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Michael A. Olivas, *The Growing Role of Immigration Law in Universal Higher Education: Case Studies of the United States and the EU***

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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 U.S., 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). (Shachar, 2006; Solimano, 2008; Lawler, 2009; Kato and Sparber, 2010; Anderson, 2010; Cantwell, 2011; Basken, 2012)

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 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. (Olivas, 2009) Perforce, immigration law has become the technical and policy regime for effectuating and implementing these interests.

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. (Two unexpected findings: cases on undocumented immigrants in both venues, and widespread use of durational residency requirements. [Adler, 1995; Davies, 2005; Cassarino, 2009; Griffin, 2012]) The review of events traces back just before the most important existential event of the twenty first century, the terrorist attacks upon the U.S. in 2001, and then considers the reflexive and resultant immigration changes initiated as a direct result of these international terrorist threats.

In addition, in the US, 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 presence in the U.S. (Olivas 2012a, b)

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 institution in the US 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. (Lee, Maldonado-Maldonado, and Rhodes, 2006; Mény, 2008;

Slaughter and Cantwell, 2011) 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: Pre-9/11 (1980-September 11, 2001)

In the dozen 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. Following the election of President Ronald Reagan and his inauguration, the hostages were released on January 21, 1981, 444 days after the original siege. 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.” Each Iranian student in the U.S. 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. 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. A 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. (at 1145)

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".

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. (at 746-747, citations omitted)

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": "classifications 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." (at 748).

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. The Supreme Court denied certiorari on May 19, 1980, 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 US institutions in 1981, 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. (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 the more unforgiving current immigration regime.)

By the time the hostages were released in January, 1981, more than half a dozen other cases involving Iranian non-immigrants were being heard in federal courts. (Yarbrough, 1982; Lanphier, 1984; Bollag and Neelakantan, 2006) 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. On May 9, 1980, just before the U.S. Supreme Court denied cert in the *Narenji* case, allowing the DC Appeals Court decision to stand, the NMSU Regents passed a Motion:

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 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." (at 1368)

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." (at 1370, citations omitted). 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.

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. The Judge also swept this aside:

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. (at 1371)

When he 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." (at 1379-1380)

The federal courts deciding *Narenji* and the subsequent *Tayyari* employed two different constitutional standards in upholding the federal regulation and in striking down the state university regental 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, 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.

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; the lowest number occurred in 1999, when there were fewer than 1,700 students. (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 2010/11 academic year, 5,626 students from Iran were studying in the United States (up 19% from the previous year), with 83.5% being enrolled as graduate or other post-baccalaureate students. Iran was the greatest sender nation of students to the U.S. from 1974 to 1983, while it is barely in the list of the top twenty five senders in 2011. (Torbaty, 2010; IIE, 2011) Until 2011, Iranian students could only enter and exit once on their student visas, the only entry-exit restriction affecting a specific single country. In 2012, additional immigration restrictions were placed upon Iranian students studying in U.S. colleges and seeking employment in nuclear energy fields, broadly affected.

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 (Bollag and Neelakantan, 2006), longstanding prohibitions on curricular study for international students in sensitive subject matter (GAO, 2005), and 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 (ACLU, 2006; Bollag and Canevale, 2006; Basken, 2012). 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 transparent, but these mask the complexities that underpin international student admissions. (Berger and Borene, 2005; Committee on Policy Implications, 2006; GAO, 2007) The purpose of this project is not to parse these immigration requirements, which feed a large industry practice and support network. For example, the NAFSA: Association of International Educators organization [www.nafsa.org] represents their interests in the United States, organizes the process, and has professionalized the international student advisor network. (Bollag, 2006c) 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. (NAFSA, 2003; NAFSA, 2006) Another network, the Institute for International Education [www.IIE.org] fosters exchange programs, evaluates transcripts, and provides technical assistance among world higher education systems. (IIE, 2011) 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. (Archibold, 2006; ACE, 2006; IIE, 2011; Flora and Hirt, 2010) 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. (GAO, Redden, 2010a, 2010b; Anderson, 2010; Mills, 2010; Pope, 2011; Steinberg, 2011; Kever, 2012)

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. (There are a number of other immigration categories that allow study, but these are the major such vehicles.) 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. (McMurtrie, 1999) 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. (Kapoor, 2005) And, while most international students will have permission to remain in the US 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 intervention (name omitted for political purposes, in case I need another favor) 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. (Berger and Borene, 2005; Steiner-Long, 2005; Shachar, 2006; Lawler, 2009)

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.

