CHAPTER EIGHT

Justice and the Free Movement of Persons: Educational Mobility in the European Union and the United States

ANDREA SANGIOVANNI

Part I

The average cost of a university education in Britain is £7,355.[1] The average student, however, only pays £3,255 in tuition fees, which means that more than half of students' university education is subsidized by the general taxpayer. Five percent of these students—about sixty-five thousand —are residents in other EU member states who have come to the United Kingdom to study. In 2009, the total outlay from the British taxpayer to nonresident EU students was therefore about £650 million ($1.01 billion). If we also count the effective subsidies involved in tuition loans (arising from lower rates of interest and lower rates of recovery from EU students who move back to their home country), the figure rises to about £785 million ($1.22 billion).[2] Nonresident international students from outside the European Union studying in the United Kingdom, on the other hand, pay nearly the full costs of their university education (barring some special cases).[3] The difference between EU and non-EU students is the result of a landmark 1985 European Court of Justice (ECJ) ruling, *Gravier*, which barred member states from charging higher rates of tuition to EU citizens. The court

held that differential tuition fees, in addition to illegitimately discouraging the free movement of persons across EU borders, also discriminated on the basis of nationality and hence violated Article 7 of the Treaty of Rome.

Leaving aside the legal question, to what extent, if any, do UK taxpayers (and by extension any member state citizen or resident) have a *justice*-based obligation to subsidize students from other EU member states—an obligation they lack with respect to non-EU international students? Consider that EU member states are permitted to impose residency requirements for access to social benefits, subsidized nonemergency medical care, and national voting rights (i.e., they are permitted to mandate, for example, a three-year residency requirement before economically inactive migrant EU citizens can acquire eligibility for maintenance grants). But, as we have just seen, they are not permitted to impose the same restrictions on tuition fees. Is there a morally relevant distinction to be drawn between imposing residential requirements for access to social benefits (including maintenance grants) but not similar requirements for eligibility for lower tuition fees? In what way, if any, do the history and specific institutional characteristics of the European Union matter in answering these questions?

The issues raised stand at the center of European policy debate, and are widely seen to affect key decisions regarding the provision and structure not only of university education but also the welfare state. The same issues are also important in the United States.[4] Indeed, it is very useful to compare the European Union with the United States, since in many ways the United States is the exact opposite of the European Union. Unlike the European Union, different tuition rates for residents and nonresidents attending US state universities are quite common. For example, nonresident students (including international students) attending UC Berkeley must pay approximately $37,000 per academic year; residents pay only two-fifths that amount, or approximately $14,000. Furthermore, in the United States, durational residency requirements for access to welfare benefits, nonemergency medical care, and state voting rights (applied to US citizens who transfer their residence to another state) are prohibited. If you move from Arizona to California, for example, you become eligible to vote in California elections and to receive California welfare benefits as soon as your residence is confirmed. On the contrary, in the European Union, such durational residency requirements are *not* prohibited. Is there a morally relevant distinction between the United States and the European Union? Should different types of justice-based principles apply to the European Union and the United States, or should the same principles apply but with different consequences in the two cases?

It is important to emphasize that the questions I ask, although they depend in crucial ways on both the empirical and legal facts, are not themselves empirical or legal. We are not interested in the question, do European (or American) publics support the policies in question? Similarly, as will become clear, we are only indirectly interested in the question, what does the law, properly understood, require? Our primary concern is with the normative issues underlying the legal and empirical questions. As EU and US citizens, should we support reform of the case law and legislation governing these areas? What is the moral basis for our judgments?

As we will see, there is no way to answer these questions properly without raising key questions, perhaps surprisingly, in the global justice debates. For the answers depend on a central question within those debates, namely: In virtue of what kinds of social interaction, if any, are obligations of social justice triggered? Which, in our case becomes: Under what conditions does a norm of equal treatment or protection require one to provide the same (or equivalent) benefits to both insiders and outsiders? What makes someone an insider or outsider in the morally relevant sense?

In Part I, I will outline the legal and historical background of free movement in the United States and the European Union, explaining in each case how two very different understandings of the commitment to free movement have produced two very different reactions to durational residency requirements. In Part II, I provide a sketch of a normative model, which can, once developed, answer the questions raised in this chapter. By showing how the model can usefully systematize our judgments in these cases, I hope to reveal some of its appeal in our search for a more general reflective equilibrium on the best account of international justice *simpliciter*.

The United States

The United States has long been committed to an ideal of free movement across state borders. Though the commitment is not explicitly repeated in the US Constitution, the right of free movement (or "travel") is commonly understood as an essential component of the federal polity the Constitution created.[5] The right not to just to enter

but also to *reside* in other states is also taken as a fundamental right protected by the Constitution.[6]

Though the right to enter, move through, and reside in other states is well-established, it is controversial to what extent and in what areas a state can justifiably treat long-term residents, new residents, and nonresidents differently. On one hand, US courts have upheld state rights to charge nonresidents higher tuition, to grant exclusive hunting privileges and licenses to state residents,[7] and to require that someone be resident in a state for at least one year before he or she can file a petition for divorce.[8] On the other hand, however, the courts have progressively chipped away at the ability of states to differentiate among long-term residents, nonresidents, and new residents in an increasing number of other areas.[9] For example, before the late 1960s and early 1970s, states could require new residents to reside legally in the state for a certain amount of time (often one year) before acquiring access to basic public services and privileges. But in the late 1960s and 1970s the court overturned all such durational requirements, including those necessary for obtaining voting rights,[10] welfare benefits,[11] and nonemergency medical care.[12]

Durational requirements regarding eligibility for welfare benefits merit a closer look because, as we will explore in more detail, they bear a close structural similarity to durational requirements for in-state tuition. What is the rationale for overturning durational requirements in those cases but not with regards to university tuition fees?

