Risk sharing between member states through migration as a social right

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Abstract: Economists claim that the European monetary union would work so much better if labor mobility were higher. But economic models treat workers' migration to another member state essentially in the same way as workers' changing jobs within the domestic economy. The jurisprudence on free movement of persons (workers and services) and non-discrimination that the CJEU developed over the years can show how different cross-border and within-border movements are. For comparative political economists, who conceptualize welfare states as institutionally coherent regimes, this proves that free movement of persons clashes with the "logic of closure" (Ferrera) on which welfare states rest. This paper takes free movement of citizens within the United States as reference point to show how homogenous social security systems are, how contested the social right of free movement is and what role courts play in shaping them. The basis for differentiated regulation of free movement in the euro and the dollar area is that welfare states consist of varied social programs with specific access rights. They operate on principles of discrimination, rather than closure. Judicial interventions can clash with these principles but there is no irreconcilable difference of logics at work. At the same time, labor migration as an economic adjustment mechanism for entire regions is arguably overrated, both in its positive and its negative impact.

Key words: migration, immigration policy, monetary union, risk-sharing

1 Introduction: Europe against the U.S. benchmark

Economists claim that the European monetary union would work so much better if labor mobility between member states were higher. They typically cite the United States as the prime example for a monetary union where risk-sharing between regions works through the channel of migrant workers.[1] These references compare internal U.S. migration with migration between member states in the Euro area (EA). This follows the theory of optimum currency areas, whose inventor, Robert Mundell (1961), actually referred to Canada. Workers' migration to another member state of the Canadian dollar area was synonymous with workers' moving from one firm to another within the same Province. The OECD (2014: 147) captures this understanding of free movement in contrast to (managed) labor migration: "The free movement of labour is not subject to restrictions on

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[1] References include even authors like Bayoumi and Eichengreen (1993) and Krugman (2013: 441, 445-46), ie economists who do not simply adhere to neoclassical textbook economics.

occupation, duration or employer characteristics." In textbook economics and in the OECD definition, free movement of labor is the absence of regulation.[2]

The jurisprudence on free movement of persons (workers and services) and non-discrimination that the Court of Justice of the EU (CJEU) developed over the years can show how different cross-border and within-border movements are. This jurisprudence does not simply aim at facilitating labor migration across borders but at enforcing free movement in a common market with different welfare states. Free movement, and economic migration more generally, then becomes a social right, not only to take up a job, but also to get more or less equal access to the risk sharing pools that a welfare state is made of.

Comparative political economists take this seriously. But they claim that unrestricted flows of people clashes with "the logic of closure" on which European welfare states operate (Ferrera 2005, 2009; cf Conant 2008: 46). This view is based on an institutionalist-culturalist conceptualization of support for redistribution that can explain why free movement is politically resisted. Nationally constituted welfare states require the underpinning of solidarity between those who share a cultural framework and institutions of safety nets that reinforce the framework: for instance, if strong support for redistribution is part of the self-image of a nation, a universalist welfare state can be built and in turn buttress this framework of (fairly) equal citizens. These "quasi- equilibria" (Hall 2014) can be upset by migration: for instance, rising inequality may lead to adaptations of how much inequality is acceptable so that the support for redistribution does not shift as much or becomes less inclusive (Kerr 2014). The political constraint of nationally bounded solidarity can come into direct opposition to the economic imperative of a common market. It creates a "progressive dilemma" (Goodhart 2004) in that openness to migration and the ensuing multiculturalism undermine the support for a generous welfare state. Those who see such a dilemma tend to side with the welfare state.

These two influential scholarly perspectives have strong and fairly opposite implications for how the promotion of free movement in the Euro area should be evaluated. Economists conclude that EU-wide deregulation has not gone far enough in removing national obstacles to immigration while they should avoid incentives to move solely for the purpose of claiming benefits. Comparative political economists conclude that EU regulations have gone already too far and should instead respect the national constitution of welfare states so that openness to people and trade does not overstretch solidarity underpinned by national institutions.

Against this background, my paper examines how free movement in the EU is constructed as a distinct social right of migration. Instead of using some ideal type as reference point (the borderless economy or national welfare states based on one coherent ideology), I distinguish free movement in the Euro area from that *within* the United States. This perspective sides with comparative political economists insofar it analyzes free movement of workers not simply against the benchmark of a borderless search for work. Conceptually, however, I think it is more fruitful to regard welfare states not as nationally constituted, tightly knit regimes but as consisting of a set of conditionally accessible schemes that have varied political underpinnings, depending on the political forces that push for and against them. This theoretical perspective can be traced back to the new politics of the welfare

[2] There are exceptions to the simplistic economists' view of free movement, for instance Boeri (2010).

state.[3] Nationality has rarely been a condition for access to benefits; it is criteria like a minimum of contributions, residence, age or need. Nor does the nationality of a migrant necessarily matter for how much difference cross-border migration makes. U.S. citizens moving from Mississippi to Massachusetts have to change their pension and health care providers and get different entitlements to unemployment benefits and social assistance, analogous to an EU-national moving from Finland to France.

In the view of economists and political economists, the United States are at the other end of the spectrum of mobility and (non-)closure compared to Europe. So we can study the social right to free movement, on the one hand in the U.S., where welfare schemes have the same institutional access criteria defined by federal legislation, while states vary enormously with respect to the access and level of entitlements (Baicker et al 1998: 228; OECD 2012: 1). This is in contrast with the EA, on the other, where institutional differences prevail but social security systems are overtly coordinated and meta-regulated to ensure a particular entitlement to free movement. Methodologically, this paper studies EU migration as a social right by comparing free movement as presumably intended by CJEU jurisprudence with the regulation of inter-state migration in the US. If my perspective is fruitful, we should see that the political difficulties and the policy solutions are not worlds apart but analogous, exactly because free movement is a differentiated and contested social right either way.

The paper outline is as follows: The next section challenges the stereotype that the U.S. is a homogeneous welfare union while Europe is made up of irreconcilable welfare regimes and lends empirical support to my conceptualization of the welfare state. The third section specifies the social rights of inter-state migrants in the two monetary unions by looking at its conflictual evolution involving heavy court interventions. Then I evaluate briefly recent evidence about internal mobility in the two monetary unions to argue that labor migration as an economic adjustment mechanism is overrated, both in its positive and its negative impact. The concluding section argues that the social right to free movement as envisaged by EU legislation and jurisprudence is bound to be constantly resented in major destination countries, not because it destroys their welfare states but because it forces them in effect to redistribute to the poorer territories of the union.

