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## Special Issue

### EU Citizenship: Twenty Years On

## Dimensions of Citizenship

By Patricia Mindus<sup>\*</sup>

The Maastricht Treaty (the “Treaty”) first introduced the status of EU citizenship. The twentieth anniversary of the signing of the Treaty, marked in 2013, was declared the European Year of the Citizen. Union citizenship has been understood as the world’s first post-national citizenship, although it is still complementary to national citizenships. EU citizens enjoy rights that have been expanded, modified, and reinterpreted in light of the EU integration process. The Court of Justice of the European Union (CJEU) has been a driving force in this process. This twentieth anniversary has provided the *occasio* for this special issue. Indeed, much has happened over the last two decades. The Maastricht Treaty entered into force on the heels of German reunification, and afterwards, a series of EU treaties followed: The Amsterdam Treaty, the Nice Charter of Fundamental Rights, the aborted constitutionalization process and the Rome Treaty in 2004, and the Treaty of Lisbon. The Euro took over former national currencies in 2002; the enlargement process led to today’s twenty-eight Member States. But the *ratio* of this special issue is based on other events as linked to the 2008 financial crisis, bailouts, the fiscal compact, and similar measures. In a nutshell, the timeliness of this volume is linked to the current financial disarray. Since prognosis presupposes diagnosis, no further words are necessary as to the importance of this task. It is (almost) self-evident that before taking action and preparing for the future, one needs to address the very first question: *Nosce te ipsum* or know thyself. Union citizens need to take a step back and ask what they need to be and who they want to become.

The Eurozone crisis placed enormous strain on the capacity of the Member States to sustain the conditions of social citizenship. The sustainability of the constitutional settlement at the European level is questioned; the double asymmetry lamented; the democratic quality of the European public space mocked; the elbow room for reform constrained. In sum, political citizenship is doubted and yet called for. The May 2014 elections to the European Parliament were held in this setting. Who participates is another, closely connected, issue: Citizenship defines the *demos*. The legal specificities of citizenship laws, regulating access and loss, are central to understanding its evolution. In a world of increasing migration, defining the *demos* in terms of citizenship and migration policy can no longer be downplayed: Acquisition and loss of citizenship do not belong to the legal backwaters of administrative law. These are questions of constitutional impact

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because such policies determine who is entitled to participate in collective decision-making. This is particularly urgent in Europe: The German Federal Constitutional Court (FCC) declared in the *Lissabon Urteil* that citizenship laws belong to core sovereignty and cannot be delegated to supranational policy-making.<sup>1</sup> Can the EU impede a Member State from, say, selling passports to lighten debt or deficits? What rights are given and taken with Union citizenship? Does mobility push groups of people towards likelier disenfranchisement and social disembeddedness? Does an extension of the scope *ratione personae* come at the cost of eroding the intention and substance underpinning entitlements?

Citizenship is a key mechanism for inclusion and exclusion, distinguishing insiders from outsiders. Values are embedded in the design of this social “gate”; these values need to be debunked. Unsurprisingly, citizenship has attracted growing attention and is destined to become increasingly decisive as international migration is driven upwards by economic, political, demographic, and climate factors. Today, 2.9% of the world’s population lives outside their country of origin; in 2011, 6.6% of the EU27 population was foreign-born, making the EU a fascinating case study. We need a more accurate understanding of the possible solutions responsive to the integrative requirements of society that citizenship is all about. This is especially true in relation to Union citizenship because of its distinctive features: Its derivative (and not dual) nature and its relation to a multi-level polity and, last but not least, its basic principle—freedom from discrimination on grounds of nationality.

The papers presented in this volume are the result of a conference held 21–22 March 2013 in Uppsala, Sweden, “*European Citizenship—Twenty Years On.*”<sup>2</sup> The focus was on three questions: Has EU citizenship lived up to expectations? What are the problems facing citizens today and how can they be resolved in the best way? What challenges lie ahead? The aim of the conference was, and the aim of this volume is, assessing how EU citizenship has evolved over the last twenty years. Two criteria have guided the choice of papers included in this special issue. The first is quality: The scholars whose works are gathered here include some of the world’s top scholars in the field. Many of them have been engaged in citizenship studies, in its various forms, for decades. Only scholars conversant

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<sup>1</sup> Bundesverfassungsgericht [BverfG - Federal Constitutional Court], Case No. 2 BvE 2/08, para. 252 (June 30, 2009), [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html).

<sup>2</sup> I am grateful to the Department of Philosophy and the Faculty of History and Philosophy at Uppsala University for hosting the conference and to the Stockholm Law School and Uppsala Faculty of Law for co-organizing it; as well as to Vetenskapsrådet, Edward Cassel and Wenner-Gren Foundations, the Swedish Network for Research in EU Law, and the Uppsala Forum on Peace, Democracy and Justice for sponsoring the conference. My gratitude also goes to Sverker Gustafson and Anna Cornell Jonsson for chairing the conference, and to Ulf Bernitz (Stockholm), Adrian Favell (Sciences-Po), Kees Groenendijk (Nijmegen), and Dora Kostakopoulou (Warwick) for their participation. All the conference presentations can be viewed at: <http://media.medfarm.uu.se/play/kanal/121>. Medfarm Play, UPPSALA UNIVERSITET, <http://media.medfarm.uu.se/play/kanal/121> (last visited July 22, 2014).

with the details of the highly complex framework of the EU and who have followed the changes over time are in the enviable position of being able to distinguish the persistent transformations from the many vanishing trends. The second criterion applied is disciplinary: The scholars whose work is present in this issue come from a broad range of scientific fields. These fields include: EU law, constitutional law, migration law, political science, labor law, international private law, comparative law, political theory, and jurisprudence. This array is not merely lip service to fashionable trans-disciplinary approaches. There is a specific reason behind this choice pertaining to the very significance of the term “citizenship” that requires a brief explanation.

Citizenship studies have boomed in recent decades, largely parallel to the evolution of EU citizenship. The debate on citizenship is complex and spans the boundaries of disciplines such as the legal, political, and social sciences. The success of this buzzword has implied an extension of its semantic boundaries: From having been an expression used merely to describe the position of a subject before the State—*Staatsangehörigkeit*—today “citizenship” means much more.

The traditional concept of citizenship, of which Bertolt Brecht sarcastically concluded that the passport is the noblest part of man,<sup>3</sup> is increasingly being called into question. This traditional concept basically does less than bargained for, thus losing its *raison-d'être*, for example, avoiding the multiplication of incompatible legal positions imposed on the same individual. The problem is not merely that the traditional legal concept does not properly account for the political dimension of citizenship or allow for a distinction between those who can easily access rights and those who cannot—a *de facto* question requiring a sociological investigation. A significant problem is that the traditional view, to use Bauböck's phrasing, is a “recipe for chaos”<sup>4</sup> in a world of migration where each country decides who counts as citizens. Consider persistent statelessness or problems facing people with multiple citizenships in uncoordinated states, and other perverse effects. Problems such as: Forum shopping, legal tourism, trafficking, and racketeering. European citizens are not free from such evils, as Union citizens have woken up stateless after the withdrawal of nationality.

The semantic enrichment of “citizenship,” however, has boosted the side effects of the deepening misunderstandings between scholars of different disciplines. Citizenship studies suffer from low cross-fertilization among disciplines, as well as national and methodological biases, with most work being qualitative and nationally-focused. The current state-of-the-art studies usually do not allow examination beyond the complex legal

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<sup>3</sup> BERTOLT BRECHT, FLÜCHTLINGSGESPRÄCHE 7 (1998).

<sup>4</sup> Rainer Bauböck, *Citizenship and National Identities in the European Union*, in INTEGRATION DURCH DEMOKRATIE. NEUE IMPULSE FÜR DIE EUROPÄISCHE UNION 302–20 (Eugen Antalovsky, Josef Melchior & Sonja Puntischer-Riekman eds., 1997).

and technical specificities of single countries to see the overall picture. Researchers usually work in well-divided and non-communicating fields. Attempts to bridge the various perspectives are lacking; legal scholars do not converse sufficiently with sociologists; political scientists often obviously ignore issues discussed in international private law. Citizenship scholars often treat migration lawyers as if they belong to another galaxy within the academic universe. Scholars work largely unaware of methodological differences while having substantially contiguous fields. So, an assumption here is that citizenship means different things in different contexts. Because we are usually blinded by our own environments, a way to start in order to avoid this bias as much as possible is to ask the question: What is the opposite of a citizen?

Lawyers will claim that the opposite of a citizen may be a foreigner or a stateless individual. But, it may also be the politically powerless or disenfranchised subject, as many political scientists will perceive it. It may also be the marginalized or excluded person who may stay excluded even if he or she has the nationality of the country in question and enjoys voting rights—an aspect many social scientists will emphasize. Citizenship can thus be viewed as the obverse of different forms of exclusion: Social, political, and legal. Therefore we can speak here of three different models.

The political model of citizenship contrasts *citoyen* to *sujet*. First developed by Aristotle, this view regained popularity after the French revolution—hence the French terminology. The citizen here is the active member of the state, contributing to the formation of collective auto-determination by making decisions or voting for representatives. The subject is the passive or disenfranchised member of the community who does not participate in collective decision-making. Yet, he or she is subject to laws that others (citizens and/or their representatives) have chosen. The problem this model concerns is the legitimacy of decision-making with *erga omnes* validity.

In the legal model, the citizen, largely equivalent to the national, is opposed to an individual who does not belong to a given legal order: For example, both aliens and stateless individuals. Here, citizenship is equated to “the personal sphere of validity of the legal order.”<sup>5</sup> With roots in Roman law, citizenship became prevalent with the rise of the modern state, with the principles of sovereignty<sup>6</sup> and nationality,<sup>7</sup> even though the

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<sup>5</sup> HANS Kelsen, *GENERAL THEORY OF LAW AND STATE* (1945).

<sup>6</sup> JEAN BODIN, *LES SIX LIVRES DE LA RÉPUBLIQUE* 68 (Scientia Verlag 1977) (1583); PATRICIA MINDUS, *CITTADINI E NON. CITTADINI E NO. FORME E FUNZIONI DELL’INCLUSIONE E DELL’ESCLUSIONE* (2014).

<sup>7</sup> FRANCIS BACON, *ARGUMENT IN THE CASE OF THE POST-NATI OF SCOTLAND* (1608); HARVEY WHEELER, *Comments, CALVIN’S CASE AND THE EMPIRE* (1947); Polly J. Price, *Natural Law and Birthright Citizenship in Calvin’s Case (1608)*, 9 *YALE J.L. & HUMAN.* 73, 73–129 (1997); Michelle Everson, *Subjects or Citizens of Erewhon?*, 7 *CITIZENSHIP STUD.* 57, 65–83 (2003); Elizabeth F. Cohen, *Jus Tempus in the Magna Carta: The Sovereignty of Time in Modern Politics and Citizenship*, 43 *POL. SCI. & POL.* 463 (2010).

“principle of nationality”—ethnicity as a ground for conferring the status—was often challenged in colonial arrangements. Even the reading in *Nottebohm*<sup>8</sup> where citizenship figures as *un fait social de rattachement* is increasingly challenged by various practices of extraterritorial protection. The citizen may be granted franchise without changes to the essentially formalist model. It thus accommodates a wide range of rights and is compatible with most regimes. Based on a rigid dichotomy (no in-betweens), it aims to guarantee legal certainty or rule of law.

In the model prevailing in sociology, inspired by T.H. Marshall,<sup>9</sup> which focuses on social cohesion, the opposite of the citizen is neither the politically powerless nor the foreigner, but rather the marginalized or excluded person, to use the formula of Robert Ezra Park and Gino Germani.<sup>10</sup> The sociological model is based on a gradualist dichotomy. This means that there are intermediate positions in between full exclusion and full integration. This is why it makes sense to speak of “limited citizenship.”

The conference in Uppsala was designed to shed light on these different dimensions of citizenship and investigate their previously unexplored interactions in order to show how legal membership in the Union affects other dimensions of membership—foremost, the political and social citizenship of people living in the Union. This is why this special issue is structured in four parts. The first part is dedicated to the theoretical foundations of EU citizenship; the other three parts are each dedicated to one core dimension: The legal, political, and social dimensions of EU citizenship. This editor’s hope is that this structure can help clear misunderstandings, bridge outlooks, and suggest new insights into a status that to varying degrees affects everyone in the Union today.

The first part is comprised of three papers dealing with the foundations of EU citizenship: Citizenship as a birthright in a multi-level polity (Bauböck), the shared values required for solidarity (Føllesdal), and the principle that associates citizenship with equality, rather than with identity (Eleftheriadis).

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<sup>8</sup> *Nottebohm Case (Liech. v. Guat.)*, 1955 I.C.J. 4 (April 6); Suzanne Bastide, Comment, *L’affaire Nottebohm devant la Cour Internationale de Justice*, 45 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 607 (1956); J.H. Glazer, *Affaire Nottebohm (Liechtenstein v. Guatemala)*, *A Critique*, 44 GEO. L.J. 313 (1955); Jacques Maury, *L’arrêt Nottebohm et la condition de nationalité effective*, 23 ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 515 (1958); PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 176–81, 318–21 (1979).

<sup>9</sup> THOMAS H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS AND OTHER ESSAYS* (1950). See also *CITIZENSHIP TODAY: THE CONTEMPORARY RELEVANCE OF T.H. MARSHALL* (Martin Bulmer & Anthony M. Rees eds., 1996).

<sup>10</sup> Robert E. Park, *Human Migration and the Marginal Man*, 33 AM. J. OF SOC. 881 (1928); GINO GERMANI, EL CONCEPTO DE MARGINALIDAD: SIGNIFICADO, RAÍCES HISTÓRICAS Y TEÓRICAS, CON PARTICULAR REFERENCIA A LA MARGINALIDAD URBANA 66 (1973).



Rainer Bauböck develops the idea that citizenship, defined as status of membership in a democratic polity, implies that EU citizenship requires a multi-level structure mirroring the type of polity the Union is. This structure requires boundaries to enable the determination of who is included—the long-term stakeholders in the common good of the particular polity—and who is excluded—those who do not have such a stake in that particular polity. Union citizenship is deeply connected to other citizenship statuses at the national and local levels. The basic criterion grounding the boundary-definition all over the world today is birthright—by descent or birth within the territory. But how is this justified? Why is birthright preferred over residence-based membership (*ius domicilii*)? For Bauböck, this concerns cross-generational long-term sources of solidarity and trust in a world where most people are not mobile. In a hyper-mobile world, in contrast, where the majority of the population migrates, *ius domicilii* become the basic principle, but then solidarity and trust become much lower, and democracies need to be re-casted. However, the residence-based criterion is already valid for citizenship acquisition at the local level: Local citizenship status is implicitly based on *ius domicilii*. All residents are consumers of, and contributors to, local public services and have a claim to hold local governments accountable, so they are stakeholders in the local common good. Residential citizenship is sustainable at the local level because it is nested within birthright regimes. Municipalities do not exist on their own; they are embedded within birthright citizenship communities as sub-State communities. As such, all local citizens are birthright citizens of either his or her State of residence or of origin. A question following from this way of casting Union citizenship is whether it can be understood as a post-national form of membership. At the European level, citizenship is strictly derivative of Member State nationality. This derivation is a constitutive feature of the EU polity. According to Bauböck's analysis, as long as EU citizenship remains derivative, Union citizenship cannot be equated to a form of cosmopolitan citizenship, since the latter requires the replacement of birthright citizenship with *ius domicilii* at the EU level.

Andreas Føllesdal investigates the *vexata quaestio* of common values and shared identity as a presupposition for a non-formalist account of European citizenship. There seems to be an increasing need for shared values among those enjoying citizenship in Europe, as nationals of Member States engaged in multi-level governance or as Union citizens. The Euro crisis has boosted the call for such values and underscores how contested they are. What sort of shared European identity is required for EU citizenship to firmly support a sustainable trust in the European political and legal order? What substantive values and beliefs should be shared? Do we need a unique set of values, exclusive among those who share this citizenship? Føllesdal argues that we do need some shared values, and discusses their content here. We do not merely need commitment to principles of legitimacy (human rights and fair distribution) to promote stability, but also a commitment to fundamental conceptions concerning equal citizenship. Citizens must also share a commitment to premises supporting these principles of legitimacy—for example, agreement on a conception of citizens as political equals. The belief, according to which it is necessary to share a “thick European identity”—a set of shared values and cultures—in order to build

trust, is challenged by the fact that many of these values are important historical achievements that are no longer unique to Europe. They are questionable in terms of exclusiveness: Why is it important that non-Europeans have no share in these values? Considering the EU as a (quasi) federation, and looking at the history of federal experiences, the EU is likely to be exposed to certain standard threats. The EU will need to become self-sustaining by creating and maintaining political loyalty among the citizenry; the citizens will have to develop and maintain both a loyalty toward their own State and an “overarching loyalty” toward the federal level of institutions, officials, and fellow citizens. Another set of threats will emanate from the Member States due to the “exit option” and the fact that they are prone to exercise veto power in the EU’s decision-making system. The lessons learned from comparative federal studies bring both good and bad tidings for European citizenship: “Constitutional contestation” is to be expected and underscores the need to boost forms of political trust.

Pavlos Eleftheriadis takes on the challenge of outlining the philosophy underlying EU citizenship. Legal concepts normally have a very strong philosophical background in the history of ideas; for example, human rights, democracy, equality, and rule of law. Is EU citizenship a part of this set of concepts with a thick philosophical background? Eleftheriadis explores this possibility and emphasizes the ways in which EU citizenship differs from how citizenship generally has been conceived. As a legal and moral principle, citizenship is associated with equality rather than with identity. This specific equality has three main aspects: (1) legal equality, being the equal formal status before the institutions of government; (2) political equality, meaning equality in political status—right to vote and stand in elections; and (3) social equality, consisting mainly of (unconditional) social assistance and contribution-based social insurance. The first two elements offer an incomplete depiction of our equal status. Moreover, citizenship also entails duties. Foremost, compliance with civil and criminal procedures, the democratic duty to comply with just as well as unjust laws, and the conscription and payment of taxes benefitting others. The problem is that the aforementioned model does not fit EU citizenship, which fails to meet most of these criteria. There are no direct duties linked to enforcement because all enforcement is performed by the Member States in the EU; citizenship is not attributed directly by the EU; it does not entail full political rights, or full social rights. Yet, this does not imply that a philosophy of EU citizenship cannot be traced. The values supporting EU citizenship must come from a theory of reciprocity, not from a theory of equal status. Reciprocity is conceived here as fairness in the development of a common project. Fairness in cooperation between Member States requires a safety net of solidarity that is acceptable to all, regardless of the respective size and strength of the Member States. And therein lies the rub: Fairness is a great challenge because there is no single political power to deliberate, tax, and distribute within the Union.