In the eighteenth and nineteenth centuries, indigents did not have a right to travel across state borders. Regulating the entry and exit of indigents was considered well within the purview of the state's police power, and hence did not implicate any articles of the Federal Constitution (and did not implicate, by extension, any of the Privileges and Immunities protected by Article IV).[13]

The Great Depression of the 1930s and the New Deal changed the picture dramatically. From being a merely local problem susceptible to treatment through merely local solutions, poverty and indigence became a problem of national concern. And from being considered a "pestilence" traceable to the bad habits and vicious character of those suffering from it, poverty and indigence became matters of concern for all US citizens, whatever their state of origin. With the Great Depression—with thousands out of work, many crossing borders in search of a better life—it became clear that destitution could be caused by circumstances beyond the control of any individual. This general concern was reflected in the New Deal and the raft of new federal

programs designed to deal with poverty and economic insecurity, including, most importantly, the Social Security Act of 1935. Today, there is little question that the federal government bears a central responsibility in preventing social exclusion, poverty, and economic insecurity, and in directly raising the revenue to fund that responsibility from all US citizens and residents whatever their state of origin.

In light of the New Deal, it not surprising that the court in *Edwards v. California* in 1941 struck a decisive blow to laws of exclusion and removal that were designed to prevent indigents from freely crossing state borders. *Edwards* concerned a California law that made it a crime to knowingly assist indigents in entering the jurisdiction. Recognizing the historic change brought about by the Great Depression—the "spectacle of large segments of our population constantly on the move," giving "rise to urgent demands upon the ingenuity of government"[14]—the court nonetheless was emphatic that California had overstepped its bounds. No "single state" could now "isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders. It is frequently the case that a state might gain a momentary respite from the pressure of events by the simple expedient of shutting its gates to the outside world. But, in the words of Mr. Justice Cardozo, 'The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.'"[15]

The court was relentless in asserting the national character of the "Welfare Union" created by the New Deal:

> It is urged, however, that the concept which underlies [the California law] enjoys a firm basis in English and American history. This is the notion that each community should care for its own indigent, that relief is solely the responsibility of local government... We... suggest that the theory of the Elizabethan poor laws no longer fits the facts. Recent years, and particularly the past decade, have been marked by a growing recognition that in an industrial society the task of providing assistance to the needy has ceased to be local in character. The duty to share the burden, if not wholly to assume it, has been recognized not only by State governments, but by the Federal government as well. The changed attitude is reflected in the Social Security laws under which the Federal and State governments cooperate for the care of the aged,

the blind and dependent children. It is reflected in the works programs under which work is furnished the unemployed.[16]

Edwards v. California established a precedent that, with time, eroded the ability of states not only to exclude indigents but also to limit the eligibility of new residents for welfare benefits.

A majority of states, in the wake of the case, established durational requirements for obtaining welfare benefits. The explicit aim was to dissuade rather than explicitly prevent indigents from crossing borders. The court in *Shapiro v. Thompson*, led by Justice Brennan, struck down the legislation. Durational residency requirements discriminated among categories of residents regarding benefits that were among the "basic necessities of life"; the legislation, furthermore, had a "chilling effect" on the right to travel, and hence (echoing *Edwards*) illegitimately attempted to "fence out those indigents who seek higher welfare benefits."[17]

While the Supreme Court has not, to date, reviewed the constitutionality of durational requirements for in-state tuition, it has not only affirmed the judgments of lower courts upholding such requirements (in *Starns v. Malkerson*[18] and *Sturgis v. Washington*[19]), but it has also been at pains (for example, in *Shapiro*, *Maricopa*, and *Saenz*) to distinguish welfare benefits, voting rights, and access to nonemergency medical care from education. But is there a case to be made for a distinction between the former and the latter? Perhaps the most convincing case for a *legal* distinction here would point to the fact that a university education is neither a "fundamental privilege of citizenship" essential for the livelihood of the nation (such as voting rights) nor a "basic necessity of life" (such as welfare benefits and nonemergency medical care).[20] But, even assuming it is true that a *university* education (rather than, say, primary and secondary education) is neither a basic necessity of life nor a fundamental privilege of citizenship, why should these be *morally relevant* standards for distinguishing the two cases? Why should stronger norms of equal protection and treatment only be triggered when fundamental privileges of citizenship or basic necessities are at stake? Why isn't it enough that education is a very important interest that is strongly associated with the exercise of other basic liberties (including freedom of speech and political participation), and is a central component not only of a flourishing life but also of a flourishing polity? This becomes especially relevant in light of the very same considerations regarding the sink-or-swim-together character of the "Welfare Union" invoked in *Edwards v. California*. If we are now jointly and equally responsible, as

US citizens, for one another's social and economic fate, why shouldn't we also be jointly and equally responsible for our educational prospects? Consider the court's judgment in *Brown v. Board of Education* (understood here not as a legal but as a moral precedent):

> Today, education is perhaps the most important function of state and local governments.... It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship... In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[21]

We will return to these questions later. For now, it is enough to see that the distinctions drawn between welfare benefits, nonemergency medical care, and voting rights on one hand, and university education on the other, stand on shaky ground, both legally and morally. Is there a criterion of social justice that allows us to make sense of the moral and legal judgments evinced by considering the US case, but that are also plausible when extended to more complex cases, such as the European Union?

