

## **An Immigration Innovation: A Comparative Analysis of the American Diversity Visa Lottery Program and the Canadian Points-Based System**

Jennifer Hopkins

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

---

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [selbyc@stjohns.edu](mailto:selbyc@stjohns.edu).

## NOTES

# AN IMMIGRATION INNOVATION: A COMPARATIVE ANALYSIS OF THE AMERICAN DIVERSITY VISA LOTTERY PROGRAM AND THE CANADIAN POINTS-BASED SYSTEM

JENNIFER HOPKINS<sup>†</sup>

### INTRODUCTION

Our beautiful America was built by a nation of strangers. From a hundred different places or more . . . joining and blending in one mighty and irresistible tide. This land flourished because it was fed from so many sources—because it was nourished by so many cultures and traditions and peoples.<sup>1</sup>

— *President Lyndon B. Johnson*

United States immigration policy has historically been a strategy for national growth.<sup>2</sup> Congress passed the Immigration Act of 1990 to stimulate further growth by increasing immigration opportunities.<sup>3</sup> This substantial immigration reform created the Diversity Visa (“DV”) lottery program, which administers

---

<sup>†</sup> Senior Articles Editor, *St. John's Law Review*; J.D. Candidate, 2021, St. John's University School of Law; B.A., 2017, University of Maryland, College Park. First and foremost, thank you to Professor Catherine Baylin Duryea for her invaluable guidance and encouragement throughout this process. Thank you to the *St. John's Law Review* Editorial Staff—especially to my mentor and editor, Kylie McLaughlin. And thank you to my friends and family for their constant support. I dedicate this Note to my parents and role models, James Hopkins and Dr. Kathleen Hopkins.

<sup>1</sup> Remarks at the Signing of the Immigration Bill, 2 PUB. PAPERS 1039 (Oct. 3, 1965).

<sup>2</sup> See PASTORA SAN JUAN CAFFERTY ET AL., *THE DILEMMA OF AMERICAN IMMIGRATION: BEYOND THE GOLDEN DOOR* 195 (1983).

<sup>3</sup> Immigration Act of 1990, Pub. L. No. 101-649, § 131, 104 Stat. 4978, 4997–99 (codified as amended at 8 U.S.C. § 1153(c)).

50,000 lawful permanent residence visas annually.<sup>4</sup> These visas are drawn randomly from a pool of applicants from countries with low rates of immigration to the United States.<sup>5</sup>

Donald J. Trump pushed for major immigration reform beginning on his first day in office,<sup>6</sup> including the repeal of the DV program and the development of a points-based system modeling the current policy in Canada.<sup>7</sup> While President Trump stressed the economic benefits that the point system could bring, the DV program has always contributed much more.<sup>8</sup> The program brings more diversity to the United States; more diversity builds a stronger economy and further advances traditional American ideology.<sup>9</sup>

This Note sheds light on how beneficial the DV Lottery program is to the United States by comparing it to Canada's points-based system. This Note proceeds in five parts. Part I provides a brief historical background of the DV program, highlighting how United States immigration laws have evolved and where the DV program currently stands. Part II provides historical context of Canada's points-based immigration system, along with the eligibility requirements and application process. Part III argues that the United States' DV lottery program is superior to the Canadian points-based system on both economic and ideological grounds. The DV program brings in "new seed" immigrants who stimulate the economy in ways a point system cannot match<sup>10</sup> and advances traditional American ideology by encouraging a

---

<sup>4</sup> *Id.* Originally, Congress provided for 55,000 diversity visas annually. 8 U.S.C. § 1151(e) (2012). However, in 1997, the Nicaraguan and Central American Relief Act (NACARA) devoted 5,000 of the 55,000 annual diversity visas to the NACARA program. Pub. L. No. 105-100, § 203(d), 111 Stat. 2160, 2199 (1997).

<sup>5</sup> See Jonathan H. Wardle, Note, *The Strategic Use of Mexico To Restrict South American Access to the Diversity Visa Lottery*, 58 VAND. L. REV. 1963, 1969 (2005).

<sup>6</sup> See President Donald J. Trump, Inaugural Address (Jan. 20, 2017).

<sup>7</sup> See President Donald J. Trump, Remarks on Modernizing Our Immigration System for a Stronger America (May 16, 2019).

<sup>8</sup> "One of the secrets to America's success as an immigrant society is the historic commitment to such diversity." JEB BUSH ET AL., COUNCIL ON FOREIGN RELATIONS, INDEPENDENT TASK FORCE REPORT NO. 63: U.S. IMMIGRATION POLICY 81 (2009).

<sup>9</sup> See discussion *infra* Part III.

<sup>10</sup> A "new seed" immigrant is an independent immigrant with neither close family ties nor qualifying job skills, who has a pioneering spirit and unique work ethic. See Anna O. Law, *The Diversity Visa Lottery—A Cycle of Unintended Consequences in United States Immigration Policy*, J. AM. ETHNIC HIST., Summer 2002, at 3, 12–13.

diverse population.<sup>11</sup> Part IV argues that current criticisms of the DV program are misconceived. Finally, Part V acknowledges the need for immigration reform within the DV program. This Part suggests changing the visa allocation formula to stimulate further diversity and properly account for all prospective immigrants. And while the DV program is currently beneficial to the United States, these legislative measures will ensure its continued success.

## I. THE DIVERSITY VISA PROGRAM: HISTORY AND DEVELOPMENT

### A. *History and Evolution of the DV Program*

During the early twentieth century, American immigration policy was administered by the National Origins Formula, a system of quotas intended to prevent immigration from being dominated by any one ethnic group.<sup>12</sup> A turning point came with the Immigration Act of 1965, which marked “one of the most liberal and expansive reforms to the American system because of its abolition of race, ethnicity and national origin from the immigration selection process.”<sup>13</sup> The 1965 Act eliminated the quotas and instead prioritized immigrants who had relatives living in the United States and immigrants who possessed skills that employers wanted.<sup>14</sup>

However, the 1965 Act posed a barrier for hundreds of thousands of Irish citizens who wanted to flee an economic crisis but were unskilled and had no family in the United States.<sup>15</sup> This did not go unnoticed by congressional members of Irish descent, who leapt into action and proposed a solution: the diversity visa program.<sup>16</sup> The early arguments behind this proposal included

---

<sup>11</sup> See, e.g., EMMA LAZARUS, *THE NEW COLOSSUS* (1883) (“Give me your tired, your poor, / Your huddled masses yearning to breathe free, / The wretched refuse of your teeming shore. / Send these, the homeless, tempest-tost to me, / I lift my lamp beside the golden door!”).

<sup>12</sup> See Zachary J. Carls, Comment, *American Immigration: A Path of Return to a Pre-Modern Ideal of Open Immigration Policy*, 7 PENN ST. J.L. & INT’L AFFS. 187, 192 (2019).

<sup>13</sup> Law, *supra* note 10, at 4 (internal citations omitted).

<sup>14</sup> *Id.*

<sup>15</sup> Anna O. Law, *The Irish Roots of the Diversity Visa Lottery*, POLITICO (Nov. 1, 2017), <https://www.politico.com/magazine/story/2017/11/01/diversity-visa-irish-history-215776> [<https://perma.cc/QBM7-MBWW>].

<sup>16</sup> Law, *supra* note 10, at 12–14.

support for “new seed immigrants” who “were young [and] single,” without “close family ties” or “qualifying job skills.”<sup>17</sup> Representative Emanuel Celler (D-NY), a proponent of the program, argued that a number of these new seed immigrants should be admitted annually because “there was something valuable in someone who simply wanted to come [to] the United States . . . because of pioneering spirit and immigrant work ethic.”<sup>18</sup> The program was created in 1986 as a temporary solution and distributed visas on a first-come, first-served basis to citizens of countries deemed to be “adversely affected” by the current law.<sup>19</sup> However, the Immigration Act of 1990 modified the program to include a completely randomized, permanent lottery.<sup>20</sup> The main purpose of the 1990 Act was “to foster new, more varied, migration from other parts of the world” through the DV program.<sup>21</sup>

---

<sup>17</sup> *Id.* at 12–13.

<sup>18</sup> *Id.* The idea of a points-based system was introduced in 1989, during this period of a major push for immigration reform. S. 358, 101st Cong. § 203(b) (as passed by Senate, June 19, 1989). This system would have admitted immigrants based on points awarded for age, education, occupational demand, and so on, and it was passed by the Senate. *Id.* However, it failed to pass the House, and instead, the DV program was adopted. Wardle, *supra* note 5, at 1975–83. The Judiciary Committee report contains no explanation as to why the DV program was originally adopted over the point system, only discussing a goal to “further enhance and promote diversity.” H.R. REP. NO. 101-723, pt. 1 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6710, 6728. See Walter P. Jacob, Note, *Diversity Visas: Muddled Thinking and Pork Barrel Politics*, 6 GEO. IMMIGR. L.J. 297, 332 (1992) (“[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)).