Part II of this special issue focuses on the legal dimension of citizenship and its technicalities, perhaps best seen in relation to the frontiers of Union citizenship. Even if EU citizenship has evolved greatly since its introduction, there are flaws and gaps in the

protection of EU citizens. What happens, for instance, if an EU citizen is erased, expelled, or vanishes from a Member State in which he or she is a resident? In principle, Member States are free to withdraw nationality; however, the EU prohibits automatic loss of Union citizenship in the event a Union citizen becomes stateless in cases of loss of nationality. This event, however, has already occurred (e.g., *Rottmann*<sup>11</sup>). Similarly, what happens if a Union citizen, having committed a crime, is deported from his or her country of residence? There is a tension between public security and public policy, and there have been cases (e.g., *Tsakouridis*<sup>12</sup>) in which the CJEU expanded the meaning of public policy in order to cover national security matters more broadly, allowing a Member State to expel citizens. The edges of protection also entail a challenge for testing non-discrimination, as in the case of preferential treatment reserved to mobile “euro-stars” *vis-à-vis* static inhabitants—a path-dependent feature linked to the fact that Union citizenship is entwined with free movement.

Willem Maas explores the possible path-dependent aspects of EU citizenship and underscores the political intentions behind its institution. In fact, the goal of creating European citizens has always been an essential element of the European project, rather than an afterthought accidentally introduced in the Maastricht Treaty. This enables us to better grasp why the legal institution of the status has assumed its specific shape. Maas sets out the origins of Union citizenship and summarizes the evolution of EU citizenship by shedding light on the debates about the proper relationship between human rights (for everyone) and citizenship rights (for EU citizens only), and about the relationship between national and EU citizenship (or national and EU law). It is important to recall that these debates occurred within the context of an ever-expanding scope of EU law. Maas’ focus is on the growth of supranational citizenship rights from workers to movers to citizens; the main idea is that this continuing expansion of Union citizenship should mean the end of reverse discrimination, in which national law disadvantages those who cannot appeal to EU law but must rely solely on national law. Taking a comparative perspective, European citizenship is not *sui generis* or unprecedented, but rather, it should be seen as one manifestation of the ubiquitous tension between unity and diversity, or commonality and difference, a tension present within any political community but manifested most clearly in other federal states characterized by multilevel citizenship. This offers a new perspective on the debates about Union citizenship’s *finalité politique*.

Gerard de Groot and Chun Luk look at a different, but interconnected, set of discriminating features relating to Union citizenship. The derivative status of Union citizenship, fleshed out in Declaration 2 attached to the Maastricht Treaty, evidenced no clear legal bases for the harmonization or unification of the different nationality regimes of Member States, even though we can observe an indirect influence via the CJEU jurisprudence. This case law

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<sup>11</sup> *Rottmann v. Bayern*, CJEU Case C-135/08, 2010 E.C.R. I-1449.

<sup>12</sup> *Baden-Württemberg v. Tsakouridis*, CJEU Case C-145/09, 2010 E.C.R. I-1345.

confirms that autonomy in nationality matters, but also indicates that there are some limits as to what Member States can do, as shown by the judgments in such cases as *Micheletti*,<sup>13</sup> *Kaur*,<sup>14</sup> *Chen*,<sup>15</sup> *Eman and Sevinger*,<sup>16</sup> and *Rottmann*.<sup>17</sup> There are still many legal issues regarding the relationship between nationality of a Member State and EU citizenship. For example, loss of nationality should only be effective after the person has had the possibility to challenge the decision, but this procedural guarantee is not applicable in all Member States. Moreover, allowing some grounds for loss of citizenship to only apply to naturalized citizens constitutes an unjustified discrimination of naturalized citizens versus *ressortissant* by birth. In cases involving loss of nationality, Member States are held to apply the proportionality principle, as well as other general principles of EU law, such as non-discrimination, protection of legitimate expectations, and access to justice. An important challenge today is implementing these general principles in the nationality-regulating legal regimes of Member States. In the event national courts should prove reluctant in this process, one possibility that should be explored is taking such issues to the European Court of Human Rights.

Eva Ersbøll examines the problem of reverse discrimination concerning many Second Country Nationals (SCN) and takes a specifically Nordic perspective. Historically speaking, an interesting parallel is that of the Union citizenship and the Nordic Union citizenship. While it is important for Third Country Nationals (TCN) to acquire the nationality of the Member State where they reside in order to guarantee secure residence status, in general SCNs seem rather indifferent or reluctant to naturalize when moving to another Member State. This reluctance can be traced back to policies adopted by Member States, but is also dependent on a lack of knowledge about Union citizenship rights. Still, EU citizenship is, in certain situations, difficult to reconcile with equality principles and other principles of law generally recognized with regard to citizenship. Suffice it to mention that even Union citizens themselves do not enjoy equal rights. Union citizen rights are determined in light of the fundamental freedom to move and reside freely within the territory of the Member States. Therefore, mobile citizens may enjoy preferential treatment, while static citizens may be subjected to discrimination. These problems are illustrated by several cases brought before the CJEU and a couple of important Danish cases that Ersbøll discusses. There still is a need today to harmonize Member State rules on the acquisition and loss of nationality, as this is necessary in order to resolve the problem of reverse discrimination.

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<sup>13</sup> *Micheletti v. Delegación del Gobierno en Cantabria*, CJEU Case C-369/90, 1992 E.C.R. I-4239.

<sup>14</sup> *The Queen v. Sec'y of State for the Home Dep't, ex parte Kaur*, CJEU Case C-192/99, 2001 E.C.R. I-1237.

<sup>15</sup> *Zhu v. Sec'y of State for the Home Dep't*, CJEU Case C-200/02, 2004 E.C.R. I-9925.

<sup>16</sup> *Eman v. College van Burgemeester*, CJEU Case C-300/04, 2006 E.C.R. I-08055.

<sup>17</sup> *Rottmann*, CJEU Case C-135/08.

The political dimensions of EU citizenship are explored in Part III of this volume. Albert Weale explores the political legitimacy required for functioning welfare regimes currently under stress; Jane Reichel tests the accountability of the composite administration towards citizens; and Agustín Menéndez shows how case law has played a role in furthering the erosion of the political leeway and casts European citizenship as part of the problem rather than the solution.

In order to address the state of EU citizenship twenty years after the Maastricht Treaty, Weale focuses in particular on the legitimization of social citizenship understood as the collective protection against the financial risks associated with the life cycle. This protection takes the form of social rights within the welfare state, including rights to income protection, access to health care, and the provision of education. Social citizenship is, though, politically based. It derives its political legitimacy from the theory of “democratic contractarianism”: An international political contract could provide advantages for participants over and above the outcomes of a system in which Grotian norms—equality of states within the international system and respect for the territorial integrity of states—are respected. According to this perspective, the European Union is a contractual association of contractual associations, a two-level game structure, in which the political representatives of each state simultaneously owe obligations to the political representatives of other states and to their own populations. In order for such an international contract to be stable, states have to be able to make credible commitments to one another—especially about fiscal responsibility—as each state must be able to believe that all other states are capable of delivering on their promises. A necessary condition of this credibility is that states enjoy the confidence of their populations, a form of democratic political legitimacy. Weale’s claim is that a political association at the international level, which goes beyond negative integration, implies a requirement of strengthening domestic democratic legitimacy. The logic of credible commitment leads directly to the domestic conditions of political legitimacy when a two-level game is involved. Since the Eurozone crisis, high rates of unemployment have plagued Europe. These seriously challenge social citizenship. What we need to understand are the ways in which unemployment is related to the political constitution of the EU.

During the twenty years since Union citizenship was introduced in 1993, the constitutional setting of the Union and its relations to the Member States have changed. One aspect of this change within the embedded or “material” constitution is the cooperation between administrative organs within the EU and its Member States. Because she is well aware of the fact that administrative bodies play a key role in contemporary governance, both in policy-making and implementation, Jane Reichel focuses on the political constitution within the administrative setting. The implementation of EU law at the national level has changed from being mainly an issue for the Member States to decide, to becoming an issue of shared responsibility for the EU and the Member States in most sectors of EU law. Communicative channels between EU citizens and the bureaucracy are therefore crucial. One of the reasons for introducing a Union citizenship in the 1993 Maastricht Treaty was to

provide a direct channel between the citizens of the Member States and the EU. Reichel scrutinizes this intense cooperation between EU and national authorities, examining to what extent and how it has provided new sector-specific arenas for participation that may be framed as participative democracy tools, reflecting Article 11 TEU. This is important in order to understand one of the rights under the heading “citizenship” that too often is forgotten: The right to good administration (Article 41 in the Nice Charter). Yet an inherent difficulty with open and participatory decision-making procedures from an accountability point of view is the allocation of powers to the potentially multiple actors involved. In the EU’s heterogeneous administrative model, the boundaries between the European and national bodies, as well as between the private and the public, are quite loose. This may pave the way for soft governance tools rather than distinct legal rules, to the detriment of the citizen who cannot hold decision-makers accountable for regulatory choices. So the introduction of mechanisms of participation and deliberation within the European composite administration cannot in itself be expected to render the regimes legitimate.

Fundamental rights are not only about subjective rights but also about collective goods. This is the starting point of Agustín José Menéndez’s analysis. The discourse of European law has managed to push this distinction out of sight. The European Monetary Union is an asymmetric monetary union based on hollowing out political rights, constraining that which is politically possible. Consider, say, the choice of not printing money as limiting political options. In times of crisis, Member States are left with only two options: Either measures taken within the tax system or the labor market. Thus, the policy option left for a Member State is to erode social rights by necessity—for example, by squeezing wages. Menéndez’s thesis is that Union citizenship has become that which permitted the conversion of economic freedom into the meta-constitutional standards of the EU. The case law of the CJEU on EU citizenship undermines the political and social dimensions of citizenship: Citizenship is now about exercising the basic forms of economic freedom, not about political or social rights. This causes two main problems: First, this creates an asymmetric constitutional position inside the EU by turning EU law into a tool to challenge policy areas—for example, personal taxes—that are not areas in which the EU as a legislative actor is actually able to act, since the competences must be exercised through unanimous voting in the Council. So when the CJEU enters the areas of personal tax law, it produces an irritating and destabilizing effect and no institutional actor can likely re-establish the balance. Second, the case law leads to a judicialization hidden behind proportionality. The latter, in fact, is used to justify a broad range of decisions. Proportionality, though, is not about legitimizing decisions; it is about showing their inner structure.

The inner structure of the policies regarding citizens is also key to understanding the social dimension of Union citizenship. In the last part of this special issue, the social embeddedness of the economic and political prerequisites for a working citizenry is explored. Stefano Giubboni sets out a social conception of citizenship and investigates how Union citizenship lives up to the idea that citizenship needs to be a status of social

integration and the nature of the thorns in the side of inclusiveness. Michelle Everson then further explores features of the idea of social citizenship, and especially modes furthering exclusionary practices. What are the consequences in terms of dehumanization of the idea that citizenry is cast in terms of consumers? Christian Joerges closes this special issue, taking a broad perspective on the European Economic Constitution in which he sees a specific form of power settlement; “authoritarian managerialism” outlines the material constitution of the Union, for example, the realist approach to describing the organization of political and social forces crystallizing into institutional practices. These papers commence from the outlook of conceiving European citizenship as a status of social integration.

Stefano Giubboni’s starting point is the classic definition of “social citizenship” by Marshall,<sup>18</sup> based on the founding idea that social citizenship has to be conceptualized in terms of recognizing a “universal right” to real income which is not proportionate to the market value of the claimant and, at the same time, a system of industrial citizenship based on the organized action of collective labor. This is the achievement of a long series of political struggles and presupposes a double process at the national level: On the one hand, a geographical fusion, or unification of the market and the development of a political belonging within the Nation State, and, on the other hand, a sort of functional separation in the administrative capacity to deal with distribution within the welfare state. These two requirements do not apply to the European context that developed through a radically different evolution: Its geographical fusion only fully applies to the market, while the national welfare states had to remain distinct. Given these very different pre-conditions, how can we define the idea of European citizenship in terms of *statut d’intégration sociale*?<sup>19</sup> Giubboni’s paper tells this story, making the claim that European citizenship offers a kind of transnational social integration, allowing people to enter the redistributive circles within the Members States through free movement. Originally, the idea was to allow workers to fully share in the social fabric of the host Member State and to be assimilated into it through entitlement to the full range of social rights offered by the host Member State to its own nationals. At the same time, however, the territoriality of labor law at the national level was not challenged. The enlargement of the freedom of movement to include economically inactive Europeans implied a shift in the paradigm of social solidarity. This has created an inherent tension between the individual grounds of the status of social integration of the economically inactive nationals of Member States and the collective foundations of the solidarity system of the host Member State. Besides being internally fragile, the social status of European citizenship today is also threatened by external constraints, such as the case of posted workers, whose status is included in the

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<sup>18</sup> MARSHALL, *supra* note 9.

<sup>19</sup> LOÏC AZOULAI, LA CITOYENNETÉ EUROPÉENNE, UN STATUT D’INTÉGRATION SOCIALE, IN CHEMINS D’EUROPE : MELANGES EN L’HONNEUR DE JEAN PAUL JACQUE 1–28 (2010).

protection of free movement of services (not of workers), leading to a gross violation of the equal treatment principle.

National industrial citizenship as embodied in the Marshall paradigm is not merely about inclusion. The other side of the coin speaks of the troublesome language of exclusion. Michelle Everson explores this side in relation to the class schisms within the national setting, within its own internal national narrative. Modern schisms, though, are not necessarily about class, which is destructive of the voice of other groups. In this debate, there is the idea of consumption as a form of citizenship, including as a form of political citizenship. The consumption, or at least our attitude to production at the global level, can overcome the external exclusionary nature of our traditional ideas of citizenship; for example, through the idea that consumers as a group can organize boycotts and force the creation of ethical consumption at the global level. Thus, there is something very progressive in this idea of the market. But, there are also many problems in its entire construct; specifically, there is something about the collective constructed notion of justice that the market has difficulties with. Foucault said there are two traditions of political liberalism:<sup>20</sup> The German and the American tradition. In the first, the concept of the market was balanced and mediated through a political system grounded in the idea of republic. In the second, “anarcho-liberalism” liberates people, not as human beings, but rather within the rationality of the market, which brings to a potential dehumanization of *homo oeconomicus*.<sup>21</sup> The problem with anarcho-liberalism in Europe is that it is similar to a colonizing philosophy that “marketizes” everything, making its inherent bio-power potentially massive. In the anarcho-liberalism paradigm, justice is market justice; therefore, it is at odds with political liberalism focusing on political capacity. The counterpart of this movement in law is law and economics, for example, the promise of a scientific paradigm that informs legal legitimacy with reference to facts. This kind of promise is repeatedly being embodied by the CJEU within the EU: The idea of justice conveyed by many of its recent decisions is no longer the standard of justice created through the legal system, but an immediate form of judicial response to specific circumstances.

Derogation and obsession with single cases also worries Christian Joerges. Failing to make general rules so that each issue must be decided on an *ad hoc* basis is basically failing to make law. This means failing substantially in respecting the very notion of justice. This trait—for example, derogation from law as constituted by general rules—is distinctive of the current Economic Constitution of the Union. In Joerges’ reading, a new regime is emerging that can be labeled “authoritarian managerialism” where the authoritarianism involved depends on the case-to-case basis of intervention of leagues of executives into

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<sup>20</sup> MICHEL FOUCAULT, *BIRTH OF BIOPOLITICS: LECTURES AT THE COLLEGE DE FRANCE 1978–79* (2008).

<sup>21</sup> Compare *id.* with Michelle Everson, *The Fault of (European) Law in (Political and Social) Economic Crisis*, 24 L. & CRITIQUE 22 (2013).



the legislative realm. His analysis starts from the observation that one of the main critiques of the European project is the predominant role of economy in its architecture. The assumption of the “naturalness” of market society had been an early object of criticism in Karl Polanyi’s *The Great Transformation* from 1944,<sup>22</sup> where Polanyi claimed that market-making is not an evolutionary process, but occurs through political planning and decisions. He stressed the social embeddedness of economy and criticized the subjection to market discipline of three specific products, which he called “false commodities”: Money, labor, and land. In the Union today, we have a new common commitment to budgetary discipline, which appears to be the new fundamental value of the EU, a new instruments of economic governance, and a new national commitment: The strengthening of competitiveness through social austerity. On the whole, this makes up a new regime that can be defined as “authoritarian managerialism.” Its basic trait is derogation from law as constituted by general rules. In fact, it gives the European authorities the power to look into the national economies, to offer advice, and to implement that advice and do it on a case-by-case basis, no longer on the basis of a general rule. Europe thus lies in the shadow of Carl Schmitt, who famously claimed in 1936 that legislative delegations tend to escape control. By comparing France, the UK, and Germany, he observed this behavior in all the aforementioned countries, foreseeing that the next step would have been governments taking on legislative tasks.<sup>23</sup> This is what has happened within the European machinery as well, where an increasing and scarcely controllable power of governance is steadily developing. This paper fleshes out this claim and explains why the original idea of “integration through law” was both about peace and about economic power. It amounted to the idea of constructing an economic order in which the States could live together under the rule of law, peacefully co-existing. The paper reaches the conclusion that it is difficult to see, at present, how the current regime and the commitment of Europe to rule of law and democracy can be made compatible.

Yet, contemporary democracy is composed of three pillars which need to be reconciled: The rule of law, the democratic state, and the social state. Therefore, it is paramount to any solution that the citizen, who is “the simple element of a polity,”<sup>24</sup> as Aristotle once put it, is recognized in its constitutive three dimensions: The legal, the political, and the social. These offer different perspectives on citizenship and emphasize different fundamental problems. Obviously, “different” does not mean “incommensurable” and the basic issues (social cohesion, legitimacy, and rule of law) are all unquestionably necessary elements for enabling peaceful living. Yet, one should not forget that in accordance with the field of investigation chosen, the type of “citizenship” varies and so do the procedures and methods for acting in response to the problem. The *ratione personae* will, perhaps,

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<sup>22</sup> KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* (1944).

<sup>23</sup> CARL SCHMITT, *DER HÜTER DER VERFASSUNG* (1931).

