

**THE GROWING ROLE OF IMMIGRATION
LAW IN UNIVERSAL HIGHER EDUCATION:
CASE STUDIES OF THE UNITED STATES
AND THE EU**

*Michael A. Olivas**

I.	INTRODUCTION.....	354
II.	U.S.: THE WAR ON TERROR, UPDATED.....	357
	<i>A. Pre-9/11 (1980–September 11, 2001)</i>	357
	<i>B. Post-9/11</i>	371
	<i>C. The DREAM Act at the State and Federal Levels</i>	376
	<i>D. Prosecutorial Discretion and Deferred Action</i>	383
III.	THE EU AS A LOOSE FEDERATION.....	393
	<i>A. History of the Bologna Process</i>	396
	<i>B. Related College Law Decisions in ECJ Cases</i>	403
IV.	CONCLUSION AND CAUTIONS.....	428

* Michael A. Olivas is William B. Bates Distinguished Chair in Law, at the University Law Center, and Director, Institute for Higher Education Law & Governance. An earlier draft of this paper was prepared for the 3rd Oxford US-UK Roundtable, August, 2012. I would like to thank Professors Tim Birtwistle, David Palfreyman, Gareth T. Davies, Augustina H. Reyes, William A. Kaplin, Barbara A. Lee, and Judith Areen, and especially Dimitry Kochenov for their generous reviews and suggestions. I absolve all of them for any remaining errors. The Lumina Foundation provided financial support for the Roundtable, and the M.D. Anderson Foundation supports my research through the Bates Chair.

I. INTRODUCTION

The increasingly prominent role of immigration law in the world of higher education is evident to observers in both camps, that is, to those who specialize in the comprehensive law of higher education, across countries, and to those whose expertise is immigration and naturalization law. Of course, there has always been a substantial and broad band of intersection, such as the required visa regime for international admissions, across all nations and institutions (in the United States, the usual F-1 process that admits and enrolls more than a million students and scholars each year—one of several categories possible for international study), and the complex process for working in a foreign country as an academic and evaluating educational credentials for employment authorization (such as the landed immigrant procedures in Canada or NAFTA-related work certification degree requirements).¹ As common as these transactions have been over the years, the shrinking world with its increased geopolitical and diplomatic roles played by competitive higher education policies has moved the

1. See Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 N.Y.U. L. REV. 148, 175 (2006) (explaining the relative importance an immigrant's skill and education plays in qualification for permanent residency in Canada); THE INTERNATIONAL MOBILITY OF TALENT: TYPES, CAUSES, AND DEVELOPMENT IMPACTS 177–79 (Andres Solimano ed., 2008) (analyzing causal theories and applying models to determine whether expansion of the American F-1 nonimmigrant visa program for international students has resulted in brain drain or gain in their countries of origin); MARTIN J. LAWLER, PROFESSIONALS: A MATTER OF DEGREE 265 (5th ed. 2009) (detailing the H-1B requirements for evaluating an applicant's education and degree equivalency); Takao Kato & Chad Sparber, *Quotas and Quality: The Effect of H-1b Visa Restrictions on the Pool of Prospective Undergraduate Students from Abroad*, 95 REV. ECON. & STAT. 109, 112 (2013) (showing how critical degrees in higher education are to professional foreign nationals seeking visas); Stuart Anderson, *Debunking Myths About International Students and Highly Skilled Immigrants*, 19 INT'L EDUCATOR 4, 6 (2010), available at http://www.nafsa.org/_File/_/sepoct10_frontlines.pdf (discussing the effects of immigration control through the visa regime upon American innovation); Brendan Cantwell, *Transnational Mobility and International Academic Employment: Gatekeeping in an Academic Competition Arena*, 49 MINERVA 425, 428–29 (2011) (describing the mutualistic codependence of immigration and education policies); Paul Basken, *Foreign Scientists and U.S. Policy Makers Seek Ways Around Visa Stalemate*, CHRON. HIGHER EDUC., Aug. 17, 2012, at A15 (addressing the United States' unwillingness to utilize its full visa quota for highly skilled foreign professionals).

implementation of immigration to center stage as never before. Not only is there a growing propensity for these regimes to be considered in court cases and for a dizzying array of legislative/regulatory/administrative rules to be drafted in their service, but there is an astonishing move towards large scale national, international, transnational, consortial, and other interlocking legal mechanisms for advancing higher education interests across countries.² Perforce, immigration law has become the technical and policy regime for effectuating and implementing these interests, joining the traditional areas of diplomacy, foreign policy, finance, intellectual property, and increasingly, national security domains.

In this preliminary investigation, I use case studies and detailed literature reviews from the United States (U.S.) and from the European Union (EU), as higher education institutions in these two systems represent the major receiver colleges in the world system, and among the major sender nations as well. Moreover, while there are many differences in the details, the large-scale immigration mechanisms are similar in their organizational features.³ The review of events traces back just

2. See Michael A. Olivas, *What the "War on Terror" Has Meant for U.S. Colleges and Universities*, in DOCTORAL EDUCATION AND THE FACULTY OF THE FUTURE 249, 255–56 (Ronald G. Ehrenberg & Charlotte V. Kuh eds., 2009) [hereinafter *What the "War on Terror" Has Meant*] (listing recent efforts by various countries to reduce mobility restrictions and attract foreign scholars).

3. Unexpectedly, in both venues there are cases on undocumented immigrants and documentation of widespread use of durational residency requirements. See COMMUNIQUE OF THE CONFERENCE OF EUROPEAN MINISTERS RESPONSIBLE FOR HIGHER EDUCATION, THE EUROPEAN HIGHER EDUCATION AREA—ACHIEVING THE GOALS 4 (2005) (advocating the EU's willingness to facilitate mobility programs through the portability of grants and loans); Gareth T. Davies, 'Any Place I Hang My Hat?' or, *Residence is the New Nationality*, 11 EUR. L. J. 43, 55 (2005) [hereinafter *Any Place I Hang My Hat*] (providing an example of immigration cases laying the foundation for durational requirements in the EU); Jean-Pierre Cassarino, *EU Mobility Partnerships: Expression of a New Compromise*, MIGRATION INFO. SOURCE (Sept. 15, 2009), <http://www.migrationpolicy.org/article/eu-mobility-partnerships-expression-new-compromise> (reporting the adoption of new internationally coordinated mobility partnerships between EU Member States and third party countries to lower migration barriers); Christopher L. Griffin Jr., *The Alaska Permanent Fund Dividend and Membership in the State's Political Community*, 29 ALASKA L. REV. 79, 85–87 (2012) (giving an example of how durational residency requirements in the United States mirror those of the EU with regard to entitlement eligibility).

before the most important existential event of the twenty-first century, the terrorist attacks upon the United States in 2001 and similar terrorism events in the world, and then considers the reflexive and resultant immigration changes initiated as a direct result of these international terrorist threats.

In addition, in the United States, there has been an increased anti-Latino nativism and restrictionist backlash, particularly aimed at the rising number of undocumented college students, those not in authorized status; while these do not, in most instances, invoke immigration controls at the front end, the increased visibility and the sympathetic back-stories of these sojourner children have led several of the individual states to enact more accommodationist college policies. In this context, I review the political economy of the DREAM Act—both at the federal level and at the state level, and the 2011–2012 developments in the use of prosecutorial discretion to treat undocumented college students, that is, students in unlawful status in the United States.⁴

Over a decade later, some of the more routine immigration controls instituted have been enacted and regularized, while some have been discarded, but a surprising number of them have been added and incorporated into institutional practice. Even so, the flow of international students continues to tilt towards Western institutions in the United States and the EU, exceeding even their pre-9/11 levels. I will also review the major immigration and structural exchange mechanisms governing cross-national EU Member States, their effects upon non-EU-member nations, and the interplay that is becoming evident.⁵

4. See Michael A. Olivas, NO UNDOCUMENTED CHILD LEFT BEHIND: *PLYLER V. DOE* AND THE EDUCATION OF UNDOCUMENTED SCHOOLCHILDREN 86 (2012) (discussing the perseverance of immigration reform as a multi-faceted policy agenda, driven by necessity); Michael A. Olivas, *Obama's New Immigration Policy: Disappointment Is in the Details*, CHRON. HIGHER EDUC. (June 18, 2012), <http://chronicle.com/article/Obamas-New-Immigration/132377> [hereinafter *Obama's New Immigration Policy*] (lamenting the Obama Administration's deferred action policy for its failure to reform existing executive prosecutorial discretion).

5. See Jenny J. Lee, Alma Maldonado-Maldonado & Gary Rhodes, *The Political Economy of International Student Flows*, in XXI HIGHER EDUCATION HANDBOOK OF THEORY AND RESEARCH 545–90 (John C. Smart ed., 2006); Yves Mény, *Higher Education in Europe: National Systems, European Programmes, Global Issues. Can They be*

Finally, I review the structural political features in this polity that are being driven by the worldwide economic slowdown, and suggest ways that these will likely influence or even drive immigration policy directions in higher education worldwide.

II. U.S.: THE WAR ON TERROR, UPDATED

A. *Pre-9/11 (1980–September 11, 2001)*

In the dozen-plus years before the terrorist attacks upon the United States, the most significant foreign policy immigration-related matter had been the siege and occupation by Iranians, particularly college students, of the U.S. Embassy in Tehran, and the resulting kidnapping of U.S. personnel on November 4, 1979.⁶ Following the election of President Ronald Reagan and his inauguration, the hostages were released on January 21, 1981, 444 days after the original siege.⁷ Within weeks of the original embassy takeover, on November 13, 1979, the Attorney General issued regulation 8 C.F.R. § 214.5, requiring that all nonimmigrant postsecondary students who were natives or citizens of Iran to report to a local INS office or designated campus official to “provide information as to residence and maintenance of nonimmigrant status.”⁸ Each Iranian student in the United States was required to present a passport, evidence of school enrollment in good standing, payment of fees, the courses in which he or she was enrolled, and a current physical address in the United States.⁹ Any failure to comply with these requirements was to be considered a violation of the terms and conditions of nonimmigrant status in the United States and would subject the student to removal or deportation.¹⁰ A

Reconciled?, 7 EUR. POL. SCI. 323, 329–30 (2008) (covering the new financial incentives encouraged by the European Commission to increase regional academic competition); Sheila Slaughter & Brendan Cantwell, *Transatlantic Moves to the Market: The United States and the European Union*, 63 HIGHER EDUC. 583, 590–91 (2012) (elaborating on the goals of the Lisbon Agenda announced by the European Commission).

6. *Narenji v. Civiletti*, 481 F. Supp. 1132, 1134–35 (D.D.C. 1979).

7. Bernard Gwertzman, ‘Alive, Well, and Free’: Captives Taken to Algiers and Then Germany—Final Pact Complex, N.Y. TIMES, Jan. 21, 1981, at A1.

8. *Narenji*, 481 F. Supp. at 1147–48 (D.D.C. 1979).

9. *Id.*

10. *Id.*

challenge to this regulation was filed by a group of affected Iranian students.

In *Narenji v. Civiletti*, the District Court concluded that regulation 214.5 was unconstitutional because it violated the Iranian students' right to equal protection of the laws. The court found no basis for what it characterized as the "discriminatory classification" of the Iranian students:

While the intrusion upon the individual liberty of these aliens in this instance might have seemed at first blinking wholly justified in terms of the result sought, to allow its destruction of our fundamental tenets would throw open the door to further broad and potentially dangerous assertions of executive power over aliens, exclusive of the protections the Constitution provides. Today there are few major occurrences, domestic or otherwise, without significant international impact. There are many opportunities for the executive to invoke its authority to conduct foreign policy and thereby delegate to itself the authority to, in effect, assume the role of Congress, the elected, representative body with which the primary responsibility for immigration policy making rests, and thus assure that its actions will be afforded that immunity from judicial review that courts have recognized accrues to legislative efforts in that field. Accordingly, the promulgation of 8 C.F.R. § 214.5 being an act lying outside of the bounds of the authority conferred on the defendants by the Congress and the Constitution, that regulation is determined to be unconstitutional.¹¹

Further, the District Court found no "overriding national interest" that would allow the regulation to stand: the court found that "although defendants' regulation is an understandable effort designed to somehow reply to the Iranian attack upon this nation's sovereignty and the seizure of its citizens, it is one that does not support a legitimate national interest."¹²

11. *Id.* at 1145.

12. *Id.*

The appellate court disagreed and reversed the lower court:

The regulation is within the authority delegated by Congress to the Attorney General under the Immigration and Nationality Act. That statute charges the Attorney General with “the administration and enforcement” of the [Immigration and Nationality] Act and directs him to “establish such regulations . . . and perform such other acts as he deems necessary for carrying out his authority under the provisions of” the Act. He is directed to prescribe by regulation the time for which any nonimmigrant alien is admitted to the United States, and the conditions of such an admission. Finally, the Act authorizes the Attorney General to order the deportation of any nonimmigrant alien who fails to maintain his nonimmigrant status or to comply with the conditions of such status. These statutory provisions plainly encompass authority to promulgate regulation 214.5.¹³

Citing a number of national security Supreme Court decisions, the Appeals Court invoked the “political question” doctrine, by which Courts will not look into the policy rationales or second-guess the Administration, unless the policy is discriminatory, under the least-stringent measure, whether or not the policy of the regulation is “rational”:

[C]lassifications among aliens based upon nationality are consistent with due process and equal protection if supported by a rational basis. The Attorney General’s regulation 214.5 meets that test; it has a rational basis. To reach a contrary conclusion the District Court undertook to evaluate the policy reasons upon which the regulation is based. In doing this the court went beyond an acceptable judicial role. Certainly in a case such as the one presented here it is not the business of courts to pass judgment on the decisions of the President in the field of foreign policy. Judges are not expert in that field and they lack the information necessary for the formation of an opinion.¹⁴

13. *Narenji v. Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (May 19, 1980) (citations omitted).

14. *Id.* at 748 (citations omitted).

The end of the dispute came relatively quickly, as *Narenji* lasted only a short time in its expedited review: the appeal was argued December 20, 1979, and was decided exactly a week later, over Christmas week; the final hearing was denied January 31, 1980.¹⁵ The Supreme Court denied *certiorari* on May 19, 1980,¹⁶ and the challenge was ended. While the larger constitutional and policy questions were important, the immigration authority (then-INS) found few of the Iranian usual-suspect-students to be out of status. Of the more than 65,000 Iranian students enrolled in U.S. institutions in 1981, only 2,751 were found to have a violation sufficient to remove them from the country, while another 6,274 students left without being required to do so.¹⁷ (It is worth noting that what was a small venial sin in that period would likely have been found today to have committed the equivalent of mortal sins, and more students would have been removed under today's more unforgiving current immigration regime.)

By the time the hostages were released in January 1981,¹⁸ more than half a dozen other cases involving Iranian non-immigrants were being heard in federal courts. But for this discussion, the most important was *Tayyari v. New Mexico State University*, a 1980 case in which a federal judge struck down a single institution's attempt at establishing a foreign policy response to the hostage crisis.¹⁹ On May 9, 1980, just before the U.S. Supreme Court denied *cert* in the *Narenji* case, allowing the D.C. Appeals Court decision to stand, the NMSU Regents passed a Motion:

[T]hat any student whose home government holds, or permits the holding of U.S. citizens hostage will be denied admission or readmission to New Mexico State

15. *Id.* at 745.

16. *Narenji v. Civiletti*, 446 U.S. 957 (1980) (denying certiorari).

17. Richard Haitch, *Follow Up on the News: Counting Iranians*, N.Y. TIMES, Aug. 16, 1981, at 49. See Barbara A. Lee & Mark R. Davies, *No More "Business as Usual" in Higher Education: Implications for U.S. and U.K. Faculty*, 40 J.C. & U.L. 499 (2014), for a good review of developments in employment policies.

18. Gwertzman, *supra* note 7.

19. *Narenji*, 481 F. Supp. at 1134–35 (D.D.C. 1979); *Tayyari v. N.M. State Univ.*, 495 F. Supp. 1365 (D.N.M. 1980).

University commencing with the Fall 1980 semester unless the American hostages are returned unharmed by July 15, 1980.

To clarify its original action, Regents passed a Substitute Motion on June 5, 1980, which reads:

Any student whose home government holds or permits the holding of U.S. citizens hostage will be denied subsequent enrollment to New Mexico State University until the hostages are released unharmed. The effective date of this motion is July 15, 1980.²⁰

The Regents defended their actions on several grounds, all of which were denied by U.S. District Judge Santiago Campos. They argued Eleventh Amendment immunity, but the judge gave this argument short shrift, citing a number of jurisdictional cases, including *Ex parte Young*: this doctrine “that a state officer cannot act in his official capacity in an unconstitutional manner would allow declaratory and injunctive relief to be granted against the members of the Board of Regents. Thus, Defendants’ immunity defense must fall.”²¹ He found jurisdiction in the Iranian plaintiffs’ Title VI claim, and took notice that two of the fifteen plaintiffs were permanent residents, while the others were non-immigrants properly enrolled on student visas.²²

They also argued that no harm had yet befallen the students, because the matter was being considered between semesters, so that the Motion had not yet taken effect.²³ The Judge also swept this aside:

20. *Tayyari*, 495 F. Supp. at 1367–68.

21. *Id.* at 1370 (citation omitted).

22. *Id.* at 1370–71.

23. *Id.* at 1371. Notwithstanding the many problems identified in this study and the rising costs of college attendance in the United States, the number of international students and scholars has increased substantially. See Scott Jaschik, *Shifts in Foreign Grad Population*, INSIDEHIGHERED.COM (Nov. 12, 2014), <https://www.insidehighered.com/news/2014/11/12/foreign-grad-population-increasing-india-not-china> (reviewing enrollment patterns, including the rise of Indian and Brazilian students in the United States); Neil G. Ruiz, *The Geography of Foreign Students in U.S. Higher Education: Origins and Destinations*, BROOKINGS INST. (Aug. 29, 2014), <http://www.brookings.edu/research/interactives/2014/geography-of-foreign-students> (study of U.S. international students); Elizabeth Redden, *Urban Geography of Foreign Students*,

As for the potential ineligibility of some Iranian students for enrollment at NMSU on a basis other than Regents' Substitute Motion, this argument is precluded by a stipulation entered into between Plaintiffs and Defendants at the hearing. That stipulation was to the effect that these Plaintiffs would be eligible for reenrollment but for the Motion adopted by Regents. Therefore, the Court may proceed to the merits of Plaintiffs' contentions.

Plaintiffs claim they are being denied equal protection of the laws and due process rights guaranteed to them under the Constitution of the United States. They seek a judicial declaration that the action of the Regents in adopting the Motion denying Plaintiffs subsequent enrollment at NMSU is unconstitutional. Also, they pray for an injunction permanently enjoining Defendants from implementing the challenged Motion.²⁴

When the judge analyzed the constitutional question posed by the state university's attempt to forge its own international policy, he invalidated the Regents' Motion and enjoined it permanently, on the grounds that preemption doctrine would not allow a state entity to undertake immigration policies that were reserved exclusively to the federal immigration authorities:

Here, Regents' motion is directed at one nation, Iran. Their purpose was to make a political statement about the hostage situation in Iran and to retaliate against Iranian nationals here. The potential effect on international relations *vis-a-vis* Iran is much greater here than with a regulation affecting all aliens regardless of nationality. Attempts to solve the hostage crisis must come from the federal government. State officials in New Mexico must not impede those efforts.

I conclude that the action by Regents of NMSU imposes an impermissible burden on the federal government's power to regulate immigration and conduct foreign affairs. As such, it must be invalidated.²⁵

INSIDEHIGHERED.COM (Aug. 29, 2014), <https://www.insidehighered.com/news/2014/08/29/new-analysis-international-student-visa-approvals-traces-migration-patterns>.

24. *Tayyari*, 495 F. Supp. at 1371.

25. *Id.* at 1379–80.

The federal courts deciding *Narenji* and *Tayyari* employed two different constitutional standards in upholding the federal regulation and in striking down the state university regents' policy aimed at excluding Iranian students. While the *Narenji* Court found that the restriction involved the presidential foreign affairs powers, necessitating only rational basis scrutiny,²⁶ the judge in *Tayyari* undertook an equal protection analysis and applied strict scrutiny, determining that such state action was preempted and reserved to the federal government.²⁷

As a footnote to these developments, student enrollment data show that the U.S.-Iran relationship has never been fully restored since 1979, when a peak of 51,310 students were enrolled in U.S. institutions;²⁸ the lowest number occurred in 1999, when there were fewer than 1,700 students.²⁹ (The *Narenji* case cites 65,000, but those figures counted all Iranians studying under all the various non-immigrant, exchange, and other visas—whereas these figures include only those on specific F-1 student visas.) In the 2010–2011 academic year, 5,626 students from Iran were studying in the United States (up 18.9% from the previous year), with 83.5% being enrolled as graduate or other post-baccalaureate students.³⁰ Iran was the greatest sender nation of students to the United States from 1974 to 1983, while it is barely in the list of the top twenty-five senders in 2011.³¹ Until 2011, Iranian students could only enter and exit once on their student visas,³² the only entry-exit restriction affecting a specific single country. In 2012, additional immigration restrictions were placed upon Iranian students

26. *Narenji*, 617 F.2d at 748.

27. *Tayyari*, 495 F. Supp. at 1373.

28. INST. OF INT'L EDUC., OPEN DOORS FACT SHEET: IRAN, <http://www.iie.org/~media/Files/Corporate/Open-Doors/Fact-Sheets-2013/Country/Iran-Open-Doors-2013.ashx> (last visited Oct. 18, 2014).

29. *Id.*

30. *Id.*

31. *Id.*; Yeganeh June Torbati, *New Wave of Iranians Seek U.S. Studies*, N.Y. TIMES, Aug. 10, 2010, at A12.

