Part II.b.

34. *See* Jennifer Elrick, FOCUS MIGRATION, COUNTRY PROFILE: CANADA, 1 (2007), *available at* http://focus-migration.hwwi.de/typo3_upload/groups/3/focus_Migration_Publikationen/Laenderprofile/

of his [or her] education, training, skills or other special qualifications is likely to become successfully established in Canada."[35] The point system was explicitly designed by the Canadian government as a "selective immigration policy . . . [that] must be planned as a steady policy of recruitment based on long-term considerations of economic growth."[36] Those selected through the point system are invited to settle in Canada permanently.[37] Over the past fifteen years, the federal skills-based migration stream, with the point system at its apex, has accounted for more than 50 percent of Canada's permanent resident intake, reaching a colossal 69.3 percent in 2010.[38] The Minister of Citizenship, Immigration and Multiculturalism recently reaffirmed Canada's ongoing commitment to the permanent skills based migration program, which "remains the principal avenue for *permanent* immigration to Canada."[39]

In a classic example of inter-jurisdictional policy emulation, Australia introduced a new selection system for skilled migrants in 1973.[40] This new system "was similar to that adopted by Canada in

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CP_08_Canada.pdf ("In Europe and elsewhere, Canada's immigration policy–or at least its so-called 'points system'–is often regarded as a model to be emulated.").

35. NINETTE KELLEY & MICHAEL TREBILCOCK, THE MAKING OF THE MOSAIC: A HISTORY OF CANADIAN IMMIGRATION POLICY 358 (1998) (quoting 1962 P.C. 86, §.31(a) (Can.). The point system was introduced as part of the new and influential immigration regulations adopted in 1967. *Id*. at 358-361.

36. JEAN MARCHAND, WHITE PAPER ON IMMIGRATION 12 (1966).

37. Immigration and Refugee Protection Act, §12(2), S.C. 2001, c. 27, *available at* http://laws-lois.justice.gc.ca/eng/acts/I-2.5/FullText.html.

38. CITIZENSHIP AND IMMIGRATION CAN., CANADA FACTS AND FIGURES: IMMIGRATION OVERVIEW OF PERMANENT AND TEMPORARY RESIDENTS 9 (2010), *available at* http://www.cic.gc.ca/english/pdf/research-stats/facts2011.pdf.

39. News Release, Citizenship and Immigration Can., More Federal Skilled Workers for Canada in 2012 (Nov. 3, 2011) (emphasis added), *available at* http://www.cic.gc.ca/english/department/media/releases/2011/2011-11-03.asp. Recent years have also seen a spike in the number of temporary admissions to Canada, more than half of them fitting into the category of highly-skilled temporary entrants, such as IT specialists, who are later eligible to adjust their status to permanent residency based on the Canadian experience they have acquired. This is contrasted with the highly restrictive programs governing the admission of low-skilled migrants, especially those who arrive under the SWAP program.

40. *See* MICHAEL KLAPDOR ET AL., PARLIAMENT OF AUSTL.: DEP'T OF PARLIAMENTARY SERVS., AUSTRALIAN CITIZENSHIP: A CHRONOLOGY OF MAJOR DEVELOPMENTS IN POLICY 9 (2009). The 1973 changes were part of a larger process of removing racial and national-origin discrimination against non-Europeans. Such discrimination persisted until the late 1960s and early 1970s in Australia's immigration and citizenship policy, which received the notorious "White Australia" title. *Id.* at 4-11; s*ee generally* CHARLES A. PRICE, THE GREAT WHITE WALLS ARE BUILT: RESTRICTIVE IMMIGRATION TO NORTH AMERICA AND AUSTRALASIA, 1836–1888 (1974) (examining the origins of Australia's racially restrictive immigration policies).

1967" and was "[d]esigned to make selection more objective and less open to the discretion of officials."[41] The principles of this selection system were later expanded into a full-blown point system, called the Numerical Multifactor Assessment System (NUMAS), which was formalized into law in 1979. Australian immigration officials often describe the point system as a "transparent and objective method of selecting skilled migrants with the skills and attributes" that are valued by the admitting society.[42] These permanent skills-based programs accounted for over two thirds (67.4 percent) of Australia's permanent migration intake in 2010-2011.[43] New Zealand then followed suit, adopting its own variant of the point system to attract the highly skilled. The technique of engendering targeted and selective skills-based admission and settlement routes has since been "exported" to the four corners of the world. New competitors, including some that until very recently did not define themselves as immigration nations (Germany is a prime example), have become more agile and more focused on recruiting global talent.[44]

In 2000, European leaders reached agreement on the Lisbon Agenda, committing European Union nations "to the goal of becoming 'the world's most competitive and dynamic knowledge-based economy,'" particularly in "the competition for people."[45] Since 2000, the share of

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

42. *What is the Points Test?*, AUSTL. GOV'T: DEP'T OF IMMIGR. AND CITIZENSHIP, http://www.immi.gov.au/skilled/general-skilled-migration/points-test.htm (last visited Nov. 13, 2012).

43. AUSTL. GOV'T DEP'T OF IMMIGR. AND CITIZENSHIP, 2010-11 MIGRATION PROGRAM REPORT 3 (2011) [hereinafter MIGRATION PROGRAM REPORT], *available at* http://www.immi.gov.au/media/statistics/pdf/report-on-migration-program-2010-11.pdf.

44. *See generally* INDEP. COMM'N ON MIGRATION TO GERMANY, STRUCTURING IMMIGRATION, FOSTERING INTEGRATION 63-64 (2001) (Ger.), *available at* http://www.bmi.bund.de/SharedDocs/Downloads/EN/Broschueren/Structuring_Immigation_-_Fostering_Id_14625_en.pdf?__blob=publicationFile (discussing the immigration policy changes necessary in Germany, and a "Green Card" system by which Germany recruits skilled migrants).

45. RICHARD FLORIDA & IRENE TINAGLI, EUROPE IN THE CREATIVE AGE 8, 12 (2004) (quoting the "Lisbon agenda"). *See also* Council Directive 2009/50, arts. 17-29, 2009 O.J. (L 155) (EU). "The object of this directive is to improve the European Union's (EU) ability to attract highly qualified workers from third countries. The aim is not only to enhance competitiveness within the context of the Lisbon strategy, but also to limit brain drain." *Entry and Residence of Highly Qualified Workers (EU Blue Card)*, EUROPA, http://europa.eu/legislation_summaries/internal_market/living_and_working_in_the_internal_market/l14573_en.htm# (last updated Aug. 18, 2009). For highly qualified third-country nationals, the Blue Card offers greater mobility within the EU and the ultimate promise of acquiring secure membership status in the EU's free-movement zone, after five years of continuous

researchers in the EU-27 countries has grown at double the pace as it has in both the United States and Japan, although the EU still lags behind these competitors in absolute numbers.[46] The focus has been on making the transition to EU countries smoother for skilled professionals and on easing the rules affecting the recruitment of international students, especially those excelling in the fields of science and engineering—the very same talent pool that is already the target of fierce competition.[47]

Within the first decade of the twenty-first century, some of the more dynamic Asian economies, such as Singapore, Taiwan, and South Korea, began to recruit globally. Once emigration countries, they are now trying to lure back their most eminent national scientists by extending them generous resettlement offers. China and India, the major sending countries of highly-skilled migrants, are also weighing in. India has seen the skyrocketing growth of new technology hubs such as Bangalore, often referred to as the Silicon Valley of India.[48] The economic impact of India's technology-inclined services is huge, making it attractive for bright young engineers and entrepreneurs to stay at home rather than seeking better fortunes abroad, while at same time enticing the country's extensive scientific diasporas in North America and Europe to return. China, for its part, has adopted a multipronged strategy, a key feature of which is tremendous governmental investment in basic sciences and their commercial applications. It is now the world's second largest producer of scientific knowledge, measured by indicia such as number of articles published in peer-reviewed scientific journals, trailing only the United States.[49] As part of its One-Thousand-Talent program, China is also aggressively using financial, taxation, and membership perks to attract high-caliber international scholars and returning Chinese citizens to lead key

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legal residence, although the implementation of the Blue Card still faces various hurdles by the member states.