<sup>24</sup> ARISTOTLE, *POLITICS* BOOK III § 1274b, 33–42 (H. Rackham trans., Harvard Univ. Press 1944).

vary as well. These three different dimensions continue to live side by side in today's debate, but they need to be bridged. This special issue aims to be a step in that direction.



## Special Issue

### EU Citizenship: Twenty Years On

## The Three Levels of Citizenship within the European Union

*By Rainer Bauböck\**

European Union citizenship is derived from Member State nationality. This fact often has been considered a “birth defect” to be overcome by either disconnecting EU citizenship from Member State citizenship or by reversing the relationship in a federal model so that Member State citizenship would be derived from that of the Union. I argue in this essay that derivative citizenship in a union of states can be defended as a potentially stable and democratically attractive basic feature of the architecture of the EU polity where EU citizenship is perceived of as one layer in a multi-level model of democratic membership in a union of states such as the EU. This perspective is not a defense of the status quo, but rather allows for—or even requires—a series of reforms addressing a number of inconsistencies and democratic deficiencies in the current citizenship regime.

Most academics writing about Union citizenship tend to compare it to that which they know best: Nation State citizenship. It then comes as no surprise when they conclude that the current construction of EU citizenship is internally incoherent, externally not sufficiently inclusive, and also lacking in democratic legitimacy. To a certain degree, I agree with this criticism; however, such authors often apply the wrong standard of comparison and therefore are likely to promote faulty solutions. As the EU Treaties clearly have spelled out since the 1997 Treaty of Amsterdam, EU citizenship is complementary or additional to Member State nationality without replacing it. National citizenship is a constitutive element of EU citizenship and therefore cannot serve as an external standard of comparison.

Scholars have described the EU polity as a multi-layered system of governance and governments for some time now. The EU consists not only of the supranational institutions of the European Commission, the Council, the European Parliament, and the Court of Justice of the European Union (CJEU), but also of the national parliaments and governments of the Member States. There is a corresponding system of multi-level citizenship in the Union that needs to be studied and evaluated as a constellation where individuals have plural memberships and where citizenship regimes are connected with each other across levels.

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### A. Local, National, and Supranational Citizenship

This multi-level perspective avoids regarding EU citizenship as either a post-national alternative to Member State citizenship or as a mere appendix filled with a few additional rights not deserving of the label “citizenship” in the strong sense of a status of equal membership in a self-governing polity.

We neither have to envision a futuristic world nor travel far back in history in order to understand how a multi-level system of citizenship can work. Every larger democratic state already internally contains some type of multi-level citizenship regime. It is true that only a few federal states, such as Austria, Switzerland, and the United States of America, formally acknowledge in their constitutions a citizenship of their provinces or states. Yet even highly centralized states, such as France, have elections for regional assemblies that enjoy a range of devolved decision-making powers. While unitary and federal constitutions differ greatly with regard to the political status and powers of sub-national territories, all democratic states, apart from micro states and city states, are subdivided into municipalities with democratically-elected offices such as local councilors or mayors.

The qualifier “self-governing” polity used in the above definition of citizenship does not refer to sovereignty or independence in external relations to other polities. Instead, it refers to the concept of “popular sovereignty” as the requirement that political authority must be internally authorized by citizens through democratic participation and procedures. This interpretation allows dependent polities to be considered as self-governing even if their powers have been delegated or circumscribed by another level of government. Municipalities may be constitutionally-dependent polities whose powers are determined by higher-level governments such as provinces or sovereign states. Yet, as municipalities have devolved autonomy and democratic elections for local governments, they also have their own citizens.

From a neo-republican perspective emphasizing non-domination,<sup>1</sup> local level citizenship is not only a common feature of contemporary democracies but also a democratic requirement. It makes little difference in a classic liberal view whether all individual rights are guaranteed by a central government in a uniform way throughout a state territory or whether local governments are responsible for protecting some of these rights. A neo-republican emphasis on non-domination adds to this a positive reason for local citizenship. If self-government is considered as an intrinsically important value preventing the domination of citizens by the arbitrary exercise of power, it then is not a trivial or morally neutral question whether local matters are decided by governments accountable to local

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<sup>1</sup> See PHILIP PETTIT, *REPUBLICANISM. A THEORY OF FREEDOM AND GOVERNMENT* (1997); QUENTIN SKINNER, *LIBERTY BEFORE LIBERALISM* (1998).

citizens or by national governments accountable to all national citizens. If central state authorities were in charge of deciding all matters of local government, then representatives of national majorities would unjustly dominate the inhabitants of municipalities.

Conceiving of democratic states as polities with nested layers of local, regional, and state level citizenship is not only a useful analogy for better understanding the EU citizenship constellation, but sub-national citizenships also form an integral part of this constellation. There are not only two, but at least three distinct levels of individual membership in the Union that are universally present throughout the EU polity and include all its resident citizens: local, national, and supranational citizenships.

### **B. Birthright Citizenship at State Level**

If citizenship at its core is a membership status, then the first task when describing this triple level structure is analyzing the rules determining who is a member at each level of the polity. For the national level, such rules are laid down in nationality laws. These laws differ enormously with regard to their specific legal provisions and conditions for acquisition and loss of nationality, not only globally, but also within the EU. Though, once such rules are compared to the rules for determining citizenship in supranational and local polities, it becomes obvious that all nationality laws have a common basic structure and purpose.

A fundamental feature of nationality law in modern states is automatic acquisition of citizenship status at birth, either by descent from citizen parents (*ius sanguinis*) or by birth in the state territory (*ius soli*). These two principles are often contrasted and associated with ethnic and civic conceptions of citizenship respectively. This contrast is exaggerated for two reasons. First, nearly all states combine both principles. The difference is mainly in how much weight each is given. States where *ius soli* dominates domestically, such as the United States, have *ius sanguinis* provisions for the second generation born abroad. And most states where *ius sanguinis* dominates also have domestically *ius soli* provisions for foundlings or children otherwise born stateless. Second, the differences between *ius soli* and *ius sanguinis* in many ways are less interesting than their commonalities. Both confer citizenship at birth or based on circumstances of birth and turn individuals into citizens for an unlimited time that normally is expected to last a whole life. Birthright and lifetime citizenship are remarkable features in the context of liberal democracy because they do not conform to expectations that membership in a liberal polity should be based on individual consent or on inclusion of all who reside in a territorial jurisdiction.

*Ius sanguinis* is often considered as “inherited” citizenship. The metaphor of inheritance, however, is misleading. *Ius sanguinis* citizenship is not analogous to a property inherited at a parent’s death. There is no transaction as with a property previously owned by a parent and subsequently owned by the child. In addition, the acquisition of citizenship by the child

is related to the child's birth rather than the parent's death. A somewhat closer, but still misleading analogy is the idea of inheriting genetic properties. Children "inherit" most of their parents' genes at conception and share these subsequently with their parents. The same could be said about an inherited citizenship status. However, the crucial impact of genetic descent is that it underpins a special relation that children have with their parents, distinguishing them from the children of other parents. By contrast, *iure sanguinis* citizenship establishes a relation of similarity and equality between all children born to citizen parents rather than a special relation between parents and their biological offspring. Citizenship status acquired *iure sanguinis* is a relation of horizontal equality among biologically unrelated individuals whose parents were citizens of the same polity. In this respect, *ius sanguinis* serves exactly the same function as *ius soli*, which establishes the same relation of horizontal equality among those sharing the circumstance of birth in a particular territory.

The acquisition of citizenship by naturalization and the loss of citizenship through renunciation or withdrawal are merely corrective rules serving to resolve marginal discrepancies between a citizenship population determined by birthright and a reference population that states want to exclude or include. The need for such corrective devices arises mainly because of migrations generating non-resident populations with, and resident populations without, birthright citizenship.

Correcting birthright allocation, though, is also necessary when international borders change, either through state breakup and secession or through unification and territorial incorporation. Three different rules have been used for the initial determination of citizenship of populations in newly independent states or incorporated territories: (1) a zero option including all residents at the time of independence; (2) a restoration option referring back to citizenship in an independent predecessor state; and (3) the transformation of a previous federal entity citizenship into that of an independent successor state.

The zero option has been chosen by the vast majority of post-Soviet states which have no prior history of independent statehood. Estonia and Latvia opted for a restoration model excluding most of their large Russian minorities from access to citizenship at independence.<sup>2</sup> In both the violent breakup of Yugoslavia and the peaceful separation of Czechoslovakia, the previously fairly insignificant citizenships of the various federal republics were upgraded into new national citizenships of the successor states. Just as with *ius soli* and *ius sanguinis*, these three rules for determining collective acquisitions of citizenship in new states or territories can in various ways be combined and are mostly implemented together with option rights for a citizenship other than the one assigned through the primary rule.

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<sup>2</sup> William Rogers Brubaker, *Citizenship Struggles in Soviet Successor States*, 26(2) INT'L MIGRATION REV. 269, 277-84 (1992).

It is crucial to understand that only shifting international borders automatically lead to inclusion or exclusion of entire territorial populations. Democratic states with stable borders never include first-generation immigrants without asking for their consent. One might object that there is the exceptional case of co-ethnic immigrants in Germany and Israel who have been automatically naturalized upon entry. However, these groups have been identified as members of the nation prior to immigration. Accepting the invitation to “return” implies consent by the immigrant to acquiring full citizenship status.

Correcting birthright allocation through naturalization therefore requires an individual application, as does voluntary renunciation by non-resident citizens. Involuntary withdrawal of citizenship by the state is sometimes used as a sanction, but may also affect persons who are seen as lacking a genuine link to the state concerned. This is sometimes the case if persons have inherited their citizenship through birth abroad and have never taken up residence in their ancestors’ country of origin. In any case, acquisition and loss of citizenship in democratic states that is not based on birthright is regulated by procedures involving individual consent or qualifications for membership. Thus, primary determinations of citizenship at the birth of both states and individuals are corrected by consent-based secondary determinations for individuals who want to change, or no longer have a claim to retain, their initial citizenship.

What is the purpose of birthright citizenship and how can it be justified? All modern states are constructed as trans-generational political communities and birthright membership is the crucial mechanism supporting their continuity. There are also distinctly democratic reasons for birthright allocation. Governments of independent states wield comprehensive political powers over their subjects and take decisions affecting future generations in important ways. While this may also be true for some powerful non-state actors, such as large corporations, only political governments can be held accountable by and be made responsive to citizens. If all citizens regarded themselves as merely temporary residents living among other temporary residents, then they would have little reason to support long-term decisions for the sake of future generations.<sup>3</sup> Instead of hoping to win a political argument or election, exit would become the preferred response by minorities who regard majority decisions as contrary to their fundamental interests or convictions.

The focus of normative critique therefore should not be on birthright as such, but rather on those rules generating unjustifiable exclusion or over-inclusion. Every birthright regime not properly corrected by fair access to naturalization unjustly excludes first generation immigrants. For similar reasons, an *ius sanguinis*-based regime that automatically includes the children of citizens independently of whether their parents have ever lived in the

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<sup>3</sup> See Rainer Bauböck, *Temporary Migrants, Partial Citizenship and Hypermigration*, 14(5) CRITICAL REV. OF INT’L SOC. & POL. PHIL. 665, 685 (2011).



country is over-inclusive as it turns extra-territorial populations into citizens based on a criterion that does not indicate a genuine link to the polity.

### C. Residential Citizenship at the Local Level

Yet in contemporary states, citizenship at the local level is no longer determined through birthright.<sup>4</sup> Liberal democracies grant internal freedom of movement not merely to their own citizens, but instead to all legal residents in their territory, and local governments provide public services to all those residing within their jurisdiction. It is true that most democratic states still reserve the franchise in local elections to their national citizens. However, national citizens do not have to apply for local naturalization after moving to a different municipality; they are automatically included as local citizens with full participatory rights after a certain period of residence. Moreover, fourteen European states, twelve of which are EU Member States, have fully disconnected local from national citizenship by also enfranchising third-country nationals.<sup>5</sup>

A second type of citizenship regime based on *ius domicilii*, i.e., automatic residential membership, is thus found at the local level. Birthright citizenship at the state level has a sticky quality due to its strong external dimension. It is not lost through emigration and can be passed on to at least the second generation born abroad. This is also a main reason why plural nationality is becoming more frequent. A growing number of children of migrant origin acquire several citizenships at birth. Moreover, an increasing number of states also tolerate dual nationality in cases of naturalization or voluntary acquisition of a foreign nationality. By contrast, local citizenship is fluid and generally singular at any point in time. Taking up residence in another municipality leads to automatic acquisition of a new citizenship and automatic loss of a previous one.

This arrangement can again be supported by democratic reasons. Local governments are responsible for providing public services to local residents and ought to be accountable to these residents. Discrimination on grounds of nationality is arbitrary from the perspective of local self-government. But why do arguments in favor of birthright citizenship not also apply to the local level? The answer is simply that local residential citizenship is not an independent structure. It is nested within a national citizenship regime, so that every local

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<sup>4</sup> This is a relatively recent development. Birthright citizenship in municipalities (*Heimatrecht*) in late 19<sup>th</sup> century Austria and Germany was used to restrict internal migration by denying poverty relief and access to local public services to citizens residing outside their municipality of birth. Switzerland's *Bürgergemeinden*, in which membership is acquired at birth, is a historical remnant of this system. Today's *hukou* system in the Peoples' Republic of China is an extreme case of local birthright citizenship as an instrument of exclusion from social welfare. This is based on *ius sanguinis* so that rural *hukou* status is even inherited by the second generation of migrant-descent born in cities.

<sup>5</sup> See JO SHAW, THE TRANSFORMATION OF CITIZENSHIP IN THE EUROPEAN UNION: ELECTORAL RIGHTS AND THE RESTRUCTURING OF POLITICAL SPACE 77–80 (2007).

citizen is also a member of a trans-generational political community—either as an internal citizen of the encompassing state or as an external citizen of a foreign country.

By considering local and national citizenships as a combined multi-level structure, we can see how these two principles of residence and birthright supplement each other. The long-term perspective of democratic community supported by birthright at the national level provides a stable background for more fluid memberships at the local level. Local citizenships are not for life, and are acquired as easily as they are lost. Mobile individuals will therefore be multiple local citizens sequentially over the course of their lives, but not simultaneously, since local citizenship has only a very weak external dimension.

There is an additional democratic reason for keeping local citizenships singular at any point in time: No citizen should have multiple votes across several sub-state polities because provinces and municipalities are integrated into a common structure of government and democratic representation.

#### **D. EU Citizenship: Derivative Status and Mobility-Based Rights**

Intergenerational and residential citizenships are the two basic regimes found in contemporary democratic polities. EU citizenship represents a third and hybrid type. When asking who are the citizens of the EU, the answer is the nationals of the EU Member States. Individual membership in the EU polity therefore is determined neither by an EU birthright, nor by residence in the EU, but is derivative of Member State nationality. Yet the control that the Member States retain over the acquisition and loss of EU citizenship is exposed to a powerful force operating at a transnational level: The right to free movement inside the territory of the Union. This residential aspect of EU citizenship is not only articulated in the narrowly conceived rights of territorial admission, settlement, and access to employment, but also includes a general right of non-discrimination on grounds of nationality and applies to political rights. EU citizens residing in Member States other than their state of nationality can there participate in local and European Parliament elections.

The derivative nature of EU citizenship is not a historically unique construct. The same citizenship architecture was characteristic for early stages of federal statehood in Germany, Austria, and the United States of America. Switzerland seems to be the only surviving case where federal citizenship is formally derived from cantonal citizenship.<sup>6</sup> In Switzerland, as in the EU, the distinct polities of the union enjoy wide powers of self-determination with regard to naturalization. The important difference is that in Switzerland federal rather than provincial law regulates birthright acquisition and loss of

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<sup>6</sup> See CHRISTOPH SCHÖNBERGER, UNIONSBÜRGER: EUROPAS FÖDERALES BÜRGERRECHT IN VERGLEICHENDER SICHT 122–24 (2005).

citizenship.<sup>7</sup> Member State self-determination in matters of citizenship is therefore stronger in the EU than in any of the historical or contemporary federal nations. Even the much looser union between the Nordic states, after abandoning post-1945 plans for a common Nordic citizenship, engaged its Member States in a harmonization of their citizenship laws so that they would become compatible with free movement rights developed through the Nordic Passport Union.<sup>8</sup> No such coordination has been possible in the EU, although Member States can subvert each other's immigration controls by producing EU citizens with free access to the rest of the Union.

The tension between the strictly derivative nature of EU citizenship and its residence-based free movement rights also generates differential treatment of EU citizens residing in their country of nationality and those residing in another Member State, termed here "first country nationals" (FCNs) and "second country nationals" (SCNs) respectively. The protection of EU citizenship applies in specific ways to those persons who have invoked their free movement rights and those who are involved in cross-border situations in other ways. Such individuals enjoy, for example, extended rights to family migration that most Member States deny their own FCNs who want to invite TCN family members to join them. Such instances of reverse discrimination have been a notorious side effect of a construction of EU citizenship that applies more directly to mobile populations than to sedentary ones. In a series of recent judgments, most prominent among which are the 2010 *Rottmann*<sup>9</sup> and 2011 *Zambrano*<sup>10</sup> cases, the Court of Justice of the European Union has expanded the meaning of cross-border situations to include many that previously were considered to be purely internal. In order to do so, the Court often must apply a twisted logic that derives fundamental rights from a merely potential link with the exercise of free movement.

While free movement generates substantial privileges for SCNs, their most important democratic citizenship rights remain less secure than for FCNs. Although EU citizens residing in other Member States enjoy voting rights in local and EP elections there, SCNs remain excluded from political representation in the national government of their host country, with the exception of Irish citizens in the UK and British citizens in Ireland who can vote in national elections. From a residential citizenship perspective, this is an oddity. One

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<sup>7</sup> In the United States of America, birthright citizenship was established as a federal power through the 14th Amendment of 1868. Withdrawal of citizenship remained largely under the control of state courts and comprehensive protection against denaturalization was only provided by a 1967 landmark decision of the Supreme Court. See *Afroim v. Rusk*, 387 U.S. 253 (1967); PATRICK WEIL, *THE SOVEREIGN CITIZEN: DENATURALIZATION AND THE ORIGINS OF THE AMERICAN REPUBLIC* (2013).

<sup>8</sup> EVA ERSBØLL, *Nationality Law in Denmark, Finland, and Sweden*, in *TOWARDS A EUROPEAN NATIONALITY: CITIZENSHIP, IMMIGRATION AND NATIONALITY LAW IN THE EU* 230, 233–34 (Randall Hansen & Patrick Weil eds., 2001).

