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**The Challenges to Lawmaking With
Respect to Highly Qualified Immigration:
A Comparison of the European Union and
United States**

Lucy Haley

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Abstract

This paper compares the law and policy surrounding highly qualified immigration in the United States and the European Union. In recent years, both the United States government and the European Commission have adopted policies aimed at attracting and retaining highly qualified immigrants. This paper analyzes the effectiveness of such policies in facilitating highly qualified migration and promoting economic growth.

The paper begins with a comparison of the existing laws addressing highly qualified immigration to the U.S. and the EU. Specifically, the paper compares the H-1B visa/green card system in the United States with the Blue Card/Long-Term Resident permit system in Europe. In addition, laws regarding the entry and transition into the workforce of international students—viewed as a key source of human capital by policy-makers in both the U.S. and the EU—are addressed.

Two challenges for policy-making with respect to highly qualified immigration are discussed: the politicization of the topic of economic immigration, and the difficulty of achieving consensus with respect to immigration policy. Significantly divergent attitudes towards immigration between U.S. states and EU Member States—as well as differences in workforce demand for highly qualified professionals—complicate the implementation of a centralized immigration policy. The paper also considers the impact of the ongoing economic crisis on immigration policy-making, noting the extent to which the effects of the downturn have polarized public opinion in Europe and the United States.

Finally, the paper offers recommendations for both the United States and the European Union in developing an immigration policy that encourages economic growth. In particular, the paper emphasizes the importance of a centralized immigration policy that facilitates the mobility of highly qualified immigrants between the various U.S. states and EU Member States.

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I. Introduction

From the 1970s to the late 1990s, most European countries adopted restrictive immigration policies with the ultimate aim of zero immigration, leading critics of such policies to refer to the continent as “fortress Europe”.¹ Beginning in the late 1990s, policymakers at the European Union (EU) level began to recognize the need for a shift in this attitude towards immigration. Declining birthrates, an aging population, and low employment rates among native populations threatened to slow economic growth and overburden the extensive social welfare systems in place in most Member States. In response to these pressures², Europe has somewhat belatedly entered the “global war for talent”³, with policies at the EU-level as well as in several Member States aiming to encourage the immigration of highly qualified immigrants. Efforts to formulate an EU-wide immigration policy, however, have come into conflict with Member States that seek to limit immigration, as well as those that do not want to relinquish sovereignty to the EU by adopting a centralized migration policy.

¹ Andrzej Bolesta, *New Immigration Policy for Europe* 3-4 (Transformation, Integration & Globalization Econ. Res., Working Paper No. 70, 2004), available at <http://www.tiger.edu.pl/publikacje/TWPN070.pdf>. In October 1999, in its discussion of a common policy on immigration, the European Council explicitly rejected the aim of “zero immigration” and the following year, the Commission in a Communication to the Council, explicitly stated that “[t]here is a growing recognition that, in this new economic and demographic context, the existing “zero” immigration policies which have dominated thinking over the past 30 years are no longer appropriate.” *Communication from the Commission to the Council and the European Parliament on a Community immigration policy*, at 5, COM (2000) 757 final (Nov. 11, 2000).

² For example, the Commission’s 2005 Policy Plan on Legal Migration (*see infra* note 14 for further information) acknowledges the demographic need for additional migration, providing that “[w]ith regard to economic immigration, the current situation and prospects of EU labour markets can be broadly described as a “need” scenario . . . In consideration of the low employment and high unemployment rates in many EU countries, priority must be given to actions toward attracting more EU citizens and legally resident migrants to employment . . .” *Communication from the Commission: Policy Plan on Legal Migration*, COM (2005) 669 final (Dec. 21, 2005) [hereinafter *Policy Plan on Legal Migration*].

³ Although it appears that the idea of a “global war for talent” was initially used by consultancy firms, in the past decade use of the term has expanded beyond the world of human resources and has been applied to the discussion of national policies surrounding immigration. Phillip Brown and Stuart Tannock, *Education, Meritocracy and the Global War for Talent* 24 J. OF EDUC. POLICY 377, 380 (2009). As one article notes “Even governments have got the talent bug. Rich countries have progressed from simply relaxing their immigration laws to actively luring highly qualified people. Most of them are using their universities as magnets for talent.” Adrian Wooldridge, *The Battle for Brainpower*, THE ECONOMIST (Oct. 5, 2006) <http://www.economist.com/node/7961894>.

Despite its reputation as a nation of immigrants, since the 1960s, the U.S. government has considered that labor-based migration is not needed in the United States.⁴ Immigration policy since that time has focused on family reunification for existing, legally present immigrants. Unlike in the EU Member States, however, the U.S. has long made exceptions to this rule for highly-skilled immigration, allowing a set number of qualifying professionals to enter on a temporary basis each year, with the possibility of later attaining permanent residence.⁵ Since the mid-1990s, however, the demand for employment-related visas on the part of employers has greatly exceeded the supply, causing many policy-makers to reconsider the conclusion that economic immigrants are not needed. As in Europe, however, the U.S. faces difficulties in achieving consensus among the states – as well as between Democrats and Republicans – on what immigration policy should be.

Leadership within the EU, as well as in the U.S. government, has adopted the approach championed by many economists that highly qualified immigration is key to continued economic growth and must be more effectively promoted.⁶ At the same time, however, opposition to immigration has grown among many national populations, and democratic leaders have frequently found themselves obliged to consider policies that address the concerns of their anti-immigrant constituents. The financial crisis in the United States and Europe, which began in 2008, has caused a small decline in immigration numbers, but not a major shift, meaning that the debate is still highly relevant. The resulting slowdown in economic growth in the U.S. and in

⁴ T. ALEXANDER ALENIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA & MARYELLEN FULLERTON, *IMMIGRATION AND CITIZENSHIP, PROCESS AND POLICY* 351 (7th ed., 2012).

⁵ Exceptions from strict quotas on immigration for temporary immigrants of “distinguished merit and ability” have been in place since 1952, although the possibility to convert this temporary stay to permanent residence was introduced in 1990. Ruth Ellen Wasem, Memorandum from the American Immigration Law Association to the U.S. Congress, H-1B Visas: Legislative History, Trends Over Time, and Pathways to Permanent Residence (Mar. 20, 2006), *available at* <http://www.aila.org/content/default.aspx?docid=18974>.

⁶ For argument regarding the effects of immigration on wages, levels of employment and fiscal spending *see* text accompanying notes 131-136.

most European countries has polarized the debate on the benefits of highly qualified immigration further, with supporters arguing that laws that admit more highly qualified immigrants would boost job creation, and detractors arguing that increased immigration of any kind leads to declining wages and higher unemployment.

In Part II of this paper, I outline the laws in place regarding highly qualified immigration in both contexts, and compare the efficacy of these policies in promoting highly qualified immigration and economic growth. In Part III, I look at how divergent attitudes towards economic immigration between EU Member States and U.S. states have affected lawmaking in this area, and how politicization of the issue has hindered consensus making. In Part IV, I specifically consider the effects of the global financial crisis on the making and implementation of laws dealing with skilled immigration. I look at the policies adopted in the wake of the crisis by the U.S. government and by several Member States, as well as evidence regarding changes in public opinion. Finally, in Part V, I draw conclusions based on these findings, and provide recommendations on how the United States and the European Union might better use immigration policy, including policies on the admittance of highly qualified immigrants, to promote economic growth.

II. Laws Regarding Economic Migration in the U.S. and the EU

A. EU Law Regarding Economic Migration

It is only recently that laws regarding economic migration have begun to be harmonized between the EU Member States. Previously, determinations regarding the economic migration of third-country nationals had largely been left to the Member States, as expressed in Art. 79(5) of the Treaty for the Functioning of the European Union (TFEU), as amended by the Treaty of Lisbon, which provides that the treaty's measures on immigration "shall not affect the rights of

Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work.”⁷ As Steiner and Woods note, “Member States have fiercely resisted any attempt to set European rules on this question for fear of losing the ability to control the volume of economic migration into their countries.”⁸

This attitude has been gradually shifting in recent years, with the EU directives on family reunification⁹ and long-term residence¹⁰ representing the first significant steps towards harmonization. Directive 2003/109/EC on the Status of Long-Term Residents requires that Member States provide permanent residence for persons who have resided legally in a Member State for five years.¹¹ Because the EU cannot impose requirements on Member States’ citizenship policies¹², the Long-Term Residents Directive is a way of providing long-term residents with a status similar to Union Citizenship, allowing them to enjoy freedom of movement and social protection and assistance.¹³

The move towards harmonization began to gain significant momentum in December 2005, when the European Commission issued the Policy Plan on Legal Migration.¹⁴ The Commission proposed the adoption of a general framework directive and four specific directives dealing with highly qualified workers, seasonal workers, remunerated trainees, and intra-corporate transferees, respectively.¹⁵ The aim of the Plan was to attract workers to the EU, and to narrow the gap between Member States that provide a high degree of socioeconomic rights to

⁷ Treaty on the Functioning of the European Union, art. 79(5), consolidated version, as amended by the Treaty of Lisbon, 2010 O.J. (C 83) 47 [hereinafter TFEU].

⁸ JOSEPHINE STEINER & LORNA WOODS, EU LAW 588 (2009).

⁹ Council Directive 2003/86/EC, 2003 O.J. (L 251) 12,18.

¹⁰ Council Directive 2003/109/EC, 2004 O.J. (L 16) 44, 53 [hereinafter Long-Term Residents Directive].

¹¹ *Id.* art. 4(1). Residents must show that they have sufficient resources to provide for themselves and their families without state assistance. Member States may deny permanent residence on the grounds of public policy, and may impose “integration conditions” on third-country nationals as a condition of acquiring permanent residence status, such as language tests. *Id.* arts. 5, 6.

¹² STEINER & WOODS, *supra* note 8, at 584.

¹³ *Id.* at 585-86.

¹⁴ Policy Plan on Legal Migration, *supra* note 2.

¹⁵ *Id.*

third-country migrants on matters such as working conditions and pay, education, tax benefits, trade union rights, and social security, and the less generous Member States.¹⁶ The Plan explicitly references labor immigration as a strategy to combat the demographic change caused by low birthrates.¹⁷ Also in December 2005, the European Council adopted the Global Approach to Migration, aimed at establishing partnerships with non-EU countries to address migration flows, and to improve accountability and burden-sharing among the Member States.¹⁸ Since then, the Global Approach has been revised and reframed as the Global Approach to Mobility and Migration (GAMM), largely in response to increased flows of migrants and refugees as a result of the Arab Spring.¹⁹ In 2008, the Commission advanced a proposal for a common immigration policy for Europe, which set forth ten principles through which a common EU migration policy would be formulated, and proposals for their implementation.²⁰

Improving integration of immigrants into national and local communities is also a key component of the EU's immigration policy.²¹ Integration is important from a cultural and

¹⁶ See Andrea Broughton, *Commission issues policy plan on legal migration*, EUROPEAN INDUSTRIAL RELATIONS OBSERVATORY (Jan. 25, 2006) <http://www.eurofound.europa.eu/eiro/2006/01/feature/eu0601205f.htm>.

¹⁷ Policy Plan on Legal Migration, *supra* note 14, at 4-5.

¹⁸ Presidency Conclusions, Global Approach to Migration: Priority actions focusing on Africa and the Mediterranean, Brussels European Council (Dec. 15-16, 2005).

¹⁹ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. The Global Approach to Migration and Mobility*, COM (2011) 743 final (Nov. 18, 2011).

²⁰ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Common Immigration Policy for Europe: Principles, Actions and Tools*, COM (2008) 359 final (June 17, 2008).

²¹ The Common Agenda for Integration sets forth the EU's strategy for integrating third-country nationals (*Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Common Agenda for Integration: Framework for the Integration of Third-Country Nationals in the European Union*, COM (2005) 389 final (Sept. 1, 2005) [hereinafter Common Agenda]) and an updated report was completed by the Commission in 2011 (*Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. European Agenda for the Integration of Third-Country Nationals*, COM (2011) 455 final (July 20, 2011) [hereinafter European Agenda]). In addition, debates on integration are held regularly through the Ministerial Conferences on Integration and a European Integration Forum and European Integration Fund have been established to assist Member States and civil society actors with the integration process. See *A Common Agenda for the Integration of Non-EU Nationals*, EUROPEAN COMMISSION http://ec.europa.eu/home-affairs/policies/immigration/immigration_integration_en.htm (last visited May 25, 2012).

societal perspective, but also from an economic standpoint; on the whole, immigrants in EU Member States show lower levels of labor force participation than immigrants in the United States, Australia or Canada²² – they are also frequently employed in positions for which they are overqualified based on their education and prior labor market experience in their country of origin.²³

The first of the directives envisioned in the December 2005 Plan to be adopted was Directive 2009/50/EC (hereinafter, the “Blue Card Directive”), adopted in 2009, creating a new regime for the entry and residence of third-country nationals engaged in “highly qualified employment” – the EU “Blue Card”.²⁴ The Blue Card is an EU-wide work permit that is valid from one to four years, and can be renewed thereafter. It allows highly skilled workers to work in any Member State except in Denmark, the UK or Ireland, which opted out of the Blue Card regime to retain their existing national policies.²⁵ The original intent of the Blue Card was to allow the EU to compete with Canada, the United States and Australia in the global competition

²² According to statistics from the Organisation for Economic Cooperation and Development (OECD): “On average in European OECD countries, in the third quarter of 2010, 24.5% of young migrants were unemployed compared to 19.6% for the young native-born. Corresponding figures for the United States were respectively 15.8% and 18.8% (Canada 19.4% and 14.2%; Australia 12.9% and 11.3%; New Zealand 19.9% and 16.4%). OECD, INTERNATIONAL MIGRATION OUTLOOK: SOPEMI 2011 37 (2011) [hereinafter INTERNATIONAL MIGRATION OUTLOOK]. The European Commission has recognized and seeks through the integration program to help Member States to address the issue of labor force involvement and overqualification. The third principle of the Common Agenda states: “Employment is a key part of the integration process and is central to the participation of immigrants, to the contributions immigrants make to the host society, and to making such contributions visible.” Common Agenda, *supra* note 21, at 6. Similarly, the 2011 European Agenda identifies “the prevailing low employment levels of migrants, especially for migrant women” and “high levels of ‘over-qualification’” among immigrants as two of the “most pressing challenges” to integration. Potential solutions identified are “recognition of qualifications and competences from the country of origin”, promoting diversity in the workplace, and combating employment discrimination. European Agenda, *supra* note 21, at 3, 5.

²³ According to OECD data from 2000, the overqualification rate of foreign born to native-born workers was highest in Greece, Spain, Sweden, Italy and Denmark, and lowest in New Zealand, Slovakia, Poland, Canada and the United States. Explanations for this data explain that in Southern Europe immigration is relatively new phenomenon so the labor market may be take some time to adjust to the change, while Northern European countries have substantial refugee populations who often face special health, psychological and logistical complications in obtaining suitable employment. JEAN-CHRISTOPHE DUMONT & GILLES SPIELVOGEL, OECD, A PROFILE OF IMMIGRANT POPULATIONS IN THE 21ST CENTURY: DATA FROM OECD COUNTRIES 139-140 (2008). Data from 2003-2004 shows similar results. OECD, INTERNATIONAL MIGRATION OUTLOOK *supra* note 22, AT 137-138. It is worth noting that across Europe, national populations face vastly divergent levels of overqualification. *Id.*

²⁴ Council Directive 2009/50/EC, 2009 O.J. (L 155) 17, 29 [hereinafter Blue Card Directive].

