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Free Movement and Discrimination: Evidence from Europe, the United States, and Canada

Willem Maas*

Department of Political Science, Glendon College, York University, 2275 Bayview Avenue, Toronto, ON, Canada M4N 3M6

Abstract

This article surveys some general lessons to be drawn from the tension between the promise of citizenship to deliver equality and the particularistic drive to maintain diversity. Democratic states tend to guarantee free movement within their territory to all citizens, as a core right of citizenship. Similarly, the European Union guarantees (as the core right of EU citizenship) the right to live and the right to work anywhere within EU territory to EU citizens and members of their families. Such rights reflect the project of equality and undifferentiated individual rights for all who have the status of citizen. But they are not uncontested. Within the EU, several member states propose to reintroduce border controls and to restrict access for EU citizens who claim social assistance. Similar tensions and attempts to discourage freedom of movement also exist in other political systems, and the article gives examples from the United States and Canada. Within democratic states, particularly federal ones and others where decentralized jurisdictions are responsible for social welfare provision, it thus appears that some citizens can be more equal than others. Principles such as benefit portability, prohibition of residence requirements for access to programs or rights, and mutual recognition of qualifications and credentials facilitate the free flow of people within states and reflect the attempt to eliminate internal borders. Within the growing field of migration studies, most research focuses on international migration, movement between states, involving international borders. But migration across jurisdictional boundaries within states is at least as important as international migration. Within the European Union, free movement often means changing residence across jurisdictional boundaries within a political system with a common citizenship, even though EU citizenship is not traditional national citizenship. The EU is thus a good test of the tension between the equality promised by common citizenship and the diversity institutionalized by borders.

Keywords

Free movement; citizenship; borders; mobility rights; European Union; United States; Canada

1. Free Movement and Citizenship

> All governments believe that the freedom of movement of Canadians to pursue opportunities anywhere in Canada is an essential element of Canadian citizenship. Governments will ensure that no new barriers to mobility are created.[1]

*) E-mail: maas@yorku.ca.

1) From 'Mobility Rights in Canada', part 2 of the Social Union Framework Agreement (1999) available online at http://www.scics.gc.ca/english/conferences.asp?x=1&a=viewdocument&id=638 and discussed in greater detail below in Section 5.

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> Everyone has the right to freedom of movement and residence within the borders of each State.[2]

Equal citizenship is possible in theory but not in practice. This truth is evident in unitary states but even more so in multilevel political systems such as federal states or the European Union. Governments and other administrative bodies must necessarily discriminate between individuals to determine which persons fall within their jurisdiction and which do not. With the exception of Monaco (which consists of a single municipality) and Vatican City (a peculiar 'state' of less than 900 inhabitants), every state in the world contains multiple administrative divisions.[3] Because of differences among administrative divisions — for example in tax rates, social services, or simply political clout within the overarching system — the mere existence of separate or overlapping jurisdictions inevitably results in individuals subject to one jurisdiction receiving different treatment from those subject to another. Furthermore — this is the main contention of the present article — individuals attempting to move from one jurisdiction to another often encounter barriers or impediments and incentives or disincentives to movement within the putatively equal political space.

The barriers or encouragements that individuals face when attempting to move between jurisdictions may be large or small, but even 'administrative hassles' may hinder freedom of movement. International instruments such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights affirm that everyone has the right to freedom of movement and residence within the borders of each state but, as argued above, nowhere is such movement completely free. Generally speaking, free movement is higher where there is greater concern for equal citizenship; conversely, the larger (in terms of area and population) or more complex (in terms of administrative jurisdictions) the overarching political system, the higher the likelihood of impediments. Barriers to free movement can grow or persist even in very democratic societies that have a deep concern for equal citizenship. To illustrate this point, this article considers free movement in three multilevel democratic political systems: the European Union, Canada, and the United States.

The next section considers the politics of borders and boundaries, amplifying and extending the arguments just made and arguing that 'internal migration' (within the borders of a state) deserves as much study as international migration. The following three sections consider, in turn, free movement in the European

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2) Article 13.1 of the Universal Declaration of Human Rights (1948). Similarly, Article 21.1 of the International Covenant on Civil and Political Rights (1966) specifies that 'Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence'.

3) Even Liechtenstein, population approximately 35 000, has eleven administrative divisions and San Marino, population approximately 32 000, has nine. The Pacific island micro-states of Nauru and Tuvalu also have several administrative divisions. Of course, the smaller the state, the less room for barriers to free movement. See Section 2 below.

Union (Section 3), the United States (Section 4) and finally (Section 5) Canada. The conclusion concludes with some general thoughts about the inevitable tension between diversity and equality.

2. Borders and Boundaries

Because virtually every state in the world has internal jurisdictional boundaries, it is worth inquiring about the purpose of these borders. As leading scholar, Bauböck writes that the 'primary function of a political border is to demarcate the jurisdiction of a political authority. Its secondary function is as a site of control over flows of goods or people. A border that is completely open in the sense of being uncontrolled still clearly [identifies] the territory within which the laws of a particular government apply. Internal borders in liberal democracies are all open in this way'.[4] It is certainly true that movement within liberal democracies is generally uncontrolled and therefore free. But the right to settle or reside is not always so established, despite the UN Declaration and especially a person's 'freedom to choose his residence', specified in the International Covenant on Civil and Political Rights.[5]

Comparative analysis demonstrates that barriers to freedom of movement and residence are imposed mostly on 'undesirable' individuals or groups. This is hardly surprising but raises the question of how desirability is determined. That passive verb, *is determined*, can be made active by specifying which individual or institution decides the desirability or undesirability of migrants and others who wish to move. Just as state agents (e.g. border control officers or civil servants in charge of residency registration) are the relevant authorities for controlling international migration, so sub-state agents control internal migration and free movement, applying sub-state criteria.

