

**AN OVERVIEW OF THE US IMMIGRATION SYSTEM AND  
COMPARISON WITH MERIT-BASED IMMIGRATION SYSTEMS IN  
LIGHT OF THE PROPOSED RAISE ACT**

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**I. INTRODUCTION**

The United States has more immigrants living within its borders than any other country in the world.<sup>1</sup> It has often been characterized as a “nation of

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<sup>1</sup> Phillip Connor & Gustavo Lopez, *5 facts about the U.S. rank in worldwide migration*, PEW RES. CTR. (May 18, 2016), <http://www.pewresearch.org/fact-tank/2016/05/18/5-facts-about-the-u-s-rank-in-worldwide-migration/> (based on 2015 UN data which counted persons born in US territories, such as Puerto Rico, as immigrants). While recent data shows that the United States has the highest *total* number of immigrants, those immigrants make up a lower *proportion* of the overall US population than immigrants in many other countries. *See id.* For example, in 2015, immigrants accounted for roughly

immigrants.”<sup>2</sup> Since 2000, people born outside of the United States have composed more than 10% of its population.<sup>3</sup> In 2016, more than a quarter of US children under the age of eighteen lived with at least one foreign-born parent, and foreign-born workers made up roughly 17% of the country’s civilian workforce.<sup>4</sup> The laws which apply to the entry of foreign-born nationals to the United States, therefore, have huge implications for US families, employers, and society as a whole.

Alongside its association with openness to immigration, the United States has also been characterized as a “nation of laws.”<sup>5</sup> The United States Constitution grants the federal government broad authority in creating and enforcing laws to both facilitate and control the entry of foreign nationals.<sup>6</sup> Whether justified by national security, foreign policy, commerce powers, or other grounds, the legislative and executive branches have historically exercised near plenary power over

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one-in-seven people in the United States; one-in-five people in Canada; and nearly 90% of the population of the United Arab Emirates. *Id.*

<sup>2</sup> Leon Rodriguez, *I Ran USCIS. This is a nation of immigrants, no matter what mission statements say.*, WASH. POST (Feb. 26, 2018), [https://www.washingtonpost.com/news/posteverything/wp/2018/02/26/i-ran-uscis-this-is-a-nation-of-immigrants-no-matter-what-mission-statements-say/?utm\\_term=.ff02d5b854e3](https://www.washingtonpost.com/news/posteverything/wp/2018/02/26/i-ran-uscis-this-is-a-nation-of-immigrants-no-matter-what-mission-statements-say/?utm_term=.ff02d5b854e3); *but cf.* Jerry Schwartz, *US: A nation of immigrants, but ambivalent about immigration*, WASH. TIMES, Feb. 2, 2017, <http://www.washingtontimes.com/news/2017/feb/2/us-a-nation-of-immigrants-but-ambivalent-about-imm/> (contrasting the United States’ immigrant heritage with its recurring restrictive immigration laws and anti-immigrant sentiment).

<sup>3</sup> See *U.S. Immigrant Population and Share over Time, 1850-Present*, MIGRATION POL’Y INST., <https://www.migrationpolicy.org/programs/data-hub/charts/immigrant-population-over-time?width=1000&height=850&iframe=true>. For more statistical information on the demographic make-up of immigrants in the United States, see Jie Zong et al., *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL’Y INST. (Feb. 8, 2018), <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states>.

<sup>4</sup> Zong et al., *supra* note 3.

<sup>5</sup> See, e.g., David Nakamura, *‘Language as a weapon’: In Trump era, immigration debate grows more heated over what words to use*, WASH. POST, Jan. 21, 2018, [https://www.washingtonpost.com/politics/language-as-a-weapon-in-trump-era-immigration-debate-grows-more-heated-over-what-words-to-use/2018/01/21/d5d9211a-fd6a-11e7-a46b-a3614530bd87\\_story.html](https://www.washingtonpost.com/politics/language-as-a-weapon-in-trump-era-immigration-debate-grows-more-heated-over-what-words-to-use/2018/01/21/d5d9211a-fd6a-11e7-a46b-a3614530bd87_story.html); see also Vanessa Romo et al., *Trump Ends DACA, Calls on Congress to Act*, NPR (Sept. 5, 2017), <https://www.npr.org/2017/09/05/546423550/trump-signals-end-to-daca-calls-on-congress-to-act> (quoting President Donald Trump, who stated: “[W]e must also recognize that we are a nation of opportunity because we are a nation of laws.”).

<sup>6</sup> *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (pointing out that “[the Supreme] Court has repeatedly emphasized that over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens” (citations and internal quotes omitted)).

immigration.<sup>7</sup> Despite this, or perhaps as a result, the laws which govern immigration to the United States have often created controversy.<sup>8</sup>

A US Circuit Court judge's recent dissent illuminates the conflicts between our identity as a welcoming nation of immigrants and a restricting nation of laws:

Every American . . . has a family memory that includes ancestors who came from some place where life was not as good as it is here. The DNA of our national character makes it very difficult to tell an individual that he cannot enjoy the same liberty, safety, and security that we enjoy. . . . No doubt, those who must make necessary policy choices and those who must enforce those choices feel, or should feel, that same angst. But immigration must be regulated . . . .<sup>9</sup>

Throughout his campaign and continuing with his presidency, Donald Trump has vocally, and often controversially, expressed his view that immigration must not only be regulated, but also decreased.<sup>10</sup> Beginning with his first public campaign announcement in June 2015, President Trump expressed his extreme dissatisfaction with the United States' current immigration system, saying the country had become a "dumping ground" for the rest of the world.<sup>11</sup> As president, he has sought both to prevent unauthorized ("illegal") immigration, and to limit lawful immigration.<sup>12</sup> His extreme anti-immigrant views have inspired strong reactions, including from lawmakers.

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<sup>7</sup> See *Fiallo*, 430 U.S. at 792; see generally Kif Augustine-Adams, *The Plenary Power Doctrine After September 11*, 38 U.C. DAVIS L. REV. 701 (2005).

<sup>8</sup> E.g., Schwartz, *supra* note 2.

<sup>9</sup> *Velasquez-Banegas v. Lynch*, 846 F.3d 258, 272 (7th Cir. 2017) (Ripple, J., dissenting).

<sup>10</sup> See, e.g., *Full Text: Donald Trump announces a presidential bid*, WASH. POST, June 16, 2015, [https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/?utm\\_term=.4bd4af84858f](https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/?utm_term=.4bd4af84858f) [hereinafter *Donald Trump Campaign Announcement*]; see also Eugene Scott, *Trump's history of making offensive comments about nonwhite immigrants*, WASH. POST, Jan. 11, 2018, [https://www.washingtonpost.com/news/the-fix/wp/2018/01/11/trumps-history-of-controversial-remarks-about-nonwhite-immigrants/?utm\\_term=.a32ac4c25936](https://www.washingtonpost.com/news/the-fix/wp/2018/01/11/trumps-history-of-controversial-remarks-about-nonwhite-immigrants/?utm_term=.a32ac4c25936).

<sup>11</sup> *Donald Trump Campaign Announcement*, *supra* note 10. In addition to stating generally that "[t]he US has become a dumping ground for everybody else's problems," Mr. Trump made his despicable comments on Mexican immigration in particular – "When Mexico sends its people . . . [t]hey're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people." *Id.*

<sup>12</sup> See, e.g., Exec. Order No. 13,767, 82 Fed. Reg. 8,793 (Jan. 25, 2017); see also Bob Bryan, *Trump's radical push to scale back legal immigration is becoming a key flashpoint*

One piece of proposed legislation that President Trump has supported to further his immigration goals is the Reforming American Immigration for Strong Employment (RAISE) Act.<sup>13</sup> A version of the RAISE Act was introduced to the United States Senate on August 2, 2017.<sup>14</sup> If passed, the Act would significantly restructure existing legal pathways for immigration, greatly limiting the number of lawful immigrants accepted in to the United States in the process.<sup>15</sup> As the name might suggest, the RAISE Act would prioritize immigrants with skills that employers might value, such as education and English-language proficiency.<sup>16</sup> It would do so by using a “merit-based” system, which assigns immigrants points based on their credentials and possession of desired qualities.<sup>17</sup> President Trump believes the bill “will help ensure that newcomers to our wonderful country will be assimilated, will succeed, and will achieve the American Dream.”<sup>18</sup> But is the RAISE Act the best answer to fixing America’s complex immigration system?

The purpose of this Note is to examine the RAISE Act, considering both the major transformations it would make to existing US laws, and what US legislators could learn from foreign jurisdictions (particularly Canada and Australia) that have already adopted similar merit-based immigration programs. In particular, this Note explores how countries and immigrants are benefitted or harmed by immigration schemes which prioritize “high-skilled” immigrants rather than seeking a more diverse immigrant labor force and/or prioritizing family ties. Throughout, this Note considers the contrasting economic and social goals behind immigration laws.

First, this Note gives a detailed overview of the major pathways for entry and immigration to the United States based on existing law, including family and employment-based pathways. Second, it discusses how the RAISE Act would seek to change those existing pathways. Third, it lays out approaches that Australia and Canada have used in their merit-based immigration statutory schemes. Australia and Canada are interesting comparisons because they were among the first two

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*in Congress*, BUS. INSIDER (Jan. 29, 2018, 1:46 PM), <http://www.businessinsider.com/trump-legal-immigration-plan-changes-2018-1>.

<sup>13</sup> See, e.g., Priscilla Alvarez, *Can a Decades-Old Immigration Proposal Pass Under Trump?*, THE ATLANTIC (Aug. 21, 2017), <https://www.theatlantic.com/politics/archive/2017/08/can-a-decades-old-immigration-proposal-pass-under-trump/537138/>; *President Donald J. Trump Backs RAISE Act*, WHITE HOUSE (Aug. 2, 2017), <https://www.whitehouse.gov/the-press-office/2017/08/02/president-donald-j-trump-backs-raise-act>; see generally RAISE Act, S. 1720, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/senate-bill/1720/text>.

<sup>14</sup> RAISE Act, S. 1720.

<sup>15</sup> *President Donald J. Trump Backs RAISE Act*, *supra* note 13.

<sup>16</sup> See Alvarez, *supra* note 13; see generally RAISE Act, S. 1720.