²⁵ *Id.* recitals 28, 29.

for talent.²⁶ The directive as enacted allows Member States to control the number of Blue Cards issued by setting quotas based on national labor market conditions or refusing to issue Blue Cards if national quotas are exceeded.²⁷ Beginning in 2013, the Commission will collect statistics from the Member States on the Blue Card program on an annual basis, and from 2014 onwards, it will submit reports on the application of the directive to the European Parliament and the Council and propose any changes to the program.²⁸

The deadline for transposition of the Blue Card Directive was June 19, 2011; however, several Member States have been tardy in passing implementing legislation to bring the directive into force. In 2011, the European Commission issued reasoned opinions²⁹ to six Member States that had not passed the legislation necessary to implement the Blue Card program: Germany, Italy, Malta, Poland, Portugal and Sweden.³⁰ Implementing legislation has now been proposed in these countries but has yet to be approved.³¹ In February 2012, the Commission issued three more reasoned opinions to Austria, Greece, and Cyprus, who have also not yet transposed the

²⁶ See, e.g., RODERICK PARKES & STEFFEN ANGENENDT, HEINRICH BÖLL STIFTUNG, *AFTER THE BLUE CARD: EU POLICY ON HIGHLY QUALIFIED MIGRATION: THREE WAYS OUT OF THE IMPASSE 3* (2010); Elizabeth Collett, European Policy Centre, *The Proposed European Blue Card System: Arming for the Global War for Talent?* MIGRATION INFORMATION SOURCE (Jan. 7, 2008) <http://migrationinformation.org/feature/display.cfm?id=667>.

²⁷ LUCIE CERNA, INT'L LAB. ORG., *POLICIES AND PRACTICES OF HIGHLY SKILLED MIGRATION IN TIMES OF THE ECONOMIC CRISIS* 10 (2010).

²⁸ Blue Card Directive, *supra* note 24, at arts. 20, 21.

²⁹ Before the European Commission may bring a case against a Member State before the Court of Justice of the European Union, it must first issue a reasoned opinion. TFEU, *supra* note 7, at art. 258.

³⁰ Press Release, European Commission, 'Blue Card' – Work permits for highly qualified migrants 6 Member States fail to comply with the rules (Oct. 27, 2011), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1247&type=HTML>.

³¹ *Id.*; see also *Chamber of Deputies examining Blue Card Directive*, AFRICA NEWS (Apr. 2, 2012) <http://www.africa-news.eu/immigration-news/italy/4030-chamber-of-deputies-examining-blue-card-directive.html>; *VISA: Portuguese government realigns visa and residency policies – Portugal*, PORTUGUESE AMERICAN JOURNAL (Mar. 27, 2012) <http://portuguese-american-journal.com/visa-portuguese-government-realigns-visa-and-residency-policies-portugal/>; *EU stops proceedings against Malta over blue card warning*, MALTA TODAY (Feb. 27, 2012) <http://www.maltatoday.com.mt/en/newsdetails/news/national/EU-stops-proceedings-against-Malta-over-blue-card-warning-20120227>. However, implementing legislation for the Blue Card has been approved in Italy. *Italian government approves EU Blue Card*, AFRICA NEWS (Mar. 19, 2012) <http://www.theafricanews.com/immigration-news/italy/3976-italian-government-approves-eu-blue-card.html>.

requirements of the Blue Card Directive.³²

The base requirements for a Blue Card are: (i) a work contract or binding job offer with a salary at least 1.5 times the average gross annual salary paid in the Member State concerned; (ii) a valid travel document and a valid residence permit or a national long-term visa; (iii) proof of sickness insurance; (iv) for regulated professions, documents establishing that the immigrant meets the legal requirements of the profession, and (v) for unregulated professions, the documents establishing the relevant professional qualifications.³³ Conferral of the Blue Card is also subject to the requirement that the applicant does not pose a threat to public policy in the view of the Member State.³⁴ The Blue Card allows the recipient and his or her family to travel to and from the Member State where the Card is issued, and provides the recipient with equal treatment with nationals with regard to working conditions, social security, pensions, recognition of diplomas, education, and vocational training.³⁵ After two years of employment, the Blue Card holder may seek employment in a position other than the one he or she entered in without the prior approval of Member State authorities.³⁶ After eighteen months of legal residence, the holder may move to another Member State, provided that he or she will be engaged in highly qualified employment and subject to the admission terms of that Member State.³⁷

In 2010, two new directives were proposed by the Commission pursuant to the 2005 Policy Plan discussed above: the Directive on Seasonal Employment, and the Directive for

³² Press Release, European Commission, 'Blue Card': Commission warns Member States over red tape facing highly qualified migrants (Feb. 27, 2011), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/167&type=HTML>.

³³ Blue Card Directive, *supra* note 24, at art. 5.

³⁴ *Id.*

³⁵ *Id.* art. 7.

³⁶ *Id.* art. 12. It is worth noting, however, that the language of the Blue Card Directive is permissive, not mandatory in this respect, providing that "After these first two years [of Blue Card employment], Member States *may* grant the persons concerned equal treatment with nationals as regards access to highly qualified employment." [emphasis added].

³⁷ *Id.* art. 14.

Intra-Corporate Transfer of Non-EU Skilled Workers. These proposed directives are currently under discussion within the European Parliament and Council.³⁸ Most recently, in December 2011, the Commission adopted the Single Permit Directive (Directive 2011/98/EU) that standardizes the procedure of applying for a work permit throughout the European Union and sets forth a common set of rights available to all third-country nationals working legally in the EU.³⁹ The work permit set forth in the Single Permit Directive is distinct from the EU Blue Card in that it would be available to all categories of workers, not just highly qualified workers, although it excludes seasonal workers. The set of common rights set forth in the Single Permit Directive applies to Blue Card holders, holders of the new permit, and any other third-country national working in a Member State that is not a Long-Term Resident.⁴⁰ Finally, the Commission is reported to be planning to make a proposal for an EU Immigration Code in 2013, which would consolidate all of the directives discussed above, and set higher minimum standards for the Member States.⁴¹

Policies that aim to attract third-country national students to attend universities, as well as policies that allow such students to be employed upon graduation, are another way in which to increase the highly qualified population.⁴² Student Directive 2004/114/EC creates common rules to permit third-country nationals to enter a Member State to attend university, although they

³⁸ Towards a common European Union migration policy, EUROPEAN COMMISSION http://ec.europa.eu/home-affairs/policies/immigration/immigration_intro_en.htm (last visited May 25, 2012). The proposed intra-corporate transferee directive was approved by the Civil Liberties, Justice and Home Affairs Committee of the European Parliament on January 26, and will go on to consideration by the Council. The proposed seasonal workers directive is currently still under consideration with the Civil Liberties Committee. *Non-EU Skilled Workers: Common Rules To Ease Intra-Corporate Transfers*, THE INFORMATION DAILY (Jan. 27, 2012) <http://www.egovmonitor.com/node/45847>.

³⁹ Council Directive 2011/98/EU, 2011 O.J. (L 343) 1,9 [hereinafter Single Permit Directive].

⁴⁰ *Id.* art. 3.

⁴¹ Steve Peers, *A Proposal for an EU Immigration Code* 14 STATEWATCH 1, 3-5 (2012)

⁴² PARKES & ANGENENDT, *supra* note 26, at 9-10.

must be self-sufficient and have health insurance.⁴³ The directive provides a residence permit for a period of one year, renewable for the student's course of study, during which time a student may be employed, although the maximum number of hours per week may be determined by national legislation.⁴⁴ As with the Blue Card Directive, Denmark, the U.K., and Ireland are not parties to the Student Directive.⁴⁵

B. U.S. Law Regarding Economic Migration

Highly qualified employees and professionals may enter the U.S. through an employer-sponsored green card, an H-1B visa for "specialty occupations", or one of several more specialized work visas. In the United States, the presumption since 1965 has been that foreign workers are not needed. Accordingly, in order to make a permanent offer of employment to a foreign national, the U.S. employer must affirm that no sufficiently qualified U.S. workers were available.⁴⁶ Currently, only around 15% of United States Citizenship and Immigration Services ("USCIS") Form I-551 Permanent Resident Cards ("Green Cards") are issued for employment reasons. Within that 15% of employment-related green cards, approximately 90% are granted to immigrants who first entered the U.S. on a temporary employment visa (usually H-1B).⁴⁷

In order to apply for a green card on behalf of a foreign employee, the employer must complete a labor certification process, through which the employer is required to demonstrate that it has advertised the position to U.S. citizens and that no qualified U.S. applicants were

⁴³ Council Directive 2004/114/EC on the Conditions of Admission of Third-Country Nationals for the Purposes of Studies, Pupil Exchange, Unremunerated Training or Voluntary Service, arts. 6, 7, 2004 O.J. (L 375) 12, 18 [hereinafter Student Directive].

⁴⁴ *Id.*, arts. 12, 18. The period number of hours per week during which a student is allowed to work may not be less than ten, however.

⁴⁵ *Id.*, preamble 25, 26.

⁴⁶ ALEINIKOFF, MOTOMURA & FULLERTON, *supra* note 4.

⁴⁷ DEMETRIOS G. PAPADEMETRIOU & MADELINE SUMPTION, MIGRATION POLICY INSTITUTE, THE ROLE OF IMMIGRATION IN FOSTERING COMPETITIVENESS IN THE UNITED STATES 6-7 (2011) [hereinafter FOSTERING COMPETITIVENESS].

rejected.⁴⁸ Only certain categories of professions, including nurses, physical therapists, aliens with “extraordinary ability”, professors and researchers and multinational executives and managers are excluded from the labor certification requirement.⁴⁹ Although there is strong concern that large corporate employers frequently do not really interview U.S. citizens for the positions in question⁵⁰, the volume of paperwork required to comply with the labor certification process is likely to discourage a smaller, less experienced employer that legitimately has a need to hire highly qualified applicants from overseas.⁵¹ Although in 2005 the U.S. remodeled the labor certification process in order to reduce backlogs, Congress has not revisited the underlying premise that in general, increased immigration – including skilled immigration – is not needed.⁵²

Due to the considerable difficulty of obtaining a green card for employment purposes from overseas, virtually all immigrants who eventually receive a green card on the basis of employment initially arrive on temporary visas and adjust their status from within the U.S.⁵³ The most common temporary visa for highly skilled workers is the H-1B visa, which has a three year duration, extendable for up to six years total, pursuant to application.⁵⁴ Beneficiaries must be in a specialty occupation, defined as an occupation that requires “theoretical and practical application of a body of highly specialized knowledge” and at least an undergraduate education.⁵⁵ Applying for an H-1B visa as opposed to a green card is easier for the employer as

⁴⁸ ALEINIKOFF, MOTOMURA & FULLERTON, *supra* note 4, at 353.

⁴⁹ *Id.* at 355, 373.

⁵⁰ See USCIS, H-1B BENEFIT FRAUD & COMPLIANCE ASSESSMENT (2008) (finding widespread fraud by employers in the labor certification process).

⁵¹ *Ethical Considerations in Immigration Cases* 4 IMMIGRATION L. REPORT 169 (1985) (noting that “[w]hile the largest employers often have “canned” job descriptions and statements of minimum requirements for most positions in their corporate hierarchy, most employers do not have such sophisticated operations.”).

⁵² ALEINIKOFF, MOTOMURA & FULLERTON, *supra* note 4, at 404. In March 2005, the U.S. government introduced a completely electronic labor certification system, the Program Electronic Review Management. *Id.*

⁵³ PAPADEMETRIOU & SUMPTION, FOSTERING COMPETITIVENESS, *supra* note 47, at 7.

⁵⁴ Immigration and Nationality Act of 1952 § 214(g)(4), 8 U.S.C. § 1184(g)(4) (2010)

⁵⁵ *Id.* § 214(i), 8 U.S.C. § 1184(i).

they generally do not need to go through the labor certification process described above.⁵⁶ Since the middle of the last decade, there has been a shortage of H-1B visas available as compared to the number of applications made.⁵⁷ These visas are currently capped at only 65,000 per year, although there are exceptions for the first 20,000 applications from professionals with advanced degrees.⁵⁸ Further, the number of employment-based visas issued to immigrants of any country must not exceed seven percent of the total visas issued under that visa category; the same rule applies to green cards granted for employment purposes.⁵⁹

An H-1B visa holder may change jobs, but the new employer must be prepared to sponsor another H-1B visa.⁶⁰ A visa holder who is dismissed by his or her sponsoring employer without a new H-1B application pending by a new employer must leave the United States immediately, or will be considered to be present in the country illegally.⁶¹ H-1B visas are “dual intent” visas, meaning that immigrants who enter on such a visa may intend to stay only temporarily *or* to pursue permanent residence. In order to adjust status to permanent residence,

⁵⁶ *Id.* Employers submitting an H-1B visa petition must however, file a Labor Condition Application attesting that the job is being offered at the prevailing wage or actual wage to similar individuals. Employers whose workforce consists of 15% or more foreign employees are subject to additional requirements. ALEINIKOFF, MOTOMURA & FULLERTON, *supra* note 4, at 403.

⁵⁷ *See, e.g.* Press Release, USCIS, US Reaches FY 2008 H-1B Cap (Apr. 3, 2007), *available at* <http://www.uscis.gov/files/pressrelease/H1BFY08Cap040307.pdf>; Press Release, US Reaches FY 2009 H-1B Cap (Apr. 8, 2008), *available at* <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=c5b6628090e29110VgnVCM1000004718190aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>; Press Release, US Reaches FY 2010 H-1B Cap (Dec. 22, 2009) <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=153a1638367b5210VgnVCM100000082ca60aRCRD&vgnnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD>; Press Release, US Reaches FY 2011 H-1B Cap (Jan. 27, 2011) <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnextoid=7fd9b9138c9cd210VgnVCM100000082ca60aRCRD>.

⁵⁸ *H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models*, USCIS, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=e34c83453d4a3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=e34c83453d4a3210VgnVCM100000b92ca60aRCRD> (last visited May 25, 2012).

⁵⁹ Immigration and Nationality Act of 1952, § 202, 8 U.S.C. § 1152 (2010).

⁶⁰ ALEINIKOFF, MOTOMURA & FULLERTON, *supra* note 4, at 402.

⁶¹ Ron Hira, *The H-1B and L-1 Visa Programs: Out of Control* 12 (Economic Policy Institute, Briefing Paper 280, Oct. 14, 2010).

the employers of H-1B workers must petition for them. Due to the cap on green cards available for economic immigrants, and the resulting backlogs, getting a green card through adjustment of status is a lengthy process.⁶² An immigrant who changes employers – or even accepts a raise or promotion from a current employer – will have to begin the application from scratch, thus losing his or her “priority date” or place in the waiting list for a green card.⁶³ Although accurate statistics on the average wait time for obtaining a green card are not available, evidence suggests that obtaining an employment-based green card normally takes no less than 5 years and in many cases takes longer than a decade.⁶⁴ Due to a annual cap on the number of immigrants who may be granted a green card from any given country per year, immigrants from certain large countries such as China and India may wait up to twenty years.⁶⁵

Aside from its oversubscription and delays, the two major and interrelated criticisms of the H-1B system are (i) that it is unfair to immigrants, as it puts them at the mercy of their employers; and (ii) it has the effect of displacing domestic workers and lowering wages across the sector, as there is no labor certification process required to obtain the visa. With regards to (i), the fact that the visa holder is totally dependent on their employer to maintain status in the country means that they are unable to bargain for salary increases, or address abusive practices in the workplace.⁶⁶ The extended time that it takes to adjust status to permanent residence means immigrants will be subjected to these kinds of working relationships for many years. With

⁶² PAPADEMETRIOU & SUMPTION, FOSTERING COMPETITIVENESS, *supra* note 47, at 11.

⁶³ Puneet Arora, *Congress must address employment-based Green Card backlog*, THE HILL (July 28, 2011) <http://thehill.com/blogs/congress-blog/civil-rights/174049-congress-must-address-employment-based-green-card-backlog>.

⁶⁴ See, e.g. Stuart Anderson, Nat'l Found. for Am. Pol'y, *Waiting and More Waiting: America's Family and Employment-Based Immigration System 1* (2011) available at http://www.nfap.com/pdf/WAITING_NFAP_Policy_Brief_October_2011.pdf.