In non-democratic states, barriers to freedom of movement or residence are common. For example, the *hukou* system of household registration in China was designed explicitly to hinder internal migration and is only now slowly being reformed, for example by allowing rural residents to purchase 'temporary urban residency permits'.[6] Yet the relaxation of barriers is far from complete. For example, the new policies for Chongqing and Guandong provide residence permits only for migrants from the specific province or municipality, thereby excluding

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4) R. Bauböck (2009) 'Global Justice, Freedom of Movement and Democratic Citizenship', 50 *European Journal of Sociology/Archives Européennes de Sociologie*, 1–31, on p. 10.

5) Supra note 2.

6) L. Wu (2013) 'Decentralization and Hukou Reforms in China', 32 *Policy and Society*, 33–42. Wu argues that recent decentralization policies in China do make local governments more powerful and responsible for providing social welfare to their local citizens but have also undermined the incentives for local governments to provide welfare to migrant workers. Thus decentralization has hindered integrating the large number of migrant workers into local cities and promoting equity within national social welfare delivery.

millions of migrants, potential (who would move if allowed) and actual (who move regardless, becoming 'illegal migrants' within their own country): in 2009, for example, 'of the 145 million migrant workers (and their 22 million accompanying family members), 51 percent migrated across provincial boundaries'.[7]

Another example of such 'internal passports' that prohibit or inhibit internal migration is the *propiska* system that severely restricted free movement in the former Soviet Union and was inherited from the Russian Empire. It was cancelled in 1993 through the 'Law on the Right of Russian Citizens to Freedom of Movement, the Choice of a Place of Stay and Residence within the Russian Federation (1993, amended 2004)', reflecting the new Russian constitution's guarantee (Article 27.1) that 'Everyone who is lawfully staying on the territory of the Russian Federation shall have the right to freedom of movement and to choose the place to stay and reside'.[8] Despite this constitutional guarantee, barriers continue to exist, most notably the 43 so-called closed cities known as Closed Administrative Territorial Formations (*Zakrytoe Administrativno-Territorial'noe Obrazovanie*, ZATO), home to well over one million people.[9] And of course notorious barriers to free movement were the pass laws in South Africa (particularly the Pass Laws Act of 1952, in force until 1986), specifying where, when, and for how long individuals could remain outside their 'homeland'; key to the *apartheid* system.

The jurisdictional boundaries we have been discussing are territorial: physical borders between different administrative units. But jurisdictional boundaries may also be personal: based on personal characteristics or social divisions. This type of organizing logic predates the idea of equal citizenship and prevailed in the Middle Ages (e.g. division of societies into different estates, with different laws) as well as the *millet* system in the Ottoman Empire, in which members of different confessional communities were governed with their own courts under their own laws.[10] Such an alternative logic is reflected in the idea of non-territorial citizenships, an idea which has lost prominence with the rise of the nation-state as the territorial basis for political authority and the idea of equal citizenship. As David Elkins puts it, as 'the idea of the nation-state achieved its hegemony as a territorial, all-purpose political organization, it affected aspects of citizens' identity. Out of the

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7) F. Cai (2013) 'The Hukou Reform and Unification of Rural-urban Social Welfare', in D. Kennedy and J.E. Stiglitz (eds) *Law and Economics with Chinese Characteristics: Institutions for Promoting Development in the Twenty-First Century*, Oxford: Oxford University Press, p. 452.

8) Available online at http://legislationline.org/topics/country/7/topic/10/subtopic/44.

9) R. Lemaître (2005) 'How closed cities violate the freedom of movement and other international human rights obligations of the Russian Federation', Leuven Institute for International Law Working Paper 77 (June 2005), available online at http://www.law.kuleuven.be/iir/nl/onderzoek/wp/WP77e.pdf.

10) A millet system, in which personal status depends on one's registration within a religious community, was in place as early as 4th Century Persia in the Zoroastrian Assanid Empire and persists in many Middle Eastern states: e.g. in Israel even staunch atheists are registered as Jewish (or differently, if they 'belong' to another religion), and in Egypt the operation of family law depends on the individual's compartmentalization into Muslim, Christian, or Jewish communities.

myriad ways in which each person can be characterized, one's territorial location in a nation has come to assume overwhelming importance'.[11]

As mobility increases, non-territorial citizenship may become an appropriate institutional response to pluralism. It may also be appropriate for indigenous or Aboriginal peoples, 'nations' often dispersed territorially or too small for statehood. For example, Alan Cairns champions the 1966 Hawthorn Report conclusion that 'in addition to the normal rights and duties of citizenship, Indians possess certain additional rights as charter members of the Canadian community'; this leads to an asymetrical citizenship in which Aboriginal (or First Nations) individuals are 'a bit more equal than other Canadians', what Cairns (following the Report) terms 'Citizens plus'.[12] The idea that some individuals can be 'a bit more equal' than others, becoming 'citizens plus' with additional rights, can seem jarring to a concern for citizenship founded on equal status. But historically it was not unusual to have 'multiple categories and forms of citizenship within the jurisdiction of the same state, as in the 'active' and 'passive' citizens the French revolutionary regime distinguished until 1792 or the intricate hierarchy of citizenships the Venetian state established during its years of imperial glory'.[13]

Such examples illustrate that the dichotomy between insiders with rights (citizens) and outsiders without rights (foreigners) is simplistic and not always accurate. Democratic states tend to guarantee free movement within their territory to all citizens. Similarly, the European Union guarantees the right to live and the right to work anywhere within EU territory to EU citizens and members of their families. Such rights reflect the project of equality and undifferentiated individual rights for all who have the status of citizen. But they are not uncontested. Within the EU, several member states have or propose to reintroduce border controls and restrict access for EU citizens who claim social assistance. Some, most notably France and Italy, have emphasized their expulsions of Roma, which challenge human rights norms against discrimination. Within democratic states, particularly federal ones and others where decentralized jurisdictions are responsible for social welfare provision, it sometimes appears that some citizens are more equal than others. Principles such as benefit portability, prohibition of residence requirements for access to programs or rights, and mutual recognition of qualifications and credentials facilitate the free flow of people within states and reflect the attempt to eliminate internal borders.