<sup>19</sup> Wardle, *supra* note 5, at 1968–69, 1969 n.24. The first green-card lottery was very green indeed; of the 10,000 visas distributed, 4,161 went to Irish citizens. Celestine Bohlen, *For Illegal Irish Immigrants, a Time To Test That Luck*, N.Y. TIMES, Mar. 17, 1989, at B1, <https://www.nytimes.com/1989/03/17/nyregion/for-illegal-irish-immigrants-a-time-to-test-that-luck.html> [<https://perma.cc/V7VW-V49V>].

<sup>20</sup> 8 U.S.C. § 1153(e)(2) (2018). The Act was scheduled to go into effect on October 1, 1994. Stephen H. Legomsky, *Immigration, Equality and Diversity*, 31 COLUM. J. TRANSNAT’L L. 319, 335 (1993). With the new modifications, Congress sought to ensure that lottery winners were chosen randomly from around the world, not just from European countries. Law, *supra* note 10, at 23.

<sup>21</sup> RUTH ELLEN WASEM, CONG. RSCH. SERV., R41747, DIVERSITY IMMIGRANT VISA LOTTERY ISSUES 1 (2011). However, in a 1987 congressional hearing before the Subcommittee on Immigration, Congressman Donnelley (D-MA) “admitted that the program was intended as a backdoor amnesty program for the Irish,” because President Reagan’s Immigration Reform and Control Act of 1986 could not be extended to the Irish. Law, *supra* note 10, at 19–21. However, the Irish eventually lost interest in the lottery as the economic situation in Ireland greatly improved. *Id.* at 23. In 1994, a total of 16,344 Irish immigrated through the DV program; by 1996,

Since its enactment, the DV Lottery has proven to be successful at fostering new and more varied migration.<sup>22</sup>

### B. *Eligibility and the Application Process*

In order to be eligible for a diversity visa, applicants need to satisfy three requirements.<sup>23</sup> First, they must be natives of a low-admission foreign state.<sup>24</sup> Low-admission states are those that have not sent more than 50,000 immigrants to the United States in the past five years.<sup>25</sup> Second, applicants must have at least a high school education or its equivalent.<sup>26</sup> Third, they must be legally permitted to enter the United States.<sup>27</sup> Prospective immigrants must enter the lottery during a designated one-month period by electronically submitting a short petition through the United States Department of State's website.<sup>28</sup> The Department of State uses software to assign each application a random number and then the software randomly selects a number of petitions from each of the designated regions.<sup>29</sup> After being randomly

---

that number dropped to 963, and by 1997 it was 359. *Id.* Accordingly, the DV program evolved to accept a more diverse population.

<sup>22</sup> In 1990, 0.21% of foreign-born individuals were born in the bottom ten countries of origin for the foreign-born population in the United States; in 2017, that number doubled to 0.42%. JILL H. WILSON, CONG. RSCH. SERV., R45973, *THE DIVERSITY IMMIGRANT VISA PROGRAM* 17 n.86 (2019).

<sup>23</sup> U.S. DEP'T OF STATE, *INSTRUCTIONS FOR THE 2020 DIVERSITY IMMIGRANT VISA PROGRAM (DV-2020)*, at 1–2 [hereinafter *DV INSTRUCTIONS*], <https://travel.state.gov/content/dam/visas/Diversity-Visa/DV-Instructions-Translations/DV-2020-Instructions-Translations/DV-2020-Instructions-English.pdf> [<https://perma.cc/XY9V-CA4P>] (last visited Mar. 24, 2021); Melissa Chapaska, Note, *The Immigration Gamble: Eliminating the Diversity Visa Program*, 5 *WIDENER J.L., ECON. & RACE* 67, 69 (2013).

<sup>24</sup> *DV INSTRUCTIONS*, *supra* note 23.

<sup>25</sup> Chapaska, *supra* note 23, at 69. As part of the complex formula Congress created to allocate diversity visas, natives of low-admission states in low-admission regions are prioritized over natives of low-admission states in high-admission regions. 8 U.S.C. § 1153(c)(1)(E). No visas are distributed for natives of high-admission states. *Id.*

<sup>26</sup> *DV INSTRUCTIONS*, *supra* note 23. This requirement is also satisfied by “two years of work experience . . . in an occupation that requires at least two years of training.” *Id.*

<sup>27</sup> Chapaska, *supra* note 25, at 69. “An immigrant is legally permitted to enter the United States so long as he or she does not satisfy any of the ten basic inadmissibility grounds provided by the Immigration and Nationality Act.” *Id.* at 70. An immigrant may be found inadmissible for various health, criminal, or security reasons. 8 U.S.C. § 1182.

<sup>28</sup> Chapaska, *supra* note 23, at 70.

<sup>29</sup> *DV INSTRUCTIONS*, *supra* note 23.

selected through the lottery process, the “winners” have the right to apply for a visa. They must pay an application fee, complete an interview with a consular officer, and go through a Department of Homeland Security (“DHS”) security clearance to determine if they are eligible to enter the United States.<sup>30</sup>

### C. *Current Controversy*

In recent years, there have been many efforts by Republicans in both the House and the Senate to end the DV program.<sup>31</sup> Lawmakers have cited concerns about fraud, national security, and border security.<sup>32</sup> Republican members of Congress have introduced multiple bills; however, nothing has passed both houses.<sup>33</sup>

There have also been bipartisan efforts to reform immigration. Senator Charles Schumer (D-NY) introduced the Immigration Modernization Act on April 16, 2013, which would have entirely repealed the DV program.<sup>34</sup> This bill proposed a point system that would have distributed approximately 120,000 to 250,000 visas per year based on “points awarded for . . . individual characteristics.”<sup>35</sup> The Act passed through the Senate, but it was not considered by the House of Representatives and died in the 113th Congress.<sup>36</sup> A similar proposal arose in 2017, the

---

<sup>30</sup> *Id.* at 5.

<sup>31</sup> *See, e.g.*, Chapaska, *supra* note 23, at 78–81.

<sup>32</sup> *See, e.g.*, 164 CONG. REC. S288–89 (daily ed. Jan. 18, 2018) (statement of Sen. David Perdue) (“We know that the diversity visa lottery is fraught with fraud. We know that it has been related to at least one act of terrorism, and it needs to be eliminated.”); *see also infra* Part IV.

<sup>33</sup> *See, e.g.*, Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. § 1102 (2005) (seeking to tighten border security and eliminate the DV program); SAFE for America Act, H.R. 1430, 110th Cong. § 2 (2007) (seeking to eliminate the DV program); RAISE Act, S. 1720, 115th Cong. § 2 (2017) (seeking to eliminate the DV program and implement a point system); Immigration in the National Interest Act of 2017, H.R. 3775, 115th Cong. § 2 (2017) (same); RAISE Act, H.R. 2278, 116th Cong. § 2 (2019) (same); RAISE Act, S. 1103, 116th Cong. § 2 (2019) (same); SAFE for America Act, H.R. 413, 117th Cong. § 2 (2021) (seeking to eliminate the DV program); Visa Lottery Repeal Act, S. 859, 117th Cong. § 2 (2021) (same).

<sup>34</sup> Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 2303 (2013). The Act was co-sponsored by seven other members, who, as a bipartisan group, also wrote and negotiated the bill. *Id.*

<sup>35</sup> Chapaska, *supra* note 2325, at 81.

<sup>36</sup> *See* Steven T. Dennis, *Immigration Bill Officially Dead: Boehner Tells Obama No Vote This Year, President Says*, ROLL CALL (June 30, 2014, 3:43 PM), <https://www.rollcall.com/2014/06/30/immigration-bill-officially-dead-boehner-tells-obama-no-vote-this-year-president-says-updated-video/> [https://perma.cc/9DPJ-5EBV].

Reforming American Immigration for Strong Employment (“RAISE”) Act.<sup>37</sup> The RAISE Act would have ended the DV Lottery and moved the United States to a “skills-based immigration points system,” similar to the 2013 proposal.<sup>38</sup> The proposed system would award points based on age, formal education, English language proficiency, extraordinary achievement, highly compensated employment, investments, and pre-existing offers of admission under family preference category.<sup>39</sup> A similar proposal was reintroduced in the House and the Senate on April 10, 2019, gaining support from only Republican members of Congress.<sup>40</sup>

Additionally, President Donald Trump announced his support for points-based immigration in November 2017 and again in May 2019, saying that he wanted to repeal the DV program, model Canada’s merit-based immigration system, and prioritize high-skilled workers.<sup>41</sup>

Diversity lottery. Sounds nice. It’s not nice. It’s not good. It hasn’t been good . . . So [I] want to immediately work with Congress on the Diversity Lottery Program, on terminating it, getting rid of it. [I] want a merit-based program where people come into our country based on merit.<sup>42</sup>

---

<sup>37</sup> S. 1720.