<sup>17</sup> Alvarez, *supra* note 13.

<sup>18</sup> *Id.*

countries to adopt point-based immigration systems,<sup>19</sup> and thus they present a unique opportunity to explore how such systems succeed or fail in practice. Additionally, Australia has moved from admitting primarily family-based immigrants to primarily skills-based immigrants,<sup>20</sup> the same re-focusing of immigration priorities contemplated in the RAISE Act. After discussing how Canada and Australia have structured their point-based immigration programs, this Note points to some of the benefits and drawbacks that these countries have seen in implementing them. Finally, this Note draws from all of these areas to establish which policy considerations might best serve the United States in the future.

## II. OVERVIEW OF CURRENT US IMMIGRATION POLICY ON ADMISSIONS

The Immigration and Nationality Act (“the INA” or “the Act”) is the statute which largely governs immigration to the United States.<sup>21</sup> It creates various categories under which non-US citizens may seek to enter the United States on either a temporary (nonimmigrant) or permanent (immigrant) basis.<sup>22</sup> To enter the United States lawfully, a non-citizen must generally seek a visa, be granted that visa, and then be allowed entry pursuant to that visa.<sup>23</sup> A visa is a passport stamp or travel document which indicates that a person is permitted to enter a country, and, if applicable, the authorized length of stay.<sup>24</sup> Having a valid visa does not guarantee that a person will be allowed to enter the United States, it merely signifies that the noncitizen is *eligible* to seek entry (i.e. it allows that noncitizen to “knock

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<sup>19</sup> *Immigration systems: What’s the point?*, THE ECONOMIST (July 7, 2016), <https://www.economist.com/news/international/21701753-countries-invented-points-based-immigration-systems-have-concluded-they-do-not>.

<sup>20</sup> GARETH LARSEN, FAMILY MIGRATION TO AUSTRALIA 2 (2013), [https://www.apf.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1314/FamilyMigration](https://www.apf.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1314/FamilyMigration).

<sup>21</sup> The Immigration and Nationality Act (INA) is codified at 8 U.S.C. § 1101 et seq, but the INA citation is used more often. *Immigration and Nationality Act*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/laws/immigration-and-nationality-act> (last updated Sept. 10, 2013) [hereinafter INA].

<sup>22</sup> See INA §§ 101(a)(15), 203.

<sup>23</sup> *What is a U.S. Visa?*, U.S. DEP’T OF STATE, <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/frequently-asked-questions/what-is-us-visa.html> (last visited Oct. 11, 2018) [hereinafter *What is a U.S. Visa?*, U.S. DEP’T OF STATE] .

<sup>24</sup> *Id.*

on the door”).<sup>25</sup> While attempting to enter the country using a valid visa, a person could still be denied entry on several applicable grounds.<sup>26</sup>

Temporary visitors to the United States may seek visas allocated for tourists, students, researchers, guest workers, or a variety of other nonimmigrant designations, depending on their reasons for coming to the country.<sup>27</sup> Many nonimmigrant categories require that the visa recipient *not* intend to remain permanently in the United States.<sup>28</sup> Those who do seek to enter (or remain) permanently in the United States must generally fit within one of a handful of separate *immigrant* categories to be eligible for an immigrant visa.<sup>29</sup> If they are granted an immigrant visa, and allowed to enter the United States at an official port of entry (or if they are allowed to remain in the United States lawfully) they become lawful permanent residents.<sup>30</sup>

Non-refugee immigrants to the United States fall within three main groups: family-based, employment-based, and diversity.<sup>31</sup> In the first two quarters of fiscal year 2017, the United States took in just over half a million immigrants.<sup>32</sup> Of this number, nearly 67% immigrated based on family ties, 13.3% were employment-based immigrants, and less than 4% fell into the diversity category.<sup>33</sup> The remaining 20% of immigrants to the United States in that time period came as asylees or

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<sup>25</sup> Patricia J. Sullivan, *Family-Based Immigration Petitions: Who’s Your Daddy*, MICH. B. J., Feb. 2018, at 21.

<sup>26</sup> See *What is a U.S. Visa?*, U.S. DEP’T OF STATE, *supra* note 23. In large part, the reasons why a visa-holder might be denied entry to the United States (the “grounds of inadmissibility”) are laid out in INA § 212(a).

<sup>27</sup> See INA § 101(a)(15).

<sup>28</sup> *Id.*

<sup>29</sup> See *id.*

<sup>30</sup> See *What is a U.S. Visa?*, U.S. DEP’T OF STATE, *supra* note 23. With almost no exceptions, before foreign nationals may become US citizens (“naturalize”), they must be granted status as lawful permanent residents first. See INA § 316. Furthermore, before being eligible to apply for US citizenship, they must maintain that status for a number of years, in addition to meeting other residency, character, and miscellaneous requirements. *Id.*

<sup>31</sup> See INA § 201(a). The Diversity program, or “visa lottery,” allocates 55,000 immigrant visas a year to random applicants from countries with low immigration levels to the United States. *Trump’s Immigration Proposal Would Eliminate Green Card Lottery*, NPR (Jan. 31, 2018), <https://www.npr.org/2018/01/31/582240526/trumps-immigration-proposal-would-eliminate-green-card-lottery>. These applicants must meet certain educational or professional guidelines but have few other requirements to qualify. See INA § 203(c).

<sup>32</sup> *Legal Immigration and Status Report Quarterly Data*, U.S. DEP’T OF HOMELAND SEC. (July 6, 2018), <https://www.dhs.gov/immigration-statistics/readingroom/special/LIASR> [hereinafter *Legal Immigration and Status Report Quarterly Data*] (citing figures from Fiscal Year 2017 attachment; Table 1B).

<sup>33</sup> See *id.* (citing figures from Fiscal Year 2017 attachment; Table 1B) (note that “family ties” includes two categories: family-sponsored preferences, and immediate relatives of US citizens).

refugees, or through other miscellaneous immigration programs.<sup>34</sup> These numbers more or less reflect typical immigration trends from prior years.<sup>35</sup>

### **A. Family-Based Immigration to the United States**

Family-based immigration is by far the largest source of new permanent residents in the United States.<sup>36</sup> Family-based immigration can be further broken down into two main types: (1) immigrants who are the “immediate relatives” of US citizens; and (2) immigrants who fall into one of four different “preference categories” based on a familial relationship with a sponsoring US citizen or lawful permanent resident.<sup>37</sup>

Immediate relatives are the children, spouses, or parents of US citizens.<sup>38</sup> Rather than taking their traditional meanings, “children” and “parents” in this context are legally defined. Under the INA, a “child” must be less than twenty-one years old, and must not be married.<sup>39</sup> Furthermore, if the child is adopted, born outside of marriage, or a stepchild, then they will have to meet additional requirements laid out by the statute.<sup>40</sup> Finally, a parent of a US citizen only qualifies as an immediate relative if one’s US citizen son or daughter is at least twenty-one years old.<sup>41</sup>

Section 203(a) of the INA describes the family-based immigration preference categories. The first preference category is for the unmarried sons and

<sup>34</sup> See *Legal Immigration and Status Report Quarterly Data*, *supra* note 32 (citing figures from Fiscal Year 2017 attachment; Table 1B).

<sup>35</sup> See Table 6. *Persons Obtaining Lawful Permanent Resident Status By Type And Major Class Of Admission: Fiscal Years 2013 To 2015*, U.S. DEP’T OF HOMELAND SEC. (Dec. 15, 2016), <https://www.dhs.gov/immigration-statistics/yearbook/2015/table6>. In 2015, the United States accepted 1,051,031 new immigrants. *Id.* Of this number, 64% immigrated through family-based categories (including the preference categories and the immediate relative category), 13.7% came through employment-based preference categories, 4.6% through the diversity category, and the remaining 17.7% were asylees, refugees, or miscellaneous category immigrants. *See id.*

<sup>36</sup> For a more in-depth look at family-based immigration, its history, and recent policy discussion, see generally WILLIAM A. KANDEL, U.S. FAMILY-BASED IMMIGRATION POLICY (2016), <http://trac.syr.edu/immigration/library/P11607.pdf>.

<sup>37</sup> INA §§ 201, 203(a).

<sup>38</sup> INA § 201(b)(2)(A)(i).

<sup>39</sup> INA § 101(b)(1).

<sup>40</sup> *Id.*; for example, fathers of children born out of wedlock must have a “bona fide parent-child relationship” with their offspring in order for either the father or the child to seek immigration benefits through the other. INA § 101(b)(1)(D).

<sup>41</sup> INA § 201(b)(2)(A)(i). For an article discussing how this requirement contradicts the idea of “anchor babies” see, e.g., Janell Ross, *The myth of the “anchor baby” deportation defense*, WASH. POST, Aug. 20, 2015, [https://www.washingtonpost.com/news/the-fix/wp/2015/08/20/the-myth-of-the-anchor-baby-deportation-defense/?utm\\_term=.c5cf68af46a5](https://www.washingtonpost.com/news/the-fix/wp/2015/08/20/the-myth-of-the-anchor-baby-deportation-defense/?utm_term=.c5cf68af46a5).

daughters of citizens.<sup>42</sup> These “sons” and “daughters” of citizens do *not* fall into the category of “children” of citizens (and therefore are *not* classified as immediate relatives) because of the under twenty-one age limit under the INA.<sup>43</sup> This category, therefore, refers to the adult (aged twenty-one or older), unmarried offspring of US citizens. In the next category, the second preference is the *only* family-based category for the relatives of lawful permanent residents (as opposed to the relatives of US citizens), and it is divided into two parts.<sup>44</sup> The so-called “2A preference category” is for the spouses or children (unmarried and under twenty-one) of residents; and the “2B preference category” is for the unmarried sons or daughters (aged twenty-one or older) of residents.<sup>45</sup> The third preference category is for the married sons or daughters of US citizens, regardless of their age.<sup>46</sup> There is no category for the married sons or daughters of lawful permanent residents. Finally, the fourth family-based preference category is for the brothers and sisters of US citizens.<sup>47</sup> The US citizen sibling must be at least twenty-one to sponsor the immigration of their non-citizen brother or sister.<sup>48</sup>

Immediate relatives receive a huge advantage in becoming US residents—they are exempt from the annual quotas, which nearly all other immigrant categories are subject to.<sup>49</sup> This means that visas are immediately available for immediate relatives who seek to immigrate to the United States through their US citizen parent, spouse, or adult child—they do not have to wait the months, years, or even decades that many other applicants are subject to. The State Department issues the monthly “visa bulletin,” which indicates the current wait times for the various preference categories of both family and employment-based immigration.<sup>50</sup>

The length of the wait depends on both the country of origin and the preference category.<sup>51</sup> This is because the statute allocates visa availability by preference category,<sup>52</sup> and because the number of family preference visas available to any single country is capped at 7% of the total amount of visas allocated for family preference immigrants as a whole.<sup>53</sup> Countries whose nationals seek to immigrate to the United States in greater numbers may face longer wait times

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<sup>42</sup> See INA § 203(a)(1).