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11) D.J. Elkins (1995) *Beyond Sovereignty: Territory and Political Economy in the Twenty-first Century*, Toronto, ON: University of Toronto Press, p. 29.

12) P. Resnick and G.P. Kernerman (eds) (2005) *Insiders and Outsiders: Alan Cairns and the Reshaping of Canadian Citizenship*, Vancouver, BC: University of British Columbia Press; A. Cairns (1999) *Citizenship, Diversity, and Pluralism: Canadian and Comparative Perspectives*, Montreal, QC: McGill-Queen's University Press; A. Cairns (2000) *Citizens Plus: Aboriginal Peoples and the Canadian State*, Vancouver, BC: University of British Columbia Press.

13) C. Tilly (1995) 'Citizenship, Identity and Social History', 40 (Supplement S3) *International Review of Social History*, 1–17, on p. 8.

Most studies of migration focus on international migration, movement between states, involving international borders. But migration across jurisdictional boundaries within states (between provinces, states, Länder, regions, or even from one municipality to another) is at least as important as international migration. 'Free movement' here means changing residence across jurisdictional boundaries within a political system with a common citizenship. The presumptive equality promised by common citizenship renders problematic the selective barriers to free movement erected by governments or other official agencies: central, regional, local, functional. Or, conversely, not barriers but incentives to move, targeted at specific groups of people or individuals with specific characteristics. In theory, citizenship means equal and undifferentiated rights for all citizens, but focusing on free movement shows that the rights of citizenship are variable.

In the European Union, EU citizenship grants the right to move and reside freely within the territory of the Member States but there is continual attention to limits imposed on these rights. Similarly, national constitutions usually guarantee rights to free movement but often also limit these rights. Thus, for example, Germany's Basic Law declares that all Germans shall have the right to move freely throughout the federal territory, but specifies that this right may be restricted if the absence of adequate means of support would result in a particular burden for the community. Canada's Charter of Rights and Freedoms similarly declares that Canadians have the right to move to and take up residence in any province but specifies that this right is subject to any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services. And India's constitution states that all citizens have the right to move freely throughout the territory of India and to reside and settle in any part of the territory of India, but subordinates these rights to 'reasonable restrictions' that are 'either in the interests of the general public or for the protection of the interests of any Schedule Tribe'.

3. Europe as Area of Free Movement

As is probably familiar to most readers of this journal, one of the most important motivations for European integration has been the drive to enhance free movement within Europe: to lower barriers, to break down impediments to movement, to make borders disappear or at least lose the significance they once had.[14] The key right of EU citizenship has thus been the right to live and work anywhere within EU territory. Free movement rights for workers launched the process of European political integration, and the further development of European rights is central to the entire project of integration.

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[14] W. Maas (2007) *Creating European Citizens*, Lanham, MD: Rowman & Littlefield, p. 120.

Robert Schuman's aim of reducing the rigidity of borders while not eliminating them or inventing a rationalized geography captures the objective of facilitating and encouraging freedom of movement throughout the entire European space.[15] In 1963, Schuman wrote: 'It is not a question of eliminating ethnic and political borders. They are a historical given: we do not pretend to correct history, or to invent a rationalized and managed geography. What we want is to take away from borders their rigidity and what I call their intransigent hostility'.[16] Its political evolution explains why the free movement of persons consistently ranks as the key benefit of European integration. Free movement is the most widely known right of EU citizenship, and it is also the first thing people think of when asked 'what does the European Union mean to you?'

Just as a key development in the European Union today is the reduction or elimination of internal boundaries, so too the removal of internal borders was a crucial condition for the successful rise of states.[17] Internal migrations, such as those from rural areas to cities during industrialization, did not cause nationalism, but they did generate needs that nationalism could address. Across Europe, the movement of people that spurred nationalism was migration within the state. A key function of the modern state was to facilitate the free flow of people within its boundaries.[18] The rise of a veneer of European central citizenship, over well-established local citizenships, has a parallel in the development of federal citizenship in the United States and other federal states. The process of reaching central citizenship from several units is far from uniform across federal states. In India, for example, there has never been an emphasis on territorially-based state citizenship; instead, the focus has been on the extent to which non-territorial religious and cultural groups should be granted differentiated rights. This lack of state citizenship was a conscious choice of the constitutional drafters, meant to differentiate the Indian constitution from others, such as that of the United States. B.R. Ambedkar, the chair of the committee that drafted the Indian constitution, proposed 'a dual polity with a single citizenship. There is only one citizenship for the whole of India . . . there is no State citizenship'.[19] By contrast, EU citizenship is still derivative of member state citizenship, and these generally resist the expansion of migrant rights to social benefits, a resistance that has been largely successful because the migrants who benefit from EU law cannot mobilize sufficient

15) *Ibid.*

16) Cited in *Ibid.*, p. 61.

17) K.W. Deutsch (1957) *Political Community and the North Atlantic Area: International Organization in the Light of Historical Experience*, Princeton, NJ: Princeton University Press. This paragraph and the next are based on W. Maas (2009) 'Unrespected, Unequal, Hollow?: Contingent Citizenship and Reversible Rights in the European Union', 15 *Columbia Journal of European Law*, 265–280, pp. 271, 278 and 279.

18) Maas, *Creating European Citizens*.