The European Union

Free movement has a long but very different history from the right to travel in the United States. In the charter establishing the European Economic Community, the Treaty of Rome (1957), the founding member states committed themselves to preserving the "four freedoms," namely free movement of workers, services, capital, and goods. It is important that what was guaranteed was the free movement of *workers* rather than the free movement of *citizens* of any one member state. Those who had a contract of employment in another member state (and accompanying family members) were guaranteed rights to move and reside. The legal implications of these Treaty provisions were drawn out in the 1970s. In a string of important cases, the ECJ clarified and expanded the scope of what counted as a worker, now encompassing part-time workers,[22] workers on short-term contracts,[23] and workers that have needed to supplement their income with various state-provided benefits.[24] At around the same time, the community legislator extended and consolidated the coordination of social security benefits across member states in a series of important directives.[25]

However important these developments were in realizing the Common Market, their aim was not, like the New Deal, to define a common, pan-European system of social security for all workers. The aim was more modest. Workers who exercised their right to move risked losing eligibility for home state benefits, especially in cases where such eligibility required periods of contribution (such as pensions and supplementary occupational insurance schemes) or where a period of steady residence was required (as in certain forms of unemployment insurance). The goal of the 1970s directives was to ensure that such movement would not hinder access to social security, and thus not act as a disincentive to move (for example, by assuring accumulability in the case of pensions and removing waiting periods for access to unemployment benefits). It is important to emphasize that member states, however, still retained broad and nearly complete discretion over social policy, including the levels and kinds of social security that were available as well as the right to control their borders in all other cases.

These limitations are easily explained. The basic point and purpose of the European Union in this period was to "uphold and stabilize the postwar consensus on which the European welfare state was rebuilt."[26] 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, and 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, most importantly trade with West Germany, and expand investment opportunities through the removal of intra-European capital restrictions. Both the formation of the European Coal and Steel Community in 1952 and the Treaty of Rome secured the possibility of a reindustrialized Germany (whose coal and steel industries were locked within a complicated structure of supranational controls), while also laying the seeds of a customs union (later to be transformed into a free trade area and subsequently a single market). The protection of the four freedoms reflected, in short, the primarily *economic* nature of the European project, whose primary aim was to strengthen the capacity of states to secure domestic commitments to solidarity in the postwar period.

Recent developments have significantly expanded the scope of free movement within Europe. Two milestones stand out. First, the 1985 Schengen Agreement, incorporated into the Treaty of Amsterdam in

1999 and covering 25 states (all but 3 of which are in the European Union; the United Kingdom and Ireland also have opt-outs), removed internal border controls among its member states. Second, and more importantly for our purposes, the Treaty on European Union (1992) established Citizenship of the European Union, committing its signatories to recognize every European citizen's "right to move and reside freely within the territory of the Member States."[27] When exercising such rights to move and reside, "any discrimination on the grounds of nationality" was, furthermore, "prohibited." How far has the ECJ gone in applying the Citizenship articles? Does the right to nondiscrimination and free movement within the European Union play the same roles within the ECJ's jurisprudence as the United States right to travel and the Equal Protection and Privileges and Immunities Clauses do within the Supreme Court's?

Notice first that the right to move and reside is not unconditional, but "subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect." This is important in light of recent EU legislation that has sought to consolidate the conditions required by European citizens to acquire legal residence in other member states under European law, namely Directive 2004/38, the so-called Citizens Residence Directive (CRD). For our purposes, there are two components of the CRD that are important. First, economically "nonactive" citizens (i.e., not workers or the family members of workers) can establish a right to reside only if they can demonstrate that they have "sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State."[28] This requirement holds for five years, after which the resident is eligible for acquiring permanent residence status. (EU permanent residents possess a longer list of privileges and immunities than their US counterparts, including a fairly expansive right to bring in family members.) Furthermore, the CRD extends the scope of equal treatment (including equal access to all forms of social assistance available to nationals) to all those who have been legally resident in a member state for at least five years, and to all workers regardless of their length of residence.[29] But, at the same time, it explicitly allows member states to derogate from the equal treatment requirement in the area of social assistance and maintenance grants[30] for those who have been resident for less than three months (and five years for maintenance grants), leaving open what member states may do with respect to those who have been resident from three months to five years.

In drawing our contrast with the United States, the key question to ask is this one: Does European law permit durational requirements with respect to social assistance? And, more generally, should it? In the case of workers, the ECJ was the first to extend the scope of equal treatment to all migrant workers including those who have resided only briefly in the host state (a result now recognized, as we have just seen, in the CRD).[31]

Subsequent case law has to some extent clarified that question. Unlike the US Supreme Court, the ECJ recognizes that states have a legitimate and compelling interest in protecting the fiscal integrity of their social welfare systems by limiting access to social assistance for economically inactive nonresidents. It is widely accepted, furthermore, that this interest is grounded in the fact that member states retain the primary responsibility for social assistance and protection, and that the European Union's action in this area is supplementary and derivative. The European Union never had a New Deal; there is no Welfare Union or joint commitment to a Europe-wide system of social solidarity.[32] In its free movement jurisprudence, this recognition is reflected in its acceptance that member states can use durational residence requirements to establish that there is a "real link" between the economically inactive claimant and the society in question.[33]