46. DEMETRIOUS G. PAPADEMETRIOU ET AL., MIGRATION POLICY INST., TALENT IN THE 21ST-CENTURY ECONOMY 7 (2008).

47. *See* Cate Gribble, *Policy Options for Managing International Student Migration: The Sending Country's Perspective*, 30 J. HIGHER EDUC. POL'Y & MGMT. 25 (2008) (discussing the impact of international student migration on sending countries, and the various policies employed by these countries to regulate student migration).

48. *See, e.g.,* Ajay Agrawal, et al., *Brain Drain or Brain Bank? The Impact of Skilled Emigration on Poor-Country Innovation*, 69 J. URBAN ECON. 43 (2011); DEVESH KAPUR, DIASPORA, DEVELOPMENT, AND DEMOCRACY: THE DOMESTIC IMPACT OF INTERNATIONAL MIGRATION FROM INDIA 95 (2010).

49. *Science and Engineering Indicators 2012*, NATIONAL SCIENCE FOUNDATION, Ch. 5, Tbl. 5-17, *available at* http://www.nsf.gov/statistics/seind12/c5/c5s4.htm (S&E articles in all fields, by country/economy: 1999 to 2009).

laboratories, projects and disciplines in China.[50] Perfecting the technique of targeted admission routes, China is also adopting a more flexible approach that allows mid-career scholars to spend part of the year in China, and the rest in the West. In this way, the country is gaining significant knowledge transfers without insisting on permanent settlement as a precondition for repatriation benefits.[51] These changes in policy and in attitude, along with stronger growth prospects in emerging markets, have created a pattern of "return migration" by successful emigrants who have settled in richer countries abroad.[52]

The economic crisis has generally seen a slowdown in labor migration.[53] Unexpectedly, however, it has also furthered, rather than hindered, the attractiveness of skills-based categories. Policymakers increasingly draw a connection between highly-skilled migration, job creation, capital investment, and boosting competitiveness.[54] Politically, the admission and settlement of the highly skilled is accepted more readily by the public in comparison to other immigration streams and policies.[55]

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50. The One-Thousand-Talent program was introduced by the Chinese government in 2008 in order to encourage the international recruitment of 2,000 scientists, experts, and scholars who were educated outside China, encouraging them to take "leadership positions in universities, research institutions and business enterprises." *See* Zhang Yue, *Thousand Talent Program Brings More Pros*, CHINA DAILY, April 28, 2012, *available at* http://www.chinadaily.com.cn/bizchina/2012-04/28/content_15168335.htm. For the program's details, see RECRUITMENT PROGRAM OF GLOBAL EXPERTS, http://www.1000plan.org/ (last visited March 8, 2013).

51. *See* David Zweig et al, *Redefining the Brain Drain: China's "Diaspora Option*," 13 SCI., TECH., & SOC'Y 1 (2008).

52. *See e.g.*, David Zweig, *Competing for Talent: China's Strategies to Reverse the Brain Drain*, 145 INT'L LABOUR REV. 65 (2006). *See also* Wadhwa, *supra* note 18, at 48.

53. MIGRATION OUTLOOK 2011, *supra* note 16, at 40.

54. Tito Boeri, *Introduction in* BRAIN DRAIN AND BRAIN GAIN, *supra* note 6, at 1. The precise impact of exceptionally-skilled immigration is hard to quantify; policymakers increasingly like to draw a connection between highly-skilled migration, job creation, capital investment, and boosting competitiveness. Although the current economic crisis has led several countries to introduce restrictions on highly-skilled migration, these restrictions usually take the form of tightening admission criteria rather than changes in the policies themselves. Other countries, such as Canada, have taken a more bullish approach, arguing that given the long-term trajectory of expected demographic changes and the centrality of talent for the new economy, "[t]his is the time to attract the best skills instead of reducing the intake of immigrants." Lucie Cerna, Int'l Migration Papers No. 99, *Policies and Practices of Highly Skilled Migration in Times of the Economic Crisis*, v (2010) (citing Anup Mittal, *Canada Encourages Immigration even in Current Financial Crisis*, CANADA UPDATES (Nov. 28, 2008, 7:14 PM), http://www.canadaupdates.com/blogs/canada_encourages_immigration_even_in_current_financial_crisis-9241.html).

55. See Jens Hainmueller & Michael J. Hiscox, *Attitudes Toward Highly Skilled and Low-Skilled Immigration: Evidence from a Survey Experiment*, 104 AM. POL. SCI. REV. 61 (2010), for an overview on these political trends.

By setting human capital criteria for selecting *who* to admit, governments are signaling their preference for a particular class of immigrants. For governments facing growing public sentiment that demands restrictive immigration policies, the focus on productive and highly-skilled migrants conveys a message of control, while internationally signaling to potential "recruits" that those who fit the bill of extraordinary talent are wanted and welcome. As we explain below in our discussion of the super talent category, membership resources held and distributed by governments are at times used strategically to draw in those skilled migrants who fall into the category of the "wanted and welcome."[56] Shedding light on this talent-for-citizenship exchange adds a previously missing membership-goods dimension to what has typically been an economics-focused and domestic-centered analysis of skilled migration policies.

II. AT THE TOP OF THE SKILLS-MIGRATION PYRAMID: "SUPER TALENT" IN SPORTS AND SCIENCE

The extraordinary ability category, to borrow from the official terminology of American immigration law and policy, is a selective club indeed.[57] It includes Nobel Prize laureates, Olympic athletes, acclaimed artists, world-class innovators—that is, those with the potential to disproportionately contribute to establishing or cementing the admitting country's international stature and reputation for excellence and innovation. Here, we find the crème de la crème, the super talent category. This last category perhaps best captures the arms-race logic of the global race for talent, whereby attracting individuals whose pertinent capacity is marginally better than their competitors may pay off disproportionally and lead to huge differences in outcome and thus to a comparative advantage. With regard to those in the super talent

56. WANTED AND WELCOME?: POLICIES FOR HIGHLY SKILLED IMMIGRANTS IN COMPARATIVE PERSPECTIVE (Triadafilos Triadafilopoulos ed.) (forthcoming). *See also* Shachar, *The Race for Talent*, *supra* note 22, at 203.

57. According to U.S. Citizenship and Immigration Services, to qualify for First Preference EB-1 under the category of "extraordinary ability," the applicant "must be able to demonstrate extraordinary ability in the sciences, arts, education, business, or athletics through sustained national or international acclaim." To prove this requirement, the applicant's "achievements must be recognized in [their] field through extensive documentation" and evidence. *Employment Based Immigration: First Preference EB-1*, U.S. CITIZENSHIP AND IMMIGR. SERVICES, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=17b983453d4a3210VgnVCM100000b92ca60aRCRD&vgnextchannel=17b983453d4a3210VgnVCM100000b92ca60aRCRD (last visited Nov. 24, 2012).

category, recruiting nations appear to be willing to pull out all the stops—including breaching their own otherwise rigid residency and naturalization requirements—to woo and entice these individuals, all in pursuit of national prestige and glory.[58]

Government officials are willing to tender a fast-tracked visa or a settlement permit in an expedited fashion for those with super talent—whether in the sciences, arts, or sports—even for individuals who have not complied with typical requirements for naturalization, such as establishing residence in the new home country.[59] This is a remarkable shift, having potentially far-reaching implications for our understanding of state adaptability, and it is leading to the transformation of membership goods into tightly controlled "assets" that government officials (not private individuals—it is a serious offense to sell or trade in citizenship) can use as bargaining chips to lure in those deemed prize recruits.

Picking winners, in this context, comes very close to resembling headhunting practices, turning immigration officials and other policymakers, as well as public and private actors with devolved authority, into enterprising recruiters of super talent. This trend becomes particularly visible when we explore individual stories and legal policies at the intersection of sports and nationality.

A. Elite Athletes

Many readers will be familiar with the case of Becky Hammon, a superstar point guard from the American heartland. Although she finished as runner-up for the most valuable player title in the Women's National Basketball Association [WNBA] in 2007, Hammon was not shortlisted for the U.S. women's Olympic basketball squad for the 2008 Beijing Summer Games.[60] Instead of staying home to root for her national team, Hammon chose to pursue her lifelong dream of playing in the Olympics by joining the roster of another country. Despite not being of Russian descent or a full-time resident of Russia, Hammon (who had previously played professional basketball in Russia) was fast-tracked for Russian citizenship by the country's officials just in time to join their Olympic basketball team, helping them secure a bronze medal in Beijing.[61] The case of Becky Hammon, despite the media attention it has received, is far from unique in the world of Olympic

58. These trends are identified in Shachar, *Picking Winners*, *supra* note 4.

59. *Id.*

60. Mark Schwarz, *Olympics Opportunity Too Much for Hammon to Pass Up*, ESPN.COM (June 5, 2008), http://sports.espn.go.com/oly/news/story?id=3427182.