<sup>38</sup> *Id.* § 220

<sup>39</sup> *Id.* §§ 220(c)–(h). “Extraordinary achievement” includes winning an Olympic medal or a Nobel Prize. *Id.* § 220(f).

<sup>40</sup> See H.R. 2278; S. 1103. Many Democratic members of Congress have vocalized their opposition to this Act. Richard Blumenthal, a Democratic Senator, stated “[t]his offensive plan . . . is nothing but a series of nativist talking points and regurgitated campaign rhetoric that completely fails to move our nation forward toward real reform.” David Nakamura, *Trump, GOP Senators Introduce Bill To Slash Legal Immigration Levels*, WASH. POST (Aug. 3, 2017, 12:50 AM) (second alteration in original) (quoting Sen. Richard Blumenthal (D-CT)), <https://www.washingtonpost.com/news/post-politics/wp/2017/08/02/trump-gop-senators-to-introduce-bill-to-slash-legal-immigration-levels/> [<https://perma.cc/UR2M-VLKW>].

<sup>41</sup> President Donald J. Trump, Joint Address to Congress (Feb. 28, 2017); *President Trump’s Bold Immigration Plan for the 21st Century*, WHITE HOUSE (May 21, 2019), <https://www.whitehouse.gov/articles/president-trumps-bold-immigration-plan-21st-century/> [<https://perma.cc/YBV6-JKGQ>] (“The ‘Build America Visa’ will use a clear, fair point-based criteria—one that prizes extraordinary achievement and potential to contribute to our Nation—to determine who should be issued a green card for permanent residence in the United States.”).

<sup>42</sup> *President Trump Meeting with Cabinet*, (C-SPAN online broadcast Nov. 1, 2017), <https://www.c-span.org/video/?436675-1/president-trump-end-diversity-visa-lottery-program-wake-york-attack&start=94> [<https://perma.cc/4CZY-SG25>]; see also President Donald J. Trump, Remarks at FBI National Academy Graduation Ceremony (Dec. 15, 2017) (“[Other countries] give us their worst people, they put them in a bin, [and pick] the worst of the worst.”).



Throughout his administration, President Trump pushed for immigration reform that would model Canadian immigration policy, and focus on human capital factors indicative of economic success. However, President Trump and the Republican members of Congress failed to account for all of the benefits that the DV program brings to the United States economy and society in ways that a point system could not.<sup>43</sup>

## II. THE POINT SYSTEM: HISTORY AND DEVELOPMENT OF CANADA'S IMMIGRATION POLICY

### A. *History and Evolution of the Canadian Point System*

In 1967, Canada became the first country in the world to introduce a points-based immigration system.<sup>44</sup> Canada abandoned its previous scheme that favored white Europeans and adopted a point system that assessed applicants regardless of their place of origin, race, or culture.<sup>45</sup> The 1967 immigration regulations instead “assigned points” to prospective immigrants “relating to their ability to . . . settle in Canada.”<sup>46</sup> Prime Minister Pierre Trudeau sought to recognize the cultural contributions of various ethnic groups to Canadian society even further by an-

---

<sup>43</sup> It is worth noting that not all of the proposals recently before Congress would cut the DV program; several immigration reform efforts have also been made to maintain the DV program. Lisa Desjardins, *Every Immigration Proposal in One Chart*, PBS NEWSHOUR (Feb. 13, 2018, 6:17 PM), <https://www.pbs.org/newshour/politics/every-immigration-proposal-in-one-chart> [https://perma.cc/Q7WK-7DH3]. Efforts have also been made to prioritize the DV program; on his first day in office, President Joe Biden submitted an immigration bill to Congress, which would increase the amount of diversity visas to 80,000 per year. *Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment To Modernize our Immigration System*, WHITE HOUSE (Jan. 20, 2021) [hereinafter *Fact Sheet*], <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-biden-sends-immigration-bill-to-congress-as-part-of-his-commitment-to-modernize-our-immigration-system/> [https://perma.cc/9TQC-VLUZ].

<sup>44</sup> See Lindsay Van Dyk, *Canadian Immigration Acts and Legislation*, CANADIAN MUSEUM IMMIGR. PIER 21, <https://pier21.ca/research/immigration-history/Canadian-immigration-acts-and-legislation> [https://perma.cc/5M3Z-TBWD] (last visited Mar. 24, 2021).

<sup>45</sup> RAY MARSHALL, *VALUE-ADDED IMMIGRATION: LESSONS FOR THE UNITED STATES FROM CANADA, AUSTRALIA, AND THE UNITED KINGDOM 2* (2011) (discussing how Canada's approach to immigration policy in the early 1900s “was to maintain the essential ‘British’ character of its population”).

<sup>46</sup> *Immigration Regulations, Order-in Council PC 1967-1616, 1967*, CANADIAN MUSEUM IMMIGR. PIER 21, <https://pier21.ca/research/immigration-history/immigration-regulations-order-in-council-pc-1967-1616-1967> [https://perma.cc/AMF8-PLM5] (last visited Mar. 24, 2021).

nouncing multiculturalism as an official government policy in 1971.<sup>47</sup> The Canadian Multiculturalism Act of 1988 codified this policy, which “reflect[ed] Canada’s increasingly diverse racial and ethnic composition.”<sup>48</sup>

However, in 2002, the Canadian government started straying from its “fairly broad and generous” immigration policy that focused on these multiculturalism efforts and instead chose to prioritize economic prosperity.<sup>49</sup> The government began giving more weight to the admission of immigrants expected “to achieve the nation’s economic goals.”<sup>50</sup> Accordingly, the Immigration and Refugee Protection Act was amended in 2002 to give priority to migrants with valuable and in-demand skills.<sup>51</sup> These changes included putting more emphasis on higher education and language proficiency, along with reducing points for foreign work experience.<sup>52</sup>

### B. Eligibility and the Application Process

While Canada’s current immigration policy still admits immigrants through a family reunification category and a refugee category, the economic category represents the largest portion of immigrants that enter Canada each year.<sup>53</sup> This economic category utilizes the points-based system, which defines how useful a prospective immigrant is for the national economy by determining if they qualify for “Express Entry.”<sup>54</sup> Express Entry refers to a pool of immigrant workers that either Canadian employers

---

<sup>47</sup> Van Dyk, *supra* note 44.

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

<sup>49</sup> Grace H. Parsons, Note, *An Overview of the U.S. Immigration System and Comparison with Merit-Based Immigration Systems in Light of the Proposed RAISE Act*, 35 ARIZ. J. INT’L & COMPAR. L. 469, 486 (2018).

<sup>50</sup> *Id.*

<sup>51</sup> MARSHALL, *supra* note 45, at 7.

<sup>52</sup> *Id.* (noting that immigrants with foreign work experience caused a gap in the labor market because some skills were not transferable and compatible in the Canadian market).

<sup>53</sup> Annalisa Nash Fernandez, *Canada’s Immigration Policies Are Just as Warped as America’s—but in a Whole Different Way*, QUARTZ (Mar. 15, 2017), <https://qz.com/932244/american-versus-canadian-immigration-policies-are-not-actually-that-dissimilar-yet-the-us-is-cast-as-the-devil/> [<https://perma.cc/X97T-A54L>]. In 2015, immigrants admitted for economic reasons represented sixty-three percent of Canada’s documented immigrants. *Id.*

<sup>54</sup> *Id.*; Dara Lind, *Moving to Canada, Explained*, VOX, <https://www.vox.com/2016/5/9/11608830/move-to-canada-how> [<https://perma.cc/49WY-7XV7>] (last updated Nov. 8, 2016, 9:58 PM).

can hire from or the government can choose to accept based on their skills.<sup>55</sup> The system distributes points based upon how well a prospective immigrant will integrate in Canada according to factors like language, adaptability, and how much they can contribute to the economy via education, experience, employment, and age.<sup>56</sup>

The point scoring system is known as the Comprehensive Ranking System (“CRS”) and a candidate’s total point accumulation is known as her CRS score.<sup>57</sup> The total score is calculated out of 1,200 points—a prospective immigrant can receive a “core set” of up to 600 points, and further, up to 600 “additional points.”<sup>58</sup> Core points go toward ensuring valuable human capital, which includes skills, work experience, and education level.<sup>59</sup> Additional points are awarded based on factors such as “Canadian degrees,” a standing job offer, “a nomination from a province,” a sibling who is a citizen or permanent resident of Canada, and “strong French language skills.”<sup>60</sup> For example, a prospective immigrant who is between twenty and twenty-nine years of age, has a Ph.D., is highly proficient in both English and French, has years of Canadian work experience, and has arranged employment would score a very high number of points.<sup>61</sup> A 2010 program evaluation concluded that generally, the points factors are effective predictors of economic performance in Canada,<sup>62</sup> though the Canadian government has acknowledged that underemploy-

---

<sup>55</sup> Lind, *supra* note 54.

