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## The Strategic Use of Mexico to Restrict South American Access to the Diversity Visa Lottery

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# The Strategic Use of Mexico to Restrict South American Access to the Diversity Visa Lottery

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## I. INTRODUCTION

In 1990, Congress enacted the Family Unity and Employment Opportunity Act (the “1990 Act”), which created a visa lottery to enhance the diversity of the immigrant stream and to ensure that areas of the world sending relatively few immigrants to the United States could still have access to the immigrant stream.<sup>1</sup> In order to achieve these goals, Congress created a complex formula by which 55,000 “diversity” visas would be distributed annually among six geographically defined regions based on the total number of

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1. See 8 U.S.C. § 1153(c) (2005) (setting forth the diversity visa lottery). With the release of the 2004 immigration statistics, we can now review the effects of 10 years of the permanent diversity visa lottery.

immigrant admissions from each region.<sup>2</sup> Under this formula, regions with relatively low admission rates are granted more visas than regions with relatively high admission rates.<sup>3</sup>

As the bulk of immigrants to the United States come from Asia and North America (primarily Mexico), it is not surprising that fewer diversity visas are granted to North American and Asian immigrants than to immigrants from Europe and Africa.<sup>4</sup> What is startling is how few diversity visas are allotted to immigrants from South America, even though every year there are fewer non-diversity<sup>5</sup> immigrants from South America than from Europe.<sup>6</sup> For example, in 2004, South America accounted for approximately 8% of all non-diversity immigrant admissions, significantly less than the 12% that came from Europe.<sup>7</sup> In that same year, almost 38% of all diversity visa

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2. 8 U.S.C. § 1153(c)(1).

3. See *id.* The population of each region also plays a role in the calculus. For purposes of this Note, that part of the diversity formula can be largely ignored, but it does explain why the Oceania region qualifies for so few diversity visas.

4. See *infra* app. tbls. 3 & 5.

5. This Note refers to all visas issued under any provision other than the diversity visa lottery as “non-diversity” visas, and any immigrants admitted under any non-diversity visas as non-diversity immigrants.

6. See OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SECURITY, 2004 YEARBOOK OF IMMIGRATION STATISTICS tbl. 8, available at <http://uscis.gov/graphics/shared/statistics/yearbook/2004/table8.xls> [hereinafter 2004 YEARBOOK]; OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SECURITY, 2003 YEARBOOK OF IMMIGRATION STATISTICS 29-32 tbl.8, available at <http://uscis.gov/graphics/shared/statistics/yearbook/2003/2003Yearbook.pdf> [hereinafter 2003 YEARBOOK]; OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SECURITY, 2002 YEARBOOK OF IMMIGRATION STATISTICS 30-33 tbl.8, available at <http://uscis.gov/graphics/shared/statistics/yearbook/2002/Yearbook2002.pdf> [hereinafter 2002 YEARBOOK]; IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEP’T OF JUSTICE, 2001 STATISTICAL YEARBOOK 42-45 tbl.8, available at <http://uscis.gov/graphics/shared/statistics/yearbook/2001/yearbook2001.pdf> [hereinafter 2001 YEARBOOK]; IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEP’T OF JUSTICE, 2000 STATISTICAL YEARBOOK 44-47 tbl.8, available at <http://uscis.gov/graphics/shared/statistics/yearbook/2000/Yearbook2000.pdf> [hereinafter 2000 YEARBOOK]; IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEP’T OF JUSTICE, 1999 STATISTICAL YEARBOOK 44-47 tbl.8, available at <http://uscis.gov/graphics/shared/statistics/yearbook/1999/FY99Yearbook.pdf> [hereinafter 1999 YEARBOOK]; IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEP’T OF JUSTICE, 1998 STATISTICAL YEARBOOK 44-47 tbl.8, available at <http://uscis.gov/graphics/shared/statistics/yearbook/1998/1998yb.pdf> [hereinafter 1998 YEARBOOK]; IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEP’T OF JUSTICE, 1997 STATISTICAL YEARBOOK 44-45 tbl.8, available at <http://uscis.gov/graphics/shared/statistics/yearbook/1997YB.pdf> [hereinafter 1997 YEARBOOK]; IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEP’T OF JUSTICE, IMMIGRATION TO THE UNITED STATES IN FISCAL YEAR 1996 tbl.6, available at <http://uscis.gov/graphics/shared/statistics/archives/fy96/1007.htm> [hereinafter IMMIGRATION IN FISCAL YEAR 1996]; IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEP’T OF JUSTICE, IMMIGRATION TO THE UNITED STATES IN FISCAL YEAR 1995 tbl.6, available at <http://uscis.gov/graphics/shared/statistics/archives/fy95/133.htm> [hereinafter IMMIGRATION IN FISCAL YEAR 1995].

7. See 2004 YEARBOOK, *supra* note 6, tbl.8.

immigrants came from Europe, but only 3% of all diversity immigrants came from continental South America.<sup>8</sup>

This Note will shed light on the legislative slight of hand responsible for this discrepancy, which has been largely overlooked in the debate surrounding the diversity visa lottery: the strategic definition of the South America region.<sup>9</sup> By defining the South America region to include, for diversity lottery purposes, Mexico, Central America, the Caribbean, and the South American continent, the drafters of the diversity lottery were able to limit a cultural group's access to the lottery while simultaneously ensuring that a maximum number of lottery visas would be available for European and African immigrants.

To put the enactment of the diversity visa lottery in context, Part II will offer a brief overview of the history of U.S. immigration law and policy through the 1990 Act, and Part III will discuss the

8. See *id.* This Note compares admissions in the same year to illustrate the lottery's actual effect on the immigrant stream. When the number of visas to be sent to each region is actually calculated, however, all admissions from the past 5 years (including diversity-based admissions) are tabulated. 8 U.S.C. § 1153(c) (2005).

9. Most of the debate about the lottery has centered on the propriety of promoting diversity by admitting more Europeans, or by discriminating between countries and regions generally. See, e.g., Bill Ong Hing, *No Place for Angels: In Reaction to Kevin Johnson*, 2000 U. ILL. L. REV. 559, 587-89 (2000) (discussing approaches used to reduce immigration from Asia and Latin America and concluding that the diversity visa lottery "is evidence . . . that current immigration law is tainted by race discrimination"); Kevin R. Johnson, *Race, the Immigration Laus, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111, 1135 (1998) (noting that Congress, "in an ironic twist of political jargon" established the diversity visa lottery which, "though facially neutral, prefers immigrants from nations populated primarily by white people"); Stephen H. Legomsky, *Immigration, Equality and Diversity*, 31 COLUM. J. TRANSN'L L. 319, 330, 333-34 (1993) (discussing the rationales for the "so-called 'diversity' program" and the questions it raises about "the role that ethnicity should play in our immigration laws"); Stanley Mailman, *Upcoming Visa Lottery*, N.Y. L.J., Feb. 28, 1994, at 3 (discussing the possible policies behind the diversity visa lottery and stating that the underlying implication - "that natives of one country are . . . less desirable than those of another" - is an "unfortunate addition" to our immigration system); Kunal M. Parker, *Official Imaginations: Globalization, Difference, and State-Sponsored Immigration Discourses*, 76 OR. L. REV. 691, 713-14 (1997) (noting that "the very existence of a category of immigration based purely on difference is at odds with an emphasis on productivity, skills, resources, and self-sufficiency as organizing principles of legal immigration"); Symposium, *Challenges in Immigration Law and Policy: An Agenda for the Twenty-First Century*, 11 N.Y.L. SCH. J. HUM. RTS. 521, 537-39 (1994) (arguing that the diversity visa lottery's attempt to help countries "adversely affected" by the repeal of the national origins quota system is comparable to an attempt to benefit whites that were "adversely affected" by the 1964 Civil Rights Act); Jan C. Ting, *"Other than a Chinaman": How U.S. Immigration Law Resulted From and Still Reflects a Policy of Excluding and Restricting Asian Immigration*, 4 TEMP. POL. & CIV. RTS. L. REV. 301, 308-10 (1995) (arguing that the diversity visa lottery works to exclude Asian immigrants); Walter P. Jacob, Note, *Diversity Visas: Muddled Thinking and Pork Barrel Politics*, 6 GEO. IMMIGR. L.J. 297, 311-13, 329-30, 337-43 (1992) (describing lobbying efforts by an Irish political interest group in favor of the diversity visa lottery, and noting the problems inherent in the use of any "diversity" criteria to effectuate immigration policy).

legislative history of the diversity visa lottery. Part IV will provide a detailed exploration of the effects of the distinctive region definitions in the "so-called" diversity visa lottery<sup>10</sup> and the ostensible reasons for these definitions. Finally, Part V will discuss a number of potential solutions to this disparate treatment (including legislation introduced this year that would eradicate the lottery, albeit for very different reasons), advocating ultimately in favor of a random lottery that does not discriminate with respect to nationality or ethnicity.

## II. SETTING THE STAGE

Few issues "cut as deeply into the emotions of Americans as immigration. That is why comprehensive, fundamental reform of immigration policy occurs infrequently."<sup>11</sup> This Section will set the stage for one of those rare attempts to fundamentally reform U.S. immigration policy: the Family Unity and Employment Opportunity Act of 1990, which enacted the diversity visa lottery. To put the 1990 Act in context, this section will present a brief history of U.S. immigration law, followed by an overview of the principles and policies that guide immigration reform and an explanation of how those principles and policies affected the 1990 Act.

### A. A Brief History

Congress enacted virtually no immigration restrictions until 1875, thus permitting a large influx of Chinese and European immigrants seeking opportunities associated with the California gold rush and the construction of the transcontinental railroad.<sup>12</sup> But in 1875, Congress began a pattern of restricting immigration along racial lines by making it a felony to contract to supply Chinese laborers.<sup>13</sup> Subsequent acts prohibited the immigration of "all persons of the Chinese race" except for elite classes such as government officials, and required all Chinese nationals to obtain certificates of identity.<sup>14</sup>

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10. Legomsky, *supra* note 9, at 320.

11. Lawrence H. Fuchs, *Immigration Policy and the Rule of Law*, 44 U. PITT. L. REV. 433, 433 (1983).

12. James F. Smith, *A Nation that Welcomes Immigrants? An Historical Examination of United States Immigration Policy*, 1 U.C. DAVIS J. INT'L L. & POL'Y 227, 228-29 (1995).

13. *Id.* at 230; see also Ting, *supra* note 9, at 302-03 ("The popular view of Chinese as criminals and prostitutes led to the enactment of the first federal statute restricting immigration in 1875, an act which excluded criminals and prostitutes from immigrating to the United States.")

14. Ting, *supra* note 9, at 303-04; see also Smith, *supra* note 12, at 230 (noting that the Chinese Exclusion Act of 1882 "banned the immigration of Chinese laborers for ten years . . . and

Chinese immigrants found without certificates of identity would be deported unless their legal residence could be established by a "credible white witness."<sup>15</sup> By 1917, Congress had restricted immigration from other Asian countries and excluded other "undesirables" from the immigration stream, such as convicts, prostitutes, disabled persons, anarchists, polygamists, alcoholics, illiterates over age 16, and paupers.<sup>16</sup>

In the 1920s, Congress modified its immigration policy by enacting and refining a national origins quota system designed to "preserve the Northern European and British Isles composition of the population" by forcing the ethnic composition of the immigration stream to mirror the ethnic proportions of foreign persons already present in the United States.<sup>17</sup> By 1952, Congress had eliminated all exclusions based on race (perhaps out of deference to its World War II and Korean War allies)<sup>18</sup>; but the national origins quota system remained in effect until the civil rights turmoil of the 1960s.<sup>19</sup>

Congress repealed the national origins quota system in 1965, replacing it with a new focus on family reunification and uniform per-country ceilings, codified in the Immigration Act of 1965 (the "1965 Act").<sup>20</sup> The unpredicted effect of the 1965 Act, however, was the

prohibited Chinese from becoming United States citizens"). The Supreme Court upheld these acts, declaring that Congress's power to exclude and deport aliens was absolute. *See Chae Chan Ping v. United States*, 130 U.S. 581, 606-10 (1889) (upholding the Chinese Exclusion Act of 1882); *Fong Yue Ting v. United States*, 149 U.S. 698, 711-14, 728-32 (1893) (upholding the 1892 Act, which imposed the certificate of identity requirement); *see also Ting, supra note 9*, at 303-05 (discussing the Supreme Court's holdings, in *Chae Chan Ping* and *Fong Yue Ting*, that Congress has "absolute power" to exclude and order deportations").