Strikingly, however, the European Union has gone much farther than the United States in condemning durational residency requirements for paying (lower) resident ("in-state") tuition fees. Ever since the ECJ's 1985 *Gravier* judgment, member states can no longer charge higher tuition (or registration) fees to citizens and residents of other member states (though they can continue to charge higher fees for international students).[34] In its judgment, the court recognized that member states have sole and exclusive competence over how to finance and organize their systems of higher education. But, in this case (which involved a French student beginning a course in Belgium), "the questions referred concern neither the organization of education nor even its financing, but rather the establishment of a financial barrier to access to education for foreign students only."[35] In the wake of *Gravier*, member states quickly passed a series of directives defining the conditions for the free movement of students in an attempt to limit the effects of the ECJ's judgment. These conditions include *inter alia* a financial self-sufficiency and comprehensive medical insurance requirement, and explicitly exclude nonresidents from eligibility for maintenance grants (these conditions have all been carried over in the CRD). The court responded, in turn, by limiting how stringent the residential requirements for obtaining

eligibility for maintenance grants could be (in *Bidar*), and by requiring states to show a "certain degree of financial solidarity" in cases where a student temporarily came to lack "sufficient resources" and turned to the host state for social assistance (in *Grzelczyk*).

From a purely legal point of view, the court's judgment in *Gravier* seems (as has often been remarked[36]) somewhat bizarre given that differential tuition fees *are* a central component of a state's educational policy (just think of the importance of such tuition fees for a university's financial sustainability in, for example, Britain). From a legal point of view, the ECJ's real link jurisprudence has also caused some unease, given the vagueness inherent in the notion. What counts as being sufficiently integrated in a host society? When and under what conditions is residence a good indicator of such integration? To many commentators, the court's approach in such cases seems ad hoc and "intuitive."[37]

We are not, however, concerned with the strictly legal rationale or implications of these decisions. What we want to know is to what extent the ECJ's line of argument can be defended on moral grounds (leaving aside whether legal interpretation must itself be informed by political morality). Has the ECJ been right to allow durational and financial self-sufficiency requirements? Do host state residents have a justice-based obligation to subsidize the secondary education of EU citizens resident in another member state? If our answers in the EU case diverge from those in the US case, then what, in the history and character of the European Union, distinguishes the United States for moral purposes? With the legal and empirical background in place, we are now in a position to answer these questions.

Part II

In brief, I believe a form of what I call *internationalism* can provide the required answers. Internationalists are *cosmopolitans* insofar as they believe that all persons deserve equal respect and consideration. They also share with *statists* the position that obligations of social justice are only triggered in the presence of relevant forms of social interaction.[38] But, contrary to statists, they do not believe that international relations are, beyond a human rights/humanitarian floor, a justice-free zone. The key element that distinguishes all internationalist views from their rivals is that the content of fundamental principles of social justice *varies with the type and extent of social interaction involved.* Statism has a binary structure: Either the relevant social 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, on the other hand, 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. An example is the form of internationalism that I favor, namely *reciprocity-based internationalism*. 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).[39] 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 responsibility for the collective goods secured by legal-political authority. By contributing to the generation of these 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.[40] 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, members of various voluntary associations, citizens and residents of states, EU citizens and residents, and members of the WTO or UN will be different not only in virtue of the diverse *kinds* of collective goods generated by each type of cooperation but also the *way* in which such goods are produced.

Using this framework, what principles of solidarity apply to citizens and residents of *states* (such as the United States or France)?[41] 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, more demanding norms of socioeconomic justice, I

argue, are best understood as a demand of reciprocity for the mutual provision of this central class of collective goods. 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[42] as moral grounds for greater reward.[43] 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.

What implications would adopting reciprocity-based institutionalism have for developing principles of solidarity for the European Union? Internationalism takes not only the history and institutional structure of the European Union but also the deep and pervasive effects of its primary and secondary law seriously. How? We know that principles of solidarity for the European Union will be less demanding than those for the state level, precisely in virtue of the more mediated and less comprehensive nature of the collective goods provided at the European Union level. While of course the European Union is also sustained by our compliance, trust, resources, and participation, the range of areas over which it has authority is comparatively narrow. The reason is that European citizens rely to a far greater extent on the contributions, participation, and influence of their fellow residents and citizens than they do 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 or comprehensiveness of the 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 percent of EU GNI compared with about 40 to 50 percent 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).[44] A comparison to the United States is relevant here. In 2009, the US federal government spent $12,131 per person; the European Union spent $375 (€268) per person. The United States, that is, spends about 32 times more per person than the European Union. To put things in perspective, the beleaguered city of Baltimore *alone* spent $3,378 per person in 2009, about eight times the European Union. Even with respect to its evolving body of social law, the European Union is limited to mainly regulatory functions (for example, occupational health and safety) rather than direct provision. Without its member states, the European Union would lose the capacity to govern and regulate those delegated areas within its jurisdiction. This is because the European Union, 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 European Union, member states would forgo a range of benefits, but they would not lose the capacity to govern.