32. *Changes to Iranian Student Visa Validity*, U.S. DEP'T OF STATE (May 20, 2011), <http://video.state.gov/en/video/952172201001/changes-to-iranian-student-visavalidity>.

studying in U.S. colleges and seeking employment in nuclear energy fields.³³

There have been other immigration-related college law cases that have bearing upon scholarly mobility, such as restrictions upon visitor visas for pending college lecturers,³⁴ longstanding prohibitions on curricular study for international students in sensitive subject matter,³⁵ and limited work permits for international scholars who have employment offers from U.S. employer-colleges, but who encounter permission problems, even with the expedited special handling processes available to college employers.³⁶ These picked up considerably after the events of September 11, 2001, and some have morphed into permanent restrictions that have a perennial place on court dockets in the United States. Students outside the United States have to apply to college like anyone else, and then some. The “then some” is largely an overlay of international-student requirements on top of the admissions process, and additional paperwork—both of which operationalize the immigration process. Conceptually, the steps are quite simple and

33. Brian Stoddart, *Countries Want to Take Economic Advantage of the New Student Mobility, but Must also Play to Home Political Constituencies Over Issues of Local Interest and Electoral Politics*, LONDON SCH. ECON. BRIT. POL. & POL'Y BLOG (Oct. 2, 2012), <http://blogs.lse.ac.uk/politicsandpolicy/the-politics-of-international-education>.

34. See Burton Bollag & Shailaja Neelakantan, *After Visa Delay, Prominent Indian Scientist Spurns U.S. Invitation*, CHRON. HIGHER EDUC., Mar. 10, 2006, at A40 (recounting the tale of a prominent Indian chemist who was insulted and discouraged due to his inability to obtain a visa).

35. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-198, BORDER SECURITY: STREAMLINED VISAS MANTIS PROGRAM HAS LOWERED BURDEN ON FOREIGN SCIENCE STUDENTS AND SCHOLARS BUT FURTHER REFINEMENTS NEEDED 5, 5 n.9 (2005) [hereinafter BORDER SECURITY] (describing how Security Advisory Opinions are required for many reasons “including concerns that a visa applicant may engage in illegal transfer of sensitive technology”).

36. See Press Release, American Civil Liberties Union, *Groups Condemn State Department's Decision to Deny Visa to Oxford University Professor Who Criticized U.S. Policies* (Sept. 25, 2006), available at <http://www.aclu.org/safefree/general/26851prs20060925.html> (reporting that a renowned Oxford professor was denied a visa due to his alleged political affiliations); Burton Bollag & Dan Canevale, *Iranian Academics Are Denied Visas*, CHRON. HIGHER EDUC., Sept. 1, 2006, at A72 (explaining how, despite their status as travelling scholars, several Iranian professors had their visas revoked upon arrival at a reunion in San Diego); Basken, *supra* note 1 (discussing how the American visa regime's inflexibility has stalled one researcher's start-up plan).

transparent, but they mask the complexities that underpin international student admissions.³⁷

These immigration requirements feed a large industry trade practice and support network. For example, the NAFSA: Association of International Educators organization represents their interests in the United States, organizes the process, and has professionalized the international student advisor network.³⁸

A number of NAFSA studies have clearly documented the extent to which there are structural problems in student application processing, consular delays (including 2001 evidence that over a quarter of consular visa applications for intending students had been denied), and flaws in the immigration requirements, especially in the domiciliary requirements of intending immigrants.³⁹ Another network, the Institute for

37. See IMMIGRATION OPTIONS FOR ACADEMICS AND RESEARCHERS (Dan H. Berger & Scott M. Borene eds., 2005); COMM. ON POLICY IMPLICATIONS OF INT'L GRADUATE STUDENTS & POSTDOCTORAL SCHOLARS IN THE U.S. ET AL., POLICY IMPLICATIONS OF INTERNATIONAL GRADUATE STUDENTS AND POSTDOCTORAL SCHOLARS IN THE UNITED STATES 67 (2006) (explaining that the national security measures taken after the terrorist attacks on 9/11 to change the visa regimes have had a substantial effect upon student visa applicants' impressions of the United States as a destination for education); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-1047T, HIGHER EDUCATION: INTERNATIONAL STUDENTS TO THE UNITED STATES AND IMPLICATIONS FOR GLOBAL COMPETITIVENESS 11 (2007) [hereinafter INTERNATIONAL STUDENTS TO THE UNITED STATES] (discussing that applicant discouragement remains, despite the federal government's attempts to simplify post-9/11 student visa requirements).

38. Burton Bollag, *Education Group Calls for National Foreign-Student Recruitment Strategy*, CHRON. HIGHER EDUC., June 23, 2006, at A44 [hereinafter *Education Group Calls for National Foreign-Student Recruitment Strategy*]; ASS'N OF INT'L EDUCATORS, *Restoring U.S. Competitiveness for International Scholars and Students* (2006), available at http://www.nafsa.org/uploadedFiles/NAFSA_Home/Resource_Library_Assets/Public_Policy/restoring_u.s.pdf.

39. See NAT'L ASS'N OF FOREIGN STUDENT ADVISORS, IN AMERICA'S INTEREST: WELCOMING INTERNATIONAL STUDENTS: REPORT OF NAFSA'S STRATEGIC TASK FORCE ON INTERNATIONAL STUDENT ACCESS 10 (2003), available at https://www.nafsa.org/uploadedFiles/NAFSA_Home/Resource_Library_Assets/Public_Policy/in_america_s_interest.pdf (discussing "burdensome government regulations that restrict international student access to the United States" and delays to entering the United States); see also NAT'L ASS'N OF FOREIGN STUDENT ADVISORS, RESTORING U.S. COMPETITIVENESS FOR INTERNATIONAL STUDENTS AND SCHOLARS 4, 7 (2006), available at http://www.nftc.org/default/Visa%20Policy/2006_06_nafsa_restoringuscompetitiveness.pdf (noting flaws with the requirements for student visas, such as requiring students to establish "nonimmigrant intent").

International Education fosters exchange programs, evaluates transcripts, and provides technical assistance among world higher education systems.⁴⁰ Other allied organizations, governmental agencies, and NGO's also coordinate these functions. As a result, millions of students and scholars travel outside their countries and interact with colleges on a formal basis.⁴¹ The amazing truth is that the system works so well much of the time, not that it bogs down and fails some participants, although the failures are more evident in recent years.⁴²

40. *What We Do*, INST. INT'L EDUC., <http://www.iie.org/en/What-We-Do> (last visited Nov. 4, 2014).

41. See INST. OF INT'L EDUC., OPEN DOORS 2011: REPORT ON INTERNATIONAL EDUCATIONAL EXCHANGE (2011) (providing statistics on international student enrollment); Randal C. Archibold, *Wait Ends for Father and Son Exiled by F.B.I. Terror Inquiry*, N.Y. TIMES (Oct. 2, 2006), <http://www.nytimes.com/2006/10/02/us/02terror.html>; see also AM. COUNCIL ON EDUC. [ACE], STUDENTS ON THE MOVE: THE FUTURE OF INTERNATIONAL STUDENTS IN THE UNITED STATES (2006), available at <http://www.acenet.edu/news-room/Documents/IssueBrief-2006-Students-on-the-Move-The-Future-of-International-Students-in-the-United-States.pdf> (reporting trends in international student enrollment in U.S. institutes of higher education); Bethany H. Flora & Joan B. Hirt, *Educational Consortia in a Knowledge Economy: Collaboration, Competition, and Organizational Equilibrium*, 33 REV. HIGHER EDUC. 569, 571, 573 (2010) (discussing the use of the Metropolitan Higher Education Center to "expand access to adult higher education").

42. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-1047T, HIGHER EDUCATION: CHALLENGES IN ATTRACTING INTERNATIONAL STUDENTS TO THE UNITED STATES AND IMPLICATIONS FOR GLOBAL COMPETITIVENESS 4 (2007) [hereinafter CHALLENGES IN ATTRACTING INTERNATIONAL STUDENTS] (noting that although the "U.S. share of international students worldwide decreased between 2000 and 2004," the United States still enrolls "more international students than any other country"); see also Elizabeth Redden, *Privatized Pathways for Foreign Students*, INSIDEHIGHERED.COM (Aug. 4, 2010), <http://www.insidehighered.com/news/2010/08/04/pathways> (detailing the benefits of Pathway programs at U.S. colleges to promote recruitment of international students); Elizabeth Redden, *In Over Its Head?*, INSIDEHIGHERED.COM (Dec. 15, 2010), <http://www.insidehighered.com/news/2010/12/15/keuka> (reviewing a dissertation that critiques a U.S. degree program operating in China); Anderson, *supra* note 1, at 4 (explaining that although there has been an increase in the enrollment of international students in graduate level programs, this has not decreased the enrollment of U.S. students in the same programs); Andrew Mills, *Low Enrollment Led Michigan State U. to Cancel Most Programs in Dubai*, CHRON. HIGHER EDUC. (July 16, 2010), <http://chronicle.com/article/Low-Enrollment-Led-Michigan/66151> (reporting various reasons for Michigan State University canceling programs in Dubai, such as financial pressure on families after the financial crisis hit and inability to attract enough students); Justin Pope, *New Caution for US Universities Overseas*, BOSTON.COM (Oct. 20, 2011), <http://www.boston.com/>

In the United States, international students travel for the most part on F-1 visas (traditional college attendance) or on M-1 visas (short-term college attendance or language study), while exchange scholars and researchers travel on J-1 visas. Their families and dependents are allowed to follow on related visa-categories.⁴³ Students first must be evaluated and admitted for study and then submit timely paperwork that shows requisite financial support, language ability, insurance coverage, security clearances, and other eligibility for study.⁴⁴ As noted, these required documents have grown more complex and time-consuming, and it is not unusual that delays in the processing will affect timing for admissions and travel to the United States.⁴⁵ And, while most international students will have

news/nation/articles/2011/10/20/new_caution_for_us_universities_overseas (discussing the issues with and unpopularity of U.S. universities overseas); Jacques Steinberg, *Recruiting in China Pays Off for U.S. Colleges*, N.Y. TIMES, Feb. 12, 2011, at A1 (noting Grinnell College has had tremendous success attracting Chinese applicants); Jeannie Kever, *Faulty Planning May Be to Blame for HCC Qatar Campus's Problems*, HOUS. CHRON. (Feb. 4, 2012), <http://www.chron.com/news/houston-texas/article/HCC-in-Qatar-A-long-distance-challengeHCC-had-3039161.php> (detailing problems with “accreditation, high faculty turnover and growing worries” about the dean at the Houston Community College campus in Qatar).

43. There are a number of other immigration categories that allow study, but these are the major such vehicles.

44. Beth McMurtie, *A Veteran U.S. Diplomat Explains How the Visa Process Works for Chinese Citizens*, CHRON. HIGHER EDUC. (Sept. 24, 1999), at A60, available at <http://www.chroniclerecareers.com/article/A-Veteran-US-Diplomat/10704>; see *Student Visa*, U.S. DEP'T OF STATE, <http://travel.state.gov/content/visas/english/study-exchange/student> (last visited Nov. 11, 2014) (advising F-1 applicants that they may be required to show acceptance into a school certified by the Dept. of Homeland Security, enrollment in the Student and Exchange Visitor Information System, and evidence of academic preparation such as standardized test scores, in addition to proof of how the applicant intends to pay for their education); *Documents for F1 Visa Applicant*, IMMIHELP, <http://www.immihelp.com/visas/studentvisa/f1-visa-documents.html> (last visited Nov. 11, 2014) (indicating that applicants for an F-1 visa are required to obtain SEVIS I-20 form proving non-immigrant student eligibility and to produce evidence of financial resources, and recommending that student visa applicants provide standardized test scores); see *Health Insurance Requirements for the F1 Visa*, INT'L STUDENT INS., <http://www.internationalstudentinsurance.com/flstudent/insurance-requirements-f1-visa.php> (last visited Nov. 11, 2014) (clarifying that while the U.S. State Department does not require F-1 applicants to obtain insurance, many American schools attended by such students will nevertheless require that foreign students carry insurance).

45. INTERNATIONAL STUDENTS TO THE UNITED STATES, *supra* note 37 (“Visa policies and procedures, tightened after September 11 to protect our national security,

permission to remain in the United States for the pendency of their studies, assuming satisfactory academic progress and no disqualifying behavior, this is not an easy task. In my thirty years in this kind of work, I have seen students deported or removed for failure to register properly in summer transfer work, for dropping a class that was not offered, for working required overtime in a permitted summer program, and for other minor transgressions that were not properly papered or preapproved. I had to seek senior political intervention⁴⁶ for a student of mine who returned home for semester break and who missed his flight, rendering him technically inadmissible upon his return. In the usual case, students can extend their studies for many years, can go on for additional studies, and can “work” in limited circumstances. Once they complete their studies, they can apply for and be eligible for employment in the United States. Many do so, especially in academic appointments for which they are qualified.⁴⁷

This nutshell summarizes the many circumstances, and does not refer to the many horrors that can occur. But most of these horrors implicate immigration status and its structural apparatus, and this overlay, with its many technical and legal details, is quite unforgiving and punitive—more so in this post-9/11 world. There is still too much discretion accorded overseas consular officials, whose judgments concerning intending sojourners is virtually unreviewable.⁴⁸ Additionally, there has been a surprising amount of litigation involving international

contributed to real and perceived barriers for international students. Post-September 11 changes included a requirement that almost all visa applicants be interviewed, affecting the number of visas issued and extending wait times for visas under certain circumstances.”).

46. Name omitted for political purposes, in case I need another favor.

47. See IMMIGRATION OPTIONS FOR ACADEMICS AND RESEARCHERS, *supra* note 37; Kathy Steiner-Long, *J-1 Exchange Visitors for Academic and Research Activities*, in IMMIGRATION OPTIONS FOR ACADEMICS AND RESEARCHERS 77 (Dan H. Berger & Scott M. Borene eds., 2005). See generally LAWLER, *supra* note 1 (describing the process of obtaining business visas for foreigners seeking employment in the United States).

48. See McMurtie, *supra* note 44 (noting the lack of information concerning criteria for evaluating applications and the lack of a standardized process used by U.S. officials in granting visas to Chinese citizens).

students and scholars, ranging from financial aid eligibility,⁴⁹ employment issues,⁵⁰ ability to travel to the United States (and its converse, the inability of many U.S. citizens to travel on scholarly exchanges to Cuba),⁵¹ insurance requirements,⁵² discrimination allegations,⁵³ retaliation for diplomatic reasons,⁵⁴ and many other dimensions.⁵⁵ Suffice it to say that this is a rich legal literature and substantial practice area. And the results reveal that international students prevail as well as lose in

49. *Nyquist v. Mauclet*, 32 U.S. 1 (1977).

50. *See Cantwell*, *supra* note 1, at 425 (providing information on “how policy discourse and technologies empower and limit [scholars] in negotiating employment arrangements across national boundaries”).

51. *See* Burton Bollag, *U.S. Again Bars Cuban Scholars*, CHRON. HIGHER EDUC., Mar. 17, 2006, at A53 (describing an incident where 65 Cubans were banned from entering the United States for a conference); Burton Bollag, *Greek Professor Barred from U.S.*, CHRON. HIGHER EDUC., July 7, 2006, at A42 (discussing the denial of entry into the United States of a Greek professor); *see also* Burton Bollag, *College Fined for Cuban Program*, CHRON. HIGHER EDUC., July 21, 2006, at A33 [hereinafter *College Fined for Cuban Program*] (explaining that Ausberg College was fined for “four short trips” to Cuba “for religious and humanitarian groups”).

52. *Ahmed v. Univ. of Toledo*, 664 F. Supp. 282 (N.D. Ohio 1986) (holding that universities may require international students to obtain health insurance).

53. *See generally* Gil Gott, *The Devil We Know: Racial Subordination and National Security Law*, 50 VILL. L. REV. 1073, 1109 (2005) (detailing issues surrounding ongoing discrimination and exclusion from American society).

54. *See* Burton Bollag & Dan Carnevale, *Iranian Academics Are Denied Visas*, CHRON. HIGHER EDUC., Sept. 1, 2006, at A72 (noting that “Iran is identified as a state sponsor of terrorism” and therefore “people from that country who request visas are subject to special processing”; implying a causal link between this and the reason that “dozens of Iranian professors and alumni had their visas revoked after landing in the United States”); *see also* *Education Group Calls for National Foreign-Student Recruitment Strategy*, *supra* note 38, at A44 (discussing the effects of visa restrictions set after the terrorist attacks of September 11, 2001 on the ability of the United States to compete for international students); *see also* *College Fined for Cuban Program*, *supra* note 51, at A33 (explaining that Ausberg, a Lutheran college in Minneapolis, was forced to stop traveling to Cuba “after the Bush Administration . . . tightened restrictions . . . in June 2004”).

55. *See* Lila Guterman, *The Taint of ‘Misbehavior,’* CHRON. HIGHER EDUC., Feb. 24, 2006, at A14 (detailing the events surrounding an American scientist’s part in a Korean research scandal); *see also* Miriam Jordan, *New Backlash in Immigrant Fight, Grass-Roots Groups Boost Their Clout*, WALL ST. J., Sept. 28, 2006, at A1 (describing an activist group’s efforts to aid in cracking down on illegal immigration); Kato & Sparber, *supra* note 1, at 109 (explaining how “restrictive H-1B policy has affected the average academic quality . . . of prospective international students who face reduced U.S. employment opportunities after graduation”).

these cases, particularly when the college actions are thinly veiled instances of prejudice, as in the example of the actions described in the *Tayyari* case, when New Mexico State University trustees attempted to punish enrolled Iranian NMSU students, including even permanent residents, for the takeover of the U.S. embassy in Tehran by militant students in the late 1970's.

Moreover, under shifting norms of national security, there is a longstanding and embarrassing practice in the United States of restricting travel to controversial figures, including intellectuals and scholars. The recent federal court decision, to which the U.S. government has acceded, to require the government either to issue a visa to Tariq Ramadan, a Muslim scholar from Switzerland, or articulate reasons for not doing so (he had an offer to assume a tenured position at the University of Notre Dame),⁵⁶ gives cause for cheer, only to be offset by the government's refusal to allow U.S. citizens to re-enter the country from Pakistan.⁵⁷ After the initial cheer about Professor Ramadan's fate, the United States refused him entry, on different grounds.⁵⁸ Such accomplished people who would want to work in the country, as well as those many who simply wish to interact in scholarly forums, have many options and will find refuge elsewhere.⁵⁹ Professor Ramadan, after being refused entry into the United States, was appointed by British Prime Minister Tony Blair to a working group to advise him on UK

56. See Burton Bollag, *U.S. Won't Appeal Tariq Ramadan Ruling*, CHRON. HIGHER EDUC., Sept. 8, 2006, at A23 (describing the basis of the lawsuit); Ian Buruma, *Tariq Ramadan Has an Identity Issue*, N.Y. TIMES MAG., Feb. 4, 2007, at 36 (detailing Tariq Ramadan's qualifications). See generally *Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 115-16 (2d Cir. 2009) (providing the federal court decision).

57. See Demian Bulwa, *Man OK'd to Return to U.S. from Pakistan*, S.F. CHRON., Sept. 13, 2006, at B5 (describing the denial, and ultimate clearance, of U.S. citizens to return to the United States from Pakistan).

58. Annie Shuppy, *Muslim Scholar Denied a U.S. Visa Again*, CHRON. HIGHER EDUC., Oct. 6, 2006, at A41.

59. See Burton Bollag & Shailaja Neelakantan, *After Visa Delay, Prominent Indian Scientist Spurns U.S. Invitation*, CHRON. HIGHER EDUC., Mar. 10, 2006, at A40 (noting that after U.S. officials initially denied entry of a prominent Indian professor of organic chemistry into the United States, the scholar refused to resume travel to the United States due to the hostile treatment by officials).

terrorism.⁶⁰ But in these ideological exclusions, even with the virtual long distance alternatives, the United States has forgotten the lessons of WWII, when the brain drain from Europe brought the country extraordinary academic, humanitarian, and political talents from elsewhere. These flying dutchmen will find regimes willing to allow them to ply their trade, and U.S. colleges and corporations will read about their achievements from abroad and see them recorded in patent offices elsewhere.⁶¹ These picked up considerably after the events of September 11, 2001, and some have morphed into permanent restrictions that have a perennial place on court dockets in the United States.

B. Post-9/11

Of course, the events of September 11, 2001 changed everything, and predictably, changed them largely for the worse. Literally dozens of statutes have been enacted or amended by Congress to address terrorism since the attacks against the United States, and several of these either directly implicate higher education institutions or affect colleges in substantial fashion. In addition, new legislative proposals have arisen, in areas that will affect colleges and universities should they become law. Regulations to implement this legislation have cascaded, and many more are in progress. Like an elaborate billiard game, these new statutes cross-reference, compound, and alter existing statutes, including well-established laws.

60. Naser Farghali, *A Brief Encounter with Al-Wassateyya*, ISLAMIST GATE (June 4, 2014, 9:34 AM), <http://www.islamistgate.com/728>; see Tony Blair, *Why We Must Attract More Students From Overseas*, GUARDIAN, Apr. 17, 2006, at A1 (discussing the details of the UK-India Education and Research Initiative); Aisha Labi, *Britain Expands Foreign-Student Recruitment*, CHRON. HIGHER EDUC., Apr. 28, 2006, at A55 (describing Tony Blair's foreign student recruitment effort through the UK-India Education and Research Initiative).

61. See Bollag & Neelakantan, *supra* note 59, at A40 (discussing a scholar's reluctance to travel to the United States after being denied a visa to speak at an "international scientific conference in the United States"). See generally Stephen E. Blythe, *The Tiger of the Peninsula is Digitized: Korean E-Commerce Law as a Driving Force in the World's Most Computer-Savvy Nation*, 28 HOUS. J. INT'L L. 573, 575-76 (2006) (explaining that Korea is now regarded as "one of the Southeast Asian 'Tigers' because of its high rate of economic growth . . .").

The primary statutes enacted by Congress to combat terrorism since the 2001 attacks have included: Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), P.L. 107–56 (October 26, 2001) [major omnibus anti-terrorism legislation, amending several statutes]; Aviation and Transportation Security Act, P.L. 107–71 (November 19, 2001) [regulating flight training schools]; Enhanced Border Security and Visa Entry Reform Act of 2002, (Border Security Act) P.L. 107–173 (May 14, 2002) [data collection on international students and scholars]; and Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (BPPRA), P.L. 107–188 (June 12, 2002) [controls use and distribution of toxins and other biological agents used in scientific research and instruction].