<sup>9</sup> *Janko Rottmann v. Freistaat Bayern*, CJEU Case C-135/08, 2010 E.C.R. I-1449.

<sup>10</sup> *Gerardo Ruiz Zambrano v. Office national de l'emploi*, CJEU Case C-34/09, 2011 E.C.R. I-1177.

can hardly argue that the local franchise is necessary in order to prevent SCNs from suffering political disadvantage, while at the same time maintaining that being deprived of the much more important national franchise is an acceptable restriction of their free movement rights.<sup>11</sup>

Finally, EU citizenship generates another highly problematic distinction between mobile European SCNs and TCN migrants. The residential dimension of EU citizenship has imposed a special privilege of local voting rights for SCNs on often-reluctant Member States, such as Austria, France, and Germany, all of which adhere to the constitutional idea of a unitary people consisting of identical members across all levels of the polity. This has led to a distinction between two classes of local citizens that is arbitrary from the perspective of local self-government. More generally, there are now two strongly contrasting approaches to the integration of migrants in the EU. Member States and the EU itself promote active integration policies for TCNs that combine sanctions and tests with affirmative measures, while for intra-EU migrants, a market citizenship logic dictates a *laissez-faire* approach assuming that unconstrained mobility and non-discrimination is all that is needed for social integration.

#### **E. Scenarios for Rectifying the Deficits of EU Citizenship**

Some of these problems could be addressed by weakening the derivative nature of EU citizenship and moving forward on the road towards a fully residential citizenship not only at the local, but also at the supranational level. Allow me to briefly sketch four possible steps on this road.

A first reform would introduce the automatic acquisition of EU citizenship, but not Member State nationality, to long-term resident TCNs. This proposal, which has been occasionally endorsed by migrant lobby organizations, MEPs, and the Committee of the Regions as well as by some scholars, would create two classes of EU citizens: Those for whom this status is derived from their nationality and those for whom it is instead derived from residence. While the reform would lead to more inclusion by providing long-term resident TCNs with local voting rights throughout the EU and all the other privileges of EU citizens, it can hardly be seen as overcoming current concerns in Member States about immigrant integration. Resolving these issues by removing them from the domestic agenda of Member States can only breed further anti-EU resentment among Member State electorates. Finally, this proposal would also remove the most powerful argument for opening access to national citizenship to all long-term resident immigrants. If these immigrants enjoy automatic access to EU citizenship, they will not only lack incentives for

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<sup>11</sup> For a debate on this question, see Rainer Bauböck, Philippe Cayla & Catriona Seth, *Should EU citizens living in other member states vote there in national elections?* (RSCAS Working Paper No. 32, 2012), [http://eudo-citizenship.eu/docs/RSCAS\\_2012\\_32.pdf](http://eudo-citizenship.eu/docs/RSCAS_2012_32.pdf).

naturalization, but will also be perceived as having no substantive claim to full membership and political participation at the national levels.

A second and more radical proposal would address this latter problem for SCNs by abolishing any remaining distinctions between FCNs and SCNs and granting the latter a residence-based franchise in national elections. If this reform were adopted after the first one, it would also benefit TCNs. This move would retain the exclusionary potential of nationality laws in regulating access to EU citizenship, but would effectively eliminate any traces of the derivative nature of EU citizenship with regard to its content of rights, leaving Member State nationality behind as a hard but empty shell.

A third possible reform could then be a response to this outcome that abolishes birthright citizenship in Member States and establishes it instead as the basic principle for determining EU citizenship. All those born in the territory of the EU—with possible conditions for prior parental residence as in all current versions of national-level *ius soli*—and all those born to EU citizen parents outside the territory would automatically become citizens of the Union and of all its Member States. As a consequence, state level citizenship would have to be determined by residence. This move would effectively transform the EU into a federal state and downgrade the Member State citizenship to provincial status.

Finally, we can imagine a utopian fourth step that would abolish birthright citizenship even at the level of the European supranational state and replace it with a uniform rule that in every polity, all those and only those who are long-term residents will be counted as citizens. In contrast to the democracy-based argument in defense of birthright sketched above, some political theorists have argued from a cosmopolitan perspective that birthright citizenship is a major source of violence between states<sup>12</sup> or that it serves to maintain a globally unjust distribution of resources and opportunities.<sup>13</sup> According to this view, the three preceding proposals should be regarded as merely intermediary steps on the road to universal residence-based citizenship.

As my earlier discussion of the conditions for residential citizenship at the local level has made clear, I am not convinced by this project. Its third step, at which the current Union would be replaced by a federal state, cannot be ruled out *a priori*. There may be future economic, political, or military crises that convince Member States of the need for a much deeper political integration. Yet, such a possible response to a life-threatening challenge must not be confused with a hidden *telos* that supposedly pulls the EU towards becoming a federal state, even in the absence of democratic support by its citizens.

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<sup>12</sup> JACQUELINE STEVENS, *STATES WITHOUT NATIONS: CITIZENSHIP FOR MORTALS* (2001).

<sup>13</sup> Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49(2) *THE REV. OF POL.* 251, 252 (1987); AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* 8–13 (2009).

The fourth scenario, in my view, is even more clearly a dystopian rather than a utopian one. It is difficult to imagine how democratic political communities could be formed and maintained without assurances of trans-generational continuity provided by birthright membership. Yet we cannot rule out this possibility on purely normative grounds. In a hypothetical world where most people are migrants living outside their countries of origin for most of their lives, maintaining birthright membership would amount to establishing a tyranny of sedentary minorities over mobile majorities. Current residence would then become the only justifiable basis for linking territorial jurisdictions to populations of citizens. I assume that in this scenario only minimal states could claim legitimate authority. Considerations of social justice that support public systems of education, health, and welfare based on redistributive taxation would find little popular support, and democratic participation would be reduced to a small politically-interested elite. The need for belonging to associations with birthright membership would then not vanish completely, but would probably be articulated through the formation of non-territorial associations based on religion, class, or ethnicity. What I cannot imagine is how democracy as we know it could survive such a radical disconnection between residence-based territorial jurisdictions and birthright-based non-territorial associations.<sup>14</sup>

In today's world, less than 4% of the global population is comprised of international migrants residing for more than twelve months outside their country of birth.<sup>15</sup> Among the 507 million EU residents, 4.1% are TCNs and 2.7% are SCNs.<sup>16</sup> In such a world, instead of dismantling territorial and trans-generational political communities with largely sedentary populations for the sake of promoting geographic mobility, migrants must be enabled to integrate as equal citizens into these polities at all levels.

#### **F. Modest Reforms within the Multi-Layered System**

In conclusion, for the time being, we should explore alternative ways of resolving the deficiencies of EU citizenship. The starting point should be to accept it as a potentially coherent and normatively attractive constellation of three interconnected membership regimes: A birthright-based one at the Member State level, a residential one at the local level, and a derivative regime with residence-based rights at the supranational level. This perspective supports a few modest reforms.

The first would be to extend the local franchise to all residents in all Member States. Instead of deriving the local citizenship and franchise from the national and European

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<sup>14</sup> See *supra* text accompanying note 4.

<sup>15</sup> UNITED NATIONS, INTERNATIONAL MIGRATION REPORT 2006: A GLOBAL ASSESSMENT, E. A. S. A. P. DIVISION (2006).

<sup>16</sup> *EU Citizenship - Statistics on Cross-border Activities*, EUROSTAT (May 19, 2014), [http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php/EU\\_citizenship\\_-\\_statistics\\_on\\_cross-border\\_activities](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/EU_citizenship_-_statistics_on_cross-border_activities).

citizenships, the former would be ultimately based on its own distinct principle of inclusion, a principle already embraced by twelve Member States and implicitly present as well in the local democracy in all other states. The main obstacle for this reform is the constitutional construction of a *unitary demos* across all levels within a state. The anachronistic character of this constitutional conception is also displayed by the fact that campaigns for a local franchise for TCNs have been surprisingly resilient even in France, Germany, and Austria where constitutional courts or councils have blocked reforms.<sup>17</sup>

The second reform would ensure that European citizens residing in other Member States do not lose their representation at national levels. This can easily be achieved by introducing absentee ballots in those few Member States that still have not done so—for example, Ireland and Greece—or by scrapping provisions in other countries—such as the UK and Denmark—that withdraw voting rights after a certain period of residence abroad.<sup>18</sup> Serious concerns in countries with large diasporas that a general right of external voting might impact electoral results too strongly could be taken into account by limiting an absentee franchise to SCNs and excluding emigrants residing in third countries, or by reducing the weight of the external vote by counting it separately for specially reserved seats.<sup>19</sup> There are reasons why external voting has recently become a global democratic standard and these reasons can be decisively reinforced through the imperative that free movement inside the EU must not lead to a loss of democratic representation at any level. A final argument for the external franchise solution rather than the extension of national voting rights to SCNs in their country of residence is that the former reform affirms the derivative nature of EU citizenship that the latter denies.

The third and most important reform would be to coordinate access to EU and national citizenships through some common basic standards for *ius soli* and *ius sanguinis*, for naturalization, renunciation, and withdrawal. Allowing the CJEU to expand the scope of EU citizenship rights while denying the EU any competence to harmonize Member State policies with regard to citizenship status undermines the legitimacy of the Court. It is also likely to create conflicts between states suspecting each other of undermining their immigration control powers, and leaves the EU agendas of harmonizing integration policies

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<sup>17</sup> See Luicy Pedroza, *Citizenship Before Nationality: How Democracies Redefine Citizenship by Debating the Extension of Voting Rights to Settled Immigrants* (2012) (unpublished Ph.D. dissertation, University of Bremen) (on file with author).

<sup>18</sup> On 4 July 2012, the German Constitutional Court abolished the three-month German residence requirement for external voting in German elections. Bundesverfassungsgericht [BVerfG - Federal Constitutional Court], Case No. 2 BvC 1/11, 132 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 39 (Apr. 7, 2012). In the 2013 national elections, German citizens without prior residence in Germany could vote if they could demonstrate some familiarity with German politics and that they were affected by it, see <http://www.konsularinfo.diplo.de/wahlen>.

<sup>19</sup> See Rainer Bauböck, *Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting*, 75(5) FORDHAM L. REV. 2393, 2446 (2007).

towards TCNs and promoting the political participation of SCNs in their host countries radically incomplete.

None of these reforms challenge the derivative nature of EU citizenship or the importance of birthright membership in the Member States that, after all, have created the European Union. These reforms instead make explicit the as of yet underdeveloped multi-level structure of citizenship in the European polity.





## Special Issue

### EU Citizenship: Twenty Years On

## A Common European Identity for European Citizenship?

*By Andreas Follesdal\**

### A. Introduction

Over the past two decades, authors, many of whom are included in this volume, have addressed several salient foundational issues concerning citizenship in Europe. Others in this volume address some of these issues—such as the relationship between national and European citizenship regarded as multilevel (Rainer Baubock and Ulf Bernitz), the relationship between citizenship and legal human rights (Samantha Besson), the relationship between citizenship and political rights in particular (Agustin Menendez and Jo Shaw), and citizenship and social rights (Stefano Giuboni).

This essay elaborates on the need for shared values among those who share citizenship in Europe, as either citizens of Member States engaged in multilevel governance or as Union citizens. The European crisis has increased the call for such values, and also shows that people contest these values. The issues include: What is the responsible exercise of political rights in national elections with repercussions for EU governance, how to trust authorities at all levels concerning human rights, the extent of cross-border solidarity at the risk of free-riders, and the trust that the political and legal order will remain responsive to the best interests of all affected.

To invoke a slightly different issue, what sort of shared European identity is required for Union citizenship to represent part of a sustainable, just European political and legal order? Which substantive values and beliefs should be shared? And is there a need for “unique” values and beliefs, exclusive among those who share citizenship?

This essay addresses the following issues: Section B affirms the need for some shared values; Section C explores aspects of European citizenship such as a shared identity; and Section D denies the need for a shared “thick” cultural identity. Likewise, Section E questions the need for unique values. Finally, Section F points to several challenges concerning identity and citizenship in a Union with asymmetric federal elements, especially when subjected to asymmetric shocks.

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## **B. The Need for Some Shared Values**

There are several reasons to create and maintain some shared values—a collective identity—among Union citizens. Three merit mention here.

### *I. Policies Require Union Citizens to Restrain Their Self-Interest for the Sake of Other Europeans*

Ordinary Union citizens must sometimes refrain from benefits in order to support other members of the Union. For example, the Common Agricultural Policy (CAP, European Commission 2012)<sup>1</sup> gives a large part of the EU's budget to farmers and rural development. Such transfers benefit citizens of some states at the expense of others. The net “givers” must curb their self-interest for the sake of foreigners, and others must trust they will not do so in the future.

### *II. The Losers in Majority Decisions Today Must Obey, and Trust that Future Losers will Comply when Tables are Turned*

In majoritarian decisions, those who find themselves in the minority will not get their will done. Yet, they are expected to comply. Belief that the system is fair could motivate them to comply, as could the belief that they may get their turn when others lose. Others must generally trust the “losers” to follow this motivation, at least as long as the burdens are not too harsh.<sup>2</sup> One way to prevent unreasonable burdens is to have institutions in place that protect human rights.

### *III. Crafters of Legislation and Treaties Must Consider the Interests of Europeans Other than Their Own Electorates*

Individuals must trust EU treaty negotiators, legislators, and domestic and EU officials to not only promote the interests of their own constituency unbridled, but also to consider the interests of other Europeans. Such complex motivations must operate not only when crafting legislation and policies, but also when negotiating treaties. The authorities—and the citizens who vote them into office—must remember other entities' values and commitments. Trust of this commitment highlights a crucial necessity for general compliance.

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<sup>1</sup> EUR. COMM'N, THE COMMON AGRICULTURAL POLICY: A PARTNERSHIP BETWEEN EUROPE AND FARMERS (2012), [http://ec.europa.eu/agriculture/cap-overview/2012\\_en.pdf](http://ec.europa.eu/agriculture/cap-overview/2012_en.pdf).

<sup>2</sup> BRIAN BARRY, *Is Democracy Special?*, in DEMOCRACY AND POWER: ESSAYS IN POLITICAL THEORY 24, 42 (Brian Barry ed., 1991).

To ensure citizens trust each other to the requisite degree, there may have to be some “meta agreement” that constrains political disagreements, framing even those disagreements that concern “constitutional essentials.” For example, about the polity, such as Turkish membership or aspects of the European regime, and the extent of supranational governance.

This meta agreement may find an agreed meta ideology—a consensus of sorts—at least about some procedural aspects, about the values of democratic decision-making, and human rights. But more may also seem desirable. Leaving such details aside, the shared European identity at present appears quite meager. Indeed, insofar as people share few frames of reference in the form of agreement about the polity, we may ask whether a meager identity would suffice. A central question then becomes, of course, suffice for what? Also, what should the base line of comparison be?

For our purposes, it seems especially helpful to draw lessons from comparative federalism on the assumption that the EU will maintain several salient federal, multilevel features.

From the point of view of federal political theory, the EU has several federal elements.<sup>3</sup> One of the central challenges of such political orders is how they merit and facilitate trust and trustworthiness among citizens committed to uphold a normatively legitimate political order. Comparative studies of federalism warn of a higher level of ongoing contestation concerning the constitution and its values and interpretation than in unitary political orders.<sup>4</sup> Stabilizing mechanisms are more important in order to prevent the disintegration of the political order and citizen disenchantment. These stabilizing mechanisms may also have to accommodate and correct great imbalances and conflicts of various kinds. Among the most contentious conflicts are typically the objectives of the federal level. For example, witness in the EU disagreements among Member States about how “deep” the Union should be with regard to such matters as social rights, foreign policy, and monetary and fiscal policies. Ironically, the grounds of shared values and goals may be especially weak in federations, given their frequent genesis as solutions to intractable problems otherwise resolved by a unitary political order. In particular, many scholars underscore the need to develop an overarching loyalty to the federation as a whole, in order to ensure the political order does not disintegrate.<sup>5</sup>

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<sup>3</sup> Andreas Follesdal, *Towards a Stable Federal Finalité with Federal Features? The Balancing Acts of the Constitutional Treaty for Europe*, 12 J. Eur. Pub. Pol’y 572, 572–74 (2005).

<sup>4</sup> MIKHAIL FILIPPOV, PETER C. ORDESHOOK & OLGA SHVETSOVA, *DESIGNING FEDERALISM: A THEORY OF SELF-SUSTAINABLE FEDERAL INSTITUTIONS* (2004); JONATHAN LEMCO, *POLITICAL STABILITY IN FEDERAL GOVERNMENTS* 3 (1991).

<sup>5</sup> JUAN J. LINZ, *Democracy, Multinationalism and Federalism*, in *DEMOKRATIE IN OST UND WEST* 382, 383 (Wolfgang Merkel & Andreas Busch eds., 1999); FILIPPOV, *supra* note 4, at 331.

### C. Some Fragments of a Shared European Identity for Political Trust

For trust among European citizens, I contend it must reside upon three sets of commitments.

#### *I. Commitment to Defer to Authorities—and Laws and Regulations—that Citizens Believe are Legitimate*

First, citizens must have a commitment to their institutions and the decisions and rules that their officials make. In practice, this means that they must generally abide by the laws and other rules that apply to them. In this way, they respect the legitimate expectations of those around them who depend on their compliance.

Citizens must also have reason to believe that others will continue to comply in the future. Such trustworthiness—essential for stability—can be maintained by a publicly-known, generally-shared commitment to comply, for what each person regards as good reasons.

#### *II. Commitment to Principles of Legitimacy for the EU as a Multi-Level Political Order*

Such principles of legitimacy—duly worked out for multi-level political orders—serve several roles in accounting for stability. One role is to provide critical standards for assessing existing, concrete institutions. Another role is to secure some shared bases for compliance with just institutions, since these principles provide justification for such existing institutions.

#### *III. Commitment to Some Premises for Such Principles*

Citizens must also share a third commitment: A commitment to some of the premises that support such principles of legitimacy in turn. That is, a stable political order would seem to first require agreement on a vague conception of citizens as political equals, as equal members of the multi-level political order. To illustrate this commitment, consider John Rawls' suggestion that people should regard social institutions as a system of cooperation among individuals regarded for such purposes as free and equal participants.<sup>6</sup> That particular conception is insufficient for the challenges facing us under globalization, or for the European Union. A second premise may thus be to regard the EU as a complex system of cooperation for mutual advantage among citizens.

