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## ARTICLE

# MIGRATION AND SYSTEMS COMPETITION: A CONSTITUTIONAL ECONOMICS PERSPECTIVE<sup>1</sup>

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### INTRODUCTION

Modern society is characterized by increasing mobility of both capital and labor. Local communities, regions, and countries are in a constant competition for those production factors. Location decisions of firms, but also of individuals, are a central driving force for policy design at different levels of government.<sup>2</sup> On the capital side, the regulation of subsidies or other benefits given to incentivize firms to relocate create a wider constitutional order, through which inter-jurisdictional competition takes place. European State Aid law and WTO subsidy law are examples of such a regulation.<sup>3</sup> On the side of labor, there is an intricate framework of legal provisions restricting or enabling the movement of individuals across international borders, or at times even within a country. They establish an order, or a set of rules, through which open economies interact. Jurisdictions relate to each other in a cooperative, but also competitive way. For instance, there is international cooperation with regard to refugees (be it to avoid their entry or to redistribute them among countries), but there is also competition

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2. See generally Horst Siebert, *Locational Competition: A Neglected Paradigm in the International Division of Labour*, 29 THE WORLD ECON. 137 (2006) (examining the concept of locational competition and its implications for firms and governments).

3. See generally Kenneth P. Thomas, *COMPETING FOR CAPITAL: EUROPE AND NORTH AMERICA IN A GLOBAL AREA* (2000) (comparing EU regulation of state aid to business with virtually unregulated investment competition in North America); see also Alan O. Sykes, *The Questionable Case for Subsidies Regulation: A Comparative Perspective*, 2 J. LEG. ANAL. 473 (2010) (evaluating WTO subsidy laws).

for highly-skilled or rich migrants, with some countries even offering citizenship for immigrants who either bring talent or investments.<sup>4</sup>

Although the inter-jurisdictional competition between countries is apparent, the process of institutionalization of a constitutional order regulating that competition is in its infancy. With increasing regional and bilateral integration, the framework for such competition is laid. The European Union can be seen as such an example, as can federally-organized countries such as the United States or Canada. Such frameworks regulating regulatory or inter-jurisdictional competition that have been studied so far are most notably in the area of corporate law.<sup>5</sup> The debate generally revolves around questions concerning when decentralized decision-making is superior to centralization and under what conditions such competitive frameworks succeed or fail.

Finding an optimal constitutional order—that is, an overarching framework—for migration is non-trivial and goes beyond the debate in corporate law. Migration policy can be seen as a problem of constitutional choice because it relates “to the choice of the ‘rules of the game’ that citizens are willing to live by.”<sup>6</sup> Standard economics theorists (especially those in the sub-field of trade theory) would argue that open borders with free movement of workers are a precondition for an efficient allocation of productive resources. Economic theories of federalism and welfare-enhancing, inter-jurisdictional competition are based on the assumption that consumer-voters are mobile. Yet migration involves more than just an allocation of production factors. As the Swiss writer Max Frisch famously said, “We asked for workers, but human beings came.”<sup>7</sup> Economic theory argues that in the presence of externalities—that is, effects on third parties—legal interventions are justified. Although restrictive migration laws create market distortions and cause welfare losses, there are other aspects to consider. First, there is the effect of migration on rigid labor markets. Second, there are the consequences for the welfare state and its fiscal balance. These concerns can potentially lead to a collapse of systems competition.<sup>8</sup> With a sub-optimal institutional design, welfare losses might prevail instead of welfare gains.

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4. See generally Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 N.Y.U. L. REV. 148 (2006) (discussing the competitive hiring practices for highly-skilled immigrants).

5. See, e.g., Christian Kirchner, Richard W. Painter & Wulf A. Kaal, *Regulatory Competition in EU Corporate Law After Inspire Art: Unbundling Delaware’s Product for Europe*, 2 EUR. CO. FIN. L. REV. 159 (2005).

6. Gabriele Orcalli, *Constitutional Choice and European Immigration Policy*, 18 CONST. POLITICAL ECON. 1, 2 (2007).

7. See Max Frisch, *Vorwort*, in *SIAMO ITALIANI – DIE ITALIENER. GESPRÄCHE MIT ITALIENISCHEN ARBEITERN IN DER SCHWEIZ* (Alexander J. Seiler ed., 1965).

8. See generally Hans-Werner Sinn, *The Selection Principle and Market Failure in Systems Competition*, 66 J. PUB. ECON. 247 (1997) (evaluating different paths to market failure due to government influence).

The topic becomes even more complex once it is observed that some of the theoretical predictions fail to come true. The theorem of factor price equalization suggests that wages for identical jobs in two countries with liberalized trade (e.g., through NAFTA or European integration) tend to approach each other.<sup>9</sup> Yet full convergence in wages and living standards due to migration has not taken place. The differences in hourly wages among European countries are still substantial.<sup>10</sup> Interestingly, even an abolition of legal restrictions on migration does not lead to the migration levels that one might expect. For instance, Puerto Ricans, being U.S. citizens, are free to move to the contiguous states. In fact, since the end of World War II, one-third of Puerto Ricans have chosen to do so.<sup>11</sup> But this also means that two-thirds have chosen *not* to move and rather preferred to stay on an island where the 2012 average annual earnings of workers in production occupations was around thirty-five percent below the U.S. average.<sup>12</sup> This might seem puzzling at first, but it serves as a reminder that differences in wage levels are not the sole determinant of migration decisions. Indeed, factors like social networks or the political environment in the destination country affect these decisions as well.<sup>13</sup>

Migration policy is usually discussed in the setting of national policy. This article, however, views migration regimes from the perspective of inter-jurisdictional competition and discusses under which conditions such a framework can be welfare-enhancing. In this view, migration (“exit”) can be a factor contributing to the better functioning of institutions and the system as a whole and relates also to another instrument, namely the articulation of protest (“voice”). Section I gives an overview of legal regimes in place. Section II discusses the possible benefits from migration. Section III focuses on the potential reasons for a sub-optimal allocation of resources, and Section IV presents solutions to these problems. Finally, Section V revisits the systems competition view of migration by not only looking at the mobility of people, but also their possibilities of express discontent with the performance of the jurisdiction they live in or want to live in.

## I. MANAGING MIGRATION FLOWS

Migration is currently managed through a variety of legal mechanisms. While every country has immigration laws and related regulations, the ap-

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9. See generally Paul A. Samuelson, *International Trade and the Equalisation of Factor Prices*, 58 THE ECON. J. 163 (1948) (analyzing theories regarding the equalization of factor prices across country borders); Abba P. Lerner, *Factor Prices and International Trade*, 19 ECONOMICA 1 (1952) (exploring different factors that influence factor prices in different countries).