Other relevant U.S. legal initiatives that have triggered enhanced immigration-related security measures have included the Student and Exchange Visitor Information System (SEVIS), a comprehensive computerized system designed to track international students and exchange scholars; the Department of State's Technology Alert List (TAL), an enhanced consular official review process for detecting terrorists who seek to study sensitive technologies; the Visas Mantis, a program intended to increase security clearances for foreign students and scholars in science and engineering fields; the Interagency Panel on Advanced Science Security (IPASS), designed to screen foreign scholars in security-sensitive scientific areas; the Consumer Lookout and Support System (CLASS), a file-sharing program that incorporates crime data into immigration-screening records; NSEERS, a special screening program designed to track Middle Eastern and Muslim country students, abandoned in 2011; the Interim Student and Exchange Authentication System (ISEAS), a transitional program until SEVIS is fully operational, and replacing the previous Coordinated International Partnership Regulating Act of 1996. In addition, there are many Presidential Directives and other federal statutory/regulatory matters that

govern the intersection of immigration, national security, and higher education.⁶²

Particular concern has been directed at the use and controls for hazardous chemical and biological materials, snaring science graduate students and faculty in violations, and even leading to jail terms.⁶³

As one careful immigration scholar writing at the time noted in this area:

Let us be clear: Immigration law does not revolve around national security or terrorism. As you will see, national security is merely one of many policy ingredients in the mix. Moreover, only the most minute proportion of actual immigration cases present any national security issues at all. Conversely, while many of the policy responses to September 11 have been immigration-specific, most have been generic national security strategies. A full chapter devoted solely to national security runs the risk, therefore, of lending that subject undue prominence. This must be acknowledged. For two reasons, separate treatment of this material is useful nonetheless. First, in the aftermath of September 11, the inevitable preoccupation

62. Michael A. Olivas, *IIRIRA, the DREAM Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435, 459 (2004) [hereinafter *IIRIRA*]; see also BORDER SECURITY: *supra* note 35, at 1 (describing the Visas Mantis Program); CHALLENGES IN ATTRACTING INTERNATIONAL STUDENTS, *supra* note 42 (identifying ways to strengthen post-September 11 visa processes in order to “reduce[] barriers for international students while balancing national security”); *What the “War on Terror” Has Meant*, *supra* note 2, at 252–53 (pointing out that many “statutes have been enacted by . . . Congress to address terrorism since the 9/11 attacks . . . and several of these . . . implicate higher education institutions”); 83 No. 35 Interpreter Release 1943 (Sept. 11, 2006) (discussing the difficulty U.S. citizens who had travelled to Pakistan experienced upon trying to return to the United States).

63. Grace E. Merritt, *UConn Student’s Anthrax Case Won’t Go to Trial*, HARTFORD COURANT, Nov. 20, 2002, at B7 (describing a situation where a University of Connecticut graduate student entered into pre-trial diversion program for alleged unlawful possession of a biological agent (anthrax), violating 18 U.S.C. § 175(b)); see Kenneth Chang, *Split Verdicts in Texas Trial of Professor and the Plague*, N.Y. TIMES, Dec. 2, 2003, at A22 (condemning a professor at Texas Tech University for reporting 30 vials of plague bacteria as missing at his laboratory); Victoria Sutton, *The Culture of Science and the Regulation and Litigation of Biodefense Research*, 6 UNIV. ST. THOMAS L.J. 523, 525, 528 (2009) (stating that Associate Professor Steven Kurtz was one of the first to be charged under a new post-9/11 regulation for possessing bacteria in his home).

with terrorism and war has utterly dominated the public discourse on immigration. Welcome or not, that reality cannot be ignored. Second, Congress and the executive branch have responded with a wave of counterterrorism initiatives. Many of them specifically target either noncitizens or particular classes of noncitizens. Synthesizing these measures makes it easier to describe, digest, and evaluate them in context.⁶⁴

After the planes crashed, some of these changes would have been enacted, even if some of the hijackers had never been students enrolled in U.S. flight schools. The resultant revisions have been accelerated, and breathed life into dormant statutes. For example, the SEVIS initiative had been mandated by IIRIRA in 1996, but had never been implemented.⁶⁵ Concerned generally about overstays, Congress had ordered that an automated entry-exit system be developed, and when it was not developed, enacted two additional statutes in 1998 and 2000 to deal with this issue. Following September 11, 2001, the USA PATRIOT Act was signed into law, including Section 414, which lent additional urgency. In 2002, Congress once again acted on this subject, enacting the Enhanced Border Security and Visa Entry Reform Act of 2002.⁶⁶ In June 2002, the Department of Justice announced the creation of the National Security Entry-Exit Registration System (NSEERS); after a decade of unsatisfactory program design and evidence it was being used primarily against Middle Eastern countries, it was allowed to die in 2011.⁶⁷

The postsecondary corollary is the Student and Exchange Visitor Information Program (SEVIS), a web-based student tracking system, which has been delayed and vexing for colleges

64. STEPHEN LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 843 (4th ed. 2005).

65. *IIRIRA*, *supra* note 62, at 460.

66. Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, 116 Stat. 543 (codified as amended at 8 U.S.C. §§ 1701-1778 (2004)).

67. *IIRIRA*, *supra* note 62, at 460; Muzaffar Chishti & Claire Bergeron, *DHS Announces End to Controversial Post-9/11 Immigrant Registration and Tracking Program*, *MIGRATION INFO. SOURCE* (May 17, 2011), <http://www.migrationinformation.org/usfocus/display.cfm?ID=840>.

required to use it. Both NSEERS and SEVIS were to be rolled into a more comprehensive database called the U.S. Visitor and Immigration Status Indication Technology System (U.S. VISIT),⁶⁸ once the technical, legal, and system problems have been resolved. In the meantime, campus officials have had to spend countless hours tracking and identifying international students and scholars, in an immigration regime that is extraordinarily complex and detailed.⁶⁹ The delays have been responsible for disrupting the flow in international students and researchers to U.S. institutions, and the lags in processing the paperwork and technical requirements can require a year in advance of enrollment.⁷⁰ Tensions with Iran have led to significant political and economic sanctions, including employment and education restrictions by the United States and the EU. For example, in 2012, Congress enacted and President Obama signed the Iran Sanctions, Accountability, and Human Rights Act of 2012 [Pub. L. 112–158], which provides that Section 501 of that law provides:

The Secretary of State shall deny a visa to, and the Secretary of Homeland Security shall exclude from the United States, any alien who is a citizen of Iran that the Secretary of State determines seeks to enter the United States to participate in coursework at an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)) to prepare the alien for a career in the energy sector of Iran or in nuclear science or nuclear engineering or a related field in Iran.⁷¹

68. Robert F. Loughran & Delisa J. Futch, *Keeping Pace with the Immigration Security Measures Implemented by the Departments of State and Homeland Security*, in HANDBOOK FOR THE AREA IV SHRM & HR HOUSTON INTERNATIONAL CONFERENCE (2000), available at <http://www.fosterquan.com/content/includes/AttorneyArticles/pace.pdf>.

69. IMMIGRATION OPTIONS FOR ACADEMICS AND RESEARCHERS, *supra* note 37; Sylvia H. Kless, Assoc. Director for Student Servs., Univ. of Rochester, The Impact of Recent Law and Policy Changes on International Students and Scholars in the U.S., Nat'l Conf. on L. & Higher Educ. (Feb. 20–22, 2005) at 6, 13, 19.

70. See CHALLENGES IN ATTRACTING INTERNATIONAL STUDENTS, *supra* note 42, at 11–12 (noting that all visa applicants must now be interviewed and “long wait times discourage legitimate travel to the United States”).

71. Iran Threat Reduction and Syria Human Rights Act of 2012, H.R. 1905, 112th Cong. § 501.

This provision is effective “with respect to visa applications filed on or after” August 10, 2012.⁷² After the EU developed similar sanctions, institutions in the Netherlands moved to restrict Iranian students, who took the matter to court and prevailed.⁷³ However, additional actions to remove Iranian graduate students occurred in Norway as well, after the Norwegian Directorate of Immigration and the country’s Police and Security Service combined to single them out and ban them from university studies, construing such study as violations of international sanctions against the country.⁷⁴

C. The DREAM Act at the State and Federal Levels

In 1996, several comprehensive restrictionist immigration statutes were enacted into law, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which necessitated that individual states enact new laws if they were to allow undocumented college students to gain state residency tuition status.⁷⁵ None of the several states that already had such practices were allowed to grandfather them in: new laws were required, and the default position was that they were ineligible, absent state law. It was not until five years had passed, in 2001, that Texas passed the first statute to accord the state resident tuition allowed by Sections 1621 and 1623 of the new federal laws.⁷⁶ Other states followed Texas’ lead and through 2015, twenty states have allowed undocumented students to establish residency and pay

72. *Id.*

73. *Immigration Office Softens Stand on Permits for Iranian Nationals*, DUTCH NEWS (July 4, 2012), http://www.dutchnews.nl/news/archives/2012/07/immigration_office_softens_sta.php.

74. Fariba Sahraei, *Iranian Students Face Expulsion from Norway Over Sanctions*, BBC NEWS MIDDLE E. (July 26, 2014), <http://www.bbc.com/news/world-middle-east-28488024>.

75. Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1637 (1997); *IIRIRA*, *supra* note 62, at 449, 452.

76. Johnny Sinodis, *The DREAM Act Still Just a Dream for Now: The Positive Effects of Creating a New Path to Lawful Status by Encouraging Military Enlistment and the Pursuit of Higher Education*, 2 L.J. SOC. JUST. 158, 168 (2011).

in-state tuition:⁷⁷ one state (Oklahoma) had granted this status and then rescinded the financial aid part of the statute;⁷⁸ South Carolina voted to ban the undocumented from attending its public colleges.⁷⁹ Wisconsin has since rescinded its statute,⁸⁰ while Maryland enacted such an accommodationist law, but the voters signed enough petitions to set the measure on the 2012 ballot for a recall measure; then Maryland voters ratified the law,⁸¹ making it the first state to vote favorably on a resident tuition policy for the undocumented. California added financial aid, beginning in 2013,⁸² while Connecticut and Rhode Island acted to allow the resident tuition status—the former by statute and the second by regulation as set out in accordance with the state’s admissions law.⁸³

Most other states allowed them to enroll, but charged them non-resident tuition. Given undocumented students’ ineligibility to secure lawful employment, these students do not qualify for jobs in college or after graduation. They may not be licensed or gain authorization for skilled professions such as teaching, law, or the medical professions, although both the state bars in California and Florida ruled that undocumented law graduates who could be certified by the usual moral character and fitness process and who passed the bar could be admitted; two legal rulings were decided on this issue, which implicate the same Sections 1621 and 1623 that govern in-state tuition, as in *Martinez v. Regents*.⁸⁴ After the smoke cleared, undocumented

77. Table One: State Laws Allowing Undocumented College Students to Establish Residency, 2015, INST. FOR HIGHER EDUC. L. & GOVERNANCE, <https://www.law.uh.edu/ihel/documents/Statute-TableOne.html> (last visited Apr. 4, 2015).

78. *Id.*

79. NAT’L CONFERENCE OF STATE LEGISLATURES, *Undocumented Student Tuition: Overview* (Feb. 10, 2015), available at <http://www.ncsl.org/research/education/undocumented-student-tuition-overview.aspx>.

80. *Id.*

81. Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion, and the Vexing Case(s) of DREAM Act Students*, 21 WM. & MARY BILL RTS. J. 463, 464–65 (2012) [hereinafter *Dreams Deferred*].

82. EDUCATORS FOR FAIR CONSIDERATION, 2012–2013 FINANCIAL AID GUIDE FOR UNDOCUMENTED STUDENTS 8–9 (2012).

83. NAT’L CONFERENCE OF STATE LEGISLATURES, *supra* note 79.

84. Paloma Esquivel, *Can Illegal Immigrant Practice Law?*, L.A. TIMES, June 11,

lawyers have been sworn into the California bar, while Deferred Action for Childhood Arrivals (DACA) lawyers may practice in Florida.⁸⁵ As is evident from the cases that have arisen, this is highly contested terrain, surprisingly so, especially considering how few such students exist in the context of over eighteen million college students. No estimates exceed 50,000 to 60,000 each year for students nationally,⁸⁶ which would constitute the entire enrollment at the main Columbus campus of The Ohio State University. In order to clear up the confusion on the issue, and to provide a path to legalization for the affected students after their graduation, the DREAM Act was introduced in 2001, in essentially its present form.

In response to a state that had requested clarification in July 2008, the Department of Homeland Security opined, in a query from North Carolina about its options concerning admitting these students (or not), that any determinations of tuition residency or admissions policy by states were state matters, not in the federal domain:

[T]he individual states must decide for themselves whether or not to admit illegal aliens into their public post-secondary institutions. States may bar or admit illegal aliens from enrolling in public post-secondary institutions either as a matter of public policy or through legislation. Please note, however, that any state policy or legislation on this issue must use federal immigration status standards to identify which applicants are illegal aliens. In the absence of any state policy or legislation addressing this issue, it is up to the schools to decide whether or not to enroll illegal aliens,

2012, at AA1; Ben Winograd, *Courts Weigh Issuance of Law Licenses to Undocumented Attorneys*, IMMIGRATION IMPACT (Aug. 10, 2012), <http://immigrationimpact.com/2012/08/10/courts-weigh-issuance-of-law-licenses-to-undocumented-attorneys>.

85. *In re Sergio Garcia on Admission*, 315 P.3d 117, 120 (Cal. 2014) (recognizing the California statute to admit undocumented applicant to the California bar); *In re Florida Bd. of Bar Examiners*, 134 So. 3d 432, 437 (Fla. 2014) (not admitting DACA applicant to the Florida bar).

86. Jeffrey S. Passel, *Further Demographic Information Relating to the DREAM Act*, URBAN INST. (Oct. 21, 2003), <http://www.nilc.org/document.html?id=20> (stating that the estimate of 65,000 undocumented alien graduated “should be considered substantially too high”).

and the schools must similarly use federal immigration status standards to identify illegal alien applicants.⁸⁷

Inasmuch as state tuition and admissions policies have always been state issues, it is surprising that a state entity would pose such a question, implicitly suggesting that the determination of a state status might turn on a federal determination; one wonders what the North Carolina response would have been, had the federal Department responded that the federal government actually would assert jurisdiction over the matter. A number of cases challenging the various state laws concerning have been filed by restrictionist advocates, and as of 2012, none had prevailed, falling short either on civil procedure grounds (that is, that the plaintiffs had not been harmed by someone else receiving the lower, instate tuition—so they could not be provided a remedy in law) or, as in the important 2010 *Martinez v. University of California Regents* case, the state statute was upheld as a legitimate state policy.⁸⁸

In another higher education immigration/residency case that occurred in California during this time period, a number of immigrant organizations filed suit in November of 2006 to challenge California's postsecondary residency and financial aid provisions in *Student Advocates for Higher Education v. Board of Trustees of the California State University*.⁸⁹ Citizen students with undocumented parents were being prevented from receiving the tuition and financial aid benefits due to them, at least in part because the California statute was not precisely drawn (or was being imperfectly administered). The challenge highlights several overlapping policies: immigration, financial aid independence/dependence upon parents, and the age of majority/domicile. The state agreed to discontinue the practice, and entered into a consent decree, resolving the matter in the plaintiffs' favor.⁹⁰ The order overturned CSU's odd and

87. Letter from Jim Pendergraph, Exec. Dir., Office of State & Local Coordination, to Thomas Ziko, Special Deputy Attorney Gen., N.C. Dep't of Justice (July 9, 2008), available at <http://www.nacua.org/documents/AdmissionUndocAlien072008.pdf>.

88. *Martinez v. Univ. of Cal. Regents*, 241 P.3d 855, 859 (Cal. 2010).

89. *Student Advocates for Higher Educ. v. Bd. of Trs. of the Cal. State Univ.*, No. CPF-06-506755, (Cal. Super. Ct. 2007).

90. *Id.*

likely-unconstitutional take on undocumented college student residency—that a citizen, majority-age college student with undocumented parents, was not able to take advantage of the California statute according the undocumented in-state residence, even if the student was otherwise eligible.⁹¹ In a similar fashion, the Virginia attorney general and the Colorado attorney general also ruled that U.S. citizen children could establish tuition residency status on a case-by-case basis, even if their parents were undocumented.⁹²

These rulings made a virtue of necessity, inasmuch as citizen children (whether birthright or naturalized) who reach the age of majority by operation of law establish their own domicile, so that their parents' undocumented status is irrelevant to the ability of the children to establish residency. In *A.Z. v. Higher Education Student Assistance Authority*, a New Jersey appeals court ruled that a similar program in the state (the Tuition Assistance Grant, TAG) could not withhold the grants from citizen children whose parent were undocumented:

Given our determination that A.Z. is the intended TAG recipient and that she meets the residency and domicile requirements independently of her mother, we need not determine B.Z.'s legal residence or domicile nor review HESAA's conclusion that B.Z. lacks the capacity to become a legal resident or domiciliary of New Jersey. We note, however, substantial authority supporting the proposition that a person's federal immigration status does not necessarily bar a person from becoming a domiciliary of a state.

....

In sum, A.Z. is the intended recipient of a TAG. She is a citizen. The record also supports that she is a legal resident of, and domiciled in, New Jersey, based upon her lengthy and continuous residence here. To the

91. *Id.*

92. Memorandum from Ronald C. Forehand, Senior Assistant Attorney Gen., Commonwealth of Va., to Lee Andes, State Council of Higher Educ. for Va. (Mar. 6, 2008), available at <http://www.acluva.org/wp-content/uploads/2009/12/20080306AGmemoInStateTuition.pdf>; AG Alpha No. HE HE AGBCF, No. 07-03 (2007), available at LexisNexis 2007 Colo. AG LEXIS 3.

extent the agency's 2005 regulation irrefutably established that a dependent student's legal residence or domicile is that of his or her parents, it is void. Therefore, HESAA erred in denying A.Z. a TAG.⁹³

The latest instance of such a restriction upon birthright citizens was discovered in Florida, when the *Ruiz* case, also decided in 2012, successfully challenged a similar practice in the state, where U.S. citizen children whose parents were undocumented were denied resident tuition.⁹⁴

In fall 2010, at the urging of Latino groups, and to jumpstart comprehensive immigration reform, Senator Harry Reid (D-NV) changed his mind and brought forward a bill. Facing a substantial challenge in his reelection to the U.S. Senate, he opted for a down payment approach, with DREAM being the first building block toward future comprehensive reforms, and AGJOBS legislation as the likely next step. The DREAM Act became an amendment to a Department of Defense bill, S. 3454, the "National Defense Authorization Act for Fiscal Year 2011."⁹⁵ He also added two other amendments: a repeal of Don't Ask, Don't Tell, regarding the enlistment of gay and lesbian soldiers in the military, and an overhaul of the "secret hold" tradition in the Senate, to require public-disclosure moving legislative actions forward.⁹⁶ On September 21, 2010, the vote became hostage to the DADT controversy, and the Republicans voted as a bloc, rather than accord President Obama and the Democrats a victory on this issue; the cloture motion was rejected 43–56 (with 1 absence).⁹⁷ Senator Reid voted "no" after it was clear

93. *A.Z. v. Higher Educ. Student Assistance Auth.*, 48 A.3d 1151, 1159 (N.J. Super. Ct. App. Div. 2012). As of this 2015 writing, New Jersey has still not complied with this decision.

94. Michael R. Vasquez, *U.S.-Citizen Children of Immigrants Protest Higher Tuition Rates*, MIAMI HERALD, Oct. 24, 2011, at B1; *Dreams Deferred*, *supra* note 81, at 468.

95. 156 CONG. REC. 127 (Sept. 21, 2010) (statement of Sen. Dick Durbin).

96. *Id.*

97. U.S. Senate Roll Call Votes 111th Congress—2d Session On THE CLOTURE MOTION (MOTION TO INVOKE CLOTURE ON THE MOTION TO PROCEED TO S. 3454), U.S. SENATE (2010), available at https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=2&vote=00238; Ted Barrett & Dana Bash, *Senate Halts 'Don't Ask, Don't Tell' Repeal*, CNN (Sept. 22, 2010, 8:23 AM), <http://www.cnn.com/2010/09/22/politics/senate.dadt.repeal/>.

that he did not have the required 60 votes.⁹⁸ Even Republican supporters of the legislation in the 2007 vote did not support the overall package in the 2010 effort, and two Democrats crossed over to vote against it as well. Once again, the DREAM Act was tantalizingly close, and followed many public stories about undocumented college students in the media; these continued through the lame-duck session, where once again the votes were not there.

The “third time” may be the mythical “charm,” but not in this subject matter. In the final days of the same Congress, the greatest disappointment occurred. On December 8, 2010, the House attached the DREAM Act (H.R. 6497) to another moving House bill, H.R. 5281, and passed it: 216 to 198.⁹⁹ This was the first time that the House had ever voted upon a version of the DREAM Act since its introduction in 2001. Initially, the Senate was scheduled to take a procedural vote on its version of DREAM (S. 3992), but instead, Senate Democrats voted 59–40 to withdraw S. 3992 and focus on the bill passed on December 8 by the House.¹⁰⁰

On December 18, 2010, the Senate took up the Cloture Motion (technically, the Motion to Invoke Cloture on the Motion to Concur in the House Amendment to the Senate Amendment No. 3 to H.R. 5281, the Removal Clarification Act of 2010).¹⁰¹ Democratic backers of the legislation fell short of the 60 votes required to move the DREAM Act legislation forward, with a vote of 55–41 in favor. Five Democrats joined most Republicans in voting against the measure, while three Republicans voted “yes.”¹⁰² Four members were not present for the vote.¹⁰³ The ultimate irony was that in a separate vote, the offending Don’t

cnn.com/2010/POLITICS/09/21/senate.defense.bill/index.html.

98. 156 CONG. REC. 127, *supra* note 95 (stating that the “no” vote for his own motion allowed him to call for reconsideration).