15. *Ting, supra note 9*, at 303-04.

16. *See Smith, supra note 12*, at 230-31.

17. *Id.* at 232-33 & n.29; *see also* RICHARD D. STEEL, *STEEL ON IMMIGRATION LAW* §§ 1:1, 4 (1985) (describing the quota system). The Americas remained exempt from the established quotas, *Smith, supra note 12*, at 232, but Congress further restricted Asian immigration during this period by limiting immigration from the "Asiatic barred zone" (essentially China, Japan, and Korea), *Legomsky, supra note 9*, at 327. *See also Fuchs, supra note 11*, at 433-34 (discussing the quota system).

18. *See Smith, supra note 12*, at 233 (stating that Congress repealed the Chinese exclusion during World War II "because it felt that such legislation represented a continuing insult to its Chinese ally").

19. *Ting, supra note 9*, at 305-06; *Smith, supra note 12*, at 233. In 1952 Congress also passed laws favoring highly skilled workers as immigrants and curbing illegal immigration from Mexico. *Smith, supra note 12*, at 233.

20. *Legomsky, supra note 9*, at 328; *see also Smith, supra note 12*, at 233-34 (discussing the repeal of the national origins quota system and the imposition of per-country limits); Kiera LoBreglio, Note, *The Border Security and Immigration Improvement Act: A Modern Solution to a Historic Problem?*, 78 ST. JOHN'S L. REV. 933, 938 (2004) (discussing the 1965 Act's focus on family reunification). While Asian immigration increased dramatically following passage of the Act, immigration from the Americas was limited for the first time (albeit only by a hemisphere quota until 1976, when the country quotas were applied to the Americas), resulting in a severe

creation of a "geographically uneven immigrant stream" and long delays in the visa issuance process.<sup>21</sup> Another unforeseen effect of the 1965 Act was to increase illegal immigration from Mexico, a country which previously had not been subjected to the quotas.<sup>22</sup> In 1986, Congress responded to concerns about illegal immigration with the Immigration Reform and Control Act (the "IRCA"). The IRCA imposed sanctions on employers for hiring undocumented workers, allocated more money for border control, and granted amnesty to illegal immigrants who had been present continuously in the United States since 1982.<sup>23</sup>

Following the enactment of the IRCA, Congress also began a series of temporary programs designed to increase the number of visas available for countries determined to be "underrepresented" or "adversely affected" by the repeal of the national origins quota system

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backlog and long delays to would-be Mexican and Caribbean immigrants. *See id.* at 938 ("As a result [of the 1965 Act] an unforeseen volume of Mexican and Caribbean immigrants . . . caused huge delays in the visa application process; this backlog delayed family reunification, which may have actually spurred illegal immigration." (internal citation and quotation marks omitted)); Smith, *supra* note 12, at 234-35 & n.44 (discussing the problems the limit on Western Hemisphere immigration posed for Mexican immigrants, and the imposition of country ceilings on Western Hemisphere countries in 1976). Moreover, the family reunification policy may have exacerbated these delays by increasing the number of prospective immigrants with qualifying family ties to the United States. Legomsky, *supra* note 9, at 328-29. Although these effects may seem obvious in hindsight, there is some evidence that Congress did not think the effect would be so dramatic. *See, e.g.*, 136 CONG. REC. S7793 (daily ed. Jan. 3, 1989) (statement of Sen. Moynihan).

21. Legomsky, *supra* note 9, at 328-29; *see also infra* note 44. Attempts to remedy these delays have made little progress. As of September 2005, the current waiting period for a prospective immigrant in the Philippines in the first and third preference categories (unmarried and married adult sons and daughters of citizens) is approximately fifteen years. U.S. Dep't of State, *Visa Bulletin* (Sept. 2005), available at [http://travel.state.gov/visa/frvi/bulletin/bulletin\\_1360.html](http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html). A Philippine immigrant in the fourth preference (brothers and sisters of adult citizens) can expect a twenty-two year wait. *Id.* The wait for similar Mexican immigrants is currently thirteen to twenty-two years. *Id.*

22. Smith, *supra* note 12, at 235; *see also* Frederick G. Whelan, *Principals of U.S. Immigration Policy*, 44 U. PITT. L. REV. 447, 456-57 (1983) (noting that "the whole phenomenon of illegal immigration from south of the United States border is partly an artifact of recent changes in American law" and that the policy of policing the border "has given those coming now an incentive to bring their families and stay, rather than travel back and forth as in the past"). The long visa delays caused by the Act may also have been partially responsible for the increase in illegal immigration. LoBreglio, *supra* note 20, at 938.

23. LoBreglio, *supra* note 20, at 939; *see also* Smith, *supra* note 12, at 236-40 (discussing the provisions of the IRCA). The amnesty program aimed to curb illegal immigration by providing a clean slate on which to implement the new immigration policies, which focus on "the rule of law." *See infra* Part II.B (discussing the rule of law principle, one of three principles that make up current United States immigration policy). The IRCA also created new categories of temporary workers and non-immigrant workers, such as seasonal agricultural workers. Smith, *supra* note 12, at 236-40.

in 1965.<sup>24</sup> With the 1990 Act, Congress further addressed concerns about perceived imbalances in U.S. immigration policy by allocating more visas for some family-based categories, increasing employment-based immigration, and creating the diversity visa lottery.<sup>25</sup> The employment provisions were aimed at “highly-educated or highly-skilled” immigrants, as well as “wealthy foreigners” who would invest at least one million dollars into the creation of a “new commercial enterprise.”<sup>26</sup> The diversity visa lottery, which built on the temporary programs designed to benefit “adversely affected” countries, allocated visas to aliens from countries with low U.S. admission rates in an attempt to “restructure the ethnic mix of the immigrant pool.”<sup>27</sup>

### B. Policies and Principles

The current landscape of U.S. immigration policy is as convoluted as its history. Although family reunification is still the preferred model, at least according to many legislators, it no longer dominates the policy landscape as it did under the 1965 Act. Rather, policymakers now confront multiple “issues on which moral and political philosophy comes face to face with the practical exigencies of legislation.”<sup>28</sup>

At least three principles currently guide the formulation of U.S. immigration policy: international cooperation, the rule of law, and the notion of an “open society.”<sup>29</sup> The principle of international

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24. Legomsky, *supra* note 9, at 328-29 (noting that the 1965 Act's imposition of country limits and the Act's emphasis on family unity resulted in a “geographically uneven immigrant stream,” and that in 1986 Congress began enacting “a series of one-shot-only temporary programs” designed to benefit countries “adversely affected” by the 1965 Act's repeal of the national origins quota system). Not surprisingly, the “adversely affected” countries were almost all from Europe: Albania, Algeria, Argentina, Austria, Belgium, Bermuda, Canada, Czechoslovakia, Denmark, Estonia, Finland, France, the Federal Republic of Germany, the German Democratic Republic, Great Britain and Northern Ireland, Guadeloupe, Hungary, Iceland, Indonesia, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Monaco, the Netherlands, New Caledonia, Norway, Poland, San Marino, Sweden, Switzerland, and Tunisia. Jacob, *supra* note 9, at 299 n.14.

25. Smith, *supra* note 12, at 241.

26. *Id.*; 8 U.S.C. § 1153(b)(5) (2005).

27. Smith, *supra* note 12, at 241.

28. Whelan, *supra* note 22, at 447. As a threshold matter, countries are generally acknowledged to have “an unrestricted, or discretionary, authority over immigration.” *Id.* at 447. Thus, it may be “morally permissible for immigration policy to be based exclusively on considerations of interest.” *Id.* at 451. In this sense, immigration policy “may more closely resemble foreign policy.” *Id.* at 450.

29. See Whelan, *supra* note 22, at 453 (describing the three principles that underlie the proposals of the Select Commission on Immigration and Refugee Policy); Fuchs, *supra* note 11, at 438 (discussing how the Select Commission was guided by these three principles when it made its recommendations to the President and Congress).



cooperation allows U.S. immigration policy "to take another nation's interests into account as well as our own," whether to create "a more equal distribution of income and opportunities among the world's people regardless of national boundaries," or to lessen "migratory pressures" by alleviating the conditions that cause them.<sup>30</sup> The rule of law principle asserts that our immigration policy "should be enforced, and therefore [should be] enforceable," which means that policymakers should only act on those policies that the public will be willing to pay to enforce.<sup>31</sup> Finally, the "open society" principle maintains that accepting people from other countries is in the national interest because immigrants "may be expected to contribute in the future, to economic growth and to cultural diversity and enrichment."<sup>32</sup>

Consideration of these principles has resulted in the establishment of the policies that have influenced immigration reform legislation.<sup>33</sup> For example, some of the more prominent policies affecting immigration legislation include diversity, family

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30. Whelan, *supra* note 22, at 481-83. To illustrate, IRCA's amnesty provision can be viewed as an attempt to (eventually) reduce migratory pressure on the United States from Mexico by temporarily relieving Mexico of some of its unemployed citizens "until its population control and economic development policies yield better results." *Id.* at 482.

31. *Id.* at 455-56. Whelan points out that this principle raises concerns about the compatibility of non-discrimination with the preservation of a distinctive national character, an admitted national interest. *Id.* at 457-58. Moreover, the "formal equality of treatment for countries obviously does not mean equality of opportunity for individuals . . . . Equal treatment for individuals would have called for omitting considerations of nationality altogether and accepting applicants on a first-come first-served (or a lottery) basis within a world-wide pool . . . ." *Id.* at 458-59. Professor Fuchs, who was the Executive Director of the Select Commission on Immigration and Refugee Policy, asserts that "the rule of law emerged as the most powerful and, strangely enough, the most controversial" principle during Select Commission proceedings. Fuchs, *supra* note 11, at 438; *see also id.* at 445 (stating that "economic considerations took second place to those based on jurisprudence").

32. Whelan, *supra* note 22, at 460-61. For example, some degree of openness may be a moral requirement, such as the acceptance of refugees. *Id.* at 461. Insofar as there will be restrictions, the principle of openness also questions how selective we should be in determining who will be admitted; are willing immigrants inherently beneficial to society, or should they be screened for certain desirable characteristics? *See id.* (discussing the principles underlying a system of selective immigration as opposed to a truly open or random system).

33. *See* Fuchs, *supra* note 11, at 443 (stating that "policy is not just a matter of how many are admitted, from what countries and by what criteria, but also the process by which they are admitted"). The issue of how many immigrants should be admitted is well beyond the scope of this Note. Some relevant considerations, however, include: What level of population growth is desirable for the United States, and for the world? What will be the impact on the respective population growth rates of admitting more individuals into a comparatively low-fertility society? How does it impact the environment and the national and world economies to admit more individuals into a high-production high-waste society? How will current immigration levels affect future willingness to admit immigrants? For a helpful discussion of these points, *see* Whelan, *supra* note 22, at 463-69. The issue of procedure is also beyond the scope of this Note.

reunification, and national economic well-being.<sup>34</sup> The policy of diversity is designed to enhance “cultural diversity, consistent with the national interest.”<sup>35</sup> This objective is pursued by enhancing access to the immigration stream from a greater variety of source countries.<sup>36</sup> The general idea of family reunification has not generated significant controversy, but its implementation has.<sup>37</sup> The conflict centers primarily on whether the family-based preferences should reach beyond the nuclear family.<sup>38</sup> The general economic policy underlying immigration is to promote economic growth, or at least to “not cause a decline in the average economic welfare (income) of the population.”<sup>39</sup> While immigration has generally enhanced economic growth and may help offset the “aging” of the U.S. population (and the looming Social Security crisis), critics argue that high levels of immigration keep wages at low rates.<sup>40</sup>

A look at history reveals how these policies and principles have already influenced immigration law. For example, economic fears largely drove the decisions in the late nineteenth-century that led to the exclusion of Chinese and other Asian immigrants.<sup>41</sup> And it was the principle of international cooperation, forged by war-time alliances, that ultimately defeated these restrictions. Likewise, principles of the “open society” and diversity led to the repeal of the national origins quota system (which was premised on anti-diversity) and the enactment of the 1965 Act.<sup>42</sup> Ironically, however, the very provisions that repealed the national origins quota system, when coupled with the principle of family reunification, may have actually created a *less* diverse immigrant stream (hence causing the concerns

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34. Whelan, *supra* note 22, at 469. The policy decisions underlying decisions to accept, or not to accept, refugees are also beyond the scope of this Note. For an insightful discussion on the relevant considerations, see Fuchs, *supra* note 11, at 435-37, 445-46. *See also* Smith, *supra* note 12, at 236 (discussing U.S. refugee policy).