A third commitment required to maintain assurance among citizens may be standards for allocating authority among states and EU bodies. State, regional, and global institutions somehow split and share sovereignty. A shared conception of the proper responsibilities of

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<sup>6</sup> JOHN RAWLS, A THEORY OF JUSTICE 15 (1971).

states, regional authorities, and global institutions seems necessary to structure discussions about how to allocate powers between them. One candidate for such allocation is a suitably specified principle of subsidiarity: There is a presumption of local allocation of power, so that the burden of arguments rests with those who want to centralize power.

### 1. *Why Such Commitments?*

To include such more theoretical principles may seem an unnecessary call by theoretically-inclined philosophers. Although there are two reasons for this third kind of commitment. A consensus to support existing institutions and principles of legitimacy presents an insufficient reason to convince others of one's trustworthiness regarding future compliance with these procedures. A person's present compliance and support does not by itself give us reason to trust that he or she will continue to respect the principles of legitimacy. We also need assurance that others regard themselves as having reasons to continue to comply in the future.

Moreover, citizens also need to trust those who will create and modify institutions. That is, citizens must have the ability to trust each other not only when applying shared rules and following existing practices, but also when establishing such institutions, for example when they craft treaties or constitutions. Such tasks must be guided and trusted by others to find guidance in a sense of justice, including a commitment to a shared conception of the equal standing of individuals within the multi-level global political order.

### **D. A Shared Thick European Identity?**

Are these three commitments—including the commitment to international human rights norms—enough of a basis for the sense of community required to sustain a legitimate and sufficiently democratic European order? Critics have worried that it is unrealistic to believe individuals across Europe will act on feelings of solidarity and charity across hundreds of miles.<sup>7</sup> The European-shared culture and common heritage seems too thin to support the required trust, especially when compared to the national heritages bolstering compliance within, say, the European welfare states.<sup>8</sup> There is no “demos” in Europe, no shared sense of destiny, common culture, or broad set of values.

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<sup>7</sup> Ulrich K. Preuss, *Problems of a Concept of European Citizenship*, 1:3 EUR. L.J. 267, 276 (1995).

<sup>8</sup> DAVID MILLER, ON NATIONALITY 67–73 (1995).

*I. Not Necessary for Trust*

Trust does not need a “thick” common basis of shared beliefs, values, and traditions. Most states today are too large to sustain feelings of sympathy even among citizens. There are states whose citizens lack a “thick” shared values and sense of community. Indeed, the search for a common ethnic or cultural base for “belonging” has worried many Europeans in discussions of the desirability of a “Union Citizenship,” due to the memory of past wars based on such grounds.

Instead, a satisfactory account of European citizenship need not build on a broad base of common identity, culture, and history.

The shared motivation may instead be a shared sense of justice and more limited commitments to the equal dignity of all individuals, motivated by either a sense of justice or “a desire . . . to arrange our common political life on terms that others cannot reasonably reject.”<sup>9</sup>

In this view, the motivating force is not a feeling of altruism but rather a sense of justice—a preparedness to comply with those just institutions that apply to us.<sup>10</sup> The duty to honor the legitimate expectations of others, and the sense of justice as it binds us to the institutions that surround us, requires day-to-day compliance with laws and other commands. This is a different motivation for individuals’ compliance than “sentiments of affinity”—the emotional bonds between individuals.

A critical question is whether this inherently “abstract” sense of solidarity based on universalistic principles of social justice can motivate—and be sustained—over time. This worry should be alleviated by considering that existing Nation States are usually too large to foster empathy and sympathetic concern for the well-being of all others.<sup>11</sup> Still, many such states enjoy support from their citizens. The account I sketch assumes this more “impersonal” motivation: A sense of justice and an interest in doing our moral duty and expressing respect for others, rather than a sense of community, “thick” identity, or empathy.

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<sup>9</sup> JOHN RAWLS, *POLITICAL LIBERALISM* 124 (1993).

<sup>10</sup> John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 540 (1980).

<sup>11</sup> Craig Calhoun, *Identity Politics and the Post-Communist Societies*, in *IDENTITY FORMATION, CITIZENSHIP AND STATEBUILDING IN THE FORMER COMMUNIST COUNTRIES OF EASTERN EUROPE*, 1, 3 (ARENA Working Paper No. 20/96, 1996); Robert Goodin, *What Is So Special About Our Fellow Countrymen?*, 98 ETHICS 663, 675 (1988).

### E. The Need for Unique Values Shared Only Among Citizens?

Some prominent contributors to democratic theory insist that the members of the citizenry must share some features unique to them, to the exclusion of others. For example, a national public culture generally shared only by the members.<sup>12</sup> In the European setting, the quest is for shared and unique markers of a European identity. Jürgen Habermas and Jacques Derrida famously dismissed some values and norms central to Europeans, because they had become broadly shared elsewhere:

Haven't the most significant historical achievements of Europe forfeited their identity-forming power precisely through the fact of their worldwide success? And what could hold together a region characterized more than any other by ongoing rivalries between self-conscious nations? Insofar as Christianity and capitalism, natural science and technology, Roman law and Code Napoleon, the bourgeois-urban form of life, democracy and human rights, the secularization of state and society have spread across other continents, these legacies no longer constitute a *proprium*.<sup>13</sup>

They instead list some alternative candidates: The French Revolution, skepticism about market efficiency, trust in state capacity, caution about the role of the state vis-à-vis religion, and the welfare models now secured by European states.<sup>14</sup> In this interpretation, Habermas and Derrida seek unique values or norms, shared only by Europeans. Note that Habermas holds that this interpretation of the text is a misunderstanding. He insists that he is not a "liberal nationalist," but instead defends "the extension of collective political identities beyond the borders of nation-states."<sup>15</sup> This interpretation of Derrida and Habermas does not hold that they defend liberal nationalism, but finds it difficult to interpret Habermas in any other way than that he indeed looks for norms or values that are uniquely the possessions of Europeans. Considering the nominees for alternative exclusive values, two comments are relevant. First, the nominees may be challenged on

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<sup>12</sup> Calhoun, *supra* note 11, at 3; Goodin, *supra* note 11, at 675.

<sup>13</sup> Jürgen Habermas & J. Derrida, *February 15, or What Binds Europeans Together: A Plea for Common Foreign Policy, Beginning in the Core of Europe*, 3 CONSTITUTIONS 291, 294 (2003).

<sup>14</sup> *Id.* at 295–96.

<sup>15</sup> Jürgen Habermas, *The Concept of Human Dignity and the Realistic Utopia of Human Rights*, 41:4 METAPHILOSOPHY 464, 475 (2010).



historical accuracy and normative significance.<sup>16</sup> For instance, surveys such as the European Social Survey show wide divergence among citizens of European and other states as regards trust in their own governments.<sup>17</sup> This trust varies across states and political affinities.<sup>18</sup> Likewise, there is no shared and uniquely European welfare state model distinct from those of Japan, New Zealand, the United States, and other states which Europeans will agree is worth establishing and keeping. Second, it is unclear why these features need to be unique in order to build trust among Europeans. Why should Europeans trust each other more because other citizens do not share certain values?

#### **F. Challenges Concerning Citizenship in the European Union, Considered as a (Quasi) Federation**

Federal arrangements face more constitutional contestation than unitary political orders.<sup>19</sup> These topics of contestation include: Which competences should be enjoyed by central authorities, how Member States should influence such decisions, and sometimes questions of which member units to include in the polity. Insofar as the EU maintains federal features, such constitutional frames will likely remain more contested than in unitary political orders. One example is how to ensure that the European Central Bank remains sufficiently independent in relevant ways, yet under sufficient indirect democratic control. It is not only in the EU that leaders tend to transform and re-frame some policy issues into constitutional ones. This is typical in other federations as well.<sup>20</sup>

The comparative study of political orders with federal features shows that one of their central challenges is to be self-sustaining. They must create and maintain political loyalty among the citizenry both toward their own member unit and overarching loyalty toward the federal level institutions, officials, and citizens.<sup>21</sup> In the EU, one important task is to ensure that Union citizens and political authorities maintain dual political loyalties, both toward compatriots and authorities of their own Member State and overarching loyalty

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<sup>16</sup> Andreas Follesdal, *Universal Human Rights as a Shared Political Identity: Impossible? Necessary? Sufficient?*, 40 METAPHILOSOPHY 65, 72–73 (2009).

<sup>17</sup> European Social Survey, ESS 1–5, European Social Survey Cumulative File, Study Description, Norwegian Social Science Data Services, Data file edition 1.1 (Bergen, 2012).

<sup>18</sup> PIPPA NORRIS, CRITICAL CITIZENS: GLOBAL SUPPORT FOR DEMOCRATIC GOVERNMENT (1999).

<sup>19</sup> JONATHAN LEMCO, POLITICAL STABILITY IN FEDERAL GOVERNMENTS (1991); HERMAN BAKVIS, GERALD BAIER & DOUG BROWN, CONTESTED FEDERALISM: CERTAINTY AND AMBIGUITY IN THE CANADIAN FEDERATION 3–9 (2009).

<sup>20</sup> FILIPPOV, *supra* note 4, at iii–x.

<sup>21</sup> Raymond Breton, *Identification in Transnational Political Communities*, in RETHINKING FEDERALISM: CITIZENS, MARKETS, AND GOVERNMENTS IN A CHANGING WORLD 40, 55 (Karen Knop, Sylvia Ostry, Richard Simeon & Katherine Swinton eds., 1995); Richard Simeon & Daniel-Patrick Conway, *Federalism and the Management of Conflict in Multinational Societies*, in MULTINATIONAL DEMOCRACIES 338, 362 (Alain G. Gagnon & James Tully eds., 2001).

toward the Union citizenry and authorities as a whole. The challenge of building such an overarching loyalty is difficult in many federations but is especially demanding in the EU, which is regarded as a political order with federal elements.

*I. Such "Coming Together" Federations Have Some "Standard" Challenges*

Several joining members have strong and plausible alternatives to agreement, which enhances their national identity and bargaining positions. First, the EU consists of well-established Member States that could, in principle, exist independently, and who have been prepared to bargain even harder about many particular choices.<sup>22</sup> Second, a European party system which can foster cross-cutting loyalties and identities is still underdeveloped at best.<sup>23</sup> Third, a high number of veto points in a complex decision system risks deadlock and a lack of problem-solving ability; thus, the system loses legitimacy in the long run. Fourth, adding to the problem of stasis, in federations, leaders tend to transform and reframe some policy issues into constitutional ones.

For our purposes, we must underscore two central points. "Constitutional contestation" and the lack of a shared political identity will remain high in the EU. Indeed, it may well remain higher there than in "other" federal political orders for several reasons. A further source of potentially destabilizing constitutional contestation is Article 50 of the Treaty of the European Union,<sup>24</sup> which explicitly recognizes Member States' right to withdraw from the Union—unusual in political orders with federal features. With highly relevant foresight, Stepan noted in 1999 that:

The fact that since the French Revolution no fully independent nation-states have come together to pool their sovereignty in a new and more powerful polity constructed in the form of a federation would seem to have implications for the future evolution of the European Union. The European Union is composed of independent states, most of which are nation-states. These states are indeed increasingly becoming "functionally federal." Were there to be a prolonged recession (or a depression), however, and were some EU member states to experience very high unemployment rates in comparison to others, member

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<sup>22</sup> Simeon, *supra* note 21, at 315.

<sup>23</sup> Simeon, *supra* note 21, at 321. *But see* SIMON HIX, WHAT'S WRONG WITH THE EU AND HOW TO FIX IT (2008).

<sup>24</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art. 50, Dec. 13, 2007, 2007 O.J. (C306) 1.

states could vote to dismantle some of the economic federal structures of the federation that were perceived as being “politically dysfunctional.” Unlike most classic federations, such as the United States, the European Union will most likely continue to be marked by the presumption of freedom of exit.<sup>25</sup>

Note that this has some implications for the choice of a baseline to assess the requisite European identity: It is not a zero-sum game vis-à-vis national identity and it is not obvious that either should be dominant overall. Indeed, many citizens in many federal political orders hold dual identities.<sup>26</sup> Perhaps we should not expect all conflicts between these to fade; some tensions may remain between segments of Union citizens.

The second particular source of instability is that the EU is “polycentric” with variable geometry. In such asymmetric federations, political parties correctly disagree about the objectives of the Member States and the central authority. In these federal arrangements, member units have pooled different competences. Citizens and authorities of different member units are correct to claim that the objectives of the central unit are different across the member units. This has been discussed in the study of European integration as a polycentric or variable geometry feature of the EU. One implication is that the conception of European—and EU—identity may well legitimately be different depending on whether the persons’ states are members of Schengen-Europe or of Euro-Europe. This creates different legitimate expectations of solidarity and intervention across Member States, and debates about who must bear the burdens of responses to the Euro crisis. Consider the debates about the root causes of the present Euro crisis and whether solutions should focus on internal adjustment in some Member States or on ways to restructure the *modus operandi* of the European Central Bank.

These comparisons with political orders with federal elements bring both good news and bad news. It is good news because this phenomenon of political instability is not so unique to the EU; in fact, it is typical of political orders with federal elements. The bad news for those concerned with stability is that federal orders also suffer a higher risk of two kinds of instability: They tend toward fragmentation or complete centralization. In short, we should expect the same sort of constitutional contestation for the EU. The asymmetric nature of the EU regarded as a federation—and the asymmetric economic shocks it suffers—increase the need for a shared European identity and shared values, but challenges the prospects of shared conceptions of the objectives of the Union. It is an open question what the shared European identity should consist of and how to assess spreading Euro-scepticism in the Europeanized public spheres about precisely such issues. The Euro regime

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<sup>25</sup> Alfred Stepan, *Federalism and Democracy: Beyond the U.S. Model*, 10 J. DEMOCRACY 19, 33 (1999).

<sup>26</sup> Simeon, *supra* note 21, at 362.

is a particularly vexing challenge, since some—but not all—Member States are directly subject to it, while non-Euro Member States are also drawn into the discussions and may become part of agreed solutions, more or less willing.

Contestation about constitutional frames for the EU is only to be expected. A shared identity and shared values may remain out of reach for a long time, precisely when Europeans need them most.



## Special Issue

### EU Citizenship: Twenty Years On

## The Content of European Citizenship

By Pavlos Eleftheriadis<sup>\*</sup>

### A. The Problem

Many European Union law scholars, commentators and politicians consider the creation of European citizenship by the Treaty of Maastricht an important landmark in the process towards “ever closer union.” By marking a special relationship with the Union itself, citizenship epitomizes the growing maturity of the Union as a political community and not merely an economic project of a single market. Citizenship introduces the first elements of a political, social, and emotional bond between the peoples of Europe and their new Union. Nonetheless, the content of European citizenship remains a puzzle. The rights it grants are very different to those promised by states. When looked at in detail, it fails to match many of the most central elements of citizenship.

One of the problems in this area is that there is no single common core of citizenship rights. State citizenship in general marks a special relationship with a political community marked by a bundle of rights and duties, yet that relationship takes many forms.<sup>1</sup> Some sociological accounts present a model of citizenship with many components *disaggregated* and broken down as overlapping identifications.<sup>2</sup> Nevertheless, even these theories presuppose that the primary case of citizenship is some type of special belonging or attachment to a political community. Multiple national or other identities do not challenge the idea of a special attachment to a single set of institutions. In fact, they presuppose it. A theory of citizenship must explain the content of this special bond between the citizens and his or her political community and must explain whether or to what extent such a special bond has moral value sufficient to create moral obligations on those sharing it.<sup>3</sup>

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<sup>1</sup> A special relationship is assumed by most theoretical approaches, whatever the nuances and transformations resulting under the twin pressures of globalization and mass migration. See, e.g., John G. A. Pocock, *The Idea of Citizenship Since Classical Times*, in *THEORIZING CITIZENSHIP* 29–52 (Ronald Beiner ed., 1995).

<sup>2</sup> See, e.g., Jean Cohen, *Changing Paradigms of Citizenship and the Exclusiveness of the Demos*, 14 *INT’L SOC.* 245–268 (1999).

<sup>3</sup> Pavlos Eleftheriadis, *Citizenship and Obligation*, in *PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW* 159–188 (Julie Dickson & Pavlos Eleftheriadis eds., 2012) (discussing the general issue in detail).

A theory of European citizenship must accommodate the peculiar phenomenon of Union citizenship existing side by side with that of the member states. The Treaty on the Functioning of the European Union provides that “every person holding the nationality of a Member State shall be a citizen of the Union,” yet this status “shall be additional to and not replace national citizenship.”<sup>4</sup> The European bond, therefore, coexists with the continuous bond of the same person with his or her state. But how is it possible that these parallel special bonds do not conflict with each other?

One possible reading is that EU citizenship and national citizenship are complementary. As a citizen of a Member State, one has rights and duties to one’s political community that are distinct from the rights and duties to any other such community. For example, one has a right to elect political representatives, to move about freely without formalities, and to enjoy the benefits of social protection of the welfare state in his or her home state. At the same time, the citizen has duties to obey the law, to serve in the army (wherever there is still conscription), and to pay a share of taxes and social security contributions.

EU citizenship is different. There are few rights and duties connecting European citizens to the European Union itself. The Union does not raise its own taxes, nor does it have its own social welfare arrangements or distributive scheme. All political rights are exercised through the Member States. All social rights are dependent on national schemes. Catherine Barnard summarized the EU’s own arrangements of social policy as a “patchwork,” rather than “a fully-fledged social policy with welfare institutions and cradle-to-grave protection,” because it “makes no provision for what is generally agreed to be the central core of social policy: social insurance, public assistance, health and welfare services, education and housing policy.”<sup>5</sup>

The main content of European citizenship is not, therefore, a complete scheme of political status or social protection, but a certain right to equal treatment by *other* political communities. A citizen of Europe has rights in France or Germany. European Union Citizenship does not signify a special relationship to the European Union in the way that it matches the special relationship signified by domestic citizenship. One is a citizen of Europe, precisely by having a special relationship with the state of national citizenship and associated rights against *other* member states.

This peculiar role for European citizenship is clearly visible in the most central legislation of citizenship and residence. Under Article 3 of the EU Residence Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member State, third country nationals who are family members of a

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<sup>4</sup> Consolidated Version of the Treaty on the Functioning of the European Union art.20, Mar. 9,2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

<sup>5</sup> CATHERINE BARNARD, EC EMPLOYMENT LAW 49 (2006).