<sup>43</sup> INA § 101(b)(1).

<sup>44</sup> INA § 203(a)(2).

<sup>45</sup> *Id.*

<sup>46</sup> See *id.* § 203(a)(3).

<sup>47</sup> *Id.* § 203(a)(4).

<sup>48</sup> *Id.*

<sup>49</sup> See INA § 201(b).

<sup>50</sup> See *Visa Bulletin for April 2018*, U.S. DEP’T OF STATE (Mar. 9, 2018), <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2018/visa-bulletin-for-april-2018.html> [hereinafter *Visa Bulletin*].

<sup>51</sup> *Id.*; see also INA §§ 201 & 202.

<sup>52</sup> INA § 201.

<sup>53</sup> See INA § 202(a)(2).



because of this statutory provision.<sup>54</sup> Take, for example, the Philippines. If a US citizen father filed a visa petition for his married daughter, who was born in the Philippines and is a citizen and national of the Philippines, that petition would have needed to be filed on or before March 22, 1995, for a visa to have been available to his daughter in April 2018.<sup>55</sup> Therefore, the daughter would have had to wait for more than twenty-three years before an immigrant visa could be available to her to allow her to seek to come to the United States. In contrast, if the man's daughter was under twenty-one and unmarried, and if the two maintained a "bona fide" relationship, she would be his immediate relative. He could file for her today, and she could have a visa available without waiting.

One of the major criticisms of the United States' family-based immigration scheme as it currently exists is that it facilitates so-called "chain migration."<sup>56</sup> As the name suggests, chain migration is essentially a commentary on the ability of a new permanent resident to petition for another relative to be admitted to the United States, who then petitions for another, and then another, and so on.<sup>57</sup> Critics (such as the Federation for American Immigration Reform) argue that this results in large numbers of family-based immigrants being allowed admission to the United States without regard for their credentials or ability to contribute meaningfully to the United States economy or society.<sup>58</sup> According to such critics, this is problematic because it means the immigrant population is created by family connections rather than valuable skills, affecting the make-up of the United States population over time.<sup>59</sup> For example, in a December 2017 blog post, the Trump Administration cited Department of Homeland Security data on immigrants to the United States between 2005 and 2016: over those ten years, 13 million people immigrated to the United States.<sup>60</sup> Of those 13 million, nearly 9.3 million were immigrating through

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<sup>54</sup> See, e.g., Anita Ortiz Maddali, *Left Behind: The Dying Principle of Family Reunification Under Immigration Law*, 50 U. MICH. J. L. REFORM 107, 119 (2016).

<sup>55</sup> See *Visa Bulletin*, *supra* note 50.

<sup>56</sup> See John Burnett, *Explaining 'Chain Migration'*, NPR (Jan. 7, 2018), <https://www.npr.org/2018/01/07/576301232/explaining-chain-migration>.

<sup>57</sup> *Id.*

<sup>58</sup> *Merit-Based Immigration Systems*, FED'N FOR AM. IMMIGR. REFORM (Mar. 2017), <https://fairus.org/issue/legal-immigration/merit-based-immigration-systems>.

<sup>59</sup> *Id.* Chain migration has also been criticized for allowing terrorists and criminals entry to the United States. See, e.g., Nick Miroff, *Family ties drive U.S. immigration. Why Trump wants to break the 'chains.'*, WASH. POST, Jan. 2, 2018, [https://www.washingtonpost.com/world/national-security/how-chain-migration-became-a-target-in-trumps-immigration-agenda/2018/01/02/dd30e034-efdb-11e7-90ed-77167c6861f2\\_story.html?utm\\_term=.52d711d7668a](https://www.washingtonpost.com/world/national-security/how-chain-migration-became-a-target-in-trumps-immigration-agenda/2018/01/02/dd30e034-efdb-11e7-90ed-77167c6861f2_story.html?utm_term=.52d711d7668a); see also *Trump Administration Decries Family-Based Immigration Policy*, VOA NEWS (Dec. 24, 2017), <https://www.voanews.com/a/trump-criticizes-family-immigration/4177095.html> [hereinafter *Trump Administration Decries Family-Based Immigration Policy*, VOA NEWS].

<sup>60</sup> Zeke Miller & Jill Colvin, *White House to Begin All-Out Push for Merit-Based Immigration Next Year*, CHI. TRIB., Dec. 15, 2017, <http://www.chicagotribune.com/news/nationworld/politics/ct-white-house-immigration-20171215-story.html>.

a US citizen or permanent resident relative.<sup>61</sup> Conversely, only one in fifteen were allowed admission due to their skills.<sup>62</sup> Although skills-based immigration is seemingly under-emphasized by the United States' current system, family-based immigrants still make meaningful social and economic contributions, and existing employment-based categories do tend to favor skilled over unskilled workers.<sup>63</sup>

## **B. Employment-Based Immigration to the United States**

Similar to family-based immigration, employment-based immigration to the United States is divided into various preference categories, each of which is subject to annual quotas limiting the availability of visas.<sup>64</sup> Just like the family preference categories, the employment categories also have per-country annual percentage caps,<sup>65</sup> and the visa bulletin helps applicants determine when their wait is over.<sup>66</sup> There are five employment-based preference categories.<sup>67</sup> These categories allow for immigration into the country based on different combinations of education, reputation, experience, or miscellaneous qualities that are not directly related to employment or employability.<sup>68</sup> Many, but not all, of the employment-based categories require that a prospective immigrant have a job offer from an employer who is willing to sponsor them.<sup>69</sup> Additionally, some require what is known as a labor certification.<sup>70</sup> A labor certification is a determination made by the US Department of Labor verifying that: (1) there are not enough domestic workers “who are able, willing, qualified . . . and available”<sup>71</sup> for the employment sought by the immigrant; and (2) the immigrant’s employment “will not adversely

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<sup>61</sup> Miller & Colvin, *supra* note 60.

<sup>62</sup> *Id.*

<sup>63</sup> Laura Wides-Muñoz, *Family-based immigration has ‘merit,’ too*, WASH. POST, Feb. 5, 2018, [https://www.washingtonpost.com/news/posteverything/wp/2018/02/05/family-based-immigration-has-merit-too/?utm\\_term=.f6b352052e44](https://www.washingtonpost.com/news/posteverything/wp/2018/02/05/family-based-immigration-has-merit-too/?utm_term=.f6b352052e44); see Kayleigh Scalzo, *American Idol: The Domestic and International Implications of Preferring the Highly Educated and Highly Skilled in U.S. Immigration Law*, 79 GEO. WASH. L. REV. 926, 927 (2011) (“in the category of [Employment-Based] immigration, the INA gives significant preference to highly skilled and highly educated aliens at the expense of unskilled and skilled aliens”).

<sup>64</sup> See INA § 203(b).

<sup>65</sup> See *id.* § 202(a)(2).

<sup>66</sup> See *Visa Bulletin*, *supra* note 50.

<sup>67</sup> See INA § 203(b).

<sup>68</sup> See *id.*

<sup>69</sup> See INA § 203(b)(1)–(6); see also *Employment-Based Immigrant Visas*, U.S. DEP’T OF STATE, <https://travel.state.gov/content/visas/en/immigrate/employment.html#first> [hereinafter *Employment-Based Immigrant Visas*].

<sup>70</sup> See INA § 212(a)(5); see also *Employment-Based Immigrant Visas*, *supra* note 69.

<sup>71</sup> INA § 212(a)(5)(A)(i)(I).

affect the wages and working conditions of workers in the United States similarly employed.”<sup>72</sup>

The first employment-based preference category is for “priority workers.”<sup>73</sup> This category is further divided into three subgroups: “aliens with extraordinary ability”;<sup>74</sup> “outstanding professors and researchers”;<sup>75</sup> and “certain multinational executives and managers.”<sup>76</sup> Immigrants in the latter two subgroups must have a sponsoring-US employer who has offered them a job.<sup>77</sup> Regardless of which subgroup a first-preference employment immigrant falls into, a labor certification is *not* required for any priority workers.<sup>78</sup> However, immigrants in this category must seek to enter the United States to continue working in whatever field, academic area, or managerial position they qualified to immigrate under.<sup>79</sup>

The second employment-based preference category allocates visas for immigrants “who are members of the professions holding advanced degrees” (or their equivalent),<sup>80</sup> or who have “exceptional ability.”<sup>81</sup> Immigrants in these categories are required to obtain labor certifications,<sup>82</sup> and, with some exceptions, they must have a job offer from a sponsoring-US employer.<sup>83</sup>

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<sup>72</sup> INA § 212(a)(5)(A)(i)(II).

<sup>73</sup> INA § 203(b)(1).

<sup>74</sup> “Extraordinary ability” is defined by federal regulation as “a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor.” 8 C.F.R. § 204.5(h)(2) (2017). The INA provides that the alien’s field of endeavor must be in the sciences, arts, education, business, or athletics. INA § 203(b)(1)(A)(i).

<sup>75</sup> The general requirements for this subgroup are that the prospective immigrant should: (1) be internationally recognized in their subject area; (2) have three or more years of experience in that area; and (3) seek to teach or conduct research in that area in the United States. INA § 203(b)(1)(B)(i)–(iii).

<sup>76</sup> To obtain US residence under this subcategory, an immigrant must be seeking to work as a manager or executive for an employer or an affiliate of an employer for whom they worked for at least one year in the three years preceding their application for admission. INA § 203(b)(1)(C).