2 How diverse are the two currency areas in social security terms?

Free movement is conceptualized here as a differentiated social right to seek employment, residence and social security in another (member) state, not as the absence of any regulation.[4] Ten EA member countries are taken to form one country for purposes of labor mobility, just like normative OCA theory requests, but with different regional welfare systems. These countries are Austria, Belgium, Finland, France, Germany, Ireland, Italy, the Netherlands, Portugal, and Spain. The EA-10 were selected for reasons of data availability from the OECD and because they had a combined population size of 309 mio in 2012, similar to the U.S. (314 mio).

[3] Cf Pierson (2001), Schelkle (2012: 21-26); see also Baldwin (1990) for an intricate historical account, Scruggs and Allen (2006: 68-69) for a direct challenge to Esping-Andersen's (1990) regime classification and Sainsbury (2006) for a critical evaluation of the Worlds of Welfare Capitalism with respect to the social rights of immigrants.

[4] Social security is used here synonymously with social policy more widely, not confined to old-age security (as in the U.S.) or social insurance only (as in the EU codification).

How different or homogenous is the access to major social security schemes within these two monetary unions of equal population size? The following table lists the cash benefits, unemployment compensation for up to one year and social assistance that a migrant might want to claim if s/he moves between states in one of these monetary unions. Since actual benefit levels are highly sensitive to the family situation and previous earnings, I assume for unemployment benefits the prototypical economic migrant in search for better employment: single with no children and fully employed before losing the job in the state of residence.[5] For social assistance, the paradigmatic case is a lone parent with two children who receives social assistance. These choices are partly dictated by data availability and comparability: the Congressional Research Service gives figures for social assistance levels in U.S. states for this family constellation.[6]

Table 1: Variation in monthly cash benefits for inter-state economic migrants, 2012-2014

		U.S. states	EA-10 member states
Unemployment benefits	**Previously full-employed average worker, single**		
	Least generous state(s)	$22-1011[a]	€815 (gross) €822 (net)[c]
	Most generous state(s)	$636-2920[a]	€2542 (gross) €1825 (net)[c]
	Median	$189 (min. benefit) $1754 (max. benefit)	€1272 (gross and net)
	As share of average wage in state	24 - 58%	30 - 75% (gross) 51 - 75% (net)
Guaranteed minimum resources (eg social assistance)	**Lone parent with two children**		
	Least generous state(s)	$689[b]	€0 / 467[d]
	Most generous state(s)	$1,348[b]	€1874 / 2593[d]
	Median	$869	€1506 / 1626[d]
	As share of average wage in state	14 – 35%	0 - 65% (for unemployed) 30–96 % (low-wage employed)

Sources: Congressional Research Service (2014a, 2014b) and Census for U.S. state benefits and wages; OECD database on benefits and wages for EA-10

a gives range of minimum and maximum monthly benefits

b combined benefit of TANF (Temporary Assistance for Needy Families) and SNAP (Supplementary Nutritional Assistance Program, "Food Stamps" before 2008)

c net is after income taxes and social security contributions

d the first figure is for unemployed lone parent with no previous earnings, the second figure is for lone parent employed at 30% of the average wage

One striking message of this table is that there is as much variation in unemployment benefits between U.S. states as there is between EA-10 members. This can be inferred from how widely they

[5] A single worker without children would not receive an earnings subsidy from the Earned Income Tax Credit (EITC) in the U.S. but would pay federal tax even if full-employed at the minimum wage only (CBPP 2015). – There is evidence that unmarried individuals are significantly more likely to migrate than those married (Dustmann and Görlach 2015: 27-28).

[6] I include SNAP, formerly Food Stamps, into social assistance here because anybody on TANF (for which the presence of children is a precondition) will be entitled to these vouchers.

vary as a share of average state wages (24-58% compared to 51-75% net). The maximum unemployment benefit in the most generous state Massachusetts is almost three times as high as in the least generous state Mississippi (2920:1011) while average wages in Massachusetts are only 1.5 times as high as in Mississippi.[7] The ratio in the EA-10 is similar for gross unemployment benefits, namely 3 (=2542:815), a ratio which results from benefit levels in the Netherlands and Ireland, respectively; the average wage ratio between the two countries is also about 1.5. For unemployment benefits net of taxes and social security contributions (SSC), this ratio is just slightly above 2 (=1825:822) between the Netherlands and now Portugal while the average wage in the Netherlands is 2.7 times that of Portugal. Obviously, the ratios would be much higher if the entire EA would have been considered with members like Slovakia.[8] The point here is not that the EA is more homogeneous than usually thought but that these noticeable differences persist in the United States which has been a free movement area for a long time.

Another finding is that the extent of variance is reversed when we look at so-called "minimum guaranteed resources", ie all means-tested benefits for poor households: U.S. states show less variation than the EA-10 and they converge on low levels, namely even in the most generous state below the federal poverty level for a family of three.[9] By contrast, EA-10 states have widely differing benefit levels for poor households. For an unemployed lone parent with two children that had no previous earnings, Italy has no benefits whatsoever while in Ireland this family could get benefits to the tune of two thirds of the average wage, largely thanks to family benefits. For an employed parent on low income (30% of average wage), the variation is equally extreme, namely from no gain in Spain (30% ratio with and without benefits) to almost an average wage (96%). The latter is again the case in Ireland where in-work benefits top up relatively generous family benefits, in stark contrast to Ireland's low unemployment benefits for childless workers.

The U.S. downward convergence of social assistance levels seems to confirm those who fear a progressive dilemma, namely that free movement and openness to migrants comes at the cost of generosity of the welfare state. The EA-10 evidence is more ambiguous. Is it possible that institutional variety actually protects them against "the race to the bottom" in poverty relief because they are locked in their institutional pathways on which they embarked when they were relatively closed? To answer this question, one would first have to assess how different welfare states are in institutional terms. Do they form tightly knit regimes that are resistant to change?

An important institutional difference concerns the mode of financing a social policy scheme. Esping-Andersen's (1990) time-honored classification of *Worlds of Welfare Capitalism* postulates that conservative welfare states are largely based on contributions (that replicates the stratification of labor market status), social democratic welfare states on tax finance with universal access (that replaces labor market status with egalitarian citizenship) and liberal welfare states on tax finance for residual, means-tested benefits (that distinguishes the needy and welfare-dependent from all other

[7] For minimum unemployment benefit levels, the ratio between the most generous state, Washington State, and the least generous state Hawaii is 29 (=636:22).
[8] The available OECD data on the new member states show that their unemployment benefit levels relative to wages show a wide variety, just as in the rest of the EA (OECD 2007: table 1.1).
[9] The federal poverty level was $1591 in 2012, cf. Congressional Research Service (2014a: table A-5).

citizens).[10] In tax-financed schemes, access is typically channeled by categorical criteria: for instance, (a minimum length of) residence in National Health Care-type systems, age for a universal child care benefit and a state pension, and need for disability benefits or social assistance. Contribution-based schemes grant access if the claimant has made the necessary insurance payments and the case arises, such as illness, unemployment, or retirement.