61. *Id.*

citizenship.[62] Chris Kaman, center for the National Basketball Association [NBA]'s Los Angeles Clippers, New Orleans Hornets, and recently the Dallas Mavericks, was born and raised in the United States, attended college at Central Michigan State, and (by his own admission) does not speak German.[63] But his great-grandparents were German, and this entitled him to acquire German citizenship.[64] German sports authorities approached Kaman and granted him a German passport in July 2008 in an expedited process, all in time to compete for the German national team in the 2008 Beijing Olympic Games.[65] In another instance, several weeks before the 2006 Winter Olympics in Turin, President Bush signed a congressional bill that included a special provision granting citizenship for aliens of extraordinary ability.[66] This legal maneuver allowed ice dancers Tanith Belbin, born and raised in Canada, and Maxim Zavozin, born and raised in Russia, to represent the United States.[67] Belbin and her partner secured a silver medal for the United States.[68] Zavozin went on to become a Hungarian citizen in January 2010, just in time to represent Hungary in the 2010 Winter Olympics in Vancouver.[69]

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62. Every Olympic Games has human dramas and legal disputes arising from national allegiance switches. The final authority to resolve such disputes lies with the Court of Arbitration for Sports (CAS). *See* COURT OF ARBITRATION FOR SPORT, STATUTES OF THE BODIES WORKING FOR THE SETTLEMENT OF SPORTS-RELATED DISPUTES (2010) (Switz.), *available at* http://www.tas-cas.org/d2wfiles/document/3923/5048/0/code%202010%20(en).pdf. In the 2000 Summer Olympic games held in Sydney, for example, the Olympic "citizenship of over a hundred athletes was challenged prior to the Games." Lauri Tarasti, *Citizenship Issues a Problem for Professional and Top-Class Sport*, MOTION – SPORTS FIN., 1/2007, at 39, 40.

63. *See Chris Kaman*, ESPN, http://espn.go.com/nba/player/_/id/1982/chris-kaman (last visited March 8, 2013); Chris Sheridan, *Kaman the German: He'll Never Wear a Team USA Jersey*, ESPN, http://sports.espn.go.com/oly/summer08/basketball/columns/story?columnist=sheridan_chris&page=kamanfeature-080817 (last visited Mar. 8, 2013).

64. *Id.*

65. *See* Greg Johnson, *Kaman Living Olympic Dream, Even as a German*, GRAND RAPIDS PRESS, Aug. 3, 2008, *available at* http://www.mlive.com/olympics/index.ssf/2008/08/kaman_living_olympic_dream_eve.html.

66. S. Res. 2044, 109th Cong. (2005) (enacted). *See also* Andrea Gerlin, *Waiving the Flag*, TIME, Feb. 12, 2006, *available at* http://www.time.com/time/magazine/article/0,9171,1158938,00.html.

67. *See* Gary Mihoces, *Ice Dancer Belbin Aces Citizenship Test*, *Can Represent USA*, USA TODAY, Jan. 4, 2006, at 8C, *available at* http://usatoday30.usatoday.com/sports/olympics/winter/2006-01-04-notes-belbin_x.htm.

68. Associated Press, *2006 Olympic Silver Medallists Belbin-Agosto Retire*, TSN.COM (June 10, 2010, 5:37 PM), http://www.tsn.ca/figure_skating/story/?id=324246.

69. Before obtaining citizenship, Zavozin even told reporters that "[i]n Hungary, it's a little easier to get citizenship, and that was the decision, so that we could maybe start to compete this season." Lynn Rutherford, *New Partnership on the Horizon*,

In one particularly crude talent-snatching incident, oil-rich Azerbaijan resorted to luring teenaged sporting stars to its national team, leading to a bitter dispute with Bulgaria over the financial terms of an alleged trade that paved the way for two young Bulgarian weightlifters to compete under the Azerbaijan flag. Although controversial, with the transaction being approved just days prior to the opening of the 2012 London Olympics, this maneuver proved golden for Azerbaijan.[70] One of the weightlifters, Valentin Hristov, won an Olympic bronze medal in London and a gold medal in the 2012 European Championships.[71] And the list goes on.

The United States, more than any other country in the world, has gone out of its way to perfect the technique of attracting accomplished athletes by "swapping passports in pursuit of Olympic medals."[72] However, the practice has become more common internationally than ever; it is no longer limited to the world's traditional sports powerhouse. Consider the case of Maryam Yusuf Jamal, a middle-distance runner, who was born and raised in Ethiopia under the name Zenebech Tola. In 2005, after a failed attempt to receive political asylum in Switzerland, she received a fresh passport from Bahrain in a very short time.[73] This allegiance switch proved to be a jackpot for the tiny Gulf nation: running as a competitor for Bahrain, Jamal won gold at the 2007 International Association of Athletics Federation (IAAF) World Championships in Osaka, Japan and again at the 2009 IAAF World

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ICENETWORK.COM (July 23, 2008), http://web.icenetwork.com/news/article.jsp?ymd=20080723&content_id=49634&vkey=ice_news.

70. *Bulgarian Weightlifter Wins Olympic Bronze for Azerbaijan*, NOVINITE.COM (July 30, 2012), *available at* http://www.novinite.com/view_news.php?id=141800.

71. *See IOC Approves Last Changes of Nationality Ahead of London Games,* OLYMPIC.ORG (July 16, 2012), http://www.olympic.org/news/ioc-approves-last-changes-of-nationality-ahead-of-london-games/168322 (indicating that Bulgarian native, Valentin Hristov, was approved to compete for Azerbaijan in the 2012 London Olympics).

72. Duff Wilson & Andrew W. Lehren, *Swapping Passports in Pursuit of Olympic Medals*, N.Y. TIMES, June 15, 2008, at SP1 (noting that since 1992 approximately fifty top athletes competed for other nations before becoming members of U.S. Olympic teams). This may be explained in part by the fact that, unlike the committees in most other advanced industrial countries, the U.S. Olympic Committee has no continuous public funding. Instead, athletes raised in the United States must heavily rely on local, community, and corporate support. *See* Michael Jay Friedman, *U.S. Funding of Olympic Athletes a Private and Community Affair: Individual Citizens and Corporations Enable America's Olympic Effort,* IIP DIGITAL (Sept. 1, 2007), http://iipdigital.usembassy.gov/st/english/article/2006/02/20060209164553jmnamdeirf0.9387018.html#axzz2DP3BJiI3.

73. *Maryam Yusuf Jamal*, *Most Successful Athletes, Women*, *Bio*, GLOBAL SPORTS COMMUNICATION, http://www.globalsportscommunication.nl/athletes/most-successful-athletes/EN10885-Maryam-Yusuf-Jamal.aspx (last visited March 8, 2013).

Championship in Berlin.[74] In 2012, at the London Olympics, she won a bronze medal—Bahrain's first medal at the Olympics—in the women's 1,500 meters. Despite hardly ever residing in her new country of citizenship, she professes to getting "a lot of support from their Federation both morally and financially."[75]

The debate about recruiting super talent is important because of its visibility and symbolism. Tensions are brewing not only because of the potentially pernicious effect of poaching exceptional talent for the sake of advancing a relative national advantage in a fiercely competitive global environment; but also because of the intuition that, unlike ordinary professions, certain public service jobs—not only national athletes but also elected politicians, top diplomats, or high-ranked military generals—are more closely tied to an expression of sovereignty and collective identity. Few are concerned with the citizenship status of national team trainers and coaches; many national sports teams in Africa, Asia, Latin America, and Europe are trained by foreign coaches.[76] But when it comes to those who actually wear the national uniform and perform at the frontline—in the stadium, government, or battlefield—the sensitivity to the citizenship aspect is notably higher.

Herein lies the greatest paradox: it is for a country's sense of collective pride and national reputation that its government officials are willing to expedite citizenship for those with exceptional talent. This practice potentially leads to situations in which individuals serve as sports ambassadors for a nation to which they have only the flimsiest of links, and in certain cases, on whose territory they might have never even set foot. Yet, this erosion of citizenship-as-membership via country hopping is done in the name of *promoting* the national interest and the international prestige of the recruiting polity.