<sup>77</sup> *See Employment-Based Immigrant Visas, supra* note 69.

<sup>78</sup> *See id.*

<sup>79</sup> INA § 203(b)(1)(A)–(C).

<sup>80</sup> *Id.* § 203(b)(2)(A). The regulations define an advanced degree as “any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate.” 8 C.F.R. § 204.5(k)(2).

<sup>81</sup> INA § 203(b)(2). Subsection (C) of this statute provides that “possession of a degree, diploma, certificate, or similar award . . . shall not by itself be considered sufficient evidence of such exceptional ability.” Also, as with “extraordinary ability” in the first preference category “exceptional ability” is limited to ability in certain fields. INA § 203(b)(2)(A). From the regulations: “Exceptional ability in the sciences, arts, or business means a degree or expertise significantly above that ordinarily encountered in the sciences, arts, or business.” 8 C.F.R. § 204.5(k).

<sup>82</sup> *See* INA § 212(a)(5)(A), (D).

<sup>83</sup> *See* INA § 203(b)(2)(B).

The third preference category is for “skilled workers, professionals, and other workers.”<sup>84</sup> Immigrants in this category generally must have both a sponsoring employer and an approved labor certification.<sup>85</sup> Skilled workers are defined in the statute as those who are able to perform non-seasonal labor that requires two or more years of training or experience.<sup>86</sup> Professionals are “[q]ualified immigrants” with baccalaureate degrees “who are members of the professions.”<sup>87</sup> “Other” workers are essentially unskilled laborers, capable of performing non-seasonal work for which qualified US workers are unavailable.<sup>88</sup>

The fourth employment-based category is for “certain special immigrants,”<sup>89</sup> including several miscellaneous categories, many of which do not even deal with employment at all.<sup>90</sup> None of the subgroups in this category require labor certification.<sup>91</sup>

The fifth and final employment-based preference category deals with job creation.<sup>92</sup> This category creates an immigrant visa for foreign nationals who invest a designated amount into a “new commercial enterprise” in the United States.<sup>93</sup> The investment must benefit the United States economy and create full-time jobs for ten or more US citizens or residents.<sup>94</sup> This category has been criticized for its potential to be abused and its essential facilitation for wealthy people to buy their way into the United States.<sup>95</sup>

As mentioned, the United States took in about half a million new permanent residents in the first half of 2017, and about 67% of those people immigrated based on family ties.<sup>96</sup> Only 74,821, or about 13.3%, immigrated

<sup>84</sup> INA § 203(b)(3).

<sup>85</sup> *Id.* § 203(b)(3)(C); *Employment-Based Immigrant Visas*, *supra* note 69.

<sup>86</sup> *Id.* § 203(b)(3)(A)(i). This provision also specifies that qualified US workers must not be available to fill the job opening. *Id.* However, this requirement is redundant as that condition is also fulfilled by the labor certification requirement.

<sup>87</sup> *Id.* § 203(b)(3)(A)(ii). Under the INA, the term “profession” includes but is not limited to “architects, engineers, lawyers, physicians, surgeons, and teachers. . . .” INA § 101(a)(32).

<sup>88</sup> INA § 203(b)(3)(A)(iii). As with the skilled workers subgroup discussed *supra* at note 86 (INA §203(b)(3)(A)(i)), the specification that “qualified workers are not available in the United States” is fulfilled by the labor certification requirement established in § 203(b)(3)(C).

<sup>89</sup> *Id.* § 203(b)(4).

<sup>90</sup> INA § 101(a)(27) (lists examples of who is considered a “special immigrant”).

<sup>91</sup> *Employment-Based Immigrant Visa*, *supra* note 69.

<sup>92</sup> INA § 203(b)(5).

<sup>93</sup> *Id.* § 203(b)(5)(A).

<sup>94</sup> *Id.* §§ 203(b)(5)(A)(i)–(ii).

<sup>95</sup> Walter F. Roche Jr. & Gary Kohn, *INS insiders profit on immigrant dreams*, BALTIMORE SUN, Feb. 20, 2000, [http://articles.baltimoresun.com/2000-02-20/news/0002220371\\_1\\_investor-visa-program-immigration-program-immigration-laws/2](http://articles.baltimoresun.com/2000-02-20/news/0002220371_1_investor-visa-program-immigration-program-immigration-laws/2) (quoting former Congressman John W. Bryant as saying: “Have we no self-respect as a nation? Are we so broke we have to sell our birthright?”).

<sup>96</sup> *Supra* Part II.

through employment-based categories.<sup>97</sup> This includes immigration through the “priority,” “exceptional ability,” and “skilled” categories, as well as “unskilled” and miscellaneous categories.<sup>98</sup> These numbers further reflect the United States’ current focus on family-based immigration, and how much of a drastic departure the RAISE Act would be.

### **C. Unauthorized Immigration to the United States**

In addition to those who obtain immigrant status in the United States through one of the above-mentioned legal pathways, people who seek to live permanently in the US without permission (“undocumented” or “illegal” immigrants) also greatly impact the country socially and economically. Recent estimates place the number of unauthorized immigrants living in the US at somewhere between 11 and 11.3 million.<sup>99</sup> Of that number, the Pew Research estimates that 8 million are part of the US civilian labor force.<sup>100</sup> Thus, unauthorized immigrants, while composing only about 3.4% of the US population, make up at least 5% of the US workforce.<sup>101</sup>

The impact of this unauthorized segment of the population is much debated and highly contentious.<sup>102</sup> This Note does not delve into those nuances. I briefly mention them here just to emphasize that, while this Note’s discussion is largely limited to discussion of authorized immigration, unauthorized immigrants pose additional challenges for US lawmakers, both in addressing those who are already within the United States, and in responding to the push and pull factors that might drive future unlawful migration. Furthermore, it is worth noting that some argue that increasing visa availability under unskilled labor categories would decrease the flow of extralegal immigration by providing a viable legal pathway for those who would otherwise join the undocumented population.<sup>103</sup> However, the RAISE Act contemplates doing the opposite by focusing on expanding lawful immigration options for skilled rather than unskilled laborers. Most likely, the RAISE Act’s provisions would have some effect on undocumented workers and their

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<sup>97</sup> See *Legal Immigration and Status Report Quarterly Data*, *supra* note 32.

<sup>98</sup> See *id.*

<sup>99</sup> Jens Manuel Krogstad et al., *5 facts about illegal immigration in the U.S.*, PEW RES. CTR. (Apr. 27, 2017), <http://www.pewresearch.org/fact-tank/2017/04/27/5-facts-about-illegal-immigration-in-the-u-s/> (stating that “[t]he US civilian workforce includes 8 million unauthorized immigrants, accounting for 5% of those who were working or were unemployed and looking for work.”) (emphasis added).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> See, e.g., Bruce Stokes, *Americans Divided Over Immigration Reform*, PEW RES. CTR. (Apr. 3, 2013), [www.pewglobal.org/2013/04/03/americans-divided-over-immigration-reform/](http://www.pewglobal.org/2013/04/03/americans-divided-over-immigration-reform/) (discussing various US public opinion surveys on immigration reform, including divided results on “illegal” immigrants and border security).

<sup>103</sup> See Scalzo, *supra* note 63, at 949–50.

immigration to the United States, but again, that is outside the scope of this discussion.

### III. OVERVIEW OF PROPOSED US LEGISLATION: THE RAISE ACT

US Senators Tom Cotton and David Perdue first proposed the RAISE Act in February 2017, seeking to amend the Immigration and Nationality Act.<sup>104</sup> They later introduced an updated version in August 2017.<sup>105</sup> The bill echoes similar legislation which was proposed in the 1990s, but which ultimately never became law.<sup>106</sup> The 1990s' proposal came in response to several pieces of legislation in the preceding quarter century which had increased the United States' foreign-born population significantly.<sup>107</sup> A congressional panel on "Legal Immigration Reform" sought to introduce legislation that would gradually cut legal immigration.<sup>108</sup> However, Democrats and Republicans disagreed on the effects that such a decrease would have on the United States economy, and both partisan disagreement and outside pressures prevented Congress and the Clinton Administration from adopting the proposals.<sup>109</sup>

Similar to the proposed 1990s legislation, the RAISE Act in part seeks to respond to a large foreign-born population.<sup>110</sup> The sponsoring senators, Cotton and Perdue, assert that the problem with United States' current immigration system is that it lets in too many people, yet, at the same time, not enough skilled laborers.<sup>111</sup> The senators identify the "influx of low-skilled immigrant labor" over the past generation as a major driving factor in depressing wages for recent immigrants and working-class Americans alike.<sup>112</sup> The Federation for American Immigration

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<sup>104</sup> See RAISE Act, S. 354, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/senate-bill/354/related-bills/>.

<sup>105</sup> Press Release, David Perdue, United States Senator for Georgia, Senators Perdue, Cotton Introduce the Reforming American Immigration for a Strong Economy Act (Aug. 2, 2017), <https://www.perdue.senate.gov/news/press-releases/senators-perdue-cotton-introduce-the-reforming-american-immigration-for-a-strong-economy-act>.

<sup>106</sup> Alvarez, *supra* note 13.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> See Tom Cotton & David Perdue, *Reforming American Immigration for a Strong Economy Act (RAISE Act): A Bill to Raise Working Wages & Boost American Competitiveness*, [https://www.perdue.senate.gov/imo/media/doc/170801\\_New\\_RAISE\\_Act\\_One\\_Pager\\_FINAL.pdf](https://www.perdue.senate.gov/imo/media/doc/170801_New_RAISE_Act_One_Pager_FINAL.pdf) (last visited Oct. 11, 2018).

<sup>112</sup> *Id.* ("A generation-long influx of low-skilled immigrant labor has put downward pressure on the wages of working Americans, with recent immigrants' wages hardest hit. For Americans who didn't finish high school, wages have dropped nearly 20 percent since the 1970s. This collapse in working-class wages threatens to create a near-permanent underclass for whom the American Dream is just out of reach.")