As we have already suggested, the point and purpose of the European Union is therefore best understood as an attempt to *strengthen* its constituent member states in an era of globalization rather than an attempt to realize a federal state on a higher plane, or to provide a focal point for a globe-encompassing cosmopolis, or to otherwise dissolve or transcend the state. 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. States, however, also face important risks, in integrating, to their capacity to grow and to retain the capacity to deliver on domestic commitments. 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 (for example, 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 question becomes: What do member states and their citizens owe one another 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 guide member states' interaction within the European Union? In brief, I argue[45] that the fair return member states owe one another, under *member state solidarity*, is given by the level at which each state would insure against the potential losses involved in integration had they known the distribution of risks but not their place in that distribution.

Part III

Recall that we ended Part I by wondering whether there was a justice-based criterion available that might guide our judgment with respect to durational residency requirements for welfare benefits and in-state tuition fees, both in the United States and the European Union. And also recall that the aim of Part II was to provide precisely such a criterion. We are now in a position to tie together the strands laid out in Parts I and II, and hence to make good on our claim.

With respect to the United States, our answers should be clear. Because the United States is a federal *state*, more demanding norms of social justice apply to all US citizens and (long-term) residents wherever in the United States they reside. Since at least the New Deal and the civil rights movements of the 1950s and 1960s, the federal government has become the ultimate guarantor of the rights, liberties, immunities, and privileges of all US citizens.[46] This is the case even in welfare policy, where, although states are mainly responsible for direct provision, the US government is heavily involved in guiding and steering state policies (including funding them). The public goods that US citizens and residents provide one another via the federal government are comprehensive and far-ranging, and ultimately provide the basic structure in which Americans develop their talents and abilities. From

this point of view, the court's line of judgments with regards to durational residency requirements in areas of nonemergency medical care, welfare benefits, and voting rights are fully justified. But, similarly, any inequalities in educational opportunities that stem from differential tuition fees would be *unjustified*. The court's reasoning regarding differential tuition fees would therefore be rejected by the reciprocity-based internationalism (as it was by statism).

The European Union, however, is not a federal state. The public goods it provides are very different in content and form from the ones provided by the US government, and so, therefore, is its point and purpose. As a result, our normative analysis must take the more complex form outlined in Part II. With respect to durational residency and financial self-sufficiency requirements for nonpermanent residents, our response must also be complex, requiring us to take into account the demands of national *and* EU solidarity. Following from the account of national solidarity summarized in this chapter, it seems clear that member states have a strong and morally compelling interest in maintaining and protecting the fiscal integrity of their welfare states.[47] However, migrant EU citizens who have an intent to remain for an appreciable period, including ones who are economically inactive, have a strong and morally compelling interest in equal treatment (based on their expected contribution to the maintenance and reproduction of the public goods provided by the host state). Financial self-sufficiency requirements are therefore unjustified, but durational residency requirements are justified as ways of ascertaining the bona fide residence of claimants.

Educational Mobility

What about the ECJ's tuition fee judgments—judgments that have fundamentally altered the landscape of higher education in Europe? Here I outline a possible answer.

The preamble to the Lisbon Treaty (signed into law in 2009) commits its signatories to "promote the development of the highest possible level of knowledge for their peoples through a wide access to education," and, as stated in Article 165 of the Treaty on the Functioning of the European Union or TFEU (ex-Art. 149), to "contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organization of education systems and their cultural and linguistic diversity." Here we have a statement of

the aims and purposes of Union action: The Union ought to promote the capacity of each member state to improve its educational systems in line with domestically established priorities, while also committing them to cooperate in the provision of such education, primarily but not exclusively by "ensuring the mobility of students and teachers."[48]

In one sense, students are like workers. Through their education, they promise to become active and productive participants in the social, cultural, and economic life of whatever member state in which they end up fixing their residence. But, on the other, they are like the newly arrived economically inactive. In no member state do students pay for the full costs of their own education (with the exception of some private universities), and the work they do while following a course of study is mostly provisional and occasional. Students are expensive. In Britain, for example, the teaching subsidy is £4,000 and tuition fees are £3,255 per student (under the current system, which is obviously changing quickly). Tuition loans, furthermore, are heavily subsidized by the taxpayer, since they are given at low rates of interest, and must be paid back only once the student makes more than £15,000. If we then consider that EU students make up roughly 5 percent of the overall student population at the moment (i.e., ca. 65,000), with numbers rising quickly each year, then the outlay is at least £260 million yearly, plus the tuition loan subsidy. It becomes even more expensive when we take into account the fact that tuition loans are very hard to recover from students who leave the country (for example, by returning to their home country). Indeed, it seems that, in 2009, over half of EU students who moved from Britain failed to pay off their loans. (The subsidies are so large that they likely dwarf the outlays in social benefits that are paid yearly to all EU citizens who have exercised their right to move, whether they are workers, family members, or otherwise economically inactive.) The situation is worse for countries such as Austria, Belgium, and Sweden (all net importers of students), where the university sector is funded (in most cases) entirely by the taxpayer rather than from tuition fees. Given these facts, the question becomes: Why should host state taxpayers subsidize the education of citizens from other member states?

From the point of *national solidarity* there seems to be no reason to support such subsidies. Students who have arrived in a host state solely for their studies lack a genuine connection to the member state in which they live. While they might comply with law and pay some taxes (mostly VAT) while they are attending university, they do not meaningfully contribute to the reproduction and hence authorship of the collective goods animating their host state. Therefore, according to

national solidarity, they lack a claim to an educational subsidy equivalent to the one guaranteed to long-term resident EU citizens, or to EU workers and their family members.