⁶⁵ *Id.*

⁶⁶ See, e.g. Moira Herbst, *Are H-1B Workers Getting Bilked?* BLOOMBERG (Jan. 31, 2008) http://www.businessweek.com/magazine/content/08_06/b4070057782750.htm (noting that companies may use threat of deportation as well as threats of harm to family members back home to force employees to submit to wages below industry standards).

regards to (ii), many observers have suggested that employers do not in fact hire H-1B professionals because their talents are unavailable in the U.S. workforce, but rather because they will perform the same job functions for a much lower wage.⁶⁷ As there is no labor certification process, USCIS has only the employer's word that no U.S. residents were available to fill the position. In fact, evidence suggests that H-1B workers in the information technology industry are in fact paid lower wages than similarly situated resident employees.⁶⁸ In fact, roughly half of H-1B visas granted in recent years are in the IT industry, leading to claims that the visa system leads to outsourcing in this area.⁶⁹

A further disadvantage identified by some observers is that within the H-1B category, visas are granted on a first-come-first served basis, rather than requiring applicants to compete for limited spots on the basis of the urgency of the employer's need or the quality of the immigrant's skill and education level.⁷⁰ In light of these criticisms, a recent report from the Brookings Institute that proposes a market-based reform of the H-1B visa system that would allow companies to bid on visas for potential employees has received significant attention from U.S. media and politicians.⁷¹

⁶⁷ David Sirota, *Obama's High Tech Labor Lies*, SALON (Feb. 6, 2012) http://www.salon.com/2012/02/06/obamas_high_tech_labor_lies/singleton/.

⁶⁸ See, e.g., *id.*; Hira, *supra* note 61, at 11.

⁶⁹ In fact, India's minister of commerce Kamal Nath famously dubbed the H-1B visa the "outsourcing visa." Many of the largest H-1B applicants – Infosys, Wipro, Tata Consultancy Services and HCL Technologies – are outsourcing firms based in India, who use the visa to allow certain of their employees to gain the expertise and knowledge necessary to meet the needs of their U.S. clients. Anand Giridharadas, *Outsourcers corner market for U.S. skilled worker visas*, N.Y. TIMES (April 12, 2007) <http://www.nytimes.com/2007/04/12/business/worldbusiness/12iht-visa.4.5257621.html?pagewanted=1>.

⁷⁰ PAPADEMETRIOU & SUMPTION, FOSTERING COMPETITIVENESS, *supra* note 47, at 10.

⁷¹ The report proposes sales of H-1B and L-1 visas to employers via an internet auction process overseen by the U.S. Department of Commerce. The author envisions that permits would be sold between employers on a secondary market, and that immigrants initially admitted under a purchased permit would have total mobility to move between employers, thus preventing employer abuses. The auction system would be phased in gradually: in the second phase, immigrants would be able to buy their permit from their employers after a initial period of six months to increase mobility, and in the third phase, the number of visas would be adjusted according to price signals from the auctions. GIOVANNI PERI, BROOKINGS INSTITUTE, RATIONALIZING U.S. IMMIGRATION POLICY: REFORMS FOR SIMPLICITY, FAIRNESS, AND ECONOMIC GROWTH 15-21 (2012).

Although the H-1B visa is the most broadly applicable employment-related visa, there are other dual-intent employment visas for immigrants that meet certain specialized requirements. Corporations may petition for an L-1 visa for their intra-company transferees, who must be executive or managerial-level employees, and must have been working at the company for at least one continuous year within the three years prior to admission. In most ways the L-1 visa is very similar to the H-1B: it is valid for three years, with permitted extensions, and the visa holder's employer may apply for a green card on their behalf.⁷² Immigrants "who possesses extraordinary ability in the sciences, arts, education, business, or athletics" may be able to get an O-1 visa: such persons still require that a U.S. employer or agent petition on their behalf, and must provide detailed evidence of their "extraordinary ability", such as consultation from a peer group "with expertise in the beneficiary's area of ability", and international prizes or awards.⁷³ The major advantage of securing one of these more specialized visas is that, unlike in the case of an H-1B visa, there are no annual caps on the number of L-1 and O visas issued.

In 1992, in an attempt to stimulate economic growth, Congress implemented the Immigrant Investor or EB-5 visa for immigrants who invest at least \$1,000,000 in a new commercial enterprise. This requirement is lowered to \$500,000 if the investment is made in a "targeted employment area": rural or high-unemployment areas of the U.S. If the investment creates at least ten jobs, the visa automatically becomes a permanent green card.⁷⁴ This program

⁷² *L-1A Intracompany Transferee Executive or Manager*, USCIS, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=64d34b65bef27210VgnVCM100000082ca60aRCRD&vgnnextchannel=64d34b65bef27210VgnVCM100000082ca60aRCRD> (last visited May 25, 2012).

⁷³ *O-1 Visa: Individuals with Extraordinary Ability or Achievement*, USCIS, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=b9930b89284a3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=b9930b89284a3210VgnVCM100000b92ca60aRCRD> (last visited May 25, 2012).

⁷⁴ *EB-5 Immigrant Investor*, USCIS, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=facb83453d4a3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=facb83453d4a3210VgnVCM100000b92ca60aRCRD> (last

was underutilized by investors and never reached its annual cap (approximately 10,000)⁷⁵, and is set to be phased out in September 2012 in favor of the EB-6 Startup Visa, which will use the unallocated numbers from the EB-5 category.⁷⁶ The Startup Visa, in contrast to its predecessor, does not require a set minimum investment, reduces the number of jobs created from ten to three or five, depending on the circumstances, and requires that the business have a minimum profitability after two years and at least one U.S. investor.⁷⁷

Students seeking to study in the United States enter under a separate visa, the F-1 visa. As in Europe, F-1 visa applicants must prove that they are financially sufficient, and are not eligible for federal financial aid to assist in paying for tuition. F-1 visa holders are generally not permitted to work in the United States, although on-campus employment of twenty hours a week or less is permitted. Upon graduation, F-1 visa holders may remain in the U.S. for one year in order to gain labor market experience, with an additional seventeen months in the case of certain science, technology, engineering and mathematics (STEM) degree holders.⁷⁸ Unlike the H-1B, the F-1 visa is not a dual-intent visa; that is, a holder of a student visa may not adjust status to permanent residence. A foreign student in the U.S. must find an employer to sponsor them for a H-1B visa, or adjust to another category of temporary visa. 20,000 H-1B visas are available above the annual cap for foreign students with master's degrees from U.S. institutions. In fact, evidence suggests that most international students who acquire permanent residency do so through marriage to a U.S. citizen, rather than through employment.⁷⁹

visited May 25, 2012).

⁷⁵ Leslie Thiele & Scott Decker, *Residence in the United States Through Investment: Reality or Chimera?* 3(1) ALBANY GOV. L. REV. 103–147 (2010).

⁷⁶ Angus Loten, *Kerry, Lugar Re-Start Start-Up Visa*, WALL STREET JOURNAL (Mar. 15, 2011) <http://blogs.wsj.com/in-charge/2011/03/15/kerry-lugar-re-start-start-up-visa/>.

⁷⁷ StartUp Visa Act of 2011, H.R. 1114, 112th Cong. (2011).

⁷⁸ *Students/Exchange Visitors*, IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/sevis/practical-training/> (last visited May 25, 2012).

⁷⁹ PAPADEMETRIOU & SUMPTION, FOSTERING COMPETITIVENESS, *supra* note 47, at 14.

In keeping with the idea that retention of international students is key for economic growth, the past year has seen several proposed laws aiming to reform the student visa system, particularly with regard to STEM graduations. Proponents of these reforms tout them as promoting economic growth in the wake of the recession.⁸⁰ For example, Congress is currently considering the IDEA Act (“Immigration Driving Entrepreneurship in America”), which would allow certain STEM graduates to apply for green cards upon graduation, effectively allowing them to skip the H-1B visa step.⁸¹ Another proposed bill, the STAR Act of 2012 (“Securing the Talent America Requires for the 21st Century”) would eliminate the Diversity Visa program⁸², and instead award the 55,000 green cards granted annually under the program to graduating

⁸⁰ For example, Republican presidential candidate Mitt Romney’s campaign policy book states that

“[a]s president, Mitt Romney will also work to establish a policy that staples a green card to the diploma of every eligible student visa holder who graduates from one of our universities with an advanced degree in math, science, or engineering . . . Permanent residency would offer them the certainty required to start businesses and drive American innovation. . . . these new Americans would generate economic ripples that redounded to the benefit of all.”

ROMNEY FOR PRESIDENT, INC., BELIEVE IN AMERICA: MITT ROMNEY’S PLAN FOR JOBS AND ECONOMIC GROWTH 128 (2011). Similarly, in her introduction to the IDEA Act (*see infra* note 81), U.S. Representative Zoe Lofgren states that “[m]y bill would allow some of the world’s sharpest minds to stay in the United States and help us grow our economy.” (Press Release, Rep. Zoe Lofgren, Lofgren Sponsors Bill to Promote Innovation, Research and Job Growth (June 14, 2011), *available at* http://lofgren.house.gov/index.php?option=com_content&view=article&id=639&Itemid=130) and in a statement regarding the newly proposed Startup Act 2.0 (*see infra* notes 85-86 and accompanying text) Senator Moran, one of the bill’s sponsors, stated that “[t]o get America’s economic engine roaring once again, entrepreneurs, both American and foreign-born, must be free to pursue their ideas, form companies in the United States and hire employees.” Andrew Harrer, *Senators beckon immigrant entrepreneurs and workers with Startup Act 2.0* WASHINGTON POST (May 22, 2012) http://www.washingtonpost.com/business/on-small-business/senators-beckon-immigrant-entrepreneurs-and-workers-with-startup-act-20/2012/05/22/gIQATpICjU_story.html.

⁸¹ The IDEA Act of 2011, which proposes an exemption to the 140,000 annual cap on employment-based green cards for graduates of a U.S. institution with a master’s degree or higher in STEM subjects, is currently under consideration in Congress. Immigration Driving Entrepreneurship in America Act of 2011, H.R. 2161, 112th Cong. (2011). The law would also eliminate the requirement for labor certification, and would change the F-1 visa system to make it a dual-intent system, like the H-1B visa. *Id.*

⁸² The Diversity Visa program, in which green cards are awarded to applicants on a lottery basis, was instituted in 1990 in order to increase immigration from countries underrepresented in the U.S. immigrant population. It has been criticized as discriminating against individuals of certain nationalities (*see, e.g.* Anna Law, *The Diversity Visa Lottery: A Cycle of Unintended Consequences in United States Immigration Policy* 21 J. AM. ETHNIC HIST. 3, 18-24 (2004)(noting that the program was intended to increase immigration from European countries)), as well as for its low educational standards for potential immigrants, as it requires only that lottery winners have at least a high school degree or two years of work experience in an occupation requiring at least two years of training (*see, e.g.* *Diversity Visa Program and its Susceptibility to Fraud and Abuse: Hearing Before Subcomm. on Immigration, Border Security, and Claims of the H. Comm. On the Judiciary*, 108th Cong. 25 (2004) (statement of Jan Ting, Professor of Law, Temple University) (noting that the visa lottery allocates visa “without regard to skills, advanced education, or employability.”))

STEM master's and Ph.D. students with job offers in their fields.⁸³ The SMART Jobs Act of 2012 (“Sustaining our Most Advanced Researchers and Technology Jobs Act”) would create a new dual-intent visa for immigrants coming to the U.S. to pursue a graduate degree in a STEM field, allowing them to apply for a green card upon graduation, conditional on their full-time employment in a position in a STEM field.⁸⁴ Most recently, the Startup Act 2.0, introduced on May 22 and based on an earlier piece of legislation proposed in December 2011⁸⁵, would create two new classes of green cards for STEM graduates as part of a broad package of measures aimed at encouraging new business growth. The first category would provide 50,000 five-year provisional green cards for STEM graduates who work in the field for five years during that time, and the second category would create 75,000 three-year provisional green cards for H-1B holders or STEM graduates who create a new business, provided that business meets certain growth benchmarks.⁸⁶

Another important proposed measure that has been part of the national debate on immigration for the past decade⁸⁷ – the DREAM Act – is less often presented from an economic perspective. The DREAM Act proposes to provide permanent residence to young people who came to the U.S. irregularly as children if they enter higher education or the U.S. military following their graduation from high school.⁸⁸ While there is no legislation in place that would

⁸³ Securing the Talent America Requires for the 21st Century (STAR) Act of 2012, S. ___, 112th Cong. (2012).

⁸⁴ Sustaining our Most Advanced Researchers and Technology Jobs (SMART) Act of 2012, S. ___, 112th Cong. (2012).

⁸⁵ The original bill (Startup Act of 2011, S. 1965, 112th Cong. (2011)) failed to pass, apparently due to concerns that it sought to replace American workers with foreign workers. Harrer, *supra* note 80.

⁸⁶ For more information on the new bill, which has yet to be released, see *Startup Act 2.0*, Jerry Moran United States Senator for Kansas, <http://moran.senate.gov/public/index.cfm?p=startup-act> (last visited May 25, 2012).

⁸⁷ An earlier version of the DREAM Act (*see infra* note 88) was first proposed in 2001. Development, Relief, and Education for Alien Minors Act of 2001, S. 1291, 107th Cong. (2001).

⁸⁸ Development, Relief, and Education for Alien Minors (DREAM) Act of 2010, H.R. 5281, 111th Cong. (2010). In December 2010, the Dream Act was passed by the House of Representatives, but failed to receive the necessary votes in the Senate. Lisa Mascaró and Michael Muskala, *Dream Act fails to advance in Senate* L.A. TIMES (Dec. 18, 2010) <http://articles.latimes.com/2010/dec/18/news/la-pn-senate-dream-20101219>. The measure was reintroduced in the Senate in May 2011 for consideration by the 112th Congress. Karoun Demirjian, *Harry Reid reintroduces the*

prevent an undocumented⁸⁹ individual from attending university, in practice, undocumented young people often have difficulty attending university due to the fact that in many states, they are not eligible for the federal financial aid that a majority of U.S. students rely on in order to finance the high costs of university tuition.⁹⁰ Further, even if these students are able to pay for university, such an expense may seem like a poor investment when undocumented graduates are unable to obtain employment in their area of qualification due to their immigration status. While this proposed legislation is more frequently presented from a humanitarian point of view by its advocates⁹¹, passage of the DREAM Act would have a significant impact on the United States economy, as it would enable young people who would otherwise be channeled into low-skilled

DREAM Act LAS VEGAS SUN (May 11, 2012) <http://www.lasvegassun.com/news/2011/may/11/harry-reid-reintroduces-dream-act/>. In the meantime, Republican Senator Marco Rubio has proposed an alternate version of the DREAM, which would provide temporary visas but not permanent residence to qualifying undocumented young adults, although he has yet to release a written proposal. *Elise Foley, Luis Gutierrez Could Support 'Watered-Down' Dream Act* HUFFINGTON POST (May 21, 2012) http://www.huffingtonpost.com/2012/05/21/luis-gutierrez-could-support-watered-down-dream-act_n_1534241.html.

⁸⁹ In this paper the terms “undocumented” (most commonly used in U.S. discourse) and “irregular” (the more commonly-used term in Europe) are used interchangeably to refer to immigrants whose presence in a country violates that country's immigration laws.