Reform further criticizes the existing immigration system for being “based on nepotism.”<sup>113</sup> Essentially, this criticism is linked to concerns with “chain migration,” through which foreign nationals are able to petition for other relatives upon immigrating to the United States.<sup>114</sup> The Federation for American Immigration Reform sees “chain migration” as problematic because many immigrants are allowed entry based on family ties alone, even though they might have limited or no ability to contribute to US society or the US economy.<sup>115</sup> Thus, the Federation’s views align with Senators Cotton and Perdue—they believe that US immigration policy should re-focus to emphasize skills and employability rather than family unity.

To address these concerns, the RAISE Act would overhaul the US immigration system by decreasing available immigrant visas, ending the diversity visa program entirely, eliminating several family immigration categories, and establishing a skills-based “points” system for employment immigration.<sup>116</sup> Within ten years of its enactment, the RAISE Act would cut current lawful immigration levels in half.<sup>117</sup> Through these changes, the lawmakers predict that income and opportunity will increase for the American working class.<sup>118</sup> They state that “[t]he RAISE Act will stem the flow of low-skill immigrants into the United States, reduce our country’s oversupply of low and unskilled labor, and lead to an increase in wages for working Americans, who are long overdue for a raise.”<sup>119</sup> Congresswoman Nancy Pelosi feels differently.<sup>120</sup> She stated that the proposed legislation “abandons the fundamental respect for family, at the heart of our faith, at the heart of who we are as Americans.”<sup>121</sup> Regardless of its effects on American laborers and values, the RAISE Act would undoubtedly impact those seeking to immigrate to the United States.

The RAISE Act would drastically restructure and reduce family-based immigrant categories by “[re-]focus[ing] family-sponsored immigration on spouses and minor children.”<sup>122</sup> For starters, the immediate relative designation would no longer include the parents of adult US citizens.<sup>123</sup> Only spouses and children (redefined to be under eighteen years of age, rather than twenty-one) of US citizens would fall into this category.<sup>124</sup> Next, the four existing family-based preference

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<sup>113</sup> FED’N FOR AM. IMMIGRATION REFORM, *supra* note 58.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Alvarez, *supra* note 13.

<sup>117</sup> *Id.*; Cotton & Perdue, *supra* note 111.

<sup>118</sup> Cotton & Perdue, *supra* note 111.

<sup>119</sup> *Id.*

<sup>120</sup> See *Trump Administration Decries Family-Based Immigration Policy*, VOA NEWS, *supra* note 59.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

categories would be replaced by a single category including only “spouses and minor children of permanent resident[s].”<sup>125</sup> Adult children of residents or citizens and siblings of US citizens would no longer qualify for any family-based immigration categories.

While the parents of adult US citizens would be precluded from qualifying for *immigrant* visas through their children, the RAISE Act would create a *nonimmigrant* visa for those parents.<sup>126</sup> This so-called “W” visa would need to be re-applied for every five years.<sup>127</sup> It would *not* allow the parent visa-holders to work, and it would require the adult children to provide financial support and health coverage for their parents for the duration of their stay in the United States.<sup>128</sup>

As significant as the changes to family-based immigration would be, employment-based immigration would be even more substantially restructured by the RAISE Act.<sup>129</sup> The existing employment preference categories would be abandoned in favor of a merit-based system, which would assign points to immigrants based on favorable employment qualities.<sup>130</sup> Prospective immigrants would be awarded differing point values based on three main traits: their education level, their English proficiency, and their age.<sup>131</sup> Immigrants aged twenty-six to thirty would be awarded the highest number of points, with ever-decreasing point values for people in age categories younger or older than this range.<sup>132</sup> Those under the age of eighteen would not even be eligible to apply.<sup>133</sup> Additionally, “points [could] also be awarded for extraordinary achievement, job offers, investment in and active management of a new commercial enterprise, and having a valid offer of admission under family preference categories.”<sup>134</sup> Prospective immigrants who accrued a minimum of thirty points would be eligible to submit an online application for placement in a pool, which would sort applicants by point values.<sup>135</sup> As a threshold matter, to be eligible to enter the applicant pool, a person would also need to have a job offer meeting certain salary requirements, or a degree that is higher than a bachelor’s degree.<sup>136</sup> If an applicant wished to have their spouse immigrate with them, and if their spouse earned a lower point level, then the applicant’s point value would be decreased according to a formula established in the bill.<sup>137</sup> Every six months, the highest-ranked immigrants would be invited to

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<sup>125</sup> RAISE Act, S. 1720.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *See id.*

<sup>130</sup> RAISE Act, S. 1720.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *In-Depth Analysis: The RAISE Act*, BERARDI IMMIGR. L. (Aug. 29, 2017), <https://berardiimmigrationlaw.com/depth-analysis-raise-act/>.

<sup>135</sup> RAISE Act, S. 1720.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*



file a petition for a points-based immigrant visa.<sup>138</sup> Each fiscal year, only 140,000 immigrant visas would be issued under this category.<sup>139</sup> This is slightly less than the annual number of employment-based immigrants the United States currently accepts.<sup>140</sup>

The RAISE Act would seek to continually meet the ever-changing immigration needs of the United States by mandating that the points be reevaluated by various government agencies every four years.<sup>141</sup> At these meetings, changes in points would be based on concerns in four main areas: (1) increasing the United States' per capita growth in gross domestic product; (2) enhancing the chances of financial success for point-based immigrants; (3) cultivating the "fiscal health" of the United States; and (4) maintaining or increasing wages for domestic workers.<sup>142</sup> While these factors consider the wellbeing of the United States, its workforce, and its immigrants, it is important to note that all four deal only with economic concerns. This focus, coupled with the extreme reduction of family-based immigrant categories, highlights the major change the RAISE Act would signify to the policy goals and pathways of US immigration.

#### IV. MERIT-BASED IMMIGRATION SCHEMES IN FOREIGN JURISDICTIONS

A number of foreign jurisdictions currently employ some form of merit-based immigration. These include Australia, Austria, Canada, Denmark, Germany, Hong Kong, Japan, New Zealand, South Korea, and the United Kingdom.<sup>143</sup> Australia and Canada are most often cited as being the countries that inspired the RAISE Act and the Trump Administration's support for a merit-based immigration system.<sup>144</sup> Over the years, Australia has restructured its point-based immigration to favor the admission of skilled workers over the admission of relatives.<sup>145</sup> With the RAISE Act, the United States is contemplating adopting that same change. Furthermore, Canada was the very first country to adopt a point-based merit system

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<sup>138</sup> RAISE Act, S. 1720.

<sup>139</sup> *Id.*

<sup>140</sup> See *Legal Immigration and Status Report Quarterly Data*, *supra* note 32. In between fiscal years 2013 to 2015, on average the United States accepted 152,251 employment-based preference immigrants per year. U.S. DEP'T OF HOMELAND SEC., *supra* note 35, table 6.

<sup>141</sup> RAISE Act, S. 1720.

<sup>142</sup> *Id.*

<sup>143</sup> FED'N FOR AM. IMMIGR. REFORM, *supra* note 58.

<sup>144</sup> See, e.g., Jacqueline Williams, *Trump Looks to Australia in Overhauling Immigration System*, N. Y. TIMES, Aug. 3, 2017, <https://www.nytimes.com/2017/08/03/world/australia/trump-immigration-merit-based-points.html>.

<sup>145</sup> LARSEN, *supra* note 20.

as part of its admissions process.<sup>146</sup> Because Canada paved the way for point-based migration, and because Australia's remodeling of immigration goals mirrors the United States' own proposed changes, these countries offer a unique comparison to understand how such a radical change in US immigration policy might affect the country.

The following sections describe existing point-based immigration schemes in Canada and Australia, as well as some of their successes and shortcomings.

### **A. Canada's Immigration System**

In 1967, Canada enacted the world's first point-based immigration system.<sup>147</sup> The new legislation favored immigrants who were young, educated, experienced, and fluent in English and/or French.<sup>148</sup> Furthermore, Canada's point-based system was an attempt to reject previously-existing admissions procedures that were racially-discriminatory, favoring white applicants over non-whites.<sup>149</sup>

Since establishing a point-based immigration scheme fifty years ago, Canada has gone through several additional changes in its immigration laws.<sup>150</sup> The US Library of Congress characterized Canada's pre-2006 immigration policy as "fairly broad and generous."<sup>151</sup> However, the Canadian government then began to re-focus its immigration policy, further prioritizing the admission of permanent residents who were thought to be more likely to achieve the nation's economic goals.<sup>152</sup> Canada's Immigration and Refugee Protection Act lists its first objective for immigration as: "to permit Canada to pursue the maximum social, cultural and economic benefits of immigration."<sup>153</sup> However, the Act also includes among its objectives, an aim "to see that families are reunited in Canada."<sup>154</sup> Thus, while Canada has shifted in focus, family reunification remains a goal of its predominantly merit-based immigration system. Furthermore, many immigrants brought in under Canada's "merit" immigration program are actually family

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<sup>146</sup> THE ECONOMIST, *supra* note 19; Adam Donald, *Immigration Points-Based Systems Compared*, BBC NEWS (Jun. 1, 2016), <http://www.bbc.com/news/uk-politics-29594642>.

<sup>147</sup> THE ECONOMIST, *supra* note 19.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *See Points-Based Immigration Systems: Canada*, THE L. LIBR. OF CONG. (Jun. 9, 2015), <https://www.loc.gov/law/help/points-based-immigration/canada.php> [hereinafter *Points-Based Immigration Systems: Canada*].

<sup>151</sup> *Id.*

<sup>152</sup> *See id.*

<sup>153</sup> Immigration and Refugee Protection Act, S.C. 2001, c 27, art. 3(1)(a) (Can.) [hereinafter *Immigration and Refugee Protection Act*].

<sup>154</sup> *Id.* art. 3(1)(d).

immigrants, because they are the close relatives of the primary merit-based applicant.<sup>155</sup>

In November 2017, the Canadian government announced a three-year plan to expand its immigration program.<sup>156</sup> For the first time in over 100 years, Canadian immigration rates would rise to 1% of the country's population.<sup>157</sup> The program plans to bring in just under a million immigrants over three years.<sup>158</sup> This expansion is in response to the country's need for more high-skilled workers and province-specific labor needs.<sup>159</sup> Furthermore, Canada relies on incoming immigrants to maintain its population growth.<sup>160</sup> Thus, the changes will serve both economic and social ends.