Union citizen derive rights to enter and reside in a Member State only if the Union citizen has exercised his or her right of free movement in *another* Member State.<sup>6</sup> Only persons who have exercised movement in the European Union enjoy the right of European Citizenship. The Directive does not apply if the Union citizen remains in the state of his or her citizenship.

It appears, therefore, that paradoxically in EU law the right of citizenship is weaker wherever the bond of community is stronger. This means, for example, that a UK citizen cannot bring her family member into the UK under the Directive—or under European Citizenship *simpliciter*—but can bring them to live with her if she has moved to France, where she is not a citizen. This solution is perfectly understandable under the law of the free movement of persons but sits uneasily with the logic of citizenship. What kind of citizenship grants you more rights abroad than at home?

Advocate General Francis Jacobs described European Citizenship as “a commonality of rights and obligations uniting Union citizens by a common bond transcending Member State nationality.”<sup>7</sup> In the same Opinion, the Advocate General went on to add:

The introduction of that notion was largely inspired by the concern to bring the Union closer to its citizens and to give expression to its character as more than a purely economic union. That concern is reflected in the removal of the word ‘economic’ from the Community’s name (also effected by the Treaty on European Union) and by the progressive introduction into the EC Treaty of a wide range of activities and policies transcending the field of the economy.<sup>8</sup>

The tension between the more political language of citizenship and the economic logic of free movement has been a feature of EU law ever since the Maastricht Treaty. The Court of Justice of the European Union has often said that citizenship is “intended to be the fundamental status of nationals of the Member States,” implying that it does not yet enjoy

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<sup>6</sup> Article 3 states: “This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.”

<sup>7</sup> Criminal proceedings against Horst Otto Bickel and Ulrich Franz, CJEU Case C-274/96, 1998 E.C.R. I-0763, para. 23.

<sup>8</sup> *Id.*



this status.<sup>9</sup> But statements of this kind replace the first paradox with a second. The Court derives rights from a fundamental status that does not yet exist.

These are not just theoretical concerns. They determine the fate of families and individuals whose residence or immigration status is uncertain. They were all thrown into the open in a remarkable series of cases before the European Court of Justice in 2011. In the first case, *Ruiz Zambrano*,<sup>10</sup> the Court dealt with the case of two Belgian children of a Colombian couple of over-stayers. The couple was claiming an EU right to residence in Belgium as family members. Because the children had never been outside Belgium, the Directive did not apply.<sup>11</sup> One would have expected this to be a “purely internal situation,” where Belgian law would dispose of the case. The Court, however, thought otherwise. It repeated the well-known doctrine that “citizenship is intended to be the fundamental status of nationals of the Member States”<sup>12</sup> and concluded that Article 20 TFEU precludes national measures having the effect of depriving citizens of the “genuine enjoyment of the substance of the rights conferred by virtue of that status.”<sup>13</sup> A refusal to grant a right of residence to the parents of those dependent minors would have this effect, namely that the children would be “unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.”<sup>14</sup> Consequently, citizenship does not merely entail the protection of some rights by the enforcement of the correlative duties but, in addition, it protects the “exercise” of the “substance” of those rights.<sup>15</sup>

This odd expression was tested within a few weeks in the case of *McCarthy*, a case where an Irish national who had always resided in the United Kingdom claimed residence rights for her Jamaican husband in the UK on the basis of European citizenship.<sup>16</sup> It was clear that Mrs. McCarthy could not claim rights under the Directive. The Court concluded:

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<sup>9</sup> Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve, CJEU Case C-184/99, 2001 E.C.R. I-6193, para. 31; Baumbast and R v. Secretary of State for the Home Department, CJEU Case C-413/99, 2002 E.C.R. I-7091, para. 82.

<sup>10</sup> Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm), CJEU Case C-34/09, (Mar. 8, 2011), <http://curia.europa.eu/>.

<sup>11</sup> *Id.* at para. 39.

<sup>12</sup> *Id.* at para. 41.

<sup>13</sup> *Id.* at para. 42.

<sup>14</sup> *Id.* at para. 44.

<sup>15</sup> *Id.*

<sup>16</sup> McCarthy v. Secretary of State for the Home Department, CJEU Case C-434/09, (May 5, 2011), <http://curia.europa.eu/>.

In circumstances such as those of the main proceedings, in so far as the Union citizen concerned has never exercised his right of free movement and has always resided in a Member State of which he is a national, that citizen is not covered by the concept of 'beneficiary' for the purposes of Article 3(1) of Directive 2004/38, so that that directive is not applicable to him.<sup>17</sup>

But, in addition, she could not reasonably claim to be "deprived" of the genuine enjoyment of the substance of the rights associated with her status as a Union citizen either because she had never exercised any rights of free movement. The court ruled:

However, no element of the situation of Mrs McCarthy, as described by the national court, indicates that the national measure at issue in the main proceedings has the effect of depriving her of the genuine enjoyment of the substance of the rights associated with her status as a Union citizen, or of impeding the exercise of her right to move and reside freely within the territory of the Member States, in accordance with Article 21 TFEU. Indeed, the failure by the authorities of the United Kingdom to take into account the Irish nationality of Mrs McCarthy for the purposes of granting her a right of residence in the United Kingdom in no way affects her in her right to move and reside freely within the territory of the Member States, or any other right conferred on her by virtue of her status as a Union citizen.<sup>18</sup>

These issues returned in *Dereci*, which concerned five separate cases of third country nationals seeking residence rights in Austria. Here the precise effect of various family relationships were put before the Court.<sup>19</sup> None of these relationships concerned dependent school-age children with their parents. None of them succeeded. Advocate General Mengozzi noted that the *Zambrano* and *McCarthy* cases raised certain questions

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<sup>17</sup> *Id.* at para. 39.

<sup>18</sup> *Id.* at para. 49.

<sup>19</sup> *Murat Dereci and Others v. Bundesministerium für Inneres*, CJEU Case C-256/11, (Nov. 15, 2011), <http://curia.europa.eu/>.

“which could be seen as stumbling blocks, or at least as paradoxes.” Namely, that a citizen can enjoy EU rights of citizenship only if they abandon the state of their citizenship.<sup>20</sup>

The Court’s Grand Chamber in effect embraced these paradoxes by ruling that:

The criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole.<sup>21</sup>

The Court then noted that this criterion is “specific” in that “a right of residence may not, exceptionally, be refused to a third country national, who is a family member of a Member State national, as the effectiveness of Union citizenship enjoyed by that national would otherwise be undermined.”<sup>22</sup> In *Zambrano* Advocate General Sharpston had said that “lottery rather than logic would seem to be governing the exercise of EU citizenship rights.”<sup>23</sup> In spite of the efforts of the ECJ to sort this mess out in *Dereci*, the lottery seems to go on and on.

### B. Embracing the Paradox?

What are we to make of these problems? Some theorists seek to overcome the paradoxes of EU citizenship by referring to the supposed “progressive” evolution of its contents or its inherent dynamic. Armin von Bogdandy, for example, concludes that even though the various principles of EU law are paradoxical, in that they never settle on a consistent scheme of principle between unity and diversity, this is just a “tension” that is normal in any “real” federation.<sup>24</sup> Von Bogdandy concludes embracing and almost praising the indeterminacy of European citizenship:

Carl Schmitt was likely right on one point: substantial stability is largely impossible in a real – that is,

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<sup>20</sup> *Id.* at para. 43.

<sup>21</sup> *Id.* at para. 66.

<sup>22</sup> *Id.* at para. 67.

<sup>23</sup> *Zambrano*, CJEU Case C-34/09 at para. 88.

<sup>24</sup> See Armin von Bogdandy, *Founding Principles*, in *PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW* 11–54 (Armin von Bogdandy & Jürgen Bast eds., 2009). For a similar mood of resignation see also Stefan Kadelbach, *Union Citizenship*, in *PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW* 443–478 (Armin von Bogdandy & Jürgen Bast eds., 2009).

heterogeneous – federation. However, it is more likely that, in a rapidly changing interdependent world, substantial stability is an outdated, illusory, pipedream.<sup>25</sup>

In effect, citizenship for von Bogdandy is not an ordinary legal principle like the principle of freedom from arbitrary arrest whose content is specified and applied by the police and the courts. It is a different kind of legal principle, unstable and open-ended, whose consequences remain obscure. In any event, von Bogdandy argues, the search for concrete constitutional principles is a “pipedream.”

In an equally equivocal discussion, Jo Shaw suggests that European citizenship “has not found a secure and comfortable position in debates about a “new” constitutionalism of the Union.”<sup>26</sup> Nevertheless, Shaw insists, like von Bogdandy, that this is a dynamic process of polity building.

Both arguments, in my view, put the cart before the horse: They assume that state-building is the aim both of the Union and of the idea of citizenship. They then conclude that incoherence is only a temporary problem, until the process of integration catches up with the idea of citizenship. Nevertheless, there is no evidence that EU citizenship in practice has any state-building aims. Shaw and von Bogdandy miss the fact that the incoherence of EU citizenship is internal, it is not the result its mismatch with other EU law doctrines. Even if other areas of EU law completed the process of federation and integration, citizenship would remain internally incoherent. To avoid the incoherence, the law of EU citizenship would have to change itself, for example by abolishing Article 3 of Directive 2004/38.

In fact, the straight comparison of EU citizenship to national citizenship attempted by Shaw and others seems entirely inappropriate. This whole approach has caused great legal uncertainty in litigants in very sensitive cases of immigration, residence and personal status, as is evident from the facts in the cases of *Zambrano*, *McCarthy* and *Dereci* as we have just seen. The future and livelihood of the persons involved in those proceedings depended on a clear application of the principles of citizenship. Insisting on a highly implausible account of citizenship would strengthen the sense of paradox, damage the integrity of European Union law and undermine the credibility of the Court of Justice. It is

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<sup>25</sup> Armin von Bogdandy, *Founding Principles*, in *PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW* 54 (Armin von Bogdandy & Jürgen Bast eds., 2009). Of course, stability can be the result of incoherence. Bad law or corrupt law often fails to surprise those living under it.

<sup>26</sup> Jo Shaw, *Citizenship: Contrasting Dynamics*, in *THE EVOLUTION OF EU LAW* 575, 597 (Paul Craig & Grainne de Burca eds., 2011).

therefore essential for European law to work out a coherent set of principles appropriate to the specific role that Citizenship plays in the Union.

### **C. Citizenship: Egalitarian Rights and Duties**

The idea of citizenship is normally identified with a special sense of formal equality. Becoming a citizen means one stands equal to all other person, at least in all institutional settings. Whatever one's background, family, education or profession a citizen claims equal recognition and equal rights and duties before shared political institutions. This sense of formal equality, enabling anyone to own property, to have a name and identification papers or to bring a claim before a court, is now universally joined by equality in political rights, like the power to vote in elections and the right to be a candidate for political office or join political parties.

In modern Europe, legal and political equality is accompanied by a particular kind of economic equality and a more or less comprehensive protection through social rights. The sociologist T. H. Marshall is famous for bringing these together in a new ideal of citizenship addressing the realities of social class:

Citizenship is a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed. . . . Social class, on the other hand is a system of inequality. And it, too, like citizenship can be based on a set of ideals, beliefs and values.<sup>27</sup>

Marshall has explained how progressively political citizenship has entailed the introduction of social rights:

The components of a civilised and cultured life, formerly the monopoly of the few, were brought progressively within reach of the many, who were encouraged thereby to stretch out their hands towards those that still eluded their grasp. The diminution of inequality strengthened the demand for its abolition, at least with regard to the essentials of social welfare . . . . These aspirations have in part been met by incorporating social rights in the status of citizenship and thus creating a universal right to real income which

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<sup>27</sup> THOMAS H. MARSHALL, CITIZENSHIP AND SOCIAL CLASS AND OTHER ESSAYS 28–29 (1950).

is not proportionate to the market value of the claimant.<sup>28</sup>

Marshall is referring to the social welfare state that European states have created since the Second World War. It is not clear why exactly European states made those reforms but they have made them. Some believe they are the result of nation-building, others see them as the result of pressure from workers' movements. Philosophers now speak of the welfare state as a matter of justice, not simply a matter for satisfying the urgent needs of the poor or even that of building much needed fellow feeling. The social welfare state is a standard element of the European political landscape.<sup>29</sup>

Within the European social model, citizens enjoy free tangible services, such as education and health, as well as payments to support their housing or other needs if they are out of work and do not have sufficient assets. These benefits may take the form of unconditional benefits, or of benefits linked to some work-related insurance scheme.

Citizenship under Marshall's distinctions involves, therefore, three elements: legal status, political status, and social status. All of them entail some kind of equal treatment. First, legal status involves the formal equality of access to property rights and to standing before courts of law. Second, political status involves the equal right to vote and stand for election. Finally, social status involves, in Marshall's own words, "the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society."<sup>30</sup> The various rights are of course interconnected. Marshall wrote, for example, that education is a precondition of civil freedom.<sup>31</sup> Citizenship is then the result of all those comprehensive rights and duties. It is the result of an egalitarian architecture of the state, and of a corresponding constitutional doctrine.

It is evident that European Union citizenship fails in all three ways to match its national counterpart. It does not allocate equal standing to citizens as persons, since this is a matter for domestic constitutional law. It does not award equal political rights to citizens, since this too belongs to state law.<sup>32</sup> Finally, the EU and its institutions do not have the power to

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<sup>28</sup> *Id.* at 29.

<sup>29</sup> For a discussion of Marshall's arguments and their contemporary relevance see John D. Stephens, *The Social Rights of Citizenship*, in *THE OXFORD HANDBOOK OF THE WELFARE STATE* 511 (Francis G. Castles, Stephan Leibfried, Jane Lewis, Herbert Obinger & Christopher Pierson eds., 2010). For an interesting general discussion see STEVEN HILL, *EUROPE'S PROMISE: WHY THE EUROPEAN WAY IS THE BEST HOPE IN AN INSECURE AGE* (2010).

<sup>30</sup> See MARSHALL, *supra* note 27.

<sup>31</sup> *Id.* at 26.

<sup>32</sup> The fact that EU law has nothing to say on the process and conditions for the election of members of the European Parliament is a common theme in the case law of the Court of Justice of the European Union. See, e.g.,

raise its own revenue by way of income tax or corporation tax nor to distribute the benefits and burdens of social life by way of a social welfare state. All these powers rest with the states.

Looked at in this way, EU citizenship is not a principle of equality at all. It is a *moderation* of the inequalities that result from national citizenship. The logic of EU citizenship is entirely different from that of national citizenship.

EU law awards some rights of equality to persons who happen to be under the jurisdiction of another state, as in *Grzelczyk*,<sup>33</sup> *Zambrano*, *Baumbast*,<sup>34</sup> and *Zhu and Chen*.<sup>35</sup> These cases show that the ordinary rights and duties of citizenship are not available to the European citizen. EU law does not award them political or social rights, nor does it impose duties of contribution to the common good. These are things done by the Member States.<sup>36</sup> They are tasks for national welfare systems and schemes of social insurance.

European citizenship creates a more limited obligation to give the *same* social rights to the citizens of the EU that the Member States give to their own nationals. The obligation exists only if the EU citizens have a real link with the host member state. If, for example, a Member State offers inadequate unemployment benefits, which are very low and last only for a few months, and no other support to unemployed families—the situation, for example, currently in Greece—EU citizenship offers, in principle, no remedy.<sup>37</sup> There is no duty of social justice or solidarity under EU citizenship. We must conclude that EU citizenship is not backed by an egalitarian principle, at least not one of common European

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Eman v. College van Burgemeester en Wethouders van den Haag, CJEU Case C-300/04, 2006 E.C.R. I-8055; Le Pen v. European Parliament, CJEU Case C-208/03, 2005 E.C.R. I-6051; Italian Republic and Beniamino Donnici v. European Parliament, CJEU Cases C-393/07 & C-9/08, 2009 E.C.R. I-03679.

<sup>33</sup> *Grzelczyk*, CJEU Case C-184/99.

<sup>34</sup> Ruiz Zambrano v. Office national de l'emploi, CJEU Case C-34/09, 2011 E.C.R. I-01177; Baumbast v. Sec'y of State for the Home Dep't, CJEU Case C-413/99, 2002 E.C.R. I-7091.

<sup>35</sup> Zhu v. Sec'y of State for the Home Dep't, CJEU Case C-200/02, 2004 E.C.R. I-9925.

<sup>36</sup> See, e.g., D'Hoop v. Office national de l'emploi, CJEU Case C-224/98, 2002 E.C.R. I-6191, para. 38; Collins v. Sec'y of State for Work and Pensions, CJEU Case C-138/02, 2004 E.C.R. I-2703, para. 69; Office national de l'emploi v. Ioannis Ioannidis, CJEU Case C-258/04, 2005 E.C.R. I-8275, para. 30; The Queen, on the application of Bidar v. London Borough of Ealing, CJEU Case C-209/03, 2005 E.C.R. I-2119, paras. 55–56. By contrast, in the U.S. such entitlements are automatic with residence. See, e.g., *Edwards v. California*, 314 U.S. 160 (1941); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Saenz v. Roe*, 526 U.S. 489 (1999). See Ann P. van der Mei, *Freedom of Movement for Indigents: A Comparative Analysis of American Constitutional Law and European Community Law*, 19 ARIZ. J. INT'L & COMP. L. 803 (2002).

<sup>37</sup> See, e.g., MANOS MATSAGANIS, *THE GREEK CRISIS: SOCIAL IMPACT AND POLICY RESPONSES* (Friedrich Ebert Stiftung 2013).

application. All social welfare states are national in scope. They only apply within Member States, not in a cross border context.

What does this mean for European Union citizenship? Should we conclude that it is just a slogan empty of meaning? Von Bogdandy and Shaw say almost as much, as we saw above, because they reduce EU citizenship to some kind of equilibrium in giving and taking powers. But if we do not give it any content whatsoever, EU citizenship will just become a label without meaning. European citizenship would thus emerge as the accidental result of the whims of a court or the desires of a legislator.

#### **D. The Ideal of Reciprocity**

We can do better than that. There is no doubt that citizenship in Europe is associated with a comprehensive ideal of social equality. We must articulate this ideal in a way that does not compete with the nature of the European Union as a Union of Peoples, rather than a federal state in the making. European citizenship is a distinct institutional arrangement connected to the same ideal. In the domestic case, social rights may arise out of a principle of distributive justice or simply out of a desire to succeed in nation-building. The historical creation of the European welfare state may well be related to these aims. None of these, however, will work as foundations of European citizenship. The principle of distributive justice is not (yet) accepted for international union, whereas state building is not (yet) in evidence.