Olympic citizenship thus offers us a rare window to explore the most foundational tensions and questions about the future of citizenship in an increasingly globalized and interconnected world. It tests our deepest intuitions about the meaning and content of the relationship between the individual and the state that the individual officially represents. It

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74. Paul Gains, *Osaka 2007—Women's 1500M: Calm and Cool, Jamal Bears Helsinki in Mind En Route to Osaka Gold*, IAAF ATHLETICS, http://www.iaaf.org/news/news/osaka-2007-womens-1500m-calm-and-cool-jamal (Sept. 2, 2007).

75. *Biography: From Zenebech to Maryam*, THE OFFICIAL WEBSITE OF MARYAM YUSUF JAMAL, http://www.maryamjamal.com/Biography/BiographyManager.php?biography=856 8369527 (last visited Oct. 25, 2010).

76. To provide just one indication of how prevalent the global mobility of coaches has become, consider the fact that in the 2010 FIFA World Cup in South Africa, twelve out of thirty-two qualifying national teams were trained by foreign coaches. *See Foreign Managers on a Mission*, FIFA.COM (June 10, 2010), http://www.fifa.com/worldcup/archive/southafrica2010/news/newsid=1232750/index.html.

further compels us to take a hard look at how these market-oriented and calculated citizenship grants are turning membership bonds that in the past might have focused on notions of collective identity and allegiance into far more instrumental bargains. The consequent emergence of a transfer market draws upon a strategic, perhaps even opportunistic, perception of citizenship as a prized reward that can be used to lure those with abundant talent whom the recruiting nation covets.

As a greater number of competitors enter the global race for talent, each jurisdiction is pushed to try harder to outbid or retaliate against the recruitment moves made by its international counterparts. In an unequal world, an added concern is that affluent nations will send scouts to shop for athletes in poorer countries, where aspiring sportsmen and women are willing to "chang[e] nationality for a few shillings" in the hope of fulfilling their Olympic dreams of fame and accomplishment.[77] This is the dark side of the talent-for-citizenship exchange, which infuses it with concerns about unequal bargaining power among the core parties: the recruiting nation, the home country, and the lured athlete. From a global justice and fair play perspective, patterns of inequality are accentuated when societies holding relative advantages in terms of wealth and stability remove the stops and begin to exploit their economic and citizenship rewards as part of a borderless, laissez-faire talent hunt.

This citizenship barter takes place in a broader institutional context. Major international sporting events like the Olympics revolve around national team participation. The bestowal of citizenship is therefore crucial for unleashing the lured athlete's potential as a boon and boost to the recruiting nation. Gaining the legal status of a citizen before representing the new country is a formal eligibility requirement set by the Olympic Games' governing bodies.[78]. This sets up the unique parameters of Olympic citizenship in sports—the goal is to reach the Olympics, and the path must include a citizenship grant by the

77. Owen Slot, *Buying the Flag: Kenyans are Exploited Like 'Slaves' in Talent Trade*, TIMES (London), Apr. 10, 2008 (quoting the president of the Kenyan athletics federation), *available at* http://www.timesonline.co.uk/tol/sport/more_sport/athletics/article3716012.ece; *see also* Wladimir Andreff, *The Correlation Between Economic Underdevelopment and Sport,* 1 EUR. SPORT MGMT. Q. 251 (2001). Such patterns raise not only concerns with fast-tracking of form-over-substance citizenship grants, but also about South-North creaming (a term familiar from the classic brain drain debates), or what some have critically called neocolonialist patterns of recruitment in which "dignity and integrity tend to fall by the wayside in what has become a glorified body market." *See* Joseph Blatter, *Soccer's Greedy Neo-Colonialists*, FIN. TIMES, Dec. 17, 2003, 19 (Joseph "Sepp" Blatter is the current president of Fédération Internationale de Football Association (FIFA)).

78. INT'L OLYMPIC COMM., OLYMPIC CHARTER, Rule 42.1; Bylaw to Rule 42, ¶ 2 (2012).

recruiting nation as well as recognition by the relevant sporting governing bodies that a passport swap is valid for the purposes of participating in international events under the new country's flag.[79]

This bartering of "membership goods" for talented athletes by glory-hungry nations seeking to attract those with exceptional prowess and brawn brings into sharp focus the core conceptual and ethical dilemmas at the heart of the global talent hunt. These dilemmas include the blurring of allegiance with commodification, the dilution of citizenship-as-membership through the proliferation of form-over-substance grants, and the conflation of the language of national pride with neoclassical economic principles that treat human capital as a factor of production able to generate significant branding and reputation gains. The practice described here of either proactively snatching top talent from other countries or offering a soft landing for rising stars who seek to leave their home countries is, of course, not limited to elite sports. In the United States, for example, this maneuver has long been used to advance national interests in media, arts, technology, science, and academia.[80]

B. Acclaimed Scientists

Another arena in which governments are investing heavily is the brave new world of the "great brain race."[81] As high-ranking immigration officials have boldly asserted, "the next frontier . . . [is] looking at opportunities to attract the best talent and going out there and getting it."[82] Examples abound. Consider the United Kingdom's new Tier 1 "exceptional talent" category, introduced in 2011, which is folded into that country's point-based system and is explicitly designed to attract "exceptionally talented individuals in the fields of science,

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79. *Id.* The athlete must also satisfy other relevant requirements such as compliance with other portions of the Olympic Charter and IF rules. These terms are spelled out in Rule 41 of the Charter ("Eligibility Code"). *Id.*, Rule 41. For further discussion, see Shachar, *Picking Winners*, *supra* note 4, at 2114-20.

80. For detailed analysis, see Shachar, *The Race for Talent*, *supra* note 22, at 148, which identifies the rise of a global race for talent and America's initial first-mover advantage as the "IQ magnet" for highly skilled migrants.

81. *See* BEN WILDAVSKY, THE GREAT BRAIN RACE: HOW GLOBAL UNIVERSITIES ARE RESHAPING THE WORLD (2010). Wildavsky's analysis is focused primarily on international students whereas our analysis is broader in scope, exploring the legal categories designed to facilitate the recruitment of those with extraordinary talent engaged in scientific research, broadly defined.

82. *Canadian Immigration Minister*, *supra* note 22.

humanities, engineering and the arts, who wish to work in the UK."[83] The UK Home Office Policy Guidelines for this exceptional talent category clarify that the UK is selectively seeking individuals "who are already internationally recognised at the highest level as world leaders in their particular field, or who have already demonstrated exceptional promise and are likely to become world leaders in their particular area."[84] Unlike most other categories, those entering under the exceptional talent category need not be sponsored by an employer. Instead, the UK creatively delegated the substantive assessment of an applicant's super talent to already existing and highly-regarded designated bodies. These bodies include the Royal Society (a fellowship of the world's most eminent scientists), which holds the responsibility to vet the super talent of nominated natural sciences and medical science research applicants; the Arts Council, which, through this special visa, can help bring in "the very best artists of international standing to live and work in the UK";[85] and both the British Academy (the national academy for the humanities and social sciences) and the Royal Academy of Engineering, which are vested with the power to nominate and assess excellence in their respective fields of expertise. These professional bodies and distinguished academies already possess the expertise and poise to assess international excellence; doing so is the core function of their operations. The combined process of selection and vetting of super talent offers both credibility and "buy-in" from the relevant academic or professional communities with whom those with super talent will likely interact if and when they settle in the country.

For governments struggling to justify immigration intakes, to increasingly unwilling voters (the UK's government being a case in point), the focus on top talent provides a reliable measure of accountability and quality control. In introducing the new Tier 1 category, the UK Immigration Minister explained that despite the government's commitment to reducing net migration to the country, this new route for entry was essential: "The UK is a global leader in science,

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83. *See* Home Office, *Tier 1 (Exceptional Talent) of the Point Based System—Policy Guidance (version 8/2011)*, UK BORDER AGENCY, at 9, *available at* http://www.west-info.eu/files/UKAgenziaDelleFrontiere-Tier1-2011.pdf. Details of these requirements can be found at *Immigration Rules: Part 6A-Points-Based System*, § 245B to 245BF, UK BORDER AGENCY, *available at* http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part6a/.

84. *Immigration Rules: Part 6A-Points-Based System*, § 245B, UK BORDER AGENCY, *available at* http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/imigrationrules/part6a.