So far we have discussed educational mobility from the point of view of national solidarity. But we also have to consider it from the point of view of *EU* solidarity. How do we balance the demands of solidarity at a national level with those at a European level? Let us begin with tuition fees after *Gravier*. Since the court's ruling, member states can no longer charge different tuition fees for nonresident EU students (they can still, however, charge higher tuition fees for non-EU, international students). Tuition loans (but not maintenance grants and loans) must also be offered on the same terms as resident applicants. This explains the large subsidy from the home state taxpayer to EU students mentioned above, which would obviously be much smaller if states could charge differential rates. The Preamble and Article 165 TFEU express the solidarity implicit in the transnational ideal: by joining the Union, member states pledge themselves to ensuring the mobility of students by cooperating in the provision of education, but without undermining domestic commitments to educational provision and access. Equalizing tuition fees among all EU students can reasonably be seen as a way of implementing that ideal—an ideal that reflects, as I have said, the reciprocity states owe one another in virtue of opening their societies, economies, and legal systems to one another.

The trouble comes when we reflect on the tuition fees from the point of view of European solidarity. Would member states have taken steps, in our hypothetical insurance market, to secure against the possibility of such transnational subsidization of students? The answer seems to be clearly yes. As we have seen, such subsidies are significant, and have noticeable effects on the problem-solving capacity of member states seeking ways to fund their university system while guaranteeing places for all resident students. Although it is difficult to find reliable evidence, EU rules on tuition fees may have also contributed to the current move toward privatization, that is, shifting the costs of funding higher education from the public purse to the individual student.[49]

There are two considerations from within *member state solidarity*, however, that qualify this line of reasoning. First, not all states are net importers of students, which means that not all member state taxpayers end up subsidizing the education of nonresident EU citizens. Net importers, arranged from lowest to highest, include the Czech Republic, Italy, Sweden, Austria, Belgium, Germany, and the United Kingdom (which is far and away the largest net importer). Second,

member states stand to gain from importation of students if those students decide to remain and pursue work in the host state after their studies. While most EU students return to their home country, a good number stay.[50] In the cases where students decide to stay, it strikes me as uncontroversial (again, from within the account of solidarity being worked out here) that the investment host state taxpayers make in EU students' education is fully reciprocated.

Given these two facts, the question becomes: To what extent would member states have insured against such subsidization had they known the statistics on mobility of students—including how many students end up leaving soon after their studies—but not known whether they were going to be net importers or exporters? There are four options that seem to me to carry the most promise:

1. Member states would insure against these possibilities by *not* equalizing tuition fees, that is, by allowing states to charge, *pace* the ECJ, higher tuition fees for nonresident EU students. (This would include states that currently do not charge tuition fees).
2. Allow differential tuition fees but, in line with the reasoning in cases such as *Schwarz* and *Morgan* and *Bucher*, require member states to provide the same level of funding for students who exercise their right to study elsewhere in the European Union as students who remain. This would, in effect, secure the portability of educational benefits across EU borders. States would agree, furthermore, to a system that compensates home states for the full costs initially disbursed where a student decides to stay on in the host state (for some reasonably extended period of time).
3. Equalize entry conditions for higher education (including tuition fees for states that have them) but also establish a system of payments funded through EU coffers (or an additional levy) that would partially or fully compensate net importers for the full costs of educating migrant students who return home.
4. Equalize entry conditions (including tuition fees), but ensure that the home state compensate the host state for the full (or perhaps partial) cost of educating migrant students who return home (as is currently the case among cantons in Switzerland).

While 1 *could* be chosen purely from the perspective of *member state solidarity*, it would fail to realize the demands of *transnational solidarity* implied by the commitment to encourage mobility of students across borders. According to this option, students would have to pay the full

costs of their education, and there would be no guarantee that the home state would help them cover those costs. Options 2, 3, and 4 do much better on that account since they require some form of assistance for students who move. Option 2 does so by guaranteeing portability of educational benefits.[51] According to this proposal, any student who wants to study abroad would be entitled to the same benefits, on the same terms—including tuition and maintenance loans and grants—as home state students who decide to remain. In cases where a student decides to remain after completing his or her studies, the host state would then compensate the home state for the assistance provided. There are at least two problems with this proposal. First, while the proposal would benefit students from home states that charge tuition fees and provide loans, it would not help those students from home states that do not. This may, furthermore, create a perverse incentive for home states to *reduce* the benefits on offer. Second, the opportunities available to EU students to study abroad would vary tremendously depending on the member state they were from; students from well-off states with generous support would have much greater opportunities than those from less-well-off states with less generous support. Option 4, on the other hand, proposes to keep the current system of equalized tuition fees, but sets up alongside it a system of full (or perhaps partial) compensation to the host state for students who choose to return home.[52] These transfer payments would be made, say, after some reasonably extended period of residence (and perhaps work) in the host state. This strikes me as a system that has greater promise than 1 or 2. There are, however, three main problems with this proposal. First, it would create a perverse incentive for home states to keep their departing students from coming back (since their coming back would trigger a compensatory claim). It would thus encourage "brain drain" from states that are likely already to be relatively less developed. Second, it would be both difficult and cumbersome to enforce given the essentially bilateral transfers involved. Third, it gives relatively short shrift to the demands of *transnational solidarity* since the costs of educating EU students would not in any meaningful sense be shared.