10. See Hans-Werner Sinn & Wolfgang Ochel, *Social Union, Convergence and Migration*, 41 J. COMMON MKT. STUDIES 869, 884–87 (2003).

11. GEORGE J. BORJAS, IMMIGRATION ECONOMICS 34–35 (2014).

12. *Id.*

13. Jennifer Fitzgerald, David Leblang & Jessica C. Teets, *Defying the Law of Gravity: The Political Economy of International Migration*, 66 WORLD POLIT. 406, 407 (2014).

proaches taken in these laws vary from country to country. The United States, for instance, relies on quota-based systems, which is *de facto* tantamount to the federal government setting the supply of labor that businesses can tap.<sup>14</sup> Other countries (e.g., Canada and Australia) select potential immigrants by awarding points for certain characteristics, such as language proficiency, family ties, or professional training.<sup>15</sup> This too means that there is a bureaucracy making decisions regarding the supply of labor. In general, national migration laws tend to be skill-biased and give preference to highly skilled individuals.<sup>16</sup>

In addition to national law, there is a growing body of international law providing channels for migration. At the bilateral level, there are migration agreements, many of which are inspired by the International Labor Organization (ILO) Model Agreement on Temporary and Permanent Employment.<sup>17</sup> Bilateral migration agreements can link various issues related to migration (e.g., admission, return, visa policy, border security, etc.). Furthermore, recent free trade agreements attempt to not only liberalize trade in goods, but also in services.<sup>18</sup> They therefore contain provisions on labor mobility, mostly for highly-skilled individuals who provide their services across international borders. In doing so, they slightly correct the skill-bias present in national migration law.<sup>19</sup> Furthermore, there are technical agreements dealing with, for instance, the repatriation of individuals and visa policies.<sup>20</sup>

At the multilateral level, although there is no comprehensive convention on migration and no general customary or conventional legal obligations preventing states from denying foreigners access to their labor markets, there are several treaties pertaining to migration. For instance, the Convention relating to the Status of Refugees gives special rights—that is, the right to asylum—to people who are persecuted in their home country.<sup>21</sup> With regard to labor migration, the General Agreement on Trade of Ser-

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14. Michael J. Trebilcock, *The Law and Economics of Immigration Policy*, 5 AM. L. & ECON. REV. 271, 272–74 (2003).

15. *Id.*

16. PHILIP MARTIN, MANOLO ABELLA & CHRISTIANE KUPTSCH, *MANAGING LABOR MIGRATION IN THE TWENTY-FIRST CENTURY* 55 (2006); LANT PRITCHETT, *LET THEIR PEOPLE COME: BREAKING THE GRIDLOCK ON GLOBAL LABOR MOBILITY* xii (2006).

17. International Labour Organization, *Migration for Employment Recommendation (Revised)*, 1949 (No. 86), at VIII(2), 32nd ILC session (July 1, 1949).

18. Marion Panizzon, *International Law of Economic Migration: A Ménage à Trois? GATS Mode 4, EPAs, and Bilateral Migration Agreements*, 44 J. WORLD TRADE 1207, 1231–32 (2010).

19. Marion Panizzon, *Migration and Trade: Prospects for Bilateralism in the Face of Skill-Selective Mobility Laws*, 12 MELB. J. INT'L. L. 95, 106–07 (2011).

20. See Florian Trauner & Imke Kruse, *EC Visa Facilitation and Readmission Agreements: A New Standard EU Foreign Policy Tool?*, 10 EUR. J. MIGR. & L. 411, 429 (2008).

21. See Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954).

vices (GATS),<sup>22</sup> which is an inherent part of the WTO system, distinguishes between four modes of providing services across borders. One of them (referred to as Mode 4)<sup>23</sup> relates to individuals crossing borders in order to perform a service. Thus, state commitments under the GATS entitle certain service providers to move across borders, at least on a temporary basis.

There are basic human rights provisions that at least allow for *leaving* a country (albeit not to *enter* another). Article 13(2) of the Universal Declaration of Human Rights states, "Everyone has the right to leave any country, including his own, and to return to his country."<sup>24</sup> This principle is also stated in Article 12 of the International Covenant on Civil and Political Rights ("Everyone shall be free to leave any country, including his own"),<sup>25</sup> although some exceptions apply. A special case is the situation of stateless persons. This group of people, who are not necessarily refugees or even migrants, receive some protection through the Statelessness Status Convention of 1954<sup>26</sup> and the subsequent Statelessness Reduction Convention of 1961,<sup>27</sup> although both conventions sport only a relatively small number of ratifications (sixty-six and thirty-eight, respectively). Although they do not address rules on admission, there are conventions providing rights for migrants (or migrant workers more specifically) such as the Migration for Employment Convention of 1949,<sup>28</sup> the Migrant Workers (Supplementary Provisions) Convention of 1975,<sup>29</sup> and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.<sup>30</sup> These conventions have not been very successful in terms of numbers of signatories, especially since the high-income countries were rather reluctant to enter these agreements.<sup>31</sup> The conclusion from this is that although migrants benefit from a range of human rights stemming from customary or conventional law once they arrive in their state of destination,

22. General Agreement on Trade in Services Annex 1B, Apr. 15, 1994, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994).

23. *Id.* at art. I(2)(d).

24. Universal Decl. of Human Rights, G.A. Res. 217A, art. 13(2), U.N. Doc A/810; GAOR, 3d Sess. (Dec. 12, 1948).

25. International Covenant on Civil and Political Rights, art. 12(2), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, 1057 U.N.T.S. 407, (entered into force Mar. 23, 1976–Mar. 28, 1979).

26. *See* Convention relating to the Status of Stateless Persons, *opened for signature* Sept. 28, 1954, 360 U.N.T.S. 117 (entered into force Jun. 6, 1960).

27. *See* Convention on the Reduction of Statelessness, *opened for signature* Aug. 30, 1961, 989 U.N.T.S. 175 (entered into force Dec. 13, 1975).

28. Convention Concerning Migration for Employment (Revised), *opened for signature* Jul. 1, 1949, 20 U.N.T.S. 79, (entered into force Jan. 22, 1952).

29. Convention (No. 143) Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, June 24, 1975, 1120 U.N.T.S. 323.

30. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, 2220 U.N.T.S. 3.

31. JOEL P. TRACHTMAN, *THE INTERNATIONAL LAW OF ECONOMIC MIGRATION* 178–81 (2009).

international law provides virtually no rights to admission into a country other than their country of citizenship.<sup>32</sup> In other words, there is no global consensus that migration might be a welfare-enhancing element of inter-jurisdictional competition and that a broader institutional framework above the level of national migration laws might be needed.