35. Whelan, *supra* note 22, at 469.

36. *Id.*

37. *Id.* at 471-72. The general policy has been questioned, however, as an instance of “nepotism.” *Id.* at 472-73. While this seems like an otherwise unjust discrimination of “independent” immigrants, the alternative is to admit laborers without their families, a morally, socially, and economically dubious proposition. *See id.* at 473.

38. *Id.* at 471-72.

39. *Id.* at 474.

40. *Id.* at 474-76. It has also been pointed out that admitting motivated immigrants may deprive developing nations of needed labor. *Id.* at 476.

41. *See* Ting, *supra* note 9, at 302 (describing the economic conditions that led to the “clamor in the western United States against immigrants from China” that caused Congress to enact restrictive immigration laws).

42. Whelan, *supra* note 22, at 458.

that led to the enactment of the diversity visa lottery).<sup>43</sup> Finally, the IRCA may have been an attempt to establish the rule of law just for the sake of letting law rule, irrespective of the policies behind or the effects of any particular law.<sup>44</sup> This jumbled mess of policies and incoherently applied principles was the impetus for Congress's attempt to reformulate almost every aspect of immigration policy with the 1990 Act.

### C. *The Immigration Act of 1990*

In 1990, after two years of deliberations, Congress enacted the most dramatic changes in immigration law since 1965.<sup>45</sup> In addition to addressing concerns about diversity in the immigration stream, the 1990 Act endeavored to deal with economic concerns such as labor shortages and the desire to recruit highly skilled workers and wealthy investors from foreign countries.<sup>46</sup> It also tried to strengthen the family reunification provisions by addressing certain controversial areas, such as the family preference categories.<sup>47</sup> Additionally, the 1990 Act revisited the entire system of temporary (or non-immigrant) visas.<sup>48</sup> According to the House Report, the purpose of the 1990 Act was to

[e]ase current U.S. immigration law restrictions that (1) hinder the reunification of nuclear families, (2) impose barriers to immigration on nationals of countries that have served as traditional sources of immigration to the United States, and (3) severely limit

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43. See *id.* at 470 ("If cultural and especially linguistic diversity is the goal that justifies the policy of imposing equal country ceilings, then the policy may be adjudged a partial failure in its recent operation . . . . With respect to the salient and politically sensitive matter of language, at any rate, recent immigration has been less diverse than was immigration before diversity became a conscious objective."). See also *supra* notes 20-23 and accompanying text.

44. Whelan, *supra* note 22, at 454-55; see also Fuchs, *supra* note 11, at 439 (noting that the Select Commission decided it was necessary to "close the back door to illegal migration" in order to "maintain the open society - to keep the front door open"). For example, the heavily criticized amnesty provision was advocated as the means of cleaning the slate before ushering in a new era dominated by the rule of law. Whelan, *supra* note 22, at 454. The idea was that supporting a group of "second-class" persons was too costly to our system of government. Fuchs, *supra* note 11, at 440 (quoting SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, 97TH CONG., 1ST SESS., FINAL REPORT AND RECOMMENDATIONS 72 (1981)). But concerns that amnesty would create a perverse incentive to immigrate illegally in hopes of another amnesty provision have largely been vindicated.

45. Mark W. Peters, Note, *Much Ado About Anything? The Effect of the Immigration Act of 1990 and Subsequent Amendments on Nonimmigrant Alien Artists and Entertainers*, 38 WAYNE L. REV. 1661, 1661 (1992).

46. H.R. REP. NO. 101-723, pt. 1, at 41-42, 58-72 (1990).

47. *Id.* at 40-41, 73.

48. *Id.* at 43-45.

the number of highly skilled or otherwise needed foreign-born workers who may become lawful permanent residents of the United States.<sup>49</sup>

### III. ENACTMENT OF THE DIVERSITY VISA LOTTERY

Conceding that the 1990 Act was a broad attempt to reshape the entire landscape of U.S. immigration policy, this Note addresses only one of the ways in which the 1990 Act implemented just one of these policies: diversity, through the diversity visa lottery.<sup>50</sup> Furthermore, this Note deals with just one aspect of the lottery – the region definitions. It should be noted, however, that the diversity visa lottery constituted just one part of a substantial and complex immigration reform, which undoubtedly explains the absence of significant opposition to the specific mechanisms behind the diversity lottery.<sup>51</sup> Although this does not legitimize Congress's action, it is inevitable that there will be some give and take between legislators and interest groups when so many interests are at stake.<sup>52</sup> That being said, the diversity provisions did face some controversy on the legislative floors.

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49. *Id.* at 31.

50. Other diversity-based provisions included the temporary lottery (which was specifically designed to give most of the visas to Ireland and Northern Europe), and provisions granting visas to specific countries. See Pub. L. No. 101-649, §§ 132-34, 152, 104 Stat. 4978, 5000, 5005 (1990) (providing 40,000 visas in the years 1992, 1993, and 1994 to immigrants from countries that are “not contiguous to the United States and that [were] identified as . . . adversely affected foreign state[s]”); also providing 1000 visas to “displaced Tibetans”; also providing visas for employees of the United States consulate in Hong Kong).

51. See Jacob, *supra* note 9, at 331-35 (discussing the need to form broad coalitions across immigrant groups to secure passage of significant legislation).

52. See 136 CONG. REC. S17106 (daily ed. Oct. 26, 1990) (statement of Sen. Kennedy) (“This legislation represents a compromise. Each of us would have written this bill differently if we could. The issues surrounding legal immigration stir deep emotions and strong political passions.”); Jacob, *supra* note 9, at 331-35; see also *Immigration Act of 1989 (Part 3): Joint Hearings Before the Subcomm. on Immigration, Refugees, and Int’l Law of the Comm. on the Judiciary and the Immigration Task Force of the Comm. on Educ. and Labor*, 101st Cong. 687 (1990) (statement of Daniel A. Stein, Executive Director of the Federation for American Immigration Reform) (“The topic of immigration reform is one that cannot be taken lightly or addressed in just a series of short hearings, followed by a speedy mark-up. Immigration reform comes with open debate over many months . . . . Exchanges are made and compromises are reached that are equitable to both sides.”); 136 CONG. REC. S17113 (daily ed. Oct. 26, 1990) (statement of Sen. Simpson) (calling immigration “the greatest political no-win turkey I have ever been in”).

### A. Background

By 1988, Congress was concerned that so few immigrants were coming from "traditional sources" of immigration.<sup>53</sup> This concern was not without some justification. The 1989 President's Comprehensive Triennial Report on Immigration (the "Triennial Report") showed that only about 10% of immigrants came from Europe in 1985, 1986, and 1987.<sup>54</sup> Furthermore, the Triennial Report indicated that Asia and North America (including Mexico, Central America, and the Caribbean) accounted for almost 80% of all immigrants in each of those years.<sup>55</sup>

On the demographics of current immigration, the Triennial Report concluded:

The highest number of immigrant admissions (42.8 percent) were from Asia in 1987 . . . . Following the trend that began with the elimination of the national origins quotas . . . [in] 1965, the highest percentage of immigrants came from Asia during the 1985-1987 period. This pattern has been true every year since 1978 . . . .

Mexico, the Philippines, and Korea were the three leading countries of birth for immigrants admitted to the United States during the 1985-1987 period . . . . With the exception of 1982 when Vietnam led all countries . . . , Mexico was the leading country of immigration to the United States during the 1980s.<sup>56</sup>

Concerns about these demographic disparities prompted both the Senate and the House to consider ways to increase immigration from European countries in their respective versions of what would become the 1990 Act.

### B. In the Senate

The Senate first approved a version of the 1990 Act in 1988 by a substantial majority, but the House sat on the bill until the 100<sup>th</sup>

53. See, e.g., H.R. REP. NO. 101-723, pt. 1, at 31; 136 CONG. REC. S2211 (daily ed. Mar. 15, 1988) (statement of Sen. Thurmond) (noting that new legislation was needed to "put Western Europeans on a more equal footing with the rest of the immigrant pool"); 136 CONG. REC. S17110 (daily ed. Oct. 26, 1990) (statement of Sen. Dodd) ("In recent years certain traditional sources of American immigration have been disadvantaged . . .").

54. THE PRESIDENT'S COMPREHENSIVE TRIENNIAL REPORT ON IMMIGRATION, INTERNATIONAL MIGRATION TO THE UNITED STATES tbl.F (1989) [hereinafter TRIENNIAL REPORT]; see also *infra* app. tbl.1. The Triennial report was mandated by the IRCA legislation.

55. TRIENNIAL REPORT, *supra* note 54, tbl.F; see also *infra* app. tbl.1. According to the Triennial Report, South America accounted for about 7% of immigrants annually, Africa for about 3%, and Oceania for less than 1% annually. *Id.*

56. TRIENNIAL REPORT, *supra* note 54, at 12. The other countries in the Triennial Report's top-ten list were Cuba, India, China (Mainland), Dominican Republic, Vietnam, Jamaica, and Haiti. *Id.* tbl.G.

Congress expired.<sup>57</sup> Senators Simpson and Kennedy reintroduced the legislation in February 1989, promoting it as a response to the 1981 Report of the Select Commission on Immigration and Refugee Policy.<sup>58</sup> Senator Kennedy argued that the bill (S. 358) was intended “to make our immigration system more accurately reflect the national interest, more flexible, and also more open to immigrants from nations which are short-changed by current law.”<sup>59</sup> The bill placed a greater emphasis on reunification of close family members (i.e., the nuclear family) and employment-based immigration, and created a new category of independent immigrants.<sup>60</sup>

There was no visa lottery in S. 358. Instead, the bill contained a points-based system directed at the perceived inequities against would-be immigrants from countries that were “adversely affected” by the demise of the national origins quota system. In the words of Senator Simpson, this new system of “independent” immigration addressed the concern that

[m]any of the older source countries of immigration—that is, Europe and Canada—no longer are able to qualify under today’s family-dominated system, and some areas of the world have not in the past and do not now have the family ties necessary to send large numbers of immigrants to the United States—such as Africa.<sup>61</sup>

Of course, some legislators criticized the system for purporting to increase diversity by bringing in more Europeans and Canadians. Furthermore, there is considerable evidence that this provision of the legislation was largely tailored to meet the demands of Irish immigrant special interest groups.<sup>62</sup> Nonetheless, there was substantial agreement in the Senate that northwestern Europeans,

57. 136 CONG. REC. S1228-29 (daily ed. Feb. 7, 1989) (statement of Sen. Kennedy).

58. *Id.* at S1229.

59. *Id.*

60. This is a necessarily short description of all that this bill was designed to accomplish. There are many more aspects to the bill that are beyond the scope of this Note (such as the way it re-structured the family preference system, the way it designed the employment-based system, and the immigrant investor provision). One provision worth mentioning, however, is the NP-5 program, which allocated visas to immigrants from countries “adversely affected” by the 1965 legislation. *See* H.R. REP. NO. 101-723, pt. 1, at 76-77. The definition of an “adversely affected” country is one so defined by the IRCA legislation, “except countries contiguous to the United States.” *Id.* at 77; *see also supra* note 24.

61. 136 CONG. REC. S1230 (daily ed. Feb. 7, 1989) (statement of Sen. Simpson). Interestingly, Canada has never qualified for visas under the diversity visa program because it sends too many immigrants (more than 50,000 in any five-year period). *See, e.g.*, Bureau of Consular Affairs, *Registration for the Diversity Immigrant (DV-2006) Visa Program*, 69 Fed. Reg. 65012, 65016-17 (Nov. 9, 2004) (listing countries whose natives qualify for the lottery).