85. *UK Opens Its Doors to Exceptionally Talented Migrants, Latest News and Updates*, UK BORDER AGENCY (July 20, 2011), *available at* http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2011/july/31-t1-et.

humanities and engineering and we are a cultural centre for the arts: we will continue to welcome those who have the most to offer and contribute to our society and economy."[86] The new exceptional talent route, added the Minister, "will ensure that we continue to attract the brightest into the UK and keep the UK a global leader."[87] Many in the British scientific community welcomed the move, especially given the overall cuts to admission. This sentiment is perhaps best captured in the remarks made by the President of the Royal Society: "The UK is a global leader in science because we can attract the best minds from around the world to work with our home grown talent."[88] The United Kingdom is, however, not alone in this high-stakes game.

Although relying mostly on temporary skills-based admission routes, the United States also has special programs designed to recruit those with super-talent. The employment-based first-preference category (EB-1) offers a privileged path to a green card upon landing for those with "extraordinary ability in the sciences, arts, education, business, or athletics" who can demonstrate "sustained national or international acclaim."[89] Much like super talent in the UK, establishing evidence of such truly extraordinary ability, as articulated by U.S. Citizenship and Immigration Services, requires nothing short of the receipt of internationally recognized prizes or awards, such as a "Pulitzer, Oscar, [or] Olympic Medal."[90] The United States has also used the EB-1 category to lure exceptional talent in the fields of science and academia by bringing in the most innovative scholars to campuses across the nation under the designation of "outstanding professors and researchers" and with the anticipation that those scholars will do research at the cutting edge, push the frontiers of knowledge forward, and create tomorrow's leaders of science.[91] For others at the top of their

86. *Id.*

87. *Id.*

88. *Id.*

89. *Employment-Based Immigration: First Preference EB-1*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=17b983453d4a3210VgnVCM100000b92ca60aRCRD&vgnextchannel=17b983453d4a3210VgnVCM100000b92ca60aRCRD (last visited Mar. 10, 2013).

90. *Id.*

91. *Employment-Based Immigration: First Preference EB-1*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=17b983453d4a3210VgnVCM100000b92ca60aRCRD&vgnextchannel=17b983453d4a3210VgnVCM100000b92ca60aRCRD (last visited April 8, 2013). For an accessible account of the importance of investing in human capital for universities and their strategies for recruiting top talent, *see e.g.,* Elizabeth Station, *Opportunity Knocks*, UNIVERSITY OF CHICAGO MAGAZINE (Sept.-Oct. 2010),

fields, such as gifted concert pianists, members of elite dance companies, brilliant visual artists, and the like, the United States also offers the O-1 visa (the "genius visa"), which is open to individuals who possess "extraordinary ability in the sciences, arts, education, business, or athletics."[92]

At either the senior or junior levels of the academic ladder, we usually find a recruiting university or research institute involved in the process, which is reserved for those with exuberant promise or already established star status—those who have secured international recognition for their "outstanding achievements in a particular academic field."[93] The United States remains a favored destination for many with extraordinary talent and achievements, but other attractive destination countries are not standing still.[94] America's post-9/11 restrictive turn in immigration has given competing nations an unparalleled opportunity to leap ahead.[95] Take Australia. There, permanent skill-based programs accounted for over two thirds (67.4 percent) of total migration intake in 2010-2011, and included a small stream reserved for "distinguished individuals with special or unique talents of benefit to Australia."[96] This "distinguished talent" admission route grants qualifying recipients the security of permanent residence (thereby putting them on the road to citizenship) as well as the

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http://magazine.uchicago.edu/1010/features/opportunity-knocks.shtml (last visited April 8, 2013).

92. *O-1 Visa: Individuals with Extraordinary Ability or Achievement*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=b9930b89284a3210VgnVCM100000b92ca60aRCRD&vgnextchannel=b9930b89284a3210VgnVCM100000b92ca60aRCRD (last visited March 10, 2013). *See also* Moira Herbest, *Immigration: When Only "Geniuses" Need Apply*, BUSINESSWEEK, May 17, 2009, http://www.businessweek.com/bwdaily/dnflash/content/may/2009/db20090517_864505 (last visited April 8, 2013).

93. *Employment-Based Immigration, supra* note 91.

94. *See e.g.* Stephen Yale-Loehr & Christoph Hoashi-Erhardt, *A Comparative Look at Immigration and Human Capital Assessment*, 16 GEO. IMMIGR. L.J. 99 (2010) (criticizing current American immigration law and policy for not introducing a point-based system for selecting skilled-stream migrants, and comparing United States with Canada and Australia).

95. In the post-9/11 era, the United States has significantly increased the security screening of visa applicants, which has caused delays and bureaucratic backlogs. This has made the recruitment of international students for advanced degrees in science and engineering more difficult for American universities. *See e.g.,* Yudhijit Bhattacharjee, *US Immigration: Groups Urge Easing of Restrictions on Visa Policies Affecting Scientists*, 304 SCIENCE 943 (2004); NATIONAL RESEARCH COUNCIL, POLICY IMPLICATIONS OF INTERNATIONAL GRADUATE STUDENTS AND POSTDOCTORAL SCHOLARS IN THE UNITED STATES 66-80 (2005).

96. MIGRATION PROGRAM REPORT, *supra* note 43, at 3.

opportunity to bring family members to the country, who are then granted a right to work if they so wish.[97] The Australian distinguished talent stream targets "people who are internationally recognised for exceptional and outstanding achievement in: a profession, the arts, sport, research or academia."[98] In addition to setting the bar high, Australia also demands that those seeking privileged admission based on their talent be active in their field of expertise.[99] In the same spirit as the United Kingdom's selection process, Australia's Migration Regulations require that a distinguished talent migrant be nominated by an eligible person or an Australian organization with a national reputation in the same field as the applicant.[100] Typically, "the nomination should come from the peak Australian body."[101] Australia is forthright about wishing to select top talent (as evidenced, for example, by its detailed review process and extensive documentation requirement), and also frank about the "returns" it expects from the talent-for-citizenship exchange. In the bureaucratic language of immigration law and regulation, this is formalized in the requirement that "the applicant will be an asset to the Australian community."[102] Talent-for-citizenship, fair and square.

Even countries that do not offer super talent programs up front have joined the hunt for talent by creating specialized recruitment programs that fulfill the same function of attracting and retaining candidates with abundant human capital and high-demands skills. Germany is a case in point. There, recent years have seen a concentrated effort to overcome the past "zero migration" policy on the theory that for Germany to fully reestablish itself as a world-class powerhouse, it must compete internationally in attracting the "best minds."[103] Germany now makes it easier for international students to

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97. *Distinguished Talent Visa*, *About This Visa*, AUSTRALIAN GOVERNMENT DEPARTMENT OF IMMIGRATION AND CITZENRY, http://www.immi.gov.au/skilled/specialist-entry/124/ (last visited Mar. 8, 2013). This stands in contrast to the cumbersome procedures for securing spousal employment in the United States, which have put a strain on many dual career H1-B families.

98. *Id.*

99. *Id.*

100. *Distinguished Talent Visa*, *Eligibility*, AUSTRALIAN GOVERNMENT DEPARTMENT OF IMMIGRATION AND CITZENRY, http://www.immi.gov.au/skilled/specialist-entry/124/eligibility-applicant.htm (last visited Mar. 8, 2013).

101. AUSTRALIAN GOV'T: DEP'T OF IMMIGR. AND CITIZENSHIP, FORM 1000: NOMINATION FOR DISTINGUISHED TALENT 1 (2011), *available at* http://www.immi.gov.au/allforms/pdf/1000.pdf.

102. *Distinguished Talent Visa*, *Eligibility*, *supra* note 100.