99. 156 CONG. REC. 161 (Dec. 8, 2010).

100. 156 CONG. REC. 162 (Dec. 9, 2010).

101. U.S. Senate Roll Call Votes 111th Congress—2d Session On the Cloture Motion (Motion to Invoke Cloture on the Motion to Concur in the House Amendment to the Senate Amendment No. 3 H.R. 5281, U.S. SENATE (2010), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=2&vote=00278.

102. *Id.*

103. *Id.*

Ask, Don't Tell policy was repealed, and that Senator Hatch, who introduced the original legislation a decade earlier, did not vote for the DREAM Act.¹⁰⁴

These Sections have documented the extensive previous legislative activity, the dramatis personae of contestants, and the considerable research and policy literature and media attention paid to the issue of immigration and higher education. The holding of *Plyler v. Doe*, that allowed undocumented school children to enroll freely in elementary and secondary schools,¹⁰⁵ has been challenged but has remained good law nearly thirty years after the 1982 decision.¹⁰⁶ Indeed, except for a mid-1990's dustup that threatened congressional action to overturn the holding, *Plyler* has become accepted and accommodated by a substantial majority of school districts and policymakers, making a virtue of necessity and holding the innocent children harmless for what may have been the transgressions of their undocumented parents. However, *Plyler* does not extend to high school graduates and their admission to college or other post-compulsory schooling, and a number of cases and issues have arisen, but many DREAMers (the catchall term for undocumented college students) had reached the point where they saw no hope and no possibilities for the needed comprehensive immigration reform.

D. Prosecutorial Discretion and Deferred Action

This Section details the final two facets of undocumented college students as a component of comprehensive immigration reform: the near-miss of the 2007 and 2010 legislative votes, its unusual provenance, and its likely recurrence all make this issue a bellwether for the likelihood of a more omnibus

104. Elizabeth Bumiller, *A Final Phase for Ending 'Don't Ask, Don't Tell'*, N.Y. TIMES, July 23, 2011, at A13; Lisa Roche, *Hatch Skips DREAM Act Vote He Calls 'Cynical Exercise'*, DESERT NEWS, Dec. 20, 2010.

105. *Plyler v. Doe*, 457 U.S. 202, 205 (1982).

106. See Ben Winograd, *After 30 Years, Plyler v. Doe Decision Survives but Remains Under Attack*, IMMIGRATION IMPACT (June 15, 2012), <http://immigrationimpact.com/2012/06/15/after-30-years-plyler-v-doe-decision-survives-but-remains-under-attack> (stating that while there has been an effort to bring the issue back before the Justices, *Plyler* is still valid and has allowed undocumented children to receive primary education).

legislative strategy. One might usefully ask: Can the DREAM Act pass as a standalone bill, if at all, or must it be a part of a larger legislative strategy? President Barack Obama determined that he would find executive authority to address the inchoate and marginal status where these students found themselves, and in the Summer of 2011, within six months of the failure of the DREAM Act to attract the sixty votes, his Administration indicated it would simply assign low enforcement priority to DREAMers, and would not remove or deport them if they were caught in the immigration enforcement mechanism, unless they had criminal records or other disqualifying characteristics. In June 2011, in a series of detailed “Morton” memoranda, the Administration rolled out a series of reviews of all the 400,000 persons then in immigration proceedings, and would close the removal cases and grant two-year stays and possible employment authorization (permission for the DREAMers so certified to work without violating federal law).¹⁰⁷

The review, which had seemed so promising, was underwhelming by any measure. The Obama Administration began the most aggressive enforcement in U.S. history, militarizing the border, building the futile fence that is supposed to deter unauthorized entry, and removing over 400,000 persons in 2011, more than any recent presidency. In addition, the re-set of deferred action was used more sparingly than had been the case in President George Bush’s presidency.¹⁰⁸ Yet even with these demonstrable enforcement priorities and results, congressional restrictionists were not satisfied and would not acknowledge the metrics of immigration enforcement, as the stated predicate for what everyone knew was needed, comprehensive immigration reform of one sort or another, to regularize the flow, to reorganize the complicated and unsuccessful employment provisions, especially those designed for short-term high skilled work, and to provide some tradeoff for increased legal immigration: a pathway to eventual

107. *Obama’s New Immigration Policy*, *supra* note 4; *Dreams Deferred*, *supra* note 81, at 473; Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U. N.H. L. REV. 1, 12 (2012).

108. Julia Preston, *Administration Spares Students in Deportations*, N.Y. TIMES, Aug. 9, 2010, at A1.

legalization or “amnesty,” perhaps along the lines of the last such program, that of the 1986 IRCA legalization provisions. The data were not transparent or available, but the preliminary figures revealed fewer than 2% of the test-case reviews for deferred action led to closed-cases, and only 54% of those fortunate few were given permission to work—and these were considered the easy, most deserving, “low-hanging fruit”—and while their removals were temporarily stayed, they received no benefits, remained ineligible for most forms of relief, and were, in many respects, no better off than before.¹⁰⁹ Fewer than 300 of these closed cases were DREAM Act eligible students. They were now “known to the government,” yet had no hope of any reconstitution of their unlawful status.¹¹⁰

Worse, a number of DREAMers had become frustrated by the legislative failures, and with no futures, they began to “out” themselves in a longstanding U.S. protest tradition and civil rights argot. While their status may have been characterized as a low priority for removal, this public revelation of their status had the practical effect of putting their undocumented families at risk, and in the increased removal regime, they were less well off than they had been before.¹¹¹ And in the difficult

109. *Obama's New Immigration Policy*, *supra* note 4; *Dreams Deferred*, *supra* note 81, at 540–41.

110. See Julia Preston, *Young Illegal Immigrants Jump at a First Chance*, N.Y. TIMES, Aug. 16, 2012, at A1 (noting the huge amount of young illegal immigrants eager to enroll in the new program).

111. Ryan E. Gildersleeve & Susana Hernandez, Inst. for Higher Educ. Law & Governance, Presentation at the 2010 Association for the Study of Higher Education Annual Meeting in Indianapolis, IN: Undocumented Immigrant Students in American Higher Education Policy and Discourse (2010) (highlighting the failure of the DREAM Act to provide easier access to education and noting the dehumanizing nature of the publicity); see Stephen H. Legomsky, *Undocumented Students, College Education, and Life Beyond: Undocumented College Students in the United States*, in CHILDREN WITHOUT A STATE: A GLOBAL HUMAN RIGHTS CHALLENGE 217, 217 (Jacqueline Bhabha ed., 2011) (explaining the difficulties such as being barred from working, voting, and participating as effective adults in society); Laura Corruner, “Coming Out of the Shadows”: *DREAM Act Activism in the Context of Global Anti-Deportation Activism*, 19 IND. J. GLOBAL LEGAL STUD. 143, 158 (2012) (stating that the increase in punitive enforcement-oriented immigration policies have made illegal immigrants worse off); Fanny Lauby, *Undocumented Youth Mobilization and the DREAM Act: The Potential for Collective Representation in the U.S. Congress* 3, 12 (2012), available at <http://ssrn.com/abstract=2107822> (stating that the restrictionist nature of the new programs has limited

thermodynamics of immigration, the conservative restrictionists howled, and all the competing GOP presidential candidates in an election year, vied with each other to see who could be the most nativist, build (or electrify) the biggest fence, or engage in the harshest rhetoric.

Tens of thousands of undocumented students are making their way through college without federal financial support and with little state financial aid available. Yet they persist—only to find that they cannot accept employment or enter the professions they have trained for. Thus, cases of undocumented law-school graduates who have passed the bar are surfacing in California, Florida, and New York, and more will surface soon enough concerning lawyers, doctors, teachers, psychologists, and others as more and more unauthorized students graduate from college.¹¹² They were very visible in the public domain, and effectively lobbied the Obama Administration for some form of administrative relief.¹¹³ Seeing this brick wall, a number of immigration-law professors drafted and circulated a letter to the President, calling upon him to use the administrative discretion available to him, in lieu of any likely legislative reform of immigration policy right now, to help undocumented college students who find themselves in the worst of all possible worlds.¹¹⁴ It appears that President Obama heard, and in June 2012, he announced an even more expansive deferred action

immigrants' access to various benefits).

112. Don J. DeBenedictis, *Licensing of Nonlawyers Gets Traction*, DAILY J. (May 23, 2013), <http://www.dailyjournal.com/public/PubMain.cfm>; see Winograd, *supra* note 84 (noting the cases of Sergio Garcia in California and Jose Gordinez-Samperio in Florida as law school graduates who haven't received their licenses); Erica Pearson, *Undocumented Immigrant Wants New York to Let Him Practice Law*, NY DAILY NEWS (Oct 22, 2012), <http://www.nydailynews.com/new-york/illegal-immigrant-new-york-state-practice-law-article-1.1189647> (noting the case of Cesar Vargas in New York who graduated from law school but cannot receive a license to practice law).

113. Miriam Jordan, *Anatomy of a Deferred-Action Dream*, WALL ST. J., Oct. 15, 2012, at A2 [hereinafter *Anatomy of a Deferred-Action Dream*] (detailing the marches, sit-ins, mobilizing of volunteers that were employed as lobbying efforts).

114. Julia Preston & Helene Cooper, *After Chorus of Protest, New Tune on Deportations*, N.Y. TIMES, June 18, 2012, at A11; Laura Meckler & Miriam Jordan, *U.S. to Stop Deporting Some Illegal Immigrants*, WALL ST. J., June 16, 2012, at A1; Paloma Esquivel, *supra* note 84, at AA1; *Anatomy of a Deferred-Action Dream*, *supra* note 113, at A2; *Obama's New Immigration Policy*, *supra* note 4.

policy for DREAMers, which is still in the implementation first phases.¹¹⁵

On the 30th anniversary of *Plyler v. Doe*—the 1982 case in which the U.S. Supreme Court ruled that states could not deny funds for the education of children of unauthorized immigrants—the President announced a halt to the deportation of some undocumented immigrants who came to the United States as children and have graduated from high school and served in the military. Unfortunately, despite the excitement—and outrage from President Obama’s Republican opponents—it was not the long-stalled DREAM Act, which would have created a path to citizenship for some immigrants who came to the United States as children and have been admitted to college or registered under the Selective Service Act. The President’s decision, which uses existing prosecutorial discretion, gives both too much (if you listen to those who would restrict immigration) and, I believe, far too little, although it may be as much as he can give under his inherent administrative authority. While drawing positive attention to hardworking and law-abiding undocumented immigrants is a good thing, both God and the devil reside in the details. As a practical matter, those who oppose easing their path are likely to resist any substantive change. GOP presidential candidate Mitt Romney indicated his determination to veto any version of the DREAM Act, and Representative Lamar Smith, a Republican from Texas who once championed the concept of prosecutorial discretion, had whatever the opposite of a conversion on the road to Damascus is.¹¹⁶ Republicans in Congress have unsuccessfully attempted to

115. *Dreams Deferred*, *supra* note 81, at 541–42; see Michele Waslin, *Law Professors Push White House to Grant Administrative Relief to DREAMers*, IMMIGRATION IMPACT (May 31, 2012), <http://immigrationimpact.com/2012/05/31/law-professors-push-white-house-to-grant-administrative-relief-to-dreamers> (listing three alternatives to deportation: deferred action, parole-in-place, and deferred enforcement departure); Julia Preston & John H. Cushman, Jr., *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES, June 16, 2012, A1 (stating that Obama’s new policy could benefit more than 800,000 young people and permit them to work legally and obtain documentation); Adeshina Emmanuel, *Illegal Immigrants See Opportunity in New Rule*, N.Y. TIMES, Aug. 10, 2012, at A9 (discussing benefits of allowing work permits and deferred action to skilled workers).

116. *Obama’s New Immigration Policy*, *supra* note 4.

cut off funds to implement DACA, while DHS employees unsuccessfully attempted to end the program in federal court; the federal judge refused to enjoin the program and allowed it to continue. Likely DREAM Act beneficiaries even sought to enjoin Congressional procedural rules such as Cloture in an unsuccessful effort to ease passage of the bill.¹¹⁷

In reality, the President's adoption of a "deferred action" policy is, to a great extent, old wine in a new wineskin. The policy does not grant legal-residency status, as the DREAM Act would, but only defers deportation for a renewable two-year period. Announcing the policy shows considerable new political will, but it did not change existing law or expand available discretion. Forms of prosecutorial discretion, including deferred action, have been available for many years (originating in the John Lennon deportation case, in the early 1970s); nothing substantive has been added to existing authority.¹¹⁸ Indeed, in the Morton Memo of June 2011, the government announced that it would focus on deporting known criminals and urged prosecutors to use their discretion in considering the cases of students who would qualify for the DREAM Act.¹¹⁹ Yet data from the Department of Homeland Security show that fewer than 300 such students have been granted administrative closure to this day—a remarkably small number, given their clear qualifications for approval.¹²⁰ While it is impossible to tell just how successful the review ordered by John Morton, director of U.S. Immigration and Customs Enforcement, has been to this point—the government has made the data virtually impossible to gather and analyze in any systematic way—the Morton program has been underwhelming. Bear in mind, too, that this administration removed and deported nearly 400,000

117. *Crane v. Napolitano*, 920 F. Supp. 2d 724 (N.D. Tex. 2013); *Common Cause v. Biden*, 909 F. Supp. 2d 9 (D.D.C. 2012), *aff'd on other grounds*, 748 F.3d 1280, 1283 (D.C. Cir. 2014).

118. *Dreams Deferred*, *supra* note 81, at 542; *Obama's New Immigration Policy*, *supra* note 4; Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U. N.H. L. REV. 1 (2012) (discussing the lack of information and transparency concerning prosecutorial discretion).

119. *Obama's New Immigration Policy*, *supra* note 4.

120. *Id.*

unauthorized immigrants in the previous year.¹²¹ Even with those metrics, and the militarization of the U.S.-Mexico border, those who would further restrict immigration are not convinced that there has been enough enforcement. They adamantly oppose the President's new decision.¹²²

What is clear is that very few (and certainly not all) of those being reviewed under the Morton protocols received employment authorization with any reprieve they may have gotten. Their status was essentially frozen. The President's announcement appeared at first to continue the problem, since it indicated that permission to work will be determined on a case-by-case basis. Of course, both under Morton rules and throughout U.S. immigration history, the right to work has been handed out only sparingly. Most importantly, the review process in President Obama's plan is essentially designed for those already in the machinery of deportation or removal.

However, a surprising development occurred, one that brought hope to accommodationists and immigrants, and despair to restrictionists. In less than three months' time, there was an entirely-new application procedure for deferred action and it was exceedingly generous. Even after the first two years of the program, many details had yet to be determined. But in the first twenty-four months, nearly two-thirds of a million eligible applicants were processed, and they received employment authorization, social security numbers, consideration as "lawfully-present," and permission to leave and re-enter the country without detriment.¹²³ An unknown number of eligible students chose not to out themselves to enter the system, especially if they had some misdemeanors or a criminal record, as it could also bring their undocumented parents to the attention of the authorities, and the costs and technical provisions scared off some number of likely recipients who were

121. *Id.*

122. *Id.*; see Preston & Cooper, *supra* note 114 (noting that while his change in policy had received support from the Latino community, opponents of President Obama have criticized his actions as an end-around congressional authority).

123. Daniel Gonzales, *A Year Later, Immigrants face DREAM Act's Limits*, ARIZ. REPUBLIC (Aug. 13, 2013), available at <http://www.usatoday.com/story/news/nation/2013/08/13/a-year-later-immigrants-face-deferred-action-programs-limits/2651235>.

put off by what seemed to be vague and confusing process—and mistrust about the program led to wariness and a wait-and-see approach.¹²⁴

Furthermore, students who reside in states where they cannot enroll in public colleges or where the states have no resident-tuition provisions for undocumented immigrants have found it difficult to raise a claim under this policy, because they have been unable to enroll in college. While twenty states have laws granting some undocumented immigrants in-state tuition rates, most do not. As a result, even if the federal DREAM Act itself were to be enacted tomorrow by Congress, states would still have to pass laws to grant in-state tuition and financial aid to qualified students in the majority of states, or most of them would be unable to afford college.

And some features of President Obama's program were difficult as policy. Not only were substantial numbers of immigration adjudicators adamantly against the DACA initiative—as evidenced by the lawsuits to overturn the policy¹²⁵—but administrations come and go, and such initiatives can wax and wane. President Obama's 2012 reelection cured this concern, and the 2014 DACA renewal process has been a successful extension of the program, yet it is unclear if the

124. See Brian Bennett & Cindy Chang, *Some Wary of Work Permit Program; Many Younger Illegal Immigrants Hesitate to Apply, Fearing Their Data Could be Used Against Them One Day*, L.A. TIMES (Oct. 2, 2012), <http://articles.latimes.com/2012/oct/02/nation/la-na-illegal-kids-20121002> (noting the opinion of Daniel Gonzales that he is “still skeptical” and fears that he and his parents will be deported using the information from his application if he applies for a work permit); Kirk Semple, *Undocumented Life Is a Hurdle as Immigrants Seek a Reprieve*, N.Y. TIMES, Oct. 4, 2012, at A1 (noting the struggles of Chul Soo to piece together records in order to apply for the program); Roberto G. Gonzales, *Wasted Talent and Broken Dreams: the Lost Potential of Undocumented Students*, 5 IMMIGR. POLY FOCUS 9, 11 (2007) (“Undocumented students in the United States are currently trapped in a legal paradox.”).

125. *Crain v. Napolitano*, 920 F. Supp. 2d 724 (2013) (dismissing in part the action brought by ICE agents and the state of Mississippi, challenging the Obama Administration's policy of deferred action), *appeal docketed*, No. 14-10049 (5th Cir. Jan. 14, 2014); *Arpaio v. Obama*, 27 F. Supp. 3d 185 (D.D.C. 2014) (denying Arizona sheriff's challenge to DACA), *appeal docketed*, No. 14-5325 (D.C. Cir. Dec. 29, 2014); *Texas v. United States*, No. B-14-254, 2015 WL 648579 (S.D. Tex. Dec. 3, 2014) (concerning a multi-state challenge and injunction to DACA/DAPA), *appeal docketed*, No. 15-40238 (5th Cir. Feb. 23, 2015).

President will ultimately be able to resolve the federal impasse on either DREAM Act or larger reform legislation. On this point, opponents and supporters of immigration reform can agree: The DACA approach, no matter how efficacious it has turned out to be, cannot be the only way to resolve the impasse. The real question is: How can this complex issue be resolved in the current climate? Thirty years after the Supreme Court told us that undocumented immigrants deserve and are entitled to an education, the U.S. polity has not resolved the impasse.

Ultimately, even if the tens of thousands of undocumented students currently enrolled in our colleges, and the many who have graduated and cannot use their education, receive deferred action, they will still not find themselves on a pathway to permanent residence.¹²⁶

Their chances of being deported may have been reduced, and this is not nothing, but without a reasonable opportunity to regularize their status, they will still live in the shadows—with limited hope. Despite the uncertainty, hundreds of thousands of these DREAMers have begun the process of seeking deferred action and employment authorization.¹²⁷ With their widespread ability to receive employment authorization, as appears to be happening in the early cases, their life chances will improve dramatically. In the racial thermodynamics of the nativism in Arizona, which has persisted in its restrictionist efforts, Governor Jan Brewer enacted law that took place the day after the deferred action programs to be certain that Arizona benefits were still out of the reach of these students.¹²⁸ And litigation has

126. See Muzaffar Chisthi & Faye Hipsman, *Key Factors, Unresolved Issues in New Deferred Action Program for Immigrant Youth Will Determine Its Success*, MIGRATION INFO. SOURCE (Aug. 16, 2012), <http://www.migrationpolicy.org/article/key-factors-unresolved-issues-new-deferred-action-program-immigrant-youth-will-determine-its> (stating that the program merely provides an avenue for a conditional reprieve from deportation); ROBERTO GONZALES & ANGIE BAUTISTA-CHAVEZ, AM. IMMIGRATION COUNCIL, *TWO YEARS AND COUNTING: ASSESSING THE GROWING POWER OF DACA* 7 (2014) (noting that DACA has limited inclusionary power and leaves much to be addressed).

127. See Preston, *supra* note 110 (“Tens of thousands of young illegal immigrants waited excitedly in lines as long as a mile and thronged to information sessions across the country on Wednesday, the first day that a federal immigration agency began accepting applications for deportation deferrals that include permits to work legally.”).

128. Daniel Gonzalez & Wingett Sanchez, *Brewer Bars Public Benefits for Illegal*

been required in Georgia to secure in-state residence eligibility for DACA students, litigation that is still pending.¹²⁹ The evidence from the first round of DACA suggested that the immigration authorities were generous and granted deferred action in large numbers as well as employment authorization,¹³⁰ likely the low-hanging easier fruit. History may be on their side, but the DREAMers still find themselves in a cruel limbo not of their making, and with no clear way out of the thicket.

Immigrants, ARIZ. REPUBLIC (Aug. 15, 2012, 11:20 PM), <http://www.azcentral.com/arizonarepublic/news/articles/2012/08/15/20120815arizona-brewer-bars-public-benefits-illegal-immigrants.html>; *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1057–58 (9th Cir. 2014); CATHOLIC LEGAL IMMIGRATION NETWORK, INC., *DACA RECIPIENTS AND THE RIGHT TO IN-STATE TUITION: LITIGATION COMMENCES IN ARIZONA AND GEORGIA* (2013), available at https://cliniclegal.org/sites/default/files/daca_litigation_update_8-20-13.pdf; Marc Lilienkamp, *Undocumented Migrant Children in the EU*, EUR. PARLIAMENTARY RES. SERV. (Dec. 17, 2014), <http://epthinktank.eu/2014/12/17/undocumented-migrant-children-in-the-eu-2> (reviewing EU reports).