(McMurtrie, 1999) Additionally, there has been a surprising amount of litigation involving international students and scholars, ranging from financial aid eligibility, (Nyquist v. Mauclet, 1977) employment issues, (Cantwell, 2011) ability to travel to the US (and its converse, the inability of many US citizens to travel on scholarly exchanges to Cuba), (Bollag, 2006b, 2006d, 2006e) insurance requirements, (Ahmed v. University of Toledo, 1986) discrimination allegations, (Gott, 2005) retaliation for diplomatic reasons, (Bollag and Canevale 2006; Bollag, 2006c, 2006e) and many other dimensions. (Guterman, 2006; Jordan, 2006; Cooper and Shanker, 2006; Kato and Sparber, 2010) While length considerations preclude fuller details, suffice it to say that this is a rich legal literature and substantial practice area. And the results reveal that international student prevail as well as lose in 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 US 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 US 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) (Bollag, 2006f; Buruma, 2007; American Academy of Religion v. Napolitano, 2009), gives cause for cheer, only to be offset by the government’s refusal to allow US citizens to re-enter the country from Pakistan (Bulwa, 2006). After the initial cheer about Professor Ramadan’s fate, the U.S. refused him entry, on different grounds. (Shuppy, 2006) 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. (Archibold, 2006) Professor Ramadan, after being refused entry into the US, was appointed by British Prime Minister Tony Blair to a working group to advise him on UK terrorism. (Blair, 2006; Labi, 2006) 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 US colleges and corporations will read about their achievements from abroad and see them recorded in patent offices elsewhere. (Bollag and Neelakantan, 2006; Blythe, 2006) 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. (Committee on Policy Implications, 2006; Anderson, 2010)

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.

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 13, 2002) [data collection on

international students and scholars];

Public Health Security and Bioterrorism Preparedness and Response

Act of 2002 (BPRA), 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. (GAO, 2005, 2007; Olivas, 2004, 2009; "U.S. Citizens" 2006) 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. (DOJ, 2002; Chang, 2003; Sutton, 2009)

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 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. (Legomsky, 2005: 843)

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. (Kobach, 2005, 2007) 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. 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 1, 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. 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. (Wadhia, 2012; Chishti and Bergeron, 2011) 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 required to use it. Both NSEERS and SEVIS were to be rolled into a more comprehensive data base called the U.S. Visitor and Immigration Status Indication Technology System (U.S. VISIT), 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. (Berger & Borene, 2005; Kapoor) 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. (Olivas, 2004; GAO, 2007) 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.” [Sec. 501] This

provision is effective "with respect to visa applications filed on or after" August 10, 2012. After the EU developed similar sanctions, institutions in the Netherlands moved to restrict Iranian students, who took the matter to court and prevailed. ("Immigration office softens stand," 2012)

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 (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. 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. Other states followed Texas' lead and through 2012, fourteen states have allowed undocumented students to establish residency and pay in-state tuition: one state (Oklahoma) had granted this status and then rescinded the financial aid part of the statute; South Carolina voted to ban the undocumented from attending its public colleges. Wisconsin has since rescinded its statute, while Maryland enacted such an accommodationist law, but the voters signed enough petitions to set the measure on the 2012 for a recall measure; California added financial aid, to begin in 2013, 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. (Olivas, 2012c)

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 are due soon on this issue, which implicates the same Sections 1621 and 1623 that govern in-state tuition, as in Martinez. (Esquivel, 2012; Winograd, 2012, DeBenedictis, 2012) 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, 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 their 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: “the 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, and the schools must similarly use federal immigration status standards to identify illegal alien applicants.”