Similar to the United States, Canada's immigration system allocates visas for permanent residents in family, employment, refugee, and miscellaneous categories or "classes."<sup>161</sup> The major non-refugee categories for immigration to Canada are the "Family Class" and the "Economic Class."<sup>162</sup> Additionally, some temporary or guest workers are able to become permanent residents, and other prospective immigrants are allowed status through humanitarian or other public policy-based programs.<sup>163</sup>

By statute, Canadian residents or citizens can sponsor an immigrant in the Family Class if the prospective resident is the "spouse, common-law partner, child, parent or other prescribed family member" of the citizen or resident.<sup>164</sup> Under certain circumstances, Canadians may also apply for a "conjugal partner," grandparent, brother, sister, nephew, niece, orphaned grandchild, or other

<sup>155</sup> Mireille Paquet, *Canada's merit-based immigration system is no 'magic bullet'*, THE CONVERSATION (Feb. 21, 2018, 6:59 PM), <http://theconversation.com/canadas-merit-based-immigration-system-is-no-magic-bullet-90923>.

<sup>156</sup> *Canada Immigration Plan Targets Near 1 Million Immigrants Over 3 Years*, IMMIGRATION.CA (Nov. 1, 2017), <http://www.immigration.ca/canada-immigration-plan-targets-near-1-million-immigrants-3-years/>.

<sup>157</sup> *Id.* In contrast, the number of immigrants the United States takes in each year constitutes only 0.3% of its population. Catherine Porter, *Canada's immigration system, lauded by Trump, is more complex than advertised*, N. Y. TIMES, Mar. 2, 2017, <https://www.nytimes.com/2017/03/02/world/canada/immigration-trump.html>.

<sup>158</sup> *Canada Immigration Plan Targets Near 1 Million Immigrants Over 3 Years*, *supra* note 156.

<sup>159</sup> Nicholas Keung, *Canadian government to raise annual immigration intake by 13% by 2020*, THE STAR (Nov. 1, 2017), <https://www.thestar.com/news/immigration/2017/11/01/canadian-government-to-raise-annual-immigrant-intake-by-13-by-2020.html>.

<sup>160</sup> Daniel Tencer, *Canada More Dependent Than Ever on Immigration, Data Shows*, HUFFINGTON POST (Oct. 3, 2017), [https://www.huffingtonpost.ca/2017/10/03/canada-more-dependent-than-ever-on-immigration-data-shows\\_a\\_23231446/](https://www.huffingtonpost.ca/2017/10/03/canada-more-dependent-than-ever-on-immigration-data-shows_a_23231446/).

<sup>161</sup> *Immigration to Canada Overview*, IMMIGRATION.CA, <http://www.immigration.ca/immigrationtocanadaoverview/> (last visited Oct. 11, 2018) [hereinafter *Immigration to Canada Overview*].

<sup>162</sup> *Id.*

<sup>163</sup> *Points-Based Immigration Systems: Canada*, *supra* note 150.

<sup>164</sup> Immigration and Refugee Protection Act, art. 12(1).

relative.<sup>165</sup> Thus, the family-based categories are broader than the current US categories, and much broader than the limited categories proposed under the RAISE Act.<sup>166</sup> Family Class immigrants to Canada also are not subjected to a points system.<sup>167</sup>

Canada's Economic Class is more complicated, and it relies on a point system for determining immigrant eligibility and admission.<sup>168</sup> The class is divided into multiple subclasses based on skillset and provincial nominee status.<sup>169</sup> The Canadian government has terminated several previously-existing business classes, including a federal investor and entrepreneur programs.<sup>170</sup>

Canada's point-based system allows Canadian provinces to sponsor immigrants based on the labor needs specific to that area of the country.<sup>171</sup> In fact, the Minister *must* consult with provincial leaders to determine how many permanent residents will be accepted in each class, how they will fill regional economic and demographic needs, and how they will be integrated into Canadian society.<sup>172</sup>

The skilled worker class is filled through a program known as "Express Entry."<sup>173</sup> Essentially, Express Entry is a program that Canada uses to rank prospective applicants for its skilled worker classes.<sup>174</sup> Prospective immigrants fill out applications with information on their background, credentials, and ties to

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<sup>165</sup> *Family Sponsorship Immigration Overview*, IMMIGRATION.CA, <http://www.immigration.ca/family-sponsorship-immigration-overview/> (last visited Oct. 11, 2018) [hereinafter *Family Sponsorship Immigration Overview*].

<sup>166</sup> *Supra* Part II, Section A; *supra* Part III.

<sup>167</sup> *Points-Based Immigration Systems: Canada*, *supra* note 150.

<sup>168</sup> *Id.*

<sup>169</sup> *See Immigration to Canada Overview*, *supra* note 161.

<sup>170</sup> *Immigrant Investor Program*, GOV'T OF CAN., <http://www.cic.gc.ca/english/immigrate/IIP-EN.asp> (last modified Aug. 23, 2018).

<sup>171</sup> *Points-Based Immigration Systems: Canada*, *supra* note 150; *Immigrate as a provincial nominee*, GOV'T OF CAN. (Jul. 6, 2017), <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/provincial-nominees.html>; *see also* Stephen Smith & Noah Turner, *A busy final quarter of 2017 for Canada's Provincial Nominee Programs*, CAN. IMMIGR. NEWSL., (Jan. 4, 2018), [https://www.cicnews.com/2018/01/a-busy-final-quarter-of-2017-for-canadas-provincial-nominee-programs-0110006.html#gs.ogbc6\\_I](https://www.cicnews.com/2018/01/a-busy-final-quarter-of-2017-for-canadas-provincial-nominee-programs-0110006.html#gs.ogbc6_I).

<sup>172</sup> Immigration and Refugee Protection Act, art. 10.2.

<sup>173</sup> *Who Qualifies for Canadian Permanent Residence/Skilled Worker Immigration?*, IMMIGRATION.CA, <http://www.immigration.ca/who-qualifies-for-canadian-permanent-residence-skilled-worker-immigration/> (last visited Oct. 11, 2018) [hereinafter *Who Qualifies for Canadian Permanent Residence/Skilled Worker Immigration?*].

<sup>174</sup> *See How Express Entry Works*, GOV'T OF CAN. (Dec. 2, 2017), <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/works.html> [hereinafter *How Express Entry Works*]. The official titles of the immigration programs facilitated by Express Entry are the Federal Skilled Worker Program, Federal Skilled Trades Program, and Canadian Experience Class. *Id.*

Canada.<sup>175</sup> Pool members are then scored using a Comprehensive Ranking System (CRS) that assigns varying point levels to each applicant based on their profile.<sup>176</sup> The CRS assigns point values based on “human capital factors,” which include age, proficiency in English and/or French, educational history, and work experience.<sup>177</sup> The human capital factors seek to identify pool members who will have the highest earning potential in Canada.<sup>178</sup> Those selected are then given the opportunity to apply (an “invitation to apply” or ITA) for permanent residence in Canada.<sup>179</sup> Upon receiving an invitation to apply, applicants have ninety days to submit their application for permanent residence.<sup>180</sup>

In the past, having a job offer provided potential applicants with a substantial amount of points, and therefore, a much higher chance of being offered an invitation to apply.<sup>181</sup> However, in November 2016, Canada restructured its CRS point allocation to lower the number of points awarded based on a standing job offer.<sup>182</sup> Before the change went into effect, about 40% of the applicants who were selected had a job offer.<sup>183</sup> After the change, this number fell to just 10%.<sup>184</sup> Not only were more potential immigrants without job offers selected to apply, but more people were eligible to even enter the express entry pool, and the gender gap among selected applicants narrowed.<sup>185</sup> These effects indicate the potential for even seemingly minor changes in immigration law to greatly impact future immigrant profiles.

Since implementing its point-based system, proponents say that Canada has earned increased support for immigration from the general public.<sup>186</sup> Additionally, merit-based systems are thought to further an immigrant’s “integration” into their new country.<sup>187</sup> However, programs such as language training and job-search support might have more to do with an immigrant’s adjustment to a new country.<sup>188</sup> In 2018, Canada plans to spend \$1 billion on

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<sup>175</sup> *Documents for Express Entry*, GOV. OF CAN., <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/documents.html> (last visited Oct. 11, 2018).

<sup>176</sup> *How Express Entry Works*, *supra* note 174.

<sup>177</sup> Stephen Smith et al., *No Job Offer? No Problem, new Express Entry Report Confirms*, CAN. IMMIGR. NEWSL., (Jan. 4, 2018), <https://www.cicnews.com/2018/01/no-job-offer-no-problem-new-express-entry-report-confirms-0110038.html#gs.T5RVY50>.

<sup>178</sup> *Id.*

<sup>179</sup> *Who Qualifies for Canadian Permanent Residence/Skilled Worker Immigration?*, *supra* note 173.

<sup>180</sup> *How Express Entry Works*, *supra* note 174.

<sup>181</sup> Smith et al., *supra* note 177.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> Paquet, *supra* note 155.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

integration services.<sup>189</sup> At least in part, the success that Canada's immigrants have seen might have more to do with the country's support of them *after* they immigrate rather than the system that allowed them to immigrate in the first place.

Furthermore, Canada's immigration system is not perfect. Some Canadian skilled immigrants are unable to obtain the accreditation they need to work in the country.<sup>190</sup> More troubling, over the past decades, Canada's immigrants have faced underemployment while its labor market has suffered from shortages.<sup>191</sup> The country has had to rely on temporary rather than permanent immigration to fill many of its labor needs.<sup>192</sup> While this may be a shortcoming of the merit-based system, it also might be a result of the slow pace of the necessarily bureaucratic immigration process being unable to keep up with a dynamic, ever-changing economy.<sup>193</sup>

## **B. Australia's Immigration System**

Australia requires all foreign citizens to obtain visas to be allowed within the country.<sup>194</sup> Just like Canada, Australia's adoption of its first point-based immigration scheme in 1979 was an attempt to prioritize immigration based on skill rather than race.<sup>195</sup> The country's immigration system has two major components known as "programs": a Migration Program and a Humanitarian Program.<sup>196</sup> Each of the two programs is further divided into streams, categories, and subclasses.<sup>197</sup> The Humanitarian Program deals largely with refugee and asylum-type immigration,<sup>198</sup> which is outside the scope of this discussion. The Migration Program consists of three "streams": Skilled, Family, and Special Eligibility.<sup>199</sup>

For the past twenty years, Australia's immigration system has gradually shifted from focusing on family-based immigration to skills-based immigration.<sup>200</sup>

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<sup>189</sup> Paquet, *supra* note 155.