62. For a very insightful discussion on this point, see Jacob, *supra* note 9, at 311-35 (describing in depth the efforts and effectiveness of the behind-the-scenes legwork of special interest groups, particularly pro-Irish groups, in passing the diversity provisions).

such as "Irish, Germans, Italians, [and] Poles" were being "inadvertently discriminated against by the present system."<sup>63</sup>

The points-based approach of S. 358 was designed to admit immigrants based on the number of points they scored under an elaborately designed point allocation system.<sup>64</sup> Points were awarded for a variety of factors, including age (up to 10 points), education (up to 25 points), occupational demand (up to 20 points), occupational training and work experience (up to 20 points), and prearranged employment in the United States (up to 15 points).<sup>65</sup> A provision awarding a relatively high number of points to potential immigrants who spoke English, however, proved too controversial,<sup>66</sup> and the Senate ultimately removed it from the bill. The Senate approved S. 358 on July 13, 1989, by a vote of 81-17.<sup>67</sup>

### C. In the House

Following months of committee hearings and mark-ups, the House Committee on the Judiciary recommended passage of the corresponding House bill (H.R. 4300) in September 1990. This bill largely followed the model of the S. 358, and it served the same three purposes: to "strengthen[] our system of family reunification"; to "provide[] to the employers and employees of this country a system of legal immigration for . . . individuals who are needed in our economy"; and to "ensure[] the long-term diversity in our flow of immigrants from around the world."<sup>68</sup> H.R. 4300, however, eliminated the Senate's independent immigration system, replacing it with a

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63. 136 CONG. REC. S1843 (daily ed. Feb. 28, 1989) (statement of Sen. D'Amato); *see also* 136 CONG. REC. S8529 (daily ed. July 20, 1989) (statement of Sen. Daschle); 136 CONG. REC. S7896 (daily ed. July 13, 1989) (statement of Sen. Simpson); 136 CONG. REC. S7793 (daily ed. July 12, 1989) (statement of Sen. Moynihan); 136 CONG. REC. H2164 (daily ed. May 24, 1989) (statement of Rep. Fish).

64. S. 358, 101st Cong. (1989).

65. *Id.*

66. *See, e.g.*, 136 CONG. REC. S7865 (daily ed. July 13, 1989) (statement of Sen. Simpson); 136 CONG. REC. S7865 (daily ed. July 13, 1989) (statement of Sen. Simon); 136 CONG. REC. S7751 (daily ed. July 12, 1989) (statement of Sen. Simon); 136 CONG. REC. S7633-34 (July 11, 1989) (statement of Sen. Simpson); 136 CONG. REC. S2211 (daily ed. Mar. 15, 1988) (statement of Sen. Pell).

67. 136 CONG. REC. S7907 (daily ed. July 13, 1989).

68. 136 CONG. REC. H8631 (daily ed. Oct. 2, 1990) (statement of Rep. Morrison); *see also Immigration Act of 1989 (Part 3): Joint Hearings Before the Subcomm. on Immigration, Refugees, and Int'l Law of the Comm. on the Judiciary and the Immigration Task Force of the Comm. on Educ. and Labor*, 101st Cong. 687 (1990) (app. 1, text of H.R. 4300).

permanent diversity visa lottery similar to the *ad hoc* programs that had surfaced recurrently since 1986.<sup>69</sup>

### 1. Committee Hearings

From September 1989 through March 1990, the House Judiciary Committee's Subcommittee on Immigration, Refugees, and International Law conducted a series of hearings to consider S. 358 and four alternative immigration reform bills. All four bills had some diversity provision: H.R. 672 and H.R. 2448 had points-based systems similar to the Senate bill, but differed in how the points should be allocated; H.R. 2646 deferred the issue to the executive branch, allowing the President to determine which immigrants to admit consistent with foreign policy goals and the national interest; and H.R. 4165 introduced the diversity visa lottery provisions almost exactly as they now stand.

Interestingly, H.R. 4165, the only bill to include a visa lottery, was not introduced until March 1, 1990. But no representative of any ethnic-based organization testified in or submitted a statement to the hearings after September 27, 1989.<sup>70</sup> Hence, these organizations were not given an opportunity to directly respond to the diversity visa lottery in the subcommittee hearings. These organizations did comment at the subcommittee hearings on the other bills, however. And, although the majority of their testimony addressed the proposed changes to the family preference system, the diversity provisions clearly concerned them, as each organization commented on the diversity provisions of the bills before them.

For example, the National Council of La Raza (the "NCLR") indicated at the subcommittee hearings that it did not oppose creating

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69. The House bill also introduced the transitional diversity visa lottery that lasted until 1994. Because the transitional lottery followed substantially different rules than the permanent lottery, I will not discuss it at length in this Note. However, it should be noted that the transitional lottery, and the entire bill, appeared to some representatives as a patchwork of special interest legislation heavily influenced by various immigration advocacy groups, including the same Irish immigration groups that affected the Senate bill. See 136 CONG. REC. H12359 (daily ed. Oct. 27, 1990) (statement of Rep. Bryant); 136 CONG. REC. H8677-78 (daily ed. Oct. 2, 1990) (statement of Rep. Smith); Jacob, *supra* note 9, at 325; see also 101 CONG. REC. H12367 (daily ed. Oct. 27, 1990) (statement of Rep. Richardson) (listing 17 varied special interest groups that "strongly" supported the legislation).

70. The September 27, 1989, hearing included testimonies from representatives of the American Committee on Italian Migration, the National Council of La Raza, the American Jewish Committee, the Chinese Welfare Council, the Irish Immigration Reform Movement, and the Organization of Chinese Americans; there was also a joint statement by various Asian and Pacific American organizations. See *Immigration Act of 1989 (Part 1): Hearings Before the Subcomm. on Immigration, Refugees, and Int'l Law of the Comm. on the Judiciary*, 101st Cong. (1989).



a new avenue for immigration, but "that it should be done with careful consideration, on a trial basis only" because it represented "an unprecedented step in immigration policy."<sup>71</sup> The NCLR opposed S. 358 because it did not include the family members of independent immigrants selected under its points-based system, which could further aggravate backlogs for family preference visas.<sup>72</sup> The NCLR also opposed H.R. 2448 because it awarded points for English language ability: "[A]ny new channel for immigrants must promote equity and diversity in the best traditions of the U.S. The point categories should not even give the appearance of favoring some parts of the world over others."<sup>73</sup> The NCLR supported the points-based system of H.R. 672 because it did not contain an English language provision, it provided for family members of selected immigrants, and it would begin on a trial basis.<sup>74</sup>

Similarly, the Organization of Chinese Americans, Inc. (the "OCA"), supported H.R. 672 and opposed H.R. 2448 because of the English language provision.<sup>75</sup> The OCA directly addressed the potential for discrimination in the selection of independent immigrants at the subcommittee hearings: "The point system program *should not directly or indirectly favor any regions* of the world. If after enactment, the program is determined to not enhance diversity, then a *random lottery* first-come, first-serve system should be immediately implemented."<sup>76</sup>

The Chinese Welfare Council (the "Council") also advocated a first-come, first-serve system at the subcommittee hearings.<sup>77</sup> The Council criticized the points-based approach of S. 358 for failing to provide for accompanying family members and for assigning points for employment criteria when separate employment-based immigration categories already existed. The Council asserted: "If the purpose of the selected immigrant category is to permit persons to immigrate

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71. *Immigration Act of 1989 (Part 1): Hearings Before the Subcomm. on Immigration, Refugees, and Int'l Law of the Comm. on the Judiciary*, 101st Cong. 216 (1989) (statement of Cecilia Muñoz, Senior Immigration Policy Analyst for the National Council of La Raza). The NCLR is a "national organization dedicated to improving life opportunities for Hispanics in the United States." *Id.* at 205.

72. *Id.* at 216.

73. *Id.*

74. *Id.* The American Jewish Committee also favored the points-based system of H.R. 672, partly because it would begin on a trial basis. *See id.* at 277 (statement of Gary E. Rubin, Director of National Affairs of the American Jewish Committee).

75. *Id.* at 251 (statement of Melinda C. Yee, Executive Director of the Organization of Chinese Americans). The OCA is "a national, non-profit, non-partisan network of concerned Chinese Americans." *Id.* at 241.

76. *Id.* at 251 (emphasis added).

77. *Id.* at 287-88 (statement of Howard Hom, Chinese Welfare Council).

who would not otherwise be able to come under the current law, then the system would operate better on a first-come first-serve basis without any computation of points . . . .”<sup>78</sup>

The Reverend Joseph A. Cogo, representing the American Committee on Italian Migration (the “ACIM”), on the other hand, opposed S. 358 at the subcommittee hearings because it did too *little* to diversify the immigration stream:

S. 358 unfortunately does dismally little, if anything at all, to resolve the problem of the present imbalance in the usage of visas and to create diversity in our immigration flow.

I suspect that the [points-based system] was conceived with the intent of favoring the traditional flow of European immigration. . . . Honorable as this intention may be, I am afraid this [points-based system] will not solve the Irish problem at all. There are far more Asiatics [sic] – young, skilled, educated and ambitious—than there are Irish in Ireland. And, in point of fact, even if you count together the Irish, the Italians, the Portuguese and the Greeks, they will still be unable to compete, numberwise, with the number of potential immigrant candidates from Asia.<sup>79</sup>

The ACIM concluded that a “regional ceiling or a regional floor are the only practical ways to ensure diversity in our immigration flow.”<sup>80</sup>

The Irish Immigration Reform Movement (the “IIRM”) also indicated that a points-based system would do too little to help the Irish. Instead, the IIRM proposed that the legislature allocate 30,000 visas annually for 15 years to applicants from specific “disadvantaged” countries in addition to a points-based diversity system designed to assist “underrepresented” countries.<sup>81</sup> The IIRM stated: “[T]here is no question that the [proposed systems] are not fair and balanced *by themselves*. They are not meant to be. However, . . . they create some balance against a system which is currently heavily weighted against many countries in the world.”<sup>82</sup>

Not only did the hearings fail to include testimony from ethnic-based organizations about H.R. 4165 and the diversity visa lottery, but the hearings failed to include almost any testimony addressing the diversity visa lottery provision of H.R. 4165 at all. Other non-ethnic

78. *Id.* at 287. A joint statement submitted by various Asian and Pacific American organizations also opposed passage of S. 358’s independent immigration provisions, albeit largely because of the provision awarding points for English language proficiency that had already been removed. See *id.* at 613-14 (joint statement of Asian American Legal Defense and Education Fund (New York); Asian Law Alliance (San Jose); Asian Law Caucus (San Francisco/Oakland); Asian Pacific American Legal Center of Southern California; Na Loio No Na Kanaka—Lawyers for the People of Hawaii; and Nihonmachi Legal Outreach (San Francisco)).

79. *Id.* at 259-60 (statement of Rev. Joseph A. Cogo, American Committee on Italian Migration).

80. *Id.* at 262.

81. *Id.* at 222-25 (statement of Donald Martin, Irish Immigration Reform Movement).

82. *Id.* at 224 (emphasis in original).

based groups did testify after the introduction of H.R. 4165 about the merits of increasing the diversity of the immigration stream in general; but most did not testify about the specifics of the diversity provisions.<sup>83</sup>

The little testimony that did address specific provisions took aim at the various points-based systems.<sup>84</sup> For example, the Carnegie Endowment for International Peace testified at the subcommittee hearings that it favored increasing the stream of independent immigrants but argued against tailoring provisions specifically to increase diversity.<sup>85</sup> Similarly, Richard D. Lamm, Director of the

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83. See, e.g., *Immigration Act of 1989 (Part 3): Joint Hearings Before the Subcomm. on Immigration, Refugees, and Int'l Law of the Comm. on the Judiciary and the Immigration Task Force of the Comm. on Educ. and Labor*, 101st Cong. 564 (1990) (statement of Malcolm Lovell, Jr., Former Under Secretary of Labor and Director of the Institute for Labor and Management at George Washington University) ("Diversity is desirable but it should be a by-product rather than a deliberate goal of our immigration policy. Our overriding objective must be to select the most skilled, versatile and adaptable immigrants . . . whatever their country of origin."); *id.* at 669-71 (statement of Eugene McNary, Commissioner of the Immigration and Naturalization Service) (stating that the administration considered it a fundamental principal that "[w]e should continue to adhere to the current practice of admitting all aliens without regard to race, creed, sex or national origin," but that the administration considered "[p]reserving and promoting diversity in sources of immigration" an important policy goal); *id.* at 279-97 (statement of Leon F. Bouvier, Visiting Professor of Sociology, Old Dominion University) (discussing at length the impact of the demographics of the immigrant stream on American society, concluding that fewer immigrants should be admitted and that concern for the individual, as opposed to concern for specific groups, should be the prevailing principle).