We need here to turn here to a third ideal of social equality. This is the principle of contribution or the principle of fairness. A principle of fairness requires that those who receive benefits from a cooperative project to which they willingly participate are under an obligation to share the benefits fairly with the other participants. The principle often manifests itself as reciprocity in contributions, risks, and rewards between persons. The same can apply among Member States and their citizens.<sup>38</sup> Reciprocity means, literally, to reciprocate, to return something the way it came.

The psychological mechanism behind reciprocity is well understood: Reciprocity restores parity between persons. Sociologists discuss reciprocity as a mechanism that ensures social cohesion because it is easy to observe that repeated interactions with others on the basis of mutual exchange of benefits develops trust.<sup>39</sup> Philosophers, on the other hand, have never doubted that reciprocity is an ideal, and have always considered it a secondary matter to promising. Theories of contract, for example, tend to focus on the morality of promising rather than reliance. Although, some of the most sophisticated theories of

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<sup>38</sup> For the way it applies to the European Union, see Andrea Sangiovani, *Solidarity in the EU*, 33 OXFORD J. LEGAL STUD. 1 (2013).

<sup>39</sup> See, e.g., Alvin W. Gouldner, *The Norm of Reciprocity: A Preliminary Statement*, 25 AM. SOC. REV. 161 (1960).



contract insist that active reliance on a promise is something different from simply receiving a promise.<sup>40</sup>

In the philosophical literature, reciprocity commonly refers to the requirement that one returns a benefit they have received from another on account of fairness.<sup>41</sup> In his defense of reciprocity as an ideal of private law, Arthur Ripstein introduces it as follows: “The root idea, fundamental to both fair terms of interaction and the idea of responsibility, is one of reciprocity, the idea that one person may not unilaterally set the terms of his interactions with others.”<sup>42</sup> This is a distinct matter from that of keeping a promise. A promise creates obligations by virtue of itself alone. Reciprocity, by contrast, requires actions. It creates obligations by virtue of rendering a benefit to another, irrespective of a promise.

The economist Serge-Cristoph Kolm, for example, begins his wide-ranging study of reciprocity with a definition that stresses that reciprocity goes beyond a “binding exchange agreement.”<sup>43</sup> Reciprocity applies beyond such agreements, when, for example, no agreement exists or the one that exists has failed to meet a fair measure of equal return among the parties. In those cases, the reason to offer something—or the motivation—is independent of any promise or other undertaking. Some key examples Kolm discusses, for example, are the reciprocity of giving and receiving gifts or reciprocity in family relations.

Reciprocity, thus conceived, has numerous manifestations. It can be just a one-off meeting or a continuing relationship stretching in time. Its motives may be a simple desire to be fair or even a deeper psychological commitment to the wellbeing of another person. For these reasons, reciprocity is mostly associated with the private world and especially with commercial agreements where parties engage with people with whom they do not normally have a special attachment. But political associations are also cooperative ventures, although in a different way. Political institutions are based on mutual forbearance and reciprocal submission to civil authorities.

Philosophers today deploy reciprocity as a political ideal when they discuss the design of a social contract or give a similar egalitarian basis for social life. John Rawls, for example, explicitly connects reciprocity and legitimacy. He has linked the idea of a reasonable person with the recognition of the value of reciprocity: “Reasonable persons [are moved by a desire for] a social world in which they, as free and equal, can cooperate with others on terms all can accept. They insist that reciprocity should hold within that world so that

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<sup>40</sup> See, e.g., Patrick S. Atiyah, *Contracts, Promises and the Law of Obligations*, in *ESSAYS ON CONTRACTS* (1990).

<sup>41</sup> See John Rawls, *Justice as Reciprocity*, in *COLLECTED PAPERS 190* (Samuel Freeman ed., 2001).

<sup>42</sup> ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* 2 (1999).

<sup>43</sup> See SERGE CRISTOPHE KOLM, *RECIPROCITY: AN ECONOMICS OF SOCIAL RELATIONS* 1 (2008) (“Reciprocity is treating other people as other people treat you voluntarily and not as a result of a binding exchange agreement.”).

each benefits along with others.”<sup>44</sup> In light of the disagreements we expect to have with others about the terms of cooperation, legitimate political power of one person over another requires that “our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.”<sup>45</sup> For this view, political power must fulfill a *criterion of reciprocity*. Citizens must reasonably believe that all can reasonably accept a particular set of institutions.

The role of reciprocity in the social contract argument is to stress that the contract metaphor works not because a promise has actually been made. The social contract is not a promise. It is certainly not an enforceable contract. The terms of the hypothetical social contract are those that would have been fair to agree to in common with others, if we had an opportunity to conclude them fairly so as to ensure that they meet the standards of reciprocity. Unfair contracts are, of course, possible. But unfairness is not normally a reason for being excused from compliance. Unfair contracts are binding because the parties agreed. The social contract, by contrast, has not been agreed to. It is not binding because of a promise, but because of its fairness. The social contract metaphor is, thus, deployed to illustrate the ethical bonds of reciprocity, not the effect of consent. This is how a social contract may bind the members of a political community even when it has never been agreed.

The contract metaphor is also, and perhaps more widely, used in the discussion of international legal structures.<sup>46</sup> Here, too, whatever duties there may be under international law are not just the result of consent. There is a great deal of international law that is not treaty based, but custom based or based on general principles of law. International law is therefore not best understood as the creation of the will of states but as a framework with its own validity, derived from the substance of its principles not from the will of its subjects.<sup>47</sup> Moreover, the moral obligation to keep a promise is not sufficient to account for the relative stability of multilateral international obligations, through which states adopt long-term cooperative strategies. Strictly speaking, there are no legally enforceable promises in international law because international law lacks the central mechanisms of enforcement that we find in civil or criminal justice. The stable respect for multilateral treaties that we see in international practice is a moral obligation only on the basis of a presupposed commitment to cooperate. The fact that states keep such

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<sup>44</sup> JOHN RAWLS, *POLITICAL LIBERALISM* 50 (1993).

<sup>45</sup> *Id.* at 137.

<sup>46</sup> See, e.g., Robert O. Keohane, *Reciprocity in International Relations*, 40 INT’L REL. 1 (1986).

<sup>47</sup> For this view of international law, see Ronald Dworkin, *A New Philosophy of International Law*, 41 PHIL. & PUB. AFF. 1 (2013).

multilateral agreements—even when it goes against their narrow self-interest—is an act of good will. Reciprocity over many interactions is thus a much better model for why states obey international law.<sup>48</sup>

It follows that whatever grounds of obligation there may be in international relations, the grounds of promise need to be held alongside the grounds of reciprocity.

### E. Cooperative Agents

Our discussion of reciprocity has suggested a new category of identification in a political community. It encompasses those that are willing participants in a co-operative activity, benefiting or losing through it. Such cooperative agents, I argued, enjoy rights and duties of reciprocity. The ground of these rights and duties is a principle of fairness, or a principle of cooperative justice. Employers or employees, clients, financial intermediaries, or regulators are cooperative agents because they are engaged in cooperative relationships with others under a common scheme of contract, property, and tort law and are enmeshed in a complex web of relations of benefit, loss, and risk. They are, in this sense, cooperative agents connected by ties of cooperative justice.

It is obvious that all economic stakeholders are cooperative agents. There is no nationality or immigration status test. They may well be what EU law calls “third country” nationals.<sup>49</sup> And here lies the significance of economic agency and citizenship. Citizenship assumes some formal recognition. It is based on some act of membership or admission. Cooperative reciprocity, by contrast, is based on active residence alone and does not need any formal inclusion. It arises merely out of participation in the ongoing cooperative activity, merely by some active engagement in some productive role alongside others. It follows that the rights and duties of reciprocity may be more keenly felt by those engaged in these cooperative practices. So an active resident is a stakeholder, an investor in the collective well-being of a community. A citizen may come and go as he or she pleases without losing the rights of citizenship. Going, however, means you lose, in time, the status of active economic agency. Once you lose it, reciprocity does not work.

Citizenship is also distinct from nationality. The most distinguished philosopher of nationality, David Miller, draws a very clear distinction between the rights of nationality and the rights of citizenship, by which he refers to something covering both citizenship and active residence. Miller writes that citizenship is based on reciprocity, not on homogeneity:

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<sup>48</sup> See, e.g., Harold Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997).

<sup>49</sup> European citizenship under EU law excludes them from any EU rights of active residents unless they are family members of EU citizens. National citizenship is used as a filter for EU based rights of economic agency.

[T]o grasp the full force of the obligations of nationality, we need to consider what happens when national boundaries coincide with state boundaries, so that a formal scheme of political co-operation is superimposed on the national community. In this case people will have rights and obligations of citizenship as well as rights and obligations of nationality. Rights and obligations of the first kind stem simply from their participation in a practice from which they stand to benefit, via the principle of reciprocity. As citizens they enjoy rights of personal protection, welfare rights, and so forth, and in return they have an obligation to keep the law, to pay taxes, and generally to uphold the co-operative scheme.<sup>50</sup>

Miller's argument is that citizenship and nationality are not identical, even though combining them is helpful for both. The contrast between nationality and citizenship, though, helps us understand that EU citizenship need not be as paradoxical as the orthodox analyses suggest. Reciprocity need not be as exclusive as nationality.

Most analyses of EU citizenship fail to draw these distinctions. They generally collapse being a stakeholder through economic agency and active residence into national membership. It is often assumed in such discussions that duties of social assistance arise only within a homogenous national community. For example, Koen Lenaerts, a judge at the Court of Justice, writes:

Social solidarity is based upon the principle of subsidization, according to which the wealth obtained by certain members of a community is redistributed to those members in need. Social solidarity is thus grounded in the concept of membership of a community.<sup>51</sup>

Lenaerts identifies citizenship with communal membership. He concludes from this premise that "[i]n the EU, the Court of Justice (the 'ECJ') has striven to respect the principles underpinning national welfare systems, notably social solidarity, whilst ensuring that Member States comply with the substantive law of the European Union, in particular

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<sup>50</sup> DAVID MILLER, ON NATIONALITY 70–71 (1995).

<sup>51</sup> Koen Lenaerts, *European Union Citizenship, National Welfare Systems and Social Solidarity*, 18 JURISPRUDENCIA 397 (2011). See also Koen Lenaerts & Tinne Heremans, *Contours of a European Social Union in the Case-Law of the European Court of Justice*, 2 EUR. CONST. L. REV. 101 (2006).

with the Treaty provisions on the fundamental freedoms and EU citizenship.”<sup>52</sup> But this obscures the important distinctions between citizenship, nationality, and cooperative agency.

Similarly, Dougan and Spaventa write that social solidarity “only derives from the existence of a common identity, forged through shared social and cultural experiences, and institutional and political bonds.”<sup>53</sup> Nevertheless, the argument from fairness and cooperative justice shows that there is no reason why solidarity needs to be tied to this type of membership.

In fact, it is precisely this confusion between membership and economic agency that leads to the paradox of EU citizenship. The paradox is generated by the failure to see that the nationals of the European Union do not derive a separate status of citizenship from the Union, but only rights under reciprocity, whenever they become active economic agents or stakeholders in another member state. Any theory of EU citizenship must carefully distinguish between national rights of citizenship (rights linked to nationality and membership) and the rights and duties of reciprocity (that result from being a cooperative agent and an effective stakeholder).

The idea of reciprocity helps us understand one of the most important and most interesting cases on European citizenship, that of Mr. Baumbast.<sup>54</sup> In this case, for the first time—and against the contrary submissions of the Commission, the United Kingdom, and Germany—the Court of Justice established the independent status of a right to citizenship in European Union law. Mr. Baumbast was a German national, married to a third country national, who had spent several years as a migrant worker in the United Kingdom but who was no longer employed there. His family was refused renewal of their residence permit in the United Kingdom while he was being employed abroad on the grounds that they could not derive any rights from his rights as a migrant worker or under the then valid residence directives. The Court decided that the citizenship provisions of the Treaty were a sufficient legal basis on their own to ground some rights of residence for Mr. Baumbast and his family.

The Court of Justice ruled that Mr. Baumbast, as a citizen of the European Union who no longer enjoyed a right of residence as a migrant worker, could still enjoy a right of

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<sup>52</sup> Koen Lenaerts, *European Union Citizenship, National Welfare Systems and Social Solidarity*, 18 JURISPRUDENCIA 397 (2011).

<sup>53</sup> Michael Dougan & Eleanor Spaventa, *Wish You Weren't Here . . . New Models of Social Solidarity in the European Union*, in *SOCIAL WELFARE & EU LAW* 181 (Michael Dougan & Eleanor Spaventa eds., 2005).

<sup>54</sup> *Baumbast v. Sec'y of State for the Home Dep't*, CJEU Case C-413/99, 2002 E.C.R. I-7091.

residence by direct application of the then Article 18(1) EC, with an important condition, namely whether he had sufficient means to support his family. This condition is now recast by the 2004 Directive, but the essence of the judgment remains true. But what kinds of rights did Mr. Baumbast enjoy under the status of citizenship and why? If we look more closely, we see that the Court of Justice granted a very specific set of rights. It is not using European citizenship in the way of a set of rights of European membership, nationality, or ethnicity. What Mr. Baumbast receives is conditional on his economic independence. Citizenship or nationality, as a matter of principle, cannot depend on whether one is wealthy or not.

The Court in *Baumbast* was explicitly relying on the provisions of the then valid residence directive and, in particular, the test of being a burden on the social services of the host member state, to establish conditions for citizenship rights. What gave Mr. Baumbast his rights as a European citizenship was not just his German nationality, but, in addition, the fact that he was not taking advantage of other stakeholders in the same political community. In effect he was *respecting* the principle of reciprocity. Without this he would not have enjoyed rights of residence:

As regards the limitations and conditions resulting from the provisions of secondary legislation, Article 1(1) of Directive 90/364 provides that Member States can require of the nationals of a Member State who wish to enjoy the right to reside within their territory that they themselves and the members of their families be covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence... In any event, the limitations and conditions which are referred to in Article 18 EC and laid down by Directive 90/364 are based on the idea that the exercise of the right of residence of citizens of the Union can be subordinated to the legitimate interests of the Member States. In that regard, according to the fourth recital in the preamble to Directive 90/364 beneficiaries of the right of residence must not become an unreasonable burden on the public finances of the host Member State . . . .<sup>55</sup>

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<sup>55</sup> *Id.* at paras. 87–90.

We may read this as meaning that one is an “unreasonable burden” when they are *not* a cooperative agent or stakeholder: When they have not contributed to the economic wellbeing of the community or have stopped doing so.

What decided *Baumbast*, therefore, was neither nationality nor citizenship. It was the fact that Mr. Baumbast’s effective participation in the host country’s economy had created for him rights of cooperative fairness. The rights were claimable against those who had also been cooperative agents in the same society. Mr. Baumbast needed to exercise these rights to fairness because he was finding himself in an awkward no-man’s land in terms of the secondary EU law of free movement (something generally now corrected by the idea of permanent residence introduced by the 2004 the Directive). This is why a general principle had to be put to use.

In effect, the Court in *Baumbast* declares that as a matter of reciprocal arrangement between the Member States, any of their citizens who have been economically active in the EU and are not a burden on social services should enjoy rights of residence. This has now been formalized in the new directive on residence, Directive 2004/38, as we saw above. If you have been economically active, like Mr. Baumbast, in a host member state, you gain rights of residence as long as you do not become an unreasonable burden on others.

A similar principle was stated in the well-known case of *Collins*.<sup>56</sup> In that case, the Court was asked to assess the eligibility for unemployment benefits in the United Kingdom of a jobseeker from Ireland a few days after his arrival. The Court was asked: Under what conditions do European citizens derive rights of social assistance? The Court repeated the well-known principle that nationals of a Member State seeking employment in another Member State may have rights to access to the labor market but not rights to “social and tax advantages.”<sup>57</sup> The Court of Justice held that, while the residence requirement applied by the United Kingdom was indirectly discriminatory, it could be justified if a residence requirement was a necessary and proportionate means to establish a real or genuine link between the jobseeker and the labor market.<sup>58</sup> Such a link is clearly something distinct from nationality or citizenship. *Collins* establishes active economic membership as a test for the rights and duties of cooperative fairness and reciprocity.<sup>59</sup>

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<sup>56</sup> See *Collins v. Sec’y of State for Work and Pensions*, CJEU Case C-138/02, 2004 E.C.R. I-2703.

<sup>57</sup> *Id.* at para. 58.

<sup>58</sup> See *id.* at para. 66.

<sup>59</sup> See *id.* at para. 67.

## F. Conclusion

At the start of this discussion I cited Jacobs's elegant formulation of European citizenship as "a commonality of rights and obligations uniting Union citizens by a common bond transcending Member State nationality."<sup>60</sup> Throughout the essay we have been searching for this common bond. We failed to find it in the idea of a national community. We failed to find it in the formal recognition of citizenship. Instead, we found it in the idea of active economic agency, of being a cooperative agent and a stakeholder in a scheme of cooperation. This creates reciprocal rights and duties under a principle of fairness. This is, in my view, the key to European citizenship. It is a principle of fairness applied to a transnational economic community. Under this principle citizens have rights to equal treatment in other Member States because their own Member States also grant similar rights to the citizens of that other state, under the laws of the internal market. These are rights of equal treatment, requiring European citizens to be treated the way a national would have been treated. They are not self-standing entitlements to membership or participation in a new community or a new social welfare state.

This argument for the content of European citizenship is linked to a much broader general theory of the European Union as an international project. We can understand the European Union as a whole as a relationship of cooperative reciprocity among its Member States.<sup>61</sup> The members of the Union have arranged their relations on the basis of formal and enforceable public rules, the EU treaties that determine in advance what they can expect from each other. They are thus bound by the four freedoms, competition law, internal market law, and other areas of EU policy. Uniquely, however, they have also created two supranational—or transnational—institutions, the Court of Justice and the European Commission, which have the task of overseeing the compliance of everyone, large or small, strong or weak, with EU law. The two institutions are expected to give effect to a program of principled reciprocity among the Member States. Their roles complement each other and reinforce each other's independence. Through them the states achieve a different kind of reciprocity: What the Commission and the Court come to decide, either as a legislative proposal or as a judicial decision, comes to unite the Member States on the basis of stable arrangements of mutual respect. There is similarity between what I have called principled reciprocity and what Robert O. Keohane called *diffuse reciprocity* in international relations:

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<sup>60</sup> Advocate General Jacobs went on to add: "The introduction of that notion was largely inspired by the concern to bring the Union closer to its citizens and to give expression to its character as more than a purely economic union. That concern is reflected in the removal of the word 'economic' from the Community's name (also effected by the Treaty on European Union) and by the progressive introduction into the EC Treaty of a wide range of activities and policies transcending the field of the economy." Bickel and Franz, CJEU Case C-274/96, para. 23, (Nov. 24, 1998), <http://curia.europa.eu/>.