The situation presents itself differently at the regional level. Regional integration can also be linked to liberalization of labor migration. The European Union (EU), for instance, recognizes the fundamental freedom of movement, and the Schengen Agreement, a stand-alone compact that subsequently merged into EU law with the Lisbon reform of the Union, abolished border controls among signatory states.<sup>33</sup> EU citizens, unless they pose an excessive burden on the welfare system of the recipient state, are entitled to live in any EU member state and can travel among Schengen states without showing their identification at the border. Based on bilateral agreements with the EU, Switzerland, which is not a member of the EU, uses employers, rather than a bureaucracy, as gatekeepers. EU citizens willing to move to Switzerland are entitled to do so once they can produce a valid labor contract with a Swiss employer. To a much lesser extent than the EU freedom of movement or the movement between the EU and some of its neighbors, NAFTA grants rights to temporary employment of certain groups of professionals and other workers.<sup>34</sup> Migration is thus regulated using a large variety of legal instruments and through various forums.

## II. THE BENEFITS OF MIGRATION

From an economic point of view, migration increases efficiency through a plethora of mechanisms. Most of the economic literature on migration focuses on the theory of international factor mobility and primarily sees migration as being stimulated by favorable conditions in the country of destination,<sup>35</sup> particularly in terms of relative deprivation.<sup>36</sup>

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32. *Id.*

33. TREVOR C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN UNION LAW* (2014).

34. For comparisons between the EU and NAFTA, see, e.g., Christopher J. Cassise, *The European Union v. the United States under the NAFTA: A Comparative Analysis of the Free Movement of Persons within the Regions*, 46 SYRACUSE L. REV. 1343 (1995), and M. Jeanette Yakamavich, *NAFTA on the Move: The United States and Mexico on a Journey toward the Free Movement of Workers—A NAFTA Progress Report and EU Comparison*, 8 L. & BUS. REV. AM. 463 (2002).

35. See Arye L. Hillman & Avi Weiss, *Beyond International Factor Movements: Cultural Preferences, Endogenous Policies and the Migration of People: An Overview*, in *MIGRATION, THE CONTROVERSIES AND THE EVIDENCE* 76, 87–88 (Riccardo Faini, Jaime de Melo & Klaus F. Zimmermann eds., 1999).

36. See generally Oded Stark & J. Edward Taylor, *Migration Incentives, Migration Types: The Role of Relative Deprivation*, 101 THE ECON. J. 1163 (1991) (discussing the role of relative deprivation in the decision to emigrate from one's home country).

By migrating toward similarly-skilled workers in a different city or country, people can live up to the full potential of their skills.<sup>37</sup> A trained investment banker will be less productive in a rural area than if he or she were to live close to Wall Street. The same is true for skills that are complementary to the skills prevalent in any given place. For example, a center for journalism could also attract people trained in film productions. These so-called agglomeration economies are closely linked to the core-periphery model, in which the economic core area attracts economic activity from the periphery.

A concern voiced in the literature is the negative effects of “brain drain.” If highly-skilled individuals are enabled to move from a developing country to a high-income country, then the former loses the investment in human capital while the latter reaps the benefits of this investment without contributing its share.<sup>38</sup> The counter-argument revolves around the payment of remittances; immigrants tend to send substantial amounts of money back to their families in the country of origin.<sup>39</sup>

Another important aspect is the shift in immigration patterns. While migration used to be permanent (e.g., the flows of immigrants from Europe to the United States in the nineteenth century), modern migration tends to be more and more temporary in nature.<sup>40</sup> Labor migration thus is more likely to follow the pattern of job mobility. In fact, migration can be more complex. The concept of “circular migration” can be understood to encompass not only temporary and permanent migration, but also permanent or temporary return to the country of origin.<sup>41</sup> The conclusion is that migration—if managed correctly—leads or should lead to a so-called “triple win” for the host country, the country of origin, and the migrants themselves.

The final verdict is not yet in on all aspects of the economics of migration, including those mentioned above. George Borjas identifies a series of issues.<sup>42</sup> For example, it is not fully understood how individuals self-select into becoming either movers or stayers. Neither is it understood what determines the speed of economic assimilation in the host country. Different empirical studies come to radically different results regarding the impact of migration on the wage structure. Generally, the full scope of adjustments

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37. MASAHISA FUJITA, PAUL R. KRUGMAN & ANTHONY VENABLES, *THE SPATIAL ECONOMY: CITIES, REGIONS, AND INTERNATIONAL TRADE* (1999).

38. See Jagdish Bhagwati & Koichi Hamada, *The Brain Drain, International Integration of Markets for Professionals and Unemployment: A Theoretical Analysis*, 1 J. DEV. ECON. 19 (1974).

39. ÇAGLAR ÖZDEN & MAURICE W. SCHIFF, *INTERNATIONAL MIGRATION, REMITTANCES, AND THE BRAIN DRAIN* 53 (2006).

40. MIGRATION INFO. SOURCE (2003), <http://www.migrationpolicy.org/article/circular-migration-keeping-development-rolling>.

41. See Dovelyn Rannveig Agunias & Kathleen Newland, *Circular Migration and Development: Trends, Policy Routes, and Ways Forward*, MIGRATION POLICY INST. (2007), <http://migrationpolicy.org/research/circular-migration-and-development-trends-policy-routes-and-ways-forward>.

42. BORJAS, *supra* note 11, at 212–15.



taking place in an economy as a result of migration, such as the production method, the location of firms, or the occupational mobility of individuals, is still elusive. Therefore, the actual adjustment costs caused by migration are widely unknown. There are also discussions on the benefits of migration, especially regarding the question under which conditions the native population enjoys a net benefit after all adjustments and costs incurred thereby.<sup>43</sup> The economics literature on migration has also had a hard time explaining how immigration policy choices are made. Also, the very long-term effects, mostly regarding the integration of immigrants into society over the generations, are not yet understood at a satisfying level.<sup>44</sup>

From the systems competition point of view, there are several mechanisms in place involving migration. The act of “voting with the feet” is at the cornerstone of the Tiebout model—by leaving their jurisdiction, individuals match their preferences with the provision of bundles of taxes and public goods available elsewhere.<sup>45</sup> As a result, it is possible to provide public goods even through a decentralized mechanism. The subsequent literature developed this static model in which individuals are matched to a disinterested jurisdiction of their preference into a model of active inter-jurisdictional competition, in which local governments compete for resources.<sup>46</sup> Even though governments might not be in a strong enough position to actively contribute to the competition, they are nevertheless implicitly part of it and constrained in their actions (e.g., their tax rates) by its presence.<sup>47</sup>

Another way of seeing inter-jurisdictional competition is the concept of “yardstick competition” suggested by Pierre Salmon—individuals do not need to actually move to a different place; instead, they can observe policies implemented elsewhere, and if they think that such policies would be in their interest, demand similar ones from the governing politicians.<sup>48</sup> This approach is similar to Albert O. Hirschman’s dichotomy of exit and voice as reaction to decaying institutions, which emphasizes how “exit,” that is,

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43. See *id.* at 149–69; see also George J. Borjas, *The Economic Benefits from Immigration*, 9 J. ECON. PERSPECT. 3 (1995) (expanding on the hypothesis that immigration policy increases the national income of natives); see also Bob Hamilton & John Whalley, *Efficiency and Distributional Implications of Global Restrictions on Labour Mobility: Calculations and Policy Implications*, 14 J. DEV. ECON. 61 (1984) (discussing the relationship between costs and gains for native countries based on recent international policy changes).