⁹⁰ According to the U.S. Department of Education, during the 2007-2008 academic year, 65.6% of undergraduate students received some form of federal financial aid. U.S. DEPT. OF EDUC., *TRENDS IN STUDENT FINANCING OF UNDERGRADUATE EDUCATION: SELECTED YEARS, 1995-96 TO 2007-08* 1, 13 (2011). Although undocumented students may not receive federal financial aid (see Brett Covington, *Is Postsecondary Access for Undocumented Immigrants an Important Right? How the United States and Europe Differ* 23 *GEO. IMMIGR. L. J.* 403, 405 n.17 (2009) (noting that a social security number is required in order to apply for federal financial aid), eleven states – California, Illinois, Kansas, Maryland, Nebraska, New Mexico, New York, Texas, Utah, Washington, and Wisconsin – provide lowered in-state tuition and financial assistance from state funds to certain eligible undocumented students. *The Dream Act: Creating Opportunities for Immigrant Students and Supporting the U.S. Economy*, IMMIGRATION POLICY CENTER, AMERICAN IMMIGRATION COUNCIL, <http://www.immigrationpolicy.org/just-facts/dream-act#economic> (last updated May 18, 2011).

⁹¹ The movement of young immigrants demanding a DREAM Act has been compared to the Civil Rights movement in the United States (see, e.g. Helen O'Neill, *Teenage Undocumented Immigrants Coming Out of the Shadows*, HUFFINGTON POST (May 20, 2012) http://www.huffingtonpost.com/2012/05/20/teenage-undocumented-immigrants_n_1530923.html) and Senator Rubio has attempted to portray his alternative proposal as “humanitarian assistance”, stating that “this is really not an immigration mission, it's a humanitarian mission” (Erika Bolstad, *Rubio touts his version of DREAM Act as humanitarian relief*, THE MIAMI HERALD (May 10, 2012) <http://www.miamiherald.com/2012/05/10/2793717/rubio-touts-his-version-of-dream.html>). As one study notes “the bill's education requirements have an underlying economic stimulus potential that has largely gone unnoticed by members of Congress.” RAUL HINOJOSA OJEDA & PAULE CRUZ TAKASH, *NORTH AMERICAN INTEGRATION & DEVELOPMENT CENTER, UNIVERSITY OF CALIFORNIA, LOS ANGELES, NO DREAMERS LEFT BEHIND: THE ECONOMIC POTENTIAL OF DREAM ACT BENEFICIARIES* 2-3 (2010).

labor, regardless of their educational potential, to achieve greater earning potential.⁹²

C. A Comparison of EU and U.S. Law Regarding Highly Qualified Immigration

Because the EU has only recently begun adopting policies aimed at attracting highly skilled migration, the Commission has had the benefit of formulating policies based on what has and has not worked for immigration-receiving countries in the past. Accordingly, as might be expected, the EU migration directives as drafted appear to avoid many of the drawbacks present in U.S. laws. It remains to be seen, however, how faithfully the Member States will implement policies like the Blue Card Directive. Since the Blue Card Directive leaves several factors to the discretion of the Member States, such as the number of Blue Cards to be granted each year and whether or not the immigrant may self-apply⁹³, it is possible that some Member States may pass implementing legislation that is not quite in the spirit of the Directive.

Popular – and official – characterization of the Blue Card as an “EU Green Card”⁹⁴ is inaccurate: as noted above, only a minimal percentage of green cards in the United States are awarded for employment purposes, and generally only after the immigrant enters on an H-1B visa. Further, green card holders are permanent residents that enjoy all of the benefits of citizenship – save for voting and running for political office – whereas Blue Card holders are temporary residents subject to a number of restrictions. In fact, the EU Blue Card has much more in common with the U.S. H-1B visa in that it provides for a temporary stay, with the

⁹² A study by the North American Integration & Development Center estimated that were 38% of the 2.1 million immigrants estimated to be eligible for the DREAM Act to receive benefits, over the next 40 years they would earn \$1.4 trillion in current dollars; if all of those eligible to apply received benefits (an estimated 2.1 million individuals), they would earn \$3.6 trillion in current dollars. HINOJOSA & CRUZ, *supra* note 91, at 2. In addition, the extra students would benefit universities in the U.S. with additional tuition funds, as beneficiaries would only be entitled to federal student loans to finance their education, rather than federal scholarships. In addition to earning more, immigrants with a higher level of education would also cost the government less in welfare and law enforcement costs, and would have higher consumption indices. *See, e.g.* IMMIGRATION POLICY CENTER, *supra* note 90.

⁹³ Blue Card Directive, *supra* note 24, at arts. 6, 10.

⁹⁴ In its Plan, the Commission referred to the proposal as an “EU Green Card.” Policy Plan on Legal Migration, *supra* note 14, at 7.

possibility of conversion to permanent residence, and is limited to those individuals with special skills and qualifications. Accordingly, in this section I will compare the combined H-1B/green card system in the United States with the combined Blue Card/Long-Term Resident permit system in Europe. I also compare and evaluate EU and U.S. immigration policies with respect to international students, widely believed to be an important tool for increasing a country's population of highly qualified professionals.⁹⁵

1. Blue Card and H-1B Visa system.

Although it is as yet unclear how successfully the Blue Card is working in practice – and how faithfully Member States will implement the system – *on paper*, the Blue Card appears to be a superior system than the U.S. H-1B program for attracting and retaining skilled workers. Both the U.S. employment visa system and the EU Blue Card are employer-based systems in which employers effectively select highly qualified immigrants (as opposed to a points-based system, which would accept and reject applications directly from immigrants based on their qualifications). An employer-based system is generally thought to be more efficient, as it responds more directly to economic demands.⁹⁶ The downside of such a system, however, is that it increases the risk that employers will exploit the system in order to hire immigrant employees and pay them less than the market value for their services, as the employees are unable to leave for more promising employment due to their immigration status.⁹⁷ Observers have suggested that the best remedy to employer abuse is making the employment-based visa portable.⁹⁸

Figure 1: A Comparison of Employment-based Immigration Policies

⁹⁵ See, e.g. LESLEYANNE HAWTHORNE, MIGRATION POLICY INSTITUTE, THE GROWING GLOBAL DEMAND FOR STUDENTS AS SKILLED MIGRANTS 1 (2008) (noting that “also represent a valuable pool of skilled immigrants for governments wishing to recruit “tried and tested” individuals into their labor forces.”)

⁹⁶ DEMETRIOS G. PAPADEMETRIOU & MADELEINE SUMPTION, MIGRATION POLICY INSTITUTE, RETHINKING POINTS SYSTEMS AND EMPLOYER-SELECTED IMMIGRATION 3 (2011) [hereinafter RETHINKING POINTS SYSTEMS].

⁹⁷ See *supra* notes 66-67 and accompanying text.

⁹⁸ PAPADEMETRIOU & SUMPTION, RETHINKING POINTS SYSTEMS, *surpa* note 96, at 4-5.

United States H-1B Visa and European Union Blue Card: A Comparison		
	H-1B Visa	Blue Card
Qualifications required	Undergraduate degree; special priority given to those with graduate degrees	Professional qualifications as specified by the requirements of the Member State
Minimum Salary	Employer must attest that the job is being offered at the prevailing wage or actual wage to similar individuals	Wages must be at least equal to an EU-wide minimum salary threshold and at least 1.5 times the average gross annual salary in the Member State
Number granted per year	Capped at 65,000 per year with limited exceptions	Member States may determine volume of admission based on labor market conditions
Who applies	Employer	Member states may determine whether application is to be submitted by employer or immigrant
Length of stay	3 years	1-4 years, depending on Member State
Extensions	1-year extensions for a period of up to 6 years (longer if a green card application was pending in the 5 th year)	May be renewed indefinitely for the same period of time for which it was originally issued (1-4 years)
Change of employer	Visa holder may change employers at any time; however, the subsequent employer must go through the expense of sponsoring a new visa that may be subject to the 65,000 cap.	For the first 2 years, changes in employer must be approved by the Member State.
Dismissal from employment	Visa holder is illegally present in the U.S. immediately upon dismissal unless an application for another temporary visa is currently pending.	Upon dismissal, Blue Card holders have a 3-month grace period to find another employer.
Freedom of movement	Visa holder has total freedom to move around the United States and to leave the U.S., although the immigrant may not travel while an application for an extension or change of status (from H-1B to green card, for example) is pending. A move to another office of the employer in another state does not affect the visa.	Blue Card holder may enter and re-enter and pass through other Member States. 18 months after issuance of the Blue Card, the immigrant may move to another Member State as long as they remain in highly qualified employment.
Conversion to permanent residence	Employer must apply for employee's green card; employee may not apply unilaterally.	Blue Card holder may apply unilaterally after 5 years of continuous residence.

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The Blue Card system, as set forth in the Blue Card Directive, appears to better avoid the potential abuses of an employer-based system by making the Blue Card more portable and providing greater autonomy to the employee, as compared to the H-1B system. Pursuant to article 10(1) of the Blue Card Directive, it is up to Member States to decide whether applicants may apply on their own behalf,⁹⁹ whereas H-1B applicants may not.¹⁰⁰ Both systems allow the applicant to change employers, although the EU system is more portable in that after two years of employment, the Blue Card holder may change employment without notifying the Member State,¹⁰¹ whereas under the U.S. system, if the visa-holder wants to change employers, the subsequent employer must sponsor a new visa.¹⁰² In addition, the Blue Card system allows a three-month grace period for Blue Card holders who are dismissed by their employers to secure new employment¹⁰³, whereas in the United States, a dismissed employee becomes automatically illegally present in the United States.¹⁰⁴ A grace period following dismissal is likely to be important in reducing employer abuses; if an employee knows that he or she can be fired and thus required to leave the country immediately, he or she will be more likely to agree to lower wages than their skills would in fact command. Perhaps the key difference is that Blue Card holders are not dependent on their employers to apply for long-term residence: only five years of

⁹⁹ Blue Card Directive, *supra* note 24, at art. 10(1).

¹⁰⁰ The USCIS has clarified that, in some cases, an immigrant entrepreneur might be able to self-petition if his or her company has a board of directors that is invested with the authority to hire or fire the entrepreneur. *USCIS Issues "Clarifications" for Entrepreneur Immigrants: Self-sponsored H-1B and EB-2 NIW May be Possible, EB-5 Streamlined*, CAPITOL IMMIGRATION LAW GROUP, PLLC (Aug. 3, 2011) <http://www.cilawgroup.com/news/2011/08/03/uscis-issues-clarifications-for-entrepreneur-immigrants-self-sponsored-h-1b-and-eb-2-niw-may-be-possible-eb-5-streamlined/>.

¹⁰¹ Blue Card Directive, *supra* note 24, at art. 12(2). Note, however, that the Member State is not required to offer this benefit of equal treatment to Blue Card holders; *see infra* note 36.

¹⁰² Immigration and Nationality Act of 1952 § 214(n)(1), 8 U.S.C. § 1184(n)(1) (2010) ("A nonimmigrant alien ... who was previously issued a visa or otherwise provided nonimmigrant status ... is authorized to accept new employment upon the filing by the prospective employer of a new petition on behalf of such nonimmigrant ...").

¹⁰³ Blue Card Directive, *supra* note 24, at art. 13.

¹⁰⁴ Hira, *supra* note 61, at 12.

continuous residence is required, and Blue Card holders shall self-apply.¹⁰⁵ In contrast, in the U.S. only employers can apply for long-term residence permits for their H-1B visa holders,¹⁰⁶ making immigrants dependent on the employer in acquiring permanent residence.

The minimum salary requirement for the Blue Card is stricter, in that the immigrant employee's salary must be at least 1.5 times as high as the average salary in the Member State.¹⁰⁷ Further, article 8(2) of the Blue Card Directive contemplates that in evaluating applications, Member States may "verify whether the concerned vacancy could not be filled by national or Community workforce . . . [or] by third-country nationals lawfully resident in that Member State and already forming part of its labour market . . ." ¹⁰⁸ In the United States, employers must sign a Labor Condition Agreement certifying that wages are at least equal to the wages paid to similarly situated employees, or the prevailing wage for the occupation in question within the employer's geographic areas¹⁰⁹; however, the law does not provide a process to monitor truthfulness of such statements. Although mechanisms designed to ensure that employers are paying immigrants a certain wage – and not using them to undercut domestic workers – can provide protections, such systems can also be cumbersome, as the U.S. experience with labor certification has shown.¹¹⁰ Providing highly-skilled workers with the freedom to move between employers is likely to be the most efficient way to ensure that they are in fact being paid prevailing market wages for their skills, and in this respect the EU Blue Card system is superior

¹⁰⁵ Blue Card Directive, *supra* note 24, at arts. 16, 17.

¹⁰⁶ *Green Card Through a Job*, USCIS, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=24b0a6c515083210VgnVCM100000082ca60aRCRD&vgnnextchannel=24b0a6c515083210VgnVCM100000082ca60aRCRD> (last visited May 25, 2012). Immigrants may self-petition in certain limited circumstances, including extraordinary ability, National Interest Waiver, or immigrant entrepreneurs who have structured their company in such a way that they are considered an employee. *Id.*

¹⁰⁷ Blue Card Directive, *supra* note 24, at art. 5(3).

¹⁰⁸ *Id.* at art. 8(2).

¹⁰⁹ *Foreign Labor Certification*, US DEPT. OF LAB., <http://www.foreignlaborcert.doleta.gov/h-1b.cfm> (last visited May 25, 2012).

¹¹⁰ See *infra* notes 48 to 52 and accompanying text.

to the H-1B system, at least as the system is set forth in the Directive.

In addition to the potential for employer abuse, the U.S. system has another serious disadvantage: its strict federal numerical quotas on the number of visas granted. The available evidence suggests that the demand for H-1B visas on the part of employers and immigrants is greatly exceeding the supply as determined by the annual caps.¹¹¹ By providing that the Member States will set quotas for Blue Cards, the EU system has the advantage of allowing the Member States to respond to economic conditions within their territories¹¹²; Member States whose economies have strong demand for increased numbers of highly-skilled workers will not be held back by those states that have less need for such employees. On the other hand, this provision of the Blue Card Directive invites potential for abuse, as Member States may set quotas based on political rather than economic considerations.

2. Entry Requirements and Post-Graduation Retention of Foreign Students

Historically, United States universities have been the world leaders in attracting international students, although in recent years European universities have come to represent a strong opponent in the “global war for talent.”¹¹³ It is also important to note that increasingly, emerging economies are also competitors in this battle for highly-educated employees.¹¹⁴

¹¹¹ See *infra* note 57 and accompanying text.

¹¹² Blue Card Directive, *supra* note 24, at art. 6 (“This Directive shall not affect the right of a Member State to determine the volume of admission of third-country nationals entering its territory for the purposes of highly qualified employment.”) In fact, this flexibility was an explicit strategy of the Commission as set forth in the Policy Plan on Legal Migration, *supra* note 14, at 5 (noting that “there is the need to provide for sufficient flexibility to meet the different needs of national labour markets”).

¹¹³ See, e.g. John Aubrey Douglass & Richard Edelstein, Center for Studies in Higher Education, University of California – Berkeley, *The Global Competition for Talent: The Rapidly Changing Market for International Students and the Need for a Strategic Approach in the US* (2009) (arguing that in order to remain competitive against other countries that have seen increased enrollment of international students in recent years, the U.S. should embrace a strategy aimed at doubling foreign student enrollment over the next decade).

¹¹⁴ Data from the U.S. Internal Revenue Service as well as organizations dedicated to research on immigration and the economic suggests that more and more internal students are returning home with their degrees or seeking employment in third countries – a result of growth in emerging economies such as China, India and Brazil as compared to the U.S., as well as the difficulties in obtaining U.S. permanent residence. See e.g. Michelle Hirsch, *U.S. Educated Immigrants Return to Their Homelands*, *The Fiscal Times* (May 14, 2012)

Retaining well-educated foreign students after they graduate is also critical, however, and one major pitfall that both the U.S. and EU immigration systems share is that they complicate the efforts of international students to remain in the country after graduation, due to the heavy bureaucracy surrounding employment-related visas.