There was some testimony relating to the impacts of high levels of Hispanic and Asian immigration at the local level, but the testimony focused on the need to help local governments meet the demands of a growing immigrant population, as opposed to the merits of diversity (or of particular diversity provisions) in the immigration process. See *id.* at 514-16, 541-47 (1990) (statement of Patrick Burns, Center for Public Policy and Contemporary Issues at the University of Denver) (discussing the impacts of high levels of Asian and Hispanic immigration on California schools); see also *id.* at 597-605 (statement of Ellen Rodriguez, Program Administrator for the National Association of Counties) (arguing that changes in immigration policy at the national level can have serious economic consequences at the local level); *id.* at 609-17 (statement of Mark A. Tajima, Legislative Analyst for the Chief Administrative Office of the County of Los Angeles, CA) (same).

84. See, e.g., *id.* at 253-54 (statement of Prof. Barry R. Chiswick, Department of Economics, University of Illinois at Chicago) ("It is essential to preserve the non-racist character of the plan. Points should *not* be awarded on the basis of the applicant's race, religion, ethnicity, or country of origin."); *id.* at 269-72 (statement of Ben J. Wattenberg, Senior Fellow, American Enterprise Institute for Public Policy Research) (advocating a points-based system as well as additional visas made specifically available to immigrants from Europe).

85. *Id.* at 133-34 (statement of Doris Meissner, Senior Associate, Carnegie Endowment for International Peace). Ms. Meissner stated:

Increasing independent immigration . . . is a sufficient response to the problem of diversity of source countries.

Demand for immigration to the U.S. is simply not evenly distributed by geography, nor has it ever been so in our history. Demand is a function of family flows . . . ; from special economic or cultural relationships among countries . . . ; and by the legacy of historical connections . . . . Of course, these forces change and potential immigrants

Center for Public Policy and Contemporary Issues at the University of Denver, proposed that immigrants should be selected “on the basis of merit . . . without regard to race, religion or ethnicity.”<sup>86</sup> And the American Bar Association submitted to the subcommittee a February 1989 ABA resolution stating, among other things, that “the American Bar Association supports . . . a separate additional quota allotment for independent or unsponsored immigrants based on a *nondiscriminatory* selection system or lottery, or both . . . .”<sup>87</sup> The only hearing testimony that addressed H.R. 4165’s diversity visa lottery provision expressed indifference as to how the immigrant stream was diversified.<sup>88</sup>

## 2. Evolution of H.R. 4300

Five days after the conclusion of the subcommittee hearings, Representative Morrison, chairman of the subcommittee, introduced H.R. 4300.<sup>89</sup> Subcommittee and committee markups began two days later, on March 21, 1990. On September 19, 1990, the Judiciary Committee submitted a favorable report of H.R. 4300 to the House.<sup>90</sup> Interestingly, H.R. 4300 contained no diversity provision of any kind when it was introduced to the subcommittee after the March hearings;<sup>91</sup> but the version of the bill introduced to the House after

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should not be artificially shut out when they do. However, changes in the levels of independent immigration should be adequate to meet this standard. It is not necessary, in addition, to construct ways to build in an outcome of increased source country diversity.

*Id.*

86. *Id.* at 512 (statement of Richard D. Lamm, Former Governor of the State of Colorado and Director of the Center for Public Policy and Contemporary Issues at the University of Denver). Mr. Lamm criticized the various bills for “set[ting] no priorities and mak[ing] no hard choices” by “saying yes to virtually every interest group with a demand to make on the immigration process.” *Id.* at 499-500.

87. *Id.* at 908 app. 21 (emphasis added).

88. *Id.* at 432-33 (statement by Thomas R. Donahue, Secretary-Treasurer, American Federation of Labor and Congress of Industrial Organizations). Mr. Donahue stated:

We agree that the United States should be accessible to nationals of all countries. The question is how this good is to be obtained. . . .

The Senate chose an elaborate point system . . . . [H.R. 672] adopts a point system but on a time-limited pilot basis. [H.R. 2448] proposes a point system . . . somewhat differently defined. And [H.R. 4165] also would allow for “diversity” immigrants, using a still-different basis for ascertaining the targeted countries. Given this diversity of riches, for once I will be so modest as to say that we agree with the end sought and have no favorite as to the proper means.

*Id.*

89. See *id.* at 687 app. 1; 136 CONG. REC. H903 (daily ed. Mar. 19, 1990).

90. See H.R. REP. NO. 101-723, pt. 1, at 1; 136 CONG. REC. H7889 (daily ed. Sept. 19, 1990).

91. See *Immigration Act of 1989 (Part 3): Joint Hearings Before the Subcomm. on Immigration, Refugees, and Int’l Law of the Comm. on the Judiciary and the Immigration Task*

subcommittee and committee markups contained a diversity visa lottery provision almost identical to the one in H.R. 4165.<sup>92</sup>

The report of the Judiciary Committee contained no explanation as to why the lottery was selected over the other proposals, even though the lottery was in direct conflict with the Senate bill's diversity system. Citing inequities to immigrants from certain countries, "such as Italy, Ireland, Poland, and Argentina," caused by the repeal of the national origins quota system in 1965, the report simply stated:

The Committee is convinced that . . . changes must be made to further enhance and promote diversity within the present system. . . .

In order to maintain diversity in immigration to our nation, a regional program is created by the bill. This ongoing program, which begins in 19[9]4, provides 55,000 annual visas for natives of regions of the world where immigration through the preference system has been lower than 50,000 over the previous five years.<sup>93</sup>

The only other comments in the report that directly addressed the diversity lottery simply described the lottery's mechanics and asserted that it was designed to be self-adjusting in order to maintain diversity in immigration notwithstanding varying immigrant flows.<sup>94</sup>

The dissenting views published in the Committee's Report, by contrast, specifically attacked the diversity visa lottery:

H.R. 4300 expands immigration privileges to specific regions and countries under the guise of creating a more diverse immigration flow . . . . Instead of creating an underlying immigration system which is neutral as to race, religion, or national origin, H.R. 4300 grants additional visas to specific countries and regions which, the bill alleges, have been treated unfairly. This is not a rational way to create immigration policy.

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*Force of the Comm. on Educ. and Labor*, 101st Cong. 687-773 app. 1 (1990) (providing the text of H.R. 4300).

92. Compare H.R. REP. NO. 101-723, pt. 1, at 5-6 (containing the diversity visa lottery section of H.R. 4300), with *Immigration Act of 1989 (Part 3): Joint Hearings Before the Subcomm. on Immigration, Refugees, and Int'l Law of the Comm. on the Judiciary and the Immigration Task Force of the Comm. on Educ. and Labor*, 101st Cong. 52-57 (1990) (containing the diversity visa lottery section of H.R. 4165).

93. 101 H.R. REP. NO. 101-723, pt. I, at 48. The report actually states that the program was to begin in 1944, but as the Report was published in 1990, this must be a misprint. The Act actually set forth that the permanent diversity visa lottery would begin in 1994. In determining whether any country has sent over 50,000 immigrants in the previous five years, only family-sponsored immigrants, employment-based immigrants and their immediate family, and the immediate relatives of citizens are counted. *Id.* at 78, 86. Currently the lottery only issues 50,000 visas annually as a result of the Nicaraguan Adjustment and Central American Relief Act of 1996, which reserved the use of 5,000 of the 55,000 annual allotment of diversity visas to allow certain undocumented aliens from Central America to adjust their status. See Michael M. Hethmon, *Diversity, Mass Immigration, and National Security After 9/11—An Immigration Reform Perspective*, 66 ALB. L. REV. 387, 391 (2003).

94. H.R. REP. NO. 101-723, pt. I, at 78.

... We also object to H.R. 4300's designation of certain countries, regions or continents.<sup>95</sup>

The dissenters asserted that "the appropriate approach is to readjust the underlying system to make it equitable, not to give additional visas to specific countries."<sup>96</sup>

On the House floor, the discussion of H.R. 4300's diversity visa lottery provisions echoed the same themes advanced on the Senate floor in support of S. 358's points-based system. Specifically, supporters cited the need to increase diversity in the immigration stream by allocating visas to underrepresented countries (primarily European).<sup>97</sup> There was some opposition to the diversity provisions in the House,<sup>98</sup> but for the most part they were supported. Conspicuously absent, however, was any discussion of the merits of the House bill's diversity visa lottery as a means of increasing "diversity" over the merits of the Senate bill's points-based system designed to advance the same goal.<sup>99</sup> The House adopted H.R. 4300 on October 3, 1990.

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95. H.R. REP. NO. 101-723, pt I, at 138-40 (dissenting views).

96. *Id.* at 140.

97. *See, e.g., id.* at 48; 136 CONG. REC. E3110 (daily ed. Oct. 3, 1990) (statement of Rep. Scheuer); 136 CONG. REC. E3098 (daily ed. Oct. 3, 1990) (statement of Rep. Anderson); 136 CONG. REC. H8718 (daily ed. Oct. 3, 1990) (statement of Rep. Schumer); 136 CONG. REC. H8718 (daily ed. Oct. 3, 1990) (statement of Rep. Weiss); 136 CONG. REC. H8667 (daily ed. Oct. 2, 1990) (statement of Rep. Ortiz); 136 CONG. REC. H8650-51 (daily ed. Oct. 2, 1990) (statement of Rep. Markey); 136 CONG. REC. H8649 (daily ed. Oct. 2, 1990) (statement of Rep. Engel); 136 CONG. REC. H8644 (daily ed. Oct. 2, 1990) (statement of Rep. Oaker); 136 CONG. REC. H8638 (daily ed. Oct. 2, 1990) (statement of Rep. Morrison); 136 CONG. REC. H8634 (daily ed. Oct. 2, 1990) (statement of Rep. Fish); 136 CONG. REC. H8632 (daily ed. Oct. 2, 1990) (statement of Rep. McGrath); *see also* 136 CONG. REC. E3148-49 (daily ed. Oct. 5, 1990) (statement of Rep. Gilman) (commending the Ancient Order of Hibernians, an Irish group, on their efforts to bring about the 1990 immigration reforms); 136 CONG. REC. E3118-19 (daily ed. Oct. 3, 1990) (statement of Rep. Donnelly) (arguing that the diversity visa lottery and other provisions did not do enough to benefit potential Irish immigrants).

98. *See* 136 CONG. REC. H8641 (daily ed. Oct 2, 1990) (statement of Rep. Bryan) (explaining that he will offer an amendment that strikes the diversity portions of the bill and leaves only the family unity provisions); 136 CONG. REC. H8677-78 (daily ed. Oct. 2, 1990) (statement by Rep. Smith) (arguing that H.R. 4300 actually works against fairness and equality by undoing the work of the 1965 immigration bill).

99. Rep. Donnelly's comments published in the extension of remarks did discuss the merits of specific aspects of the diversity visa lottery. However, he did not contrast this lottery with the Senate's points-based system. His concerns were that the lottery did not start soon enough and that it discriminated against countries with low populations, particularly Ireland, by only allowing one application per person. *See* 136 CONG. REC. E3118-19 (daily ed. Oct. 3, 1990) (statement of Rep. Donnelly).

