

# *Solidarity in the European Union*

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**Abstract**—Political theorists aiming to articulate normative standards for the EU have almost entirely focused on whether or not the EU suffers from a ‘democratic deficit’. Almost nothing has been written, by contrast, on one of the central values underpinning European integration since at least the European Coal and Steel Community (ECSC), namely solidarity. What kinds of principles, policies, and ideals should an affirmation of solidarity commit us to? Put another way: what norms of socioeconomic justice ought to apply to the EU? This is not an empirical or narrowly legal question. We are not trying to gauge the degree of attachment there currently is in the EU by, for example, citing the latest Eurobarometer poll. We are also not attempting to state the implicit rationale followed by the Court of Justice in its recent ‘solidarity’ jurisprudence, let alone trying to fix what the Commission might mean by it. In this article, I ask the more fundamental question underlying both the legal and the empirical questions: What principles of social solidarity ought to apply between states and citizens of the emerging European polity? This question has rarely been asked or answered by political theorists in an EU context, so we are entering largely uncharted territory. The article develops a tripartite model of EU solidarity in Section 2, and then applies it to the case of free movement of persons in Section 3.

**Keywords:** distributive justice, EU law, political theory

## 1. *Introduction*

Solidarity has long been a fundamental value underpinning the project of European integration. The Preamble to the Treaty Establishing the European Coal and Steel Community Treaty (1951) recognized that ‘Europe can be built only through real practical achievements which will first of all create real solidarity, and through the establishment of common bases for economic development’. Reflecting the impetus of the Delors commission and Southern

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enlargement, ‘solidarity’ appeared alongside ‘cohesion’ in both the Single European Act (1986) and the Maastricht Treaty (1992). The Treaty of Lisbon (2006) not only continues this commitment but also expands it, mentioning it both as a value binding together member states and as a value binding together the citizens of each and every member state.<sup>1</sup> The text of these articles recognizes that each member state is defined and distinguished by its commitment to social justice, and it is one of the fundamental objectives of the Union to preserve such commitments ‘while’, as the Preamble to the Charter of Fundamental Rights puts it, ‘respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organization of their public authorities at national, regional and local levels’.

The double commitment to preserving the national solidarity at the basis of the ‘European Social Model’ as well as deepening and strengthening solidarity across member states has developed in reaction to widespread unease about the liberalizing effects of European integration—effects that are seen to reinforce rather than allay the impact of globalization and demographic change on the viability of the welfare state. This public disquiet, and the corresponding attention to the importance of both solidarity and social protection, has recently been growing. Consider, for example, the anxiety at the heart of the Dutch and French rejections of the Constitutional Treaty, fraught debates over the drafting (and redrafting) of the Services Directive, more general discussion about ‘social services of general interest’, ‘social dumping’ (eg *Viking*, *Laval*, *Rüffert*<sup>2</sup>), ‘benefit tourism’, the prospect (and now reality) of eastward enlargement, and, of course, the recent debt crisis.<sup>3</sup>

Sensing danger in the growing malaise, Community institutions have been quick to respond. The Commission, for example, has responded with frequent references to ‘solidarity’, the launching of a new ‘Social Agenda’, a draft for future development in this area (‘Europe 2020’), and myriad consultations with social partners. The European Court of Justice (ECJ) has now developed a line of jurisprudence (in the area of competition and freedom of movement law) in which it routinely refers to ‘principles of solidarity’ to determine the proper balance between market principles and social protection objectives in EU law.<sup>4</sup>

<sup>1</sup> The Preamble to the Lisbon Treaty on European Union (TEU) commits its signatories ‘to deepen the solidarity between their peoples while respecting their history, their culture and their traditions’. cf arts 2, 3, 21 TEU; arts 67, 80, 122, 194, Treaty on the Functioning of the European Union (TFEU), and again in various protocols.

<sup>2</sup> Case C–438/05 *International Transport Workers Federation, Finnish Seamen’s Union v Viking Line* [2007] ECR I–10779; Case C–341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I–11767; Case C–346/06 *Dirk Rüffert v Land Niedersachsen* [2008] ECR I–1989.

<sup>3</sup> See eg PP Craig, ‘Competence and Member State Autonomy: Causality, Consequence and Legitimacy’ in Hans Wolfgang Micklitz and Bruno de Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2012); Gráinne De Búrca, ‘Reflections on the Path from the Constitutional Treaty to the Lisbon Treaty’ (2008) Jean Monnet Working Paper No 3/2008 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1124586](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1124586)> accessed 27 September 2012.

<sup>4</sup> See eg Jo Shaw (ed), *Social Law and Policy in an Evolving EU* (Hart 2000); Gráinne De Búrca (ed), *EU Law and the Welfare State: In Search of Solidarity* (OUP 2005); Michael Dougan and Eleanor Spaventa (eds), *Social Welfare and EU Law: Essays in European Law* (Hart 2005).

To name but two further examples, the Union legislator is steadily at work on a new framework for health services in which the balance between market access and principles of solidarity is centre stage. And the eurozone countries have agreed details regarding the establishment of a European Stability Mechanism (to succeed the European Financial Stability Mechanism). Questions of solidarity are at the very heart of negotiations.

Yet, despite such prolific use of ‘solidarity’, there is very little analysis of what the nature of solidarity *is*, or why we should feel particularly moved by an appeal to it.<sup>5</sup> Referring to the convention on the ill-fated Constitution, Miguel Poiars Maduro bemoans this fact and calls for a deeper reflection on the ‘criterion of distributive justice’ that should guide European reform. ‘Without such a debate’, he writes, ‘there can be no true social contract capable of legitimizing the emerging European polity and the consequences would be either a return to a less advanced form of integration . . . or, if the current model continues to be stretched, a crisis of social legitimacy which may manifest itself in increased national challenges to European policies (whose redistributive effects are not understood and accepted)’.<sup>6</sup> But what kinds of principles, policies, and ideals should an affirmation of solidarity commit us to?

This is not an empirical question. We are not trying to gauge the current degree of attachment to the EU or the depth of European fellow-feeling by, for example, citing the latest Eurobarometer poll. We are also not attempting to state the implicit rationale followed by the Court in its recent ‘solidarity’ jurisprudence or trying to fix what the Commission might mean by it. Rather, we want to address the more fundamental question: can a more demanding criterion of solidarity—beyond, say, a humanitarian minimum—conceivably apply between states and citizens of the emerging European polity? And, if so, how demanding is it? Should we, for example judge the EU according to the standards of social justice and protection traditionally thought to apply to states? If not, how do we conceive of the ‘middle ground’ occupied by the EU (between states and the international order)? Or is talk of ‘social justice’ and solidarity inappropriate at the EU level? These are, it should be clear, manifestly normative questions: while the answers depend on getting the law and facts right, merely legal or empirical reflection cannot provide an answer to them. But they are not *only* normative questions: our answer to these questions will both depend on and shape the way we conceive of the future of the European project—including the appropriate balance between ‘market access’

<sup>5</sup> For the Court’s own approach, see eg Joined Cases C–159/91 and C–160/91 *Poucet and Pistre v AGF and Cancava* [1993] ECR I–637, paras 15, 18. cf Case C–244/94 *Fédération Française des Sociétés d’Assurances* [1995] ECR I–4013; Siofra O’Leary, ‘Solidarity and Citizenship Rights in the Charter of Fundamental Rights of the European Union’ in De Búrca, *EU Law and the Welfare State* (n 4).

<sup>6</sup> Miguel Poiars Maduro, ‘Europe’s Social Self: “The Sickness unto Death”’ in Shaw (n 4) 347. cf Delors: ‘[a]ny attempt to give new depth to the Common Market which neglected this social dimension would be doomed to failure’. J Delors, ‘Preface’ in Jacques Vandamme (ed), *New Dimensions in European Social Policy* (Croom Helm 1985) xviii.

and ‘solidarity’ in EU law, the shape and character of future reform in healthcare, pensions, public services, the boundaries of enlargement and our responsibilities to new members, and the precise balance between monetary stability and fiscal autonomy in the Economic and Monetary Union (EMU).

One might, as a result, expect the current literature on the ‘political theory of the EU’—by which I mean the literature that aims at a normative analysis of the process, policies, laws, effects, and institutions of European integration—to address these questions. Yet, despite the rich potential of the EU as a basis for deeper reflection upon the nature of distributive justice ‘beyond the state’, this literature is strikingly narrow. Two questions dominate. The first is whether or not there is a ‘democratic deficit’; the second is whether or not there is a ‘European identity’.<sup>7</sup> These two, closely related, questions have received abundant scholarly attention in recent years. Much less attention has been paid to the question of what a fully fledged European democracy and identity should be used, ultimately, *for*.<sup>8</sup> To be sure, the ‘identity’ literature makes much of the commitments of Europeans to social protection and social justice, but it is never in the context of the substantive question—are there any obligations of distributive justice among Europeans? If so, what are their grounds? Rather these commitments are considered merely instrumental in enlisting general support either for deepening and widening the project of European integration or for underwriting the democratization of the EU. This is also true of some of the most sophisticated and nuanced accounts of the EU’s impact on social solidarity both within and across borders, such as Fritz Scharpf’s *Governing in Europe*, where policy recommendations aimed at preserving the ‘European Social Model’ are cast within the framework of increasing the EU’s ‘output legitimacy’.<sup>9</sup> The judgement and demand is echoed in a recent article by Andrew T Williams, who complains that ‘the existing philosophy of EU law rests upon a *theory of interpretation* at the expense of a *theory of justice*’, concluding that ‘a satisfactory theory of justice needs to be constructed and adopted constitutionally if EU law is to be presented as the guardian of an “ideal constitution” which possesses a coherent ethical vision for the EU’.<sup>10</sup>

I have raised a question about cross-national justice, so one might think that the political theory literature on international *cum* global justice would provide a helpful platform for further reflection. The global justice literature, however, has focused almost exclusively on the more urgent problem of global poverty. It therefore offers few tools for answering our set of substantive questions

<sup>7</sup> The literature is extensive, but three recent surveys of the normative debates are indicative, namely Heidrun Friese and Peter Wagner, ‘Survey Article: The Nascent Political Philosophy of the European Polity’ (2002) 10 J Political Philosophy 342; Johan P Olsen, ‘Unity, Diversity and Democratic Institutions: Lessons from the European Union’ (2004) 12 J Political Philosophy 461.