44. BORJAS, *supra* note 11, at 214.

45. C.M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POLIT. ECON. 416, 417–18 (1956).

46. See Wallace E. Oates & Robert M. Schwab, *Economic Competition among Jurisdictions: Efficiency Enhancing or Distortion Inducing?*, 35 J. PUB. ECON. 333–54 (1988); *Aid to States and Localities and the Appropriate Competitive Framework*, in COMPETITION AMONG STATES AND LOCAL GOVERNMENTS 153 (Daphne A. Kenyon & John Kincaid eds., 1991).

47. See Daphne A. Kenyon, *Theories of Interjurisdictional Competition*, NEW ENG. ECON. REV. 13 (1997).

48. See Pierre Salmon, *Decentralization as an Incentive Scheme*, 3 OXF. REV. ECON. POLICY 24, 32 (1987).

the act of leaving, contributes to the improvement of a jurisdiction's governance.<sup>49</sup> The pressure of a mass exodus can lead to policy reform. Migration can also solve the fundamental political dilemma of any economic system formulated by Barry Weingast: "A government strong enough to protect property rights and enforce contracts is also strong enough to confiscate the wealth of its citizens."<sup>50</sup> The ability to leave limits the extortive power of the state.

A jurisdiction can also be interpreted as a club. In this view, a club is "a voluntary group deriving mutual benefit from sharing one or more of the following: production costs, the members' characteristics, or a good characterized by excludable benefits."<sup>51</sup> The members of a club have an interest in others joining the club (by analogy, nobody would want to be the sole member of a tennis club), while keeping the right to prevent any further influx if there is overcrowding of the shared resource. A seminal paper by J.M. Buchanan shows that members of a club solve optimization problems and set membership rules as well as the level of provision of the shared good accordingly.<sup>52</sup>

In the spirit of these models, jurisdictions could be seen as clubs, with infrastructure being the shared good within that club. Such reasoning can be found in the political debate. For instance, the Swiss electorate recently rejected a popular initiative (referendum) that sought to limit immigration to a bare minimum.<sup>53</sup> The referendum was initiated by an environmentalist organization (Ecopop), which argued that overpopulation in the world in general, and in Switzerland specifically, is a pivotal issue and that the number of people living in Switzerland has to be reduced as it leads to an over-usage of limited resources.<sup>54</sup> The initiative failed at the ballots, mostly because the economic effects would have been disastrous. Earlier in 2014, the electorate accepted a similar initiative, which had a more xenophobic and less environmentalist tone. This initiative amended the constitution and required the government to set quotas on immigration, even if originated from

49. See ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 3–5 (1970) [hereinafter HIRSCHMAN, EXIT, VOICE, AND LOYALTY]; see generally Albert O. Hirschman, *Exit, Voice, and the Fate of the German Democratic Republic: An Essay in Conceptual History*, 45 WORLD POLITICS 173 (1993) (detailing the relationship between "exit" and "voice") [hereinafter Hirschman, *Exit, Voice, and the GDR*].

50. Barry R. Weingast, *The Economic Role of Political Institutions: Market Preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1, 1 (1995).

51. Todd Sandler & John T. Tschirhart, *The Economic Theory of Clubs: An Evaluative Survey*, 18 J. ECON. LIT. 1481, 1482 (1980).

52. See J.M. Buchanan, *An Economic Theory of Clubs*, 32 ECONOMICA 1, 1–14 (1965).

53. See Bundesratsbeschluss über das Ergebnis der Volksabstimmung vom 30. November 2014 [Ruling of the Federal Government on the Result of the Referendum Held on Nov. 30, 2014], BBl 2015 1813 (Switz.).

54. See Botschaft zur Volksinitiative <<Stopp der Überbevölkerung – zur Sicherung der Natürlichen Lebensgrundlagen>> [Communication of the Federal Government on the Popular Initiative "Stop Overpopulation – for the Protection of Natural Livelihood"], BBl 2013 8693 (Switz.).

the EU,<sup>55</sup> in crass contradiction to the bilateral agreements between Switzerland and the EU, which provide for the free movement of people with a labor contract or sufficient means for subsistence.<sup>56</sup> Yet analyzing the optimality just from the inside of a club is not enough, and the theory of clubs has not stopped there. Subsequent models incorporated the welfare of both members just as well as of nonmembers of a club (i.e., the total economy point of view).<sup>57</sup> In other words, there is a trade-off between the collective rights of groups to shield themselves against outsiders and the individual human right to life, liberty, and the pursuit of happiness.

Most theories of inter-jurisdictional competition revolve around the effect of (potential) exit on the quality of institutions and the provision of an attractive bundle of taxes and public goods. However, and this shall be discussed in further detail in Section IV, it is to be noted that exit can drive out voice and that the latter can play just as important of a role as the former.

### III. THE WELFARE STATE AND THE LABOR MARKET

Migration can cause redistributive issues. Even if the net benefits are positive—and this is a widespread conclusion in the economics literature—it can nevertheless be argued that there are winners and losers from migration. Virtually every country in the Western world has some kind of income redistribution mechanism.

The Tiebout model mentioned above—that is, the procedure of “voting with feet”—would at first mean that individuals who prefer redistribution would move to a jurisdiction with a well-developed welfare system, while individuals who prefer otherwise would rather settle in a so-called “night watchman state.” Any jurisdictions that do not find people willing to live within their boundaries would be forced to adjust to the demand. This model only works in the so-called “pre-constitutive phase”—that is, behind the veil of ignorance. Only as long as people do not know whether they would be on the giving or the receiving end of the welfare state does voting with feet make sense. Otherwise, any welfare state would collapse, as the wealthy people move to states without redistribution. Adverse selection leads to the collapse of welfare states, and inter-jurisdictional competition in this setting is efficiency-reducing.<sup>58</sup>

55. BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 121a (Switz.).

56. See *Abkommen Zwischen der Schweizerischen Eidgenossenschaft Einerseits und der Europäischen Gemeinschaft und ihren Mitgliedstaaten Andererseits über die Freizügigkeit* [Agreement between the Swiss Federation and the European Union and its Member States on the Free Movement of Persons], June 21, 1999 (entered into force June 1, 2002).