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, in-state 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.

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 et al v Trustees, California State University et al*. 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. The order overturned CSU’s odd and 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. 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.

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. HESSA*, 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 extent the agency's 2005 regulation irrebuttably 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." 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. (Vasquez, 2011; Avila, 2012; Olivas, 2012c)

In Fall, 2010, at the urging of Latino groups, and to jumpstart comprehensive immigration reform, Sen. 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." He also added two other amendments: a repeal of Don't Ask, Don't Tell, regarding the enlistment of gays 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. 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). Sen. Reid voted No after it was clear that he did not have the required 60 votes. (The No vote for his own motion allowed him to call for reconsideration.) 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. 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. 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). 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. Four members were not present for the vote. The ultimate irony was that in a separate vote, the offending Don't Ask, Don't Tell policy was repealed, and that Sen. Hatch, who introduced the original legislation a decade earlier, did not vote for the DREAM Act. (Olivas, 2012c)

These Sections have documented the extensive previous legislative activity, the dramatic 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, has been challenged but has remained good law nearly thirty years after the 1982 decision. 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. (Olivas, 2012a)

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 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 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). (Olivas, 2012b, 2012c; Wadhia, 2012)

The review, which had seemed so promising, was underwhelming by any measure. The Obama Administration began the most aggressive enforcement in US 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. (Preston, 2010) 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 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. (Olivas, 2012 b, 2012c) 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. (Preston, 2012a)

Worse, a number of DREAMers had become frustrated by the legislative failures, and with no futures, they began to "out" themselves in a longstanding United States 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. (Gildersleeve and Hernandez, 2010; Legomsky, 2011; Corrunker, 2012; Lauby, 2012) And in the difficult 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. (The only exception was the hapless Texas Governor Rick Perry, whose having signed the state's DREAM Act legislation twice made him the piñata of the group.)

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. (DeBenedictis, 2012; Winograd, 2012; Pearson, 2012) They were very visible in the public domain, and effectively lobbied the Obama Administration for some form of administrative relief. (Jordan, 2012) 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. (Preston and Cooper, 2012; Meckler and Jordan, 2012; Esquivel, 2012; Jordan, 2012) It appears that President Obama heard, and in June, 2012, he announced an even more expansive Deferred Action policy for DREAMers, which is still in the implementation first phases. (Waslin, 2012; Preston and Cushman, Jr., 2012; Emmanuel, 2012; Olivas, 2012c; NILC)

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. Mitt Romney has indicated his determination to veto any version of the Dream Act, and Rep. 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.

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 new political will, but it does 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. (Wadhia, 2011; Olivas, 2012b, 2012c) 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. 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. 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 program has been underwhelming. Bear in mind, too, that this administration removed and deported nearly 400,000 unauthorized immigrants in the previous year. 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. (Preston and Cooper, 2012)

What is clear is that very few (and certainly not all) of those being reviewed have received employment authorization with any reprieve they may have gotten. Their status is essentially frozen. The President's announcement appeared 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. There is a new application procedure for deferred action and many details yet to be determined. I tell students not to out themselves to enter the system, especially if they have some misdemeanors or a criminal record, as it could also bring their undocumented parents to the attention of the authorities, and no provisions have been made for them. Deferred action is a vague and confusing process—and mistrust about the program has led to wariness and a wait-and-see approach. (Bennett & Chang, 2012; Semple, 2012)

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 will very likely not be able to raise a claim under this policy, because they will have been unable to enroll in college. While a dozen states have laws granting some undocumented immigrants in-state tuition rates, most do not. Even if the 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 policy were purely chimerical. The announcement refers to members of the military being "eligible" for this new relief, but undocumented adults cannot legally enlist under current law, nor can deferred-action grantees. Such absurd promises undermine the real value of President Obama's announcement, which calls attention to the vexing issue of how to deal responsibly with the potential, and eventually likely, new members of our American community. I add, but need not, that administrations come and go, and that such initiatives can wax and wane. President Obama's reelection cured this concern, yet it is unclear if he 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 approach just announced 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, we have not resolved the impasse.