This distinction is arguably important because political economists have reason to believe that given a certain public attitude towards migrants from other states, tax-financed schemes are more vulnerable to political backlash (Boeri 2010; Hall 2014: 10-11). Rightly or wrongly, taxpayers tend to feel that migrants get access to benefits which they do not help to pay for. It may depend on whether the tax-financed entitlement is based on residence or need: residence spresumably projects the equality of citizenship on the recipient while a means-test stigmatizes recipients as poor and underclass. Schemes that allocate on the basis of social security contributions (SSC) can in principle be conditioned on a minimum of contributions (eg unemployment insurance) and a more or less tight link between contributions and expected benefits (eg for pensions) to attenuate fears of nationals. However, social policy schemes can redistribute less if benefits are strictly conditioned on prior (equivalent) contributions. They tend to become a form of contrived savings.

Table 2 gives an overview of how major social policy schemes are financed in the United States and in EA-10 countries. The source for the classifications of schemes in EA-10 member states is the EU's Mutual Information System on Social Protection (MISSOC) database, and a report by the European Migration Network (EMN 2014) on 27 members of the EU. The OECD provides less extensive but still useful periodical reports about tax-benefit systems of member states; the latest on the United States is from 2012. For programs not covered by the OECD report, I consulted U.S. government websites.

The table supports common knowledge in that EA-10 member states differ considerably in institutional terms, namely how they finance benefit schemes. But it also rejects the scholarly notion that there are coherent national welfare regimes in which one mode of financing dominates. Only France uses consistently one mode of financing and that is the *mix* of contributions and general taxes. For all others, we observe a certain clustering in almost every social policy scheme: contributions are the prevalent mode of financing pensions, unemployment benefits and workers compensation, in a number of countries mixed or complemented with tax-financed programs. General taxation dominates in financing poverty relief ("guaranteed minimum resources") and family benefits, again in many countries mixed with contributions. The two exceptions – that would stand out even more clearly if all European countries were listed – are health care and maternity/ paternity benefits where no dominant mode of financing has evolved. Welfare states are "mongrels", not "thoroughbreads" of one ideology turned into one mode of financing (Bolderson and Mabbett 1995).

[10] Bolderson and Mabbett (1995) challenged this correspondence profoundly. Later, the replication of Esping-Andersen's classification by Scruggs and Allen (2006: 68-69) concluded that social policy schemes rather than entire countries should be the unit of analysis.

Table 2: Modes of financing major social policy schemes

	Social security contributions	General taxation	Mix of contributions and general taxes
Health care	Austria, Germany	Finland, Italy, Portugal, Spain; Ireland[a]; United States	Belgium, France, Netherlands
Old-age pensions and benefits	Germany, Spain		*Mixed:* Austria, Belgium, France, Netherlands; United States *Dual:* Finland, Ireland, Italy, Portugal
Unemployment benefits	Austria, Netherlands, Portugal		*Mixed:* Belgium, Finland, France, Italy *Dual:* Finland, Germany, Ireland[b], Spain; United States[c]
Workers compensation (accidents and occupational diseases)	Belgium[d], Finland, Germany, Ireland, Italy, Portugal		Austria, Belgium[d], France; United States[e]
Guaranteed minimum resources		Austria, Belgium, Finland, Germany, Ireland, Italy, Portugal, Spain; United States	France
Family benefits	Italy	Finland, Germany, Ireland, Portugal, Spain; United States	Austria, Belgium, France
Maternity and paternity benefits	Germany, Ireland	Finland	France[b] *Mixed:* Austria, Belgium, Italy, Netherlands *Dual:* Portugal, Spain

Source: MISSOC (July 2014 release) and EMN (2014: sect.2); OECD (2012), www.medicare .gov; Department of Labor

a need-based

b basis of entitlement is contributory but scheme financed by taxes

c earmarked state taxes on employers equivalent to SSC; federal taxes for extensions of standard length of entitlement

d in Belgium, insurance against accidents are financed by employers' contributions to private insurance, workers compensation for occupational diseases are financed by contributions and taxes

e some federal programs, but primarily private insurance mandated by states (employers have to provide insurance for employees)

The United States also fits this pattern, namely that the policy area is a better predictor of the mode of financing than the country, or rather: than the welfare regime to which the country supposedly belongs. The U.S. is not a liberal welfare state in the sense that general taxation finances only residual, means-tested benefits. This holds not even for health care where Medicare for the elderly and Medicaid for the poor of working age are tax-financed medical insurance programs while for everybody else health care is private. Medicare is a universal program (with age as the discriminating criterion) while Medicaid is residual (need). Social assistance and family benefits are tax-financed and means-tested but this is the case in a variety of welfare states. A mix of contributions and general taxes finances the other three programs; the U.S. has no benefits for maternity leave.

What does all this mean for the promotion of free movement, in particular by the CJEU? The conflicts should not arise between one type of welfare regime and another, such that EU regulation is particularly ill-fitted and contentious for particular countries. Rather, the conflicts should arise with respect to particular schemes in which certain modes of financing dominate. Theoretically, tax financed poverty relief and means-tested family benefits should be most susceptible to contestation while less controversial should be purely contribution based schemes such as pensions in Germany and Spain, unemployment benefits in Austria, Netherlands and Portugal, and workers compensation in a number of countries. Yet, it may depend on the exact regulation, for instance the obligation to export certain benefits to the country of residence, but not others. An interesting case is mixed financing of safety nets because they could help to establish how important notions of solidarity are, regardless of the actual institutionalization. A systematic exploration of these hypotheses would require a big comparative research project. But it should be possible to establish whether the contentious evolution of rules governing the social right of migration in the EU and in the US provide some evidence in this regard.

3 How different are social rights of free movement in the EU and in the U.S.?

In the EU, it is often claimed that the right of EU-nationals to move to another member state has evolved from a right based on work to a right based on EU citizenship (EPRS 2014: 4). Comparative political economists would describe this as a shift from the norm of a conservative welfare state like Germany to a social democratic welfare state like Sweden (Sainsbury 2006: 231).[11] This decisive shift was prepared by Court rulings, amidst much opposition from national welfare administrations, but later codified in the Maastricht Treaty and secondary legislation to which governments and national parliaments (as far as Directives are concerned) had to agree. The legal controversies revolved around the question what constitutes a worker and work in the Treaty because the worker status gives immediate access to social security equal to a national or longterm resident. As early as 1986, the Court sided with a plaintiff who argued that a "restrictive interpretation" of the free movement Article for workers (now Art. 45 TFEU) "would reduce freedom of movement to a mere instrument of economic integration [and] would be contrary to its broader objective of creating an area in which Community citizens enjoy freedom of movement ".[12] An expansive and autonomous definition of what constitutes a "worker" in EU law thus advanced a right of EU citizens to move and reside in another member state.