*D. From Bill to Law*

The Joint Conference Committee adopted the House version of the bill on October 26, 1990. The committee modified the diversity visa lottery only by requiring that immigrants admitted under the lottery have the equivalent of a high school degree. On consideration of the Joint Conference report, the Senate did not directly comment on the replacement of S. 358's points-based system with the diversity lottery, and any comments made about the diversity provisions at all were generalized.<sup>100</sup> This may have been because the drafters of the Senate bill acquiesced to the changes in order to pass other reforms that had been years in the making.<sup>101</sup> As stated by Senator Kennedy: "This bill, like all major legislation, represents many years of work, and many efforts at compromise. . . . This legislation represents a compromise."<sup>102</sup> In the end, this compromise won out as both legislative bodies approved the Joint Conference report, on October 27, 1990.<sup>103</sup> President George Bush, Sr., signed the 1990 Act, and the diversity visa lottery, into law on November 29.<sup>104</sup>

#### IV. THE REGION DEFINITIONS—WHY IS MEXICO IN SOUTH AMERICA?

The diversity visa lottery was designed to preserve the diversity of the immigrant stream by "divid[ing] the world into high and low admission regions," and allocating visas to each region "in the inverse proportion [of] the percentage of immigrants sent to the United States."<sup>105</sup> Therefore, the critical factor in determining how to allocate diversity visas is the definition of each region; these definitions dictate the type of diversity sought (e.g., cultural, racial,

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100. See, e.g., 136 CONG. REC. S17109 (daily ed. Oct. 26, 1990) (statement of Sen. Simpson); 136 CONG. REC. S17110 (daily ed. Oct. 26, 1990) (statement of Sen. Dodd).

101. Jacob, *supra* note 9, at 332 ("[F]rom the very beginning, our goal was to promote diversity. We were willing to jettison the point system to keep diversity alive.") (quoting Michael Myers, who served as counsel to the Senate Judiciary Committee's Subcommittee on Immigration and Refugee Affairs, on why the Senate sponsors were willing to adopt the House provisions).

102. 136 CONG. REC. S17106 (daily ed. Oct. 26, 1990) (statement of Sen. Kennedy).

103. 136 CONG. REC. H12368-69 (daily ed. Oct. 27, 1990); 136 CONG. REC. S17568-69 (daily ed. Oct. 27, 1990).

104. Statement of President George Bush Sr. upon Signing S. 358, 1990 U.S.C.C.A.N. 6801-2. Notably, President Bush made no reference to the diversity provisions of the 1990 Act in his signing statement. See *id.* at 6801-1 to 1-2. The President, however, did praise other provisions of the act: "[This bill] accomplishes what the Administration sought from the outset of the immigration reform process: a complementary blending of our tradition of family reunification with increased immigration for skilled individuals to meet our economic needs." *Id.* at 6801-1.

105. H.R. REP. NO. 101-723, pt. 1, at 78. Then the visas are "apportioned according to the population of [each] region." *Id.*

geographic, etc.) by laying the framework on which the mathematical formulations apply. Ultimately, the region definitions are responsible for how the blind mathematical equations allocate diversity visas to different countries.

In large part, the regions appear to be drafted along neutral geographic lines: “[T]he areas described in each of the following clauses shall be considered to be a separate region: (i) Africa. (ii) Asia. (iii) Europe. (iv) North America (other than Mexico). (v) Oceania. (vi) South America, Mexico, Central America, and the Caribbean.”<sup>106</sup> With two notable exceptions, these regions roughly approximate the continental divisions. They also roughly resemble, with the same two notable exceptions, the regions used for groupings in official immigration statistical reports, including the President’s Comprehensive Triennial Report on Immigration that was sent to Congress in 1989: Europe, Asia, Africa, Oceania, North America (including Central America and the Caribbean), and South America (the continent).<sup>107</sup>

The two notable exceptions are the subject of this Note: “North America (*other than Mexico*)” and “South America, *Mexico, Central America, and the Caribbean*.”<sup>108</sup> As a cultural grouping, this division may make sense. In fact, there is support for the proposition that Congress actually intended to make this cultural grouping. For example, in the hearings and Senate and House floor debates, the terms “Hispanic,” “Latin American,” and “Central American” were used almost interchangeably, particularly when talking about the disproportionate number of immigrants coming from Mexico and Central America.<sup>109</sup>

Without discussing the cultural similarities and differences of the various Latin American countries, “South America, Mexico, Central America, and the Caribbean” is arguably a plausible cultural grouping. The more significant question, however, is: Why did Congress choose to make this cultural grouping when it avoided other

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106. 8 U.S.C. § 1153(c)(1)(F) (2005).

107. See, e.g., TRIENNIAL REPORT, *supra* note 54, tbl.F; 2004 YEARBOOK, *supra* note 6, tbl.8; IMMIGRATION IN FISCAL YEAR 1995, *supra* note 6, tbl.6. The 2004 Yearbook explicitly includes Central America and the Caribbean in North America, as does the Immigration to the United States in Fiscal Year 1995 report. The numbers suggest that the Triennial Report did also.

108. 8 U.S.C. § 1153(c)(1)(F) (2005) (emphasis added).

109. See, e.g., 136 CONG. REC. S7335 (daily ed. July 12, 1989) (statement of Sen. Cranston) (noting that sibling relationships are important “in those countries—mostly Hispanic and Asian—where [the sibling-based] visas are most used”); 136 Cong. Rec. E3110 (daily ed. Oct. 3, 1990) (statement of Rep. Scheuer) (“Over the past quarter century the vast majority of immigrants have hailed from Latin America or from Asia.”).



possible similar groupings?<sup>110</sup> The congressional record, itself, is devoid of any explanation.<sup>111</sup>

One explanation may be that Congress sought to avoid a politically charged (and counter-productive) attempt to promote diversity by discriminating between cultures. It is not hard to imagine the political repercussions to a Senator who introduced a provision designed to select immigrants based on their religion or primary language, for the ostensible purpose of increasing "diversity."<sup>112</sup> Focusing on objective geographic divisions is a much more politically neutral way to promote diversity.<sup>113</sup>

If Congress was only interested in geographic diversity, however, why the cultural grouping of Latin America? Concerns about excessive Hispanic immigration cannot be the only reason since immigration from South America had been anything but excessive.<sup>114</sup> It is possible that the diversity lottery was a direct response to the concerns of the ACIM that the Senate's points-based system did too little to further the cause of European, and particularly Irish, migration.<sup>115</sup> An intent to increase European immigration can be deduced from the statutory provisions defining the diversity lottery regions, which provide a distinctly beneficial treatment for Irish immigrants: "Only for purposes of administering the [diversity visa

110. For example, Egypt, Sudan, and Saudi Arabia are classified in two separate continental regions instead of in a cultural grouping. But such a grouping is just as plausible as the legislative commingling of Brazil, Jamaica, and Guatemala.

111. See *supra* Part III. Likewise, even ten years after the lottery took effect, commentators have failed to explain the anomalous definition. Even Stephen Legomsky, who correctly details the mechanics of the program and notes the lottery's disproportionately favorable treatment of Europe and Africa, has not provided an explanation for the abnormal regional definition that actually explains why so many visas are granted to Europe and Africa. See STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 236-37 (3d ed. 2002) (discussing the mechanics of the diversity visa lottery).

112. Indeed, a simple allocation of additional points for English language ability proved controversial enough to require its removal from the Senate's original points-based system. See *supra* note 66 and accompanying text.

113. For some interesting discussions on the meanings of diversity, equality, xenophobia, globalization, and the implications of Congress's failure to define "diversity" in the 1990 Act, see Hethmon, *supra* note 93, at 392-405 (discussing transnational diversity theory and its impact on national immigration systems); Legomsky, *supra* note 9, at 321-25, 330-34 (considering various universal ideas that arise from discussions of immigration policy and geographic priorities in immigration policy); Parker, *supra* note 9, at 691-99, 727-30 (analyzing the impact of globalization on immigration questions).

114. According to the Triennial Report, only 7% of all immigrants were coming from South America. See *supra* notes 54-56 and accompanying text.

115. See Immigration Act of 1989 (Part 1): Hearings Before the Subcomm. on Immigration, Refugees, and Int'l Law of the Comm. on the Judiciary, 101st Cong. 259-60 (1989) (statement of Rev. Joseph A. Cogo, American Committee on Italian Migration); see also *id.* at 222-25 (statement of Donald Martin, Irish Immigration Reform Movement) (declaring that a point system would not help the problems of Irish immigration to the United States).

lottery], Northern Ireland shall be treated as a separate foreign state . . . .”<sup>116</sup> Granting Ireland double status for lottery purposes by taking Northern Ireland out of the United Kingdom (which is limited in its allotment of diversity visas because it already sends so many immigrants to the United States) lends substantial support to allegations that the creation of the lottery was little more than special interest group appeasement.<sup>117</sup>

The disparate Latin American cultural grouping may have thus been an additional attempt to benefit prospective European immigrants by limiting South American access to the diversity lottery. If the South America region only included continental South America, the number of diversity visas allocated to immigrants from continental South America would be comparable to the number allocated to immigrants from Europe and Africa because the number of total immigrants coming from each of these continents is approximately the same.<sup>118</sup> But the number of diversity visas allocated to potential South American immigrants can be significantly curtailed if Mexico, Central America, and the Caribbean are combined with continental South America, since so many immigrants already come from Mexico, Central America, and the Caribbean. The visas deprived would be South American immigrants by this unconventional geographic grouping can then be made available to the other “low admission regions”—most notably Europe and Africa.<sup>119</sup>

This tactic is particularly effective because of its effect on the North America region. After removing Mexico, Central America, and the Caribbean, only Canada and Greenland remain in the North America region.<sup>120</sup> Furthermore, Canada routinely sends more than 50,000 immigrants to the United States in any given five year period,

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116. 8 U.S.C. § 1153(c)(1)(F) (2005).

117. See, e.g., H.R. REP. NO. 101-723, pt. 1, at 138-39 (dissenting views) (“Instead of fashioning a policy for the national interest of all Americans, H.R. 4300 responds to every special interest group that has made a demand on the United States immigration system.”); Jacob, *supra* note 9, at 311-21, 323-25.

118. See *infra* notes 124-128 and accompanying text.

119. A “low admission region” is a region that does not account for more than one-sixth of the total number of immigrants over a five-year period. 8 U.S.C. § 1153(c)(1)(B)(i) (2005).

120. For immigration statistics purposes, Mexico, Central America, and the Caribbean are typically included with North America. See *supra* note 107. For diversity lottery purposes, the Bahamas has been included in the North America region, even though it is considered a part of the Caribbean for immigration statistics purposes. Compare, e.g., Bureau of Consular Affairs, *Registration for the Diversity Immigrant (DV-2006) Visa Program*, 69 FR 65012, 65017 (Nov. 9, 2004) (including the Bahamas in North America for the diversity visa lottery), with 2004 YEARBOOK, *supra* note 6 (including the Bahamas in the Caribbean).

so it would not be allocated any diversity visas.<sup>121</sup> Thus, by grouping Mexico, Central America, and the Caribbean with continental South America, the North America region could be turned into another Oceania for purposes of the diversity visa calculus, never substantially affecting the number of diversity visas available for European and African immigrants.<sup>122</sup> In sum, through the strategic definition of the South America region, the drafters of the lottery could simultaneously preclude a particular cultural grouping from meaningful access to the diversity visa lottery *and* ensure maximum access for European and African immigrants.

The numbers bear this argument out. Every year since the inception of the diversity visa lottery, there have been slightly fewer non-diversity visa immigrants from continental South America than from Europe, and slightly more non-diversity immigrants from continental South America than from Africa.<sup>123</sup> Immigrants from continental South America typically account for about 7% of all non-diversity visas; European and African immigrants account for about 14% and 4%, respectively, of all non-diversity visas.<sup>124</sup> But while immigrants from Africa and Europe together routinely account for almost 80% of all diversity immigrants (about 44% and 35%, respectively), less than 3% of all diversity immigrants come from South America, even less than its already low percentage of non-diversity admissions.<sup>125</sup> In fact, of the four continents that each account for less than one-sixth of total immigration, South America is the only one that receives a smaller percentage of diversity visas than non-diversity visas.<sup>126</sup> As predicted, North American immigrants (including Central America and the Caribbean) usually account for

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121. See Victor C. Romero, *On Elián and Aliens: A Political Solution to the Plenary Power Problem*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 343, 369 (2001).

122. Because of its low population, Oceania is granted only a few diversity visas, despite its low number of annual admissions. See *infra* app. tbls. 2-5; see also *supra* note 3.