103. *See* Federal Ministry of Education and Research, *Welcome to Germany: Easier Immigration for Highly-Skilled Workers*, Feb. 18, 2013, http://www.bmbf.de/en/19727/php (last visited April 8, 2013) (Ger.); *see also* Malcolm MacLaren, *Framing the Debate over the*

gain post-study work opportunities and for visiting scholars to enter the country on temporary skills-based visas that can later be extended and upgraded. Academics meeting the EU's Blue Card requirements are given the prize of permanent residence and the accompanying permission to bring in immediate family members who, if they wish, can gain a right to work in Germany as soon as they land (unlike the situation of spouses of H1-B visas in the United States).[104] These reforms are designed explicitly with an eye to making Germany more hospitable and welcoming to highly-skilled migrants, a task that has not always proven easy. This concentrated effort to attract brainy scholars and researchers that hail from countries beyond the borders of the European Union includes prestigious programs such as the Alexander von Humboldt Professorship, which is designed to attract "[a]cademics of all disciplines from abroad, who are internationally recognised as leaders in their field and who are expected to contribute to enhancing Germany's sustained international competitiveness."[105] The award winners are expected to carry out long-term and groundbreaking research at universities and research institutions in Germany.[106] These awards come with generous funding, set at □5 million for academics in experimental disciplines and □3.5 million for researchers in theoretical disciplines over a five-year period.[107] The Max Planck Society, the icon of German excellence in research, is also committed to international talent recruitment and has adopted English as the *lingua franca* at the various Max Planck Institutes and scientific networks as a result of the international reach and scope of its members and ambitions.[108]

Other countries have engaged in similar efforts. Before Germany established its international "brain gain" initiative, the Government of Canada, in 2000, created the Canada Research Chairs program, which established over 2000 designated research professorships, and invested more than $300 million annually to "attract and retain some of the

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German Immigration Bill: Toward Reasoned Policymaking, 2 GERMAN L.J. (2001), http://www.germanlawjournal.com/index.php?pageID=11&artID=102 (last visited April 8, 2013).

104. *Blue Card EU For Germany,* BLUECARD-EU.DE, http://www.bluecard-eu.de/eu-blue-card-germany/ (last visited Mar. 10, 2013).

105. *Sponsorship, Alexander von Humboldt Professorship*, ALEXANDER VON HUMBOLDT FOUNDATION, http://www.humboldt-foundation.de/web/alexander-von-humboldt-professorship.html (last visited Mar. 10, 2013).

106. *Id.*

107. *Id.*

108. *See A Short Portrait of the Max Planck Society,* MAX-PLANCK-GESELLSCHAFT, http://www.mpg.de/183251/portrait (last visited Mar. 10, 2013).

world's most accomplished and promising minds."[109] China's ambitious One-Thousand-Talents program, which targets individuals with full professorship or the equivalent in developed countries, offers financial and other relocation incentives to attract high-caliber international scholars and returning Chinese citizens to lead key laboratories, projects, and disciplines in China.[110] Israel's Allon Fellowship for Outstanding Young Researchers operates on a smaller scale but with a similar aim of attracting scholars who show exceptional promise by offering them a permanent position in the Israeli university system.[111] The United States is now contemplating new legislation to allow post-secondary students who have received their diplomas with distinction in the fields of science, technology, engineering, or mathematics (STEM) an expedited path to the green card as part of a major overhaul to the Immigration and Nationality Act.[112] The super talent category sits at the top of a pyramid of skilled-based migration recruitment. By definition, it is designed to encompass only a small number of individuals and of global migration flows (when compared with stricter policies that include family or low-skilled migration, for example).[113] In the global talent hunt, the expectation is that those who fit within the selective parameters of the super talent category will *disproportionately* contribute to "new technological development, business creation, social service provision, and other forms of human creativity," all the while bringing significant returns, either economic or reputational, to the admitting country.[114] The precise impact of exceptionally-skilled immigrants is difficult to quantify. The best available data focuses on their overrepresentation in "measurable, innovative activities such as patenting, publishing academic papers, and founding companies," as well as strong concentration in occupations associated with high skill level and creation of new enterprises, which is

109. *See Canada Research Chairs (CRC) Program*, HUMAN RESOURCES AND SKILLS DEVELOPMENT CANADA, http://www.hrsdc.gc.ca/eng/workplaceskills/foreign_workers/reschair.shtml (last visited Mar. 10, 2013).

110. *China Attracting Global Talent: One Thousand Talents Scheme*, RECRUITMENT PROGRAM OF GLOBAL EXPERTS, http://www.1000plan.org/groups/viewonetopic/928 (last visited Mar. 10, 2013).

111. Israel Council for Higher Education, *Alon Fellowship*, http://che.org.il/?page_id=710 (last visited April 8, 2013) (Hebrew).

112. *See Bipartisan Framework for Immigration Reform*, *supra* note 32. Previous legislative attempts, such as the IDEA Act of 2011, H.R. 2161, 112th Cong., Session 1, June 14, 2011, have not, as of yet, materialized into law. *See also supra* note 35 and accompanying text.

113. Brücker, *supra* note 6.

114. SOLIMANO, *supra* note 22, at 157.

to be expected given that precisely these qualities made them attractive in the eyes of the recruiting nation in the first place.[115]

None of these measures are refined enough to capture the less quantifiable qualities of human capital—namely, the unique combination of creativity and innovation that is encapsulated in gifted writers, technology entrepreneurs, philanthropists, and bright, risk-taking scientists. There is a growing literature on the contribution of highly-skilled migrants, diasporas, and high-tech clusters to invention and innovation.[116] Silicon Valley is perhaps the best-known example: from 1995 to 2005, foreign-born entrepreneurs founded 25 percent of all new high-tech companies.[117] A recent study found that 76 percent of patents awarded to the top ten patent-producing U.S. universities in 2011 had at least one foreign-born innovator, ranging from exceptionally talented tenured professors to graduate students and post-doctoral international fellows.[118]

This snapshot complements previous statistics showing that those who enter the country based on their skills and innovation potential make up an estimated one-quarter of all international patent applications from the United States, and that college educated immigrants are twice as likely to register patents as their U.S.-born counterparts (largely because they are more strongly concentrated in the sciences).[119] Highly-skilled migrants make up 27 percent of the U.S. workforce with a doctoral degree, and are strongly concentrated in occupations associated with high skill levels, such as medical scientists (43 percent) and physicists (25 percent), for example. These findings

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115. DEMETRIOS G. PAPADEMETRIOU & MADELEINE SUMPTION, MIGRATION POLICY INST., THE ROLE OF IMMIGRATION IN FOSTERING COMPETITIVENESS IN THE UNITED STATES 8 (2011). *See also* Jennifer Hunt & Marjolaine Gauthier-Loiselle, *How Much Does Immigration Boost Innovation?*, 2 AM. ECON. J.: MACROECONOMICS 31, 32 (2010) ("[A]ssess[ing] the impact of skilled immigration on innovation as measured by US patents per capita.").

116. *Id.* See also *infra* note 117.

117. See, for example, the pioneering work of AnnaLee Saxenian, *Silicon Valley's New Immigrant High-Growth Entrepreneurs*, 16 Econ. Dev. Q. 20, 20 (2002), examining "the economic contributions of skilled Asian immigrants in Silicon Valley." For more recent data, see, for example, P'SHIP FOR A NEW AM. ECON., PATENT PENDING: HOW IMMIGRANTS ARE REINVENTING THE AMERICAN ECONOMY 1 (2012) [hereinafter PATENT PENDING] ("This report seeks to highlight one key aspect of this challenge that is often overlooked: the crucial role that foreign scientists, engineers, and other researchers play in inventing the products and dreaming up the ideas that will power the American economy in the future."); VIVEK WADHWA ET AL., THEN AND NOW: AMERICA'S NEW IMMIGRANT ENTREPRENEURS, PART VII (2012) (presenting findings from a study about immigrant entrepreneurship and the relationship between economic progress and immigrant entrepreneurs).

118. PATENT PENDING, *supra* note 117, at 1.

119. *Id.*

provide clues as to both the pragmatic and reputation-focused reasons that may be motivating governments to actively seek to attract the highly skilled. In this managed-migration era, governments have reformed and revised the terms of admission without restraint for the best and the brightest, believing that such changes are necessary and urgent if they are to boost excellence and maintain a competitive edge.

III. POSSIBLE THEORETICAL AND ETHICAL IMPLICATIONS

A core theoretical insight to be drawn from our discussion is that the debate about migration and globalization can no longer pivot around the open versus closed borders dichotomy. This is because all countries simultaneously engage in *both* opening *and* closing their borders, but they do so selectively—in our context, by indicating quite sharply who they desire to bring in (those with extraordinary talent) and by erecting higher and higher legal walls to block those deemed "unwanted" or "too different."[120] In this stratified international mobility market, membership goods, including the promise of a "green card" (or "blue card" in the EU), are subtly turned into instruments for gaining a relative advantage in a competitive inter-jurisdictional scramble for brainpower. In this race, no country is an island, and none wants to be left behind.[121]

This is part of a larger transition. Instead of aiming to act as passive gatekeepers, governments increasingly set their goals toward picking winners.[122] Through giving priority in the visa line to those "with brains, talent and special skills,"[123] countries entangled in the global race for talent are seeking to boost their relative advantage and enhance their international prestige in a rapidly changing world. Much like monarchs, dynasties, and empires of past days that encouraged the cross-border recruitment of talent in order to bring into their respective jurisdictions the best artists, architects, musicians, scholars, poets, and innovators; governments today place special emphasis on the ability to draw human capital and agile prowess, as demonstrated by the individual narratives and legal categories we recounted in the previous pages.