In the United States, students are entitled to apply for a temporary employment visa; however, given the backlogs of the H-1B visa system, they likely face a long road to permanent resident status.¹¹⁵ In fact, one of the most common criticisms of the U.S. student visa program is that students are often unable to remain in the country after graduation, as potential employers are put off by the onerous process of hiring a foreigner, or as one Congressman recently put it “We’re training them, we’re making them awesome, and sending them back to beat us.”¹¹⁶ Passage of the IDEA Act, providing STEM graduates with an automatic green card upon graduation, or similar proposed legislation, would alleviate this issue somewhat.¹¹⁷

In the EU, students may apply for employment-based status either through the Blue Card or through existing national laws, if applicable. However, only half of time spent by students in study or vocational programs such as internships is countable towards the five-year requirement for EU long-term residence.¹¹⁸ Even considering this limitation, however, third-country national students in the EU who obtain employment-based status upon graduation will likely still obtain permanent residence sooner than similarly situated international students in the U.S. who seek

<http://www.thefiscaltimes.com/Articles/2012/05/14/US-Educated-Immigrants-Return-to-Their-Homelands.aspx#page1>; VIVEK WADHWA, ET AL., THE GRASS IS INDEED GREENER IN INDIA AND CHINA FOR RETURNEE ENTREPRENEURS: AMERICA’S NEW IMMIGRANT ENTREPRENEURS, PART VI (2011) (surveying a group of Indian and Chinese entrepreneurs who studied in the U.S., and finding that most cited greater economic opportunities as a reason for return).

¹¹⁵ See *supra* note 64 and accompanying text.

¹¹⁶ Mallie Jane Kim, *Rep. Tim Griffin to Introduce High-Skilled Immigrant Bill* US NEWS (Dec. 15, 2011) <http://www.usnews.com/news/articles/2011/12/15/rep-tim-griffin-to-introduce-high-skilled-immigrant-bill>.

¹¹⁷ See *supra* note 81-86 and accompanying text.

¹¹⁸ Long-Term Residents Directive, *supra* note 10, at art. 4(2).

permanent residence through the H-1B system.¹¹⁹ Unlike the U.S. F-1 visa, however, the EU Student Directive does not provide for a grace period during which the student may stay in the country under student status following graduation. Accordingly, students who are not in the process of converting to employment-based immigration status or some other status upon graduation will be out of status unless the applicable national law allows them to stay.¹²⁰ As in the U.S., retention of international students is a key issue for EU policymakers: the Commission's 2011 report on implementation of the Student Directive reflected concerns regarding the ability of students to remain in the EU host country after graduation.¹²¹

One advantage that the EU Student Directive has as compared to the F-1 visa system, however, is that it requires Member States to allow students to be employed while studying, whereas F-1 visa holders are not permitted to work off-campus during the course of their

¹¹⁹ Assuming that a student finishes a four-year university program (three years of study and one year of internship) in the EU and obtains a Blue Card, within three years they will be eligible to apply for residence. According to the Long-Term Residents Directive, at least, this application must be granted or denied within six months. Long-Term Residents Directive, *supra* note 10, at art. 7(2). On the other hand, an employer who hires an international student in the U.S. on an H1-B visa may immediately apply for a green card for that student, but, due to backlogs in the application process (*see supra* note 64 and accompanying text) could wait a decade or longer until a green card is granted.

¹²⁰ In fact, many Member States do provide for some type of a grace period; for example, Ireland provides a six month grace period (EMPLOYMENT RIGHTS FOR INTERNATIONAL STUDENTS, <http://gradireland.com/careers-advice/for-international-students/employment-rights-for-international-students> (last visited May 25, 2012)); the Netherlands, twelve months (UNDUTCHABLES: THE RECRUITMENT AGENCY FOR INTERNATIONALS, <http://www.undutchables.nl/candidates/working-in-the-netherlands/work-permit/> (last visited May 25, 2012); and Austria, six months (Press Release, Eurofound, New criteria-based immigration system to attract skilled workers (Aug. 18, 2011), *available at* <http://www.eurofound.europa.eu/eiro/2011/07/articles/at1107011i.htm>). Sweden has recently proposed allowing students six months to find work. *Foreign students may get six months to find work*, THE LOCAL, Mar. 10, 2011, *available at* <http://www.thelocal.se/32516/20110310/>). On the other hand, the UK has recently placed additional restrictions on its two-year grace period for new graduates as part of a series of reforms implemented by the Conservative government to restrain immigration. *New UK visa changes and how they affect applications - UK Visa Bureau explains it all*, Digital Journal (Mar. 31, 2012) <http://www.digitaljournal.com/pr/646963>.

¹²¹ *Report from the Commission to the European Parliament and the Council on the application of Directive 2004/114/EC on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service*, at 11, COM (2011) 587 final (Sept. 28, 2011) (noting that “the issue of access to work for third-country national students at the end of the studies could be specifically addressed, as this seems to be a decisive factor in students' choice of a destination country and an issue of common interest in the context of a declining working-age population and a global need for highly-qualified workers.”)

studies.¹²² Not only does allowing students to be employed off-campus make international study more feasible for talented students from less wealthy backgrounds, it is also likely to increase the speed with which a student will secure a job that will allow them to remain in the country after graduation, and thereby integrate that student into the national labor market.

Aside from the applicable immigration laws, one reason why the U.S. has historically been more successful at attracting international students is the fact that United States universities have been more willing to recognize foreign secondary and post-secondary qualifications, while many European universities have in the past been reluctant to accept non-national qualifications.¹²³ This attitude has shifted in recent years, however, with the implementation of the Bologna Process in 1999 and the resulting European Higher Education Area that came into being in 2010.¹²⁴ It is worth noting that it is not just immigration laws, but also educational standards and requirements, as well as cultural factors surrounding education, that play a role in attracting and retaining excellent foreign students – and that countries seeking to attract international students must be aware of.

While both the U.S. and the EU are working to improve policies surrounding international students in order to attract talented students to their universities and retain those students in the job market after graduating, in both the U.S. and the EU, legal and bureaucratic restrictions limit access to education for the existing immigrant population. While the U.S. is a world leader in terms of the percentage of its population that achieve an undergraduate education

¹²² Student Directive, *supra* note 43, at art 17. Students in the U.S. may work for a limited number of hours per week on campus, and may remain in the United States to work for one year after graduation. *See supra* note 78 and accompanying text.

¹²³ *See, e.g.* Annemarie Kas, Foreign Students Still Rare in Europe, NRC (Apr. 9, 2010) <http://vorige.nrc.nl/international/Features/article2520625.ece>.

¹²⁴ The European Higher Education Area, launched in 2010, was the end result of the Bologna Process which began in 1999 and was intended to “strengthen the competitiveness and attractiveness of the European higher education and to foster student mobility and employability . . .” EUROPEAN HIGHER EDUCATION AREA, <http://www.ehea.info/> (last visited May 25, 2012).

or higher¹²⁵, the current state of U.S. law effectively excludes the undocumented population from the university system by denying them the federal funding that a majority of students attending U.S. colleges rely on.¹²⁶ Within the EU framework, although the European Convention on Human Rights (ECHR) provides that “no person shall be denied the right to education”¹²⁷, at the university level, irregular immigrants are subject to higher tuition levels in many Member States and are not eligible for financial assistance.¹²⁸ Although the EU’s large refugee population is guaranteed access to education¹²⁹, many non-legal issues such as non-recognition of prior educational qualifications may limit prevent refugees from pursuing higher education.¹³⁰

III. Political Obstacles to Immigration Policymaking in the U.S. and Europe

Immigration is an almost universally controversial and politicized topic; this is certainly true for the United States and most of the EU Member States, and the EU system as a whole. Policymakers in both the U.S. and the EU seeking to enact immigration policies aimed at boosting economic growth, such as promotion of highly skilled migration face two interrelated

¹²⁵ According to OECD statistics for 2010, the United States has the fourth most educated population in the world with individuals holding at least an undergraduate degree constituting 41% of its population, following Canada with 50%, Israel with 45% and Japan with 44%. OECD, EDUCATION AT A GLANCE: OECD INDICATORS 41-42 (2011).

¹²⁶ See *supra* note 90.

¹²⁷ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Mar. 20, 1952, 213 U.N.T.S. 262. All EU Member States are parties to the ECHR. Despite the fact that a universal right to education is enshrined in the ECHR, in practice, some Member States have denied elementary and secondary education to undocumented children. A recent report by the EU Agency for Fundamental Rights, an EU advisory body established in 2007, found that in Bulgaria, Hungary, Latvia, Lithuania and Sweden, irregular students often do not have access to free primary and secondary education. EU Agency for Fundamental Rights, Fundamental rights of migrants in an irregular situation in the European Union 87 (2011).

¹²⁸ See Covington, *supra* note 90, at 435-37 (noting that irregular immigrants generally do not have access to financial assistance that would allow them to attend university despite the rising tuition costs in many countries). In fact, a recent decision of the European Court of Human Rights held that charging tuition fees for tertiary education was not a violation of the ECHR. See *Ponomaryovi v. Bulgaria*, 54 Eur. Ct. H.R. 56 (2011). Many Member States charge tuition fees (or higher tuition fees than those charged to national and EU students) to irregular immigrants, regardless of their length of residence in the country. For a comparison of tuition fees across several European countries see STUDYINEUROPE.EU, <http://www.studyineurope.eu/tuition-fees> (last visited May 25, 2012).

¹²⁹ Article 27 of the EU Refugee Directive provides that “Member States shall grant full access to the education system to all minors granted refugee or subsidiary protection status, under the same conditions as nationals.” Council Directive 2004/83/EC, on Minimum Standards for the Qualification and Status of Third-country nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted, 2004 O.J. (L 304).

¹³⁰ See, e.g. NGO NETWORK OF INTEGRATION FOCAL POINTS, POLICY BRIEFING ON ACCESS TO VOCATIONAL TRAINING AND (HIGHER) EDUCATION FOR REFUGEES AND MIGRANTS IN EUROPE 1-2 (2007).

obstacles: (i) polarized attitudes regarding the perceived economic effects of immigration; and (ii) concerns regarding federalism, and the increased unity that a single immigration policy implies.

A. Polarization regarding immigration's economic effects

Aside from questions of racism and xenophobia, citizens often feel that increased immigration will worsen their economic lot, either because immigrants will be a burden on the state welfare systems, or conversely, because they will displace citizens from their jobs or drive down wages across the economy. The first fear is clearly more relevant with respect to lower-skilled workers than educated workers.¹³¹ It is also a more justified fear in Europe than in the U.S., as welfare benefits in Western Europe are more extensive and the immigrant population taken as a whole shows lower rates of labor force participation.¹³² In the long-term, however, most observers agree that immigration will be critical to provide the level of population growth necessary to sustain these welfare systems.¹³³ With regard to the second fear, a majority of academic research suggests that on a macroeconomic level, increased immigration does not

¹³¹ Most studies estimate the overall fiscal impact of immigration as a whole to be a small positive in both Europe and the United States. While high-skilled immigrants typically contribute more in taxes than they use in welfare benefits, the reverse is true for low-skilled immigrants. See, e.g. PERI, *supra* note 71, at 11 (discussing the United States); Sari Pekkala Kerr & William Kerr, *Economic Impacts of Immigration: A Survey* 25 (Harvard Business School, Working Paper No. 09-013, 2011) (discussing Europe and the U.S.). In the United States, there is some concern that since immigrants pay taxes to the federal government but consume resources at the state and local level, they will result in deficits for municipalities. PERI, *supra* note 71, at 11. However, a recent report by ratings agency Standard & Poor's found that immigration did not cause cities to overspend or their credit ratings to drop. Amanda J. Crawford, *Immigration Doesn't Hurt City Economies Or Ratings, S&P Says*, BLOOMBERG (May 17, 2012) <http://www.bloomberg.com/news/2012-05-17/immigration-doesn-t-hurt-city-economies-or-ratings-s-p-says-1-.html>.

¹³² See, e.g. Kerr & Kerr, *supra* note 131, at 17 (noting that “[i]mmigrants in most European countries rely more on social security and unemployment benefits relative to natives than in the US or Canada.”).

¹³³ See MARTIN KAHANEC & KLAUS F. ZIMMERMANN, HIGH-SKILLED IMMIGRATION POLICY IN EUROPE 1 (2010) (noting that “[l]ooming demographic developments, such as aging populations, stalled economic growth, cash-strapped social-security systems, and the dearth of innovation potential and of skilled workforces highlight the importance of the new dynamics skilled immigration can bring about”); HERBERT BRÜCKER, UN ECON. COMM’N FOR EUR., CAN INTERNATIONAL MIGRATION SOLVE THE PROBLEMS OF EUROPEAN LABOUR MARKETS? 43 (2002) (finding that “[i]nternational migration can create a substantial fiscal gain for countries in western Europe due to their rapidly ageing populations.”).

increase unemployment or decrease average wages across a country's economy,¹³⁴ In fact, some data suggests that increased immigration creates jobs, particularly given that immigrants are more likely to start new businesses compared to native-born individuals.¹³⁵ On the other hand, it is inevitable that some native workers in certain sectors will be displaced by increased flows¹³⁶, an eventuality that is more controversial in a time of financial crisis. Given that any negative effects of increased immigration are disproportionately felt by lower-income sectors of the population, it makes sense that it is these groups that often express the strongest views regarding

¹³⁴ In fact, overwhelming evidence suggests that highly educated immigrants actually create jobs, particularly at the local level. See e.g. Enrico Moretti, *Estimating the Social Return to Higher Education: Evidence from Longitudinal and Repeated Cross-Sectional Data* 121 J. OF ECONOMETRICS 175, 201 (2004) (finding that a 1% increase in the share of college educated immigrants in a city increases wages in the city across education levels); MADELINE ZAVODNY, AMERICAN ENTERPRISE INSTITUTE, IMMIGRATION AND AMERICAN JOBS 4 (2011) (finding that increased immigration – both high-skilled and low-skilled – had a negligible impact on employment rates among native workers across the economy, but was positively correlated by increased employment rates at the state level)

¹³⁵ Immigrants are significantly more likely than native-born Americans to start a business: in 2011, 28% of new businesses in the United States were started by immigrants (Jose Pagliery, *On the rise: Immigrant entrepreneurs* CNN (May 8, 2012) and http://money.cnn.com/2012/05/07/smallbusiness/immigration-entrepreneurs/index.htm?iid=HP_River) and a similar ratio of foreign-native born ownership holds true in the context of high-technology businesses as well (Jennifer Hunt & Marjolaine Gauthier-Loiselle, *How Much Does Immigration Boost Innovation?* 2 AM. ECON. J.: MACROECON. 31, 31 (2010) (noting that 25% of high-tech companies founded in 2006 had foreign-born founders)). See also Robert Fairlie, *Entrepreneurship, Economic Conditions, and the Great Recession*, J. OF ECON. & MGMT. STRATEGY (forthcoming 2012) (finding that “Immigrants have entrepreneurship rates that are 0.12 percentage points higher than U.S. born rates.”)