129. Kate Brumback, *Immigrant Students Seek Georgia's In-State Tuition Rates*, MARIETTA DAILY J. (Dec. 6, 2013), <http://mdjonline.com/bookmark/24174707>; see also Greg Land, *'No Recourse' to Question State Regs, Judge Says*, DAILY REPORT (June 16, 2014), <http://www.dailyreportonline.com/id=1202659371605> (“In dismissing a suit that sought to allow students who were illegally brought as children into the United States to pay in-state tuition at Georgia public colleges and universities, a Fulton County Superior Court judge lamented that his hands were tied by the state’s sovereign immunity statute.”). See *DACA Beneficiary Ga. Coll. Students v. Univ. Sys. of Ga.’s Bd. of Regents*, No. 2014cv243077 (Ga. Super. Ct. Feb. 28, 2014) (invoking sovereign immunity to deny resident tuition to DACA recipients), *aff’d*, *Olvera v. Univ. Sys. of Ga.’s Bd. of Regents*, No. A14A2352, 2015 WL 1243953 (Ga. Ct. App. Mar. 19, 2015) (upholding the appeal, a decision which was appealed to the Supreme Court of Georgia on March 30, 2015).

130. See *Updated Practice Advisory on Deferred Action for Childhood Arrivals*, AIC LEGAL ACTION CTR. (Oct. 25, 2012), http://www.legalactioncenter.org/sites/default/files/practice_advisory_dreamers_1.pdf (stating that “certain young people who do not present a risk to national security or public safety and meet specified criteria will be eligible to receive deferred action for two years, subject to renewal”). By the end of 2014, over three quarters of a million DREAMers had received DACA. See *Number of I-821D, Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometrics and Case Status: 2012–2015 (December 31)*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/I821d_performancedata_fy2015_qtr1.pdf (last visited Apr. 4, 2015). See generally Jordy Yager, *Napolitano Says 200k Illegal Immigrants Have Applied for Deferred Deportation*, HILL (Oct. 24, 2012, 9:15 PM), <http://thehill.com/blogs/blog-briefing-room/news/263937-napolitano-says-200k-illegal-immigrants-have-applied-for-deferred-deportation> (noting that over 3,000 young immigrants are applying for deferred deportation every day).

DACA has proven to be the more popular immigration relief, as other, unrelated events earned President Obama the cruel moniker as the “Deporter in Chief,” both for the overall high levels of removals of unauthorized immigrant adults (and often, their U.S. Citizen children) and the expedited removals of the Central American unaccompanied children who arrived and presented claims in the United States that they were fleeing historic levels of drug- and gang-involved violence in their home countries. The President’s immigration critics were quick to link the DACA program as a pull-factor for these tens of thousands of children, even though the children were not eligible, for the most part, for DACA. In Spring, 2015, it is not yet clear how many of these terrorized children will be able to secure counsel and advance successful asylum or similar claims.¹³¹ Given the unclear traction that this matter has gained, and the Obama Administration’s early signals that it will move aggressively to return the children to their home countries, it would be unlikely that this cohort will soon, if ever, present itself in the U.S. higher education system. The stalling of the DREAM Act in Congress has been a bitter pill for immigrant advocates, given the close calls for a long-term resolution, but DACA—with a few stubborn pockets of resistance—has proven to be much more robust and transformative than most observers had dared hope.

III. THE EU AS A LOOSE FEDERATION

Given the mobility across countries that is a key EU citizenship right, there is discordance growing among the Bologna Process, European Union immigration-related laws concerning student mobility and residence, and the various national laws, particularly those that single out or directly affect higher education, particularly the comprehensive program of

131. A study by the Transactional Records Access Clearinghouse showed that when women and their children were represented by counsel in these proceedings, they were allowed to remain in the United States over 25% of the time, while those without counsel were allowed to remain in only 1.5% of the cases. *Representation is Key in Immigration Proceedings Involving Women with Children*, TRAC IMMIGR. (Feb. 18, 2015), <http://trac.syr.edu/immigration/reports/377>. See generally Julia Preston, *Tally of Unaccompanied Minors Crossing Border Illegally Falls*, N.Y. TIMES, Oct. 10, 2014, at A16 (noting a sharp decline in unaccompanied children).

college student loans and grants.¹³²

Various immigration laws of the Member States do not apply directly to EU citizens or they apply radically differently to EU citizens (since EU citizens can still be deported in exceptional circumstances), and there is evident confusion in the large arena of higher education in the EU regarding the general notion of residence and mobility for students.

The Bologna Process is a highly-developed consortial and cooperative program, lubricated by a system of portable financial assistance (loans and grants to students), but it is not directly subject to EU law and exists outside the governance of the EU. Because Member State autonomy reflects itself in the details of a given state financial aid program, the amounts, terms, and conditions vary widely across the states. In addition, every state has a different overarching policy for effectuating the education of its citizens and sojourners, and these political features are also not always interchangeable or compatible with those of other countries. But the biggest impediment to smoothing out the varying postsecondary education benefits (often referred to as “tertiary” education) is the important architecture of free movement rights of EU Member citizens, an important component of EU membership but one that does not always play out in an efficient or non-discriminatory manner in the implementation for student lives and circumstances.¹³³

132. See Cassarino, *supra* note 3 (noting the importance of various accompanying measures, including the development of mechanisms matching the supply and demand of labor, portable pension rights, and vocational training and skills development); Stéphan Vincent-Lancrin & Sebastian Pfotenhauer, *Guidelines for Quality Provision in Cross-Border Higher Education: Where Do We Stand?*, OECD EDUCATION, WORKING PAPER NO. 70, 2012, available at <http://dx.doi.org/10.1787/5k9fd0kz0j6b-en> (commenting on the existence of remaining gaps for governmental guidelines in the establishment of a system of registration or licensing for higher education providers, collaboration between international stakeholders, and enhancement of cross-border education); Queenie Lam, *National Policies on Mobility in Europe*, 67 INT'L HIGHER EDUC. 13, 13–14 (2012) (pointing out that “the lack of a systematic approach to mobility at the national level may prove to be a major stumbling block, on the road to achieving European level policy goals.”).

133. See THE EUROPEAN HIGHER EDUCATION AREA, AUSTRIAN FED. MINISTRY SCI. & RES. 4 (2009) (outlining an objective of the Bologna Process to develop national higher education qualifications frameworks that are compatible among the participating states); Dimitry Kochenov, *Pre-Accession, Naturalisation, and ‘Due Regard to Community Law’*,

In addition, there are confusing alignments within the EU. For example, the United Kingdom is a loose federation as far as higher education goes: the Scottish higher education rules and law are entirely different from English practices, which leads to confusion. Fees are much lower in Scotland and the grants more generous than those elsewhere in the UK. Moreover, since UK nationals move from England to Scotland within the same Member State, the EU law rules on non-discrimination do not apply. Indeed, in the eyes of the EU, Scots and English students have the same nationality, so it is impossible to apply non-discrimination on the basis of nationality principle, which arises from the case-law, such as *Gravier*.¹³⁴ As a result, English students in Scotland pay non-EU tuition rates, not the lower Scottish tuition. Thus, being English in the UK can put a student in a much worse position than being a Slovenian, Estonian, or French student in the UK, inasmuch as all these nationalities, EU citizens benefiting from EU non-discrimination on the basis of nationality law, are entitled to pay the lower Scottish tuition rates.

ROMANIAN J. POL. SCI. 71, 72 (2003) (stating the general rule is that European citizenship is rooted only in national regulation); Christian Bulzomi & Charlotte Leskinen, *Recent Developments on the Free Movement of Persons in the European Union 3* (IE Law Sch., Working Paper No. WPLS 10-05, 2007), available at <http://ssrn.com/abstract=1629706> (“[T]he introduction of the citizenship of the Union has created a dichotomy of rights which differ in scope and in their level of protection depending on whether or not the underlying reason for the person’s movement is linked to an economic activity.”); THE DYNAMICS OF INTERNATIONAL STUDENT CIRCULATION IN A GLOBAL CONTEXT (Hans De Wit et al. eds., 2008); Ana Balcão Reis, *Public Funding of Higher Education: Who Gains, Who Loses?* 2 (FEUNL Working Paper Series, Paper No. 553, 2010), available at <http://ssrn.com/abstract=1799304> (noting the incorporation of public funding of higher education on the welfare of different agents). See generally Dora Kostakopoulou, *European Union Citizenship: The Journey Goes On*, in 50 YEARS OF EUROPEAN INTEGRATION: FOUNDATIONS AND PERSPECTIVES 271–90 (Andrea Ott & Ellen Vos eds., 2009) [hereinafter *European Union Citizenship: The Journey Goes On*]; Siofra O’Leary, *Developing an Ever Closer Union Between the Peoples of Europe?* 3–4 (Europa Inst. Edinburgh Mitchell, Working Paper No. 6, 2008); Sacha Garben, *The Future of Higher Education in Europe: The Case for a Stronger Base in EU Law* 31 (London Sch. of Econ. & Political Sci., LEQS Paper No. 50, 2012) [hereinafter *The Future of Higher Education in Europe*], available at <http://www.lse.ac.uk/europeaninstitute/leqs/leqspaper50.pdf>.

134. Case 293/83, *Gravier v. City of Liege*, 1985 E.C.R. 593. See Nina Berglund, *Universities Reject Tuition Proposal*, NEWSINENGLISH.NO (Nov. 10, 2014), <http://www.newsinenglish.no/2014/11/10/universities-reject-tuition-proposal>, for an example of a longstanding Norwegian free-tuition policy issue that is being challenged.

I conclude with a review of the major European Court of Justice (ECJ) decisions that have addressed the immigration and free movement law issues, cases that are developing a soft common law on the crucial portability and transnational dimensions of student mobility and residency. Throughout, I draw parallels with the growing European issues of nationality and the use of immigration controls as admissions mechanisms in the United States and elsewhere in the world.¹³⁵

A. *History of the Bologna Process*

The Bologna Process, begun in 1998, led to a Declaration agreed to in 1999 by the ministers in charge of higher education representatives, and has grown from the original 29 European States to today's nearly fifty States.¹³⁶ On a regular basis, education ministers in Bologna states have continued to refine their intergovernmental coordination, often through the promulgation of communiqués and policy frameworks, usually named or identified by the name of the city where they meet periodically. Thus, there was another founding document, the 2000 Lisbon Strategy, wherein the participants established the voluntary and non-binding structure of the exchange mechanisms, particularly the means to formulate goals and

135. Aisha Labi, *Britain's New Student-Visa Policy Tightens Rules for Students and Universities*, CHRON. HIGHER EDUC., Apr. 1, 2011, at A19 [hereinafter *Britain's New Student-Visa Policy*]; Aisha Labi, *As Universities Globalize, Consortia Take On a New Meaning*, CHRON. HIGHER EDUC. (Aug. 18, 2011), <http://chronicle.com/article/As-UniversitiesGlobalize/128633>; Miriam Jordan, *Foreign Students Stream into U.S.*, WALL ST. J., Mar. 25, 2015, at A2 ("There are 1.13 million foreign students in the U.S., the vast majority in college-degree programs, according to a [2015 Department of Homeland Security report, representing] a 14% increase over last year, nearly 50% more than in 2010 and 85% more than in 2005.")

136. EUROSTAT, THE BOLOGNA PROCESS IN HIGHER EDUCATION IN EUROPE: KEY INDICATORS ON THE SOCIAL DIMENSION AND MOBILITY 3 (2009), available at <http://ec.europa.eu/eurostat/documents/3217494/5713011/KS-78-09-653-EN.PDF>; Sacha Garben, *The Bologna Process: From a European Law Perspective*, 16 EUR. L.J. 186, 186–87 (2010) [hereinafter *The Bologna Process: From a European Law Perspective*]; *The Future of Higher Education in Europe*, supra note 133, at 8–9; EDUCATION, AUDIOVISUAL, & CULTURE EXECUTIVE AGENCY, THE EUROPEAN HIGHER EDUCATION AREA IN 2012: BOLOGNA PROCESS IMPLEMENTATION REPORT 7, 9 (2012), available at <http://www.ehea.info/Uploads/%281%29/Bologna%20Process%20Implementation%20Report.pdf>.

targets.¹³⁷ In 2010, the European Higher Education Area was agreed to, and has reinforced the centrality of student and scholar exchange and mobility within the EU framework.¹³⁸ Over time, there have been agreements to recognize credit for transfer, to engage in reciprocal curricular cycles, and to coordinate the many different features of the nearly fifty State systems, which vary widely from country to country.¹³⁹

From its inception in 1998, the Bologna Process's major concern has been facilitating cross-national coordination for students, who, for example, were Belgian nationals who wished to attend the University of Paris, students from Scotland who attended Italian law schools, and the like. Just as "study abroad" or "foreign study years" anywhere in the world, the simple aspiration of a student wishing to study beyond her national institutions is not really simple: the student has to have timely and transparent information about the institutions (home and away), the language skills and fluency to undertake

137. Clementina Ivan-Ungureanu & Monica Marcu, *The Lisbon Strategy* 74–75 (Romanian J. Econ. Forecasting, Working Paper No. 1, 2006) (discussing how the Lisbon Strategy created goals but provided countries with the flexibility to determine how to meet the benchmarks).

138. COMMUNIQUE OF THE CONFERENCE OF EUROPEAN MINISTERS RESPONSIBLE FOR HIGHER EDUCATION, *supra* note 3, at 4 (stating that the EHEA seeks to facilitate the portability of grants and loans through joint action, "with a view to making mobility within the EHEA a reality").

139. See Mark Landler, *Seeking Quality, German Universities Scrap Equality*, N.Y. TIMES, Oct. 20, 2006, at A3 (enunciating that different features arise even within the same state); Knud Erik Jørgensen, *The European Union in Multilateral Diplomacy*, 4 HAGUE J. DIPL. 189, 190 (2009) (highlighting the importance of multilateral cooperation within the EU); Cassarino, *supra* note 3 (discussing the European Commission's "mobility packages" with numerous countries that would enable their citizens to gain better access to the EU); Gjermund Mathisen, *Consistency and Coherence as Conditions for Justification of Member State Measures Restricting Free Movement*, 47 COMMON MARKET L. REV. 1021, 1021 (2010) (citing the importance of consistency and coherence within free movement of the EU); Nina Berglund, *Universities Reject Tuition Proposal*, NEWSINENGLISH.NO (Nov. 10, 2014), <http://www.newsinenglish.no/2014/11/10/universities-reject-tuition-proposal> (stating that many of Norway's universities are rejecting a state budget proposal that would charge tuition fees to foreign students from outside the European Economic Area). See generally ANNE PIETER VAN DER MEI, FREE MOVEMENT OF PERSONS WITHIN THE EUROPEAN COMMUNITY: CROSS-BORDER ACCESS TO PUBLIC BENEFITS (2003) [hereinafter CROSS-BORDER ACCESS TO PUBLIC BENEFITS] (exploring the extent to which individuals have the right to access to public services among various states under European Community Law).

study in a language not necessarily her own primary home language, the ability to meet all application criteria and effectuate the admission, and the two big hurdles, the financial and subsistence support, and the documentation and attention to detail that are the hallmarks of the required immigration mechanisms. While these commitments to such mobility are undoubtedly genuine and important, the countries have different national goals, asymmetrical financial resources to improve student mobility, and wildly different systems of higher education.¹⁴⁰ Some States will always be recipients of student flows, while others will likely remain sending entities, especially if there is a mismatch between student choices and a State's institutional opportunities, re-creating the larger perennial debate about "brain-drain" issues. The centripetal forces of such multilateral organizations have evolved into soft law mechanisms, facing the vagaries of political choices in each Member State, uneven political leadership or State commitments to postsecondary education, and, especially since the 2009–2012

140. See Stefanie Schwarz & Meike Rehbarg, *Study Costs and Direct Public Student Support in 16 European Countries—Towards a European Higher Education Area?*, 39 EUR. J. EDUC. 521, 524–26, 529 (2004) (highlighting the varying costs of living and financial support available across different European countries); *Any Place I Hang My Hat*, *supra* note 3, at 55 (discussing the abolition of nationality within the EU and how it is no longer an influence on the legal position of the EU citizen); Anne Pieter van der Mei, *Union Citizenship and the Legality of Durational Residence Requirements for Entitlement to Student Financial Aid*, 16 MAASTRICHT J. ON EUR. & COMP. L. 477, 488–89, 496 (2009) [hereinafter *Union Citizenship*] (explaining the serious financial problems for Member States that accompany a large inflow of foreign students); Anne Pieter van der Mei, *Free Movement of Students and the Protection of National Educational Interests: Reflections on Bressol and Chaverot*, 13 EUR. J. MIGRATION & L. 123, 123–24 (2011) [hereinafter *Reflections on Bressol and Chaverot*] (explaining the EU's attempt to take initiatives to lower obstacles to student mobility while dealing with the threat that it poses to the financing and quality of national education systems); Mathisen, *supra* note 139, 1021 (noting the concern for a "consistent" and "systematic" system); see Yasar Kondakci, *Student Mobility Reviewed: Attraction and Satisfaction of International Students in Turkey*, 62 HIGHER EDUC. 573, 587–88 (2011) (discussing the national goals and student mobility within Turkey); Lam, *supra* 133, at 13 (describing the lack of a symmetrical approach to mobility at a national level evidenced in higher education systems). See generally Erin Komada, *Turned Away: The Detrimental Effect of Italy's Public Security Law on Undocumented Children's Right to Education*, 29 B.U. INT'L L.J. 451 (2011) (describing Italy's educational policy regarding undocumented children); see also Fred M. Hayward & Daniel J. Ncayiyana, *Confronting the Challenges of Graduate Education in Sub-Saharan Africa*, 79 INT'L HIGHER EDUC. 16 (2015).

worldwide economic downturn, their economic soundness and credit worthiness.¹⁴¹

This last dimension, the diversity and asymmetry among such a diverse and growing body, brings to mind the heterogeneity of the fifty-plus states and other political entities in the United States, where federal financial aid plays a large role in smoothing out the variegated politics and system costs across the states. To an imperfect extent, and dependent upon federal appropriations and funding patterns, there is an equalizing function at play, with greater student financial aid being met by an accordingly larger “need-based” aid. Of course, this is largely dependent upon a detailed financial aid assessment mechanism for parents and a complex administrative regime at the institutional level, one that is more often than not skewed by wealth, advantage, immigration status, and other socio-cultural characteristics.¹⁴²

Perhaps most evident in this confusing process is that politics play a disproportionate role, as when good winds blow (e.g., former UK Prime Minister Tony Blair’s strong commitment to increasing international higher education), or when there is an ill-wind blowing, such as declining percentage of Pell Grants available to students in the United States, reflecting a shift from non-reimbursable grants to repayable or income-contingent loans as the public perception of college-going being a public good to a growing sense that it is a personal matter, better left to markets and more expensive means such

141. See *The Bologna Process: From a European Law Perspective*, *supra* note 136, at 208 (stating the importance of providing a certain amount of flexibility and discretion to the Member States); *The Future of Higher Education in Europe*, *supra* note 133 (imploping policymakers to be accountable for the deferred action measures they implement instead of allowing them to be implemented by soft law); Andrea Gideon, *Higher Education Institutions and EU Competition Law*, 8 COMP. L. REV. 169–84 (2012) (explaining the recent role that economics have played in soundness and credit worthiness in the EU).

142. See, e.g., Michael A. Olivas, *Undocumented College Students, Taxation, and Financial Aid: A Technical Note*, 32 REV. HIGHER EDUC. 407, 412–13 (2009) (noting that children of undocumented immigrants must produce their parents’ tax documents to receive financial aid but the complexity of the tax code and imprecise use of immigration categories at the state level make the process complex, and undocumented families are reluctant to share confidential information in the first place).

as loans, either subsidized or not fully underwritten by the state or federal government. The increased U.S. use of various tax measures (such as Section 529 prepaid plans or tuition tax credit and other revenue-neutral mechanisms, ones that largely favor the well-to-do) also reflect a clear point of view that education is a personal, private good rather than a communitarian public good.¹⁴³

Regarding the European models, Stefanie Schwarz and Meike Rehburg have noted:

Public student support proves to be an area with highest heterogeneity throughout Europe. We observe completely different notions of the role of students in society and of the support concepts. By comparison, four types of student role models and support modes emerge.¹⁴⁴

They have also usefully categorized these “student role models”:

[S]tudents are regarded as responsible citizens . . . [n]early all students receive financial support, there are no student fees. This model is mainly applied in the Nordic countries[.] [I]t is not customary to allow financial relief, like tax allowances or children’s allowances, for the students’ parents.

Students are . . . young learners: parents are responsible for the education of their children, [who will only get support if the] parents are not sufficiently able to pay. This model can be found in Western and middle European countries Usually, students in these countries have to pay fees. Those who receive public student support, however, are exempted.

143. See Michael A. Olivas, *State College Savings and Prepaid Tuition Plans: A Reappraisal and Review*, 23 J.L. & EDUC. 475, 501–02 (2003) (noting a study that showed the richest two-thirds of Michigan citizens made up 61% of participants in a prepaid tuition program designed to make participation less burdensome for low-income families); see also Michael A. Olivas, *Developments in 529 Prepaid Tuition Plans (PTP) and College Savings Plans (CSP) Since 2003, Presentation: Sept., 2010, Center for Social Security Studies (CSSS) of Wuhan University, Wuhan, PRC*, (Institute for Higher Education and Law and Governance, IHELG Monograph Series, 10-5, 2010), <http://www.law.uh.edu/ihelg/monograph/10-05.pdf> (noting a general reduction in state appropriations to higher education and a general acceptance of 529 plans).

144. Schwarz & Rehburg, *supra* note 140, at 531.

Students are . . . children sheltered by their families. This model can be observed in Southern European countries . . . [and] [t]he majority of students lives with their parents during their studies and the core family must ensure the children's education Financial help by the State is offered only in case of urgent need. [H]igher education institutions in these countries charge student fees (except for Greece).

[In] the investor model which is represented by the UK and the Netherlands . . . students are . . . investors in their future career. [S]tudents must substantially contribute to their education. Hence, student fees are high [M]any students receive public student support . . . [and the students] are responsible for making proper use of it.¹⁴⁵

But assumptions about the efficacy of funding models do not necessarily lead to efficacious politics or structures. Although membership in the Bologna Process has likely increased Member State investments overall both in their domestic higher education support structure and in the financial assistance made available to foreign and domestic students enrolled in their national institutions, doing so has punctuated inconsistent political support and a number of structural constraints. The best European example may well be England, which is undergoing a structural privatization and disinvestment in its splendid and historically-autonomous colleges and universities, several of which are among the best in the world, by any measure.