The Maastricht Treaty established Union citizenship in 1992, the first and only case of a supranational citizenship right that complements national citizenship (Art. 20 TFEU). It gives an unconditional right to three months residence in another member state to all EU nationals. The key distinction now is between economically active and economically inactive citizens, fought over again on legal battleground: does the category of economically active citizens include unemployed job seekers and students? Can economically active citizens claim means-tested benefits, such as social assistance, family and housing benefits, if they unexpectedly fall on hard times? Do they lose their right to reside if they become thus inactive and needy? The answers to these questions can be found

[11] Thanks to Sainsbury's perceptive analysis, we can also see that these are norms of welfare regimes and not of immigration regimes which are based on norms of lineage (Germany) and of residence (Sweden).—The following overview of the EU regulation of free movement has greatly benefitted from the summary in European Parliamentary Research Service (EPRS 2014: 6-8) which guided me to the relevant Court rulings.
[12] CJEU judgment of 03.07.1986, C-66/85 *Lawrie-Blum* on whether a trainee teacher "works" or merely "studies", quote from para.12.

in the Free Movement Directive 2004/38 and in Regulation 883/2004 on the coordination of social security systems, the two most important pieces of secondary legislation on free movement as a social right in the EU. Alas, they do not always give the same answers (EPRS 2014: 6). This can be explained by their different thrusts: the Free Movement Directive 2004/ 38 applies to what benefits an EU citizen can receive from the host member state, the Coordination Regulation 883/2004 applies to what benefits EU citizens can take with them from their home state if they move to another member state.

The principle is that economically active citizens, workers and the self-employed, have immediate and equal access to all benefits upon arrival, if for instance the wage is so low that nationals receive an in-work benefit under such circumstances. [13] If they have worked for over a year and become involuntarily unemployed, they retain the active status for at least six months (Art (3) Directive 2004/38). Workers can also take with them any entitlements they acquired through contributions once they leave, even after a limited period of time, such as pensions or workers compensation for accidents. The rules for the aggregation of benefits, for instance if somebody acquired pension entitlements in more than one country, had been developed on a bilateral basis before they were then extensively meta-regulated by the EU (Bolderson and Gains 1993).

Workers cannot take non-contributory benefits with them, however: social and medical assistance and so-called Special Non-Contributory Benefits (SNCB) must be paid only to residents. [14] Social and medical assistance is not always easy to distinguish from contributory social security and health insurance, however. SNCBs can be of the mixed-finance type or tax-financed benefits that are not granted for reasons of need but typically age or disability.[15] If a government does not want to grant such a benefit to non-nationals (sometimes after it lost a Court case), it has to be specifically listed as an SNCB in Annex X of the Coordination Regulation. SNCBs imply an exemption from the exportability of benefits and are effectively discriminating between residents who are predominantly nationals and temporary residents who are predominantly non-nationals. The haggling over this list between member states and the Commission delayed the implementation of Regulation 883/2004 until May 2010. The Court and the Commission tended to treat all benefits as non-wage entitlements that mobile workers should be able to enjoy somewhere else if residents get them; member state authorities objected that some benefits are meant to ensure social cohesion among residents.

The secondary legislation is ambiguous on whether unemployed jobseekers and students have to be considered economically active; it depends on the individual circumstances that the host state administration must consider. The Free Movement Directive 2004/38 (Recital 16) lists jobseekers in line with workers and self-employed persons and states that “an expulsion measure should not be the automatic consequence of recourse to the social assistance system.” This suggests that jobseekers should normally be regarded as economically active citizens, but only if they have a previous employment history in the host state (Art.7(3) of Directive 2004/38). Otherwise they must demonstrate a “real link”, ie protracted effort to find work in the host country. Host states are not obliged to grant social assistance to jobseekers that is not classified as an SNCB; but it is still disputed

[13] Eg Case C-22/08 *Vatsouras*, para. 26-32.
[14] Art. 3(5) and Art. 70(4) of Regulation 883/2004.
[15] CJEU judgment of 11.11.2014, C-333/13 *Dano*, para 63 considers SNCB as “social assistance” in the sense of the Free Movement Directive.

whether jobseekers should have access to activation measures, such as training (EPRS 2014: 13-14). Students on vocational training are economically active although Art. 24(2) of that Directive allows host states refusing "to grant maintenance aid for studies, including vocational training [prior to acquisition of the right of permanent residence]".

Permanent residence is acquired by five years of continuous residence in another member state, irrespective of whether economically active or non-active. Before that, inactive citizens, typically pensioners and university students, non-employed citizens who are not jobseekers and jobseekers with no prospect of getting work, must have enough resources to avoid becoming "an unreasonable burden on the social assistance system of the host Member State during an initial period of residence" (Recital 10 of Directive 2004/38). What constitutes an "unreasonable" burden has not always been consistently interpreted by the Court.[16] Inactive citizens must also be covered by sickness insurance. The initial period in which host state authorities can ask for proof of these two conditions to be fulfilled have been codified as between three months and five years; after five years it is assumed that migration is permanent with social rights equal to national residents. In the first three months, an inactive citizen has no access to benefits.

These residency requirements for inactive citizens' access to benefits touches on the fundamental principle of non-discrimination on grounds of nationality (Art 24 Directive 2004/38). Recent Court rulings justify member states' right to unequal treatment as a precaution against the race to the bottom it could otherwise trigger. An undifferentiated obligation to grant non-contributory benefits "could have consequences for the overall level of assistance which may be granted by that State" (C-333/13 *Dano*, para 63; C-140/12 *Brey*, para 61). Those who do not have own resources to sustain themselves beyond three months and up to five years can lose the right of residence. Expulsion is permitted but only after individual circumstances have been considered (Recital 16 Directive 2004/38). In a recent letter to the Irish Presidency of the Council, with copies to three Commissioners, four member state governments complained that the right to free movement allows a deported citizen to return instantly and asked for the instrument of a re-entry ban.[17] Art 35 of the Free Movement Directive allows governments, however, to "adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience."

Table 3 summarizes the most important features of free movement as a social right in the EU.

[16] For instance, in C-333/13 *Dano* in contrast to C-140/12 *Brey*.
[17] The member states were Austria, Germany, the Netherlands and the UK (EPRS 2014: 11).