57. See, e.g., Sandler and Tschirhart, *supra* note 51; see also Todd Sandler & John Tschirhart, *Club Theory: Thirty Years Later*, 93 PUB. CHOICE 335, 335–55 (1997).

58. See Hans Werner Sinn, *Tax Harmonization and Tax Competition in Europe*, 34 EUR. ECON. REV. 489, 489–504 (1990).

Whether welfare states act as “magnets”<sup>59</sup> is subject to a debate with mixed empirical findings. This ambiguity is also reflected in public opinion towards immigration<sup>60</sup>—the “gap” hypothesis postulates a significant divergence between public opinion, which demands more restrictive migration policies and the relatively more liberal immigration policy outcomes.<sup>61</sup> An empirical assessment has to deal with a variety of factors, such as the fact that the structure of migrant populations, their skill sets, and their education levels (and thus migrants’ propensity to receive welfare payments) varies from country to country. Also, the structure of welfare systems can be different, with different mixes of contributory and non-contributory support schemes observable around the world. It can be argued that the structure of the welfare system—depending on the country’s legal immigration scheme—could affect the skill composition of immigrants. Low-skilled migration will be relatively more common if there are no restrictions on migration, as voters will prefer an immigration policy with a high-skills bias (as these migrants contribute more to the welfare state, who in turn will avoid high-tax countries).<sup>62</sup>

More specifically, there is a controversy as to the net effect of migrants on the fiscal balance.<sup>63</sup> One argument is that if the welfare state does not discriminate between new arrivals and longer-term residents, there is inefficient migration into the welfare systems of higher-income countries.<sup>64</sup> The counter-argument is that generally migrants are excluded from many welfare payments, but are obliged to pay taxes on their earnings. Again, the precise institutional framework matters.

Here, an important difference between the U.S. and Europe becomes apparent. Since Western European countries tend to boast more generous welfare systems and more rigid labor markets with relatively higher unemployment rates, resistance to immigration in the EU is higher than in the United States.<sup>65</sup> It is disputed to what degree the availability of welfare payments plays a role in the decision to relocate. There is empirical evi-

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59. See George J. Borjas, *Immigration and Welfare Magnets*, 17 J. LAB. ECON. 607, 608 (1999).

60. See, e.g., Amelie F. Constant & Klaus F. Zimmermann, *Migration and Ethnicity: An Introduction*, in INTERNATIONAL HANDBOOK ON THE ECONOMICS OF MIGRATION 13, 13–35 (Amelie F. Constant & Klaus F. Zimmermann eds., 2014).

61. See Marc R. Rosenblum & Wayne A. Cornelius, *Dimensions of Immigration Policy*, in THE OXFORD HANDBOOK OF THE POLITICS OF INTERNATIONAL MIGRATION 246, 246–73 (Marc R. Rosenblum & Daniel J. Tichenor eds., 2012).

62. Assaf Razin & Jackline Wahba, *Welfare Magnet Hypothesis, Fiscal Burden and Immigration Skill Selectivity* (2011), <https://ideas.repec.org/p/nbr/nberwo/17515.html>.

63. For an extensive survey, see Corrado Giuliotti & Jackline Wahba, *Welfare Migration*, in INTERNATIONAL HANDBOOK ON THE ECONOMICS OF MIGRATION 489, 489–504 (Amelie Constant & Klaus F. Zimmermann eds., 2014).

64. See Sinn & Ochel, *supra* note 10.

65. See Jørgen Drud Hansen, *Immigration and Income Redistribution in Welfare States*, 19 EUR. J. POL. ECON. 735, 735–46 (2003).

dence claiming that immigrants to the U.S. are clustered in states with relatively higher benefits, whereas native-born welfare receivers are not—that is, that the geographic sorting of immigrants in the U.S. is altered by welfare benefits.<sup>66</sup> That this happens to a larger extent with immigrants than with native-born individuals can be explained by the fact that migrants already have to bear the cost of migrating from their home country to the U.S. Thus, they relatively inexpensively choose among places to settle within the U.S., whereas relocating only pays off for natives if the additional welfare benefits exceed the costs of moving. However, it is not necessarily correct to conclude that there is inefficient migration into welfare systems—that is, that people who move to the United States would not have migrated if there were no welfare programs. An issue could just as well be that people who would re-migrate to a different place would rather stay where they are because of the welfare payments they can receive there.<sup>67</sup> With respect to the differences between the EU and the U.S., it is also important to note that migrants moving to the U.S. are relatively highly educated as compared to those moving to Europe.<sup>68</sup>

The question of inefficient migration into welfare systems has not only been studied from an economic point of view but also addressed by legal reforms. European Law closed the gap regarding welfare systems, an issue that became important with the accession of several Eastern European countries in 2004 (Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia, together with Cyprus and Malta), 2007 (Bulgaria and Romania), and most recently 2013 (Croatia). These countries were and still are substantially poorer than Western European countries and exhibit less-developed welfare systems. In 2004, the EU adopted Regulation No. 883/2004 on the coordination of social security systems.<sup>69</sup> Article 4, headed “Equality of Treatment,” stipulated that, “Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.”<sup>70</sup>

In a recent court case, the European Court of Justice (ECJ) unequivocally made it clear that States can nevertheless impose restrictions on the access to “special non-contributory cash benefits” by EU citizens.<sup>71</sup> The legal question at hand was whether the equal treatment requirement of Article 4 of Regulation 883 only applies to nationals of other EU Member

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66. See Borjas, *supra* note 59.

67. *Id.* at 608.

68. Jeffrey Grogger & Gordon H. Hanson, *Income Maximization and the Selection and Sorting of International Migrants*, 95 J. DEV. ECON. 42, 50–51 (2010).

69. Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the Coordination of Social Security Systems, 2004 O.J. (L 166) 1.

70. *Id.*

71. See Case C333/13, *Dano v. Jobcenter Leipzig* (2014), <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C333/13&td=ALL>.