Option 3 strikes me as the most promising proposal. This option implements, in effect, a compulsory educational insurance scheme for member states, in which each member state contributes a premium in return for a payout in the case of being a net recipient of EU students. In practice, the sum total in premiums (that is, the total revenue required to cover all education subsidies) would be determined by the full costs necessary to cover the total number of students who return home in

any given year. The premiums, that is, distribution of levies, could be determined in a number of ways. One intuitively plausible view, given the relatively small amount that would be involved and the fact that member states do not know whether they will be importers or exporters, would be to divide the costs of the compensation scheme according to the ratio of total students exported for each member state to the total number of students exported across all member states. So if a member state exports 5 percent of the total number of students moving across borders, then their premium would be 5 percent of the total compensation. Notice that this scheme eliminates the brain drain problem and might work even to reverse it. Because states are sharing the costs of the compensation according to how many students they export in relative terms, there is no incentive to keep students from coming back home. For every student who stays away, the member state would save only a fractional amount, namely the fraction paid as premium multiplied by the cost of the student's individual subsidy. This is analogous to the situation in which all agree to share the costs of a restaurant bill according to proportion fixed in advance. Just as people tend to order more expensive items on a menu in such a situation, member states would have an incentive to get as many students as possible to return home (thus maximizing the return on their premium). To be sure, member states such as Britain would not be as well off as they would be under the bilateral compensation scheme set out by option 4 (since their net return would also include the premium paid), but this seems fair given the transnational and member state solidarity represented by our hypothetical insurance market. Under this proposal, member states agree to share the risks and costs of an open and joint system while preserving the solidarity intrinsic to their national schemes.

A final caveat. The aim of these proposals is not to provide fully fledged policies, the elucidation of which would take us far beyond the scope of this project.[53] Such a policy analysis would need to take into account myriad complicating factors. It is enough if the model I have constructed can both serve as a normative compass for guiding our judgment in particular cases, and, if we are lucky, also systematize our nascent and precarious sense of European solidarity along the way.

Notes

1. This calculation is based solely on the so-called "teaching subsidy" that UK universities receive from the government, plus tuition fees.

2. The average cost of subsidizing tuition loans is currently about one-third of the tuition fee (or £1,000). For this figure, see http://www.hepi.ac.uk/files/32Economiceffectsofinternationalstudents.pdf. According to the BBC (http://news.bbc.co.uk/1/hi/education/7912548.stm), 70 percent of EU students who returned home failed to repay their loans. If we estimate that 50 percent will return home, and 50 percent of those will not repay, then the cost of subsidizing the tuition loans will increase by £70 million per year when the current 65,000 start repaying (assuming a constant number of EU students, which slightly underestimates the figure since the numbers are increasing).
3. They must also reside legally in the United Kingdom for a longer period than in the United States before they become eligible for reduced tuition fees.
4. See, for example, the recent California case, *Martinez v. Regents of the University of California*, California Supreme Court, Nov. 15, 2010, which upheld a California law that permits unlawful aliens to pay in-state tuition fees as long as they have attended a California high school, but denies the same benefit to US citizens who do not reside in California and have not attended a California high school.
5. There are interesting differences that stem from which part of the Constitution one conceives of the right as originating, but they are not relevant here. See Mark Strasser, "Privileges of National Citizenship: On *Saenz*, Same-Sex Couples, and the Right to Travel," *Rutgers Law Review* 52 (1999): 553–588 and Erika Nelson, "Unanswered Questions: The Implications Oì Saenz v. Roe for Durational Residency Requirements," *Kansas Law Review* 49 (2001): 193–220. See also Justice Harlan's dissent in *Shapiro v. Thompson* 394 US 618 (1969), 663ff.
6. *Zobel v. Williams* 457 US 55 (1982), 76–77.
7. *Baldwin v. Fish and Game Commission of Montana* 436 US 371 (1978); *Corfield v. Coryell* 6F. Cas. 546 (No. 3,230) (CCED Pa. 1825).
8. *Sosna v. Iowa* 419 US 393 (1975).
9. See the cases discussed in notes 6–8, but also *Zobel*, *Hooper*, and *Alaska*, *Soto-Lopez*.
10. *Dunn v. Blumstein* 405 US 330 (1972).
11. *Shapiro*.
12. *Maricopa County*.
13. It is worth noting that this case was decided before a "right to travel" was officially recognized as an essential part of the Constitution. This recognition only came with the *Passenger Cases* of 1849. In any case, the right to control the entry and exit of indigents was not challenged until 1941.
14. *Edwards v. California*, 314 US 160 (1941).
15. Ibid.
16. Ibid.
17. Justice Brennan: "On the basis of this sole difference the first class is granted and the second class is denied welfare aid upon which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life," 627.
18. *Starns v. Malkerson*, 401 US 985 (1971).
19. *Sturgis v. Washington* 414 US 1057 (1973).