<sup>8</sup> For this point, I am indebted to Glyn Morgan, *The Idea of a European Superstate: Public Justification and European Integration* (Princeton University Press 2004).

<sup>9</sup> Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (OUP 1999).

<sup>10</sup> Andrew T Williams, ‘Taking Values Seriously: Towards a Philosophy of EU Law’ (2009) 29 OJLS 549, 552.

regarding *regional* but still *international* social and political inequalities—inequalities which, moreover, do not in most cases involve the severe absolute deprivation present in the developing world.<sup>11</sup> No one contributing to the international *cum* global justice literature has tried to outline what kinds of principles of social justice, if any, apply to the EU. So we are entering largely uncharted territory here.

This article will answer our guiding questions by defending a normative model of solidarity for the EU and applying it to a number of practical cases. In Section 2 I ground my account of European solidarity in what I will call *reciprocity-based internationalism*. According to reciprocity-based internationalism, demands for social solidarity at all levels of governance can be understood as demands for a fair return in the mutual production of important collective goods. I will argue that, given the complex nature of European integration, a full account of EU solidarity must develop principles for three main contexts, namely principles of *national* solidarity (which define obligations among citizens and residents of member states), principles of *member state* solidarity (which define obligations among member states), and principles of *transnational* solidarity (which define obligations among EU citizens as such). I will then use the reciprocity-based framework to outline principles in all three dimensions of European integration. Given the limited nature of this article, my main aim in Section 2 will not be to provide a fully fledged defence of reciprocity-based internationalism from first principles.<sup>12</sup> Rather, in Section 2 I proceed by simply laying out its main features, distinguishing them from prominent competitors, and drawing the implications for the EU. Although I will not provide an argument from first principles, I do aim to support the overall plausibility of the model by applying it, in Section 3, to the normative questions raised by the free movement of persons. The free movement of persons is a good ‘case study’ because, as we will see, it raises issues that emerge in all *three* dimensions. My hope is that the three sections together will contribute to reaching ‘reflective equilibrium’ on a conception of EU solidarity: if the model succeeds in organizing our reflection in controversial cases regarding the free movement of persons across all three dimensions, and in generating consistent, coherent and robust conclusions across them, then this should reinforce its overall appeal.<sup>13</sup> Support for the tripartite conception of solidarity is secured, in other words, by showing how higher level principles, background theories and more concrete judgements in specific cases support one another within an overarching framework. The argument should also, at the same time, illustrate the plausibility of reciprocity-based internationalism as

<sup>11</sup> cf Rawls’s brief remarks on ‘cooperative [international] organizations’ in John Rawls, *The Law of Peoples* (Harvard University Press 1999) 42.

<sup>12</sup> I develop such a fully fledged defence in Andrea Sangiovanni, *Domains of Justice* (Harvard University Press) (forthcoming).

<sup>13</sup> On the idea of ‘reflective equilibrium’, see John Rawls, *A Theory of Justice* (Harvard University Press 1971) 577ff.

a general framework for thinking through problems of distribution in international contexts.

Our argument will also allow us to achieve a new perspective on an age-old question: What normative ideals underlie European integration? The framework defended here will reveal an EU that is best understood neither as a cosmopolitan federation in the making,<sup>14</sup> nor as a way of unravelling the welfare state,<sup>15</sup> nor as an extension of the national regulatory state,<sup>16</sup> nor as a way of strengthening the EU's minority nations and peoples while weakening its central governments.<sup>17</sup> Rather, the EU, as we shall see, will be understood as a way for member states to enhance their problem-solving capacities in an era of globalization, while indemnifying each other against the risks and losses implicit in integration. The EU is a project for and behalf of its member states achieved, in part, by a transnational extension of its public and social spaces to all European citizens, taken one-by-one.

## 2. *The Threefold Character of European Solidarity: A Framework*

Given our concern with social solidarity across borders, the most natural place to begin is with theories of global or international justice, asking how they might bear on the EU. This will allow us to see the distinctiveness of the reciprocity-based approach favoured here, and how it fits among more commonly recognized positions.

Imagine you are a globalist cosmopolitan. You believe that all persons deserve equal respect and consideration regardless of their place of birth, sex, age, race or nationality. You also believe that the scope of all solidaristic obligations should, as a matter of political morality, be global in reach, and that the scope of the obligations does not depend on the existence of any social interaction. Such obligations hold among persons *as such*, and hence would hold even, let us say, in a pure state of nature (in which individuals do not stand in any social relationship). You therefore oppose those who believe that obligations of social justice only hold among citizens and residents of states, and *a fortiori* you also oppose those who believe they only obtain among fellow members of a (cultural) nation.<sup>18</sup>

<sup>14</sup> As advocated by, eg Jurgen Habermas, 'Why Europe Needs a Constitution' (2001) 11 *New Left Review* 5.

<sup>15</sup> As advocated by, eg Werner Mussler, 'The Economic Constitution of the European Community: From "Rome" to "Maastricht"' (1995) 1 *ELJ* 5; EJ Mestmäcker, 'On the Legitimacy of European Law' (1994) 58 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 615; EJ Mestmäcker, *Wirtschaft und Verfassung in der Europäischen Union: Beiträge zu Recht, Theorie und Politik der Europäischen Integration* (Nomos Baden-Baden 2003).

<sup>16</sup> As advocated by, eg Giandomenico Majone, 'Europe's "Democratic Deficit": The Question of Standards' (1998) 4 *ELJ* 5.

<sup>17</sup> As advocated by, eg Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (OUP 1999).

<sup>18</sup> Examples of globalist cosmopolitanism include Charles R Beitz, 'Cosmopolitan Ideals and National Sentiment' (1983) 80 *J Philosophy* 591; Derek Parfit, 'Equality or Priority?' in Matthew Clayton and Andrew Williams (eds), *The Ideal of Equality* (Palgrave 2000); Kok-Chor Tan, *Justice Without Borders* (CUP 2004);

It follows that you would conceive of the EU as an instrument—along with all other social and political institutions—for realizing a unitary globe-encircling pattern of distribution, whose principles we can know independently of any specific knowledge about the EU. On this view, the EU serves the ideal when it helps to bring us closer to the globally preferred pattern (primarily by functioning as a model to other regions for how to expand the scope and depth of solidaristic obligations beyond the state), and undermines it when it props up the interests of Europeans at the expense of those globally worse off (think of agricultural subsidies under the CAP (Common Agricultural Policy)).

Now imagine you are a statist cosmopolitan. While you also believe that all persons deserve equal respect and consideration regardless of their place of birth, sex, age, race and nationality, you believe this entails, at most, a commitment to human rights and a general duty to assist the global poor.<sup>19</sup> However, you do *not* believe the idea of equal respect and consideration entails that fundamental principles of social justice more demanding than humanitarianism must be global in scope. This is because you hold that obligations of social justice are only triggered in the presence of the kinds of extensive social interaction present among citizens and residents of states. One prominent representative of this view, Thomas Nagel, contends that obligations of social justice are only triggered among those who share in upholding and imposing a comprehensive system of societal norms backed by coercion.<sup>20</sup> Because international law—and, indeed, European law—is not backed by a centralized system of coercion, principles of social justice do not apply there. Statists of this kind need not be euro-sceptics; their position only commits them to the thought that cooperation among EU member states raises no distinctive issues of justice. As long as the EU does not undermine the capacity of states to secure domestic commitments to solidaristic redistribution, then the EU is, as it were, justice-neutral.<sup>21</sup>

The position defended here is neither statist nor globalist in either of the senses just outlined; it is rather a version of *internationalism*. Along with both statists and globalists, internationalists are cosmopolitans insofar as they believe that all persons deserve equal respect and consideration. They also share with

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Simon Caney, *Justice Beyond Borders* (OUP 2005); Richard J Arneson, 'Do Patriotic Ties limit Global Justice Duties?' (2005) 9 J Ethics 127; GA Cohen, *Rescuing Justice and Equality* (Harvard University Press 2008); Pablo Gilabert, *From Global Poverty to Global Equality: A Philosophical Exploration* (OUP 2012).

<sup>19</sup> The position that Rawls defends in the *Law of Peoples* (Harvard University Press 1999) is statist in this sense. So are David Miller, *National Responsibility and Global Justice* (OUP 2007); Michael Blake, 'Distributive Justice, State Coercion, and Autonomy' (2001) 30 Phil & Pub Aff 257; Thomas Nagel, 'The Problem of Global Justice' (2005) 33 Phil & Pub Aff 113; Mathias Risse, 'What to say about the State' (2006) 32 Soc Theory & Prac 671.