Recent UK decisions to reduce traditional appropriations levels have caused painful cuts, necessitated retrenchment of redundant or marginal programs, caused a sharp applications decline from 2010 to 2012, attracted more non-UK students from all over the world to make up for enrollment capacity, and

145. *Id.* For evidence of how recruitment and other factors can substantially affect country recruits see Elizabeth Redden, *The University of China at Illinois*, INSIDEHIGHERED.COM (Jan. 7, 2015), <https://www.insidehighered.com/news/2015/01/07/u-illinois-growth-number-chinese-students-has-been-dramatic> (showing that almost 10% of University of Illinois freshmen were from PRC in 2014 and more than 5,000 PRC students overall on the one campus).

required enormous tuition and fee increases.¹⁴⁶ The chair of the Independent Commission on Fees reported in 2012:

Although it is too early to draw any firm conclusions, this study provides initial evidence that increased fees have an impact on application behaviour. There is a clear drop in application numbers from English students when compared to their counterparts in Scotland, Wales and Northern Ireland. On a positive note we are pleased to see that, at this stage, there has been no relative drop-off in applicants from less advantaged neighbourhoods. We will continue to monitor a range of indicators as the fee increases work their way through the system.¹⁴⁷

It is hard to envision that the poor will be held harmless over the long haul, should the English finance trends continue.

One experienced observer of UK and European colleges has recently written in dismay of the substantial changes in finance and immigration rules and their effect on the system:

The new measures also limit the ability of foreign students to bring family members into the country with them. Under the current rules, “all students on longer courses are able to bring dependents.” Soon, only graduate students enrolled at universities and government-sponsored students will be allowed to bring

146. See Sarah Lyall, *Universities in Britain Brace for Painful Cuts in Subsidies*, N.Y. TIMES, Oct. 16, 2010, at A4 (noting Parliament’s plan to cut 80% of funding to British universities, the potential for tuition hikes, and several British universities’ specific plans to cut programs to cope with reduced funding); see also Louise Loftus, *U.K. Group Set to Challenge Scots’ Selective Free Tuition*, INT’L HERALD TRIB., Sept. 5, 2011, reprinted in N.Y. TIMES (Sept. 4, 2011), <http://www.nytimes.com/2011/09/05/world/europe/05iht-educBriefs05.html> (discussing the Scottish plan to provide free tuition to Scots and other members of the European Union to relieve burden of rising tuition costs); Suzanne Daley, *Universities in Scotland to Charge Other Britons*, N.Y. TIMES, Oct. 4, 2011, at A4 (noting parallel Scottish plan to charge higher tuition to students from the rest of Britain while EU policy prevents Scotland from increasing tuition for other student from around the EU).

147. Press Release, Sutton Trust, *Decline in Student Application Follows Fee Increase Finds Independent Commission* (Aug. 9, 2012), available at <http://www.suttontrust.com/newsarchive/decline-student-applicants-follows-fee-increases-finds-independent-commission>; Marisa S. Cianciarulo, *Unauthorized Americans and European Outcasts*, 27 Geo. Immigr. L.J. 519 (2013) (contrasting European cultural obstacles to integration of undocumented immigrants with U.S. legal obstacles to integration).

in family members [T]he new measures will eliminate what is known as the “post-study work route,” which gives students two years to remain in Britain and seek jobs after their programs end. Students at universities and public “further education” colleges will retain the right to work while pursuing their studies, but all others will be prohibited from seeking employment. New restrictions will also be imposed on work placements for those taking courses outside of universities. Only graduates with offers of skilled jobs from sponsoring employers will be allowed to remain in Britain to work once they have finished their studies. Finally, the time that can be spent on a student visa will be limited to five years for study toward a bachelor’s degree or beyond. There is now no limit for degree-seeking students. The three-year limit on students’ study in nondegree courses will be retained.¹⁴⁸

B. *Related College Law Decisions in ECJ Cases*

Using any single Member State as a case study is difficult, or worse, can be misleading. Just as all the other EU Member States, the UK has its own policies for admission and tuition and grants, but more importantly with regard to students from other EU Member States, all EU law applies, in particular, EU law on EU citizenship and non-discrimination on the basis of nationality. The UK is one of the major receiver states in the EU, although other smaller countries, such as Austria or Belgium have more “foreign” students from the EU per capita.¹⁴⁹ Its worldwide popularity is exemplified by the attractiveness of London and other English cities for international students, and by how many UK institutions have become very financially dependent upon these “full-freight” international students. Worse, the shifting UK national policies to reduce the number of international students (those who enroll and those who would stay and work for two years after graduation—the equivalent of

148. *Britain’s New Student-Visa Policy*, *supra* note 136, at A19.

149. See, e.g., UNESCO INSTITUTE FOR STATISTICS, INTERNATIONAL STUDENT MOBILITY IN TERTIARY EDUCATION, EDUCATION DATA TABLES, UIS.STAT, <http://data.uis.unesco.org> (showing students from Europe make up about 13% of all enrollees in tertiary education in Austria versus about 8% of all enrollees in the UK).

the Optional Practical Training/OPT feature of U.S. immigration policy) and the entire demographic of some UK institutions led to serious problems in Summer, 2012. The fallout from this “LMU” matter remains the clear backstory underpinning the calls for overall student immigration reform.

The UK Border Agency, responsible for this jurisdiction, has exerted pressure on a number of UK colleges, and most significantly, revoked the license of London Metropolitan University (LMU) in Summer, 2012 to sponsor visas and enroll international students, who in 2011 constituted 2600 of its 18,000 enrollment.¹⁵⁰

The U.K. Border Agency said in a statement that in more than a quarter of the cases it sampled, students at the university did not have the proper visas. The agency also criticized the university for not assuring the quality of the students’ English or their class attendance, which the government says might have allowed them to work illegally.¹⁵¹

To be sure, there was genuine evidence of poor administration in recruiting and enrolling these students, but “pulling the plug” on so many fee-paying students weeks before the term began in Fall, 2012 was a drastic example of how these students count in the aggregate and why shifting national immigration and higher education policy matter. Even if the LMU incident was an outlier, the thermodynamics of this decision have sent shock waves throughout the national system and the international universe in which all national systems exist. One of the more obvious signals of the interdependence of institutions was the scramble for other colleges to absorb some of the stranded LMU students, a number of whom held perfectly-appropriate immigration status, as transfer students in their student body. In the United States, it would be as if a

150. Richard Lambert, *Immigration Policy Goes Against Our Universities*, FIN. TIMES (Aug. 30, 2012, 7:35 PM), <http://www.ft.com/cms/s/0/d8638dfc-f2bd-11e1-8577-00144feabdc0.html>.

151. D.D. Guttenplan, *British Visa Ruling Leaves Thousands in Limbo; Non-E.U. Citizens Face Deportation if They Can't Find Another University*, INT’L HERALD TRIB., Sept. 3 2012, at 6, *reprinted in* N.Y. TIMES (Sept. 2, 2012), <http://www.nytimes.com/2012/09/03/world/europe/03iht-educside03.html>.

large major urban university had its ability to issue I-20s rescinded, and within two months, had to make the school year continue, with approximately 14 percent fewer paid students.

But the real significance in this unfortunate case study may be the more diplomatic and reputational damage that has been done to the entire body of UK higher education institutions, especially to the comity of immigration and interconnectedness of international exchanges. One academic leader from another university noted this likelihood after the UK Border Agency's action, and wrote:

Moreover, the decision will have damaging implications for the UK university system as a whole. Headlines in those emerging economies that are the major source of international students will not focus on [LMU's] incompetence. Instead, they will reinforce the growing perception that the UK does not welcome these students, and is prepared almost without notice to jeopardise their education. And this at a time when countries such as Australia, Canada, Germany and France are competing to attract students from around the world. Even the US, which was pushed on to the defensive on immigration policy after 9/11, is considering changes to allow foreign postgraduates in selected disciplines to stay on for longer in the country.¹⁵²

As classes were about to start, a judge enabled the students who were affected to be enrolled for one additional term, but he did not rescind the original decision.¹⁵³

The LMU reverberations have worsened, as international students in UK colleges overall have declined, and students from traditional UK feeder countries have particularly declined. At the same time, Chinese students have grown substantially, totaling over a quarter of graduate enrollments in some UK colleges.¹⁵⁴ An authoritative reporter, for example, noted in 2014 that immigration

152. Lambert, *supra* note 150.

153. Alan Travis & Paul McClean, *London Metropolitan University Wins Reprieve in Student Visa Row*, *GUARDIAN*, Sept. 22, 2012, at 4.

154. Aisha Labi, *Drop in International Students Worries English Universities*,

has become a contentious political issue in Britain in recent years, and the government's efforts to limit immigration figures have at times conflicted with the aims of universities. Universities UK, the lobbying organization for vice chancellors, has opposed the government's approach to immigration, warning that including students in migration figures would be detrimental to universities. Policy revisions, such as the elimination of work entitlement for foreign students at private institutions, a move designed to curb abuses by bogus institutions, also had an effect on international enrollments. Those shifts, all of which may have suggested to international students that Britain was becoming less hospitable to foreigners, coincided with efforts among Britain's main competitors for foreign students to ease the path for them.¹⁵⁵

The United States has also experienced punctuated international student enrollments, such as the University of Illinois admissions, which resulted in ten percent of the 2014 freshman class at the flagship campus originating from the People's Republic of China, even with tuition charges that were twice those of resident tuition.¹⁵⁶

Setting aside the important LMU matter, it is essential to identify all the moving parts. For all EU institutions, two distinctions truly count: whether a student is or is not an EU citizen, and whether such a citizen is or is not an EU "worker." All workers are automatically entitled both to home state tuition rates as well as study grants and loans.¹⁵⁷ Non-national EU citizens without worker status are entitled to home state tuition in all cases, but to be eligible for a study grant or loan they need to demonstrate presence in the state for 5 years or, if this

CHRON. HIGHER EDUC. (Apr. 2, 2014), <http://chronicle.com/article/Drop-in-International-Students/145667>.

155. *Id.*

156. Jodi S. Cohen, *U. of I. Reaches out to 600 Freshmen from China*, CHI. TRIB. (Aug. 1, 2014, 3:43 PM), <http://www.chicagotribune.com/news/nationworld/ct-university-of-illinois-chinese-students-d1-20140801-story.html>.

157. The Education (Student Support) Regulations 2011, 2011 No. 1986 sched. 1 ¶¶ 4–6 (2011) (Eng.).

requirement is not satisfied, sufficient “integration.”¹⁵⁸ Therefore, EU citizenship is the feature recognized by the ECJ as a fundamental legal status of the nationals of the Member States and is enforced accordingly. Inasmuch as discrimination on the basis of nationality is prohibited, nationalities of the Member States are unimportant and legally-irrelevant factors to take into account in access to higher education, except for residence, which applies only in limited circumstances.¹⁵⁹

To those outside the EU, the linkage between being a student and being a worker is unusual and counterintuitive. Applying for student visas in the United States, as one leading counter-example, is fundamentally different than applying for U.S. work authorization; to be sure, there are overlaps, such as the ability of nonimmigrant students to work for limited purposes during school, predominantly on campus, and to use the internship-like OPT provisions after the education is completed. But these are two largely different regimes with only small overlaps in individual cases. In contrast, under EU law, workers (all those EU citizens satisfying the test of who is a worker, as established by the ECJ) are automatically entitled to full non-discrimination in all spheres of life, meaning that once persons qualify as workers by the ECJ-established test, they are entitled to full home treatment and no residence tests can apply.¹⁶⁰ In the EU and with relation to students from Member States, this test is relatively easy to satisfy. For example, spending six months working part-time at a fast food counter would trigger full eligibility for the college loans and study grants at the Member State of residence, putting EU workers in a substantial and privileged position.¹⁶¹

158. Case C-209/03, *The Queen v. London Borough of Ealing*, 2005 E.C.R. I-2151, I-2170.

159. CROSS-BORDER ACCESS TO PUBLIC BENEFITS, *supra* note 139, at 339; Michael A. Olivas & Dmitry Kochenov, *Case C-34/09 Ruiz Zambrano: A Respectful Rejoinder* (2012), available at <http://ssrn.com/abstract=1989900>.

160. See *European Union Citizenship: The Journey Goes On*, *supra* note 133, at 271 (discussing the evolution of EU citizenship and “the effective transformation of migrant workers into Union citizens with wide rights of equal treatment in the Member State of their residence”).

161. See Case C-444/93, *Megner v. Vorderpfalz*, 1995 E.C.R. I-4744, I-4752 (noting the broad definition of “worker”).

Thus, in the case of EU citizens who are not workers in the EU Member States, tuition, but not grants and assistance programs, is governed by the principle of non-discrimination on the basis of the nationality principle (as established in *Gravier*),¹⁶² so that a Finn in France will pay zero for her education even if moving to France solely to attend the Sorbonne. Unlike the domiciliary and intent-requirements to establish in-state residency most common in the U.S. residency schemes, intent would make no difference among EU Member State students. While *Gravier* seems in tension with the fundamental *Grzelczyk* case, the cases are consistent and harmonized: *Grzelczyk* holds that EU citizens studying outside of their state of nationality who do not qualify as workers under EU law are only entitled to assistance in exceptional cases and only when such assistance is not regular and long-lasting.¹⁶³ In other words, in principle, the distinction established in *Gravier* between grants and tuition rates holds. Also unlike the United States, which has many coordinated and regional compacts, reciprocity is not recognized as a principle of law in the EU and thus would not affect state obligations. While EU citizens are all similarly situated with respect to the tuition rates, different states and regions (e.g., Scotland/UK) can have different tuition rates, or charge no tuition at all. But as was shown by the ECJ, there are complexities with regard to study grants and loans, which are available to all the EU citizens, even when those who do not work must either satisfy residence requirements of five years (according to terms of the Directive) or, following *Bidar*, in the alternative—in a real sense, undermining or circumventing the Directive—prove that they are “sufficiently integrated into the society of the host state,” even before five years; such integration requires sufficient integrative measurements, such mastery of the second language, knowledge of local customs, and the like, designed to evidence adoption of the new home.

The principle of proportionality would apply, as the requirements of the Directive are not impossibly strict, another

162. Case 293/83, *Gravier v. City of Liege*, E.C.R. 606, 611–13 (1985).

163. Case C-184/99, *Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, 2001 E.C.R. I-6229, I-6244–45.

lesson from *Bidar*. There is a line in EU case law that does not harmonize with the elaborate and nuanced development of the law in this area, that of the concept of proportionality, a concept that allows Member States to apply stricter rules if they convince the ECJ that a large number of out-of-state EU citizens would materially disrupt the operation of vital state functions, such as healthcare or conceivably, higher education. A number of comprehensive social benefit programs could be projected to break the bank if expensive benefits or status were given to all newcomers with few eligibility or entrance requirements, but this direction is likely to be limited very strictly or it would be held to constitute nationality discrimination.

Another consideration is the widespread portability of these grants (as developed in *Morgan* and other cases), where the Court prohibited Germany from implementing a one-year study residency requirement in Germany before allowing the recipient student to move to another EU Member State on a grant from the German government.¹⁶⁴ As a result, a Finn or a German can claim a grant to study at a university from the home government and spend it at the UK's Oxford for example, or could be transformed into a "worker," even by part time or contingent employment in Cambridge, automatically qualifying for the British student support grants without meeting any integration or minimum term of residence requirement. While applicants must, of course, apply to and be admitted into the institution, forms of student support would be available much more easily than is the case in other confederated systems around the world. As for the cost of tuition, the rate would be the same, notwithstanding a particular EU nationality, inasmuch as it will be the EU passport that renders eligibility.

In a technical horizontal sense, then, the EU treats all citizens of its Member States as holding equal access, and so with regard to mobility and higher education benefits, immigration technically does not count. However, as has been shown in the action of the UK Border Agency to strip LMU of its ability to issue student visas to international (that is, non-EU) students, immigration matters considerably to all Member

164. Case C-11/06, *Morgan v. Köln*, 2007 E.C.R. I-9195, I-9214.

States, especially in vertical fashion, that is, when dealing with sojourners not of the EU (i.e., third country nationals, in the terminology of EU law). There is considerable evidence in practice and in the trade press that immigration/higher education linkages were increasingly problematic, revealing the centrality of the political dimensions of each sector, the politicization of immigration policy across several complex areas, and the diplomatic implications in many countries with nativist movements and shifting restrictionist politics. Of course, EU and worldwide fiscal problems have also posed difficult austerity financial issues for the countries, and inevitably, for their educational program support. Examples include the United States,¹⁶⁵ France,¹⁶⁶ India,¹⁶⁷ Germany,¹⁶⁸ Canada,¹⁶⁹ Australia¹⁷⁰

165. See Timothy Sandoval, *Lawmakers Plan Bill to Improve Oversight of Student-Visa System*, CHRON. HIGHER EDUC. (July 24, 2012), <http://chronicle.com/article/Lawmakers-Plan-Bill-to-Improve/133139> (describing proposed legislation that would increase penalties for fraud and tighten inspection requirements for schools admitting international students on student-visas that allow students to work).

166. See *French Government Scraps Restrictions on Foreign Graduates' Right to Work*, RADIO FRANCE INTERNATIONALE (May 31, 2012), <http://www.english.rfi.fr/economy/20120531-french-government-scraps-restrictions-foreign-graduates-right-work> (noting clash in policy over student working visas for Non-EU students).

167. See Shailaja Neelakantan, *India's New Rules for Foreign Universities Raise Questions at Home and Abroad*, CHRON. HIGHER EDUC. (Aug. 21, 2012), <http://chronicle.com/article/Indias-New-Rules-for-Foreign/133782> (discussing restrictive reforms affecting foreign universities attempting to set up degree programs in India).

168. See David Gordon Smith, *The World from Berlin: German Universities 'Share Blame' for the Problem*, SPIEGEL ONLINE (Aug. 15, 2012, 2:13 PM), <http://www.spiegel.de/international/germany/press-review-on-bologna-process-education-reforms-a-850185.html> (discussing the drawbacks of educational reform ten years after implementation of the Bologna Process).

169. See Colin Freeze, James Bradshaw & Marc MacKinnon, *Are Schools Too Eager to Forge Chinese Ties?; Canadian Partnerships with Confucius Institutes Raise Questions of Whether Academic Freedom is Being Compromised*, TORONTO GLOBE & MAIL, June 20, 2012, at A3 (noting the financial incentives that led one Canadian university to forge a relationship with the Chinese "Confucius Institute" only to find out that the Institute was persecuting religious minorities); see also Karen Seidman, *Jubilant Students Declare a Win in Tuition-Hike Conflict; 'It's a New Era of Collaboration Instead of Confrontation,' Leader Says of 'Total Victory'*, GAZETTE (Can.), Sept. 21, 2012, at A2 (discussing financial woes of Canadian universities that led to a proposed tuition hike, and its ultimate defeat).

170. See Stephen Coronos, *Consumer Guarantees and the Supply of Educational Services by Higher Education Providers*, 35 UNIV. NEW S. WALES L.J. 1, 1-2, 8-9 (2012) (discussing how the deregulation of admissions in conjunction with a national scheme for

and throughout the world.¹⁷¹ The architecture of this polity is complex, shifting, and politically contingent; internationalization of the world student population and the globalization of institutional admissions practices have inevitably led to pressure between the legal immigration regimes and the increased mobility of applicants into the foreign countries.

Just as many financial decisions and financial aid policies—including those involving immigration regimes—have led to court challenges in the United States, so has been the case in the EU, where free movement laws are regularly challenged and often affirmed by the Court, the “hard law” counterpart to the “soft law” Bologna and Lisbon initiatives and annual proclamations. There are even surprising U.S./UK similarities in immigration-related litigation, such as the legal rights to be accorded to the undocumented, or unauthorized college students and workers, and the use of durational requirements to apportion college benefits.¹⁷² European legal scholar Annette

providing funding to universities per admitted student could lead to legal problems for Australian universities that admit unqualified students to increase their rolls).

171. See Stephen Wilkins & Jeroen Huisman, *The International Branch Campus as Transnational Strategy in Higher Education*, 64 HIGHER EDUC. 627, 628, 630 (2012) (noting that in 2011 there were 183 branch campuses worldwide set up by institutions, primarily from the United States, U.K., and Australia, to make up for shortfalls in funding); see also Aisha Labi, *In Europe, Anti-Immigration Measures Run Up Against Efforts to Attract Foreign Students*, CHRON. HIGHER EDUC. (June 7, 2012), <http://chronicle.com/article/In-Europe-Anti-Immigration/132193> (noting immigration reforms in Britain, France, and Sweden that conflict with university goals to attract more international students, and EU efforts to get Member Nations on board with a consistent EU plan that covers the transition of international students to workers).