<sup>190</sup> Alia Dharssi, *Skilled Immigrants Wasting Their Talents in Canada*, CALGARY HERALD, Sep. 19, 2016, <https://calgaryherald.com/news/national/skilled-immigrants-wasting-their-talents-in-canada>.

<sup>191</sup> *Id.*

<sup>192</sup> Paquet, *supra* note 155.

<sup>193</sup> *Id.* ("Matching the demands of the labour market to new immigrants is a challenge. That's due in part to the difference between the speed at which labour markets evolve and how quickly an immigration system can operate to bring job-ready candidates to any given country and employer.").

<sup>194</sup> *Points-Based Immigration Systems: Australia*, THE L. LIBR. OF CONG. (Jun. 9, 2015), <https://www.loc.gov/law/help/points-based-immigration/australia.php> [hereinafter *Points-Based Immigration Systems: Australia*].

<sup>195</sup> THE ECONOMIST, *supra* note 19.

<sup>196</sup> *Points-Based Immigration Systems: Australia*, *supra* note 194.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> LARSEN, *supra* note 20.

In the late 1990s, the Family Stream made up for more than 50% of the migration program.<sup>201</sup> However, as recently as 2012 to 2013, this stream comprised less than a third of migrant allocations.<sup>202</sup> While family-based immigration decreased about 20%, employment-based immigration (from the “Skilled” Stream) increased roughly the same amount.<sup>203</sup> This shift was intentional, and it reflects the present goals of Australia’s immigration framework.<sup>204</sup> In 2013, Australia’s then-immigration minister, Scott Morrison, emphasized this objective, stating, “the primary purpose of our immigration program is economic, not social, in our view. Immigration is an economic policy, not a welfare policy.”<sup>205</sup> Mr. Morrison’s statement reflects the thought process shared by the US lawmakers who have introduced the RAISE Act.<sup>206</sup>

From 2015 to 2016, Australia accepted 189,770 permanent residents.<sup>207</sup> Of this number, 128,550 migrants, or roughly two-thirds, came through the skilled stream.<sup>208</sup> Only 57,400, or about 30%, came through the family stream.<sup>209</sup> These numbers further indicate Australia’s continuing commitment to emphasizing skills-based over family-based immigration.

However, this is not to say that Australia does not continue valuing family immigration. For example, in 2017, Australia also adopted a temporary visa for the parents of Australians.<sup>210</sup> This visa is quite similar to the “W Visa” proposed by

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<sup>201</sup> *Points-Based Immigration Systems: Australia*, *supra* note 194.

<sup>202</sup> *See id.*

<sup>203</sup> *See id.*

<sup>204</sup> LARSEN, *supra* note 20. In contrast to Australia’s skilled labor-immigration focus, the United States’ current system heavily emphasizes family-based immigration. *See* Helen Clark, *Australia is Scrapping a Key Component of the Merit-Based Immigration System Trump Wanted to Borrow From*, HUFFINGTON POST (May 5, 2017), [https://www.huffingtonpost.com/entry/australia-trump-merit-based-immigration\\_us\\_590a84c7e4b05c39768621ca](https://www.huffingtonpost.com/entry/australia-trump-merit-based-immigration_us_590a84c7e4b05c39768621ca). Helen Clark writes: “America’s immigration system is more family-oriented. According to the Hechinger Report, a nonprofit news agency focusing on inequality in education, ‘Seven out of 10 immigrants to Australia are accepted based on having skills the government and employers say are needed. In the United States the proportion of immigrants admitted for their skills is less than two in 10.’” *Id.*

<sup>205</sup> LARSEN, *supra* note 20 (citing S. Morrison, Minister for Immigration and Border Protection, Speech presented to the Migration Institute of Australia National Conference (2013)); S. Morrison, Minister Immigration and Border Protection, Australia’s immigration future under a Coalition Government (2013).

<sup>206</sup> *See generally* Cotton & Perdue, *supra* note 111.

<sup>207</sup> *2015-16 at a glance*, AUSTL. GOV’T, <https://www.homeaffairs.gov.au/about/reports-publications/research-statistics/statistics/year-at-a-glance/2015-16> (last visited Oct. 10, 2018) [hereinafter *2015-16 at a glance*].

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Introducing a five year temporary sponsored visa for parents*, AUSTL. GOV’T, <https://www.homeaffairs.gov.au/Trav/Visi/temporary-sponsored-visa-parents> (last visited Oct. 10, 2018) [hereinafter *Introducing a five year temporary sponsored visa for parents*].

the United States' RAISE Act.<sup>211</sup> It allows Australians to sponsor their parents to be given a visa for a five-year period, provided that their stay does not burden the Australian healthcare system.<sup>212</sup> Thus, like the W Visa, the provision serves family unity goals (albeit to a limited extent) while safeguarding the country's economic interests.

Australia's skills-based/points immigration system is similar to Canada's—interested prospective migrants fill out a survey with general information on their identity, qualifications, and connections to Australia, and the highest-ranked participants are given an offer to apply for permanent residency.<sup>213</sup> Australia's version of Canada's "Express Entry" is known as "SkillSelect."<sup>214</sup> The initial survey is known as an "Expression of Interest" (EOI).<sup>215</sup> Australian government personnel or employers can then look for desired candidates and nominate those in the SkillSelect pool for a skilled visa.<sup>216</sup> To apply for a visa through the skilled migration category, a prospective migrant must both submit an EOI and receive an invitation.<sup>217</sup>

While Canada has lowered the number of points awarded for having a job offer, Australia has removed this aspect from its points system altogether—employees seeking to immigrate through a sponsoring employer are not subjected to the points system.<sup>218</sup> However, similar to Canada, Australia has allowed for advantages to prospective immigrants who have been invited or endorsed by a state or government entity.<sup>219</sup> In contrast, the RAISE Act would require either a job offer or an advanced degree, and does not provide for any state or territory input.

Australia's system also includes a "character test" to ensure that accepted immigrants do not pose a safety concern or a threat to Australian society.<sup>220</sup> Essentially, this means that they cannot possess any disqualifying crimes—a requirement that is found in all three countries' immigration laws.<sup>221</sup>

Critics of Australia's merit-based system concede that while it brings in skilled workers, those immigrants are forced to compete for unskilled jobs, causing

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<sup>211</sup> *Supra* Part III.

<sup>212</sup> *Introducing a five year temporary sponsored visa for parents, supra* note 210.

<sup>213</sup> *See SkillSelect*, AUSTRALIAN GOVERNMENT, <https://www.homeaffairs.gov.au/Trav/Work/SkillSelect> (last visited Oct. 11, 2018) [hereinafter *SkillSelect*].

<sup>214</sup> *See SkillSelect, supra* note 213.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> Adam Donald, *Immigration points-based systems compared*, BBC NEWS (Jun. 1, 2016), <http://www.bbc.com/news/uk-politics-29594642>.

<sup>219</sup> Khanh Hoang, *Explainer: what is Australia's 'points system' for immigration?*, THE CONVERSATION (June 22, 2016, 1:58 AM), <https://theconversation.com/explainer-what-is-australias-points-system-for-immigration-26065>.

<sup>220</sup> Donald, *supra* note 218.

<sup>221</sup> *Id.*; INA § 212(a); *Points-Based Immigration Systems: Canada, supra* note 150.



problems for both the immigrants and the economy.<sup>222</sup> There are several possible explanations for the system's failure to bring in the right workers to meet the country's labor needs. Bob Birrell, president of the Australian Population Research Institute, suggests that it is problematic that there is "no assessment as to whether the skills that the applicant possesses are actually in demand" in Australia.<sup>223</sup> He thinks the plan favors recent graduates from Australian universities rather than looking at the country's actual immigration needs.<sup>224</sup> An Australian legal scholar further notes that the system cannot account for "soft" skills that employees might value, such as communication, adaptability, and resilience.<sup>225</sup>

## V. WOULD POINT-BASED IMMIGRATION WORK FOR THE UNITED STATES?

Point-based immigration systems have had mixed results in other countries.<sup>226</sup> In theory, it makes sense that an immigration system whose main goal is to recruit educated, skilled workers for available jobs would benefit both the receiving country and the arriving workforce. The receiving country would benefit from having talented workers boost its economy, and the workforce would benefit from rewarding work in a desirable location. However, in practice, this benefit has not always come to fruition. Massimiliano Tani, an Australian professor, writes that "the point system does not avoid the possibility that immigrants will end up in jobs below their level of education, ability and experience, hence contributing less than their true potential to the economic well-being of the host country."<sup>227</sup> Not only are skilled immigrants harmed when they are forced to take "lesser" jobs, but receiving countries sometimes have difficulty filling jobs that might otherwise be taken by an immigrant workforce possessing more diverse skills of varying levels.<sup>228</sup> Thus, by overemphasizing an applicant's "merit," point-based systems might fail to recognize and effectively respond to a country's actual labor needs. According to Mr. Tani, this is harmful for both the country and the immigrants.

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<sup>222</sup> See Clark, *supra* note 204 (quoting Azedah Dastyari, who states: "On the one hand [Australia's immigration system] has attracted more educated and wealthy migrants. However, there has been no guarantee that high-skilled migrants will in fact be able to move into high-skilled jobs. . . . As a result, there is the situation of high-skilled migrants competing for unskilled labor.").

<sup>223</sup> Williams, *supra* note 144.

<sup>224</sup> See *id.*

<sup>225</sup> Williams, *supra* note 144.

<sup>226</sup> THE ECONOMIST, *supra* note 19.

<sup>227</sup> Massimiliano Tani, *Using a Point System for Selecting Immigrants*, IZA WORLD OF LABOR, May 2014, at 1, <https://wol.iza.org/uploads/articles/24/pdfs/using-a-point-system-for-selecting-immigrants.pdf>.