<sup>20</sup> See Nagel, *ibid.*

<sup>21</sup> I argue against three variants of this view of the EU in Andrea Sangiovanni, 'Solidarity in the European Union: Problems and Prospects' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Law* (OUP 2012).

statists the position that obligations of social justice are only triggered in the presence of relevant forms of social interaction. But, contrary to statist, they do not believe that international relations are, beyond a human rights/humanitarian floor, a justice-free zone. Obligations of social justice more demanding than humanitarianism apply at the international level. The key element that distinguishes internationalist views is that the content of fundamental principles of social justice *varies with the type and extent of social interaction involved*.<sup>22</sup> Statism has a binary structure: either the relevant relations hold, and the full panoply of social justice obtains, or the relevant relations do not hold, and then only the humanitarian/human rights floor applies. Internationalism has a multinomial structure: different principles of social justice apply to different types of social and political institutions, depending on the kind of social interaction that the institutions instantiate. A good example is the form of internationalism developed below, namely *reciprocity-based internationalism*.<sup>23</sup> According to reciprocity-based internationalism, the type of social interaction that is relevant for social justice is the mutual production of collective goods (rather than, as in the example above, sharing in the coercive imposition of a set of comprehensive social and political institutions, or, as is sometimes supposed, sharing a national public culture or identity). On this view, demands of social justice are understood as demands for fairness in the distribution of the benefits and burdens generated by our joint production of collective goods. By contributing to the generation of such goods, we gain a stake in a fair share of the benefits made possible by them and an obligation to shoulder a fair share of the associated burdens.<sup>24</sup> What makes the view internationalist rather than statist is that the relevant principles vary according to the type and nature of the collective goods produced. What reciprocity requires among friends, citizens and residents of states, EU citizens and residents, or members of the WTO will be different not only in virtue of the diverse *kinds* of collective goods generated by institutions but also the *way* in which such goods are produced.

As a result of its more complex structure, internationalism faces a challenge: how does one go about identifying the correct principles for different types of social cooperation? The reigning assumption of contemporary Anglo-Saxon political philosophy is that in setting out and justifying principles of justice, one should seek a normative point of view unfettered by the form or structure of

<sup>22</sup> For alternative defences of *coercion*-based internationalism, see M Risse, *On Global Justice* (Princeton 2012); and Laura Valentini, *Justice in a Globalized World: A Normative Framework* (OUP 2012). I argue against both statist and internationalist versions of coercion-based distributive justice in Andrea Sangiovanni, 'The Irrelevance of Coercion, Imposition, and Framing to Distributive Justice' (2012) 40 *Phil & Pub Aff* 79.

<sup>23</sup> I provide a defense of reciprocity-based internationalism from first principles in Sangiovanni, *Domains* (n 12).

<sup>24</sup> of the principle of fair play as outlined in HLA Hart, 'Are There Any Natural Rights?' (1955) 64 *The Philosophical Review* 175; Rawls, *Justice* (n 13).

existing institutions and practices.<sup>25</sup> According to this view, institutions are conceived of as instruments in the *implementation* of principles, well downstream of the primary task of *justification*. To assign any greater role to existing institutions and practices—to allow them, that is, to influence the formulation and justification of first principles—would be to commit a fundamental mistake: constraining the content of justice by whatever social and political arrangements we happen to share would be to give undue normative weight to what is, at best, merely the product of arbitrary historical contingency or, at worst, the result of past injustice. The view defended here denies this starting point: existing institutions and practices should play a crucial role in how we think of the justification of a conception of justice rather than merely its implementation.<sup>26</sup> The view has a methodological upshot critical for any attempt to extend principles of justice to the international and supranational level: in justifying any conception of justice, we first need an interpretation both of the point and purpose of the institutions that the conception is intended to govern, and of the role principles are intended to play within them. This interpretive step constrains what the content of justice *is* by telling us what it is *for*.

What implications would adopting reciprocity-based institutionalism have for developing principles of solidarity for the EU? Unlike globalism, an internationalist perspective does not treat the EU as merely an instrument in the realization of a more encompassing and far-reaching ideal. And unlike statism, it does not regard the EU as a purely voluntary arrangement in which normative ideals of solidarity or social justice have no place. Rather, internationalism takes seriously not only the history and institutional structure of the EU but also the deep and pervasive effects of its primary and secondary law. How? If we are to develop an internationalist account of the EU, we need at least three different sets of principles, one for each dimension of intra-European social cooperation. In short, we need principles governing the joint production of collective goods within member states (*national solidarity*) and principles governing the joint production of collective goods at the European level. The latter requirement has two parts, corresponding to the way in which the EU affects the social, legal and political situation of all residents on European territory. The first part defines principles for relations between member states (*member state solidarity*), and the second part principles governing our relations qua European citizens and residents (*transnational solidarity*). The three sets of principles together form the core of our conception of solidarity for the EU.

<sup>25</sup> These assumptions are clearest in Cohen (n 18), but see also Robert Nozick, *Anarchy, State, and Utopia* (Basic Books 1974) and contemporary luck egalitarianism more generally (with the exception of Dworkin) and contemporary right- and left-libertarianism.

<sup>26</sup> For further discussion of this point, see Andrea Sangiovanni, 'Justice and the Priority of Politics to Morality' (2008) 16 *J Political Philosophy* 137.

Let us turn first to *national solidarity*, namely to principles of solidarity for citizens and residents of the state.<sup>27</sup> We begin with the idea that the primary point and purpose of the state is to provide a central class of collective goods. To illustrate, take the basic extractive, regulative, and distributive capacities central to any modern state. When well-functioning, these basic state capacities, backed by a system of courts, administration, police and military, free us from the need to protect ourselves continuously from physical attack, guarantee access to a legally regulated market, and establish and stabilize a system of property rights and entitlements. But state capacity in each of these areas is not manna from heaven. It requires the participation and collaboration of all persons residing in a territory. Without that participation and collaboration, the state would be unable to provide the goods that form its central purpose.

Against the background of this interpretation of the point and purpose of the state, socioeconomic egalitarianism, I argue, is best understood as a demand of reciprocity for the mutual provision of this central class of collective goods.<sup>28</sup> Consider the fact that we depend on the joint contributions of myriad other citizens and residents for the ability not only to develop but also to act on a plan of life. Without the support those contributions provide for the political and legal authority of the state, we would lack the resources necessary to function as biological, social and political beings. Notice further that our abilities to develop and make use of our talents, as well as our ability to profit from them, depend on the survival and maintenance of the scheme; without it, we would soon lose everything that we have gained. Therefore, those who are better able to gain from the scheme owe those less able, but who have made their gains possible, a fair return for what they have received. This fair return, I contend, is best captured by principles that do not treat their relative position in the distribution of marketable talents and abilities as such as moral grounds for greater reward.<sup>29</sup> The egalitarianism of principles that respect this embargo (such as those captured in Rawls's *justice as fairness* or Dworkin's *equality of resources*) reflects the particularly deep and pervasive nature of our mutual dependence as citizens and residents.

Above, we implied that this reciprocity-based approach to social justice could be extended, in modified form, to the EU. But to do so, we first need to characterize the form and structure of social cooperation maintained by the EU. Just as we can construct a conception of fair reciprocity at the domestic

<sup>27</sup> I draw here and in the next paragraph from Andrea Sangiovanni, 'Global Justice, Reciprocity, and the State' (2007) 35 *Phil & Pub Aff* 3.

<sup>28</sup> For empirical support that the universal welfare state is grounded in a form of generalized reciprocity (ie 'contingent consent'), see Bo Rothstein, *Just Institutions Matter: The Moral and Political Logic of the Universal Welfare State* (CUP 1998).

<sup>29</sup> This does not deny that there might be cases in which giving greater rewards to those with talents and abilities is justified. This could be the case, eg when greater rewards to those more talented makes those worst off better off than they otherwise would have been without the rewards.

level by considering the range and extent of the collective goods we provide one another via the legal-political authority of the state, in the rest of this section we will do the same thing at the European level. We will provide, that is, an account of the point and purpose of the EU in terms of the collective goods secured by it. Anticipating, we already know that principles of solidarity for the EU will be less demanding than those for the state level, in virtue of the more mediated and less comprehensive nature of the collective goods provided at the EU level. While of course the EU is also sustained by our compliance, trust, resources, and participation, the range of areas over which it has authority is comparatively narrow. The significance of this fact for solidarity will become apparent in a moment.

### A. *The Point and Purpose of the European Union*

In this section, I provide an interpretation of the collective goods generated by European integration, and of the major risks and benefits for member states and citizens that the production of such goods has brought with it. This discussion provides the groundwork for the account of reciprocity that characterizes both *member state* and *transnational solidarity*, to which we will turn in the following two sections.

How can we explain the surrender of sovereignty to a supranational organization at a moment in which the European state was exercising an increasingly confident and targeted control over its domestic economy? Following Alan Milward's pioneering work, it has become commonplace to describe the early days of European integration as a 'rescue' of the nation-state after the upheavals of World War II.<sup>30</sup> The basic point and purpose of the EU in this period was to 'uphold and stabilize the postwar consensus on which the European welfare state was rebuilt'.<sup>31</sup> As the state asserted dominance over a growing number of functions—agriculture, economic planning, industrial policy—it also expanded the reach and extent of social welfare to growing numbers of the vulnerable (workers, but also the elderly, disabled, children). To consolidate these new achievements, which were backed by new and rising public expectations, states needed to maintain and expand their revenue-generating capacities. The solution was to seek new markets through trade within Europe.

In the early days of European integration, there was little or no conflict between surrender of wide swathes of political autonomy in the economic

<sup>30</sup> See, most prominently, Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Cornell University Press 1998).

<sup>31</sup> Alan S Milward, *The European Rescue of the Nation-State* (2nd edn, Routledge 2000) 8.

sphere and its maintenance in the sphere of social protection. Indeed, the two were seen to be complementary. According to Ferrera:

historical evidence shows that the founding fathers and, more generally, most of the relevant national elites conceived of the European integration as a project capable of creating a virtuous circle between *open* and outward-looking economic policies on the one hand, and *closed* welfare states and inward-looking social policy on the other. ‘Smith abroad, Keynes at home’.<sup>32</sup>

Increasingly open European markets would provide an engine of growth for meeting domestic demands for social protection, in this way mobilizing the allegiance of new and progressively more active sectors of the population: farmers, labour and the lower middle classes.