172. Compare LAWLER, *supra* note 1 (discussing the variety of and disparity between immigration visas available to persons entering the United States based on a number of criteria, including country of origin and reason for entering U.S.), with Kay Hailbronner & Daniel Thym, *Annotation of Case C-34/09 Gerardo Ruiz Zambrano v. Office National de L'Emploi*, 48 COMMON MKT. L. REV. 1253 (2011) (discussing the change in immigration status of a family from a non-EU State residing in Belgium based on the “Union citizenship” of their two children who were born in Belgium). Compare Komada, *supra* note 140, at 451–53 (recognizing an international concern for securing the right of children to participate in education regardless of immigration status in the context of a discussion of an Italian immigration bill that would prevent undocumented children from attending school in Italy), with *Obama's New Immigration Policy*, *supra* note 4 (noting the American struggles to pass the DREAM Act to secure legal residency status for some students in the United States). See generally Olivas & Kochenov, *supra* note 159 (discussing the *Zambrano* case and noting that the Zambrano's might have

Schrauwen has carefully analyzed a core of ECJ higher education finance cases, and summarized:

In its interpretation of the Treaty provisions on free movement of citizens, the Court deploys the argumentative framework it uses in market freedoms. The case law follows the sequence of first addressing the question whether there is a hindrance to free movement and then looking for an objective justification for the hindrance. The argumentative sequence ends with the question whether the hindering measure is proportionate to the objective it seeks to protect. Ideally, assessment of student support measures in the market-like argumentative framework should be suitable to enhance student mobility with a view to both the Bologna target and the Europe 2020 Strategy. [This case law analysis] is divided according to two perspectives: access to financial support by the host State to study in that State and portability of financial support provided by the home State, in order to study in another State.¹⁷³

In a case that was decided twenty years after the 1985 *Gravier* matter, the equal treatment principles were upheld with a vengeance, when the French University College London student Dany Bidar was determined to be eligible for the tuition rates to which an English student would be entitled.¹⁷⁴ Crucially, he met the three year residency requirement inasmuch as he had lived with a relative in England, without being eligible for support until he had resided there for three years, but in accord with the British student requirements then in force, he had been deemed ineligible for a subsidized English student loan: he had a legal impediment to being able to declare the UK his domicile. Thus, he met what had been a durational requirement, but could not meet the *mens rea* “settled” intention test, as he was irrebuttably a non-national. Invoking the 2001 *Grzelczyk* case, the Court in *Bidar* took notice that the intervening Treaty on

sought EU citizenship for their family under exceptions made for asylum seekers).

173. Annette Schrauwen, *Access to and Portability of Student Grants and Loans: Where Targets Meet Free Movement Law* 9, 10–11 (Amsterdam Centre Eur. L. & Governance, Working Paper 2011-07), available at <http://ssrn.com/abstract=1935959>.

174. London Borough of Ealing, 2005 E.C.R. I-2151, I-2168.

European Union incorporated EU citizenship into the EC Treaty and had adopted a Directive [2004/38, concerning rights to move and reside freely within the territory of the Member States [2004] OJ L158/77], which provided that the Member States must grant the right of residence to all other citizen students of a Member State, if they could meet the same requirements or criteria required of nationals.¹⁷⁵ The Court held:

60. With respect to national legislation such as the Student Support Regulations, the guarantee of sufficient integration into the society of the host Member State follows from the conditions requiring previous residence in the territory of that State, in this case the three years' residence required by the United Kingdom rules at issue in the main proceedings.

61. The additional condition that students are entitled to assistance to cover their maintenance costs only if they are also settled in the host Member State could admittedly, like the requirement of three years' residence referred to in the preceding paragraph, correspond to the legitimate aim of ensuring that an applicant for assistance has demonstrated a certain degree of integration into the society of that State. However, it is common ground that the rules at issue in the main proceedings preclude any possibility of a national of another Member State obtaining settled status as a student. They thus make it impossible for such a national, whatever his actual degree of integration into the society of the host Member State, to satisfy that condition and hence to enjoy the right to assistance to cover his maintenance costs. Such treatment cannot be regarded as justified by the legitimate objective which those rules seek to secure.

62. Such treatment prevents a student who is a national of a Member State and who is lawfully resident and has received a substantial part of his secondary education in the host Member State, and has consequently established a genuine link with the society of the latter State, from being able to pursue his

175. *Id.* at I-2166.

studies under the same conditions as a student who is a national of that State and is in the same situation.

63. The answer to Question 2 must accordingly be that the first paragraph of Article 12 EC must be interpreted as precluding national legislation which grants students the right to assistance covering their maintenance costs only if they are settled in the host Member State, while precluding a national of another Member State from obtaining the status of settled person as a student even if that national is lawfully resident and has received a substantial part of his secondary education in the host Member State and has consequently established a genuine link with the society of that State.¹⁷⁶

The 2008 *Förster* case also applies, allowing Member States to establish residency requirements for maintenance grants: “Community law, in particular the principle of legal certainty, does not preclude the application of a residence requirement which makes the right of students from other Member States to a maintenance grant subject to the completion of periods of residence which occurred prior to the introduction of that requirement.”¹⁷⁷

A similar case by the U.S. Supreme Court, *Vlandis v. Kline*, had held that irrebuttable presumptions in the case of students who were trying to prove their residency status were unconstitutional; in *Vlandis*, Connecticut had wrongly treated all applicants who sent their applications from outside the State as non-residents, unable, like *Bidar*, to evince a resident intent, no matter their circumstances.¹⁷⁸ *Bidar*’s immigration status in England, first as a dependent whose material support was from a close relative and then who was properly enrolled in college there, enabled him to “equal treatment,” as he was legitimately “settled” there. But had he not been in residence in England for the requisite three years, he still would have been able to

176. Case C-209/03, *The Queen v. London Borough of Ealing ex parte Bidar*, 2005 E.C.R. I-2119, I-2171.

177. Case C-158/07, *Förster v. Hoofddirectie van de Informatie Beheer Groep*, 2008 EUR-Lex CELEX LEXIS 62007CJ0158 (Nov. 18, 2008).

178. *Vlandis v. Kline*, 412 U.S. 441, 452–53 (1973).

petition for full support after five years, or less than three years, provided he met a test that he was sufficiently economically “integrated” or “settled” into the community by acquisition of the language and knowledge of local customs and mores.¹⁷⁹ This continuum would allow the Dany Bidars of the EU an opportunity to prove their eligibility by economic integration (being employed, learning the language and customs, and not receiving dole or other assistance) or by remaining in residence for a longer period of time than that required of English counterparts.¹⁸⁰ In addition, limitations upon states being able

179. See Council Directive 2004/38, art. 16, 2004 O.J. (L 158) 77, 105 (EC) (“Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there . . . [This provision] shall apply also to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years.”); Case C-209/03, *The Queen v. London Borough of Ealing*, 2005 E.C.R. at I-2123–24 (opinion of Advocate General Geelhoed) (noting that “Nationals of a Member state are only eligible to receive a loan . . . if they are settled in the [U.K.] within the meaning of the domestic law”).

180. See Michael Dougan, *Fees, Grants, Loans and Dole Checks: Who Covers the Costs of Migrant Education Within the EU?* 42 COMMON MKT. L. REV. 943, 972 (2005) (arguing that judgment in *Bidar* “confirms that the Member State is entitled to insist upon evidence of a ‘genuine link’ between the migrant student and the host society, based upon residence for a ‘certain length of time’ and representing a ‘certain degree of integration,’ before conferring access to maintenance assistance in the form of grants or loans”); see also Michael Dougan, *Cross-Border Educational Mobility and the Exportation of Student Financial Assistance*, 33 EUR. L. REV. 723, 733 (2008) [hereinafter *Cross-Border Educational Mobility*] (stating that the Court recognizes that qualifying criteria are justified for students claiming financial assistance for foreign studies, due to risk that such claims could impose an unreasonable financial burden on the state); Oxana Golynger, *Student Loans: The European Concept of Social Justice According to Bidar*, 31 EUR. L. REV. 390, 399 (2006) (critiquing *Bidar* due to lack of criteria for determining whether a migrant constitutes an “unreasonable burden”); Mel Cousins, *Patmalniece v. Secretary of State for Work and Pensions*, 17 J. SOC. SECURITY L. 126, 128–29 (2010) (holding that U.K. requirement of “right to reside” before receiving state pension credit was objectively justified); Pablo Cristóbal Jiménez Lobeira, *EU Citizenship and Political Identity: The Demos and Telos Problems*, 18 EUR. L.J. 504, 516–17 (2012) (advocating a “mixed commonwealth” framework that “aims at taming the excesses of nationalism”); Dimitry Kochenov, *The Present and the Future of EU Citizenship: A Bird’s Eye View of the Legal Debate* 39 (The Jean Monnet Program, Working Paper No. 02/12, 2012), available at <http://ssrn.com/abstract=2063200> (noting that “the ‘genuine links’ jurisprudence of the Court is in direct tension with the liberal essence of EU citizenship”); Gideon, *supra* 141, at 174 (noting that under EU law, higher education institutions “were originally regarded as noneconomic services,” making EU Treaty provisions on free movement inapplicable. However, in more recent cases, EU

to disqualify unauthorized persons on the grounds that they were a threat to the government fisc were given short shrift in the U.S. *Plyler* case, when Texas made exactly that unavailing argument in charging tuition to undocumented children.¹⁸¹

The line of authoritative EU mobility cases has clarified and expanded the actual and fiscal terms of movement for EU nationals, by grafting free movement principles onto EU citizenship cases (such as *Baumbast*) and by grounding EU citizenship upon the various interlocking EC Articles, the expansive Directives, and the various implementing Regulations—all poised to be interpreted in expansive and more comprehensive accommodationist fashion. Legal scholar Siofra O’Leary has noted of this trend:

Remarkably, the Court extended the scope of application of these pieces of secondary legislation to lawfully resident but economically inactive EU citizens without the other conditions of eligibility . . . were not, arguably, met by such citizens. In later citizenship cases, the Court has even interpreted the material scope of EC law in a manner which appears to contradict the terms of EC secondary legislation on free movement, residence and equal treatment.¹⁸²

The recent major changes in UK immigration policy have ricocheted throughout the affected countries and within the larger Bologna Process. Christopher F. Schuetze has reported that British officials estimated the initial immigration-related costs for the changes to be over £2.44 billion:

The changes to the student visa system, first announced in Parliament by Home Secretary Theresa May on March 22, are part of the immigration changes that have been one of the governing Conservative Party’s top priorities. In an effort to reduce total net migration, the Home Office moved to restructure the

courts have determined that “a variety of educational activities have been defined as economic services”).

181. *Plyler v. Doe*, 457 U.S. 202, 229 (1982); see also *Dreams Deferred*, *supra* note 81, at 544 (referring to the *Plyler* case, which held that a state statute allowing schools to deny undocumented immigrants access to educations violated the Equal Protection Clause).

182. O’Leary, *supra* 133, at 13.

nation's rules on visas, including those for foreign students from outside the European Union (E.U. rules stipulate that individual member countries cannot impose special visa regulations on students from other Member States). The new rules also include a more stringent English-language requirement and limit the amount of time graduates can stay in the country.¹⁸³

In the *Förster* case, the Court was required to rule on the details and operations of differentiated residency rules. In a very narrowly-written opinion, the Court held that reasonable distinctions such as sliding scale durational requirements or exceptions could be justified as essential differentiations turning on different fact patterns.¹⁸⁴ The sum total of the accommodating cases is that States that are party to the complex schemes of tax contribution and entitlements to benefits have a great deal of flexibility, flexibility that can ratchet up or down the integration and durational requirements and the other quasi-immigration eligibility criteria, provided that doing so does not rise to the level of the prohibited social discrimination.¹⁸⁵

183. Christopher F. Schuetze, *Report Estimates Cost to U.K. of Fewer Student Visas*, INT'L HERALD TRIB., June 20, 2011, reprinted in N.Y. TIMES (June 19, 2011), <http://www.nytimes.com/2011/06/20/world/europe/20iht-educSide20.html>.

184. See *Förster*, 2008 EUR-Lex CELEX LEXIS 62007CJ0158, ¶¶ 52, 59 (finding that “a condition of five years’ uninterrupted residence is appropriate for the purpose of guaranteeing that the applicant for the maintenance grant at issue is integrated into the society of the host Member State . . . [but] that finding is without prejudice to the option for Member States to award maintenance grants to students from other Member States who do not fulfill the five year residence requirement should they wish to do so.”).

185. See Anne Pieter van der Mei, *Residence and the Evolving Notion of European Union Citizenship*, 5 EUR. J. MIGRATION & L. 419, 420 (2003) (analyzing developments in EU case law regarding Member States’ residence requirements for nonworkers); see also *Union Citizenship*, *supra* note 140, at 496 (arguing that the decision in *Förster* “unnecessarily undermines the fundamental status of Union citizenship” by allowing a Member State to make entitlement to maintenance aid conditional upon five years of residence, regardless of the actual degree of integration); *Reflections on Bressol and Chaverot*, *supra* note 140, at 130 (describing the decision in *Bressol and Chaverot* allowing a Member State to “protect itself from the negative consequences of a huge inflow of students from other Member States”); Anja Wiesbrock, *Free Movement of Third-Country Nationals in the European Union: The Illusion of Inclusion*, 35 EUR. L. REV. 455, 474 (2010) (noting “large discretion for Member States in determining criteria for admission” in relation to third-country nationals); Mathisen, *supra* note 139, at 1047 (arguing that measures that restrict free movement are easier to justify under EU law if they are found to be “consistent”).

There have been remarkably few studies of the economic or demographic data to gain a better sense of the overall efficacy of these migration patterns, and when they do begin appearing, they are likely to be so contingent and dependent upon the host-State's financial situation that they will not likely add to our understanding.¹⁸⁶ Such studies will also require careful attention to the receiver and sender patterns, the extent to which studying in a country leads college graduates to re-situate there and not return home, as they marry, have children with mixed-citizenship status, and put down roots. In a system that appears to facilitate and stimulate cross-national exchanges, the use of long durational requirements seems counterintuitive, especially when the eligibility period and requisite wait for eligibility could be as much as five years, longer than many undergraduate degrees require. The Netherlands has experimented with a three out of six year rule, stretching out eligibility criteria even longer. The 2012 *Case C-542/09* held that the Netherlands, by requiring migrant workers and dependent family members to comply with a durational residence requirement (the "three out of six years" rule) in order to be eligible to receive funding for higher educational studies pursued outside the Netherlands, violated its obligations, again underlining the difference between "workers" and their families and all the others.¹⁸⁷ It is clear that higher education cases and other collateral benefits challenges in the EU will continue to probe what constitutes "social discrimination," "sufficient degree of integration," "services" (invoking the transnational health care line of cases), and the other shibboleths that guide these policies.

Annette Schrauwen has perceptively summarized the conundrum of such a polity, where a given benefit program—

186. Notable exceptions are the works by Carlos Rodríguez González, Ricardo Bustillo Mesanza & Petr Mariel, *The Determinants of International Student Mobility Flows: An Empirical Study on the Erasmus Programme*, 62 HIGHER EDUC. 413, 414 (2011), and HIGHER EDUC. FUNDING COUNCIL FOR ENG., GLOBAL DEMAND FOR ENGLISH HIGHER EDUCATION: AN ANALYSIS OF INTERNATIONAL STUDENT ENTRY TO ENGLISH HIGHER EDUCATION COURSES paras. 44–47 (2014).

187. *Case C-542/09, Comm'n v. Netherlands*, 2012 EUR-Lex CELEX LEXIS 62009CJ0542 (June 14, 2012).

albeit a large one with substantial investment and mobility infrastructure—is subject to a fundamental but conflicting premise of the EU framework, where citizens of one Member state are not only free, but encouraged and facilitated to move about the EU and across countries:

In respect to student mobility, the social discrimination is on State level: less wealthy countries cannot support student mobility, for they do not have the financial means to support their nationals who study in more expensive educational systems abroad. Thus, sole home State responsibility probably will not result in a level playing field in terms of what level of financial support is available to mobile students. Some Member States use the European Social Fund for the promotion of mobility, but here also level of and conditions applicable to financial support differ widely. In the context of the EU, the Structural Funds and the research Framework Program are mentioned as being important to promote mobility¹⁸⁸

She has proposed a new structure, a European Student Lending Facility, which would allow:

a student support system into the Bologna targets without the disadvantages sole home State responsibility has. Moreover, it prevents EU Member States from having to design all sorts of complex student loan facilities in order to accommodate them with EU free movement law. One could say it even tackles the issue of equal treatment within the host State. In view of the limits set by Directive 2004/38 and the Court's ruling in *Förster*, residence conditions are still the tool EU Member States will work with when it comes to supporting students to study in national higher education institutions. The argument that differentiation implicit in residence conditions is not contributing to mobility targets is no longer relevant once a separate Lending Facility to accommodate mobile students has been designed.¹⁸⁹

188. Schrauwen, *supra* 173, at 19.

189. *Id.* at 20–21.

Such a structure is not without its own inherent problems, such as how to secure its original corpus of funds, the percentage basis on which Member States would contribute and allocate funds, and the likely scenario that the cross-subsidization would reward countries that sent more students than they would attract and did not develop their own strong national institutions. But it is an intriguing and bold start at addressing the equalization and equity problems. Legal scholar Gareth Davies has closely followed these EU mobility issues for many years, and is among the most astute scholars in this specialized field. But even he cannot bring himself to propose any structural changes in the “equal fee” debate without first requiring a revised and completely overhauled transnational EU tax structure that would equalize the financial and political interests of the various Member-states: this may be an example of the perfect being the enemy of the good, where no starting point can be agreed upon to initiate the discussion.¹⁹⁰

A.P. van der Mei, among the most accomplished scholars of these complex EU mobility and immigration intersections, has thoughtfully observed:

In her Opinion in *Bressol and Chaverot*, A-G Sharpston stated that free access to education cannot mean “free access—but only for our own nationals”. As such one may agree, but free access might very well imply “free access—but above all for *residents*”. It is residents who, as a group, finance education. Why would Member States not be entitled to give the members of this group, who bear the financial burden, preferential treatment? EU citizenship rests on the notion of equality of nationals and nationals of other Member States, but it does not necessarily order the similar treatment of non-residents and residents.

Of course, when one reasons along such lines, student mobility might be obstructed. Yet, free student mobility

190. See Gareth T. Davies, *Higher Education, Equal Access, and Residence Conditions: Does EU Law Allow Member States to Charge Higher Fees to Students Not Previously Resident?* 12 MAASTRICHT J. EUR. & COMP. L. 227, 240 (2005) [hereinafter *Higher Education, Equal Access, and Residence Conditions*] (concluding that “Europe’s student mobility policy finds itself in an artificial situation. So long as tax remains national it is logical that subsidy should too . . .”).

may also obstruct national educational policies and interests. EU law gives much legal and political weight to the rights and interests of mobile students but perhaps a bit too much in comparison with the interests of non-mobile students. The legitimacy of EU law is at stake when it condones situations in which 50%, 60%, 70% and sometimes even more chairs in lecture halls and class rooms are occupied by non-resident students. Would it be a wholly absurd idea if the EU political institutions would consider introducing a rule that would give each Member States the option to reserve let's say 60% or 70% of its study places to residents? Such a rule may seem at odds with free student mobility, but has clear advantages. It would leave "sufficiently wide" room for student mobility, have regard for the national constitutional duty of Member States to offer proper education to its own population and promote legal certainty in the sense that the question of whether a given restrictive measure is necessary and proportional does not have to be answered.¹⁹¹

Professor van der Mei is exactly right, and I have not fully understood these cases, or rather, their implications and (ir)reconcilability, either. I wonder if more work on what constitutes "free" might lead to a gloss on the term, inasmuch as "free movement," to use another example of the term, does not mean completely free in the immigration or benefits contexts. In the United States, a number of cases have parsed what constitutes "tuition," as some colleges with tuition-controls of one sort or another (legislative, statutory, or political) also charge "fees" as if they are different. As one example, student plaintiffs successfully sued the University of Missouri for charging any tuition, when the State statutory provisions required that no tuition be charged to Missouri youth over the age of sixteen years enrolled in undergraduate classes at the

191. *Reflections on Bressol and Chaverot*, *supra* note 140, at 134 (footnote omitted); see also Case C-73/08, *Bressol and Chaverot*, 2010 E.C.R. I-2739, I-2768 (opinion of Advocate General Sharpston) (stating that "free access" to education must mean free education for all, rather than for nationals only).

State's public institutions.¹⁹² Although the State Legislature, subsequent to the litigation, changed the statute, the Court held,

[d]efendant had violated the provisions of Section 172.360, RSMo 1998, as it read at the time the class action lawsuit was filed, by charging educational fees, which the Court found to be synonymous with tuition, to Missouri youth over the age of sixteen years enrolled in undergraduate classes at the University of Missouri-Columbia, the University of Missouri-Kansas City, the University of Missouri-Rolla and the University of Missouri-St. Louis¹⁹³

The Court fashioned a remedy that established a University-funded multi-million dollar program to reimburse students who had been illegally required to pay any tuition. The University unsuccessfully argued that the money that students had paid were "fees" rather than "tuition."¹⁹⁴ Students receiving bills for their enrollment likely do not differentiate or care what the characterization is, if they are being charged any amount of money, even subtracting financial aid that may be available on the sliding scale of "family contribution," or providing aid according to need, as determined by complex formulae.

In financial duress, the entire University of California has recently attempted to parse exactly this difference to charge students to attend courses; public institutions in the bellwether state have stumbled to find creative ways to impose quotas on resident students, to differentiate courses and charge on sliding scales, and to respond to the major cutbacks in state support of the systems, notwithstanding the extraordinary demand for courses and admissions by a growing college-age population. Highly competitive California post-baccalaureate programs such as law, medicine, and business have, in effect, "privatized" their tuitions and increased tuition substantially beyond the college

192. *Sharp v. Curators of Univ. of Mo.*, No. 98CC-339, 2002 WL 31875658, at *1, *6 (Cir. Ct. Mo. 2002).

193. Settlement Agreement and Release, *Sharp v. Curators of Univ. of Missouri*, No. 98CC-339 (Cir. Ct. Mo. 2005), available at <http://www.umsystem.edu/ums/fa/tuition/settlement>.

194. *Sharp*, 2002 WL 31875658, at *2.

cost of living measures.¹⁹⁵ These actions, as noted, have been copied by several UK institutions, a dubious export.¹⁹⁶

Moreover, in addition to these issues of centrally-planned EU mechanisms, there are already strong exchange and consortial arrangements available to students, not under individual student choice, such as Dany Bidar's situation where the circumstances of his living with a relative grew out of his organic, personal life experience, not a planned mobility exchange sojourn from France to England. For the many planned exchanges, there have historically been many pooled consortium arrangements facilitated by the EU, apart from the square-peg benefits regime that is trying to fit into the round hole of EU law.¹⁹⁷ The Erasmus Program (the European Community Action Scheme for the Mobility of University Students), was born in 1987, and morphed into the EU's Lifelong Learning Programme 2007–2013, which in turn

195. See Larry Gordon, *UC Alumnus Pushes Tuition-freeze Plan at California Colleges*, L.A. TIMES (July 3, 2012), <http://articles.latimes.com/2012/jul/03/local/la-me-tuition-freeze-20120702> (noting that University of California tuition increases for one student totaled about 40% during the three years up to 2011).