19) *Ibid.*

pressure to push through their interests.[20] At the same time, however, member states have arguably become 'semi-sovereign welfare-states' whose policy choices in terms of social rights are subject to increasing European scrutiny.[21]

European judicial authorities thus have a difficult role to play. They must attempt to ensure the harmonization of social policies or at least the access to social benefits for all EU citizens regardless of place of residence.[22] But they must also leave sufficient scope for the maintenance of national citizenship, because citizenship is about the essence of member state identity. In this respect, as in so many others, the EU is not *sui generis* or unlike other forms of political organization. Federal states and other compound polities have historically been characterized by variation and inequality in terms of the rights they afford members. A key challenge for the EU over the coming decades relates to social entitlements in such areas as health care, education, pensions, and other benefits, which have come to characterize modern welfare states. Unless EU institutions are able to guarantee some degree of portability and equality to these entitlements, the content of EU citizenship when compared with member state citizenship will remain relatively hollow. But unless member states are allowed to retain some authority, a backlash will result. There is, in other words, an inherent tension between the essentially regulatory role of EU authorities — ensuring that citizens of all the member states may exercise their rights of EU citizenship throughout EU territory — and the administrative power of the member states. EU law promises individuals some degree of access to entitlements throughout the EU, but member states continue to control the welfare programs that give content to citizenship. Balancing the rights of individual European citizens to move, consume services, or find employment or housing across the entire territory of the EU on the one hand, with the desire on the other hand of national governments to maintain some degree of preferential treatment for their own citizens, will distinguish the politics of EU rights for the foreseeable future.

EU law prohibits any form of discrimination on the basis of nationality: a citizen of any EU member state must be treated in the same way as a citizen of any other EU member state, without discrimination.[23] Because citizenship defines political actors and the rules within which they operate — separating full members of the polity from others, specifying the rights and duties of each category of

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20) L. Conant (2002) *Justice Contained: Law and Politics in the European Union*, Ithaca, NY: Cornell University Press.

21) M. Dougan and E. Spaventa (2005) *Social Welfare and EU Law*, Oxford: Hart Publishing.

22) See, e.g., Joined Cases C-11 & C-12/06, *Morgan v. Bezirksregierung Köln*, 2007 O.J. (C 315) 11–12 (precluding a member state from refusing to award an education or training grant to its nationals pursuing their studies in another Member State); Case C-499/06, *Nerkowska v. Zakład Ubezpieczeń Społecznych Oddział w Koszalinie*, 2008 O.J. (C 171) 7–8 (precluding a member state from refusing to pay to its nationals a benefit because they are not resident in the territory of that state but in the territory of another member state).

23) This paragraph and the next draw on W. Maas (2008) 'Migrants, States, and EU Citizenship's Unfulfilled Promise', 12 *Citizenship Studies*, 583–595.

people, and privileging certain public identities over others — citizenship is always contentious.[24] In many national states, both in Europe and elsewhere, the struggle for citizenship has been overwhelmingly a demand for inclusion in the polity, the social dignity attached to the right to vote, and the right to earn a living.[25] Inclusion in the polity is the process by which segments of society previously excluded from membership in political and socioeconomic institutions are incorporated into these institutions as citizens.[26] Critics of EU citizenship observe that the kinds of social movements which demanded inclusion and recognition in the polity and then struggled for expanding rights in nation-states are largely absent at the level of the EU. Yet denying the status of EU citizenship is not quite so clear-cut when compared with the various forms of nested or multilevel citizenship common in federal states, where individuals simultaneously hold citizenship in the national polity and derive important rights from regional or other substate jurisdictions.[27] Central governments generally disdain claims to substate 'citizenships' such as might be found in 'internal nations', for example, Scottish in Scotland, Québécois (no longer 'French Canadian' because of the necessity for a nation to have a territory, a transformation that coincided with the so-called Quiet Revolution) in Québec, Catalan in Catalonia, and so on, even though plurinational states adopt a range of policies to foster accommodation and recognition that challenge the idea of the equality of all citizens.[28]

As in several early federal states, no one today may become an EU citizen without first becoming a citizen of a member state. But the institution of citizenship developed and changed over time in such federal states, becoming ever more oriented away from the constituent units and toward the central (national) level of government. In light of such comparative examples, the question arises about the extent to which the EU could conceivably take over coordination and policy-making functions from member states on citizenship matters, including questions of attribution and loss of citizenship. The EU citizenship introduced at Maastricht recalls the earlier introduction of a national layer of citizenship over preexisting municipal or regional versions. Until the nineteenth century, it was commonly cities rather than nation-states that provided residents with the rights that today

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24) Maas, *Creating European Citizens*, p. 115.

25) J.N. Shklar (1991) *American Citizenship: The Quest for Inclusion*, Cambridge, MA: Harvard University Press, pp. 2–3.

26) H. Eckstein (1992) *Regarding Politics: Essays on Political Theory, Stability, and Change*, Berkeley, CA: University of California Press, pp. 345.

27) V.C. Jackson (2001) 'Federalism and Citizenship', in T.A. Aleinikoff and D. Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices*, Washington, DC: Carnegie Endowment for International Peace, pp. 127–182; T. Faist (2001) 'Social Citizenship in the European Union: Nested Membership', 39 *Journal of Common Market Studies*, 37–58; R. Bauböck (2007) 'Political Boundaries in a Multilevel Democracy', in S. Benhabib, I. Shapiro and D. Petranović (eds) *Identities, Affiliations, and Allegiances*, Cambridge: Cambridge University Press.

28) For a recent work examining such issues, see F. Requejo Coll and M. Caminal i Badia, (eds) (2012) *Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases*, New York, NY: Routledge.

are central to nation-state citizenship: the rights of residence and work, of trial in local courts and other civil rights, of political participation, and even to social welfare benefits.[29] The introduction in the nineteenth century of an initially 'thin' layer of nation-state citizenship rights over the existing structure of well-established, 'thick' municipal citizenships parallels the current overlaying of a 'thin' EU citizenship over those same nation-state citizenships.