But the virtuous circle was not to last. In addition to exogenous factors arising from the OPEC crises of the 1970s, the post-war settlement was put under pressure from internal European developments as well. Since the Treaty of Rome, the Community legislator has progressively enacted a stream of legislation that has guided and solidified the Treaty provisions governing free movement of goods, workers, establishment and services. Such predominantly market-making integration, in turn, has been reinforced by the Court of Justice both via its ‘constitutionalization’ of the Treaties (interpreting EU law as having direct effect and supremacy),<sup>33</sup> and its more recent ‘market access’ approach to free movement.<sup>34</sup> Through its advocacy and agenda-setting roles, the Commission has reinforced these developments, especially in spearheading the clearing away of barriers to trade required to realize the Single Market.<sup>35</sup> Both actors have, in sum, been formidable in achieving so-called ‘negative integration’ (integration aimed at ‘market-making’, eg removal of internal tariffs, non-tariff trade barriers, freedom of establishment, services and mutual recognition of product regulations). This has had the effect (*inter alia*) of opening up wide areas of the welfare state that were previously closed to supranational scrutiny (eg domestic monopolies over social provision, compulsory and non-compulsory insurance schemes, health care payments, noncitizen access to social services). Yet, these developments in ‘market-making’ have not been matched by equivalent results in the area of ‘positive integration’, or harmonization of ‘market-correcting’ policy at the supranational level. Even if member states were to agree that competences over social policy should be transferred to the European level, fundamental conflicts of interest among member states—produced by different modes of financing, running and organizing the welfare state—make positive integration in employment,

<sup>32</sup> Maurizio Ferrera, *The Boundaries of Welfare: European Integration and the New Spatial Politics of Social Protection* (OUP 2006) 92.

<sup>33</sup> Case 120/78 *Cassis-de-Dijon* [1979] ECR 649.

<sup>34</sup> Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (3rd edn, OUP 2010).

<sup>35</sup> George Ross, ‘Inside the Delors Cabinet’ (1994) 32 J Com Mar St 499; Craig (n 3).

industrial relations and social policy all but impossible.<sup>36</sup> As a result of this constitutional asymmetry at the heart of the EU, the current balance between social protection and market liberalization in Europe is widely considered to be unstable.<sup>37</sup>

With this brief outline of European developments, we can summarize the main collective benefits and risks integration brings in its train in this way. The EU secures a range of collective goods including a stable and predictable legal system (which forms the background for all other goods provided by the EU), a single market (comprising a customs union, competition law, elimination of tariff and non-tariff barriers and so on), and regional stabilization both internally among members and on the EU's periphery (the latter achieved, first, by solving the 'German problem' and later via the process of accession). But belonging to the EU also carries costs, most of which are the result of the fact that the EU is more effective in making and enabling markets than in constraining and correcting them via so-called 'positive integration'. Let us list five specific dimensions in which belonging to the EU now carries risks for its member states and specific groups of citizens within them:

- (i) The project to create a fully integrated single market, with few barriers to the movement of persons, goods, services and capital, puts pressure on the capacity of European states to maintain commitments to social protection. The Court of Justice has, for example, recently raised the question whether the Treaties—and in particular the Articles on 'Citizenship of the Union', non-discrimination and free movements of services and persons—should govern the circumstances according to which economically inactive migrants from other EU member states should be granted the same access to social and public services as nationals. This has potentially large consequences for the structure and sustainability of social services (eg access to higher education (as in *Gravier, Morgan, Commission v Austria, Bressol*<sup>38</sup>), access to health services (as in *Kohll, Decker, Watts*<sup>39</sup>), and access to social assistance (as in *Grzelczyk, Sala, Collins, Vatsouras*<sup>40</sup>)).<sup>41</sup> 'Benefit tourism' and 'welfare magnet effects' are also increasingly seen as

<sup>36</sup> This is the main thesis sustained by Scharpf (n 9).

<sup>37</sup> Martin Rhodes and Yves Mény (eds), *The Future of European Welfare: A New Social Contract?* (Macmillan 1998); Stephan Liebfried and Paul Pierson, 'Social Policy' in Helen Wallace and William Wallace (eds), *Policy-Making in the European Union* (4th edn, OUP 2000).

<sup>38</sup> Case C-293/83 *Gravier v Liège* [1985] ECR 593; Joined Cases C-11/06 and C-12/06 *Morgan and Bucher* [2007] ECR I-9161; Case C-147/03 *Commission v Austria* [2005] ECR I-5969; Case C-73/08 *Bressol* [2010] OJ C148/3.

<sup>39</sup> Case C-158/96 *Kohll* [1998] ECR I-1931; Case C-120/95 *Decker* [1998] ECR I-1831; Case C-372/04 *Watts* [2006] ECR I-4325.

<sup>40</sup> Case C-184/99 *Grzelczyk* [2001] ECR I-6193; Case C-85/96 *Martinez Sala* [1998] ECR I-2691; Case C-138/02 *Collins* [2004] ECR I-2703; Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* [2009] ECR I-4585.

<sup>41</sup> See eg A Pieter Van Der Mei, *Free Movement of Persons Within the European Community: Cross-Border Access to Public Benefits* (Hart 2003); Catherine Barnard, 'EU Citizenship and the Principle of Solidarity' in Dougan and Spaventa (n 4); Tamara Hervey, 'Social Solidarity: A Buttress Against Internal Market Law?' in Shaw (n 4).

a source of fiscal competition, especially as residency requirements are weakened.<sup>42</sup> Similarly, Court action protecting freedom of establishment and services (in light, eg of the Posted Workers Directive) has recently put pressure on domestic collective bargaining arrangements, including national norms governing the right to strike (eg *Viking*, *Laval*, *Rüffert*<sup>43</sup>).<sup>44</sup> Many wonder whether this new area of Court action signals a growing commitment to a ‘market access’ (as against ‘non-discrimination’) approach to free movement cases generally.<sup>45</sup> And, finally, both legislation and Court decisions with respect to Third-Country Nationals (eg Regulation 859/2003 extending provisions of 1408/71 on social security to TCNs and the Long-Term Residents Directive 2003/109; *Chakroun*, *Rush Portuguesa*<sup>46</sup>) raises a great variety of challenges for member states and their citizens, who stand to gain from increased mobility but also risk losing control over an area of great domestic political salience.<sup>47</sup>

- (ii) Internal market and competition law have an important effect on the organization of ‘services of general interest’, including, most importantly, social services of various kinds (arts 45–66 TFEU). Enforcement in both areas has the potential for undermining the ability of states to regulate such services in ways necessary to preserve domestic commitments to solidarity and social protection. This is especially true of those states that either have partially privatized such services or have made extensive use of ‘public-private’ partnerships, the effect of which is to open them up to review under competition law.<sup>48</sup> To illustrate, it is commonly agreed among EU lawyers that the Court has to date employed a relatively inchoate approach to the conditions under which, for example, medical services fall under competition and public procurement rules. One commentator writes: ‘by the application of (arts 81-89), any entity

<sup>42</sup> See eg Tito Boeri, Gordon H Hanson and Barry McCormick (eds), *Immigration Policy and the Welfare System: A Report for the Fondazione Rodolfo De Benedetti* (OUP 2002); Hans-Werner Sinn and Wolfgang Ochel, ‘Social Union, Convergence and Migration’ (2003) 41 J Com Mar St 869; Giacomo De Giorgi and Michele Pellizzari, ‘Welfare Migration in Europe and the Cost of a Harmonised Social Assistance’ (2006) IZA Discussion Paper Series 2094 <[www.iza.org](http://www.iza.org)> accessed 29 September 2012.

<sup>43</sup> See n 2, above.

<sup>44</sup> Simon Deakin, ‘Regulatory Competition after *Laval*’ (2007) 10 Cambridge Ybk European Legal Studies 581; Catherine Barnard, ‘Social Dumping or Dumping Socialism?’ (2008) 67 CLJ 262 (note); ACL Davies, ‘One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ’ (2008) 37 ILJ 126.

<sup>45</sup> Barnard, *Substantive* (n 34).

<sup>46</sup> Case C-578/08 *Chakroun* [2010] OJ C113/13; Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417.

<sup>47</sup> Sonja Boelaert-Suominen, ‘Non-EU Nationals and Council Directive 2003/109/EC on the Status of Third-Country Nationals who are Long-Term Residents: Five Paces Forward and Possibly Three Paces Back’ (2005) 42 CMLR 1011; Anna Kocharov, ‘What Intra-Community Mobility for Third-Country Workers?’ (2008) 33 EL Rev 913.

<sup>48</sup> Barnard, *Substantive* (n 34); Julio Bacquero Cruz, ‘Beyond Competition: Services of General Interest and European Community Law’ in De Búrca, *EU Law and the Welfare State* (n 4); Liebfried and Pierson (n 37). See also Commission, ‘White Paper on Services of General Interest’ COM (2004) 374; Tony Prosser, *The Limits of Competition Law: Markets and Public Services* (OUP 2005); Commission, ‘Implementing the Community Lisbon Programme: Social Services of General Interest in the European Union’ COM (2006) 177.

involved in the provision of healthcare services may, if a private undertaking, either breach the competition rules or be a state-aid recipient, or if a public authority, either be a state-aid donor or a contracting authority which has violated the rules on public procurement'.<sup>49</sup> The conclusion is that 'the relevant case law of the Court is neither complete nor entirely coherent'.<sup>50</sup> Tony Prosser writes that the current case law is 'inherently vague and highly politicised'.<sup>51</sup> Beyond the case law, EU legislation in the field is also marred by similar unclarity.<sup>52</sup> In many ways, the Services Directive has done little to clear things up.<sup>53</sup> All commentators agree that developing EU legislation and case law in the area of 'services of general interest' will, whatever shape it takes, decisively determine the balance between market and 'solidarity' principles.<sup>54</sup>

- (iii) Because of the ease with which capital can exit (or threaten to exit), economic integration shifts the incidence of taxation onto immobile factors of production. Thus it has either a redistributive effect or forces a reduction in tax rates on mobile factors. This impinges on the revenue-generating capacity of the state, and hence its capacity to support an expensive welfare state. Tax competition more generally also promotes downward pressure on forms of social protection. The effect varies by type of taxation structure. For example, welfare states which finance social spending primarily through payroll taxes, such as Germany, face the most severe pressures on social protection. This is because payroll taxes increase costs of production (whereas general taxation does not).<sup>55</sup>
- (iv) Integration has a differential impact on poor and rich regions, especially in less developed states. The process of accession, for example, exacerbates inter-regional inequalities, since it tends to favour urban, well-to-do regions (eg Prague)—which are better placed to take advantage of integration—vis-à-vis rural, less developed ones (eg Severozápad).<sup>56</sup>
- (v) Participation in EMU generates well-recognized risks for its participant states. The main problem is that participating states do not constitute an

<sup>49</sup> Vassilis Hatzopoulos, 'Health Law and Policy: The Impact of the EU' in De Búrca, *EU Law and the Welfare State* (n 4).