This frenzy of law and policy innovation stands in tension with the predictions of postnationalists and others who have repeatedly told us

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120. *See, e.g.*, Orgad, *supra* note 8 (discussing the legitimacy of compulsory cultural assimilation as a regulation for migration and citizenship).

121. *See* Shachar, *The Race for Talent*, *supra* note 22, at 158-59; KAPUR & MCHALE, *supra* note 25, at 50.

122. Shachar, *supra* note 4, at 2094.

123. DARRELL M. WEST, BRAIN GAIN: RETHINKING U.S. IMMIGRATION POLICY 131 (2010).

that the retreat of the regulatory state and the demise of its ability to devise and implement control over migration and borders (whether acting alone or in concert with local or regional partners) is imminent. The conventional wisdom is that extant borders are, or soon will be, traversed with the greatest of ease, to the extent that they will become all but meaningless, serving merely as archaic relics of a bygone era. As a corollary, it is argued that states are "losing control" over their regulatory authority to define who to include and who to exclude in the current age of globalization.[124] The domestic and comparative legal examples explored in our study challenge this linear and unidirectional story, revealing instead a far more dynamic and complex reality of multiple governmental, professional, and private actors actively engaged in a strategic and competitive scramble to lure and attract extraordinary talent across borders in a world of regulated mobility. It is here that managed and targeted migration programs play a significant role.

On the ground and around the world, countries are reinventing and reinvigorating their entry and selection criteria in profound ways, in the process revising their outlook and responding to changed conditions in a more competitive environment. This has led immigration agencies (operating primarily, but not only, at the national level) to design recruitment policies that extend *across* borders, while engaging in *inter-jurisdictional* competition with other talent-recruiting countries. For both established and newly emerging centers of excellence, rapid changes in the landscape of skilled migration increase the pressure to engage in proactive recruitment of the "best crop" of what is perceived to be a relatively finite pool of potential migrants with abundant skills and talent.

The reason is as simple as it is powerful. Unlike other factors of production, talent is distinct in that it is encapsulated in individuals. In other words, it is the *human* in "human capital" that makes it a unique and much-coveted factor of production and quality of life multiplier in the new knowledge economy, and that makes its accretion sufficiently dear so as to permit the selective stretching and bending of a country's otherwise strict admission and membership rules. Whether real or merely perceived, a perception of scarcity—of exuberant demand and systemic under-supply—further fuels the flames of the global race for talent.

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124. *See, e.g.*, CHRISTOPHER ANDERSON, RESTRICTING RIGHTS, LOSING CONTROL: IMMIGRANTS, REFUGEES, ASYLUM SEEKERS, AND THE REGULATION OF CANADA'S BORDER, 1867—1988 (2007); CONTROLLING IMMIGRATION: A GLOBAL PERSPECTIVE 5 (Wayne A. Cornelius et al. ed., 2d ed. 2004); SASKIA SASSEN, LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION 98 (1996).

The next lesson to be learned from the examination of the new world of selective migration regimes is that the voluminous migration and globalization literature has too quickly dismissed the interests and actions of states as key actors in the international migration market. The literature has lost sight of instances of interdependent causality and inter-jurisdictional competition, as well as the prestige and dominance effects of attracting extraordinary talent—the very policies at the core of our analysis. Moving beyond familiar economic-centered explanations that look primarily to push-pull factors, short-term skills gaps and business cycles, our discussion has highlighted the importance of "bringing the state back" into the analysis.[125]

This shift in perspective helps provide a more coherent explanation that accounts for the timing and the wellspring of production of complex laws and public policies that seek to encourage the immigration of extraordinary talent. If anything, the patterns of *proactive* recruitment of the so-called "best and brightest" acutely emphasize not only the privileged position that the new brand of *savoir-faire* globetrotting professionals hold in today's global race for talent (they are perceived to "know where they are wanted")[126], but also the surprisingly creative ability of immigration officials and policymakers to re-adjust legal categories. This is often done through adjusting the minute technical details of targeted migration programs in response to competitive alterations or counter-measures adopted by other credible competitors in the global talent hunt. Once the highly-skilled begin to vote with their feet, the pressure on recruiting nations to provide them attractive settlement packages increases.[127]

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125. The term "bringing the state back in" is drawn from an influential book with the same title. *See* BRINGING THE STATE BACK IN (Peter B. Evans et al. eds., 1985). The scholarship in the fields of citizenship and migration studies frequently gives ample attention to emerging postnational, supranational, or transnational conceptions of membership more than to the core legal and political dimensions of a state's immigration policy. For an exception to this trend, see James F. Hollifield et al., *Immigrants, Markets, and Rights: The United States as an Emerging Migration State*, 27 WASH. U. J.L. & POL'Y 7 (2008); Aristide R. Zolberg, *Matters of State: Theorizing Immigration Policy*, in THE HANDBOOK OF INTERNATIONAL MIGRATION: THE AMERICAN EXPERIENCE 71 (Charles Hirschman et al. eds., 1999).

126. *Canada Must Actively Recruit the Best and Brightest Immigrants,* GLOBE AND MAIL, May 4, 2012 (Can.), *available at* www.theglobeandmail.com/commentary/editorials/canada-must-actively-recruit-the-best-and-brightest-immigrants/article4104925/. The United States relies heavily on its market, innovation power, and world class to attract the world's best and brightest, although a large bipartisan coalition is now pressing for legal changes that will make knowledge migrants welcome and wanted again in America—the birthplace of today's global race for talent.

127. The choice of destination for these migrants is of course neither unlimited nor necessarily determinative. It is likely that language, networking, family ties, and

This leads us to our last point. Perhaps the most distinctive aspect of the rise of selective migration policies is the willingness by nations to go so far as to exploit the most sacrosanct resource under their control: the distribution of membership goods, including the valuable "prize" of citizenship.[128] Nations are increasingly using membership as a recruitment tool by offering fast-tracked access and other incentives to lure extraordinary talent as part of their effort to stock up on human capital while increasing their relative advantage and international reputation. The actual and symbolic benefits of luring super talent—be they the prospect of Olympic gold or the international laurels that come with winning a Nobel Prize or Fields medal—appear to be significant enough to warrant these new approaches.

IV. PIERCING INTO THE FUTURE: COMPETITIVE CITIZENSHIP AND IMMIGRATION REGIMES IN A GLOBALIZED WORLD

In the previous pages, we recounted the vigor and zeal of the multiple participants in the fast-growing worldwide competition for highly skilled migrants. The dramatic changes in immigration law and policy accompanying this competition represent an uncoordinated response by competing nations to the perception that in the knowledge-based global economy, "the resource that is in greatest scarcity is human capital."[129] Counter-intuitively, and under conditions of uncertainty, national immigration agencies (and increasingly local and regional officials, too) have reasserted themselves as significant players in the global market for the highly skilled. This has been accomplished by developing the logic of competitive immigration regimes, by maintaining tight control over their power to govern legal entry, and by conferring membership goods on those at the top echelons of the talent pyramid. These developments are occurring in a context where policymakers must remain attuned to domestic stakeholders, local industries, professional guilds, and other interest groups, while at

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post-colonial channels of migration predictably play a role in shaping the directionality of human mobility, although emergent patterns of "super diversity"—a condition that refers to small and scattered multiple-origin global migration flows—reveals a level and kind of complexity that surpasses previous experiences and predictions. Steven Vertovec, *Super-Diversity and its Implications*, 30 ETHNIC & RACIAL STUD. 1024, 1024 (2007).

128. For further discussion of the value of citizenship in a globalizing world, *see generally* AYELET SHACHAR, THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY (2009).