<sup>56</sup> *Id.*

<sup>57</sup> *How We Rank Your Express Entry Profile*, GOV'T OF CAN., <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/eligibility/criteria-comprehensive-ranking-system.html> [https://perma.cc/5UJX-WTGQ] (last modified Aug. 29, 2018).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Comprehensive Ranking System (CRS) Criteria—Express Entry*, GOV'T OF CAN., <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/eligibility/criteria-comprehensive-ranking-system/grid.html> [https://perma.cc/4JAN-HTE7] (last modified Jan. 11, 2021).

<sup>62</sup> *Evaluation of the Federal Skilled Worker Program*, GOV'T OF CAN., <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/reports-statistics/evaluations/federal-skilled-worker-program/section-1.html> [https://perma.cc/572F-5H3P] (last modified Oct. 28, 2010). However, the evaluation also found that certain factors, such as “[r]elatives in Canada” and “having studied in Canada for at least two years,” have a “negative impact” on economic performance. *Id.*

ment and unemployment among immigrants have grown in recent years.<sup>63</sup>

### III. A COMPARATIVE ANALYSIS OF THE UNITED STATES DV PROGRAM AND CANADIAN POINT SYSTEM

#### A. *An Economic Argument: The DV Program Is More Desirable Than the Point System*

The United States is undoubtedly in a position of global leadership, which stems from its unique DV program.<sup>64</sup> With the program, the United States is able to maintain its advantage in the global market because it can constantly replenish its pool of talent with unique “new-seed” immigrants.<sup>65</sup> Immigration has consistently “played a critical role in driving economic growth and workforce replenishment in many parts of the United States.”<sup>66</sup> Accordingly, maintaining a strong labor force is “one of the core goals” of the United States “immigration system.”<sup>67</sup> This Section emphasizes that the DV system provides for a strong economy in various ways that a point system could not.

---

<sup>63</sup> Diane Galarneau & René Morissette, *Immigrants’ Education and Required Job Skills*, PERSPS. ON LAB. AND INCOME, Dec. 2008, at 5, 6 (noting that underemployment and unemployment rates “undermine Canada’s ability to attract skilled immigrants”).

<sup>64</sup> JEB BUSH ET AL., *supra* note 8, at 3 (“This country has been especially good at attracting ambitious, skilled people. For talented immigrants across the world, the United States has long been the destination of first choice. Many innovative and successful new American companies—Google, Intel, eBay, and countless others—have been built by recent immigrants.”).

<sup>65</sup> See 136 CONG. REC. 27, 137 (1990) (statement of Rep. Brian J. Donnelly (D-MA)) (“Creative spirit and entrepreneurialism, essential ingredients for growth and prosperity, form the backbone” of the DV program.); Patrick Kennedy, Essay, *The Labor Economics Case for the Diversity Visa Lottery*, 71 STAN. L. REV. ONLINE 159, 160 (2018), <https://www.stanfordlawreview.org/online/the-labor-economics-case-for-the-diversity-visa-lottery/> [<https://perma.cc/M3SG-WJNN>].

<sup>66</sup> PHILIP KRETSEDEMAS, *THE IMMIGRATION CRUCIBLE: TRANSFORMING RACE, NATION, AND THE LIMITS OF THE LAW* 1 & 153 n.2 (2012) (noting that “Massachusetts, for example, would have experienced a significant population decline from the 1980s onward had it not been for immigration”); see also FISCAL POL’Y INST., *IMMIGRANTS AND THE ECONOMY: CONTRIBUTION OF IMMIGRANT WORKERS TO THE COUNTRY’S 25 LARGEST METROPOLITAN AREAS* 8 (2009), [http://fiscalpolicy.org/wp-content/uploads/2011/06/ImmigrantsIn25MetroAreas\\_20091130.pdf](http://fiscalpolicy.org/wp-content/uploads/2011/06/ImmigrantsIn25MetroAreas_20091130.pdf) [<https://perma.cc/LZE3-PPR8>].

<sup>67</sup> See Kennedy, *supra* note 65, at 161.

1. Canada's Point System Fails To Account for All Skills That Are Indicative of Economic Productivity and Prosperity

Proponents of replacing the DV program with a merit-based point system argue that it will strengthen the United States economy by bringing in more highly skilled immigrants.<sup>68</sup> Further, supporters argue that the point system can be easily and quickly adjusted to meet constantly evolving economic goals.<sup>69</sup> For example, the point system in Canada currently selects immigrants based on their potential to make "significant" economic contributions, including the "self-employed, entrepreneurs, and investors."<sup>70</sup> The point system attempts to pick out immigrants "who will earn more and make higher net contributions" to the economy.<sup>71</sup> Evidence from Canada has shown that there are higher employment rates and earnings among immigrants admitted through the points system, and the immigrants are "therefore likely to make higher net contributions to the government."<sup>72</sup>

Advocates for a point system in the United States frequently note that Canada attracts more skilled immigrants and argue that the United States could attract more skilled immigrants if a point system was utilized.<sup>73</sup> However, the United States benefits from flows of skilled and unskilled immigrants because natives accrue the greatest benefits, both when the immigrants are different from them, and when the immigrants specialize in varied fields.<sup>74</sup> Economists Giovanni Peri and Chad Sparber utilized

---

<sup>68</sup> See Lazaro Zamora & Jeff Mason, *Merit-Based Immigration System*, BIPARTISAN POLY CTR. (Apr. 11, 2017), <https://bipartisanpolicy.org/blog/merit-based-immigration/> [<https://perma.cc/5BX5-LJUB>].

<sup>69</sup> See McKenzie Harker, Comment, *Immigration Reform: The Applicability of a Point Based Immigration System in the United States*, 21 WILLAMETTE J. INT'L L. & DISP. RESOL. 56, 63 (2013).

<sup>70</sup> See DEBRA L. DELAET, U.S. IMMIGRATION POLICY IN AN AGE OF RIGHTS 12 (2000).

<sup>71</sup> Jennifer Hunt, *Analysis: Would the U.S. Benefit from a Merit-Based Immigration System?*, PBS NEWSHOUR (Aug. 3, 2017, 1:47 PM), <https://www.pbs.org/newshour/economy/analysis-u-s-benefit-merit-based-immigration-system> [<https://perma.cc/7TWG-SDZF>].

<sup>72</sup> See *id.*; cf. Charles M. Beach et al., *Impacts of the Point System and Immigration Policy Levers on Skill Characteristics of Canadian Immigrants* 47–49 (Queen's Econ. Dep't, Working Paper No. 1115, 2006), <https://core.ac.uk/download/pdf/6494456.pdf> [<https://perma.cc/S4H4-UFB5>] (noting that an analysis of landing data of all arriving immigrants to Canada shows changes in Canadian immigration policy result in changed characteristics of arriving immigrants).

<sup>73</sup> Hunt, *supra* note 71.

<sup>74</sup> *Id.*

data from the United States census to conduct an empirical analysis and concluded that immigrants tend to specialize in manual labor skills, while natives tend to pursue jobs more intensive in communication skills, which ends up balancing out the labor market.<sup>75</sup> The United States economy gains most from immigration if low-skilled immigrants continue to be admitted, and a points-based system would restrict this movement of human capital.<sup>76</sup>

Additionally, evidence suggests that immigrants admitted into Canada through the point system perform less well in the labor market than one might expect.<sup>77</sup> On average, college-educated immigrants to Canada earn only high school level wages.<sup>78</sup> Even further, the immigrants entering Canada through the point system have not proven to be more innovative than natives,<sup>79</sup> as opposed to the college-educated immigrants who enter the United States.<sup>80</sup>

There is also evidence that immigrants who enter Canada through merit-based immigration face issues with underemployment and unemployment.<sup>81</sup> A possible explanation is that Canada's system fails to account for all skills that are indicative of prosperity, such as "entrepreneurial talent and soft skills"—

---

<sup>75</sup> See Giovanni Peri & Chad Sparber, *Task Specialization, Immigration, and Wages*, 1 APPLIED ECON. 135, 135 (2009).

<sup>76</sup> See Priscilla Alvarez, *Is a "Merit-Based" Immigration System a Good Idea?*, ATLANTIC (Mar. 11, 2017), <https://www.theatlantic.com/politics/archive/2017/03/trump-cotton-perdue-merit-based-immigrationsystem/518985/> [<https://perma.cc/V64B-W8KU>]; see also Carla Tabag, Note, *The Point of a Points System: Attracting Highly Skilled Immigrants the United States Needs and Ensuring Their Success*, 46 VAND. J. TRANSNAT'L L. 271, 289 (2013).

<sup>77</sup> Hunt, *supra* note 71.