<sup>50</sup> *ibid.*

<sup>51</sup> Prosser (n 48).

<sup>52</sup> The Commission recognizes the issue and the need to address it. See eg Commission, 'Implementing the Community Lisbon Programme: Social Services of General Interest in the European Union' COM (2006) 10.

<sup>53</sup> Catherine Barnard, 'Unravelling the Services Directive' (2008) 45 CML Rev 323.

<sup>54</sup> See eg Nina Boeger, 'Solidarity and EC Competition Law' (2007) 32 EL Rev 319; Boelaert-Suominen 'Non-EU Nationals' (n 47).

<sup>55</sup> Scharpf (n 9); Wolfgang Streeck, 'Competitive Solidarity: Rethinking the 'European Social Model' (1999) Max-Planck\_Institut Für Gesellschaftsforschung Working Paper 99/8 <www.mpifg.de> accessed 29 September 2012.

<sup>56</sup> Mick Dunford and Adrian Smith, 'Catching Up or Falling Behind? Economic Performance and Regional Trajectories in the "New Europe"' (2000) 76 Economic Geography 169. See also Frank Barry and Iain Begg, 'EMU and Cohesion: Introduction' (2003) 41 J Com Mar St 781; Aadne Cappelen and others, 'The Impact of EU Regional Support on Growth and Convergence in the European Union' (2003) 41 J Com Mar St 621. See also Commission, 'The Growth and Jobs Strategy and the Reform of European Cohesion Policy: Fourth Progress Report on Cohesion' COM (2006) 281.

optimal currency area.<sup>57</sup> Because of this, the European Central Bank is unable to set an interest rate which is optimal for all participating members. Having lost their capacity to manage monetary policy, heavily constrained in their use of fiscal policy, and with no control over the exchange rate, member states are therefore liable to exogenous shocks for which they are ill-equipped to respond. Managing the impacts of such shocks will promote growing tensions among member states. Indeed, the loss of fiscal and monetary autonomy is perceived to be one of the most likely risks of a dissolution of EMU, or even a break-up of the EU itself.<sup>58</sup> These worries have most recently come to a head with debt crisis.

This list is not intended to be exhaustive. Rather, I have tried to highlight the main areas in which European welfare states face risks, in integrating, to their capacity to maintain domestic commitments to growth, stability and social solidarity.

The point and purpose of the EU is therefore best understood not as a project to realize a federal state, or to provide a focal point for a globe-encompassing cosmopolis; the EU is not, in short, an attempt to dissolve or 'transcend' the state. Rather, it is an attempt to *strengthen* its constituent member states in an era of globalization. It is, more precisely, an attempt to support the interests of each of its member states in enhancing both growth and internal problem-solving capacity (including the capacity to act on domestic commitments to national solidarity) against a background of regional stability.

However, states also face important risks, in integrating, to their ability to grow and to retain the capacity to deliver on domestic commitments ((i)–(v) above). We know, furthermore, that the long-term effects of integration on growth and problem-solving capacity are *uncertain*, and that the effects, both positive and negative, will be *unevenly distributed* among member states. Some states will gain more than others from integration; other states, even though they might still benefit overall, will be harmed in specific issue areas. Given heterogeneity in welfare regime type, taxation structure, level of development, and population size, member states face, that is, *different* risks and distributional consequences by integrating. How and on whom the risks will materialize, moreover, will often be a product of factors that are neither reasonably avoidable nor foreseeable (eg exogenous financial shocks, developments in the case law, changing demographic and fiscal circumstances, etc). What principles should guide our choice of political settlement with respect to these distributional consequences? Within a reciprocity-based framework, this

<sup>57</sup> For a survey of the literature, see MJ Artis, 'Reflections on the Optimal Currency Area Criteria in the Light of EMU' (2003) 8 Intl J Finance and Economics 297.

<sup>58</sup> David McKay, *Federalism and European Union: A Political Economy Perspective* (OUP 1999).

question becomes: what do member states and their citizens owe one other as a fair return for the mutual provision of these goods and the mutual exposure to these risks—goods and risks made possible by opening up their markets, societies and polities to the joint control and supervision of both supranational actors and intergovernmental decision-making? What kind of solidarity, in sum, should EU member states show guide member states' interaction within the EU?

According to the structure we are developing, notice that it would be inappropriate to model *member state solidarity* in the same way as we did *national solidarity*. It would be inappropriate, that is, to apply the same principles of social solidarity to the EU level as we did at the state level. The reason is that European citizens rely to a far greater extent on the contributions, participation, influence of their fellow residents and citizens than they on the contributions, participation and influence of EU citizens and residents generally. This is reflected in the fact that European citizens do not provide each other with the same range of collective goods secured at the domestic level. The EU civil service, for example, is the size of a medium-sized European city; its budget is capped at 1.23% of EU gross national income compared with about 40 to 50% in each of the member states; it has no ability to tax citizens directly (other than via regulations regarding value added tax); it possesses no independent police force or army; and its competences are circumscribed, and, when compared to the modern state, quite limited (although expansive when compared to other inter-, trans- and supranational institutions).<sup>59</sup> Even with respect to its evolving body of social law, the EU is limited to mainly regulatory functions (eg occupational health and safety) rather than direct provision.<sup>60</sup> Without its member states, the EU would lose the capacity to govern and regulate those delegated areas within its jurisdiction. This is because the EU, on its own, does not have the financial, legal, administrative or sociological means to provide and guarantee the goods and services necessary to sustain and reproduce a stable market and legal system, indeed to sustain (on its own) any kind of society at all. It depends on the institutional resources of its member states. But the converse is not, by comparison, true: without the EU, member states would forgo a range of benefits, but they would not lose the capacity to govern.

I now want to argue that the fair return which member states owe one another, under *member state solidarity*, is given by the level at which each state

<sup>59</sup> See eg Renaud Dehousse, 'European Institutional Architecture after Amsterdam: Parliamentary System or Regulatory Structure?' (1998) 35 CMLR 595; Giandomenico Majone, 'Delegation of Regulatory Powers in a Mixed Polity' (2002) 8 ELJ 319; Andrew Moravcsik, 'In Defence of the "Democratic Deficit": Reassessing Legitimacy in the European Union' (2002) 40 J Com Mar St 603.

<sup>60</sup> In view of this, the idea that Europe is now a fledging federal state in which the development, in the near or even not-so-near future, of an independent military and police, or the competences to provide or even harmonize social provision across EU borders, seems far-fetched indeed.

would insure against the potential losses identified above had they known the distribution of risks but not their place in that distribution. The underlying rationale can be easily explained. First, by asking how states would have insured against the risks intrinsic to the project of European integration *had they not known what state they would have turned out to be*, we eliminate the advantage at the bargaining table of the European social contract obtained by the fact that member states know their relative position—including their level of development, population size, welfare regime type, etc. The resulting political compromise will therefore reflect those differences. Yet, such forms of advantage seem to be the product, in most cases, of mere historical luck (compare the position of, say, Poland in the negotiations leading to their accession in 2004 to the position of Britain in 1974). By screening them off, we model a kind of procedural fairness in deciding how to organize social cooperation. Second, we might wonder why asking what *insurance* member states would purchase behind a (thin) ‘veil of ignorance’ rather than what *principles* they would choose in that position is an appropriate way of thinking about how to distribute the risks and benefits of European integration. Modelling our choice situation in terms of an insurance decision focuses the mind on the most distinctive aspect of the European project, understood as a project in which states collaborate to achieve aims that they otherwise would have been unable to achieve, but where their capacity to benefit comes with significant risks. By pooling these risks in a fair way, member states agree to constraints on the pursuit of the best overall outcome for their own citizens. The idea of insurance gives us a fruitful way to express the notion that solidarity is best understood as a kind of reciprocity among states. Furthermore, insurance decisions require one to choose how much of one’s total wealth to allocate to offsetting the materialization of specific risks. Making a rational insurance decision therefore requires one to trade off different goals and their priorities by taking into account their opportunity costs. This is helpful for our purposes because it allows us to place a natural limit on the amount that we can expect member states to bear for the disadvantages with which other member states and their citizens bring with them. By modelling the problem as an insurance problem, we ask what costs member states should be willing to pay to offset a specific set of risks associated with integration rather than the more open-ended, unconstrained question regarding how to distribute *all* benefits and burdens generated by European cooperation (assuming we could isolate them in the first place). Once again, the more limited scope of our question reflects the more mediated form of cooperation we find at the EU level.