¹³⁶ A majority of research suggests that immigration in the United States has a small positive effect on wages across the economy. See, e.g. Peri, noting that “Overall, most of the recent estimates and simulations reveal that the average U.S. worker as well as the average worker with low schooling levels experiences wage effects close to zero, and possibly positive, from immigration.” PERI, *supra* note 71, at 10. However, research also suggests that while the effect of immigration is beneficial overall, it may negatively affect certain populations, such as the uneducated and unskilled workers (see, e.g. Jennifer Gordon, *Tensions in Rhetoric and Reality at the Intersection of Work and Immigration* 2 UC Irvine L.R. 125, 142 (noting that “[i]mmigrants are largely beneficial to the economy and to resident workers overall, but to the extent they have a negative impact, it falls on prior immigrants and likely also on the least educated native workers” particularly African-American workers without a high-school degree), as well as American workers in the technology sectors that are prone to H-1B visa fraud and employer abuse. See, e.g. Norman Matloff, *On the Need for Reform of the H-1B Non-Immigrant Work Via in Computer-Related Professions* 36 U. MICH. J. L. REFORM 1, 87 (finding that “[t]he magnitude of the H-1B population significantly impacts American IT workers adversely. This occurs both at the younger (new graduate) and older (age 40+) ends of the age spectrum.”). On the other hand, Papademetriou & Sumption argue that “[t]he argument that holders of temporary H1-B visas undercut the wages and work opportunities of their US-born colleagues is difficult to confirm or refute with any certainty” noting that “while outsourcing that reduces the number of routine IT tasks to be performed by workers in the United States may hurt domestic IT workers who are only qualified for these tasks, it should *positively* affect other IT and non-IT occupations . . . enabling US firms and their employees to become more productive and hence better compensated.” PAPADEMETRIOU & SUMPTION, *FOSTERING COMPETITIVENESS*, *supra* note 47, at 18-19.

immigration.¹³⁷

At the EU level, policy-makers seem convinced of the benefits of labor migration and particularly the need to attract more highly qualified immigrants.¹³⁸ However, differing attitudes towards the benefits of immigration amongst and within Member States has made harmonization problematic. For example, while Germany, with its low unemployment rate, is currently seeking to attract increased immigration to boost its declining population,¹³⁹ other states perceive less benefits to increased immigration¹⁴⁰, and this has stalled many efforts to harmonize immigration laws. Similarly, in the United States, attitudes towards immigration seem to vary state-by-state. States like Arizona, Alabama, and Georgia have gained notoriety for their recent anti-immigration measures¹⁴¹, while the governor of Michigan has instituted a new program to attract immigrants to his state – and currently lobbies for changes to federal immigration laws – in an attempt to boost his state’s declining economy.¹⁴²

Politicization of the immigration issue in the United States may require politicians to at least create the appearance of opposition to increased levels of immigration. While the

¹³⁷ See, e.g. Delancey Gustin, *Poll offers perspective on a polarized immigration debate*, GMF BLOG (Feb. 3, 2011) <http://blog.gmfus.org/2011/02/poll-offers-perspective-on-a-polarized-immigration-debate/> (noting that a recent survey of public opinion surrounding immigration in the U.S. and in Europe found that

[i]n Europe, 49% of those whose household economic situation got worse in 2010 believed that immigrants bring down the wages of native-born workers; this compared to 36% of those whose economic situation got better or stayed the same in 2010. In the United States, those whose personal finances deteriorated last year were also more likely to say that immigrants take jobs away from native-born workers.

¹³⁸ In the Policy Plan for Legal Migration, the Commission notes that compared to the U.S. and Canada, first generation immigrants to the EU countries tend to lack university degrees. Policy Plan for Legal Migration, *supra* note 14, at 7.

¹³⁹ *Immigrants stop 8-year population decline*, THE LOCAL (Jan. 13, 2012) <http://www.thelocal.de/national/2012/01/13-40091.html>.

¹⁴⁰ In contrast, countries like the United Kingdom (which is not subject to the Blue Card Directive) and Spain, with high unemployment, are attempting to cut back on skilled immigration; see *infra* notes 183-188 and accompanying text.

¹⁴¹ See *infra* notes 158-162.

¹⁴² Global Michigan Initiative seeks to attract foreign-born workers with advanced degrees as well as seasonal agricultural help and people who want to start businesses. Chris Christoff, *Republican Snyder Woos Immigrants to Refill Depopulated Michigan*, BLOOMBERG (Jan. 19, 2012) <http://www.businessweek.com/news/2012-01-19/republican-snyder-woos-immigrants-to-refill-depopulated-michigan.html>.

Republican party is generally viewed as taking a stricter stance on immigration, and this is likely true of its voters, politicians in both major parties are often influenced by corporate interest groups that seek the easing of immigration restrictions for highly qualified workers.¹⁴³ For instance, Republican Presidential candidate Mitt Romney initially adopted a hard stance on immigration, largely in an effort to appeal to a Republican base that supports state laws such as those of Arizona, Alabama, and Georgia. Romney has since softened his anti-immigration rhetoric, however, in the hopes of winning over some swing voters who may be alienated by such policies.¹⁴⁴ In the meantime, analysts agree that federal immigration reform in the United States has entered a holding pattern for the rest of the year, with no consensus likely to be reached on any bill until after the September election.¹⁴⁵ In the U.S. context, observers have suggested ways to de-couple immigration policy-making from politics, including the creation of an “independent federal immigration commission that could develop specific policies under parameters set by Congress.”¹⁴⁶

Politicization of the issue is also a problem within the EU; as was brought into stark relief in the recent elections in France, in which incumbent President Nicolas Sarkozy rather suddenly adopted anti-immigration rhetoric in an unsuccessful attempt to win the votes of right-wing supporters of the National Front party.¹⁴⁷ Although Socialist candidate François Hollande won

¹⁴³ For instance, Republic candidate Mitt Romney has declared himself in support of the IDEA Act, which would allow STEM graduates to apply for permanent resident status upon graduation. Roque Planas, *Romney Attacks Obama on Immigration Ahead of Wisconsin Primary* FOX NEWS LATINO (Apr. 3, 2012) <http://latino.foxnews.com/latino/politics/2012/04/03/mitt-romney-attacks-obama-on-immigration-ahead-wisconsin-primary/>.

¹⁴⁴ Annie-Rose Strasser, *Shaking The Etch-A-Sketch: After Promising To Veto It, Romney Says He Wants A DREAM Act* THINK PROGRESS (Apr. 16, 2012) <http://thinkprogress.org/justice/2012/04/16/465050/shaking-the-etch-a-sketch-after-promising-to-veto-it-romney-says-he-wants-a-dream-act/?mobile=nc>.

¹⁴⁵ See, e.g., Judith Browne Dianis, *Appealing to the Right on Anti-Immigration May Not Produce Victory*, Huffington Post (Feb. 7, 2012) http://www.huffingtonpost.com/judith-browne-dianis/appealing-to-the-right-on_b_1258396.html.

¹⁴⁶ Darren M. West, *Creating a "Brain Gain" for U.S. Employers: The Role of Immigration* (Brookings Institute, Policy Brief No. 178, Jan. 2011) available at http://www.brookings.edu/papers/2011/01_immigration_west.aspx.

¹⁴⁷ *Sarkozy threatens to quit passport deal if EU countries don't seal borders against illegal immigrants*, DAILY

the presidency, the National Front party managed to gain more than six million votes in the May presidential election, coming in a strong third place.¹⁴⁸ Such politicization of the immigration question impacts not only the implementation of EU policies at the national level, but also the ability to reach consensus on new measures at the EU level.¹⁴⁹

B. A single immigration policy and concerns regarding federalism

In the European Union, harmonization of immigration policy also implicates a sensitive political issue, that of Member State national sovereignty. Since the ability to control one's borders is frequently viewed as an integral component of state sovereignty in international law, the harmonization of immigration policy creates fears among governments and observers in many Member States that the European Union is becoming a suprapstate.¹⁵⁰

Dispute between Italy and the rest of the EU over the continued viability of the Schengen area has brought the lack of conformity on immigration policy in the EU into stark relief.¹⁵¹ At its June 2011 summit, the European Council endorsed a proposal for a safeguard clause that would "allow the exceptional reintroduction of internal border controls in a truly critical situation where a Member State is no longer able to comply with its obligations under the Schengen rules."¹⁵² This proposal largely emerged as a response by several Member States to Italy's

MAIL (Apr. 8, 2012) <http://www.dailymail.co.uk/news/article-2127108/Nicolas-Sarkozy-threatens-quit-passport-deal-EU-countries-dont-seal-borders-illegal-immigrants.html#ixzz1rZiSTAuk> (reporting the President's threat to pull out of the Schengen Area).

¹⁴⁸ Vanessa Gera, *Greek party most extreme of Europe's far right*, Bloomberg (May 18, 2012)

<http://www.businessweek.com/ap/2012-05/D9UR48180.htm>.

¹⁴⁹ ANNALISA MELONI, VISA POLICY WITHIN THE EUROPEAN STRUCTURE 167 (2006) (noting that the politicization of the immigration issue in France's 2002 presidential elections had an impact at the EU level).

¹⁵⁰ STEINER & WOODS, *supra* note 8, at 595.

¹⁵¹ The Schengen Convention between Germany, Belgium, Luxembourg, France, and the Netherlands abolished border checks between the five countries, created a common short stay visa system, and facilitated police and judicial cooperation through a common database of persons who should be excluded on security grounds. Convention implementing the Schengen Agreement, June 14, 1985, 1985 O.J. (L 239) 19, 62. By the time of the signing of the Treaty of Amsterdam, all Member States had signed on to the Schengen Area except for the UK, Ireland and Denmark, and a majority agreed to incorporate the terms of the Schengen Convention into the EC Treaty with opt-out provisions for the UK, Denmark, and Ireland.

¹⁵² European Council Conclusions, Brussels European Council, Conc 1, ¶ 22, (June 23/24, 2011), *available at*

issuing of temporary residence permits to Tunisian migrants and refugees whose entry has increased since the revolution in that country.¹⁵³ In fact, several countries have recently enacted border control policies that seem to violate the Schengen rules.¹⁵⁴ Most recently, pressure from Germany, which has proposed that Member States should have the right to temporarily ban neighboring states who fail to effectively combat illegal immigration from the Schengen area, has led to drastic crackdowns on illegal immigration in troubled Greece, including construction of new detention centers and a wall along the Turkish border.¹⁵⁵ The difficulties experienced by the Schengen area motivated the Commission to put in place a system for the strengthening of the Schengen area, which will release bi-annual reports on the health of the area.¹⁵⁶ Although the weakening of the Schengen area is driven by fear of asylum-seekers rather than economic migrants, skilled or otherwise, it will surely impact the mobility of economic migrants between

http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/123075.pdf.

¹⁵³ *The next European crisis: boat people*, THE ECONOMIST (April 11, 2011)

http://www.economist.com/blogs/charlemagne/2011/04/north_african_migration. Observers suggest the issuance of these permits was a calculated response on the part of the Italian government which, feeling abandoned by the rest of the EU in its struggle to manage its external border, sought to encourage the Tunisian immigrants to move on to wealthier Member States.

¹⁵⁴ Toby Vogel, *Commission proposes temporary checks at internal Schengen borders*, EUROPEAN VOICE (May 5, 2011) <http://www.europeanvoice.com/article/imported/commission-proposes-temporary-checks-at-internal-schengen-borders/70966.aspx>. In April 2011, France began checking trains arriving from Italy; the Netherlands and Estonia have introduced use of surveillance technology on roads at internal borders. See, e.g. Andrew Rettman, *Dutch minister: Border cameras do not break EU law*, EU OBSERVER (Jan. 31, 2012)

<http://euobserver.com/9/115087>; *MPs Favor 'Trust But Check' Approach to Schengen*, ERR NEWS (Jan. 19, 2012) <http://news.err.ee/fa9e8da3-2847-4719-9104-3af4e73f0129>. Alternatively, more Europe-oriented proposals to restrain illegal immigration such as strengthening the evaluative mechanism to ensure countries are in compliance, and allowing the European Commission to have more control over Schengen governance, have not proved as politically popular as the proposed derogation measures. *Schengen Border Agreement Weakening*, PRESS TV (Feb. 5, 2012) <http://www.presstv.ir/detail/224898.html>.

¹⁵⁵ *Scheng-end? Germany wants border control in free travel zone* RT (Apr. 5, 2012) <http://rt.com/news/schengen-germany-border-control-309/>.

¹⁵⁶ In contrast (or perhaps in response) to the tough rhetoric of Merkel and Sarkozy that Schengen is no longer viable, the report reflects an optimistic view of the functioning of the Schengen area, noting that “[t]he pressure at the Schengen external borders is focused at a limited number of hot spots” and that despite the highly-publicized re-adoption of certain internal measures on the part of France, Member States are on the whole substantially in compliance with Schengen Borders Code. *Communication from the Commission to the European Parliament and the Council. Biannual report on the functioning of the Schengen area: 1 November 2011 - 30 April 2012*, at 3-8, COM (2012) 230 final (May 16, 2012). It is possible that with Sarkozy no longer in office, opposition to the Schengen area in France and the rest of Europe will decrease. Nathalie Vandystadt, *Commission publishes positive Schengen check-up*, EUROPOLITICS (May 16, 2012) <http://www.europolitics.info/sectorial-policies/commission-publishes-positive-schengen-check-up-art334379-16.html>.

Member States.

While this issue does not have an exact parallel in the United States, opponents of increased immigration have frequently made the argument, based on the U.S. Constitution, that regulation of immigration was intended by the Founding Fathers to be left to the states.¹⁵⁷ In the past two years five states – Arizona¹⁵⁸, Alabama,¹⁵⁹ Georgia¹⁶⁰, Utah¹⁶¹ and South Carolina¹⁶² – have made unilateral attempts to enforce their own stricter immigration laws which require police officers to enforce federal immigration laws by investigating any person they suspect to be illegally present, and make illegal presence and work criminal offenses under state law. Such laws also criminalize many regular interactions with illegal immigrants, such as renting a home to a family that is illegally present. The ability of individual states to set their own immigration policy is a legal battle that is currently being fought in federal courts, and will reach ultimately be decided by the U.S. Supreme Court in the case *Arizona v. the United States*.¹⁶³

Although U.S. states' anti-immigration laws are generally targeted towards illegal

¹⁵⁷ See, e.g. Joseph Baldacchino, *Regulation of Immigration: Historically a State Function* 10 NTL. HUMANITIES INST. (2010), available at <http://www.nhinet.org/epistulae10.htm> (pointing to a series of key Supreme Court decisions in the 19th Century that he argues established the right of states to regulate immigration).

¹⁵⁸ The most controversial provisions of the Arizona law SB 1070 make it a crime for immigrants to be present in Arizona without proper documents on their person at all times, and require police officers to inquire about a subject's immigration status during a "lawful stop, detention, or arrest" such as a traffic stop, for example. S.B. 1070, ARIZ. REV. STAT. ANN. § 11-1051(B) (2010).

¹⁵⁹ Alabama's H.B. 56 immigration law is modeled after the Arizona's SB 1070 but is even stricter, prohibiting illegal immigrants from receiving public benefits or attending state universities, and requiring public school officials to determine whether students are illegal immigrants, a practice that has caused many immigrant parents to pull their children out of school. The law also makes it a crime for landlords to rent to illegal immigrants and for illegal immigrants to apply for work in the state. H.B. 56 § 18, ALA. CODE § 32-6-9 (2011).

¹⁶⁰ Georgia's HB 87 is stricter in many ways than Alabama and Arizona's laws in that in its provisions that prohibit the transportation or "harboring" of illegal immigrants, it creates no exceptions for emergency medical services, public transportation, social workers or religious leaders. H.B. 87, GA. CODE. ANN. §§ 16-11-200-203 (2011).

¹⁶¹ See H.B. 497, UTAH CODE. ANN §§ 76-9-1001, 76-9-1005 (2008).