A weakness of EU citizenship compared with central citizenship in federal states is that EU member states remain the final 'masters of the treaty' that established it.[30] The need for all member states to agree unanimously before treaty changes are made makes it difficult to strengthen EU citizenship. For example, during the negotiations that led to the Amsterdam Treaty of 1997, various governments suggested expanding EU citizenship — Ireland proposed granting EU citizens the right to vote in referendums and nonmunicipal elections, establishing an EU volunteer service, and introducing a right to petition the Commission; Italy and Austria jointly proposed introducing a right of petition, a right of association in European trade unions, and a right to education in at least one second language, as well as suggesting that the EU should sign the European Convention on Human Rights and that European political parties should be strengthened. In Austria, the opposition Liberals suggested going even further by extending EU citizenship to third-country nationals who had resided legally within the EU for five years, but this proposal lacked government support and was not included in the joint proposal. Italy later suggested giving the Commission the exclusive right of initiative on issues of immigration, asylum, and external borders (meaning that EU legislation in these areas would have to originate with the Commission), giving the European Court full competence to review legislation and hear appeals and ultimately giving the European Parliament co-decision power over these areas rather than having them remain the exclusive competence of member states. France suggested that free movement issues, including visas, asylum, and immigration, should be decided by qualified majority voting rather than unanimity, which would also make it easier to pass coordinated European legislation. Finland proposed extending 'the social rights and duties of European citizens' by adding new rights to EU citizenship, having the EU sign the ECHR, and enacting an EU Bill of Rights; Portugal even drafted a European Citizens Charter, which listed all the rights of European citizenship, including social and economic rights, and was intended 'to provide citizens a clear picture of the advantages and added value of European citizenship'. But resistance from Denmark and the United Kingdom

29) Maarten Prak (1999) 'Burghers into Citizens: Urban and National Citizenship in the Netherlands During the Revolutionary Era (c. 1800)', in Michael Hanagan and Charles Tilly (eds) *Extending Citizenship, Reconfiguring States*, Lanham MD: Rowman & Littlefield.

30) This paragraph and the next draw on W. Maas (2013) 'Varieties of Multilevel Citizenship', in W. Maas (ed.) *Multilevel Citizenship*, Philadelphia, PA: University of Pennsylvania Press.

scuppered all these proposals.[31] To meet the Danish and British objections that EU citizenship should not weaken national citizenship, the Amsterdam Treaty added a new clause — 'Citizenship of the Union shall complement and not replace national citizenship' — that went well beyond the declaration attached to the Maastricht Treaty, which stated that the question of whether an individual had the nationality of a member state would be settled solely by reference to the national law. Such difficulties in reaching unanimous decisions in a Union comprising many member states leads some to dismiss claims about the supposed supranational or post-national nature of EU citizenship and conclude instead that it is transnational: despite increasingly complex multilevel and international configurations of rights and membership, citizenship in Europe remains tied to established political communities.[32]

Yet EU citizenship is not simply a concept but is backed up by supranational institutions with real authority and at least a modicum of bureaucratic capacity. Attempting to further develop the concept of EU citizenship by creating European citizens and encouraging them to use their rights is a role that the European Commission and the European Parliament fulfill in various ways.[33] The Court of Justice of the European Union has over the years also promoted an expansive reading of European rights. The most notable current formulation, repeated time and again with the same wording in a series of Court judgments since 2001, is that 'Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for'.[34] Multilevel citizenship in Europe is not simply about passports but about individuals being able to draw on rights at multiple levels of political authority. The development of citizenship of the European Union raises anew the question of the definition of citizenship and reminds us of the complex historical patterns of variegated and multitiered citizenship. The next two sections consider two other examples of variegated citizenship, the United States and Canada, with specific reference to freedom of movement.

4. Interstate Mobility in the United States

The relationship between federal and state protection of rights in the United States has long animated legal discussion. For example, the US Supreme Court in *The Slaughter-House Cases*, established that 'there is a citizenship of the United

31) These examples are covered in Maas, *Creating European Citizens*, on pp. 68–69.

32) E.D.H. Olsen (2012) *Transnational Citizenship in the European Union: Past, Present, and Future*, London: Continuum.

33) Maas, *Creating European Citizens*.

34) *Grzelczyk*, case C-184/99, ECR 2001 I-06193 (20 September 2001).

States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual'.[35] The existence of these two levels of citizenship could result in competition between the two levels. For example, US Supreme Court Justice William J. Brennan issued in 1977 what he termed 'a clear call to state courts to step into the breach' left by what he felt was the Supreme Court's lacklustre and diminished rights protection; judicial federalism would thus provide a 'double source of protection for the rights of our citizens'.[36] He argued that 'state courts no less than federal are and ought to be the guardians of our liberties', and that 'state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law'.[37] The aim was to reinvigorate a federalism animated by 'the fundamental promises wrought by the blood of those who fought our War between the States, promises which were thereafter embodied in our fourteenth amendment — that the citizens of all our states are also and no less citizens of our United States'.[38]

Freedom of movement between the US states exhibits some of the same dynamics as free movement in the European Union, given the two levels of US citizenship: state and federal. One of the peculiarities of the US is that freedom of movement is not guaranteed by the constitution. As Matthew Longo writes, this striking omission has been a source of considerable debate.[39] For many scholars, the fact that freedom of movement within the United States is not mentioned in the constitution is a sign that it was so clearly intended as a freedom that the drafters of the constitution did not think it needed to be stated,[40] with free movement intrinsic to the very nature of federalism.[41] By contrast, other scholars contend that it was omitted deliberately, since Article IV of the Articles of

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35) 83 U.S. 36 (1873).

36) W.J. Brennan Jr. (1977) 'State Constitutions and the Protection of Individual Rights', 90 *Harvard Law Review*, 489–504, on p. 503.

37) *Ibid*., 491.

38) *Ibid*., 490.

39) M. Longo (in press) 'Right of Way? Defining the Scope of Freedom of Movement Within Democratic Societies', in W. Maas (ed.) *Democratic Citizenship and the Free Movement of People*, Leiden: Martinus Nijhoff.

40) A.P. van der Mei (2002) 'Freedom of Movement for Indigents: A Comparative Analysis of American Constitutional Law and European Community Law', 19 *Arizona Journal of International and Comparative Law*, 803–861, on p. 810: 'The omission of a reference to the right to travel, which encompasses both the right to cross inter-state borders and the right to migrate, has never been seen as a denial of the right. On the contrary, the framers of the Constitution probably took the right to travel so much for granted that they considered any reference to the right superfluous … The right simply exists and the absence of an explicit reference to it may, if anything, symbolize how deeply the notion of freedom of movement is rooted in American thinking.' Cited in *Ibid*.