An analogy to domestic social insurance schemes is useful to bring out both features of the model. What is the rationale behind social insurance, including unemployment, accident, illness and old-age insurance? And why, with very few exceptions among advanced constitutional democracies, is such insurance

not purely voluntary?<sup>61</sup> Imagine there were an entirely free market in social insurance (and no social benefits or assistance). Premiums in such a market would vary tremendously, because they would depend on the risks which different individuals were judged by the actuaries to face with respect to illness, accident, unemployment, etc. Someone who is born with a congenital illness that impairs his ability to work would find that the premiums he would have to pay for unemployment and sickness insurance to be prohibitively high. On the other hand, someone in good health, and with, say, a good degree from a good university (reflecting her genetic talents), would face much lower premiums and be able to purchase a much more comprehensive package. In a society organized in this way, people's access to basic insurance would vary widely, reflecting factors about their circumstances that are arbitrary from a moral point of view. Why does someone born with a congenital illness or inadequate talents deserve to be shut out from access to social insurance, or deserve to pay a much higher premium than someone who has been the lucky beneficiary of happier circumstances? For this reason, it makes sense to ask what level of insurance someone who did not know their place in the distribution of genetic talents, or their overall health, would have chosen. With that information, we can then design a system of (compulsory) taxation that mimics the premiums that would be paid in that hypothetical insurance market; those premiums, in turn, would be used to fund a system of comprehensive social insurance.<sup>62</sup> A system of compulsory social insurance designed according to these principles expresses a kind of solidarity, in which we share the burdens of each other's misfortune as it materializes within a mutually beneficial cooperative scheme. The same basic rationale, *mutatis mutandis*, underlies *member state solidarity*, where, instead of citizens cooperating within a state, we have states cooperating within a supra-, inter-, trans-national institution.

A last point is necessary to complete our outline of member state solidarity. Granting for the moment the plausibility of the hypothetical insurance *rationale*, we might wonder what precise *form* it takes, given that the relevant actors are states rather than individuals. In some cases, the analogy with domestic social insurance is straightforward. For example, member states in our modified hypothetical insurance market would agree to a substantial outlay similar to the Structural and Cohesion Funds, where less developed member states experiencing fast social and economic change have a claim to support as they adapt to the pressures of the Single Market. An analogous case can be made for an insurance fund to cover exogenous shocks within the eurozone designed to shore up member states with rising and unsustainable debt payments. As with insurance models generally, these payouts would be

<sup>61</sup> Various non-compulsory 'top-ups' and supplementary schemes are of course widely available, but here I am referring to basic social insurance.

<sup>62</sup> For the idea of a hypothetical insurance market modelled by a system of taxation see Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2000) ch 2.

forthcoming only if it can be shown that the losses incurred were neither reasonably avoidable nor foreseeable. But such monetary outlays are not the only way in which the model can be used to illuminate the demands of solidarity among member states. Other areas that could be fruitfully pursued under the aegis of *member state solidarity* are arguments in favour of particular derogations, public-interest justifications, and mandatory requirements in the application of internal market and free movement law. Given our understanding of the point and purpose of the EU, we can find a way of striking the right balance between ‘market access’ and ‘solidarity’ principles within the evolving case law by asking what kinds of derogations, justifications, requirements member states would have agreed to as forms of insurance against changes in, for example, the provision of healthcare or education.<sup>63</sup>

So far, we have constructed models of *national* and *member state* solidarity which follow from the application of reciprocity-based internationalism to the specific conditions of the EU. In the next part of this article we will introduce the notion of *transnational* solidarity and consider how the demands of *transnational*, *member state* and *national* solidarity can be balanced in a series of concrete judgements regarding the free movement of persons. We will focus on both access to social benefits and protection and access to higher education—areas that are at the heart of concerns over the free movement of persons within the EU. As I mentioned in the introduction, my aim in discussing free movement is to illustrate how the model can systematize and guide our judgements in a number of concrete cases. If the model succeeds in organizing our reflection in such controversial cases, and in generating consistent, coherent, and robust conclusions across them (especially given the great variation in the type and character of social interaction), then this should support its general plausibility as a model of European solidarity *simpliciter*.

### 3. *Transnational Solidarity*

In the previous section we discussed how *member state solidarity* applies to member states and their EU-mediated relations. But notice that nothing I have said here implies that the EU *only* speaks in the name of its member states. In this sense, it is very unlike an organization like the WTO. Individuals, for example, have standing to bring suit under EU law in national courts and have a right of appeal to European courts. European laws, furthermore, have direct effect, often touching directly on the legal rights and obligations of citizens.<sup>64</sup>

<sup>63</sup> For educational policy, see Andrea Sangiovanni, ‘Justice and the Free Movement of Persons: Educational Mobility in the EU and the US’ in Douglas A Hicks and Thad Williamson (eds), *Leadership and Global Justice* (Palgrave 2012). See also Sangiovanni, *Domains* (n 12) pt III.

<sup>64</sup> For general discussions of the peculiar form of EU constitutionalism, which resists reduction to either classic federal state models or international law, see Jo Shaw, ‘Postnational Constitutionalism in the European Union’ (1999) 6 *J European Public Policy* 579; JHH Weiler, *The Constitution of Europe: ‘Do the Clothes have an Emperor?’ and Other Essays on European Integration* (CUP 1999); MacCormick, *Questioning Sovereignty* (n 17);

And finally, as individuals, Europeans have been granted a series of evolving civil, political, and social rights under EU law, as, for example, in the articles governing ‘Citizenship of the Union’. Though these are far from granting the full range of entitlements typical of state citizenship, they are still substantial.<sup>65</sup> As Stone Sweet and Caporaso write, the ‘EU treaties have evolved from a set of legal arrangements binding upon sovereign states into a vertically integrated regime conferring judicially enforceable rights and obligations on all legal persons, public and private, within EC territory’.<sup>66</sup> For these reasons, our construction of *member state solidarity* cannot be limited to a conception of states and their relations. It must contain at least two components: one specifically oriented to the fair return owed by member states *qua* collective agents to one another, and one to the fair return owed by EU citizens to one another. We need, that is, a conception of *transnational solidarity*.

The transnational dimension of the EU is clearest in the case of rules governing EU citizenship, coordination of social security systems, residence and non-discrimination. In the early history of the EU, member states enjoyed broad discretion over rights of residence, access to social security and assistance, and the scope of anti-discrimination. But since the 1990s, a large body of legislation and jurisprudence has expanded the scope of EU law in each of these areas, and has correspondingly shrunk the discretion of member states. Many of these areas are ones, in addition, where the demands of transnational solidarity run up against the demands of national solidarity. For example, to what extent should EU citizens who travel or move to other EU member states—but who are economically ‘inactive’ and unable to support themselves—have the same access to social and health services as long-term residents and nationals of that state? To what extent can national rules and regulations governing ‘services of general interest’—eg tuition fees for universities and payment for medical services—discriminate among nationals and non-nationals? Can *reciprocity-based internationalism* shed any light on these dimensions?

I think it can. Consider the expansion in scope and rights granted under the legislation governing free movement of persons (eg Directive 2004/38 (the ‘Citizens Residence Directive’) and Regulation 883/2004) and the increasing importance of Articles 18, 20 and 21 TFEU. On one hand, this expansion is an

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Neil Walker, ‘Postnational Constitutionalism and the Problem of Translation’ in JHH Weiler and Marlene Wind (eds), *European Constitutionalism beyond the State* (CUP 2003). This is not to say that there are no differences between, say, Walker and McCormick’s pluralism on one side and Weiler’s on the other. For an intriguing account of these differences, see Neil Walker, ‘All Dressed Up’ (2001) 21 OJLS 563, 569ff.

<sup>65</sup> For instructive discussion, see Jo Shaw, ‘The Interpretation of European Union Citizenship’ (1998) 61 MLR 293; Weiler, *The Constitution of Europe* (n 64) esp ch 10; Andreas Føllesdal, ‘Union Citizenship: Unpacking the Beast of Burden’ (2001) 20 L & Phil 313.

<sup>66</sup> Alec Stone Sweet and James A Caporaso, ‘From Free Trade to Supranational Polity: The European Court and Integration’ in Wayne Sandholtz and Alec Stone Sweet (eds), *European Integration and Supranational Governance* (OUP 1998) 102.

expression, as we have seen, of transnational solidarity. Each member state opens up not only its borders but also its markets, services and society to the citizens of other member states. On the other hand, there is a risk associated with such an expansion in rights. According to one commentator, who here represents a wide swathe of the legal literature:

The application of Community legal norms to elements of national welfare policies opens up the possibility of private litigation, based on directly enforceable Community law, which may challenge or jeopardize the content, structure, and mechanisms for provision of public welfare goods and services... This may arise for instance from the financial drain placed on national policies by requiring non-discriminatory treatment of all citizens of the European Union (EUCs) or migrant EUC workers, or because of the loss of control over supply implied by the freedom to provide and receive welfare goods and services across frontiers.<sup>67</sup>

The expansion in rights under free movement of persons has triggered fears, in short, that generous member states will become not only 'welfare magnets' but also targets for 'benefit tourism'. The worry is that this will expose the European Social Model to a 'legitimation crisis'. Transnational solidarity seems to be in direct conflict with both *member state solidarity* as well as (potentially) domestic *national solidarity*. To what extent should national taxpayers be expected to provide the same access to benefits, with respect to citizens of other member states (and now third country nationals as well) who exercise their right of free movement, as they provide to fellow citizens? And, given the potential impact on the welfare state, to what extent would member states insure against this type of downward pressure on social protection in our hypothetical insurance market?

With respect to workers—including non-contractual and part-time workers—the transnational solidarity intrinsic to an expansive understanding of the free movement provisions and Articles 18, 20, 21 and 45 TFEU is not in conflict with *national solidarity*.<sup>68</sup> Once a worker (even if he is a third country national) takes up employment in a member state, becomes a regular taxpayer and begins to participate in its civil society, he becomes integrated in the fabric of that society.<sup>69</sup> For *national solidarity*, 'integration in the fabric of a society' does not require either the acquisition of the local 'public culture' or the exercise of

<sup>67</sup> Hervey, 'Social Solidarity' (n 41) 32. See also Barnard, 'EU Citizenship and the Principle of Solidarity' (n 41); D Sindbjerg Martinsen, 'Social Security Regulation in the EU: The De-Territorialization of Welfare' in De Búrca, *EU Law and the Welfare State* (n 4); Sinn and Ochel (n 42).