<sup>228</sup> See *id.*

In addition to mixed outcomes in other countries, some scholars suggest that such an immigration system would fail in the United States in particular.<sup>229</sup> These are based in part on the same concerns expressed above—that if the United States focused too heavily on skilled immigrants, the immigrant labor force and domestic labor needs would not line up,<sup>230</sup> prolonging the need for expanded guest worker programs.<sup>231</sup> A system geared predominantly towards bringing in skilled laborers could not adequately respond to the diverse labor needs of the United States labor market or its employers; rather than responding to economic needs, it would risk furthering “un-American” values to preserve a certain demographic “ideal.”<sup>232</sup> There would be too many skilled laborers, and no one to fill the United States’ need for low-skilled labor. Thus, migrant and temporary guest workers would still be needed to fill that void, and the United States would need to increase immigration levels again, partially undoing the RAISE Act’s effects insofar as it seeks to limit immigration levels.

One study predicts that the RAISE Act could be devastating for the United States economy by “depress[ing] the United States’ gross domestic product and result[ing] in 1.3 million fewer jobs in the decade after its enactment.”<sup>233</sup> The study projected that the drastic decrease in the overall number of lawful immigrants would lead to this economic decline, even though the RAISE Act would bring in more educated immigrants.<sup>234</sup> The analysis further predicted that domestic workers could not fill the job positions that would be filled by immigrants if current immigration rates were maintained.<sup>235</sup> Senators Cotton and Perdue, as discussed above, do not think this would be an issue.<sup>236</sup> They believe that low-skill labor positions *would* be filled by domestic workers.<sup>237</sup> Furthermore, they believe that wages might even increase for those workers.<sup>238</sup>

One aspect of the RAISE Act that Canada has had some success with is the idea of ongoing review. The RAISE Act provides that its points systems should be reviewed and potentially adjusted on a regular basis. As discussed, this would be done every four years, by having the points reviewed by a group of government agencies who would have the authority to edit them to better line up with the United

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<sup>229</sup> See e.g., Scalzo, *supra* note 63.

<sup>230</sup> See Porter, *supra* note 157 (“‘If America changes toward [the Canadian] system, the Apples and Microsofts and Googles will be very happy,’ said Robert Vineberg, a retired regional director general of immigration. ‘But the vegetable growers in California will not be so happy.’”).

<sup>231</sup> See *id.*

<sup>232</sup> See Porter, *supra* note 157, at 944.

<sup>233</sup> CQ Roll Call Staff, *Wharton Analysis Says RAISE Bill Could Reduce GDP, Number of Jobs*, 2017 WL 3445674 (Aug. 11, 2017).

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> See Cotton & Perdue, *supra* note 111.

<sup>237</sup> See *id.*

<sup>238</sup> See *id.*

States' then-present economic goals.<sup>239</sup> The Canadian system also provides for certain "instructions" to be re-evaluated every five years.<sup>240</sup> Thus, the United States' mandate to continually re-evaluate its point system is not unique, and, as mentioned, this process has worked for Canada. A good example of this is the country's 2016 reforms which greatly decreased the number of points which applicants received just for having job offers. The change resulted in less gender disparity in the pool of persons eligible to be invited to apply for Canadian residency, and it allowed eligibility for applicants who previously would not have even qualified.<sup>241</sup> Thus, the RAISE Act's provision that the points system should be reviewed on a regular basis might allow the United States to better respond to changing economic and social goals to be filled by immigration. Relatedly, in late 2017, Canada announced its plan to expand immigration levels in order to better respond to ongoing labor and population growth needs.<sup>242</sup>

After Canada implemented the merit-based system, the general public's views on immigration improved.<sup>243</sup> Perhaps this was a result of bringing in a set of immigrants who, as a whole, better fit the country's social and economic needs as a result of being subject to the merit-based application process. Similarly, the majority of Australians have a positive view of immigration, believing that it makes their country and economy stronger.<sup>244</sup> In contrast, the United States has less positive views on immigration, and, as a result, could be a less attractive option for foreign-born high-skilled workers.<sup>245</sup> Some would-be immigrants feel they would not be welcomed in the United States and instead opt to immigrate to Australia or other countries.<sup>246</sup> It is possible that the RAISE Act might help (at least merit-based) immigrants feel more welcome, and that it might improve the US population's views on immigration. Or, given the drastic cuts in lawful immigration levels that the RAISE Act would lead to, it might make immigrants feel even more alienated.

President Trump believes that the RAISE Act will help immigrants better integrate to life in the United States.<sup>247</sup> However, a merit-based plan could certainly not do so on its own. Helping immigrants be successful in a new country depends not only on the process by which they are selected for entry, but also the support that is provided after acceptance. Canada expends significant resources helping its immigrant population adjust to life in the country—as noted above, in 2018, Canada

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<sup>239</sup> See *supra* Part III.

<sup>240</sup> Immigration and Refugee Protection Act, art. 14.1(9).

<sup>241</sup> See *supra* Part IV, Section A.

<sup>242</sup> Keung, *supra* note 159.

<sup>243</sup> Paquet, *supra* note 155.

<sup>244</sup> Jon Marcus, *How Other Countries are Recruiting Skilled Immigrants Who Won't Come Here*, HECHINGER REP. (Mar. 21, 2016), <https://hechingerreport.org/in-one-country-immigration-is-seen-not-as-a-burden-but-as-an-economic-gain/>.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Supra* Part I.

plans on spending one billion dollars on these services.<sup>248</sup> The United States, likewise, has some programs in place which help immigrants succeed after being accepted as residents.<sup>249</sup> The country should continue to develop such programs, especially with uncertainty caused by the perceived (and actual) anti-immigrant sentiment encouraged by the current administration. For example, the United States is considering canceling work permits it had previously authorized for the spouses of skilled immigrant laborers.<sup>250</sup> Existing Canadian programs would happily accept the laborers in addition to allowing their spouses to obtain work permits that would allow them to work in Canada, so that those immigrant homes did not lose an income.<sup>251</sup> This contemplated change in US policy, alongside an existing Canadian policy, while unrelated to the RAISE Act's provisions in particular, reflects the need for immigration policies to be conscious of both economic and social concerns. This includes the needs of the immigrants themselves.

A major difference between the RAISE Act and the Canadian and Australian schemes is the lack of state or local government involvement in the US plan. Both Canada and Australia allow for provinces or territories to invite or endorse potential immigrants, providing them with more points and a greater chance at immigrating through their respective point-based schemes.<sup>252</sup> The idea behind this is to allow certain regions to have some level of influence over bringing in immigrants who will benefit their particular labor markets. The RAISE Act would not provide for this type of state influence over immigrant selection in the United States. Given that the Canadian and Australian plans were looked to for inspiration for the US plan, this was likely an intentional decision. Perhaps this is tied to federalism concerns about the allocation of power between federal and state governments. Historically, in the United States, immigration has been regulated almost solely by the former.<sup>253</sup> Yet, if the RAISE Act's purpose is primarily to respond to the nation's employment needs, wouldn't it make sense for the more local state governments to be given some level of input? This is how Canada and Australia have sought to address localized economic concerns with a federal immigration plan. However, just because provincial/state input works in Canada and Australia does not necessarily mean that the same would be true in the United

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<sup>248</sup> Paquet, *supra* note 155.

<sup>249</sup> For a comparison of integration programs in the United States and Canada, *see generally* PHILIPPA STRUM & DAVID BIETTE, EDUCATION AND IMMIGRANT INTEGRATION IN THE UNITED STATES AND CANADA, MIGRATION POL'Y INST. (2005), <https://www.migrationpolicy.org/research/education-immigrant-integration-united-states-canada>.

<sup>250</sup> Stephen Smith, *Looming U.S. crackdown could strip the right to work from thousands of foreign worker spouses*, CAN. IMMIGR. NEWSL. (Apr. 6, 2018), [https://www.cicnews.com/2018/04/looming-u-s-crackdown-could-strip-right-to-work-from-thousands-of-foreign-worker-spouses-0410482.html#gs\\_IOTp24](https://www.cicnews.com/2018/04/looming-u-s-crackdown-could-strip-right-to-work-from-thousands-of-foreign-worker-spouses-0410482.html#gs_IOTp24).

<sup>251</sup> *Id.*

<sup>252</sup> *Supra* Part IV, Section A (discussing Canada's immigration system); *supra* Part IV, Section B (discussing Australia's immigration system).

<sup>253</sup> *See, e.g., Fiallo*, 430 U.S. at 792.

States. As one journalist noted, “countries cannot simply copy and paste policy and expect it to work.”<sup>254</sup>

## VI. CONCLUSION

In borrowing inspiration from foreign immigration structures, the United States should not only consider the letter of the law, but also the consequences of that law. The RAISE Act would result in a drastic departure from the United States’ current immigration system. Family-based immigration levels would drop dramatically. Currently, family-based immigrants make up around 670,000 of the roughly one million immigrants accepted in the United States each year.<sup>255</sup> Under the amended statutory scheme, overall immigration levels would drop to around 540,000.<sup>256</sup> Thus, the RAISE Act would result in total immigration levels that are less than the existing family-based levels alone. Furthermore, rather than having a variety of employment-based categories for workers of different backgrounds and skills, the RAISE Act would create a merit-based system which would limit employment-based immigration to only those immigrants possessing certain high-value skills or achievements. As Canada, and particularly Australia, have shown, an immigration scheme which favors high-skilled applicants rather than reflecting the actual job-market needs could have subtle negative effects for both arriving workers and receiving countries. Furthermore, the over-emphasis on “merit” undermines the valuable contributions made by family-based and non-skilled immigrants. The United States should re-think the RAISE Act so that it can respond to the various skill-levels its labor market needs without compromising either the social functions served by immigration or the needs of immigrants themselves. As journalist Laura Wides-Muñoz put it, “[f]amily-based immigration has ‘merit,’ too.”<sup>257</sup>

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<sup>254</sup> Clark, *supra* note 204.

<sup>255</sup> See *Legal Immigration and Status Report Quarterly Data*, *supra* note 32.

<sup>256</sup> Alvarez, *supra* note 13; see also RAISE Act, S. 1720.

<sup>257</sup> Wides-Muñoz, *supra* note 63.