41) S.F. Kreimer (1992) 'The Law of Choice and Choice of Law: Abortion, the Right to Travel and Extraterritorial Regulation in American Federalism', 67 *New York University Law Review*, 451–519. Cited in *Ibid*.

Confederation (1781), the predecessor to the Constitution, did include freedom of movement: 'to secure and perpetuate mutual friendship and intercourse among the people of the different states in this Union, the free inhabitants of each of these states . . . shall have free ingress and egress to and from any other state'.[42]

Through an extensive analysis of the oscillation in US judicial decisions concerning freedom of movement within the US, Longo demonstrates that in two centuries of decisions, US courts generally support freedom of movement between US states, but cannot agree on why or under what conditions it can be curtailed. In the so-called 'Passenger Cases' (*Smith v. Turner* (1849)), Chief Justice Taney, in dissent, declared that travel was to be protected as an aspect of national citizenship: 'For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States'.[43]

As Longo explains, the most cited constitutional source for freedom of movement was the Privileges and Immunities Clause (Article IV), which protects federal rights from state infringement, but a minority of justices placed it within the Commerce Clause (Article I), which enables federal oversight over inter-state commerce. This ambiguity was extended in the landmark case of *Edwards v. California* (1941), which struck down a California statute attempting to prosecute anyone who knowingly brought poor non-residents across state lines. As Justice Robert H. Jackson (later the the chief United States prosecutor at the Nuremberg Trials) wrote in the judgement, to deny freedom of movement to the poor would

> introduce a caste system utterly incompatible with the spirit of our system of government. It would permit those who were stigmatized by a State as indigents, paupers, or vagabonds to be relegated to an inferior class of citizenship. It would prevent a citizen, because he was poor, from seeking new horizons in other states. It might thus withhold from large segments of our people that mobility which is basic to any guarantee of freedom of opportunity. The result would be a substantial dilution of the right of national citizenship, a serious impairment of the principles of equality . . . [it] is a privilege of citizenship of the United States protected from State abridgement, to enter any State of the Union either for temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship thereof. If national citizenship means less than this it means nothing.[44]

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42) Articles of Confederation (1781) (Article IV, para. 1). Longo cites G.B. Hartch (1995) 'Wrong Turns: A Critique of the Supreme Court's Right to Travel Cases', 21 *William Mitchell Law Review*, 457–484, pp. 476–477: 'In terms of original intent, there is no evidence that the Framers regarded the right to travel as a fundamental right. In fact, if anything, originalist evidence points to jettisoning the right altogether. For example, when drafting the Constitution, the Framers did not include any provision guaranteeing the right to travel, even though the Articles of Confederation had . . . This omission coupled with the inclusion of the interstate Commerce Clause granting Congress power to regulate interstate travel strongly suggests that the Framers did not view the right to travel as vital to the new nation.'

43) *Smith v. Turner*, 48 U.S. (7 How.) 283 (1849) at 492. Cited in Longo (in press).

44) *Edwards v. California* 314 U.S. 160 (1941) at 181–183.

Longo argues that *Edwards* was groundbreaking, but did not resolve disagreement over the source of freedom of movement.

This disagreement would continue in the Great Society, the most significant development in US social policy, brought about by the civil rights movement. The New Deal era convinced many of the need to transfer responsibility for social programs from the state to the federal level. But the major transformation of US social policy came only after the enfranchisement of African Americans. In contrast to the New Deal, which arose in response to the economically troubled times of the Great Depression of the 1930s, Great Society programs were announced in the economic prosperity of the 1960s. Conceptualized during the dynamic presidency of John F. Kennedy, these programs were introduced during the administration of his successor, Lyndon B. Johnson. The Johnson administration banned discrimination in employment and segregation of public spaces in 1964, and followed it the next year with a law guaranteeing voting rights for African Americans across the US. The Voting Rights Act of 1965 established federal oversight of elections administration to combat the widespread disenfranchisement of African Americans, particularly in Southern States. Furthermore, it was only with the civil rights movement that a federalization of criminal law began.[45] The civil rights movement also inaugurated policies intended to expand social welfare provisions. A major aim of these programs was to eliminate poverty, and there remains today a vibrant scholarly debate about the importance of race in explaining differences in the development of social policy across different states in the US.[46] The salient points are that the expansion of civil rights in the US heralded the expansion of rights to welfare and that these twin expansions privileged central (federal) over local (state) authority.

The 'federalization' of social rights remains contested, however. The enduring tension between state and federal citizenship in the US was exemplified in *Saenz vs Roe*, decided by the US Supreme Court in 1999. The case involved a mother receiving Aid to Families with Dependent Children (AFDC, popularly known as 'welfare') who moved to California but was initially denied continuation of her benefits. Seven justices ruled that the 'right to travel in this context entails the right of travelers electing to become permanent residents of a State to be treated like other citizens of that State'. This would have appeared to be a decisive blow for federal rather than state jurisdiction over citizenship and social rights, but the remaining tension is evident in the dissenting opinion, authored by Chief Justice Rehnquist, joined by Justice Thomas. Rehnquist wrote that the 'right to travel and the right to state citizenship are distinct, non-reciprocal, and not a component of the other. This case is only about the right to immediately enjoy all the

45) G.A. Tarr and E. Katz (1996) 'Introduction', in E. Katz & G.A. Tarr (eds) *Federalism and Rights*, Lanham, MD: Rowman & Littlefield, pp. ix–xxiii.

46) T. Skocpol (1995) 'Race and the Organization of Welfare Policy', in P.E. Peterson (ed.) *Classifying by Race*, Princeton NJ: Princeton University Press, pp. 156–187.

privileges of being a California citizen versus the State's ability to test the good faith assertion of the right'.[47] If Rehnquist and Thomas had convinced three other justices to join them, the rights of Americans to move between states would once again have been dissociated from their social rights.