<sup>68</sup> See eg AP van der Mei, 'Freedom of Movement for Indigents: A Comparative Analysis of American Constitutional Law and European Community Law' (2002) 19 *Ariz J Intl & Comp L* 803, 827ff.

<sup>69</sup> cf Case C-209/03 *Bidar* [2005] ECR I-2119, para 57: 'In the case of assistance covering the maintenance costs of students, it is thus legitimate for a Member State to grant such assistance only to students who have demonstrated a *certain degree of integration* into the society of that State' (emphasis added). See also Boeger (n 54); Gareth Davies, 'Higher Education, Equal Access, and Residence Conditions: Does EU Law allow Member States to charge Higher Fees to Students not previously Resident?' (2005) 12 *Maast J Eur & Comp L* 227; Charlotte O'Brien, 'Real Links, Abstract Rights and False Alarms: The Relationship between the ECJ's "Real Link" Case Law and National Solidarity' (2008) 5 *EL Rev* 643.

voting rights. Subjection to the state's coercive authority is also not sufficient for such integration. Rather, *national solidarity* says that an individual is 'integrated into a society' when he aids in the reproduction of the state through his participation, contributions and compliance. When this is the case, other residents and citizens owe him, as a duty of *national solidarity*, equal access to the full panoply of social guarantees and protections guaranteed to other citizens (including exportability of any contributions he has built up over the time he has worked there). All resident workers, whether member state nationals or not, are, in sum, entitled to equal treatment.<sup>70</sup>

Similarly, there is no conflict between *transnational solidarity* and *member state solidarity*. I see no reason why migrant *workers* (ie those who enter having already signed an employment contract) impose a fiscal burden sufficiently large to hinder the capacity of member states to sustain their welfare systems, especially given the fact that such workers are overall net contributors (even if we take into account periods of non-voluntary unemployment).<sup>71</sup> A stronger argument from within *member state solidarity* might be staged against facilitating inward migration. The argument would point to the effect of such inward migration on the wages and benefits of (often unskilled) workers *already resident*. With respect to *benefits and assistance*, inward migration would have a negative effect if states' reaction to further migration were to cut benefits in an effort to decrease migratory inflows. If such cuts were explained by attitudes to migration based on false or unreliable beliefs (for example, the idea that non-national workers are more likely to make fraudulent benefit claims<sup>72</sup>), then the argument would be weak, since the proponent would face the further question whether there are any *good* reasons, ie ones based on something other than false or unreliable beliefs, for reducing benefits. But, as long as inward migration of *workers* does not create a dramatic increase in assistance and benefit claims (and, as we have just seen, this does not seem to be the case), then what would those reasons be?

The argument is stronger if we consider the effects of such flows on *wages* or *employment* (rather than on benefits and assistance). But here the evidence in favour of the proposition is weak (even when we consider the latest results on

<sup>70</sup> The only exception would be workers posted to another member state, whose employment there will last only as long as the work they have been contracted to do. It is relevant that posted workers do not expect to settle in the host country, generally participate little in civil society, and do not pay taxes or contributions there. The separate question whether regulations and laws in the 'country of origin' should govern the employment situation of posted workers in the host country would be decided, in *member state solidarity*, under the hypothetical insurance principle. If the 'country of origin' principle imposes downward pressure on forms of social protection in the host country, then there would be a *prima facie* case for a special exemption. Because of this, I argue, in *Domains* (n 12), that the rulings in *Laval*, *Viking*, *Rüffert* are inconsistent with the demands of *member state solidarity*.

<sup>71</sup> See eg Ceri Gott and Karl Johnston, 'The Migrant Population in the UK: Fiscal Effects' (Research, Development and Statistics Directorate Occasional Paper 77, Home Office 2002).

<sup>72</sup> Herbert Brücker and others, 'Managing Migration in the European Welfare State' in Boeri, Hanson and McCormick (n 42).

the effects of eastern enlargement).<sup>73</sup> Indeed, leaving aside the positive impact of immigration on average productivity in immigration-dependent sectors, there is some evidence that inward migration (at least in the United States) may actually *help* the labour prospects of even the unskilled (by limiting corporate incentives to exit ‘offshore’ in search of cheaper labour).<sup>74</sup> For the sake of argument, however, let us suppose that such migratory flows *did* have an appreciably negative effect on the wages or employment of the unskilled. Would that count as undermining commitments to *national solidarity* and hence to *member state solidarity* (insofar as such migration undermines domestic commitments to social solidarity)? It is important at this point to remember that such migration functions, in labour market terms, like the effects of an advance in technology (from, say, candlesticks to electric bulbs).<sup>75</sup> The new workers are more productive either because they can produce the same or more with less or more with the same, which explains the effects on the wages of those (resident) workers whose skills are now less in demand as a result. From the point of view of *national* and *member state solidarity*, the critical question is whether workers displaced in this way can have access to adequate transitional benefits, re-training, etc. As long as such commitments could be maintained without undue financial strain, there is no complaint from either form of solidarity for the effect on wages. Once again, there is little evidence that the displacement of current residents caused by new immigration (especially EU immigration) is a significant source of financial strain on the welfare state—a source of strain that would be significantly alleviated were EU immigration to be radically limited.<sup>76</sup> Of course, it is possible that given the current political

<sup>73</sup> Thomas Bauer and Klaus F Zimmermann, ‘Integrating the East: The Labour Market Effects of Immigration’ in Stanley W Black (ed), *Europe’s Economy Looks East: Implications for Germany and the European Union* (CUP 1997); Brücker (n 72); Aslan Zorlu and Joop Hartog, ‘The Effect of Immigration on Wages in Three European Countries’ (2005) 18 J Population Economics 113; Raquel Carrasco, Juan F Jimeno and A Carolina Ortega, ‘The Effect of Immigration on the Labor Market Performance of Native-Born Workers: Some Evidence for Spain’ (2008) 21 J Population Economics 627; Martin Kahanec and Klaus F Zimmermann, ‘Migration in an Enlarged EU: A Challenging Solution?’ in Filip Keereman and Istvan Szekely (eds), *Five Years of an Enlarged EU* (Springer 2010); Boeri, Hanson and McCormick (n 42). According to Bauer and Zimmerman, ‘The issue is whether immigration [from the CEECs] in the face of unemployment [in the EU–15] automatically causes problems for the labor markets of the receiving country. The conclusion here is that this is not the case’ (300). Similarly, according to Zorlu and Hartog, who provide a useful overview, ‘In traditional immigration countries, the impact of immigrants on wages of natives is generally found to be small... Theory suggests that in European labour markets, where wages are assumed to be rather rigid compared to the more flexible US labour market, the effect of immigration will be on employment rather than wages. It is thus not unexpected that most European studies consider employment consequences of immigration. However, a large employment effect of immigration has not been found’ (114). But see also Sébastien Jean and Miguel Jiménez, ‘The Unemployment Impact of Immigration in OECD Countries’ (2007) OECD Working Paper 563 <[www.oecd-ilibrary.org/papers](http://www.oecd-ilibrary.org/papers)> accessed 1 November 2012, which argues that, though there is no significant long-term impact on rates of native unemployment, there is a small positive effect over a 5–10 year period. It is, however, important to note that the Jean article is a study of the impact of immigration on OECD countries generally.

<sup>74</sup> Gianmarco IP Ottaviano and Giovanni Peri, ‘Rethinking the Effects of Immigration on Wages’ (2006) NBER Working Paper 12497 <[www.nber.org/papers/w12497](http://www.nber.org/papers/w12497)> accessed 29 September 2012; Gianmarco IP Ottaviano and Giovanni Peri, ‘Immigration and National Wages: Clarifying the Theory and the Empirics’ (2008) NBER Working Paper 14188 <[www.nber.org/papers/w14188](http://www.nber.org/papers/w14188)> accessed 29 September 2012.

<sup>75</sup> Dani Rodrik, *Has Globalization gone too Far?* (Institute for International Economics 1997).

<sup>76</sup> Boeri, Hanson and McCormick (n 42).

climate, greater immigration would in fact trigger a decline in support for the welfare state—including in this case worker retraining or transitional benefit programs—among those already resident (which as I have argued is probably caused by either false or unreliable beliefs). In this second best world, we therefore face a tradeoff: either maintain an allegiance to the demands of *transnational solidarity* or protect the gains made on behalf of *national solidarity*. But the important point for our purposes is that there is no normative conflict between the two ideals, so the framework can still provide a useful, internally consistent regulative ideal.

What follows from our discussion of *transnational solidarity* for recent restrictions on free movement and access to the labour market imposed by most of the EU-15 on accession countries (the so-called ‘transitional agreements’)? These, I hope it is clear, would be rejected by *member state solidarity* (as would the equivalent measures adopted against Spain and Portugal upon their accession).<sup>77</sup> Acceding states open both their markets, economies, societies and their legal systems to the same body of EU law as we do. For this reason, reciprocity requires that we owe them equal treatment in the face of the same law from which we, in turn, benefit.

But what about non-economically active lawful residents—EU citizens (and third country nationals) who exercise their right of movement but who either are looking for work or do not engage in paid work of any kind? Consider, in this connection, the 1996 *Martinez Sala* case. Martinez Sala, a Spanish national, had lived in Germany since 1968. Between 1976 and 1989, she had held various jobs, but since 1989 she had become dependent on social assistance. In 1993, at the time of the birth of her son, she did not have a valid residence permit, though she was in the process of acquiring one. The German authorities refused to grant a child-raising allowance for her child. The ECJ’s preliminary ruling denied, on technical grounds, that Germany had an entitlement to deprive her of the benefit.<sup>78</sup> *National solidarity*, similarly, would draw no distinction between member state citizens and *long-term* lawful residents who are inactive. Since nationals need not present proof of residence to qualify for benefits, why should long-term lawful residents? The reason for equal treatment, as before, is that long-term lawful residents who are not economically active also contribute in a meaningful way to the reproduction and maintenance of the state (through taxation, compliance, and civic

<sup>77</sup> An interesting question, which I cannot discuss further here, is whether it is justifiable to require (as the Act of Accession does) ‘old’ member states to give preference to ‘new’ member state nationals with respect to third country nationals, granting for the moment the justifiability of the Act of Accession itself. This could be seen to follow from a commitment to *transnational solidarity*. The point is largely moot in any case, since the Act of Accession is unjustifiable. Generally, *transnational solidarity* permits norms requiring preference for hiring EU citizens over third-country nationals, precisely given the reciprocity we owe other member states who have opened up their economies, markets, territories and so on, to EU regulation.