States if their residence complies with the conditions of the Directive on free movement of EU citizens.<sup>72</sup> Under this Directive, EU Member States are not obliged to award welfare payments during the first three months of a person's residence in that state. If an economically inactive person remains in the Member State for a period of three months to five years, then he or she needs to prove that he or she has sufficient resources to support him or herself in order to receive the right of residence. This system is a legal implementation of the principle that migration solely for the purpose of acquiring social assistance is inefficient from an economic point of view. The ECJ found that Member States have the right to exclude individuals from certain "special non-contributory cash benefits" if they do not have a right of residence under the Directive on free movement of EU citizens—that is, if they established residence in the Member State only to receive social payments. In its ruling, the ECJ *de facto* re-asserted the principle proposed by Hans-Werner Sinn<sup>73</sup> in that it allowed for the discrimination between nationals from the host country and nationals from other EU countries. Similar legislation also exists in the U.S. with the Personal Responsibility and Work Opportunity Reconciliation Act of 1996,<sup>74</sup> (PRWORA), which bars most immigrants from federal income assistance programs during their first five years of residence. It also allows states to extend this exclusionary period.

Recent legal developments seem to change the nature of migration and its effect on the welfare state. With the liberalization of the provision of services across international borders, new channels for migration open up. Individuals can enter labor markets as service providers instead of immigrants. An important difference is that service providers are usually not eligible for the same kinds of benefits as permanent residents. Labor immigration policy usually has to decide on two parameters: the number of migrants admitted and the rights given to them after admission.<sup>75</sup> The mentioned developments tip this balance towards possibly higher numbers with fewer rights.

Rigid labor markets have difficulties adjusting to the influx of new workers. Such rigidities occur for two reasons. First, labor relationships are by their nature generally longer-term contracts. This has to do with the costs of training new workers. Even if there are no legal barriers and even with

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72. Directive 2004/38 of the European Parliament and of the Council of 29 April 2004 on the Right of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States Amending Regulation (EEC) No. 1612/68 and Repealing Council Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC, 93/96/EEC, 2004 O.J. (L 158) 77.

73. See Sinn & Ochel, *supra* note 10.

74. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

75. See Martin Ruhs & Philip Martin, *Numbers vs. Rights: Trade Offs and Guest Worker Programs*, 42 INT'L. MIGRATION REV. 249, 249-65 (2008).

high unemployment, replacing a highly specialized worker comes at an expense and can take a substantial amount of time and resources. Second, some rigidities are imposed by legal measures aiming to protect workers from exploitation and economic hardship.

#### IV. SOLUTIONS

The previous Section III discussed the potential problems for systems competition with migration. This Section IV presents some solutions—although not all of them, as will be shown, produce the desired outcome.

A straightforward solution to the problem of inefficient migration into welfare systems would be to reduce the scope of welfare payments.<sup>76</sup> This poses a serious problem of conflicting interests. After all, it can be argued that in countries with developed welfare states, there are majority populations in favor of such systems. Thus, reducing the size of the welfare state solely in order to prevent its abuse would be overshooting. Another possibility is to centralize the welfare state at the federal level (e.g., by creating a unified European unemployment insurance system). In this case, movement between jurisdictions would be neutral in its effect on the welfare system. Alternatively, jurisdictions could harmonize their handout systems (social assistance would still be administered at the local level, but instead according to harmonized payment levels, rules, and criteria). Both of these latter suggestions come with an important caveat—they only work when the income levels among jurisdictions are not too different. This could be an option for a system like the United States, where income inequality among individuals is high, but income disparities among regions are not. In Europe, harmonizing the welfare systems of highest-income with lowest-income countries is virtually impossible.

An alternative to reducing the scope of the welfare state is protectionism—that is, restricting the influx of immigrants. Such a measure means relinquishing the benefits of migration, just like tariffs and import restrictions hamper the possible gains from trade. Nevertheless, this is a measure chosen by virtually all countries in the world in some form or another. The permissible quantities of labor migration are usually set in the fashion of a centrally planned economy by the central government in the form of quotas. A proposed compromise that combines maintaining the welfare state and reaping the benefits of migration is to decentralize migration management. Instead, sponsorship schemes awarding residence permits to holders of a work contract, and mandatory social insurances for immigrants could constitute such a middle-ground.<sup>77</sup>

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76. A.O. Sykes, *The Welfare Economics of Immigration Law: A Theoretical Survey with an Analysis of U.S. Policy*, in *JUSTICE IN IMMIGRATION* 158, 158–200 (Warren F. Schwartz ed., 2007).

77. See Trebilcock, *supra* note 14.

The literature on inter-jurisdictional competition proposes several solutions to the problem of welfare-reducing migration. Such measures can be taken either at a decentralized level of government or, on the contrary, on an international, supra-jurisdictional level. Economic theory favors legal interventions when there are externalities.<sup>78</sup> Such an intervention internalizes the externality and thus ideally provides for an optimal allocation of resources. If there is an externality due to international migration, then the intervention needs to take place at the supra-national level—that is, through an international agreement (as there is no higher authority that can impose a rule). Such an agreement should favor migration while addressing the potential reasons for inefficiencies.

The economic literature on migration, which looks at the problem from the national perspective rather than the systems competition point of view, contains several policy suggestions to improve immigration laws. For example, in 1987, Julian Simon suggested auctioning off visas.<sup>79</sup> Similarly, Gary Becker's 1998 proposal was to sell visas instead of using the quota system currently in place in the United States and other places.<sup>80</sup> These proposals have been criticized for ignoring the fact that borrowing against one's human capital is difficult due to the moral hazard and information asymmetry problems involved.<sup>81</sup> Apart from these incentive problems, the case against such measures can be made from a different perspective.

For one, what might make sense economically speaking might nevertheless pose serious problems for non-economists. In fact, many of the proposals suggest the establishment of two types of citizens—those with a right to welfare payments and those who first have to earn their right to live in a jurisdiction and then are subject to discriminatory measures such as mandatory insurance schemes or restricted access to welfare systems or labor markets. Second, the inter-jurisdictional competition literature, starting with Tiebout,<sup>82</sup> sees the act of moving as the primary mechanism through which the efficient allocation of resources is achieved. It is nevertheless also worthwhile to look not only at the “exit” aspect (in the sense of Alfred O. Hirschman),<sup>83</sup> but also the “voice” aspect—that is, how individuals can improve institutions without leaving. In some instances, voice might actually be a superior mechanism to exit.

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78. ROBERT D. COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 40 (6th ed. 2011).

79. Julian L. Simon, *The Price of Citizenship: Auctioning Immigration Visas Helps Foreigners and Americans Alike*, 39 *POL'Y REV.* 71, 71–72 (1987).

80. GARY BECKER & GUILTY BECKER, *THE ECONOMICS OF LIFE: FROM BASEBALL TO AFFIRMATIVE ACTION TO IMMIGRATION, HOW REALWORLD ISSUES AFFECT OUR EVERYDAY LIFE* 58–59 (1st ed. 1998).