<sup>78</sup> See Aneta Bonikowska et al., *A Canada-U.S. Comparison of Labour Market Outcomes Among Highly Educated Immigrants*, 37 CANADIAN PUB. POLY 25, 42 (2011) (analyzing wages of university-educated new immigrant workers in Canada from 1980 through 2005).

<sup>79</sup> See Joel Blit et al., *Immigration and Innovation: Evidence from Canadian Cities* 15 (Canadian Lab. Econ. F., Working Paper No. 12, 2017), <https://www.econstor.eu/bitstream/10419/203342/1/CLEF-012-2017-Winter-Blit-Skuterud-Zhang.pdf> [<https://perma.cc/CW3G-8F6P>] (using census data from ninety-eight Canadian cities and concluding that immigrants in the STEM field, admitted through the point system, do not raise patent rates in a significant way).

<sup>80</sup> Jennifer Hunt & Marjolaine Gauthier-Loiselle, *How Much Does Immigration Boost Innovation?*, 2 MACROECONOMICS 31, 51–52 (2010) (using a national survey and concluding that "a college graduate immigrant contributes at least twice as much to patenting as his or her native counterpart").

<sup>81</sup> Zamora & Mason, *supra* note 68.

leadership, potential, and interpersonal communication.<sup>82</sup> The Canadian system can only award points for characteristics that are easy to measure; it misses intangible skills that are often the main determinants of what makes some workers successful.<sup>83</sup>

2. The DV Lottery System Invites an Inflow of Productive Immigrants and Therefore Stimulates the Economy.

Critics of the DV Lottery program argue that because the system is so random, it can have no positive economic impact.<sup>84</sup> There is a large body of empirical literature, however, looking at the positive effects of immigrant diversity on economic performance.<sup>85</sup> Overwhelmingly, the literature concludes that DV “immigrants contribute to the vibrancy of American economic development and the richness of its cultural life. They start new businesses, patent novel ideas, and create jobs.”<sup>86</sup>

The DV Lottery system creates the necessary preconditions for the United States to serve as a global magnet for “the best and the brightest.”<sup>87</sup> The system produces flows of migration

<sup>82</sup> Roy Maurer, *Are “Merit-Based” Immigration Systems the Answer?*, SHRM (June 4, 2019), <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/trump-merit-based-points-immigration-systems-canada-australia.aspx> [<https://perma.cc/AHD7-KF52>].

<sup>83</sup> DANIEL HIEBERT, THE CANADIAN EXPRESS ENTRY SYSTEM FOR SELECTING ECONOMIC IMMIGRANTS: PROGRESS AND PERSISTENT CHALLENGES 9–10 (2019), [https://www.migrationpolicy.org/sites/default/files/publications/TCM-Competitiveness-Canada\\_Final.pdf](https://www.migrationpolicy.org/sites/default/files/publications/TCM-Competitiveness-Canada_Final.pdf) [<https://perma.cc/6HBH-RGXX>]. The system also lacks creativity in considering the labor market potential of applicants’ family members, and it has not been adapted for low-skilled workers. *Id.* at 10–12.

<sup>84</sup> See PIA M. ORRENIUS & MADELINE ZAVODNY, BESIDE THE GOLDEN DOOR: U.S. IMMIGRATION REFORM IN A NEW ERA OF GLOBALIZATION 34 (2010) (footnote omitted) (“From an economic perspective, it makes no sense to randomly award green cards. Why pick a random immigrant when you can choose the best immigrant?”).

<sup>85</sup> See, e.g., Alberto Alesina et al., Birthplace Diversity and Economic Prosperity 3 (Aug. 2015) (Harv. Univ. Dep’t of Econ. Working Paper), <https://dash.harvard.edu/bitstream/handle/1/28652196/birthplacediversityprosperityjoegrevisedaug16.pdf> [<https://perma.cc/UYT7-M9MC>] (using recent immigrant data to conclude that the diversity of immigration relates positively to economic development); Gianmarco I. P. Ottaviano & Giovanni Peri, *The Economic Value of Cultural Diversity: Evidence from U.S. Cities*, 6 J. ECON. GEOGRAPHY 9, 39 (2006) (finding that there is a net positive effect of cultural diversity on the productivity of natives).

<sup>86</sup> DARRELL M. WEST, BRAIN GAIN: RETHINKING U.S. IMMIGRATION POLICY 20 (2010). Increased diversity brings fresh and different perspectives to a society, thereby enhancing problem solving capabilities and ultimately enriching economies. See also PAUL COLLIER, EXODUS: HOW MIGRATION IS CHANGING OUR WORLD 254 (2013).

<sup>87</sup> Kennedy, *supra* note 65, at 166.

from areas where the United States would otherwise have little to no immigration, which is not something points could account for.<sup>88</sup> The DV program invites a random sample of trail-blazing immigrants to enter the United States, who create ethnic goods and services upon their arrival. Subsequently, they make the United States a more attractive place for immigrants of the same ethnicity to settle, because people want to move to areas with services and amenities that match their preferences and familiarities.<sup>89</sup> In other words, “[i]mmigrants move to places where other immigrants live, so establishing a mechanism to encourage immigration from countries with few immigrants is critical.”<sup>90</sup> Without the DV system paving the way, high-skilled immigrants would stay in their home countries where they have access to their preferential lifestyle.<sup>91</sup>

Despite not being based on points, and contrary to the arguments of many critics, the DV program itself also brings in many highly skilled immigrants.<sup>92</sup> The program sets a “lower bound” on the level of skill required to be eligible to apply; diversity visa holders must either have the equivalence of a high school diploma or meet certain work experience requirements.<sup>93</sup> Because they must meet this minimum level, these immigrants tend to be relatively skilled.<sup>94</sup>

Further, the DV program has “an in-built, skills-selective mechanism.”<sup>95</sup> This refers to the many costs involved with obtaining the visa, which usually amounts to more than the average yearly income in some countries of origin.<sup>96</sup> These costs include travel to and from the United States embassy to conduct an admissions interview, application fees, and a plane ticket to

---

<sup>88</sup> See *id.* at 165–66. “In order to attract the best and the brightest from their home countries, it helps to have a bedrock of immigration from enterprising people with less to lose from moving their lives overseas.” *Id.* at 166; see also *infra* note 147.

<sup>89</sup> See Kennedy, *supra* note 65, at 166.

<sup>90</sup> *Id.* at 160.

<sup>91</sup> *Id.* at 168.

<sup>92</sup> See ORRENIUS & ZAVODNY, *supra* note 84, at 120 n.47 (discussing how DV immigrants are usually more educated than family-related visa immigrants).

<sup>93</sup> Jeremy L. Neufeld, *The Diversity Visa: Part of a Merit-Based Immigration System*, NISKANEN CTR. 4 (Oct. 2018), [https://www.niskanencenter.org/wp-content/uploads/old\\_uploads/2018/10/Diversity-Visa-and-Skills.pdf](https://www.niskanencenter.org/wp-content/uploads/old_uploads/2018/10/Diversity-Visa-and-Skills.pdf) [<https://perma.cc/XJ9K-LF8Q>].

<sup>94</sup> *Id.* at 3.

<sup>95</sup> B. Ikubolajeh Logan & Kevin J.A. Thomas, *The U.S. Diversity Visa Programme and the Transfer of Skills from Africa*, 50 INT’L MIGRATION 1, 1 (2012).

<sup>96</sup> *Id.*



the United States.<sup>97</sup> Because of this, the immigrants who enter the United States after winning the lottery are typically higher-skilled workers who are more well-off in their home country. Consequently, the DV program brings in immigrants of above-average skill.<sup>98</sup>

Immigration that emphasizes diversity, rather than merely merit, also attracts people who specialize in occupations that are uncommon among United States native-born workers.<sup>99</sup> Evidence has shown that inflows of immigrants induced native workers to shift to occupations that were complementary to the influx of immigrants so that the natives could maintain a comparative advantage over the new workers.<sup>100</sup> And “adding immigrants of different skill levels . . . leads to higher wages . . . in the labor market.”<sup>101</sup> Economists Gianmarco Ottaviano and Giovanni Peri, in a seminal paper, found a positive correlation between wages and cultural diversity across various United States cities, which

---

<sup>97</sup> For example, the median annual per-capita income in Nepal is \$519. Glenn Phelps & Steve Crabtree, *Worldwide, Median Household Income About \$10,000*, GALLUP (Dec. 16, 2013), <https://news.gallup.com/poll/166211/worldwide-median-household-income-000.aspx> [<https://perma.cc/Y7ZA-ZXDC>]. Traveling from the outskirts of Nepal to the nation's capital, Kathmandu, could take up to 20 hours and cost \$1,000—a one-way flight from Kathmandu, Nepal, to New York, New York, is approximately \$600, and application fees amount to \$330. See, e.g., *Prepare for the Interview*, TRAVEL.STATE.GOV, <https://travel.state.gov/content/travel/en/us-visas/immigrate/diversity-visa-program-entry/diversity-visa-interview/diversity-visa-prepare-for-interview.html> [<https://perma.cc/2PLT-JHEX>] (last visited Mar. 24, 2021); *Flights from Kathmandu to New York, United States*, FARECOMPARE (last accessed Nov. 17, 2020), [https://www.farecompare.com/flights/Kathmandu-KTM/New\\_York-NYC/market.html#quote?quoteKey=CKTMCNYC20201110R20201117P1CTF](https://www.farecompare.com/flights/Kathmandu-KTM/New_York-NYC/market.html#quote?quoteKey=CKTMCNYC20201110R20201117P1CTF) [<https://perma.cc/G26V-YRJV>]. Accordingly, the costs of obtaining a DV visa are much greater than the median per-capita income.