Table 3: Outline of free movement regulations in the EU

	Economically active citizens	**Economically inactive citizens**
Contributory benefits (e.g. unemployment and health insurance)	Governed by EU law: Equality of access with resident nationals if employed; exportable; Unemployed jobseekers retain status for six months if previously employed for at least one year	Governed by EU law: No access; Right of residence beyond three months and up to five years depends on citizens being able to sustain themselves and having sickness insurance
Social and medical assistance	Indirectly governed by EU law: Restricted access for previously employed of more than one year; not exportable	Indirectly governed by EU law: No obligation on host member state to grant for up to five years; Equality of access after five years; not exportable
Special Non-Contributory Benefits	Governed by EU law: Equality of access, eg for jobseekers with "real link" to host state; Equality of access with nationals after five years while resident; not exportable	Governed by EU law: No obligation on member state to grant for up to five years; Equality of access after five years while resident; not exportable

Sources: see text

In the United States, residency requirements have also led to controversy that ended in court. Inter-state migrants can take unemployment insurance (UI) with them when they move while social assistance (TANF) is not exportable and has to be paid by the state of residence. In contrast to SNAP (aka food stamps), UI and TANF are partially financed and wholly administered by the states. Both cash benefits were created in the Social Security Act of 1935[18] by regulating and incentivizing the ways in which U.S. states provided either. The two benefits were and are clearly separated: the Act discouraged using means-testing in unemployment compensation (Baicker et al 1998: 228). For constitutional reasons, the Roosevelt administration could not simply introduce them as federal programs or risked to have the entire Act to be struck down by the Supreme Court for federal overreach (Baicker et al 1998: 239-242). The result was that the states got enormous leeway in determining eligibility criteria and benefit levels. This federal-state structure was bound to lead to conflicts, some of them ending up in court.

Residency requirements for receiving social assistance were a preferred legal measure of state and local authorities to deter poor migrants until the late 1960s (Schram and Soss 1999: 43). They stipulated, for instance, that a recipient had to reside for a year in the state before she could get any benefits or before she could get benefits at the level of the destination state if it was higher than in the state of origin (Allard 1998: 53). In the 1960s, social activists challenged these practices in the Supreme Court as being discriminatory. It resulted in a number of landmark cases that struck down these stipulations. In the most famous case, *Shapiro*[19], the Court ruled 40 such durational residency

[18] Social assistance for single parents was then called AFDC (Aid to Families with Dependent Children), replaced in 1996 by TANF. Food stamps, since 2008 called SNAP, became a regular and fully finance program under President Johnson in 1964, although it had predecessors in 1939 and 1961 when surplus agricultural produce could be distributed through food stamps at the discretion of the federal government.

[19] *Shapiro v. Thompson*, 394 U.S. 618 (1969)

requirements unconstitutional (Schram and Soss 1999: 43) because they violated the right to travel implied by the Fourteenth Amendment that gives all U.S. citizens "the same privileges and immunities in the several states".[20] This right to travel was a judicial construction since the word "travel" does not appear in the U.S. Constitution, as the Court stated frankly and repeatedly (see Stevens in *Sáenz v. Roe:* sect.III*)*. It was interpreted extensively, including a right to equal treatment in a new state of residence.

The legality of residency requirements for non-contributory benefits came again to the fore with the 1996 welfare reform under the Clinton administration, PROWRA (Personal Responsibility and Work Opportunity Reconciliation Act). It authorized "any State receiving a TANF grant to pay the benefit amount of another State's TANF program to residents who have lived in the State for less than 12 months" (*Sáenz*, case summary). Fifteen states introduced residency requirements subsequent to this authorization in the sense of wanting to pay only the lower benefits of the origin state. In eight states, they were immediately challenged in district courts (Allard 1998: 55). *Sáenz v. Roe*[21]*,* a long-standing case in California, reached the Supreme Court which struck down the residency requirement that a district court had struck down in the early 1990s. More importantly, it ruled against PROWRA's authorization as well: "This Court has consistently held that Congress may not authorize the States to violate the Fourteenth Amendment. Moreover, the protection afforded to a citizen by that Amendment's Citizenship Clause limits the powers of the National Government as well as the States." (*Sáenz*, case summary) The Californian government advanced a purely fiscal argument for its intention to disadvantage newly arriving citizens, in EU parlance: it maintained that paying the relatively high Californian benefits to newly arriving citizens is a "burden on its social security system" (Rec.10 and Art. 7(1) Directive 2004/38). But the Court dismissed "any contributory rationale for the denial of benefits to new residents" (Stevens in *Sáenz v. Roe:* sect.V). This rationale would permit states to allocate all benefits and services according to past tax contributions which, quoting from *Shapiro*, Justice Stevens deemed absurd: consequently, new residents could be barred from schools and parks or deprived of police and fire protection.

Unemployment compensation in the U.S. is a benefit financed through a mix of employer contributions levied by the states, on the hand, and tax-financed extensions in case of high (state) unemployment at the discretion of the federal government, on the other.[22] Unemployment benefits are fully portable and jobseekers arrive with the benefit of the state they come from. We have seen in table 1 that the considerable variation of monthly unemployment benefits as a share of average wages may de facto limit mobility. States compensate usually half of the weekly wage of an eligible worker, up to a certain limit. On maximum benefit, an unemployed worker from Kansas, Oregon or Utah would have benefits to the tune of 60% of state average wages; but this ratio shrinks to 46%, 53%, and 48% respectively if they would move to California for work.[23] The entitlement to unemployment benefits is short, until recently 26 weeks in all states, plus some federal extension in

[20] The Clause was regarded dormant until then because it was included into the Constitution after the abolition of slavery in 1868, as a safeguard against southern states depriving black Americans of their citizenship rights through so-called Black Codes (Winick 1999: 593).
[21] *Sáenz v. Roe*, 526 U.S. 489 (1999)
[22] In fiscal year 2014, state contributions paid about $50 bn and the federal taxes about $5 bn for unemployment insurance (CRS 2014b: 2)
[23] Own calculations for 2012/13 from CRS (2014b) and Census data for average wages.

times of unusually high unemployment. Between 2011 and 2013, nine states reduced benefit duration to 20 weeks (CRS 2014c).