81. Trebilcock, *supra* note 14, at 309–10.

82. See Tiebout, *supra* note 45.

83. See, e.g., HIRSCHMAN, *EXIT, VOICE, AND LOYALTY*, *supra* note 49.



## V. EXIT AND VOICE

A. *Generally*

The discussion of systems competition emphasizes migration as a means of “exit” in the sense of Alfred O. Hirschman. By voting with their feet, migrants control the performance of the state. They move towards a jurisdiction that provides a better bundle of taxes and public goods. This perspective is one typical of economists’ view of the market. If a customer is not satisfied by the service provided by a company, he or she stops using it and shifts his or her demand to a different company providing a better product. The inter-jurisdictional competition literature is therefore generally biased towards exit. Political scientists, on the other hand, have emphasized the importance of protest against the current state of affairs.<sup>84</sup> Combining these two views—that is, the economic and the political mechanism—can be useful for the analysis or design of a constitutional order, which is where legal science comes in.

The exit mechanism is a reaction to a decline in quality. In order to function, it can require two types of individuals in any given jurisdiction. The first type Hirschman calls “alert.”<sup>85</sup> These are the members of an organization (in our case, a jurisdiction) who observe the decrease in quality and react to it immediately. If all individuals were of this type and immediately recurred to exit, then—in this very stylized example—everybody would leave the jurisdiction, rendering any improvement obsolete. It is thus necessary to have a group of “inert”<sup>86</sup> members who give the organization the necessary time to recuperate. Exit as a mechanism has a shortcoming. It is not useful in situations in which the decline in quality affects all possible choices. So, for example, if all jurisdictions suffer from an increase in crime, corruption, environmental decay, or similar, then exit is not an option. This is an argument for more liberal migration laws, as freer migration increases the ability of individuals to spread risk—that is, to shield themselves against phenomena affecting several places where they could live. Furthermore, exit is costly, and the ideal location might simply not exist. Constant migration in search of this elusive place might thus be futile.

The other mechanism is voice. It is often seen as a residual—that is, it is used by those for whom exit is not an option. When exit is completely impossible, as was the case in Eastern European socialist countries, then voice needs to carry the entire burden of improving the system. As mentioned earlier, exit is costly. In fact, the population group most likely to migrate away (particularly in developing countries) is the middle class. For the lower classes, migration can be too expensive, and their low level of skills will usually not lead to an improvement in quality of life in another

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84. *Id.* at 30.

85. *Id.* at 24.

86. *Id.*

country. For the upper class, migration might mean giving up their status of members of a country's elite. Improving the voice mechanism can thus constitute a substantial welfare-increase. The exit mechanism can actually prove detrimental to the development of a voice mechanism.

Hirschman notes two determinants of when members of a group will resort to voice even though exit is in principle possible. First, exit can provide a granted improvement, while the overall effect of voice on the quality of an institution is uncertain. Second, individuals need to estimate their expected ability to influence the organization.<sup>87</sup>

In general, those individuals who care most about the quality of the institution are the most likely to engage in voicing their frustration—just as they are also the most likely to leave. If better-quality substitutes are readily available, exit is more likely than voice. On a global scale, this means that individuals in lower-income countries will prefer exit, whereas individuals in high-income countries will prefer voice, for lack of alternatives. Hirschman also identifies two criteria when a situation in which exit is not an option is superior to one where exit is limited, but not impossible. First, if exit “is ineffective as a recuperation mechanism, but does succeed in draining from the firm or organization its more quality-conscious, alert, and potentially activist customer or members” and second “if voice could be made into an effective mechanism once these customers or members are securely locked in.”<sup>88</sup> In some situations, namely when the mobile individuals are most sensitive to quality, exit can remain without affecting performance. The institution might be comfortable with their exit and simply continue catering to those who are immobile or insensitive to bad quality. In fact, the institution has an easier time tyrannizing those who stay.

Finally, Hirschman's triad is completed by a third element—loyalty.<sup>89</sup> Loyalty to an organization, institution, or country can be a reason to refrain from “exit.” While, for each individual, exit is often the easier option than voice, loyalty can contribute to redressing the balance. Together with existing barriers to exit, the effectiveness of voice is reinforced. Restrictions on migration, as they are in place in all parts of the world, and for many immigrants, these restrictions act as precisely this kind of barrier to exit. In other words, with no possibility of escaping, individuals are left with no other option than to use voice as an instrument to improve their fare.

The type of reaction caused by a decline in the quality of institutions is not necessarily the same as the one to which the institution is primarily sensitive. A government might be more likely to react to a revolt than to an exodus, although the latter might be a more common recourse in certain situations (e.g., in authoritarian countries, it is easier to flee than to rebel).

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87. *Id.*

88. *Id.* at 55.

89. HIRSCHMAN, EXIT, VOICE, AND LOYALTY, *supra* note 49, at 76.

In the 1970 model, exit and voice were counteracting forces. Deterioration leads to discontent, but because exit is cheaper, it undermines voice (the so-called “simple, ‘hydraulic’ model”).<sup>90</sup> Numerous examples from economic and social life were given, including the Turner or Frontier thesis named after historian Frederick Jackson Turner,<sup>91</sup> which explains the absence of a strong workers’ movement (a voice mechanism) in nineteenth-century America with the possibility of exploring opportunities on the Frontier in the West.<sup>92</sup>

Hirschman applied his original model primarily to firms and organizations, but less to national politics. Although voice is a central element in democracies, exit is a rather marginal factor and contributed little to the performance of the state.<sup>93</sup> The situation in Eastern Europe during socialist times was a big exception though. The exodus of around two million East Germans to the West between 1949 and 1961, together with the suppression of an uprising in 1953, led to hermetic closure of the borders and the building of the Berlin Wall. That is, the government of the German Democratic Republic (GDR) actively responded to exit by suppressing it. Exit was a real option for those who dared to illegally cross the border because West Germany would automatically grant the right to citizenship to East German refugees (this option was not available to citizens of other socialist countries like Poland or Czechoslovakia). It was also a perceived option for many, although the most common form of “exit” was not to escape, but to turn on the western Germany evening news on television (this was possible in the GDR because it had a neighboring country speaking the same language). In addition, forced exit was a strategy used by the authorities—dissidents and opponents of the regime were frequently expelled from the GDR. As a result of these possibilities of exit (voluntary or involuntary), opposition in the GDR did not develop in the same way and to the same extent as in the rest of the Eastern Bloc.