<sup>98</sup> This in turn raises the average skill level of American natives, because they can learn from these immigrants bringing in a diverse set of skills and experiences. Neufeld, *supra* note 93, at 6.

<sup>99</sup> See generally Thomas Kemeny & Abigail Cooke, *Spillovers from Immigrant Diversity in Cities*, 18 J. OF ECON. GEOGRAPHY 213 (2018).

<sup>100</sup> Peri & Sparber, *supra* note 75, at 164.

<sup>101</sup> See, e.g., Stuart Anderson, *The Impact of a Point-Based Immigration System on Agriculture and Other Business Sectors*, NAT'L FOUND. FOR AM. POL'Y 40 (Aug. 2017), <https://nfap.com/wp-content/uploads/2017/08/The-Impact-of-a-Point-Based-Immigration-System.pdf> [<https://perma.cc/3ZUQ-Z59P>] (quoting Richard Florida, *Immigrants Boost Wages for Everyone*, BLOOMBERG: CITYLAB (June 27, 2017, 1:26 PM), <https://www.bloomberg.com/news/articles/2017-06-27/why-all-kinds-of-immigrants-are-good-for-city-economies> [<https://perma.cc/3EN3-SWWD>]); Kemeny & Cooke, *supra* note 99, at 214–15.

led them to their overall conclusion: “a more multicultural urban environment makes U.S.-born citizens more productive.”<sup>102</sup>

*B. A Normative Argument: The DV Program Advances Longstanding American Ideology, Which the Point System Could Not Do.*

Immigration laws . . . function as a mirror, reflecting and displaying the qualities we value in others. . . . [D]ecisions on immigration policy put us to the test as no other decisions do. They reveal, for ourselves and for the world, what we *really* believe in and whether we are prepared to act on those beliefs.<sup>103</sup>

— *Stephen H. Legomsky*

The DV program is central to the United States as it advances traditional American values by welcoming 50,000 diverse immigrants annually.<sup>104</sup> On the other hand, a points-based immigration system would reshape American ideology to reflect a focus on pure human capital. This Section acknowledges that the DV system is an important piece of shaping the United States, and a point system could not make the same contributions.

The United States has been “expanded” and “improved” by immigrants, who have enhanced the country “in ways that may be easy to overlook.”<sup>105</sup> Immigration policy has historically been used as a strategy for national growth and national greatness in the United States.<sup>106</sup> Canada decided, with its first comprehen-

---

<sup>102</sup> Ottaviano & Peri, *supra* note 85 (emphasis omitted).

<sup>103</sup> Legomsky, *supra* note 20.

<sup>104</sup> See generally, e.g., MARYANNE DATESMAN ET AL., *AMERICAN WAYS: AN INTRODUCTION TO AMERICAN CULTURE* (4th ed. 2014) (citing various American values, such as equal opportunity and the pursuit of the American dream).

<sup>105</sup> See, e.g., Samuel A. Thumma, *Immigration and the American Dream*, *JUDGES’ J.*, Summer 2017, at 1, 1. Immigrants to the United States include: physicist Albert Einstein; Madeleine Albright, the first female secretary of state; Henry Kissinger, secretary of state and national security advisor; naturalist John Muir; Joseph Pulitzer, publisher and journalism award sponsor; U.S. Supreme Court Justice Felix Frankfurter; . . . actor and comedian Bob Hope; football coach Knute Rockne; and former governor/actor/bodybuilder Arnold Schwarzenegger. And the list goes on, and on, and on, and on.

*Id.*

<sup>106</sup> “Over the past two centuries, Americans have vacillated between welcoming immigrants and keeping them out.” CAFFERTY, *supra* note 2, at 3. Some fear that opportunities are limited, and immigration needs to be restricted. See *id.* But there

sive immigration policy in 1967, to focus more on economic advancement and “human capital.”<sup>107</sup> While a points-based system may advance Canadian normative goals, it fails to protect core American values of refuge and acceptance.<sup>108</sup> The DV program fosters American ideology by admitting diverse immigrants from all over the world and allowing them to pursue their American dream.<sup>109</sup> “[A]n elimination of the diversity visa is an elimination of an important part of our country’s history—the acceptance of all sorts of immigrants, not only those with a specific set of economically favorable skills or familial ties to the United States.”<sup>110</sup> The point system would not promote diversity and acceptance because it can only award points based on certain characteristics indicative of economic prosperity. While the points system can be adjusted to add weight to prospective immigrants from low-admission regions, it cannot account for the diversity of backgrounds and experiences in the same way that a random sample can.

Even further, while Canada’s points-based system may have initially reduced racial bias, it now reproduces bias in subtle ways.<sup>111</sup> For example, there is evidence that the population of

---

is also the competing and overwhelming “belief that America, land of opportunity, will offer even greater opportunities in the future for [all]” so opportunities should be shared. *Id.*

<sup>107</sup> Catherine Porter, *Canada’s Immigration System, Lauded by Trump, Is More Complex Than Advertised*, N.Y. TIMES (Mar. 2, 2017), <https://www.nytimes.com/2017/03/02/world/canada/immigration-trump.html> [<https://perma.cc/VP8P-U9XR>].

<sup>108</sup> See Parsons, *supra* note 49, at 494; see also Erik A. Bruun & Robin Getzen, *Introduction to THE BOOK OF AMERICAN VALUES AND VIRTUES: OUR TRADITION OF FREEDOM, LIBERTY & TOLERANCE* 7, 7 (Erik A. Bruun & Robin Getzen eds., 1996) (citing American values, such as “[f]reedom, [l]iberty, and [t]olerance,” to be “based on the priority that we as a nation place on embracing diversity”).

<sup>109</sup>

[T]he American Dream, that dream of a land in which life should be better and richer and fuller for every[one], with opportunity for each according to . . . ability or achievement . . . [is a] dream of social order in which each man and each woman shall be able to attain to the fullest stature of which they are innately capable, and be recognized by others for what they are, regardless of the fortuitous circumstances of birth or position.

JAMES TURSLOW ADAMS, *THE EPIC OF AMERICA* 404 (Routledge 2017) (1931) (emphasis omitted).

<sup>110</sup> Chapaska, *supra* note 25, at 74–75 (citing *Hearing on the Diversity Immigrant Program Elimination Before the H. Judiciary Subcomm. on Immigr. Pol’y & Enf’t*, 112th Cong. 128 (2011) (testimony of Resident Commissioner Pedro Pierluisi, Member, H. Judiciary Subcomm. on Immigr. Pol’y and Enf’t)).

<sup>111</sup> Justin Gest, *Points-Based Immigration Was Meant To Reduce Racial Bias. It Doesn’t*, GUARDIAN (Jan. 19, 2018, 9:55 AM), <https://www.theguardian.com>

immigrants admitted on visas for highly skilled workers on a point system is heavily skewed towards migrants from highly developed countries, nearly all of which are predominantly of white European origin.<sup>112</sup> In Canada, an applicant gains more points if she already has a job offer, but in order to get a job offer, she first needs to secure an interview. Research has shown that an individual with an Anglo-Saxon name is far more likely to get an interview than someone with the same qualifications and experience but with a Chinese or Middle Eastern name.<sup>113</sup> Points-based systems subtly bias the type of immigrants that can enter the country—typically favoring white Europeans.<sup>114</sup> Implementing a points-based system instead of the DV program would be encouraging an open animus towards non-white, non-European immigrants.

#### IV. MISPLACED CRITICISMS OF THE CURRENT DIVERSITY VISA PROGRAM

Immigration reform has been a political hot topic in recent years; thus, many different opinions have been articulated by both politicians and citizens.<sup>115</sup> Opponents of the DV program have vocalized various criticisms, which this Part addresses. More importantly, however, this Part notes that many of these criticisms are misplaced or have been solved.

---

/commentisfree/2018/jan/19/points-based-immigration-racism [https://perma.cc/D6VV-KCY3].

<sup>112</sup> See BRAIN DRAIN AND BRAIN GAIN: THE GLOBAL COMPETITION TO ATTRACT HIGH-SKILLED MIGRANTS 185 (Tito Boeri et al. eds., 2012).