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. (Chishti and Hipsman, 2012) Their chances of being deported may be reduced, but without employment authorization and 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. (Preston, 2012) It is not nothing, and if they do receive employment authorization, as appears to be happening in the early cases, their life chances will improved 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. (Gonzalez and Wingett Sanchez, 2012) Early evidence suggest that the immigration authorities are being generous and granting DA in large numbers as well as employment authorization, likely the low-hanging easy fruit. (Yager, 2012; Updated Practice Advisory, 2012) 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.

III. The EU as a Loose Federation

Given the mobility across countries that is a key EU citizenship right, and although various immigration laws of the Member States do not apply directly to EU citizens or apply radically differently to EU citizens (since EU citizens can still be deported in exceptional circumstances), in the large arena of higher education in the EU, 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 college student loans and grants. (Cassarino, 2009; Vincent-Lancrin and Pfothenauer, 2012; Lam, 2012) 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 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. (Kondacki 2001; Kochenov, 2003; Bulzomi and Leskinen, 2007; DeWit at al, 2008; Balcao Reis, 2010; Kostakoupoulou, 2009; 2012; O'Leary, 2011; Garben, 2012)

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. 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, as EU citizens benefiting from EU non-discrimination on the basis of nationality law, are entitled to pay Scottish tuition rates.

This paper concludes 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. (Labi, 2011a, b; 2012)

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 47 States. (Eurostat, 2009, 2012; Garben, 2010, 2012; Education, Audiovisual, 2012) 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 targets. 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. 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. (Landler, 2006; Jorgenson, 2009; Cassarino, 2009; Goudappel, 2010; Mathisen, 2010; van der Mei, 2011; Cousins, 2011; Jiménez Lobeira, 2012)

From its inception in 1998, the Bologna Process 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 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. (Schwarz and Rehburg, 2004; Davies, 2005; van der Mei, 2009, 2011; Mathisen, 2010; Komada, 2011; Kondakci, 2011; Lam, 2012) 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 in the 2009-2012 worldwide economic downturn, their economic soundness and credit worthiness. (Garben, 2010, 2012; Kelemen, 2011; Gideon, 2012)

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, to a certain extent, there is an equalizing function at play, with greater student financial aid being met by an accordingly larger “need-based” aid. (Ehrenberg, 2000) 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. (Olivas, 1985, 2009c) Perhaps most evident in this confusing process is that politics plays a disproportionate role, as when good winds blow (e.g., 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 U.S., 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 as loans, either subsidized or not fully underwritten by the state or federal government. (Blair, 2006; Johnstone and Marcucci, 2010) The increased U.S. use of various tax measures (such as Sec. 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. (Olivas, 2003, 2010; Lipman, 2011)

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.” (2004, at 531) They have also usefully categorized these “student role models”:

Students as responsible citizens: in this model, nearly all students receive financial support in the form of grants and loans. Usually, there are no student fees, but there is also no tax relief or child allowance for the students’ parents. This model is mainly found in the Nordic countries.

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. There are student fees, but not for those who receive support. This is the model applied in Western and middle European countries.

Students are children sheltered by their family: the majority of students live with their parents during their studies, who must ensure their children’s education. Support is only given in case of urgent need. There are student fees (except for Greece). The model is found in southern European countries.