Eligibility has become more tightly administered by states over the years so that there is a large discrepancy between actual unemployment and unemployment for which those affected get benefits. This is not for lack of coverage: almost 100% of jobs are covered by UI, that is employers must pay earmarked taxes for every employee. There is evidence that part-time and discontinuous work often does not meet the requirements of minimum earnings and a certain amount of work within five quarters. What drives down numbers of eligible claimants as well is the non-monetary requirement that unemployment must be involuntary. This latter requirement is a reason for most court cases (Baicker et al 1998: 231). Firms have an incentive to make the worker quit "voluntarily" because of so-called experience rating, a unique feature of the U.S. unemployment insurance system. Firms must pay more contributions if they use the insurance more frequently by laying off employees, up to at least 5.4% of their payroll in 2014 (CRS 2014b: 3). Roosevelt's secretary of labor, responsible for introducing unemployment insurance into the Social Security Act, had opposed experience rating inter alia for the reason that it would make firms reluctant to hire workers with some handicap (Baicker et al 1998: 243). It is easy to see that being out-of-state may be such a handicap and migrant workers may also become more easily victims of firms with sharp practices.[24]

As a consequence of all these restrictions (duration, eligibility criteria, experience rating), unemployment benefits have eroded so much that workers compensation for accidents and occupational diseases has become a bigger program than UI. This was the case even in years of a recession as in 1991-93. States seem to have shifted costs on to food stamps (now SNAP) which is a fully financed federal program (Baicker et al 1998: 234-235). Only about a third of all job losers actually receive unemployment benefits in normal times, compared to two thirds in the mid-1970s, while the rates go down to around ten percent for job leavers and reentrants into the labor market (Vroman 2009: table 3). The recipiency rate can go up to 50% after recessions and one of the success stories of the recent stimulus program was that the recipient rate peaked at a historical high of almost 68%: states were incentivized to give benefits to workers with employment histories that would normally disqualify them (Mulligan 2011).[25] But this program has ended and some states have actually decreased their entitlements to twenty weeks (CRS 2014c). The following table sums up.

[24] No other OECD country has experience-rating for employer contributions to unemployment insurance, although Austria and the UK experimented with this for a while (Baicker et al 1998: 227n).

[25] In the EA-10, only Italy has a lower unemployment benefit recipiency rate of 33% than the US with 37%; not data is provided for Portugal. Others are above OECD average, topped by Germany and Austria with over 90%. Figures are for 2007-8 (OECD 2011: Fig 0.9).

Table 4: Outline of free movement regulations in the U.S.

	Unemployed jobseeker	**Recipient of social assistance**
Unemployment insurance	Governed by federal law: Equality of access with permanent residents if employed; Exportable	Governed by federal law: No access
TANF	Governed by federal law: Equality of access with permanent residents (access conditional on the presence of children); not exportable	Governed by federal law: Equality of access with permanent residents; Not exportable
SNAP	Governed by federal law: Equality of access with permanent residents (max 3 months within 36 months period if childless); Federal program	Governed by federal law: Equality of access with permanent residents; Federal program

Sources: see text

What does this comparison tell us in political economy terms? The theoretical expectation is that non-contributory benefits, especially means-tested ones, are more susceptible to political backlash when economic migrants get them in numbers noticed by the public. It is in line with these expectations that we found states in both the U.S. and the EU that states tried to deny full and immediate access to non-contributory benefits to citizens. But in the U.S., the Supreme Court finally struck down the right of states – and the right of the national legislature to authorize states -- to impose restrictions in the guise of residency requirements for TANF. Food stamps, now SNAP, is a federally financed programme and was never subject to residency requirements. On the contrary: scholars suspect that states let benefits erode for which they pay and free-ride instead on this federal programme. This has even been forwarded as an explanation for why state administrations award the contributory benefit of unemployment insurance to less than half of all unemployed citizens.

In the EU, residency requirements are allowed for non-contributory benefits to economically inactive EU-nationals, lasting up to five years. These EU citizens, typically pensioners or students, have to prove on demand that they can sustain themselves and have sickness insurance. By contrast, migrant workers and self-employed persons should enjoy all entitlements that national residents get even if their earnings from work are too low to sustain them and their families. But host states have to export only contributory benefits when migrants return or move on to another country. This excludes a category of tax-financed benefits, SNCBs, for which migrant workers may qualify, such as supplements to pensions based on age, and which they helped to finance while they were working.

4 How mobile are workers within the euro and the dollar area actually?

This section returns to the economist's concern about low mobility in the EA, in contrast to the U.S. where migration is supposedly important and effective as regards economic adjustment. In the following, I disregard social assistance and focus on the free movement of workers. The analysis above suggests that the social rights in both monetary unions/ welfare federations facilitate migration of jobseekers as there are no legal obstacles to access the labor market of another member state. There can, of course, be financial obstacles due to the wide variation of benefits as a share of average wages in unions where wages vary considerably. And there are self-evidently other

obstacles such as language that make it more difficult for EU citizens to move to another member state. But the financial crisis since 2007-08 was such a massive shock that it provides some evidence on how strongly citizens used their right to free movement to escape the downturn in their state or region.

To assess the extent of mobility, migration between the EA-10 will be counted as domestic labor migration, analogous to inter-state migration of U.S. citizens, while all other migration is treated as immigration by non-nationals. The following table gives estimates for the internal and external migration rate for the two monetary unions, adding inflows and outflows as percentage of the population. The inter-state migration rate in the U.S. has been calculated by Molloy et al (2014: table 1) from the Current Population Survey for different age groups, which gives an average interstate migration rate of 1.6% (weighted with the share of these age groups). The inter-state migration rate for the EA-10 has been calculated using the country tables at the end of the OECD 2014 International Migration Outlook. The migration rate between the EA-10 states is a minimum insofar the OECD provides only a count of inflows from a country of origin if it is among the top 10 nationalities to this destination. These top ten nationalities cover typically 60 percent of all inflows.

Table 5: Gross migration rates, 2002-2012

	United States	Euro Area-10[c]
Inter-state migration	1.6%[a]	0.06%
International migration	0.44%[b]	0.98%
Foreign-born population, 2011	13.0%	12.0%

Sources: own calculations from

a The first figure is from Molloy et al (2014: table 1) based on the Current Population Survey.

b OECD (2014), country table; missing outflow data inferred from net migration rates (data underlying fig.1.8)

c Population weighted averages from OECD (2014), country tables; missing outflow data for France and Ireland inferred from net migration rates (data underlying fig.1.8)

Even if we concede that intra-EU-10 migration may be understated, the figures confirm that internal labor mobility is merely a fraction of that in the dollar area. This is largely due to the fact that the EA-10 (or larger) does not contain any of the larger European countries with high emigration, such as Poland or Romania. But they show up in the fact that, over the decade of 2002-12, the EA-10 has been more than twice as open to immigration flows as the U.S. This led to a catching-up in terms of the stock of foreign-born residents.[26] The composition of this stock of foreign-born residents is unsurprisingly different: in the EA-10, more than half of the foreign-born residents (6.4 percent) were from other European countries[27], while in the U.S. more than half of foreign-born residents (7.2 percent) came from Central and Latin America, less than 2 percent were Europe-born (OECD 2014: figure 2.3).

A specialist economic literature looked at the relative contribution of migration to smooth economic shocks, compared to fiscal stabilizers or financial claims across states. When a region experiences an

[26] It should be noted, however, that the standardized (international) migration statistics of the OECD covers only permanent migration, so 0.44% for the U.S. and 0.98% for the EA-10 are lower bounds (Jauer et al 2014: para 2).