¹⁶² South Carolina's Illegal Immigration and Reform Act prohibits undocumented students from enrolling in state public universities. S.C. CODE. ANN. §59-101-430

¹⁶³ *Arizona, et al. v. United States*, No. 11-182, 2011 WL 3556224 (U.S. Dec. 12, 2011). The case was heard on April 25, 2012. Although the ruling will not be handed down until the end of June, political analysts have suggested that it appears likely that the Supreme Court will uphold the Arizona law. *UPDATE 2-US high court appears to back Arizona on immigration*, Reuters (Apr. 25, 2012) <http://www.reuters.com/article/2012/04/25/usa-immigration-arizona-idUSL2E8FP90Q20120425>.

immigrants and especially those from Mexico and Central America, who primarily work in low-skilled occupations, they create a climate of hostility towards foreigners of all nationalities and income levels.¹⁶⁴ In fact, Arizona, the first state to enact this type of immigration policy, has suffered massive losses to its tourism industry, as well as a decline in the number of students attending university in the state.¹⁶⁵ In one highly reported incident that is illustrative of the business consequences of these laws, a German executive for Mercedes Benz visiting a plant in Alabama was arrested under the state's new immigration law for driving a rental car without his passport and visa¹⁶⁶ – just one month later, a similar incident occurred involving a Japanese executive for Honda.¹⁶⁷

In both the U.S. and the EU, a more unified immigration policy would increase the mobility of immigrants in the labor force, and would also decrease the cost of compliance with immigration law for companies that operate across national borders or state lines. In the U.S., several studies have already shown the negative economic impact of restrictive local and state immigration policies.¹⁶⁸ It is already clear, however, that the economic impact of such laws will

¹⁶⁴ As one practitioner notes, laws such as the ones in Alabama and Arizona create “an atmosphere where not only does the undocumented alien feel unwanted and fearful, but so too does anyone who looks different or possibly “foreign.” When the workforce is limited because people are afraid to apply for jobs – or even legal residence in the United States – it hurts business.” *What Business Needs: A National Immigration Policy*, The Metropolitan Corporate Counsel (Mar. 22, 2012) <http://www.metrocorpocounsel.com/articles/18365/what-business-needs-national-immigration-policy>.

¹⁶⁵ In the first year following the enactment of the law alone, Arizona lost an estimated 2,761 jobs, \$253 million in economic output, and \$9.4 million in tax revenues. MARSHALL FITZ & JEANNE BUTTERFIELD, CENTER FOR AMERICAN PROGRESS, ARIZONA'S 'SHOW ME YOUR PAPERS' LAW IN THE U.S. SUPREME COURT: WHAT'S AT STAKE? 11 (2012).

¹⁶⁶ Eyder Peralta, *Ala. Immigration Law Back In Spotlight After Mercedes-Benz Exec Is Arrested*, NPR (Nov. 22, 2011) <http://www.npr.org/blogs/thetwo-way/2011/11/22/142658357/ala-immigration-law-back-in-spotlight-after-mercedes-benz-exec-is-arrested>.

¹⁶⁷ Ed Pilkington, *Alabama red-faced as second foreign car boss held under immigration law* Guardian (Dec. 2, 2011) <http://www.guardian.co.uk/world/2011/dec/02/alabama-car-boss-immigration-law>.

¹⁶⁸ A study by the University of Alabama finds that HB 56 will result in losses of “69,768-139,536 jobs with \$1.2-5.8 billion in earnings for these jobs [and] . . . \$2.3-10.8 billion in Alabama Gross Domestic Product (GDP) or 1.3-6.2 percent of the state's \$172.6 billion GDP in 2010 . . .” Samuel Addy, *A Cost-Benefit Analysis of the New Alabama Immigration Law* 8 (Jan. 2012) Center for Business & Econ. Research, University of Alabama, *available at* <http://cber.cba.ua.edu/New%20AL%20Immigration%20Law%20-%20Costs%20and%20Benefits.pdf>. In 2011, the state of Georgia suffered an estimated \$140 million in agricultural losses, and prison officials are sending chain

also be felt beyond their jurisdiction.¹⁶⁹ In Europe, as the Commission noted in its 2007 report on the need for a common immigration policy:

[i]n a single market with free movement of persons, there is a clear need to go beyond 27 national immigration policies . . . national immigration policies clearly have an impact beyond national borders; and actions taken in one Member State for national or regional reasons can rapidly have an impact on other Member States.”¹⁷⁰

State or Member State policies that diverge from the federal or EU-level standard create uncertainty for employers operating in those areas.¹⁷¹ In today’s globally interconnected world, a fragmented immigration policy could have devastating effects on post-crisis economic recovery.

IV. Responses to the Economic Crisis in the U.S. and the EU

Although immigration to both the U.S. and EU has slowed somewhat since the onset of the financial crisis, it has remained high.¹⁷² Among the voting population in the U.S. and Europe, the crisis predictably coincided with decreased popular support for immigration.¹⁷³ In

gangs to assist farmers in harvesting their crops, which are literally rotting in the fields for want of agricultural labor. Benjamin Powell, *The Law Of Unintended Consequences: Georgia's Immigration Law Backfires*, FORBES (May 17, 2012) <http://www.forbes.com/sites/realspin/2012/05/17/the-law-of-unintended-consequences-georgias-immigration-law-backfires/>.

¹⁶⁹ TOM BAXTER, CENTER FOR AMERICAN PROGRESS, HOW GEORGIA’S ANTI-IMMIGRATION LAW COULD HURT THE STATE’S (AND THE NATION’S) ECONOMY 6 (2011) (noting that the shortage of migrant farmworkers caused by Georgia’s restrictive immigration policies is already being felt by the apple farming industry in Michigan).

¹⁷⁰ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Towards a Common Immigration Policy* COM (2007) 0780 final (Dec. 5, 2007).

¹⁷¹ For example, while the E-Verify system was intended as a voluntary system at the federal level, several states (Arizona, Alabama, Georgia, Mississippi, North Carolina, South Carolina, Tennessee and Utah) have made it mandatory for companies doing business in the state, creating confusion and increasing compliance costs for companies doing business around the country. *What Business Needs: A National Immigration Policy*, Metropolitan Corporate Counsel, *supra* note 164.

¹⁷² OECD, International Migration outline, *supra* note 22, at 40, 44 (noting that while “virtually all OECD countries saw declines in their GDP in 2009 . . . the relative scale of migration movements remains at significant levels, in relation to the number of entries into the working-age population from domestic sources.”).

¹⁷³ DEMETRIOS G. PAPADEMETRIOU, ET AL., MIGRATION POLICY INSTITUTE, MIGRATION AND IMMIGRANTS TWO YEARS AFTER THE FINANCIAL COLLAPSE: WHERE DO WE STAND? 15 (2010). In France, Germany, Italy, the Netherlands, the United States, and United Kingdom, the number of people who considered immigration “more of a problem than an opportunity” increased by between 4 and 9 percentage points between 2008 and 2009. In the United States, more people considered immigration a “bad thing” for the country in 2009 than at any point since

both contexts, it appears that policy-makers have sought to introduce measures targeting highly qualified migration as a tool for promoting prosperity, but have met with some opposition from those that view such migration as lowering wages and displacing national workers.

One of the initial responses to the financial crisis in the U.S. was to restrict immigration: as an amendment to the Troubled Assets Relief Program (TARP), the United States limited skilled immigration in the financial sector.¹⁷⁴ However, this approach has shifted, as the House of Representatives recently approved the Fairness for High-Skilled Immigrants Act of 2011, which would eliminate the country-specific caps on the immigration of highly skilled professionals that presently provide that no one country can account for more than 7% of the 140,000 employment-based green cards issued annually;¹⁷⁵ the bill is currently held up by opponents in the Senate.¹⁷⁶ In addition, the Obama administration and the Department of Homeland Security recently proposed a series of regulatory changes to improve the H-1B and F-1 visa programs.¹⁷⁷ Similarly, potential changes to the administrative guidelines for granting L-1 visas have raised debate recently, with some opponents arguing that changes would allow companies to use the visas for outsourcing purposes.¹⁷⁸

The Obama administration has also publicly discussed expanding the H-1B visa program

2001. *Id.*

¹⁷⁴ See, e.g. CERNA, *supra* note 27, at 15; Monica Herbst, *H-1B Visas: 'Buy American' Comes to TARP*, BLOOMBERG, (Feb. 6, 2009) http://www.businessweek.com/blogs/money_politics/archives/2009/02/h-1b_visas_buy.html.

¹⁷⁵ *Visa Law Would Give U.S. World's Tired, Poor Technologists: View*, BLOOMBERG (Nov. 30, 2011) <http://www.bloomberg.com/news/2011-12-01/expanded-visa-law-would-give-u-s-world-s-tired-poor-technologists-view.html>.

¹⁷⁶ Al Noorani, *Bipartisan Visa Reform? Hold on* Huffington Post (Mar. 22, 2012) http://www.huffingtonpost.com/ali-noorani/bipartisan-visa-reform-ho_b_1368370.html.

¹⁷⁷ *US mulls changes in F-1, H-1B visas to attract skilled workforce*, NDTV PROFIT (Feb. 2, 2008) <http://profit.ndtv.com/News/Article/us-mulls-changes-in-f-1-h-1b-visas-to-attract-skilled-workforce-297167>.

¹⁷⁸ Patrick Thibodeau, *Work visa debate shifts from H-1B to L-1 visas*, InfoWorld (Apr. 4, 2012) <http://www.infoworld.com/t/federal-regulations/work-visa-debate-shifts-h-1b-l-1-visas-190164>. Tech companies, including companies accused of using H-1B visas for outsourcing purposes, have lobbied the Obama administration to change administrative guidelines to prevent USCIS from interpreting the requirement of “specialized knowledge” too narrowly. In response, organizations such as the AFL-CIO are opposing the proposed changes. *Id.*

in response to demands from the technology industry for more foreign workers¹⁷⁹; such proposals are not without their critics, however. In January, during a web-conference between the president and constituents, one woman's question to President Obama why her husband, a semi-conductor engineer, could not find a job but yet the industry he was seeking work in continued to hire H-1B visa workers sparked nationwide discussion about the merits of the program.¹⁸⁰

At the EU-level, the Commission has reaffirmed its commitment to progressive immigration policy through measures such as the Blue Card Directive and the Single Permit Directive. In a press release regarding its issuance of a reasoned opinion against Austria, Cyprus and Greece for failure to timely implement the Blue Card Directive, the Commission stated that “[i]f Europe is to secure economic prosperity, remain competitive and maintain its welfare systems, it needs immigrant workers. The current economic and financial crisis makes this need all the more pressing, while highlighting the need for common rules and a comprehensive and balanced EU migration policy.”¹⁸¹ Such a strong statement on the part of the Commission may in fact be a response to the perception that the economic crisis is in part responsible for the slow implementation of Blue Card programs in many Member States.¹⁸²

On the national level, however, many Member States have responded to the economic crisis by placing stronger restrictions on skilled migration. Hungary, Slovenia, and Portugal greatly reduced the quota of work permits to be granted in 2009.¹⁸³ Spain also tightened its

¹⁷⁹ Neil Munroe, *Obama steps up controversial push for new high-tech visas*, THE DAILY CALLER (Jan. 31, 2012) <http://dailycaller.com/2012/01/31/obama-steps-up-controversial-push-for-new-high-tech-visas/#ixzz1mnDbPTI8>.

¹⁸⁰ Sirota, *supra* note 67.

¹⁸¹ European Commission, *supra* note 32.

¹⁸² PARKES & ANGENENDT, *supra* note 26, at 3.

¹⁸³ JOBST KOEHLER, ET AL., INT'L ORG. FOR MIGRATION, MIGRATION AND ECONOMIC CRISIS IN THE EUROPEAN UNION: IMPLICATIONS FOR POLICY 29 (2010).

quotas for economic migrants,¹⁸⁴ and set up a voluntary return program for unemployed migrants; the Czech Republic established a similar program.¹⁸⁵ Both Ireland and Estonia established minimum salary thresholds for economic migrants.¹⁸⁶ In contrast, other countries such as France and Italy have primarily focused on toughening their stance on illegal immigration in the wake of the economic crisis, receiving criticism from abroad for possible human rights violations.¹⁸⁷ Similarly, the UK has instituted a policy of increasing penalties on employers who hire illegal workers that seems likely to have already had economic repercussions, and has ramped up its investigation of these types of violations.¹⁸⁸

In fact, the UK government has adopted a particularly strong stance on immigration, which has drawn criticism from observers who argue that, rather than protecting UK jobs, the new policies will wreck further harm to the economy.¹⁸⁹ For instance, David Cameron's government has tightened requirements for skilled migration: strengthening the labor market test for occupations such as civil engineers and nurses by requiring that employers advertise jobs to

¹⁸⁴ PARKES & ANGENENDT, *supra* note 26, at 3. Spain's quota for economic immigration was set at 901 for 2009 versus 15,731 in 2008. The list of hard-to-cover occupations was also revised to cut 32 occupations representing almost all of foreign hiring.

¹⁸⁵ *Id.* Spain's program consisted of two payments – one in Spain the other paid when the migrant returned to his or her country of origin – in return for a promise not to return for three years.

¹⁸⁶ KOEHLER, ET AL., *supra* note 183, at 29.

¹⁸⁷ *Id.* at 2. In 2009, Italy followed the U.S. example by criminalizing illegal presence in the country; it also cut off access to public services such as emergency medical care and education for illegal immigrants and granted permission for citizen patrols to assist police in responding to immigration violations. *Id.* The same year, France began a program of workplace raids, and in 2010 received international attention for its massive deportation of Roma gypsies. The European Commission investigated the deportations on the grounds that minimum safeguards were not provided to protected deportee's rights. The Commission will not continue the investigation, as France responded by changing its laws to fully incorporate the Directive for the Free Movement of People, despite the fact that an even greater number of immigrants, including Roma, were deported in 2011. Leigh Phillips & Angelique Chrisafis, *Roma campaigners dismiss Brussels' claim on evictions and expulsions* GUARDIAN (Aug. 25, 2011) <http://www.guardian.co.uk/world/2011/aug/25/roma-campaigners-dismiss-brussels-deportations-claim>.

¹⁸⁸ KOEHLER, ET AL., *supra* note 183, at 31.

¹⁸⁹ *See, e.g.* Awale Olad, *Business leaders and politicians must promote a positive narrative of immigration if migrants are to play a role in rebuilding the UK economy* LSE BLOG (Aug. 24, 2011) http://eprints.lse.ac.uk/38113/1/blogs_lse_ac_uk-Business_leaders_and_politicians_must_promote_a_positive_narrative_of_immigration_if_migrants_are_to_.pdf (noting that the new laws have “prompted employers and business leaders to express concerns over the possibility that the cap may damage competitiveness”); Julia Onslow-Cole, *Without a doubt, a harsh immigration cap would hurt the UK economy*, THE TELEGRAPH (Nov. 24, 2010) <http://www.telegraph.co.uk/finance/jobs/8155178/Without-a-doubt-a-harsh-immigration-cap-would-hurt-the-UK-economy.html>.

resident workers through the national employment service before recruiting a third-country national, and requiring that students seeking to stay in the UK after graduation have at least a master's degree and a salary of at least £20,000.¹⁹⁰ Further, a new proposed law in the UK would make permanent residence only open to immigrants earning upwards of £35,000 per year.¹⁹¹ Most recently, the UK Home Office has frozen the country's cap on employment visas until April 2014.¹⁹² In addition, the UK has also sought to cut the number of international students at its universities, a measure that has received criticism from those who fear that the reduction in foreign students will limit the country's future economic growth.¹⁹³

This is not to say that some states within the 2008-2012 period did not seek to attract more immigrants. In 2009, the German government introduced a new Labor Migration Control Act, which allows highly qualified workers from both new Member States and third countries to seek permanent residency in Germany.¹⁹⁴ Sweden also introduced a new economic migration system, in which employers are no longer required to have their job offers approved by national trade unions, nor to present evidence to the Swedish Market Board of a labor market shortage.¹⁹⁵

Many observers identify financial and immigration policy as the two most serious threats

¹⁹⁰ CHRISTIANE KUPTSCH, INT'L LAB. ORG., THE ECONOMIC CRISIS AND LABOUR MIGRATION POLICY IN EUROPEAN COUNTRIES 2 (2011).

¹⁹¹ Matthew Holehouse, *Damian Green: Britain has become addicted to immigration*, The Telegraph (Mar. 6, 2012) <http://www.telegraph.co.uk/news/uknews/immigration/9125073/Damian-Green-Britain-has-become-addicted-to-immigration.html>.

¹⁹² Helen Warrell, *Skilled migrant cap frozen for two years*, FINANCIAL TIMES (Apr. 4, 2012) <http://www.ft.com/intl/cms/s/0/4f8876f8-7e48-11e1-b20a-00144feab49a.html#axzz1rPzpdSND>.