Students are investors in their future career (UK and the Netherlands): students must contribute to their education, hence high student fees. Students may receive public support in the form of grants and especially loans, students themselves are responsible to make proper use of it. (531)

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 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. (Lyll, 2010; Loftus, 2011; Daley, 2011; Cody, 2011; Gideon, 2012)

The recent UK decisions to reduce traditional appropriations levels has caused painful cuts, necessitated retrenchment of redundant or marginal programs, caused a sharp applications decline from 2010 to 2012, and required enormous tuition and fee increases. The chair of the Independent Commission on Fees reported: "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." (Smith and Bryska, 2012) 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 restrict 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," but the new rules will allow only graduate students enrolled at universities and government-sponsored students to bring in family members. . . the 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 other students 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 an offer of a skilled job from a sponsoring employer will be allowed to remain in Britain to work once they have finished their studies. Finally, the overall 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. (Labi, 2011a)

Related college law decisions in ECJ cases

Using any single Member State as a case study is difficult. 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. Its worldwide popularity is

exemplified as well by the number of non-EU students it attracts each year, and 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 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 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. “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.” (Guttenplan, 2012) To be sure, there was 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 U.S., it would be as if a 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.” (Lambert, 2012) As classes were about to start, a judge enabled the students who were affected to be enrolled for one term, but he did not rescind the original decision, which is under appeal. (Travis and McClean, 2012)

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. 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 requirement is not satisfied, sufficient “integration.” (Bidar) 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. (Grzelczyk; Ruiz Zambrano) 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. (Davies, 2003;

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 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. In the EU and with relation to students from Member State, this test is relatively easy to satisfy. For example, spending 6 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.

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), 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. In other words, in principle, the distinction established in Gravier between grants and tuition rates holds. Also unlike the U.S. 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 (i.e., Scotland/UK; Amsterdam/Aruba etc.) 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 5 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 5 years; such integration requires sufficient integrative measurements, such as 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 lesson from Bidar. There is a line in EU caselaw 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. (O’Leary, 2008)

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. 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 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. (Cambien, 2012; “Erasmus Endangered?,” 2012) Examples include the United States (Fischer, 2012; Sandoval, 2012), France (“French government, 2012), India (Neelakantan, 2012), Germany (Smith, 2012), Canada (Freeze, Bradshaw, and MacKinnon, 2012; Seidman, 2012), Australia (Corones, 2012) and throughout the world (Wilkins and Huisman, 2012; Labi, 2012). 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 (Olivas, 2009a, 2009c)—have led to court challenges in the U.S., 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. (Lawler, 2009; Hailbronner and Thym, 2011; Komada, 2011; Olivas, 2012b; Olivas and Kochenov, 2012) European legal scholar Annette 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.” (2011, at 10-11)

In a case that was decided twenty years after the 1985 Gravier case, the equal treatment principles were upheld with a vengeance, when the Frenchman University College London student Dany Bidar was determined to be eligible for the tuition rates to which an English student would be entitled. 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 irrefutably a non-national. Invoking the 2001 Grzelczyk case, the Court in Bidar took notice that the intervening Treaty on 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. 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 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.” Case C-209/03, *Bidar*, [2005] ECR I-2119

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.” Case C-158/07, *Förster*, [2008] ECR I-08507.

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. *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 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 (EU Citizens Directive 2004/38). 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. (Dougan, 2005, 2008; Golyner, 2006; Glazer, Kanninen, and Poutvaara, 2008; Cousins, 2011; Jiménez Lobeira, 2012; Kochenov, 2012; Gideon, 2012) In addition, limitations upon states being able 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 argument in charging tuition to undocumented children. (Olivas, 2012c)

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), 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. (O’Leary and Hailbronner, 2005; Davies, 2005a; 2005b; O’Leary, 2008) 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 materials cope of EC law in a manner which appears to contradict the terms of EC secondary legislation on free movement, residence and equal treatment.” (2008, at 13)

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 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.” (Schuetze, 2011)

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. (Jørgensen, 2009) 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. (van der Mei, 2003a, 2003b, 2009, 2011; Wiesbrock, 2010; Mathisen, 2010)

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. (One notable exception is the work by Rodríguez González, Bustillo Mesanza, and Mariel, 2011.) 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. 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. (Davies, 2005; van den Berg, 2007; Mathisen, 2010; Perkins and Neumayer, 2011; Schrauwen, 2011; Kelemen, 2011; Labi, 2011b)