129. Stephen Moore, *A Strategic U.S. Immigration Policy for the New Economy*, *in* BLUEPRINTS FOR AN IDEAL LEGAL IMMIGRATION POLICY 69, 69 (Richard D. Lamm & Alan Simpson eds., 2001), *available at* http://www.cis.org/articles/2001/blueprints/blueprints.pdf.

the same time paying close attention to the initiatives of other talent-hungry countries playing on the global field, turning skills-migration policy-making into a restless and fascinating policy innovation greenhouse.

Challenging the prevalent view that globalization will lead to the demise or retreat of state control over immigration; the recent changes shown here illuminate a more nuanced and complicated picture. In this new landscape of skills-based migration streams, governments proactively use their exclusive control over the allocation of membership resources to attract highly skilled migrants that they view as "assets." The desire for greatness that partly motivates the practice of importing those with super talent comes to resemble the old notions of grandeur and largesse that informed emperors, monarchs and popes who wanted to leave their mark on history, and tells us something significant about the state as well as the fusion of the logics of market and national interest in the early decades of the twenty-first century.

In this new era, the promise of acquiring secure and permanent settlement in the receiving country has itself become a competitive tool used to attract and retain knowledge migrants. Their "value" to the receiving polity is perceived to be sufficiently high to merit the designation of future citizen, whereas those entering at the bottom of the international labor migration ladder can only dream of such treatment; many of them now languish in the hinterland of "permanent temporariness" with few, if any, legal paths open that allow them to join the ranks of full and equal members of their host societies.[130]

The new willingness to selectively provide an easy-pass to membership for those with extraordinary talent may bring significant returns for recruiting nations in the short term, but in the long run it may transform, indeed possibly erode, our current understandings of membership and mobility, requiring us to think hard about the ethical and distributive ramifications for the receiving country's population as well as for "standard" immigration applicants who cannot boost a country's level of extraordinary talent. Another thorny issue is the impact of this increased competition for talent on poorer sending countries' development prospects. This includes the longstanding debate

130. *See, e.g.*, Anderson, *supra* note 21; Catherine Dauvergne & Sarah Marsden, *The Ideology of Temporary Labour Migration in the Post-Global Era*, *in* CITIZENSHIP STUDIES, SPECIAL ISSUE: CITIZENSHIP IN A GLOBALIZED WORLD: PERSPECTIVES FROM THE IMMIGRANT DEMOCRACIES (Ayelet Shachar & Geoffrey Brahm Levey eds., forthcoming); Xinying Chi, *Challenging Managed Temporary Labor Migration as a Model for Rights and Development for Labor-Sending Countries*, 40 NYU J. INTL. L. & POLITICS 497 (2008). See also MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 52-61 (1983) for a staunching and now-classic normative critique of such exclusion.

on "creaming" (a term familiar from the classic brain-drain debate)—a phenomenon in which exceptional talent is poached through aggressive tactics that pay little heed to poor countries' community investment in their highly-talented individuals, including potential institution-builders and democratic reformers. Even if remittances are sent back home, the development effects of talent emigration run too deep for monetary transfers (important as they are) to offset.[131]

Finally, the ascendance of more strategic and instrumental conceptions of citizenship strains the basic Marshallian notion of equal membership in the political community, which at least formally provides full rights and membership to those born or naturalized into the political community *irrespective* of how innovative, talented, or accomplished they may (or may not) be.[132] It is this expectation that might end up disappearing in the rush to fast track those deemed prized recruits, potentially by chipping away at the ideal of citizenship as equal political relations that are not defined by or reduced to the vicissitudes of markets and competition (nor to Aristotelian excellence).[133] This transformation raises the specter of political relations morphing into more calculated transactions, much like processes of gentrification and stratification in other spheres of social life, subtly yet persistently undercutting the commitment to on-a-par membership that is the hallmark of the modern conception of citizenship. This has always been more of an aspiration than a reality, but an unregulated and unrestrained global race for talent takes a stab at the ideal, not just its implementation.

CONCLUSION

We close the discussion by revisiting the basic puzzle at the heart of our inquiry: Why do states vigorously participate in the global race for talent? There are clearly tangible advantages to targeted recruitment. Surely the injection of highly-specialized human capital contributes to the advancement of science and technology, research and development,

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131. There is a growing body of literature reflecting significant disagreement on the actual effects of skills-based emigration on the countries of origin and how best to address these effects. *See, e.g.,* Agrawal et al., *supra* note 48; Kapur, *supra* note 48, Metka Hercog & Melissa Siegel, *Promoting Return and Circular Migration of the Highly Skilled*, UNU-MERIT WORKING PAPERS #2011-015 (2011); Subas L. Ketkar & Dilip Ratha, *Diaspora Bonds: Tapping the Diaspora During Difficult Times*, 1 J. INT'L COMMERCE, ECONOMICS AND POL'Y 251 (2010).

132. T.H. MARSHALL, CITIZENSHIP AND SOCIAL CLASS AND OTHER ESSAYS 11 (1950).

133. Aristotle, POLITICS, book 3, chapter 4, 1276 b 16- 1277 b 32 (Ernest Barker, trans., 1948).

knowledge, and economic prosperity, just as the recruitment of Olympian athletes can generate positive externalities for sports and national health campaigns. But these utilitarian and need-based explanations fail to capture the full picture. The global race for talent, echoing the desire-to-be-great of patrons, monarchs, and rulers of the past, also reflects additional motives or reasons that inspire political behavior: pride, prestige, glamour, a notion of "progress," and a desire to etch a coveted place in history. Governments that engage in the practice of luring extraordinary or super talent thus act out of distinctively statist motives or governmental rationality.[134] For Gilgamesh, it was the twelve great tablets. For Egypt, it was the Pyramids. For the United States and the USSR during the Cold War, it was Sputnik, and then the Apollo program and the tremendous mobilization that led to the achievement of a manned lunar landing.

In today's world of (neo)liberal peace, states exert rather limited control over most global flows, *but* for migration, which, despite vogue predictions to the contrary, "is still almost exclusively regulated at the national level."[135] The ability to lure the best and brightest expresses this relative degree of control by states over who to include and who to exclude, while also manifesting the pressures of spiraling competition and the growing importance of specialized expertise and knowledge for governing complex economies and diverse societies. To this we must add the less tangible, but nonetheless crucial, motivations of national pride and international prestige, which define talent-recruiting nations as members of an elite global club.

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134. *E.g.*, VERNON VAN DYKE, PRIDE AND POWER: THE RATIONALE OF THE SPACE PROGRAM 5 (1964) (noting the desire for "national prestige" through advancements and achievements in space as one of the reasons for the Space Program); Colin Gordon, *Governmental Rationality: An Introduction*, *in* THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY 1, 2-3 (Graham Burchell et al. eds., 1991). Put differently, unlike other labor immigration policies, which are often seen as serving sectarian interests (employers, regional business interests), the emphasis on recruiting the highly skilled cannot be accurately described as merely subservient. It may benefit universities and high tech industries that rely on the highly skilled, but at its heart, it is statist and cannot be reduced or fully captured by purely economic consideration or mere interest-based democratic politics.

135 Alan Gamlen & Katharine Marsh, *Introduction: Modes of Governing Global Migration, in* MIGRATION AND GLOBAL GOVERNANCE, at XV (Alan Gamlen & Katharine Marsh eds., 2012). For a law-and-economics analysis favoring greater international cooperation in migration policy, see, e.g., Alan O. Sykes, *International Cooperation on Migration: Theory and Practice*, 80 U. CHI. L. REV. 315 (2013); for an international relations perspective focusing on labor flows in the global economic, see Sandra Lavenex, *The Competition State and Multilateral Liberalization of Highly Skilled Migration*, *in* THE HUMAN FACE OF GLOBAL MOBILITY: INTERNATIONAL HIGHLY SKILLED MIGRATION IN EUROPE, NORTH AMERICA AND THE ASIA-PACIFIC 29 (Michael Peter Smith & Adrian Favell eds., 2006).

The advent of Olympic citizenship thus curiously demonstrates *both* the erosion *and* the revitalization of states' attempts to control their membership boundaries along more strategic lines, for it takes agency and governmental action to attract and retain these highly-skilled migrants who other countries may equally wish to lure. In both its origins and consequences, the flexibility of governments, using the words of law and their authority as national guardians of citizenship to promote targeted and selective recruitment, captures the promise of greater mobility and opportunity for the few while cementing unequal access to the many. These developments cast a long shadow on vogue predictions of the "death of citizenship" as well as on the Pollyannaish and unidirectional assumption that porous borders in the era of globalization will entail greater mobility to all.