¹⁹³ In addition to the cuts in skilled immigration, the British government has committed to cut net migration from current annual levels of 250,000 per year to numbers in the tens of thousands, and international students are included in these figures. Critics suggest that reducing the number of foreign students will hurt the UK's economy both in the short-term (reducing tuition fees received by universities) and long-term (reducing the supply of educated professionals and affecting the quality of university education): one report suggests that the cutting the number of international students in the country by 50,000 per year would cost the country between two and three billion pounds in economic contributions. MATT CAVANAGH AND ALEX GLENNIE, INSTITUTE FOR PUBLIC POLICY RESEARCH, INTERNATIONAL STUDENTS AND NET MIGRATION IN THE UK 10 (2012).

¹⁹⁴ Arbeitsmigrationssteuerungsgesetz [Act to Control the Immigration of Highly Qualified Foreigners adequate to the Labour Market and to amend further regulations of the Resident Law], Dec. 20, 2008, BGBl I at 2846 (Ger.).

¹⁹⁵ *Id.* at 29-30.

to the future of European integration.¹⁹⁶ It is evident that the financial crisis has increased popular support for far-right, nationalist political groups, who are generally opposed to immigration and to the EU as a political unit.¹⁹⁷ The electoral gains of far-right populist parties in several Member States in recent years, including in the UK, France, Italy, the Netherlands, Finland, Denmark, Austria and Sweden, appears to reflect public opposition to increased immigration and a resurgence of nationalist sentiment.¹⁹⁸ While at the EU level, the movement for harmonization of immigration policy reflects a recognition of the economic benefits to be gained by migration and particularly high-skilled migration, the financial crisis has to some extent hardened the views of those who perceive immigration as a threat to domestic economic conditions.¹⁹⁹

It appears that in both the EU Member States and United States, the financial crisis has not drastically shifted views on immigration, but rather increased polarization. Those who believe more highly qualified migration is essential for economic growth are seeking policy changes that reflect this; those who view migration as worsening conditions for the domestic work force are pushing back.²⁰⁰ As noted above, to a greater extent than in the United States,

¹⁹⁶ See, e.g. Peter Schuck, *Citizenship and the Financial Crisis in Europe*, HUFFINGTON POST (Jan. 24, 2012) http://www.huffingtonpost.com/peter-schuck/post_2902_b_1228777.html?ref=business&ir=Business; *The next European crisis: boat people*, THE ECONOMIST, *supra* note 153.

¹⁹⁷ See, e.g. Marley, Morris, *European leaders must be wary of rising Eurosceptic populism from both the right and the left*, EUROPEAN POLITICS AND POLICY (Mar. 26 2012) http://eprints.lse.ac.uk/42988/1/blogs.lse.ac.uk-European_leaders_must_be_wary_of_rising_Eurosceptic_populism_from_both_the_right_and_the_left.pdf (noting that “right-wing populist leaders are attempting to capitalise on anti-EU sentiment amid the on-going crisis”).

¹⁹⁸ See, e.g., Mabel Berezin, *The Normalization of the Right in Post-Security Europe* in POLITICS IN THE AGE OF AUSTERITY (Armin Schaefer & Wolfgang Streeck, eds., 2011) (suggesting that the increased popularity of these groups’ views in the wake of the financial crisis has resulted in the adoption of their rhetoric and policies by mainstream political parties); Thalif Deen, *For International Migrants, It May Be The Worst Of Times*, UN INTERSERVICE PRESS (Oct. 6, 2011) <http://www.globalissues.org/news/2011/10/06/11433> (noting that “[t]he negative European response to migrants has been prompted by several factors, including the spreading economic crisis and the rise of right-wing political groups opposed to migration”); Benjamin Ward, *Europe’s Own Human Rights Crisis*, HUMAN RIGHTS WATCH (Jan. 2012) <http://www.hrw.org/world-report-2012/europe-s-own-human-rights-crisis>.

¹⁹⁹ Cerna, *supra* note 27, at 26.

²⁰⁰ See, e.g. THE GERMAN MARSHALL FOUNDATION FUND OF THE U.S., TRANSATLANTIC TRENDS: IMMIGRATION (2011) 2-4 (finding that in both Europe and the U.S. “[b]asic public stances on immigration have not changed

European policymakers have reacted by restricting highly qualified immigration, implementing measures that seem likely to have the counterproductive effect of limiting economic growth in the medium term. In contrast, the restrictive immigration laws enacted in states such as Georgia, Alabama and Arizona are to a large extent based on widespread anti-immigration movements in those states that pre-date the economic downturn and therefore cannot be characterized as a response to the financial crisis.²⁰¹ While the EU has so far been successful in enacting progressive immigration directives, it appears to be already struggling with Member State implementation.²⁰² Meanwhile, the U.S. federal government faces problems in both enacting progressive federal immigration reform, *and* addressing the issue of divergent compliance with federal immigration law and policy at the state level.

V. Conclusions & Recommendations

Both the U.S. and the EU face serious challenges in implementing immigration policies that will facilitate the highly skilled immigration that is critical to economic growth. The EU Blue Card system, as set forth in the Blue Card directive, has a major advantage over the U.S. H-1B visa system in that it provides greater mobility to highly skilled immigrants, who are less dependent on their employers to maintain or adjust their status than U.S. HB-1 visa holders. However, it remains to be seen whether EU Member States will implement the program in good faith, or make use of the Blue Card Directive's provisions allowing Member States to restrict the number of Blue Cards granted. Both U.S. and EU policies on international students have serious

notably in the last year" but noting strong polarization in survey participants' perceptions of the economic effects of migration and policy preferences); KOEHLER, ET AL., *supra* note 183, at 5-6, nothing that:

Opinion poll data and research in selected European countries do not show a consistent increase in public hostility towards migration during the economic crisis. In countries such as the UK and Spain, where migration was already a highly politicized issue in the pre-crisis period, concerns over the economic recession reinforced rather than increased public worries about migration.

²⁰¹ For instance, Arizona had passed other strict state laws concerning immigration prior to passage of Arizona SB 1070 in 2010. David S. Broder, *Arizona's Border Burden*, THE WASHINGTON POST (July 8, 2007) http://www.washingtonpost.com/wp-dyn/content/article/2007/07/06/AR2007070601929_pf.html.

²⁰² See *supra* notes 29-32 and accompanying text.

flaws: while the United States is very successful in attracting and accepting foreign students to its universities, due to its restrictive policies with regard to economic migration, it is unable to retain many of the bright young professionals its universities have trained. With the creation of the European Higher Education Area providing greater mobility, and the Student Directive aiming to promote Europe as a world center for education, Europe has in recent years become a significant competitor to the U.S.'s status as the primary destination for international students.²⁰³

Reform in the area of immigration policy is challenging, as it implicates a debate on federalism. In Europe, a common migration policy represents a dramatic shift that is facing resistance on some fronts. In the U.S., the converse is happening: only in recent years has a push for increased state control over immigration policy begun to challenge the existing paradigm of a unified federal migration policy that has existed since the late 1800s.²⁰⁴

The financial crisis has not dramatically changed views on immigration in either the U.S. or the EU. The economic downturn has strengthened calls for increased skilled migration on one hand, and calls for decreased immigration on the other hand. As such, it has led to increased polarization between those who believe that immigration policy should focus on facilitating immigration of highly skilled professionals and improving the productivity of immigrants already present, and those who believe the focus should be on returning illegal immigrants, preventing illegal immigration, and reducing legal admissions.

What can the United States and the European Union do to establish policies that best promote highly qualified immigration? As I argue above, compared to the EU Blue Card, the U.S. H-1B visa system has two major flaws: (i) its lack of “portability” increases the likelihood

²⁰³ Douglass & Edelstein, *supra* note 113, at 7.

²⁰⁴ See, e.g. WALTER A. EWING, IMMIGR. POL'Y CENTER, OPPORTUNITY AND EXCLUSION: A BRIEF HISTORY OF U.S. IMMIGRATION POLICY 3-4 (2012) (noting that with the passage of the Immigration Act of 1891, the federal government succeeded in centralizing immigration control and that “[o]ver the decades that followed, U.S. immigration laws were marked by further centralization of federal control over immigration.”).

that the system will be abused by employers seeking to pay below market wages; and (ii) its inflexible annual caps mean that the supply of visas does not respond to demand. For this reason, the U.S. should either reform or abandon the H-1B visa system. Abandoning the system altogether would force U.S. employers to provide green cards for all of their foreign hires, which would intensify backlogs unless the green card system was also dramatically reformed. A better solution would be to revise the H-1B system to allow employees to change jobs without requiring the new employer to sponsor another visa, and to petition for a green card for themselves after a certain number of years of continuous highly qualified employment, in order to reduce employer abuses. The U.S. government must also address its annual caps on employment visas, which are unrealistic in terms of employer demand, either by adjusting caps each year based on the previous year's demand, or eliminating them altogether.

In Europe, the EU Commission will need to work closely with the Member States to ensure that the Blue Card and Student Visa programs are being implemented in good faith. Thus far, the Commission has demonstrated its commitment to enforcing the goal of immigration harmonization by advancing infringement proceedings against countries that were delayed in transposing the Blue Card Directive.²⁰⁵ However, Member States through their tardiness in implementing the program have also demonstrated their ambivalence to reforming their laws to promote increased levels of highly qualified immigration. Beginning in 2014, the Commission will report to the European Parliament and the Council on the implementation of the Blue Card Directive in the Member States and propose any changes, if necessary.²⁰⁶ The Commission should consider amending the Blue Card Directive to provide for a longer term of five years (rather than two); if the immigrant remains in highly qualified employment for those five years,

²⁰⁵ See *supra* notes 29-32 and accompanying text.

²⁰⁶ Blue Card Directive, *supra* note 24, at art. 21.

he or she will then be eligible for permanent residence pursuant to the Long-Term Residents Directive. In order to facilitate the mobility of Blue Card holders, the Commission should make it mandatory for states to provide equal treatment to Blue Card holders with respect to highly qualified employment after two years of residence.

A centralized policy of economic migration is essential for both the U.S. and Europe. In the United States, state laws that discriminate against migrants not only violate their human rights, but are also likely to deter the immigration of the high-skilled, legal professional immigrants that the U.S. should seek to attract, as well as the low-skilled illegal immigrants that are the intended targets of such laws. The recent financial crisis in Europe has demonstrated the extent to which economic problems in one country have an effect throughout the Union: similarly, allowing Member States too much leeway to derogate from progressive immigration policies such as the Blue Card Directive means that restrictive immigration policies in one Member State will have a distorting effect on the Single Market. A March 2012 OECD study notes that “[m]anaging labour flows in a labour migration framework at the EU level is important because high skilled migrants are sensitive to obstacles such as the still fragmented nature of EU labour markets.”²⁰⁷

This does not mean that the EU, and the U.S. federal government should not pay attention to the differing economies of the Member States and states, respectively. Due to the different economic needs in the various Member States, in the short-run allowing Member States to determine the number of Blue Cards granted is appropriate, as long as it is based on an assessment of economic need, as assessed in conjunction with private sector, and not on discriminatory motives. In the United States, the federal government should work with the states

²⁰⁷ ORGANISATION FOR ECONOMIC CO-OPERATION & DEVELOPMENT, OECD ECONOMIC SURVEYS: EUROPEAN UNION 2012 82 (2012) http://dx.doi.org/10.1787/eco_surveys-eu-2012-en.

to attempt to channel skilled immigration to areas of economic need, as the governor of Michigan has proposed.²⁰⁸ The EB-5 Immigrant Investor visa, although largely underutilized due to its large funding requirements, was useful in this respect, as it provided a mechanism for encouraging immigrant investors to settle in areas of greater economic need.²⁰⁹ In fact, immigrant investment has played a role in helping to revitalize several U.S. cities thought to be in decline, including Cleveland and Detroit.²¹⁰

In addition to policies to attract new highly skilled immigrants, it is also important for both the U.S. and the EU to work to improve the labor force opportunities of those already resident, both native and foreign born. In Europe, this challenge is particularly pressing with regard to immigrants and asylees, many of whom find themselves working in jobs below the skill-level attained in their native country, due in part to still-restrictive policies in many occupations. Policies to improve integration at the EU level can assist in the transition to more gainful employment, but again, it is necessary that these policies be implemented in good faith at the national level. In the United States, in contrast, immigrants tend to show greater labor force participation rates than in Europe. Policies aimed at re-integrating low-skilled domestic workers, who are priced out in sectors such as construction by immigrant labor, as well as in other sectors that are disproportionately impacted by immigration, are important.²¹¹

Investing in education and improving access to education and job training for all long-term residents will be critical for countries seeking to sustain economic growth in the future.

²⁰⁸ Chris Christoff, *Michigan Wants More Immigrants* BLOOMBERG (Feb. 2, 2012) <http://mobile.businessweek.com/magazine/michigan-wants-more-immigrants-02022012.html>.

²⁰⁹ See *infra* note 74 and accompanying text.

²¹⁰ See, e.g. Bobby Ghosh, *Arab-Americans: Detroit's Unlikely Saviors*, TIME MAGAZINE (Nov. 13, 2010) http://www.atfl.org/index.php?option=com_content&view=article&id=189:arab-americans-detroits-unlikely-saviors&catid=52:atfl-news&Itemid=107.

²¹¹ For instance, Papademetriou and Sumption note that “[i]n the long run . . . efforts to ensure that education and training systems foster adaptability to change and the ability to learn rather than simply imparting specific skills, are likely to be a more effective response to fears about outsourcing than restrictions on highly skilled immigration.” PAPADEMETRIOU AND SUMPTION, FOSTERING COMPETITIVENESS, *supra* note 47, at 19.

Policies that harness immigration to boost growth in depressed municipalities and that focus on reintegration of the displaced native workforce require investment on the part of governments, but would likely help to ease opposition to immigration among native populations, helping to achieve the consensus on immigration as a positive which is currently lacking. Both the U.S. and the EU must improve access to education for undocumented immigrants, both by allowing these immigrants to obtain education financing offered to other students, and by adopting laws that regularize the workforce participation of longterm resident undocumented immigrants. Given that children of immigrants are unlikely to return to their home country²¹², it is important that those with the interest and ability to obtain a university education or higher are able and encouraged to do so, rather than being channeled into low-skill labor, which will not promote economic growth in the long run. Measures to boost existing human capital, however, should be seen as a complement, not an alternative, to laws that facilitate the immigration of highly qualified individuals.

Successful immigration policies in both the EU and the U.S. will recognize immigrants of all skill levels, particularly but not exclusively highly skilled immigrants, as a potential source of economic growth. Such policies will seek to optimize mobility of immigrants through increased uniformity and coherence of immigration policies; committing to federal not state control of immigration in the U.S. and implementation of EU policies at the Member State level in Europe. A more ambitious focus on mobility may also seek to incentivize immigrants to settle and invest in areas where their participation will most promote economic growth. A sensible approach to

²¹² See, e.g., LEAH MUSE-ORLINOFF, CENTER FOR AMERICAN PROGRESS, STAYING PUT BUT STILL IN THE SHADOWS: UNDOCUMENTED IMMIGRANTS REMAIN IN THE COUNTRY DESPITE STRICT LAWS 18 (2012) (DISCUSSING THE SITUATION OF UNDOCUMENTED IMMIGRANTS IN THE UNITED STATES); DEMETRIOS G. PAPADEMETRIOU, MADELEINE SUMPTION, & WILL SOMERVILLE, MIGRATION POLICY INSTITUTE, MIGRATION AND THE ECONOMIC DOWNTURN: WHAT TO EXPECT IN THE EUROPEAN UNION 3-6 (2009) (discussing the situation in the EU).

immigration and economic growth will also prioritize the development of a well-educated workforce, through attraction and retention of international students, and improvement of access to education for both native- and foreign-born residents.