Yet during the turmoil of 1989, which led to the collapse of the GDR and subsequent German unification, exit and voice were complementary, Hirschman notes.<sup>94</sup> Already the construction of the Berlin Wall in 1961 can be interpreted not only as a measure against exit but also as a strong statement of power not to tolerate voice. Starting from the spring of 1989, East Germans were able to leave the country and flee to the West through Czechoslovakia and Hungary, which lifted their international travel restrictions. This sudden loss of authority and inability to prevent exit resulted in

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90. Hirschman, *Exit, Voice, and the GDR*, *supra* note 49, at 176.

91. See generally FREDERICK JACKSON TURNER, *THE FRONTIER IN AMERICAN HISTORY* (1920) (explaining the absence of a strong worker’s movement in 19th century America with the possibility of moving to the Frontier in the West).

92. Hirschman, *Exit, Voice, and the GDR*, *supra* note 49, at 107.

93. Rogers Brubaker, *Frontier Theses: Exit, Voice, and Loyalty in East Germany*, 18 *MIGRATION WORLD* 12, 12–17 (1990).

94. Hirschman, *Exit, Voice, and the GDR*, *supra* note 49, at 177.

the first rallies for reform in East Germany since the bloodstained crackdown on protestors in 1953. The mass exodus turned exit from a private, silent action to an act taking place in the public sphere—the gatherings of large crowds willing to leave the country favored public protests both for the right to leave, as well as for reform inside the country. Eventually, voice and exit did not lead to the recovery of the failing regime, but to the ultimate price—namely, the end of the GDR.

It is important to note that migrants' countries of origin—just like in the example of the GDR—are often autocratic states. If emigration decisions can be categorized by a push-pull dichotomy,<sup>95</sup> then it is also important to look at push factors. Emigration can be seen as an involuntary response to the local political culture.<sup>96</sup> In this model, individuals who would be better off in their home countries are pushed out because they are politically too far away from the political core—that is, the autocrat or clique that grants privilege. For instance, individuals who are not cronies of the ruler might not be granted necessary licenses or quotas for imports or exports, or are being discriminated against by banks or the educational system.<sup>97</sup> The least privileged have the greatest incentives to emigrate. Depending on the specifics of the country, these non-privileged people can be the most productive in the population (the case of “brain drain”).

### B. *The Voice of Migrants*

Any constitutional order for migration should address this question of voice. There have been attempts to reconcile the voice aspect with the inter-jurisdictional competition literature. It can be argued that inter-jurisdictional competition is inherently tied to an intra-jurisdictional governance problem. If we distinguish between individuals who are generally more mobile than others, and those for whom it is more costly to migrate, then the latter are in a higher need of constitutional protection. This is an argument for giving certain residual control rights (that is, over constitutional provisions) to the immobile.<sup>98</sup> This is an argument for restricted voting rights for migrants, but it does not take into account the sometimes dire situation of migrants.

Once they leave their home country, migrants are in a peculiar situation. In their destination country, they are a member of society, but are not voters and are thus limited in shaping policies. Depending on the country, the naturalization process, and thus obtaining full voting rights, can take many years (usually between five and ten), with years of study usually not

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95. Klaus F. Zimmermann, *European Migration: Push and Pull*, PROCEEDINGS OF THE WORLD BANK ANN. CONF. ON DEV. ECON. 313, 313–42 (2014).

96. Gil S. Epstein, Arye L. Hillman & Heinrich W. Ursprung, *The King Never Emigrates*, 3 REV. DEV. ECON. 107, 107–21 (1999).

97. *Id.* at 108.

98. Klaus Heine, *Interjurisdictional Competition and the Allocation of Constitutional Rights: A Research Note*, 26 INT'L. REV. L. & ECON. 33, 33–41 (2006).

counting towards the residence requirement.<sup>99</sup> Considering that migration is often not permanent, but linked to job mobility, this constitutes a serious disenfranchisement, especially if a migrant moves to another country more than once. After a long-term stay in a country, an immigrant might find it beneficial to acquire citizenship of his or her host country. Yet many countries do not allow for double nationalities, which means that if individuals decide to return to their country of origin, then they will find themselves again in a situation of disenfranchisement. Reacquiring their original citizenship is not always straightforward, and can take a substantial amount of time and effort.

Voting rights for non-citizen immigrants are the exception to the aforementioned situation. Within the European Union, EU nationals are allowed to vote at the municipal level at the place of their residence, even if this is not in their country of citizenship. For elections of the European Parliament, EU citizens can choose whether to have their vote count in their country of citizenship or in the country of residence. In both cases, they can only vote for the parties listed on the ballot of the country they chose (European elections are, by-and-large, organized on the national level, with no truly pan-European electoral campaigns or parties).

Depending on the legal rules in place in their country of origin, they might still be able to more or less easily exert voting rights in their country of citizenship. In the United Kingdom, for instance, this right expires after fifteen years of staying abroad.<sup>100</sup> Yet this voting right is only of limited use, as permanent residents in a country other than that of their citizenship are hardly affected by the laws or policies of the latter. Such restrictions on voting rights curb the possibilities for migrants to exert “voice” and participate in the political process. If migration is seen as a costly process (due to the necessary adjustments), then relying solely on the “exit” mechanism might be a sub-optimal outcome.

## CONCLUSION

Despite the general consensus in the economic literature that migration is beneficial, the specific institutional design under which it takes place affects the direction and scope of the welfare effect. Migration policy is often analyzed from a unilateral perspective of the receiving state. However, it is important to keep in mind the multi-layeredness of this multi-faceted problem and that every jurisdiction is embedded in larger, dynamic systems in which migration potentially takes place. Migration can be regulated by a

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99. THOMAS ALEXANDER ALEINIKOFF & DOUGLAS B. KLUSMEYER, *CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES* 22 (2001).

100. Representation of the People Act, § 1(3)(c) (1985) (U.K.). For an example of an unsuccessful challenge of this rule on the basis of EU freedom of movement rights, see *Preston v. Wandsworth Borough Council and Lord President of the Council*, [2011] EWCH (Admin.) 3174 (Eng.).

variety of instruments—not only immigration laws, but also through welfare laws, bilateral agreements, and wider constitutional orders, such as the EU. It is therefore important to analyze the functioning of all these factors at the same time. A constitutional economics perspective can contribute to finding the optimal allocation of regulatory power to the different levels of government.

There is an important lesson from revisiting Hirschman's *Exit, Voice, and Loyalty*—namely, that exit alone is not a sufficient mechanism to improve failing institutions. In that sense, a broader constitutional order shall not only facilitate exit in the Tieboutian sense, but also ensure the possibility of voice. Furthermore, it is important to encourage both exit and voice at a stage when they are still instruments of improvement and not just signs of abandonment.