[27] It was not possible to find out how many of them are from other EU-10 member states.

economic down-turn, laid-off workers may move elsewhere and find employment; if their families stay behind they can stabilize regional income through remittances. For the U.S., the pioneering study of Barro and Sala-i-Martin (1992) estimated that inter-state migration reduced the spillover of a state's output shock to household income by 3% at most. A different methodology confirmed this figure (Asdrubali et al 1996: 1102-3) for 1964-1990. The contribution of labor migration to income smoothing of 3% compares to 39% for cross-border equity holdings, 23% for inter-state credit and 13% for taxes and fiscal transfers. 25% of a shock to state output remained uncompensated and led to a corresponding income loss for households (Asdrubali et al 1996). A similar estimate for OECD countries between 1971 and 2007 showed that cross-border labor income is irrelevant for sharing the risk of output shocks between them (Balli et al 2011: 531-33). This difference between 0% and 3% absorption of a shock of 100% is the basis for economists' claim that the dollar area functions so much better than the euro area. My conclusion is rather that even in the U.S., labor migration made historically a minimal contribution to smoothing household income.

Recent work on the evolution of internal labor mobility in the U.S. suggests that the contribution has if anything been reduced further. Molloy et al (2014: 1) show that inter-state migration has declined since the 1980s, reversing the upward trend earlier in the 20th century. They study various explanations that have been forwarded in the literature, such as increased costs of migration (eg the lock-in effect of increasing costs of changing health insurers) and the compositional change of the work force (ageing, increasing homeownership). Their preferred explanation is that lower inter-state migration is part of lower turnover and churning in U.S. labor markets generally. In contrast to previous decades, employees do not get much advantage from changing jobs. In the authors' view, this could mean that labor markets actually function better: for instance, there could be a better match between employers and employees to begin with, or employees are promoted within firms more often while changing jobs was the way to advance one's career before. What matters for the present context is that low or declining labor mobility can have many reasons and they are not necessarily worrying.

An IMF study looks at all OECD countries over the last 40 years and compares inter-state migration in the United States and mobility between 173 European regions in 21 countries and the response to regional labour demand shocks from 1998 to 2009. They find that responsiveness in European countries has increased significantly in the EU while labor movements have become less responsive to regional shocks in the U.S. (Dao et al 2014). In a similar vein, Beine et al (2013: 21) measure gross flows in OECD countries over forty years and find that the Schengen agreement and the Euro area have significantly raised labor mobility in Europe. Notably, monetary integration which they take into account as a dummy variable seems to have contributed over 17% of the rise in bilateral migration flows between EA countries (Beine et al 2013: tables 2 and 3). The effect is stronger than differences in business cycles.

The crisis since 2007 (in the U.S.) and 2008 (in Europe) was a massive shock, as the term Great Recession indicates. If ever there was a natural experiment that allowed testing labor mobility as an adjustment mechanism, then this is it. Historical studies for normal times may be outdated; after all, moving to another country is a major decision and threshold effects could be important. A fine-grained OECD study looks at *net* migration flows between 2005 and 2012, comparing EU-27/EFTA regions (NUTS-1 and -2 levels) and U.S. states (states and Public Use Microdata Areas comparable to NUTS-2). They estimate the amount of net flows "produced" by changes in unemployment and

income differentials (Jauer etal 2014: para 23). Their results are remarkable: "the migration response to the crisis has been considerable in Europe, in contrast to the United States where the crisis and subsequent sluggish recovery were not accompanied by greater interregional labour mobility in reaction to labour market shocks." (Jauer et al 2014: 5) When they split their time series in pre- and post-crisis, they find the familiar result that pre-crisis labour mobility to region-specific labour market shocks was stronger in the United States than in Europe, while with the onset of the crisis, "Europe now showing a stronger interregional adjustment reaction than the United States" (Jauer et al 2014: para 32). Their estimates suggest that "up to about a quarter of the asymmetric labour market shock [in Europe] would be absorbed by migration within a year "." (Jauer et al 2014: 5, para 31) The authors note that this is an upper bound estimate, assuming that all measured population changes in Europe were due to migration for employment purposes.

There is an interesting twist, however: this rise in mobility is not due to intra-EA flows but to migration from the new EU member states outside the EA and third-country nationals. This rise in labor mobility is therefore, strictly speaking, not an adjustment mechanism of the EA but partially a consequence of free movement in a very heterogeneous union.[28] And before one gets carried away by the finding that up to 25% of an output shock could be compensated by labor migration, one also has to look at the cost for the countries of origin.

Table 6 looks at the socio-economic characteristics of recent migrants (share) and how they compare to their immobile peers in the country of origin (diff for difference). They are free movement migrants, ie those who come from and go to EU-27/EFTA countries and those moving within the U.S., respectively. A positive number in the diff-column means that the mobile population has a higher share in this characteristic than those left behind.[29]

Table 6: Characteristics of recent free movement migrants compared with natives of the origin region (15-64 years), 2011 and 2012

	NMS (EU-10)		**Southern Europe in EA**		**Euro area**		**United States (2011)**	
In %	share	diff	share	diff	share	diff	Share	diff
Employment rate	71	+10	59	+2	60	-4	52	-11
Unemployment rate	8	-2	15	0	16	+6	18	+7
Employment rate one year ago	61	0	51	-6	58	-5	76	+3
Unemployment rate one year ago	13	+2	15	-4	9	-3	12	+1
Share of youth (20-34)	70	+38	59	+30	58	+30	50	+20
Share of highly educated	28	+8	41	+20	41	+16	39	+6
Share of highly skilled employed	17	-19	49	+12	50	+8	25	0

Source: OECD from Jauer et al (2014: table 1)

[28] The interpretation that Beine et al (2013: 21) give their results, namely that "the inception of the Euro made Europe closer to an Optimum currency area", is in my view mistaken.

[29] The share and diff figures combined allow us to infer the share of the native population in this characteristic To take the New Member States (NMS) and their employment rate: if 71% of recent migrants from the EU-10 are employed and the difference to their immobile peers is +10%, then the employment rate of the residents in the NMS is 61%.

The first two pairs of columns show emigration countries, although the Southern Europe four (Greece, Italy, Portugal and Spain) were net immigration countries before the crisis. By comparing employment and unemployment rates in 2011/12 and a year before, we can see that migrants from the new member states and Southern Europe had different motives – in the EU-10, they were more likely to be unemployed while the Southern European migrants were actually more likely to be in employment and less likely to be unemployed[30] – but succeeded in improving their probability of being employed still one year later, EU-10 migrants much more so than Southern Europeans. The brain drain phenomenon is much more prevalent among Southern Europeans who are more educated or have a skilled job while EU-10 migrants are young and actually less likely to be in skilled employment than their fellow natives. Thus, for the NMS largely from outside the EA, migration can be a form of skill transfer while Southern European migration seems to drain countries of their younger and better trained citizens.