123. For the discussion that follows, Tables 2-5 in the Appendix may be helpful.

124. See sources cited *supra* note 6.

125. See sources cited *supra* note 6.

126. The other three "low admission" continents combined send four times as many diversity immigrants as non-diversity immigrants. European immigrants typically receive about 14% of all non-diversity visas and 44% of all diversity visas; African immigrants receive about 4% of all non-diversity visas and almost 35% of all diversity visas; and immigrants from Oceania receive about 0.5% of all non-diversity visas and about 1.4% of all diversity visas. Combined they account for about 18% of all non-diversity immigrants and 80% of all diversity immigrants. See *infra* app. fig.1.

roughly the same number of diversity visas as immigrants from Oceania—about 1% to 2%.<sup>127</sup>

Of course, the numbers change with the regional definitions.<sup>128</sup> Under the legislative definition, the South America region accounts for about 45% of all non-diversity visa admissions and less than 5% of all diversity-based admissions; and the new North America (absent Mexico, Central America, and the Caribbean) accounts for only 2% of all non-diversity admissions, and less than one-half of one percent of all diversity admissions.<sup>129</sup> In short, as predicted, the unorthodox definition of the America regions dramatically increases the number of non-diversity admissions counted against South America, thus precluding any meaningful access to the diversity lottery for immigrants from both American continents and ensuring that more diversity visas are available for European and African immigrants.

The effect of the regional definitions could not have come as a surprise to the drafters of the diversity lottery—the percentage of immigrants coming from each region has not changed substantially since Congress was presented with the Triennial Report. The Triennial Report showed that about 7% of all immigrants were coming from South America, 11% from Europe, and 3% from Africa.<sup>130</sup> Today, about 7% of all non-diversity immigrants come from South America, 14% from Europe, and 4% from Africa.<sup>131</sup> The percentages of non-diversity immigrants from each region have not changed significantly over the past 15 years, and the diversity lottery calculus has not changed since its inception. Thus, one is led to conclude that the

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127. See sources cited *supra* note 6. Asian immigrants typically account for about 16% of all diversity admissions, even though almost 35% of all non-diversity immigrants also come from Asia. See sources cited *supra* note 6.

128. Besides the disparate definition of the America regions, the diversity-visa-defined regions differ from the definitions in immigration statistics in other ways. In determining which countries and regions are high or low admission, immigrants from an overseas territory are counted with their mother countries (and their mother countries' regions). 8 U.S.C. § 1153(c)(1)(F) (2005). Additionally, a few countries are routinely considered part of one region for immigration statistics purposes, and part of another for diversity visa issuance purposes, most notably Turkey (Europe for the diversity visa lottery; Asia for immigration statistics) and the Bahamas (Caribbean for immigration statistics, but North America (not including the Caribbean) for the lottery). Compare, e.g., Bureau of Consular Affairs, *Registration for the Diversity Immigrant (DV-2006) Visa Program*, 69 Fed. Reg 65,012, 65,016-17 (Nov. 9, 2004) (listing countries by region for the diversity visa lottery), with 2004 YEARBOOK, *supra* note 6, at tbl.8 (listing countries by region for immigration statistics). The statistics in this Note take account of these discrepancies as much as possible. See *infra* note 152.

129. See sources cited *supra* note 6.

130. See TRIENNIAL REPORT, *supra* note 54, tbl.F. The percentages in the text are averages of the percentages for each year (1985-1987). See *infra* app. tbl.1.

131. See sources cited *supra* note 6.

deviant definition of the South America region works an intentional discrepancy.

## V. POTENTIAL SOLUTIONS

Inasmuch as the current "diversity" system reflects a preference for specific countries and regions to the detriment of other deserving countries and regions, it needs reform. As evidenced by the history of the diversity lottery itself, there are many ways to promote diversity in the immigration stream. This Section will address three different methods: elimination, reclassification, and randomization.

### A. *Elimination*

It could be argued that the diversity lottery should be eliminated, since it is designed to benefit European immigrants at the expense of would-be South American immigrants. In fact, three bills introduced in the House this year would do exactly that, and another would suspend the diversity lottery indefinitely.<sup>132</sup> One of these bills reintroduced legislation passed by the House in the last Congress that would eliminate the lottery out of terrorism concerns.<sup>133</sup> The House Judiciary Committee report regarding that bill characterized the diversity visa lottery as "a threat to U.S. security" because it did not limit the countries from which applicants could come and because it

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132. H.R. 1912, 109th Cong. (2005) (proposing to suspend the allocation of diversity visas and other "nonessential" visas indefinitely to provide "temporary" workload relief to the immigration services departments); H.R. 1587, 109th Cong. (2005) (proposing to eliminate the diversity visa lottery and increase the cap on a particular temporary worker visa (H-2B)); H.R. 1219, 109th Cong. (2005) (limiting its proposal to an elimination of the diversity visa lottery); H.R. 688, 109th Cong. (2005) (proposing to eliminate the diversity visa lottery as part of a larger plan to protect against terrorism and immigration fraud). None of these bills have proceeded out of committee. Additionally, a Senate bill introduced this year would enable immigrants selected by the lottery to remain eligible for processing beyond the year in which they first applied for the program. S. 1119, 109th Cong. (2005). Also, Rep. Jackson-Lee introduced two bills that would double the allotment of diversity visas as part of a pro-immigrant reform plan, H.R. 2092, 109th Cong. (2005) and H.R. 257, 109th Cong. (2005), but neither of these has made it out of committee either.

133. Compare H.R. 688, 109th Cong. (2005), with H.R. 775, 108th Cong. (2003). Other bills introduced in the last Congress would have eliminated the diversity visa lottery until illegal immigration had slowed to less than 10,000 individuals annually, H.R. 946, 108th Cong. (2003), and suspended issuance of diversity visas to relieve the immigration workload, like this year's HR. 1912, H.R. 2235, 108th Cong. (2003). Rep. Jackson-Lee also introduced two bills last year that would have doubled the annual diversity visa allotment. See H.R. 4885, 108th Cong. (2004); H.R. 3918, 108th Cong. (2004).

did not require immigrants to have family or business ties to the United States.<sup>134</sup>

Elimination of the diversity visa lottery, however, would not necessarily make this country any safer from terrorism. Immigrants seeking admission under a diversity visa must still pass the same security screening as all other immigrants.<sup>135</sup> In any event, would-be terrorists have bypassed, and will likely continue to bypass, the immigration system's security measures by simply crossing the border illegally.<sup>136</sup> Thus, the diversity lottery is not likely a significant threat to national security.

Moreover, ensuring that individuals from *every* country (even those without family or business ties to the United States) have access to the immigration process is a worthwhile goal.<sup>137</sup> Even the dissenters to the House Judiciary Committee's report on H.R. 4300 concede that "a number of regions and countries are underrepresented under the current system."<sup>138</sup>

### B. *Reclassification*

Another potential solution is to leave the system as it is, but to rename the South America region "Latin America." Obviously this does nothing to remedy current inequities; but there is a certain appeal to calling a spade a spade. Furthermore, if our society can stamp South America, Mexico, Central America, and the Caribbean with the cultural homogeny label, this would at least be an honest approach.

Another possibility is to maintain a system of regions, but to reincorporate Mexico, Central America, and the Caribbean into the North America region. A variant of this proposal would group Mexico and the Caribbean with the North America region and group Central America with the South America region. Alternatively, a seventh region could be created for Central America (and/or Mexico and/or the Caribbean).

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134. H.R. REP. NO. 108-747, at 4 (2004). Of course, this logic would also prevent *any* system of independent immigration.

135. See 8 U.S.C. § 1182(a) (2005).

136. See Ruchir Patel, *Immigration Legislation Pursuant to Threats to US National Security*, 32 DENV. J. INT'L L. & POL'Y 83, 95 (2003) (noting that foreign terrorists who have entered the United States by crossing the border illegally have done so "without any consequence by the INS").

137. See Legomsky, *supra* note 9, at 334 (arguing that we should view immigrants as individuals, not as representatives of their native countries).

138. H.R. REP. NO. 101-723, pt. 1, at 138 (dissenting views).

Each of these solutions would have the desirable effect of allocating diversity visas to South American immigrants along more equitable lines than the current system does without further reducing the small number already allocated to North American immigrants. Of course, this solution does not address the double status enjoyed by Ireland.<sup>139</sup> More significantly, this solution does not address the underlying problem—a system designed to differentiate between *any* defined groupings will inevitably have discriminatory effects, which is antithetical to a system of *independent* immigration.

### C. Randomization

The best approach is to eliminate the region system from the diversity lottery entirely. As Professor Stephen Legomsky has stated, "Countries don't immigrate. People do."<sup>140</sup> A Mexican individual without family or business ties in the United States has exactly the same immigration prospects as an Irish individual without family or business ties in the United States.<sup>141</sup> The only way to truly level the playing field for all would-be "independent" immigrants is to abandon the region system entirely. This approach may not compensate those countries that had previously benefited from racial and ethnic discrimination under the national origins quota system; but perpetuating the effects of such a discriminatory system should not be an objective of U.S. immigration policy. Only by creating a truly equal playing field, without respect to borders, can the United States send the clear message that its immigration policy truly values individuals (and diversity) without regard to race or national origin.<sup>142</sup>

Of course, there are several ways to administer a diversity system that disregards country (or region) of origin. The Senate already presented one such approach—a points-based system that selects immigrants based on their possession of characteristics considered favorable to the national interest, such as education level. The difficulty with this approach, however, is its inherent potential to mask discrimination. For example, the Senate excised an English language quotient to alleviate concerns about discrimination, only to have the same English language criterion find its way into one of the

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139. See *supra* notes 116 and 117 and accompanying text.

140. Legomsky, *supra* note 9, at 334.

141. Cf. *id.* (arguing that an immigration policy in which "a European who has no individual equities and who applies for a visa today should be admitted ahead of a Mexican who has been waiting ten years to rejoin his or her family" is antithetical to a principle of racial equality).

142. See *id.* at 334-35.

House bills considered in subcommittee hearings.<sup>143</sup> Furthermore, the Senate approved a provision allocating points based on a potential immigrant's age. But if age preference is acceptable national policy, might not gender or skin color also be acceptable considerations? As illustrated by the current diversity lottery, cultural discrimination may already be an accepted national policy. Put simply, there is too much potential for discrimination in *any* system of independent immigration that allows legislators to determine which characteristics are desirable and which are not, especially since the Supreme Court has made clear that Congress has unfettered dominion over the immigration selection process.<sup>144</sup>

The only acceptable approach to independent immigration is one that does not discriminate at any level. At this point, the suggestion (and foresight) of the Organization of Chinese Americans is worth reconsideration: "If after enactment, the program is determined to not enhance diversity, then a *random lottery first-come, first-serve system* should be immediately implemented."<sup>145</sup> The February 1989 American Bar Association resolution made a similar recommendation: "a separate additional quota allotment for independent or unsponsored immigrants based on a *nondiscriminatory* selection system or lottery, or both . . ."<sup>146</sup> The best system for admitting independent immigrants and increasing true diversity (cultural, geographic, economic, and racial) is a random lottery where the only qualification is a desire to live in "The Land of the Free."

A random world-wide lottery would allocate visas to those geographic areas with the greatest demand. As stated by Professor Frederick Whelan, "formal equality of treatment for countries obviously does not mean equality of opportunity for individuals, since a person's chance of being issued a visa, or the length of time he must wait for one, varies greatly depending on the demand in his country."<sup>147</sup> Although Whelan's statement was a criticism of the

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143. See *supra* notes 66 and 73 and accompanying text.

144. See *supra* note 14.

145. *Immigration Act of 1989 (Part 1): Hearings Before the Subcomm. on Immigration, Refugees, and Int'l Law of the Comm. on the Judiciary*, *supra* note 70, at 251 (statement of Melinda C. Yee, Executive Director of the Organization of Chinese Americans) (emphasis added).

146. *Immigration Act of 1989 (Part 3): Joint Hearings Before the Subcomm. on Immigration, Refugees, and Int'l Law of the Comm. on the Judiciary and the Immigration Task Force of the Comm. on Educ. and Labor*, *supra* note 52, at 908, app. 21 (1990) (emphasis added). Along these lines, Frederick Whelan's comments on the effect of the per-country ceilings is also prescient: "Equal treatment for individuals would have called for omitting considerations of nationality altogether and accepting applicants on a first-come first-served (or a lottery) basis within a world-wide pool . . ." Whelan, *supra* note 22, at 459.