20. Cf. *Saenz* on portability.
21. *Brown v. Board of Education*, 347 US 403 (1954).
22. *Levin*.
23. E.g., *Ninni-Orsache*.
24. *Kempf*.
25. Directive 1408/71, now replaced by Directive 883/2004.
26. Alan S. Milward, *The European Rescue of the Nation-State*, 2nd edn. (London: Routledge, 2000), p. 38.
27. "Treaty on European Union," February 7, 1992, 1992 O.J. (C191) 1; 31 I.L.M. 253 (1992).
28. European Parliament and Council, Directive 2004/38/EC, Luxembourg (April 29, 2004).
29. In addition to consolidating the various residency directives, these provisions summarized and, in a sense, "ratified" much of the ECJ's 1980s and 1990s jurisprudence in this area (e.g., *Hoeckx*, *Martinez Sala*, etc).
30. Essentially loans and grants covering room and board for university students.
31. *Hoeckx*.
32. See, for example, Christian Tomuschat, "Case C-85/96, *María Martínez Sala v. Freistaat Bayern*, Judgment of 12 May 1998, Full Court [1998] Ecr I-2691," *Common Market Law Review* 37 (2000): 447–457: "Indeed, the European Community has not yet crossed the threshold to a true Social Union, where the peoples of the 15 Member States would be considered as just one community, mutually extending solidarity, where revenues and financial charges are shared irrespective of national boundaries. As yet, the Community enjoys no powers of legislation in the social field... The individual does not acquire social entitlements just by transferring his or her residence to another Member State is he or she does not belong to one of the categories specifically recognized as holders of a right of free movement" (454).
33. See *Bidar*.
34. See also *Blaizot*.
35. 18.
36. Gareth Davies, "Higher Education, Equal Access, and Residence Conditions: Does EU Law Allow Member States to Charge Higher Fees to Students Not Previously Resident?" *Maastricht Journal of European and Comparative Law* 12 (2005): 217–231 and Michael Dougan, "Cross-Border Educational Mobility and the Exportation of Student Financial Assistance," *European Law Review* (2008): 723–738.
37. See, e.g., Charlotte O"Brien, "Real Links, Abstract Rights and False Alarms: The Relationship between the ECJ's "Real Link" Case Law and National Solidarity," *European Law Review* 5 (2008): 643–665.
38. I provide a defense of this position against globalist cosmopolitanism in Sangiovanni, *Domains of Justice* (Cambridge, MA: Harvard University Press, forthcoming) and Sangiovanni, "Global Justice and the Arbitrariness of Birth," *Monist*, forthcoming.
39. I defend reciprocity-based internationalism against its coercion-based rivals in Sangiovanni, "Global Justice, Coercion, and Nonvoluntary Interaction," in *Social Justice, Global Dynamics: Theoretical and Empirical Perspectives*, ed. Ayelet Banai, Miriam Ronzoni, and Christian Schemmel. (London: Routledge, 2011);

Sangiovanni, "Justice, Coercion, and Nonvoluntary Interaction" (unpublished, 2011); and Sangiovanni, *Domains of Justice*, Chapter 4.

40. Cf. fair play in John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1999) and H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Oxford University Press, 1994).
41. I defend this argument in much more detail in Sangiovanni, "Global Justice, Reciprocity, and the State," *Philosophy & Public Affairs* 35 (2007): 2–39 and Sangiovanni, *Domains of Justice*, Chapter 5.
42. This is not to deny that there might be cases in which giving greater rewards to those with those talents and abilities is justified. This could be the case, for example, when greater rewards to those more talented makes those worst off better off than they otherwise would have been without the rewards.
43. See Sangiovanni, "Global Justice."
44. See, for example, A. Moravcsik, "In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union," *Journal of Common Market Studies* 40 (2002): 603–624; Giandomenico Majone, "Delegation of Regulatory Powers in a Mixed Polity," *European Law Journal* 8 (2002): 319–339; R. Dehousse, "European Institutional Architecture after Amsterdam: Parliamentary System or Regulatory Structure?," *Common Market Law Review* 35 (1998): 595–627. On EU social policy, see Gráinne de Búrca, ed., *EU Law and the Welfare State: In Search of Solidarity* (Oxford: Oxford University Press, 2005).
45. For the full argument, see Sangiovanni, *Domains of Justice*.
46. Think, for example, of the desegregation of Little Rock High School, and the role of federal government in literally disarming and reconstituting the Arkansas National Guard as a federal unit under the US Army.
47. Sangiovanni, *Domains of Justice*.
48. See Article 165 of The Lisbon Treaty, http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-the-functioning-of-the-european-union-and-comments/part-3-union-policies-and-internal-actions/title-xii-education-vocational-training-youth-and-sport/453-article-165.html.
49. Though it must be said that raising tuition fees may make the situation *worse*, given how difficult it is to recover payments from EU students who move away after their studies. Indeed, given how large these loans are, it would actually increase the incentive for students to move back, rather than stay. For this point, see http://www.hepi.ac.uk/455-1875/The-government's-proposals-for-higher-education-funding-and-student-finance---an-analysis.html on the Browne proposals.
50. I don't yet have data on how many go and how many stay, but indirect evidence (such as the number of failed repayments) suggests that the majority return to their country of origin.
51. Choice 2 has been proposed in a slightly different form and for different reasons by Dougan, "Cross-Border Educational Mobility and the Exportation of Student Financial Assistance" and Davies, "Higher Education, Equal Access, and Residence Conditions: Does EU Law Allow Member States to Charge Higher Fees to Students Not Previously Resident?"

52. I leave open what to do with students who end up fixing their residence in some *third* member state. Following the logic of the argument, it is this state that should ultimately compensate the host state. For an estimate of the economic contribution made by international students to the UK economy, see http://www.hepi.ac.uk/files/32Economiceffectsofinternationalstudents.pdf.
53. For example: After how many years, exactly, would a student count as "not having returned home"? What if the student returns soon thereafter?