<sup>113</sup> Alison L. Booth et al., *Does Ethnic Discrimination Vary Across Minority Groups? Evidence from a Field Experiment* 9 (Inst. Stud. Lab., Discussion Paper No. 4947, 2010).

<sup>114</sup> Additionally, because of global social norms, men are more likely to have longer periods of uninterrupted work experience, higher education credentials, and more networking opportunities; so, the points-based systems also typically disadvantage women. See ANNA BOUCHER, GENDER, MIGRATION AND THE GLOBAL RACE FOR TALENT 2 (2016); see also Catherine Dauvergne, *Citizenship, Migration Laws and Women: Gendering Permanent Residency Statistics*, 24 MELB. U. L. REV. 280, 306–08 (2000).

<sup>115</sup> See Derek Thompson, *How Immigration Became So Controversial*, ATLANTIC (Feb. 2, 2018), <https://www.theatlantic.com/politics/archive/2018/02/why-immigration-divides/552125/> [https://perma.cc/UZ2N-YM7J].

A. *Fraud: Canada's Point System Is More Susceptible.*

Opponents of the DV program argue that it is vulnerable to fraud and harms the credibility of the United States immigration system.<sup>116</sup> These critics point to two major concerns: (1) applicants submitting more than one entry, sometimes under false aliases, to increase their chance of selection in the lottery; and (2) third-party scams extorting money from foreign applicants.<sup>117</sup> DHS has noted these concerns and has taken precautions against them. On the application website, they list a "Fraud Warning," containing the following language: "Fraudsters may send you emails claiming you've won the Diversity Visa (Green Card) lottery. Never send money to anyone who sends you a letter or email claiming you have won—learn how to protect yourself from scams."<sup>118</sup> In June 2019, DHS implemented a new policy that requires DV applicants to provide information from a valid, unexpired passport.<sup>119</sup> With this policy in place, entries submitted by applicants using a duplicative passport number will be easily identifiable and automatically disqualified, so applicants will not be able to win the lottery through fraudulent measures.<sup>120</sup>

The Canadian points-based system is actually more prone to fraud. For example, more points are awarded to those immigrants that already have extended job offers from employers. One shortcut for a prospective immigrant to gain these points is to pay the employer to be "hired."<sup>121</sup> The DV program is not susceptible to this same level of fraud; because the system is entirely random, there is no room for applicants to pay their way into the country.

---

<sup>116</sup> Chapaska, *supra* note 25, at 76.

<sup>117</sup> *Randomness Cannot Have a Place in our Immigration System*, WHITE HOUSE (Feb. 1, 2018), <https://www.whitehouse.gov/briefings-statements/randomness-cannot-place-immigration-system/> [<https://perma.cc/F77T-ERBU>].

<sup>118</sup> *Green Card Through the Diversity Immigrant Visa Program*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/greencard/diversity-visa> [<https://perma.cc/98M8-9N82>] (last updated Jan. 11, 2018).

<sup>119</sup> Visas: Diversity Immigrants, 84 Fed. Reg. 25,989, 25,989 (June 5, 2019) (codified at 22 C.F.R. § 42.33).

<sup>120</sup> *Id.*

<sup>121</sup> Richard Kurland, *Scamming Your Way into Canada Is Easy. The Fix Is Easy Too, If Government Is Willing To Act*, CBC (Sept. 16, 2019, 5:00 PM), <https://www.cbc.ca/news/canada/saskatchewan/opinion-scamming-into-canada-easy-fix-easy-too-immigration-1.5281483> [<https://perma.cc/HXM7-TS7H>].

B. *National Security: Concerns Are Misguided.*

Critics also argue that the DV program poses a potential national security threat.<sup>122</sup> They opine that the program admits new residents from countries designated as “State Sponsors of Terrorism” and “put[s] them on a path to citizenship through naturalization.”<sup>123</sup> To further support their argument, they point to infamous DV recipients, such as Sayfullo Saipov<sup>124</sup> and Hesham Mohamed Hadayet.<sup>125</sup> “Saipov came to the United States in 2010 on a diversity visa” and killed eight civilians in New York City on October 31, 2017.<sup>126</sup> Hadayet came to the United States in 1996 after his wife won a diversity visa; in 2002, he committed an attack at the Los Angeles International Airport.<sup>127</sup>

However, background and security checks were enhanced in 2011. The new requirements involve collecting fingerprint records, which the FBI uses to complete a full criminal background check, and a “name check” against various DHS-maintained watch lists.<sup>128</sup> All immigrants must go through this screening process, including those selected to receive a diversity visa.<sup>129</sup> With these new measures in place, foreigners, such as Saipov and Hadayet, would likely be prohibited from obtaining a diversity visa. Further, no immigrant admitted through the DV program has carried out a terror attack since the new security procedures began.

---

<sup>122</sup> Many new voices in the political arena hold an unsound belief that all immigration poses a national security threat. For example—“if I had a bowl of skittles and I told you just three would kill you. Would you take a handful? That’s our [immigration] problem.” Leo Kelion, *Trump Jr.’s Skittles Graphic Deleted from Twitter*, BBC NEWS (Sept. 28, 2016), <https://www.bbc.com/news/technology-37495094> [<https://perma.cc/KX4J-7GPN>] (quoting @DonaldJTrumpJr, TWITTER (Sept. 19, 2016, 4:41 PM), <https://twitter.com/DonaldJTrumpJr/status/778016283342307328> [<https://perma.cc/YL67-S2YK>]).

<sup>123</sup> *Randomness Cannot Have a Place in Our Immigration System*, *supra* note 117.

<sup>124</sup> Holly Yan & Dakin Andone, *Who Is New York Terror Suspect Sayfullo Saipov?*, CNN, <https://www.cnn.com/2017/11/01/us/sayfullo-saipov-new-york-attack/index.html> [<https://perma.cc/5TVQ-N37Q>] (last updated Nov. 2, 2017, 5:00 PM).

<sup>125</sup> Christine Hanley & Jack Leonard, *Neighbors Describe Gunman as Aloof, Devout*, L.A. TIMES (July 6, 2002, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2002-jul-06-me-shooter6-story.html> [<https://perma.cc/R45Y-S37C>].

<sup>126</sup> *See* Yan & Andone, *supra* note 124.

<sup>127</sup> *See* Hanley & Leonard, *supra* note 125.

<sup>128</sup> U.S. CITIZENSHIP & IMMIGR. SERV., 12 POLICY MANUAL, pt. B, ch. 2 (2020).

<sup>129</sup> *Id.*

Additionally, evidence shows that there is a correlation between rising levels of immigration and reductions in crime, a correlation that has been tied to the lower proclivity for criminal activity among first-generation immigrants.<sup>130</sup> Between 1990 and 2013, the share of the United States population born abroad rose from 7.9% to 13.1%, while FBI data indicates that violent crime rates declined 48% during this period.<sup>131</sup> “The decline in crime rates in the face of high levels of new immigration has been a steady national trend, and has occurred in cities across the country.”<sup>132</sup> Accordingly, the DV program does not threaten national security but instead aids in the reduction of crime.<sup>133</sup>

#### V. PROPOSALS FOR PROMOTING FURTHER DIVERSITY: THE VISA ALLOCATION FORMULA<sup>134</sup>

As beneficial as the DV program is to the American economy and society, there is still room for improvement to further promote diversity. Congress created a multi-step allocation formula to distribute the diversity visas annually—first dividing the world into six geographically defined regions, and then further dividing those regions into high- and low-admission states.<sup>135</sup> The formula first prioritizes natives of low-admission states in

---

<sup>130</sup> KRETSEDEMAS, *supra* note 66, at 100.

<sup>131</sup> See Walter Ewing et al., *The Criminalization of Immigration in the United States*, AM. IMMIGR. COUNCIL 1 (July 2015), [https://www.americanimmigrationcouncil.org/sites/default/files/research/the\\_criminalization\\_of\\_immigration\\_in\\_the\\_united\\_states.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_criminalization_of_immigration_in_the_united_states.pdf) [<https://perma.cc/7R8Z-K43Y>].

<sup>132</sup> *Id.* at 5.

<sup>133</sup> The DV program also improves diplomatic relations with other nations by building relations with foreign populations around the world, which subsequently creates allies and goodwill overseas. See Visas: Diversity Immigrants, 84 Fed. Reg. 25,989, 25,990 (June 5, 2019) (codified at 22 C.F.R. § 42.33).