147. Whelan, *supra* note 22, at 458-59.



uniform country ceilings, it is equally applicable to the current lottery system, whose highly formalized treatment of countries and regions clearly “does not mean equality of opportunity for individuals.”<sup>148</sup>

Furthermore, it is at least theoretically possible that a random lottery would do a better job of distributing visas to currently underserved regions than the current lottery. If Africa, Europe, and South America, for example, all have a similar number of individuals desiring to immigrate to the United States, a random lottery will ensure that, on average, each of these regions will receive an equal allotment of lottery visas. But if it turns out that more individuals want to immigrate to the United States from one particular region, a random lottery will not artificially inflate or deflate the actual demand for visas from each region.<sup>149</sup> In addition, a random lottery eliminates any discrepancies in the region definitions—for example, by assigning Middle Eastern countries to three different regions.<sup>150</sup> Most importantly, however, a random lottery focuses on the individual. By considering each applicant without regard to race, ethnicity, nationality, religion, age, primary language, or any other artificial criterion,<sup>151</sup> only a random world-wide lottery can provide a truly equitable system of independent immigration.

## VI. CONCLUSION

The history of U.S. immigration policy is riddled with prejudicial and discriminatory practices. One could even make the argument that Congress has become more adept at masking its discriminatory intentions. History may yet label the strategic definition of the South America region in the diversity visa lottery a particularly subtle instance of discriminatory immigration policy. By lumping Mexico, Central America, and the Caribbean with the South American continent, the drafters of the 1990 Act simultaneously limited a cultural group's access to the diversity visa lottery and ensured that a maximum number of diversity visas would be available for European and African immigrants.

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148. *Id.*

149. There are no statistics on how many individuals actually want to immigrate to the United States from every country and region, so which areas have the greatest “demand” cannot be determined with any degree of certainty.

150. *See, e.g.*, Bureau of Consular Affairs, *Registration for the Diversity Immigrant (DV-2006) Visa Program*, 69 Fed. Reg. 65012, 65016-17 (Nov. 9, 2004).

151. General admissibility requirements, such as an absence of affiliation with active terrorist groups, would still have to be met by each independent immigrant, of course. *See supra* note 135 and accompanying text.

Nevertheless, a system of independent immigration can add value to our immigration policy, especially since immigrants in many nations may otherwise be effectively denied access to the immigrant stream. The only way to effectively administer a system of independent immigration, however, is to eliminate the regions altogether and issue a truly random world-wide lottery without respect to legislatively devised, artificial criteria.

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APPENDIX<sup>152</sup>Table 1. Percentage of Immigrants Admitted by Region of Birth, 1985 – 1987.<sup>153</sup>

Region	1985	1986	1987
Africa	3.0	2.9	2.9
Asia	46.4	44.6	42.8
Europe	11.1	10.4	10.2
North America	31.9	34.5	36.0
Oceania	0.7	0.6	0.7
South America	6.9	7.0	7.4

Table 2. Percentage of Non-Diversity Immigrants Admitted by Region of Birth (South America as a continent), 1995 – 2004.<sup>154</sup>

Region	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Africa	4.3	3.7	4.2	4.2	3.5	3.6	3.8	4.3	4.9	5.1
Asia	38.8	34.8	34.4	34.9	32.1	32.4	33.7	32.9	35.9	36.0
Europe	15.5	14.3	13.1	11.7	11.9	13.5	15.4	15.5	12.4	12.2
N.America	34.2	39.6	40.9	41.4	45.1	43.1	39.9	39.7	38.0	38.2
Oceania	0.6	0.5	0.5	0.6	0.5	0.5	0.5	0.5	0.6	0.6
S.America	6.6	7.0	6.9	7.3	6.8	6.9	6.6	7.2	8.2	7.9

152. This Note compares admissions to illustrate the actual effect on the immigrant stream, even though that is not how the actual number of diversity visas allocated to a given region is determined. See *supra* note 8. Because not every recipient of a diversity visa is actually admissible, and because many recipients choose not to utilize the visa in the calendar year in which it is granted, the numbers fluctuate from year to year and always fail to equal the number actually granted. The numbers in Tables 2 and 3 of this appendix represent the regions as defined in the Statistical Yearbooks; the numbers in Tables 4 and 5 represent the regions as defined in administering the diversity visa lottery. For an explanation of how these regions differ (besides including Mexico, Central America, and the Caribbean in the South America region), see *supra* note 128.

153. TRIENNIAL REPORT, *supra* note 54, tbl.F. The Triennial Report did not list which countries it counted in each region, but the numbers indicate that it divided the regions largely as did the Immigration Service in compiling its later statistical reports (which all included Mexico, Central America, and the Caribbean with North America). See *supra* note 107 and accompanying text.

154. See sources cited *supra* note 6.

Table 3. Percentage of Diversity Immigrants Admitted by Region of Birth (South America as a continent), 1995 – 2004.<sup>155</sup>

Region	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Africa	29.1	35.4	32.9	33.9	32.7	31.1	37.0	38.1	35.7	40.7
Asia	13.6	16.4	16.7	17.1	15.2	14.2	14.2	16.8	17.6	16.2
Europe	50.3	42.3	44.1	42.8	45.6	48.3	42.8	39.4	41.4	37.6
N.America	2.6	2.0	2.8	2.9	3.1	2.4	1.7	1.4	0.9	0.9
Oceania	1.3	1.4	1.4	1.2	1.4	1.6	1.6	1.2	1.2	1.4
S.America	3.2	2.5	2.1	2.1	2.0	2.4	2.7	3.1	3.3	3.2

Table 4. Percentage of Non-Diversity Immigrants Admitted by Region of Birth (South America as defined in 8 U.S.C. § 1153(c) (including Mexico, Central America, and the Caribbean)), 1995 – 2004.<sup>156</sup>

Region	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Africa	4.3	3.7	4.2	4.2	3.5	3.6	3.8	4.3	4.9	5.1
Asia	38.8	34.8	34.2	34.6	31.9	32.1	33.4	32.6	35.6	35.7
Europe	15.5	14.3	13.3	12.1	12.2	13.8	15.8	15.8	12.8	12.6
N.America	1.9	3.8	1.5	1.8	1.5	2.1	2.2	2.0	1.8	1.8
Oceania	0.6	0.5	0.5	0.6	0.5	0.5	0.5	0.5	0.6	0.6
S.America	38.9	42.8	46.3	46.9	50.3	47.8	44.3	44.8	44.3	44.2

Table 5. Percentage of Diversity Immigrants Admitted by Region of Birth (South America as defined in 8 U.S.C. § 1153(c) (including Mexico, Central America, and the Caribbean)), 1995 – 2004.<sup>157</sup>

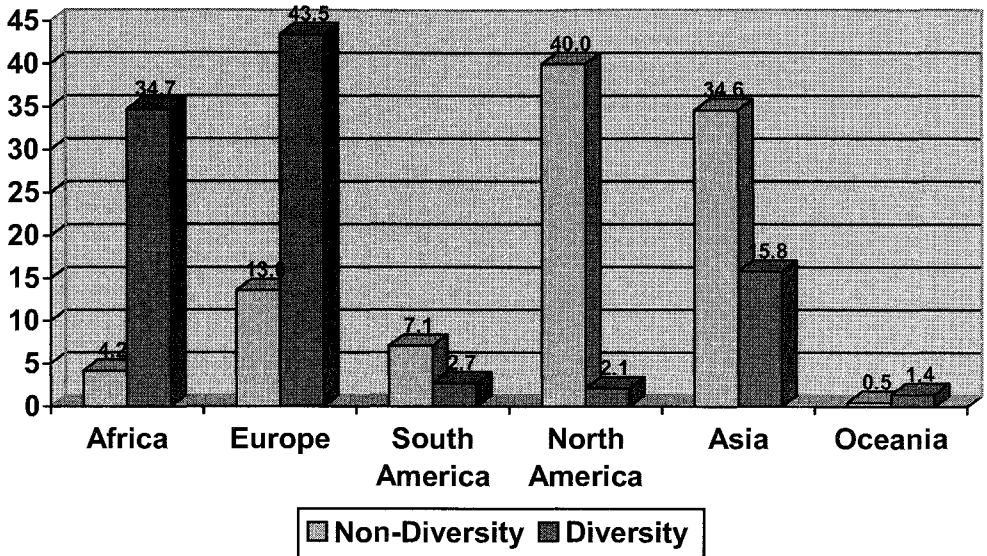
Region	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Africa	29.1	35.4	32.9	33.9	32.7	31.1	37.0	38.1	35.7	40.7
Asia	13.6	16.4	13.9	14.4	13.0	12.7	12.7	15.2	15.5	14.0
Europe	50.3	42.3	46.9	45.5	47.8	49.8	44.3	41.0	43.5	39.7
N.America	0.6	0.3	0.3	0.3	0.2	0.3	0.2	0.2	0.2	0.1
Oceania	1.3	1.4	1.4	1.2	1.4	1.6	1.6	1.2	1.2	1.4
S.America	5.1	4.3	4.6	4.7	4.9	4.5	4.2	4.2	4.0	4.0

155. See sources cited *supra* note 6.

156. See sources cited *supra* note 6. For a description of how the diversity regions are implemented, see *supra* notes 128 and 152. Because of changes in political boundaries since the start of the lottery, and changes in the way immigration statistics have been maintained, there is some uncertainty inherent in calculating these statistics.

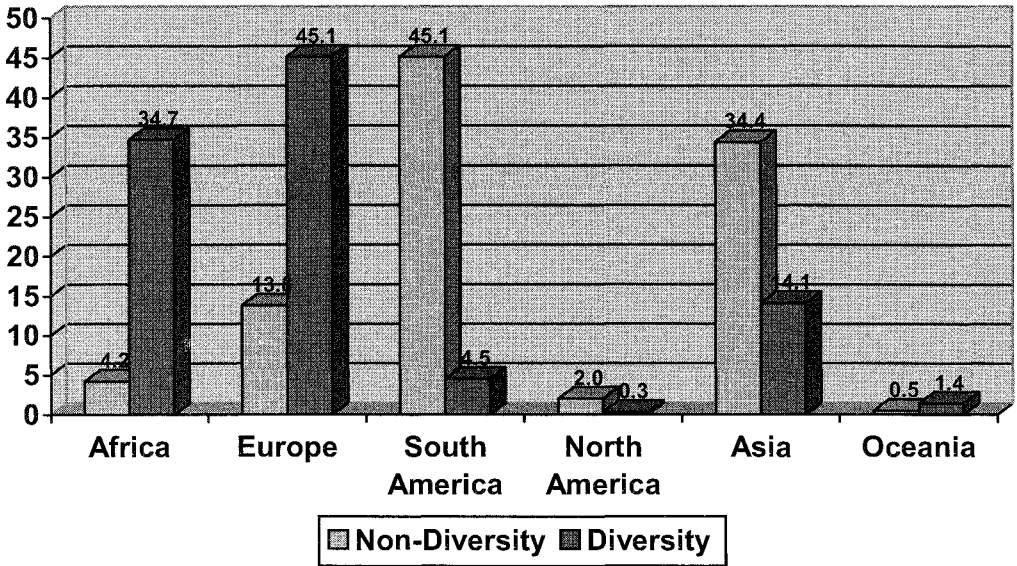
157. See sources cited *supra* note 6.

Figure 1. Average Percent of Non-Diversity and Diversity Immigrants Admitted by Region of Birth (South America as a continent), 1995-2004.<sup>158</sup>



158. See sources cited *supra* note 6. The average percent was derived by averaging the percentages from each year (1995-2004).

Figure 2. Average Percent of Non-Diversity and Diversity Immigrants Admitted by Region of Birth (South America as defined in 8 U.S.C. § 1153(c) (including Mexico, Central America, and the Caribbean)), 1995 – 2004.<sup>159</sup>



159. See sources cited *supra* note 6. The average percent was derived by averaging the percentages from each year (1995-2004).

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