196. See Sean Coughlan, *Students Face Tuition Fees Rising to £9,000*, BBC NEWS (Nov. 3, 2010), <http://www.bbc.com/news/education-11677862> (according to one observer, a government plan to permit English universities to increase annual student tuition fees from £3,290 to £9,000 represents a “tragedy for a whole generation of young people.”); see also Jean Mangan, Amanda Hughes & Kim Slack, *Student Finance, Information, and Decision Making*, 60 HIGHER EDUC. 459, 459 (2010) (noting that in 2006–2007, England replaced up-front tuition fees with variable tuition fees, and increased the availability of maintenance grants to students with lower household income); Graeme Paton, *More Students Charged Maximum £9,000 Tuition Fees*, TELEGRAPH (U.K.) (Aug. 22, 2014), <http://www.telegraph.co.uk/education/universityeducation/11051519/more-students-charged-maximum-9000-tuition-fees.html> (noting “[a] study by The Complete University Guide found that 75 per cent of institutions were imposing the maximum possible fee for every course in September—up from half in 2013.”).

197. See Hannah Fearn, *Have-Less Versus Have-Lots: Erasmus Scheme's 'Unfairness Gap' Criticised*, TIMES HIGHER EDUC. (Jan. 13, 2011), <http://www.timeshighereducation.co.uk/414859.article> (noting stipend disparities that may be reducing participation in the Erasmus academic mobility program); see also *Cross-Border Educational Mobility*, *supra* note 180, at 726 (examining the Court's consideration of whether a home state's refusal to provide financial assistance for studies in another country constitutes a “barrier to movement” barred under Article 18 of the European Constitution); Wiesbrock, *supra* note 185, at 465 (examining mobility limitations for third-country national students who wish to study in multiple EU Member States).

coexists with other non-EU partners joining to create a series of smaller, regional consortia and exchanges, such as the Erasmus Mundus, Erasmus Mundus Action 2 Asia Regional, and the Erasmus Mundus Action 2 for South African citizens projects. While case study data and original scholarship are not widely available, substantial and useful aggregate data are gathered and monitored by a network of EU and European authorities, such as one recently released by Eurostat: “The European Higher Education Area in 2012: Bologna Process Implementation Report.”

Finally, the various interlocking EU measures of immigration and nationality are in flux, as befits a dynamic world and modern mobility. Legal scholar Nathan Cambien has summarized these developments as possessing “significant consequences for the immigration laws of the Member States”:

The traditional assumption that Member States are exclusively competent to regulate the personal scope of Union citizenship can no longer be maintained therefore [T]he benefits of Union free movement law, in particular those relating to family reunification, can now in some circumstances be invoked by Union citizens even if they have never resided in a Member State other than that of their nationality. Consequently, the traditional assumption that Union law can only be invoked by Union citizens who have moved between Member States is no longer valid. Lastly, recent case law appears to diminish the importance of self-sufficiency as a condition for legal residence in another Member State for longer periods of time.¹⁹⁸

As a practical matter, I have focused upon U.S. and European (especially UK) higher education as illustrative case studies, but similar issues affect higher education systems across the world, almost by definition. As just one example of the dissemination of governance structures, powerful private interests in the United States have expressed admiration for the overall exchange mechanisms in the Bologna Process, and want

198. Nathan Cambien, *Union Citizenship and Immigration: Rethinking the Classics?* 5 EUR. J. LEGAL STUD. 10, 31 (2012).

to graft such a structure onto the U.S. system, which has very loosely-connected international exchange tissues.¹⁹⁹

In addition, developments in Australia and the Far East are in tremendous flux, in part because Australia positioned itself as a major receiver state for the region, employing immigration mechanisms and active institutional and national outreach for attracting international students, and many attended as a result, but worldwide economic conditions, institutional “capacity” (in all the senses of this word), diplomatic developments, and currency fluctuations all affect the mobility of students, who, once they have left their home country, weaken the home ties and have options available to them on a wider scale.²⁰⁰

199. See Doug Lederman, *Borrowing from Bologna*, INSIDEHIGHERED.COM (Sept. 13, 2010), <http://www.insidehighered.com/news/2010/09/13/lumina> (noting that the Lumina Foundation for Education sees potential to apply principles of the Bologna process to U.S. higher education).

200. See *Australian Vocational Educators Upset About Change in Visa Rules*, CHRON. HIGHER EDUC. (Dec. 1, 2010), <http://chronicle.com/blogs/global/australian-vocational-educators-upset-about-change-in-visa-rules> (noting that visa restrictions in Australia have been eased for students seeking university education but not vocational training); Janaki Kremmer, *Australia Steps Up Efforts to Recruit Latin American Students, and They Respond*, CHRON. HIGHER EDUC. (Aug. 23, 2010), <http://chronicle.com/article/Australia-Steps-Up-Efforts-to/124102> (describing the influx of Latin American students to Australia due to aggressive outreach and reduced visa restrictions); Steven Schwartz, *Losing a Grip on the Foreign-Student Market*, CHRON. HIGHER EDUC. (Jan. 27, 2011), <http://chronicle.com/article/Losing-a-Grip-on-the/126079> (discussing the effect of current events and policy decisions on whether students choose to study abroad in Australia); Ben Wildavsky, *Rocky Times for International Enrollment in Australia*, CHRON. HIGHER EDUC. (May 10, 2011), <http://chronicle.com/blogs/worldwise/rocky-times-for-international-enrollment-in-australia> (citing economic stability, currency, academic reputation, and political climate as factors students consider); Susan Woodward, *Competition Grows in International Student Market*, CAMPUS REV. (Feb. 27, 2012), <http://www.campusreview.com.au/2012/02/competition-grows-in-international-student-market> (stating that Australia is undergoing major changes due to a national scheme to boost Australia's economy); Dora Kostakopoulou, *One Cannot Promote Free Movement of EU Citizens and Restrict Their Political Participation* (EUI Working Paper, RSCAS 2012/32, 2012), available at <http://ssrn.com/abstract=2117184> (suggesting that extending voting rights to alien residents of EU nations would increase the options of interested international students). See generally George Williams & Sangeetha Pillai, *Commonwealth Power Over Higher Education*, 30 UNIV. QUEENSLAND L.J. 287, 287 (2011) (noting that Australia is undertaking serious reform in the regulatory structure of its universities in an attempt to attract more international students); John Ross, *Australia Bullish on Foreign Students*, INSIDEHIGHERED.COM (Mar. 25, 2015), <https://>

In a dynamic world of higher education, observers of all the different regions have noted increased transnational linkages and “exports” of the various models of exchange, what one might characterize as the good, the bad, and the ugly of international education.²⁰¹ There is a veritable flood of scholarship on the

www.insidehighered.com/news/2015/03/25/foreign-enrollments-booming-australia-sees-competitive-edge (same).

201. See Grant McBurnie & Christopher Ziguras, *The Regulation of Transnational Higher Education in Southeast Asia: Case Studies of Hong Kong, Malaysia and Australia*, 42 HIGHER EDUC. 85, 85–86 (2001) (stating concerns about the quality of transnational programs have led exporters to formulate guidelines); Christopher Ziguras, *The Impact of the GATS on Transnational Tertiary Education: Comparing Experiences of New Zealand, Australia, Singapore and Malaysia*, 30 AUSTL. EDUC. RES. 89, 89–90 (2003) (discussing recent trends towards transnational education in S.E. Asia); Stephen E. Blythe, *The Tiger of the Peninsula is Digitized: Korean E-Commerce Law as a Driving Force in the World’s Most Computer-Savvy Nation*, 28 HOUS. J. INT’L L. 573 (2006) (discussing the growth of e-commerce in Korea); Jason E. Lane & Kevin Kinser, *Africa: The Next Market for Cross-Border Higher Education?*, CHRON. HIGHER EDUC. (Sept. 20, 2011) <http://chronicle.com/blogs/worldwise/africa-the-next-market-for-cross-border-higher-education> (suggesting Africa is poised to be the next market for cross-border higher education); Michel Coutu & Marie-Hélène Giroux, *The Aftermath of 11 September 2001: Liberty vs. Security Before the Supreme Court of Canada*, 18 INT’L J. REFUGEE L. 313, 313 (2006) (“The terrorist acts of 11 September 2001 and the war on terrorism that followed have induced a pervasive sense of insecurity in Canada as elsewhere, and brought about a shift of public policy towards a confinement of security risks in a global era.”); Colin Woodard, *Far From Canada, Aggressive U.S. Border Patrols Snag Foreign Students*, CHRON. HIGHER EDUC., Jan. 14, 2011, at A1 (stating that in certain regions near upstate New York, enforcement is making professionals feel uncomfortable, rather than protecting U.S. borders); Colin Woodard, *Canadian Ph.D.’s See Downside in Global Goals, Their Work May be Undervalued as Country Pursues Excellence*, CHRON. HIGHER EDUC. (Apr. 15, 2011), <http://chronicle.com/article/Canadian-PhDs-See-Downside/127057> (noting the negative effects of globalization on Canada’s social sciences and humanities); Anita Gopal, *Canada’s Immigration Policies to Attract International Students*, 75 INT’L HIGHER EDUC. 19, 19–20 (2014) (discussing recent legal trends in Canada regarding the treatment of foreigners and attraction of transnational students); Philip G. Altbach, *Can Hong Kong Keep Its Lead in the Brain Race?*, 45 INT’L HIGHER EDUC. 15, 16–17 (2006) (noting the potential risks to Chinese universities of working with lower-quality foreign colleges and universities); Paul Mooney, *The Wild, Wild East*, CHRON. HIGHER EDUC., Feb. 17, 2006, at A46; Paul Mooney, *In a Rural Chinese Province, an American Educational Outpost*, CHRON. HIGHER EDUC., Feb. 17, 2006, at A49 (describing the potential issues of opening branches of American universities in China); Elizabeth Redden, *In Over Its Head?* INSIDEHIGHERED.COM (Dec. 15, 2010), <http://www.insidehighered.com/news/2010/12/15/keuka> (questioning the quality of American colleges overseas); Andrew Jacobs, *Rampant Fraud Threat to China’s Brisk Ascent*, N.Y. TIMES, Oct. 7, 2010, at A1 (expressing China’s issues of fraudulent resumes and the necessity of the government to strengthen criteria for

phenomenon of globalization, at the large macro-systemic level and at the institutional and field-of-study levels, all of which implicate immigration and nationality law as the mechanisms for student and scholar flows.²⁰²

teaching research ethics); Hilary K. Josephs, *Residence and Nationality as Determinants of Status in Modern China*, 46 TEX. INT'L L.J. 295 (2011); Steinberg, *supra* note 42, at A1 (discussing recent trends towards increased internationalism in higher education in the far east); Gracia Liu-Farrer, *Educationally Channeled International Labor Mobility: Contemporary Student Migration from China to Japan*, 43 INT'L MIGRATION REV. 178, 178 (2009) (discussing the value of transnational education in the Japanese economy); Marion Lloyd, *Lack of Financing Is Cited as the Top Obstacle to Internationalization*, CHRON. HIGHER EDUC. (Oct. 20, 2010), <http://chronicle.com/article/Lack-of-Financing-Is-Cited-as/125079> (citing the lack of financing as the primary obstacle to internationalization); Marion Lloyd, Karen Birchard & Jennifer Lewington, *A Higher-Education Framework for the Americas is Envisioned, but Some Wonder Who Might Lose Out*, CHRON. HIGHER EDUC. (Oct. 22, 2010), <http://chronicle.com/article/A-Common-HigherEducation/125062> (discussing the possibility of a common higher-education framework in America, along with the pros and cons of such a system); Markku Suksi, *Reform of Regional State Administration and Universities*, 16 EUR. PUB. L. 357 (2010) (discussing recent trends in higher education law in Finland that affect transnational education); Michael A. Olivas, *Colleges Should Think Twice About Exporting Their Programs*, CHRON. HIGHER EDUC. (Nov. 7, 2008), <https://chronicle.com/article/Colleges-Should-Think-Twice/30571>; Mills, *supra* note 42 (discussing recent trends in Dubai); Ulrich Teichler, *Ideas of Student Mobility in Germany*, 67 INT'L HIGHER EDUC. 14 (2012) (discussing recent trends in Germany in relation to the ERASMUS program); Jan Kercher & Nicole Rohde, *German Students Abroad*, 75 INT'L HIGHER EDUC. 18, 18 (2014) (discussing transnational education trends in Germany); William Yong, *In Iran, Future of University Is in Flux*, N.Y. TIMES, Oct. 16, 2010, at A4 (discussing recent trends in Iran); Stephen Hoare, *Universities in Belarus Seek to Raise Standards*, INSIDEHIGHERED.COM (May 16, 2014), <https://www.insidehighered.com/news/2014/05/16/universities-belarus-seek-raise-standards> (discussing recent trends in Belarus); ANGÉLINE ESCAFRÉ-DUBLET, *MIGRATION POLICY INST., MAINSTREAMING IMMIGRANT INTEGRATION POLICY IN FRANCE: EDUCATION, EMPLOYMENT, AND SOCIAL COHESION INITIATIVES* (2014) (discussing recent trends in France).

202. See Eric Beerkens, *Globalisation and Higher Education Research*, 7 J. STUD. INT'L EDUC. 128, 145–46 (2003) (discussing the impact of globalization on higher education); Brendan Cantwell & Alma Maldonado-Maldonado, *Four Stories: Confronting Contemporary Ideas About Globalisation and Internationalisation in Higher Education*, 7 GLOBALISATION SOC. & EDUC. 289, 289 (2009) (discussing the importance and implications of globalization on colleges and universities); Frans van Vught, *The EU Innovation Agenda: Challenges for European Higher Education and Research*, 21 HIGHER EDUC. MGMT. & POL'Y 1, 3 (2009) (discussing the innovation agenda of the European Union in response to the globalization trend); THE GLOBAL CLINICAL MOVEMENT: EDUCATING LAWYERS FOR SOCIAL JUSTICE (Frank S. Bloch ed., 2011) (providing an overview of the global clinical legal education); Julian Lonbay, *The Changing Regulatory Environment Affecting the Education and Training of Europe's*

The popular press and higher education trade press have faithfully reported these developments, and many of them are unsettling, particularly to the extent that bad governance or bad mechanisms, as apparently occurred in the London Metropolitan matter, can crowd out the desire for good programs. And while we must acknowledge the Biblical admonition that we shall always have the poor among us, the economic inequalities are exceptionally apparent, in that it is largely the advantaged throughout the world who attend college, and without agreeing upon the proper comparative units for analysis, we cannot always even tell who are the free-riders, or where inequality has been reduced or worsened.

IV. CONCLUSION AND CAUTIONS

One of the useful reports produced by Eurostat, “The Bologna Process in Higher Education in Europe: Key Indicators on the Social Dimension and Mobility, 2009 Edition,” summarized the mobility data of Member-state students and scholars, noting the large infrastructure erected for relatively modest student flows:

The percentage of students enrolled in higher education abroad in Europe is quite low (2.3 % of students with citizenship in the European Union were studying abroad in Europe in 2006), but this outbound mobility rate is increasing continuously, both in the EU-27 and in the Bologna Area (+5 % annually on average between 2000 and 2006).

Inbound mobility rates in Europe on the whole stood at 7 %, with around half of these students being non-citizens from within the Bologna Area. However, amongst others, Belgium, France, Austria, the United Kingdom and Switzerland registered an inbound mobility rate above 14 %, similar to that of Canada.

Despite a continuous increase of foreign students enrolled in the EU-27 at ISCED level 5 and 6 (albeit remaining low compared to Australia or New Zealand)

Lawyers, 61 J. LEGAL EDUC. 479 (2012) (discussing the education of European lawyers in relation to the increasing regulatory schemes).

the proportion of them coming from the Bologna Area has dropped.

In the EU-27, more than 10 % of graduates were not citizens of the country of graduation. In Australia and New Zealand non-nationals accounted for around one third of all graduates. Within the European Higher Education Area, the highest share of international graduates was registered in the United Kingdom, with 22 % [of graduates at ISCED 5A and 6 having their permanent residence outside the country].²⁰³

When the cheerleader for the enterprise has such a bleak prognosis, one cannot help but wonder at the enormity and possible mismatch of the fiscal and political resources relative to the student participation rates. There are, of course, many students involved in formal and informal cross-border study that does not fall under the watch of Bologna, so these numbers may be artificially somewhat lower than the cases in real life. Nonetheless, the data do suggest that there is still much excess capacity in the system, not being used by students. At the least, sojourners are not evenly distributed throughout the system.

As one final footnote, it is worth observing that in a shrinking world with near-universal access to transportation and postsecondary program information, it is likely that student mobility will increase—not in a smooth fashion equally distributed across nations but more likely in a punctuated and irregular pattern—and that any administrative details will have to exist within complex cross-national systems, most obviously finance- and immigration-related. Unsurprisingly, several of the same themes appear across national and transnational polities, especially the use of often-problematic durational requirements, residency rules, tax contributions as a basis for full participation,

203. EUROSTAT, THE BOLOGNA PROCESS IN HIGHER EDUCATION IN EUROPE: KEY INDICATORS ON THE SOCIAL DIMENSION AND MOBILITY 97 (2009), available at <http://ec.europa.eu/eurostat/documents/3217494/5713011/KS-78-09-653-EN.PDF>. See also Elizabeth Collett, *The Development of EU Policy on Immigration and Asylum: Rethinking Coordination and Leadership*, MIGRATION POL'Y INST., <http://www.migrationpolicy.org/research/development-eu-policy-immigration-and-asylum-rethinking-coordination-and-leadership> (last visited Apr. 4, 2015) (“[I]mmigration as a topic has outgrown the Home Affairs portfolio, and as such needs to be addressed in a more cross-cutting fashion, involving multiple spheres of government.”).

the difficulty in establishing cross-generational funding policies and even determining the appropriate unit of analysis, and the asymmetrical features of all systems, leading to wealth and other differentials, no matter the apparent neutrality of the policy criteria. No observer can fail to note the problematic practice of tying where one lives to eligibility for citizenship, sojourner status, or benefits; what appears to be intuitive can be made topsy-turvy by the multiple complications in drawing these lines to determine who is in and who is not favored, or what behaviors qualify and which do not. Residency and variegated durational and domiciliary criteria continue to vex, especially when they are used as proxies for membership and belonging through a mobile world.²⁰⁴

These issues of intra-state equity determined by resident and non-resident tuition and fee structures are currently playing out in California and Alaska, and their resolutions will be ugly, will invite fraud and misrepresentation, and will tear apart the communitarian comity structures that have made possible the major public U.S. institutions of higher education. Immigration restrictions will also play out in the singling out of outlaw regimes, such as U.S. and Dutch attempts to restrict Iranian engineering students, and the decision of the University of Twente to ban Iranian students.²⁰⁵ Law and finance lurk in every decision

204. See Michael Adler, *The Habitual Residence Test: A Critical Analysis*, 2 J. SOC. SECURITY L. 179, 186 (1995) (describing the habitual residence test utilized in the United Kingdom); *Any Place I Hang My Hat*, *supra* note 3, at 55 (noting that free mobility is important to protect); *Higher Education, Equal Access, and Residence Conditions*, *supra* note 190, at 227 (2005) (stating that nondiscrimination and free movement should mean that every citizen, wherever they come from, is able to choose his community and be treated there as an equal). See generally *Cross-Border Educational Mobility*, *supra* note 180 (exploring the EU citizen's free movement rights in the context of Community Law); Cousins, *supra* note 180, at 131 (discussing the extension of benefits to residents); Dimitry Kochenov & Benedikt Pirker, *Deporting the Citizens within the European Union: A Counter-Intuitive Trend in Case C-348/09, P.I. v. Oberbürgermeisterin der Stadt Remscheid*, 19 COLUM. J. EUR. L. 369, 369–72 (2013) (discussing recent EU deportation trends through a detailed analysis of the *P.I.* case).

205. See *Immigration Office Softens Stand on Permits for Iranian Nationals*, DUTCHNEWS (July 4, 2012), http://www.dutchnews.nl/news/archives/2012/07/immigration_office_softens_sta (discussing the Dutch ban, especially through the University of Twente, on all Iranian student applications); Iran Threat Reduction and Syria Human Rights Act of 2012, *supra* note 71 (proscribing the U.S. ban on Iranians); Diego Acosta

structure, especially a reasonable transnational tax architecture, and some of these are in obvious tension with each other, such as the several apparently-conflicting principles in the EU.

The existing national governance architectures sharply differentiate the issues among U.S., EU, and other regional consortia and systems, but together, they do form a worldwide system, where eager students go online or seek advice (particularly in English, a natural advantage shared by the UK, Australia, Canada, and the United States) in a more thorough and searching way, and they do not necessarily care about these facilitating structures. They simply choose a school, apply to it, and then organize their resources to attend it. This basic transaction of attending college, evident in the Mexican milpas, the African savannahs, rural Northern New Mexico, traditional Oxbridge, and the Chinese mountains, is as simple as that, and, as complex as all that.

Arcarazo and Andrew Geddes, *The Development, Application and Implications of an EU Rule of Law in the Area of Migration Policy*, 51 J. COMMON MKT. STUD. 179, 184 (2013) (describing a case where an Algerian national was deported from Italy); Jeremy C. Fox & Steve Annear, *UMass Amherst Bars Iranians From Science Grad Programs; Says Accepting New Students Could Violate US Sanctions*, BOS. GLOBE, Feb. 14, 2015, at A1. This has also been affected by actual terrorist attacks against colleges, and by college students themselves being recruited as terrorists. See, e.g., Aisha Labi, *New Law in Britain Pushes Universities to Help Stanch the Flow of Islamic Fighters*, CHRON. HIGHER EDUC. (Mar. 30, 2015), <http://chronicle.com/article/New-Law-in-Britain-Pushes/228859>; Jeffrey Gettleman, *Promised Mercy, Kenyan Students Got Bullets*, N.Y. TIMES, Apr. 4, 2015, at A1 (reporting on massacre of nearly 150 students by terrorist group Shabab against Kenyan college students).