5. Free Movement in Canada

Just as in the European Union and the United States, internal freedom of movement within Canada has faced a contentious history. Compared with US states, Canadian provinces face fewer fiscal and policymaking restraints from the federal government. Coupled with perhaps a greater diversity than the United States (though not Europe), in terms of two official languages, Canada's extensive geography has prompted the federal government to promote, simultaneously, equality and the respect for diversity. This is epitomized in the Social Union Framework Agreement (SUFA), signed in February 1999 by the prime minister of Canada and nine of the ten provincial premiers. Only the premier of Québec, the sovereignist Lucien Bouchard, did not sign the agreement.

As explained in a 2001 training manual from the Canadian Centre for Management Development (now the Canada School of Public Service), the Government of Canada's main educational institution for federal public servants:

> Canada is underpinned by political, economic and social unions. As the provinces came together to form Canada, a political union was created. With the establishment of a common currency and market, an economic union was born. In recent years the term social union has come into common parlance. Each union is based on the premise that greater things can be accomplished collectively than individually, but this must be done within the framework of Canada's federal political system. The policy-making powers of the federal and provincial governments are defined and protected in the constitution, each government having certain responsibilities. The constitution defines the powers of the federal and provincial governments in exclusive terms, but the reality is that delivering policies to citizens requires cooperation and coordination among governments. The social union is the network of social policies and programs that have been developed over many decades. While the specific content of the social union continues to evolve as governments seek to best meet the needs of Canadians, it remains rooted in the principles of equality, fairness, respect for diversity, and mutual aid and responsibility for one another. The social union has become a source of pride and solidarity to Canadians; it is a defining characteristic of our country.[48]

This optimistic and sanitized history sounds, in tone and even in wording, remarkably similar to texts published by European institutions: replace 'Canada' with 'Europe', 'provinces' with 'Member States', and 'Canadians' with 'Europeans' and

47) *Saenz v. Roe*. 526 US 489 (1999).

48) J. McLean, CCMD Roundtable on the Implementation of the Social Union Framework Agreement (Canada) and Canadian Centre for Management Development (2001) *Implementing the Social Union Framework Agreement: a Learning and Reference Tool*, Ottawa, ON: Canadian Centre for Management and Development.

the text could easily appear in documents of the European Commission or other EU institutions. This section will explain this focus on 'equality, fairness, respect for diversity, and mutual aid and responsibility for one another' and the above-mentioned 1999 agreement's statement that: 'All governments believe that the freedom of movement of Canadians to pursue opportunities anywhere in Canada is an essential element of Canadian citizenship. Governments will ensure that no new barriers to mobility are created'.

A useful place to start the explanation is the *Canadian Charter of Rights and Freedoms*, part of the Constitution Act, signed in 1982. Under the heading 'Mobility Rights', section 6 of the Charter provides:

(1) Every citizen of Canada has the right to enter, remain in and leave Canada.
(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
    (a) to move to and take up residence in any province; and
    (b) to pursue the gaining of a livelihood in any province.
(3) The rights specified in subsection (2) are subject to
    (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
    (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.
(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Even on a purely textual basis, it is clear that the free movement rights in the Canadian constitution are not unlimited; indeed, the restrictions inserted into the text make free movement rights in Canada comparable to free movement rights within the European Union. The political dynamics are also comparable.

Just as in Europe and the United States, the central government in Canada strives to eliminate or reduce barriers to free movement, and to encourage actual use of the common free movement rights. In an interview in 1997, former prime minister Pierre Trudeau asserted that the 'Charter was not intended to subordinate the provinces to the federal government through judicial interpretation of the document, but to act as an instrument of national unity by highlighting what Canadians have in common, not by limiting how the provinces could act'.[49] This

[49] J.B. Kelly (2005) *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent*, Law and Society Series, Vancouver, BC: University of British Columbia Press, p. 220.

is an example of Trudeau's attempt to counter criticism, often but certainly not exclusively from his home province of Québec, that the Charter and the rest of the Constitution Act 1982 were indeed centralizing documents that would lead to an 'Americanization' (intended pejoratively) of Canadian political culture, erasing local differences.[50]

Whatever one's views on this issue, it is incontrovertible that the federal government under Trudeau had an overall policy objective of promoting national unity by making it easier for Canadians to move from province to province — but it proved impossible to obtain provincial agreement to the proposed unqualified guarantee of free movement.[51] For example, Charter section 6(4), permitting any restrictions on internal free movement fostering 'the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada', emerged from a 15 November 1981 agreement and 'was apparently inserted to accommodate Newfoundland's requirement that its residents be given preference in employment in the offshore oil industry'.[52] Whereas in Europe such objections would typically lead to specific opt-outs for specific member states, in Canada they resulted in a general opt-out for all provinces with higher-than-average unemployment. Despite such exceptions, however, the overall effects of the Charter are 'to set limits to the diversities of treatment by provincial governments, and thus to strengthen Canadian as against provincial identities'.[53]

In the 1996 Speech from the Throne, laying out the government's legislative agenda, the Government of Canada announced it would 'continue to protect and promote unhampered social mobility between provinces and access to social and other benefits'.[54] This and similar measures to promote unity and internal free movement resulted in intergovernmental negotiations over what would later form the Social Union Framework Agreement. The motivation was clear: voters in the Canadian province of Quebec had just narrowly decided to stay in Canada, in a referendum held 30 October 1995. On the question 'Do you agree that Quebec should become sovereign after having made a formal offer to Canada for a new economic and political partnership within the scope of the bill respecting the future of Quebec and of the agreement signed on June 12, 1995?', fully 49.4% of

50) S.V. LaSelva (1993) 'Federalism as a Way of Life: Reflections on the Canadian Experiment', 26 *Canadian Journal of Political Science*, 219–234; *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms*, Law and Society Series, Vancouver, BC: University of British Columbia Press (2009); P.W. Hogg (1989) 'Federalism Fights the Charter of Rights', in D.P. Shugarman and R. Whitaker (eds) *Federalism and Political Community: Essays in Honour of Donald Smiley*, Peterborough, ON: Broadview Press, pp. 249-266.