The last two pairs of columns show immigration regions but only the intra-EA/U.S. part of it. Inter-state migrants in the EA-17 were less likely to be employed before and once they migrated. On average, they could not improve their (un-)employment situation by migrating. This reflects the youth bias among migrants together with the high incidence of youth unemployment in the EA. Brain drain was also an issue as indicated by the positive difference to highly educated and highly skilled in employment in their EA origin countries. Brain drain hardly played a role in the U.S. Those who migrated were not necessarily driven by their employment situation – they were more likely to be employed and unemployed a year before they migrated – but the move to another state had on average not the desired payoff; their (un-)employment situation was worse than among their peers left behind. The youth bias could account for this counter-intuitive result that we also find for the EA – in times of uncertainty and low demand, firms do not employ less experienced workers.

5 Conclusion: Free movement on trial

My comparison of inter-state migration in the EA and in the U.S. provided evidence that the two free movement regions are not worlds apart, contrary to the presumption in most of the literature. Free movement is a differentiated and contested social right in both: it is politically difficult to make the right a reality on the ground, the policy solutions found under judicial constraint revolve around the distinction of contributory and non-contributory benefits; and actual mobility under each regime is now very similar -- low but boosted by immigration from outside. Ultimately, it seems that both the critics of EU free movement who invoke a progressive dilemma and the promoters of free movement in economics departments and the Commission overestimate the role labor migration plays in welfare state evolutions and in territorial adjustment. Free movement is of political significance.

In both the EA and the U.S., non-contributory benefits prove to be more problematic than contributory benefits. Free movement as a social right in the U.S. is extensive as regards the basic minimum: the Supreme Court has developed a constitutional right to travel that entails for every "economically inactive" citizen the right to claim social assistance upon arrival in another U.S. state. But it is noticeable that states have allowed poverty relief to converge downwards and freeride on the federal food stamps program. For workers, there is also formally equal access to unemployment

[30] This is less tautological than it sounds as there is also the category of non-employed, eg people who care for children and thus are neither employed nor registered unemployed.

benefits but state administrations pay benefits only to less than 40% of unemployed workers even though virtually all are insured. This social right is a consequence of citizenship which is indicated by the fact that exportability is not an issue while equality is. In line with theoretical expectations, the entitlement to non-contributory benefits was controversial; contrary to expectations, the judiciary overturned several and sustained attempts of the legislature to limit them to longer-term residents.

In the EU, by contrast, economically inactive citizens, except if they are family members of workers, do not have immediate access to social assistance and other benefits allocated on the basis of need. Students are in most cases considered to be inactive although vocational training and a "real link" with the host state, established in less than the usual five years, can apparently trump this categorisation. Economically active citizens, to some extent including unemployed jobseekers, have a right to full integration into another member state's welfare system. It could be said that EU citizenship follows from the exercise of free movement. Exportability was problematic, applied to ensure equality. The creation of an artificial category of non-contributory benefits, SNCBs, to be granted to economically active or long-term resident EU-nationals but not portable, can be seen as a recalibration of an EU regime that sought to ensure non-discrimination via maximum exportability. It does now allow discrimination on the basis of residency for (previously) economically active citizens or the length of residency for those inactive.

In this perspective, the EU regime of social security coordination is not confronted with a stark choice between openness and closure of nations that would require "a strategy of institutional reconciliation" (Ferrera 2009: 231). Legislation and jurisprudence can proceed in a more nuanced fashion and treat different social policy schemes differently. Welfare states consist everywhere of a diverse set of social policy programs. A Court ruling that, say, requires maximum exportability of a contribution-based benefit, will not hit only conservative welfare states. Mixed modes of financing mean that governments could dispute that it is a purely contribution based benefit. Or they can reduce the share of the contributory benefit and supplement it with an SNCBs, targeted at resident pensioners with special needs. The CJEU is, rightly or wrongly, suspicious of these mixed benefits. And to the extent that the judiciary tries to protect national taxpayers at the cost of non-national taxpayers, it plays a valuable countervailing role to domestic political processes. But one has to be rather obsessed with the power of the Court to believe that the CJEU can trump the domestic politics of welfare states.[31] Mongrels are robust creatures.

But this conceptualization raises the question why free movement is so contentious after all. Free movement demands that destination states integrate economic migrants and their families into their welfare state without pre-selection. This is an imposition because welfare states operate on the basis of specific discrimination, rather than on wholesale closure (Mabbett 2009: 4). They use their particular age criterion for retirement and student maintenance, they allow gender discrimination in private and social insurance or not, and they set need levels sometimes in relation to internationally accepted poverty levels or not. Lawyers may find that some of this is effectively disadvantaging certain groups disproportionately, be it migrants or women, and invoke minority protection or non-discrimination principles. This is quite standard within welfare states and it should come to nobody's surprise that the EU is now having these fights that the U.S. also had. EU and federal interventions

[31] I do not know of any political theory that would support the view of what supranational judiciary can do to national democracies that Davies (2015) projects in his contribution to this panel.

sometimes prohibit using the discriminating criteria for access to social security that member states would prefer, for a variety of (justifiable and unjustifiable) reasons. But if political pressure mounts, the Court tends to respond, as it arguably has in the recent C-333/13 *Dano* ruling. EU legislation is typically formulated such that it can make a dignified retreat. For instance, the Free Movement Directive 2004/38 talks in Recital 10 of "unreasonable burden" that should be avoided by free movement while Article 7(1) talks of "burden" only, which is less onerous to prove for the administration that does not want to bear the burden of paying benefits to an inactive migrant.

As a political economist, I see supranational/ federal legislation and case law as part of the different channels through which the regulatory welfare state redistributes. It is too small as an economic adjustment mechanism for entire regions.More or less strict compliance is the instrument of fine-tuning the redistribution that comes that way. The Court's thrust, namely to facilitate mobility and maximize the social entitlements of migrant EU-nationals, in effect redistributes from richer or better-off destination countries to individuals from poorer or recession-hit origin states. To a large extent, this merely compensates citizens of these countries for the regressive redistribution that is inherent in labor mobility: given the bias of migrants being younger and/or better educated (cf table 6), there is usually regressive redistribution from origin to destination countries that remittances and the acquisition of skills can hardly undo.[32] Judicial redress of this regressive effect will not destroy mature welfare states. In fact, such redistribution is a progressive imperative, not a progressive dilemma.

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[32] Dustmann and Görlach (2015: 36-42) suggest that temporary migration is more beneficial for origin countries, permanent migration more beneficial for destination countries.

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