Annette Schrauwen has perceptively summarized the conundrum of such a polity, where a given benefit program—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 mobility....” (2011)

She proposes 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.” (Schrauwen, 2011)

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. 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. (Davies, 2005b, 235-240; Glazer, Kanninen, and Poutvaara, 2008)

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 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. [2011, at 134, citations omitted] (van der Mei, 2003a, 2003b, 2009)

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, as “free movement,” to use another example of the term, does not mean completely free in the immigration or benefits contexts. In the U.S., 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 State’s public institutions. Although the State Legislature subsequent to the litigation changed the statute, the Court held, “Defendant 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. Louis...” (Sharp v. Curators of the University of Missouri) The Court fashioned a remedy that established a University-funded multi-million program to reimburse students who had been illegally required to pay tuition. The University unsuccessfully argued that the money that students had paid were “fees” rather than “tuition.” 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 cost of living measures. (Gordon, 2012; Jaschik, 2012) These actions, as noted, have been copied by several UK institutions, a dubious export. (Dougan, 2008; Glazer, Kannianen, and Poutvaara, 2008; Mangan, Hughes, and Slack, 2010; Gideon, 2012; Lonbay, 2012)

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. (Dougan, 2008; Wiesbrock, 2010; Mangan, Hughes, and Slack, 2010; Fearn, 2011) 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 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.” (Cambien, 2012, 36-37)

As a practical matter, this paper has focused upon U.S. and European 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 U.S. have expressed admiration for the overall exchange mechanisms in the Bologna Process, and want to graft such a structure onto the U.S. system, which has very loosely-connected international exchange tissues. (Lederman, 2010) 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. (Adler, 1995; “Australian Vocational Educators,” 2010; Kremmer, 2010; Schwartz, 2011; Wildavsky, 2011b; Williams and Pillai, 2012; Woodward, 2012; Kostakopoulou, 2012)

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. (McBurnie and Ziguras, 2001; Ziguras, 2003 [SE Asia]; Blythe, 2006 [Korea]; Lane and Kinser, 2011 [Africa]; Couter and Giroux, 2006; Woodard, 2011a, 2011b [Canada]; Altbach and Postiglione, 2006;

Mooney, 2006a, 2006b; Redden, 2006b; Jacobs, 2010; Josephs, 2011; Steinberg, 2011 [PRC]; Liu-Farrer, 2009 [Japan]; Lloyd, 2010; Lloyd, Birchard, and Lewington, 2010 [Latin and South America]; Suksi, 2010 [Finland]; Olivas, 2008; Mills, 2010 [Dubai]; Teichler, 2012 [Germany]; Yong, 2012 [Iran]) There is a veritable flood of scholarship on the 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. (Beerkens, 2003; Cantwell & Maldonado-Maldonado, 2009; Van Vught, 2009; Bloch, 2011; Lonbay, 2012)

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. (“Erasmus Endangered?”, 2012)

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 still quite low (2 % of students with EU-27 citizenship 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 5A and 6 (albeit remaining low compared to Australia or New Zealand) 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.” (2009, at 14) 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 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, 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. (Adler, 1995; Davies, 2005a; 2005b; Dougan, 2008; Cousins, 2011) 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. (“House Bill Bans Visas,” 2012; Jaschik, 2012; Griffin, 2012) Immigration restrictions will also play out in the singling out of outlaw regimes, such as U.S. and 2011-2012 Dutch attempts to restrict Iranian engineering students, and the decision of the University of Twent to ban Iranian students. (“Immigration office softens stand,” 2012) Law and finance lurk in every decision 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. (Glazer, Kannianen, and Poutvaara, 2008; O’Leary, 2008)

The existing national governance architectures sharply differentiate the issues among United States, EU, and other regional consortia and systems, but together, they form a worldwide system, where eager students go online or seek advice (particularly in English, a natural advantage shared by the UK 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.

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