51) I. Greene (1989) *The Charter of Rights*, Toronto, ON: James Lorimer, pp. 45, 46.

52) P.W. Hogg (1982) *Canada Act 1982 Annotated*, Toronto, ON: Carswell, p. 25.

53) A.C. Cairns (1979) 'Recent Federalist Constitutional Proposals: A Review Essay', 5 *Canadian Public Policy*, 348–365, on p. 348.

54) Speech from the Throne to open the Second Session Thirty-fifth Parliament of Canada, February 27, 1996, para. 5.

voters voted for sovereignty; only 50.6% of voters voted to remain in Canada. (An earlier referendum, in 1980, had resulted in a much wider margin of 40.4% to 59.6%.)

Only days after the Quebec referendum, the government of Canada's western-most province of British Columbia adopted (by Order in Council No. 1348 of 2 November 1995) Regulation 462/95 which, effective 1 December 1995, imposed a 90 day residency requirement on persons entering the province before they were eligible to receive social assistance. The measure had been long in coming, as successive British Columbia governments had complained of social dumping; in a poor fiscal climate exacerbated by funding cuts from the federal government, other provinces, notably Ontario (Canada's largest province by population) and Alberta (bordering on British Columbia and hence relatively easy to move from), were reducing their social benefits, resulting in an influx of people claiming social assistance in British Columbia. This direct challenge to free movement in Canada was ultimately resolved in 1997 by an agreement between the federal and British Columbia governments in which the federal government agreed to compensate British Columbia for 'the special pressures faced by B.C. as a result of internal migration'.[55] The agreement also set the stage for the SUFA discussions because they promised a two-year review of internal mobility within Canada.

Meanwhile, preferential hiring practices had been a longstanding issue between Ontario and Quebec, with Quebec not permitting Ontario construction workers to work in Quebec on the basis that they did not meet Quebec's training standards: by the late 1990s, there were six times as many Quebec construction workers in Ontario than Ontario workers in Quebec.[56] Tension peaked between Ontario and Quebec when the government of Quebec excluded Ontario contractors from bidding on the construction of a new casino in Hull, immediately across the river from Ottawa. Following the incident, the Ontario government passed the suggestively-named *Fairness is a Two-Way Street Act* in 1999, resulting in hundreds of Quebec construction workers being dismissed from Ontario projects. Ontario also hired more inspectors to ensure Quebec workers were meeting health, tax, and labour regulations.[57]

The law was ultimately repealed as a result of negotiations between the two provinces. In a key difference with free movement in Europe, federal involvement in free movement of workers is quite limited. This is because of the constitutional

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55) British Columbia Government Communications Office, 'PM, Premier Settle B.C. Residency Dispute, Agree to New Co-operation on Mobility, Immigration and Asia-Pacific', available online at http://www2.news.gov.bc.ca/archive/pre2001/1997/0475.asp.

56) R. Gomez and M. Gunderson (2007) 'Barriers to the Inter-Provincial Mobility of Labour', Working Paper Series — Economic Analysis and Statistics, Industry Canada, WP 2007-09, available online at http://www.ic.gc.ca/eic/site/eas-aes.nsf/eng/ra02043.html.

57) *Ibid.*

division of powers which gives provinces (rather than the federal government) the authority to regulate employment and services, including professions. This division of powers results in interprovincial agreements, such as that between Ontario and Quebec. For example, the aptly-named Joint Labour Mobility Committee monitors progress in achieving full labour mobility pursuant to the *Ontario-Quebec Trade and Cooperation Agreement* of 2009. The Supreme Court of Canada generally upholds the constitutionality of provincial statutes in core areas of provincial responsibility, including labour policy, education policy, social policy, election acts, and public safety.[58] Because of this, there is a tension in Canada between the overarching Canadian citizenship and policies and laws which assert provincial difference. This is evident in proposals to create a Quebec citizenship, which 'is something normally associated with sovereign states — not sub-state nationalities'.[59] The best conclusion is that 'Canada will continue to combine features of both a territorial and a plurinational federation into the indefinite future'.[60]

6. Conclusion

Even in unitary states, local or regional authorities may develop administrative practises which discriminate between residents of one part and another part of the overarching jurisdiction. In federal states and other multilevel political systems, such as the European Union, there is a constant struggle by central authorities to maintain program portability and encourage freedom of movement within the common political space. Historically, local citizenship was not so much of an issue until 'citizenship' came to mean, with the rise of the welfare state, access to social programs. George Brown's intervention on the 1867 constitution, the British North America Act, which established the new country of Canada, that 'the proposal now before us is to throw down all barriers between the provinces — to make a citizen of one, citizen of the whole'.[61] certainly captures the political objective of fostering equality despite the challenges of diversity and geography. This is similarly the aim of federal citizenship in the United States and it is also the aim of

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58) Kelly, *Governing with the Charter*, p. 195. See generally the section entitled 'Reconciling Rights and Federalism'.

59) P. Resnick (2012) 'Canada: A Territorial or a Multinational Federation?', in F. Requejo Coll and M. Caminal i Badia (eds) *Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases*, *Nationalism and Ethnicity*, Routledge Studies in Nationalism and Ethnicity, New York, NY: Routledge, p. 182.

60) *Ibid.*

61) Intervention of 8 February 1865, Legislature of the United Province of Canada debate on the resolution for a union of the British North American colonies. See generally J.M.S. Careless (1959 and 1963) *Brown of the Globe*, 2 vols., Toronto, ON: Macmillan.

European Union citizenship: to make a citizen of any member state a citizen of the whole of Europe. The political contestation surrounding these projects means that scholarship examining the encouragement or discouragement of migration across jurisdictional boundaries *within* political systems is at least as important as that concerned with international migration across state borders.