<sup>78</sup> Case C-85/96 *Martinez Sala* [1998] ECR I-2691.

participation). As joint authors, they are therefore owed the fair return captured by principles of egalitarian justice.

To sharpen the question, we need to ask: Are there any grounds, from within either *national solidarity* or *member state solidarity*, for restricting the access of economically inactive individuals who have been lawfully residing in a member state for only a *short* period of time? Can social assistance be conditional on, for example, waiting periods (as it currently is in many member states)? And, furthermore, we need to ask: Can longer-term but not permanent residence rights (extending, eg beyond six months) be conditional on self-sufficiency requirements (ie requirements intended to demonstrate that the migrant will not become an ‘unreasonable burden’ on the state) as they currently are under Directive 2004/38?<sup>79</sup> These questions are important for our purposes because they clearly highlight a potential conflict between the ideal of free movement and *national solidarity*, on one hand, and *member state solidarity* on the other.

This tension is most evident with regards to financial self-sufficiency requirements. Viewed solely from the perspective of *national solidarity*, self-sufficiency requirements seem deeply objectionable. Whether or not someone is capable of supporting themselves is irrelevant to their capability to make a meaningful contribution to the reproduction and maintenance of the state. Consider, for example, the 1999 *Baumbast* case.<sup>80</sup> *Baumbast* was a German national who had held employment in the UK for five years. He continued residing with his family in the UK after his work contract ceased. While he had sufficient resources to support both himself and his family, his German insurance did not cover emergency medical treatment in the UK, as required by Directive 90/364 on persons of independent means. On this basis, the British authorities refused his residence renewal request. The ECJ argued that British authorities did not hold a right to deny the permit, given the fact that neither *Baumbast* nor his family constituted an ‘unreasonable financial burden’. In cases like these, it is clear that, along the same lines discussed above, *Baumbast* and his family have become, over time, joint authors of the British state and so are entitled, under *national solidarity*, to equal treatment. Indeed, *national solidarity* goes further: the same thing would be true if *Baumbast* had lacked not only emergency medical coverage *but also* sufficient resources to support himself and his family.

<sup>79</sup> According to Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158 the right of residence for more than three months remains subject to certain conditions. Applicants must:

- either be engaged in economic activity (on an employed or self-employed basis);
- or have sufficient resources and sickness insurance to ensure that they do not become a burden on the social services of the host Member State during their stay. The Member States may not specify a minimum amount which they deem sufficient, but they must take account of personal circumstances;
- or be following vocational training as a student;
- or be a family member of a Union citizen who falls into one of the above categories.

<sup>80</sup> Case C-413/99 *Baumbast* [2001] ECR I-7091.

An objector may wonder: what if Baumbast had not worked for five years prior to applying for a renewal of his residence status? Say, for example, that he and his family had just entered the UK from Germany. Would *national solidarity* allow a financial self-sufficiency test? Could it not be argued that to make a *meaningful* contribution sufficient to trigger obligations of reciprocity, one must at least reside for a significant period of time in a member state? It is important, in answering this objection, to distinguish between waiting periods for access to social protection and financial self-sufficiency requirements. Once again, *national solidarity* claims that financial self-sufficiency requirements are unrelated to one's capability to make a meaningful contribution to the reproduction and maintenance of the state, and so are objectionable even in cases in which an applicant for residence has just arrived. But it *would* allow for reasonable waiting periods for access to social protection intended to certify the connection of the migrant to the network of reciprocity characteristic of the state. Take, for example, the *Collins* case.<sup>81</sup> Collins, an Irish national, arrived in the UK and, after eight days, applied for job-seeker's allowance. It was refused on the grounds that he was not habitually resident in the UK. The ECJ held that, while the residence requirement was indirectly discriminatory, it could be justified if a residency requirement was a necessary and proportionate means to establish a 'real' or 'genuine' link between the jobseeker and the labour market. Though it left the matter to be finally resolved by British courts, the Court suggested that, since there was no doubt that Collins was genuinely seeking work (rather than abusing the system as a 'benefit tourist'), the residency requirement was (in this case) unnecessary to establish a 'real link'. From within *national solidarity*, but against the suggestion of the Court, I find no grounds to object to the British habitual residence requirement. (Indeed, there is no reason, according to *national solidarity*, why such a requirement should not also be applied to *UK citizens* who have spent most of their lives abroad.) While there were good chances that *Collins* was going to end up residing and working for the foreseeable future in the UK, until he does so, he is not entitled to the egalitarian return specified by *national solidarity*. Until such a residency period has elapsed, his contribution to the reproduction and maintenance of the state is insufficient to ground a claim (any more, indeed, than a tourist).

So far we have considered self-sufficiency tests and waiting periods solely from the point of view of *national solidarity*. But how do they look under *member state solidarity*? We can begin with financial self-sufficiency requirements. The rationale behind financial self-sufficiency requirements (as found in Directive 2004/38) is clearly to prevent 'benefit tourism'. Imposing such requirements is an attempt by member states to limit the fiscal burden of inactive migrants on the welfare system. Unlike the case of economically *active*

<sup>81</sup> Case C-138/02 *Collins* [2004] ECR I-2703.

migrants, inactive residents seeking an extension of their status clearly do pose a puzzle for *member state solidarity*: Would it be reasonable for member states to insure against the risk of ‘benefit tourism’, in our hypothetical insurance market, by imposing financial self-sufficiency requirements? Fully answering this question would require an empirical assessment of the threat which ‘benefit tourism’ actually poses to the capacity of member states to sustain domestic commitments to social protection, and the contribution which financial self-sufficiency tests would make to alleviating the threat.<sup>82</sup> Here I only note what would need to be shown to make the case convincing. In short, given the importance of the morally legitimate interests in inclusion given by *national solidarity*, it would need to be shown that, without financial self-sufficiency requirements, member states would be so burdened that their capacity to meet domestic commitments to all those lawfully resident on the territory would be significantly undermined.<sup>83</sup> This is a strong test, and it is unlikely that an empirical analysis of ‘benefit tourism’ and self-sufficiency requirements could meet it. It is relevant that research on the ‘welfare magnet’ effect in the United States, where waiting periods and financial tests have been outlawed as unconstitutional, is largely inconclusive.<sup>84</sup> Our conclusion is further strengthened when we bear in mind that *national solidarity* and *member state solidarity* would converge on the legitimacy of reasonable waiting periods for access to social protection. When we consider the (legitimate) contribution that waiting periods make to dampening the risks associated with such ‘tourism’, the possibility that financial self-sufficiency tests would undermine member states’ welfare systems seems far-fetched indeed.

I end with an intriguing possibility that could marry the EU citizen interests under *transnational solidarity*, member state interests in fiscal stability under *member state solidarity*, and migrant interests in inclusion under *national solidarity*. What I have in mind is an EU-funded compensation scheme for member states that are net importers of social assistance recipients. The level of such coverage could be determined by our hypothetical insurance market. Such a scheme could, potentially, serve both the interest in *national solidarity* and *member state solidarity*, and obviate the need for cumbersome financial and unjust self-sufficiency requirements. To explore this possibility further would take me too far afield, so I leave it aside. The important thing to see, as I mentioned in the introduction, is how the model provides a framework for generating concrete and appealing judgements across a range of different

<sup>82</sup> See the works cited in n 73.

<sup>83</sup> In the literature, welfare magnet effects have been noted, but they are generally considered too small to make an impact on social policy. See eg Brücker (n 72); Jon Kvist, ‘Does EU Enlargement start a Race to the Bottom? Strategic Interaction among EU Member States in Social Policy’ (2004) 14 J European Social Policy 301.

<sup>84</sup> See George J Borjas, *Heaven’s Door: Immigration Policy and the American Economy* (Princeton University Press 2001). cf George J Borjas, ‘Immigration and Welfare Magnets’ (1999) 17 J Labor Economics 607.

issues. If it does, then that should strengthen our confidence in its overall plausibility.

#### 4. Conclusion

I want to conclude this article with a reflection on the age-old question regarding the normative ideals underlying the project of European integration. With our interpretive *cum* critical conception of solidarity in the EU in place, we can offer a distinct perspective on this question. The EU is best conceived not as a provisional stopping point on the way either to a federal welfare polity (as some euro-federalists claim<sup>85</sup>) or to ‘post-sovereign’ polity designed to further the interests of Europe’s constituent nations (as some cultural nationalists claim<sup>86</sup>). Nor is it best conceived as a way of doing away with the welfare state (as defenders of the ‘economic constitution’ claim<sup>87</sup>), or as a mere supranational accretion of the regulatory state.<sup>88</sup> Rather, the EU is best understood as a way for member states to enhance their problem-solving capacities in an era of globalization, while indemnifying each other against the risks and losses implicit in integration. By pooling these risks, we, as European citizens, agree to share one another’s fates, to preserve our commitments to domestic solidarity, and to give each other the fair return expressed by the internationalist ideal.

<sup>85</sup> See eg Habermas (n 14).

<sup>86</sup> See eg MacCormick, *Questioning Sovereignty* (n 17); Yael Tamir, *Liberal Nationalism* (Princeton University Press 1995).

<sup>87</sup> See eg Mestmäcker, *Wirtschaft und Verfassung* (n 15); Mestmäcker, ‘Legitimacy’ (n 15); Streit and Mussler (n 15).

<sup>88</sup> See eg n 16.