<sup>134</sup> There are also other proposals for reform, such as increasing the total number of diversity visas or funding programs to aid in immigrant transitions. See, e.g., Andowah A. Newton, Note, *Injecting Diversity into U.S. Immigration Policy: The Diversity Visa Program and the Missing Discourse on Its Impact on African Immigration to the United States*, 38 CORNELL INT'L L.J. 1049, 1077 (2005) (recommending two options for “promot[ing] diversity in [the] immigration system”); Tekleab Elos Hailu et al., *Lived Experiences of Diversity Visa Lottery Immigrants in the United States*, 17 QUALITATIVE REP., Dec. 2012, at 1, 13 (recommending help “from the U.S. government or other institutions” to aid newly arrived immigrants in “find[ing] jobs with health care, housing, schooling, and information”). For example, through his proposal of the U.S. Citizenship Act of 2021, President Joe Biden recognized the United States as “a nation of immigrants” and argued for the increase of the total number of diversity visas. *Fact Sheet*, *supra* note 43; see *supra* text accompanying note 43.

<sup>135</sup> 8 U.S.C. § 1153(c)(1)(E)–(F) (2018).

low-admission regions, and then natives of low-admission states in high-admission regions.<sup>136</sup> The allocation formula is therefore critical to the success of the DV program, as it identifies what diversity will be brought in through the lottery. This Part suggests three possible proposals to modify the formula: reclassifying the regions, removing the regional groupings, and abolishing the formula altogether by completely randomizing the lottery.

#### A. *Reclassify the Regional Categories*

The definition of each region in the visa allocation formula is critical because these definitions dictate how visas will be allocated through a blind mathematical equation.<sup>137</sup> “In large part, the regions currently appear to be drafted along neutral geographic lines:” Africa; Asia; Europe; Australasia and the Pacific Islands; the United States and Canada; and the Caribbean, Mexico, Central America, and South America.<sup>138</sup> Except for South America, these regions are grouped by continent. Year after year, low-admission regions, such as Europe and Africa, receive a higher allocation of diversity visas than high-admission South America.<sup>139</sup> By defining the South American region to include Mexico, Central America, and the Caribbean, the drafters of the diversity lottery included Mexico, a high-admission state, within a group of lower-admission states, such as Venezuela,

---

<sup>136</sup> *Id.* § 1153(c)(1)(B). A high-admission region is any region that accounted for more than one-sixth of all immigrant admissions into the United States in the previous five years, and a high-admission state is one with greater than 50,000 visas issued during the five-year fiscal period in question. Currently, no visas are given to natives of high-admission states, and “[n]o state may receive more than 7% (3,850) of the total diversity visas available in any one fiscal year.” SHANE DIZON & POOJA DADHANIA, 2 IMMIGRATION LAW SERVICE § 9:11 (2d ed., rev. 2021).

<sup>137</sup> Wardle, *supra* note 5, at 1984–85.

<sup>138</sup> *Id.* at 1985 (citing 8 U.S.C. § 1153(c)(1)(F)). It is also noted that “Northern Ireland shall be treated as a separate foreign state.” *Id.* It is unclear why the statute is written to treat Northern Ireland as an individual state separated from the United Kingdom, although it is likely because of the DV program’s legislative history. See discussion *supra* Section I.A.

<sup>139</sup> In 2017, Europe obtained forty-one percent of diversity visas and Africa thirty-eight percent, while the South American region only obtained four percent. *Immigrant Number Use for Visa Issuances and Adjustments of Status in the Diversity Immigrant Category, Fiscal Years 2008–2017*, TRAVEL.STATE.GOV, <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2017AnnualReport/FY17AnnualReport-TableVII.pdf> [<https://perma.cc/UY3R-6SFH>] (last visited Mar. 24, 2021). Similarly, in 2016, Europe obtained thirty-three percent of diversity visas, Africa forty-four percent, and South America less than three percent. *Id.*



Honduras, and Argentina.<sup>140</sup> As a cultural grouping, this division may make sense. However, if Congress was attempting to target culturally similar regional areas, there were other rational groupings. For example, Middle Eastern countries such as Egypt, Saudi Arabia, and Turkey are not in a single cultural group but instead classified into three different geographical regions. However, grouping Egypt, Saudi Arabia, and Turkey seems to be “just as plausible as the legislative commingling of Brazil, Jamaica, and Guatemala.”<sup>141</sup>

Because Mexico is such a high-admission state,<sup>142</sup> South America is defined as a high-admission region.<sup>143</sup> Fewer DVs are allocated to the region, which disadvantages the lower-admission states on the South American continent. As is, the formula ensures that a maximum number of lottery visas would be available for European and African immigrants. In order to encourage more geographic diversity, the formula should be redefined so that South American countries could obtain a proportional number of visas.<sup>144</sup> Currently, the North American region only contains Canada and the Bahamas, even though Mexico is on the North American continent. In order to ensure that the smaller South American countries have an opportunity to obtain diversity visas, Mexico should either be incorporated into the North American region, or a seventh region should be created for Mexico—or Central America or the Caribbean or all of these areas.

### B. *Repeal the Regional Categories*

Another potential modification is to allocate visas based only on the status of the state, whether it is “high-admission” or “low-admission.” Instead of using the current multi-step formula, this

---

<sup>140</sup> Wardle, *supra* note 5, at 1985.

<sup>141</sup> *See id.* at 1985–86, 1986 nn.110–11.

<sup>142</sup> In 2017, about fifteen percent of persons that obtained lawful permanent resident status originated from Mexico, which is the highest percentage of all countries. DEP'T OF HOMELAND SEC., 2017 YEARBOOK OF IMMIGRATION STATISTICS tbl.10, <https://www.dhs.gov/immigration-statistics/yearbook/2017/table10> [<https://perma.cc/3J34-ZLJR>] (last updated Oct. 2, 2018).

<sup>143</sup> A region that contains more than one-sixth, or 16.6%, of persons that have obtained lawful permanent resident status is identified as high-admission, so the fifteen percent nearly guarantees that any region with Mexico will be classified as high-admission. *Id.*; *see also* 8 U.S.C. § 1153(c)(1).

<sup>144</sup> This would likely decrease the amount of DVs available to the European and African regions and balance out the distribution of visas.

reformation would ignore the regional categories altogether and adopt a more straightforward approach. By focusing on individual states rather than regions, this modification of the DV program would further promote the diversity of the inflow of immigrants.<sup>145</sup>

### C. Randomize Completely

A third approach would be to eliminate the formulaic methods from the DV program entirely and to shift the focus to the individual without regard to national origin. “Countries don’t immigrate. People do.”<sup>146</sup> Instead of valuing geographic diversity, a DV program with no formula would value individual diversity.<sup>147</sup> A random lottery that focuses on the individual would provide a truly equitable system of independent immigration, without artificial inflation or deflation from a regional allocation formula.<sup>148</sup>

## CONCLUSION

The Diversity Visa Lottery program was created in the 1990s to provide greater diversity in immigration as members of Congress recognized that “[t]he case of greater immigration is overwhelming on both economic and spiritual grounds.”<sup>149</sup> The

---

<sup>145</sup> A single geographic region could contain a very diverse population of prospective immigrants. By abolishing the regional calculation in the allocation formula, the DV program would be able to further advance its purpose and account for more diversity. See Newton, *supra* note 134, at 1056–57. It is unclear why Congress adopted a two-step formula in the first place. However, its general purpose with the program was to encourage “long-term diversity in our flow of immigrants from around the world,” which a one-step formula could do just as well. 136 CONG. REC. 27,073 (1990) (statement of Rep. Bruce A. Morrison (D-CT)).

<sup>146</sup> See Legomsky, *supra* note 20, at 334 (arguing that immigrants need to be seen as individual human beings and judged according to their individual needs and merits).

<sup>147</sup> While the proposal of a points-based system could or could not take country of origin into account as well, it is filled with inherent potential for discrimination. For example, if age preference is deemed acceptable as a national policy, gender or skin color preferences could follow. Accordingly, there is too much potential for discrimination in a point system that allows legislators to determine which characteristics are desirable and which are not. See Wardle, *supra* note 5, at 1992–93.

<sup>148</sup> *Id.* at 1993–94 (“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.’”).

<sup>149</sup> 136 CONG. REC. 27,137 (statement of Rep. Thomas J. Manton (D-NY)) (alteration in original).

program has succeeded in bringing in a more diverse group of immigrants, which has benefited the United States economy and advanced American values. Choosing a points-based system over the current DV program would be disastrous, as it would trade away our constant inflow of productive immigrants and negatively warp American ideology. While minor modifications can further promote diversity, the DV program is the key to a successful America. The program sends an important message to the rest of the world: we continue to welcome immigrants from diverse backgrounds and nations of origin. This message will be lost if the DV program is eliminated.

---

As a matter of spirit, immigrants—usually the best and most ambitious from other lands—enliven our society. We need more immigrants because we want to live in a dynamic, creative society . . . As for material benefits, no other issue unites economists from across the political spectrum. Eighty percent said immigrants have had a “very favorable impact” on U.S. economic growth in the 20th century. No one judged any negative effect.

*Id.* (alteration in original).