<sup>61</sup> See Andrea Sangiovanni, *Solidarity in the EU*, 33 OXFORD J. LEGAL STUD. 1 (2013).



In situations characterized by diffuse reciprocity, by contrast, the definition of equivalence is less precise, one's partners may be viewed as a group rather than as particular actors, and the sequence of events is less narrowly bounded. Obligations are important. Diffuse reciprocity involves conforming to generally accepted standards of behavior.<sup>62</sup>

Even though the Member States have not dissolved their institutional or judicial systems, they offer the Commission and the Court unconditional power to interpret and apply EU law with both international and domestic legal effects. These common institutions have made European citizenship possible.

It follows that reciprocity applies in two different ways in the European Union. First, it applies internationally in the relationships between the Member States. But it also applies transnationally, in the relations between states and the citizens of other states. European citizenship is the term we use to describe the set of transnational rules of reciprocity in the EU. It is an expression of transnational solidarity. Each state opens its borders to the goods, services, and workers of other states by virtue of the free movement provisions of the treaties. But it also opens up its borders to citizens, on the basis of the principle of citizenship in cases such as *Zambrano*, *Baumbast*, and *Martinez Sala*.<sup>63</sup> If this argument is correct, then the key to European citizenship is transnational reciprocity and a very specific sense of transnational solidarity. Transnational solidarity is an obligation of fairness between Member States that are engaged in a cooperative activity, each having a claim to a fair share of risks, losses, and benefits for themselves and their peoples. Fairness in cooperation between the Member States requires a safety net for individuals, such that would have been acceptable to all members, if they did not know in advance their respective size and strength and their precise risks of failure.

When we seek to understand European citizenship we should not just look for progressive similarity between national and European rights. Instead, European Union citizenship is best understood as a form of transnational solidarity which gives effect to the moral responsibilities of Member States and their peoples under a principle of fairness.

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<sup>62</sup> Robert O. Keohane, *Reciprocity in International Relations*, 40 INT'L REL. 4 (1986).

<sup>63</sup> See also Catherine Barnard, *EU Citizenship and the Principle of Solidarity*, in SOCIAL WELFARE & EU LAW 157 (Michael Dougan & Eleanor Spaventa eds., 2005).

## Special Issue

### EU Citizenship: Twenty Years On

## The Origins, Evolution, and Political Objectives of EU Citizenship

By Willem Maas<sup>\*</sup>

### A. Introduction

Within this collection flowing from the “European Citizenship: Twenty Years On” conference, this article has three functions: first, explain the political origins of a common supranational citizenship in Europe; second, summarize the evolution of EU citizenship by illustrating the debates about the proper relationship between human rights (for everyone) and citizenship rights (for EU citizens only) and about the relationship between national and EU citizenship (or national and EU law), debates occurring within a context of the ever-expanding scope of EU law; third, provide a new perspective on the debates about EU citizenship’s *finalité politique* or political objectives by placing EU citizenship in a comparative perspective. The main argument of the first section is that the goal of creating European citizens has always been an essential element of the European project, rather than an afterthought accidentally introduced in the Maastricht Treaty. Hence the conference title of “Twenty Years On” is flawed; “Sixty Years On” (dating the genesis of European citizenship not to the 1990s but rather, correctly, to the 1950s) would be more appropriate. This article’s second section describes the expanding scope and growth of supranational citizenship rights from workers to movers to citizens; the main idea is that this continuing expansion and growth of EU citizenship should mean the end of reverse discrimination, in which national law disadvantages those who cannot appeal to EU law but must rely on national law. The main argument of the third section is that EU citizenship is not *sui generis* or without precedent but rather should be seen as one manifestation of the ubiquitous tension between unity and diversity, a tension present within any political community but manifest most clearly in political systems (such as the EU and federal states) characterized by multilevel citizenship.

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## B. EU Citizenship's Origins

What is the political objective, or *finalité politique*, of EU citizenship?<sup>1</sup> This question acquires renewed urgency in the current financial and employment crisis period in which the fundamental aims of the European project more generally are being questioned. Raising the notion of *finalité politique*, whether of European integration generally or EU citizenship specifically, evokes the idea of a goal-oriented process and of evolution towards a clear destination or final form. For many in the postwar period and the early years of European integration, this destination was a European federation. In the 1951 Treaty of Paris, the original six Member States promised “to substitute for historic rivalries a fusion of their essential interests; to establish, by creating an economic community, the foundation of a broad and independent community among peoples long divided by bloody conflicts,” and to set up “institutions capable of giving direction to their future common destiny.”<sup>2</sup> This echoed the 1950 Schuman Declaration, which spoke of “common foundations for economic development as a first step in the federation of Europe”; a common market would create “a wider and deeper community” and “lead to the realization of the first concrete foundation of a European federation.”<sup>3</sup>

The idea of a European federation, expressed both in the Schuman Declaration and the Treaty of Paris, was not a fringe viewpoint. Instead, it was the consensus position across the political spectrum, except perhaps for some Communists who preferred integration with the Soviet Union.<sup>4</sup> Establishing a federal Europe was not an international relations

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<sup>1</sup> For a short history of EU citizenship's development, see Willem Maas, *European Union Citizenship in Retrospect and Prospect*, in ROUTLEDGE HANDBOOK OF GLOBAL CITIZENSHIP STUDIES (Engin Isin & Peter Nyers eds., 2014).

<sup>2</sup> Treaty Establishing the European Coal and Steel Community (ECSC) preamble, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter Treaty of Paris].

<sup>3</sup> Schuman Declaration (May 9, 1950).

<sup>4</sup> But achieving it would be difficult. As Jean Monnet wrote,

The fusion of the European peoples cannot result from the only road we are following. In the limited domains of coal and steel-atomic we seek full delegation of national powers to a supranational organization which will make decisions and be subject to controls that are also supranational. But the rest of the economy remains outside these actions. The Common Market itself is a sector as the general conduct of economic affairs—growth, taxes—remains national. The sentiment that their destiny is shared and their prosperity is shared has not been established between the peoples of Europe by the ECSC and will not be by Euratom. How to do it? It is very difficult to find a form that is satisfactory—indeed political—and that is accepted by the parliaments and peoples. We must continue to speak of the Common Market and as far as possible to achieve its beginning at least. But we must find the political

exercise that would be limited to states; the aim was to create a true supranational community in which individual citizens would share a common status and identity. Capturing this spirit, Winston Churchill called for “a European group which could give a sense of enlarged patriotism and common citizenship to the distracted peoples of this turbulent and mighty continent.”<sup>5</sup> In a speech preceding the 1948 Hague Congress, Churchill said,

We hope to reach again a Europe . . . [in which] men will be proud to say ‘I am a European.’ We hope to see a Europe where men of every country will think as much of being a European as of belonging to their native land. . . . [And] wherever they go in this wide domain . . . they will truly feel ‘Here I am at home.’<sup>6</sup>

The Hague Congress also proposed “a European passport, to supersede national passports and to bear the title ‘European’ for use by the owner when travelling to other continents.”<sup>7</sup> In the words of one of the protagonists (the Prime Minister of Belgium), Europe’s political leaders viewed economic integration as an interim step on the way towards a genuine European political community with a common citizenship: “Full well did they measure the

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opportunity that gives these countries of Europe the sense of a common destiny.

Entry in Diary of Jean Monnet (Aug. 5, 1956) (unpublished) (on file with the Fondation Jean Monnet pour l’Europe) (Willem Maas trans.). Grateful thanks to the Fondation Jean Monnet pour l’Europe and its Director, Gilles Grin, for allowing me to consult the archives.

<sup>5</sup> Winston Churchill, Speech Delivered at the University of Zurich (Sept. 19, 1946), in WINSTON CHURCHILL, *THE SINEWS OF PEACE: WINSTON CHURCHILL’S POST-WAR SPEECHES COLLECTION 198–202* (Randolph S. Churchill ed., 1949). In the same speech, Churchill also said:

There is a remedy which, if it were generally and spontaneously adopted, would as if by a miracle transform the whole scene, and would in a few years make all Europe, or the greater part of it, as free and happy as Switzerland is today. What is this sovereign remedy? It is to recreate the European Family, or as much of it as we can, and to provide it with a structure under which it can dwell in peace, in safety and in freedom. We must build a kind of United States of Europe.

*Id.* Churchill added that the “structure of the United States of Europe, if well and truly built, will be such as to make the material strength of a single state less important. Small nations will count as much as large ones and gain their honour by their contribution to the common cause.” *Id.*

<sup>6</sup> Winston Churchill, Speech Delivered to the Congress of Europe (May 10, 1948) (transcript available in the Netherlands National Archives, catalog 2.19.109 Europese Beweging in Nederland en Voorgangers, inv. 95, <http://www.gahetna.nl/collectie/archief/ead/index/eadid/2.19.109#c01:0>).

<sup>7</sup> *Id.*

importance of the economic transformations they had just decided, but in their minds, those transformations, for all their greatness, were merely accessory to, or, at the very least, the first stage of a yet greater political revolution.”<sup>8</sup>

Inspired by such thinking, the key rights of EU citizenship—primarily the right to live and the right to work anywhere within the territory of the Member States—can be traced back to the free movement provisions contained in the Treaty of Paris establishing the European Coal and Steel Community, which entered into force in 1952.<sup>9</sup> The difficulties in reaching a common definition of who would qualify for freedom of movement, and the slow ratification of the intergovernmental agreement after it had finally been reached, may help explain the much stronger free movement provisions of the 1957 Treaty of Rome. This expanded the scope of the free movement provisions and granted the European Commission—rather than the Member States, as was the case with the Paris Treaty—the power and the responsibility to propose measures required to bring about free movement of workers.<sup>10</sup>

Despite the gradual growth of European rights from the 1950s onward, EU citizenship’s legal status was confirmed only in the Maastricht Treaty, which entered into force in 1993.<sup>11</sup> To some extent, this can be seen as a terminological delay. Indeed, Commissioner Davignon argued in 1979 that “the status of ‘Community citizen’ [was] officially recognized from the moment when the Treaties granted rights to individuals and the opportunity of enforcing them by recourse to a national or Community court.”<sup>12</sup>

Regardless of when the concept of EU citizenship is deemed to have gained legal validity, its existence and growth is unmistakably part of the more general process of political integration. In the 1957 Treaty of Rome, member states promised to take “common action to eliminate the barriers which divide Europe” and to work towards an “ever closer union.”<sup>13</sup> Over the course of its more than six decades of political development, there has never been agreement in the European Union and its constituent member states about the *finalité politique* or end goal of integration. Indeed, the aim of an “ever closer union”

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<sup>8</sup> PAUL-HENRI SPAAK, *THE CONTINUING BATTLE: MEMOIRS OF EUROPEAN, 1936–1966* (Henry Fox trans., 1971).

<sup>9</sup> See Willem Maas, *The Genesis of European Rights*, 43 J. COMMON MKT. STUD. 1009–25 (2005).

<sup>10</sup> See *id.*

<sup>11</sup> The Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) [hereinafter Maastricht Treaty]. Article 8 of the Treaty announced: “Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union.” *Id.*

<sup>12</sup> Viscount Étienne Davignon, European Commissioner, Speech Delivered to the European Parliament (1979).

<sup>13</sup> Treaty Establishing the European Economic Community (EEC) preamble, Mar. 25, 1957, 298 U.N.T.S. 3 [hereinafter Treaty of Rome].

remains under threat. In September 2013, British Prime Minister David Cameron proposed deleting the idea of an “ever closer union” from the treaties, reiterating the view of the Dutch government, which had issued a similar call in June 2013:

[C]onvinced that the time of an ‘ever closer union’ in every possible policy area is behind us—as the result of the 2005 referendum on the Constitutional Treaty made clear, the Dutch people were, and still are, discontented with a Union that is continually expanding its scope, as if this were a goal in itself.<sup>14</sup>

It is not surprising that agreement on the aims of European integration is elusive - leaving aside the regular enlargements that have expanded the EU from a cozy club of six western European member states to the current pan-European grouping of twenty-eight member states and counting! Attempting to define the *finalité politique* of EU citizenship is no different from trying to discern the purpose of US or Canadian federal citizenship. In all cases the central citizenship exists in tension with forms of sub-state or subnational political identities, and these decentralized political identities are also represented by their own governments: states in the US, provinces in Canada, Member States in the EU.<sup>15</sup> The next section traces some of the ongoing tensions between efforts to build and strengthen a common EU citizenship and continuing desires for Member State control, focusing on the debates about EU citizenship’s place in the expanding scope of EU law.

### C. EU Citizenship’s Evolution: Workers to Movers to Citizens

In December 1992, just before the entry into force of the Maastricht Treaty and its citizenship provisions, Advocate General Jacobs wrote that

[A] Community national who goes to another Member State . . . [should] be treated in accordance with a common code of fundamental values, in particular those laid down in the European Convention on Human Rights. In other words, he is entitled to say ‘*civis*

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<sup>14</sup> NL ‘Subsidiarity Review’—Explanatory Note, MINISTERIE VAN BUITENLANDSE ZAKEN 1. See *European Where Necessary, National Where Possible*, GOVERNMENT OF NETHERLANDS MINISTRY OF FOREIGN AFFAIRS (June 21, 2013), <http://www.government.nl/ministries/bz/news/2013/06/21/european-where-necessary-national-where-possible.html>; Benjamin Fox, *UK Keen to Delete ‘Ever Closer Union’ From EU Treaty*, EU OBSERVER (Sept. 30, 2013), <http://euobserver.com/political/121607>.

<sup>15</sup> Katherine E. Tonkiss, Experiences of EU citizenship at the sub-national level. in ROUTLEDGE HANDBOOK OF GLOBAL CITIZENSHIP STUDIES (Engin Isin & Peter Nyers eds., 2014).

*europæus sum'* and to invoke that status in order to oppose any violation of his fundamental rights.<sup>16</sup>

Eighteen years later, Advocate General Sharpston took an even more expansive view: "In the long run, only seamless protection of fundamental rights under EU law in all areas of exclusive or shared EU competence matches the concept of EU citizenship."<sup>17</sup>

These two quotations encapsulate much of the longstanding debate about reverse discrimination and the proper relationship between EU citizenship and fundamental or human rights.<sup>18</sup> They also illustrate a gradual expansion of the scope of EU law, from a focus on those who move from one Member State to another to a focus on all EU citizens, coupled with a continuing debate about the appropriate extent and magnitude of the fundamental rights protected by Union citizenship.

Free movement is arguably the foundation for all further European rights: "Citizens of one member state who move to another one to take up residence or employment are caught up in the creation of European rights because they are the beneficiaries of free movement, practice it, and push for its expansion."<sup>19</sup> The political development of European rights started with certain categories of workers, then expanded to all workers, to certain categories of non-workers (e.g. retirees, students), and finally perhaps to all citizens.<sup>20</sup>

Until recently, though, the benefits of the EU were available only to those who could appeal to EU law by virtue of crossing from one Member State into another and ceased being in what was termed a "purely internal situation." Reverse discrimination—whereby Member States may treat their own nationals worse than nationals of other Member States by invoking a "purely internal situation" in which European law does not apply—has long been a problem within the European Economic Community turned European Union. Yet introducing Union citizenship alters the status of individuals *vis-à-vis* their governments and implies equality of treatment among citizens. The resulting political dynamics should reduce and ultimately eliminate reverse discrimination.

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<sup>16</sup> Christos Konstantinidis v. Stadt Altensteig - Standesamt and Landratsamt Calw - Ordnungsamt, CJEU Case C-168/91, para. 4 (Dec. 9, 1992), <http://curia.europa.eu/>.

<sup>17</sup> Gerardo Ruiz Zambrano v. Office National de l'Emploi (ONEm), CJEU Case C-34/09, para 170 (Sept. 30, 2010), <http://curia.europa.eu/>.

<sup>18</sup> For a good discussion of reverse discrimination as it relates to family reunification policies, see Anne Staver, *Free Movement for Workers or Citizens? Reverse Discrimination in European Family Reunification Policies*, in *DEMOCRATIC CITIZENSHIP AND THE FREE MOVEMENT OF PEOPLE* 57–89 (Willem Maas ed., 2013).

<sup>19</sup> WILLEM MAAS, *CREATING EUROPEAN CITIZENS* 5 (2007).

<sup>20</sup> See Maas, *supra* note 1; see also *id.*

Reviewing the evolution of reverse discrimination in EU law shows that the “purely internal situation” is ever more limited and its invocation ever more contentious. In international relations, ensuring the application of fundamental rights is a matter of state sovereignty. The limits placed on reverse discrimination are thus simultaneously the limits of Member State sovereignty in the face of European law, particularly the ability of Member States to deny their nationals the rights enjoyed by other EU citizens. EU citizenship’s growth has reinvigorated the longstanding prohibition of discrimination on the basis of nationality, and reverse discrimination becomes a practice that is incompatible with EU citizenship’s commitment to equality.

Certainly, the doctrine of direct effect is important for European rights and does alter the relationship between individuals and Member States. But there was always an economic element, or a link to economic activity, in the cases decided by the European Court, so that prior to the formal introduction of Union citizenship in the Maastricht Treaty the status had no legal standing independent of the economic aims of European integration.<sup>21</sup>

Elsewhere I have argued that the project of European integration has always been about more than economics; it is also about creating a community of people transcending nation states.<sup>22</sup> This argument—which can be characterized as a concern not only with markets but also with rights—does not deny that such non-economic logic is difficult to find before the 1990s in European law and in the cases decided by the Court of Justice.<sup>23</sup> Rather, the idea is that the project of transcending borders and building a European community of people is driven by a shared political commitment independent of any economic rationale.<sup>24</sup>

Advocate General Sharpston’s opinion in the *Ruiz Zambrano* case addresses pointed questions at the persistence of reverse discrimination and sparked significant interest.<sup>25</sup> The case invoked several questions, most notably whether Union citizens enjoy a right of residence in the Member State of nationality irrespective of whether they have previously exercised their European right to move, which traditionally triggered Union law.<sup>26</sup> Sharpston argued that the prohibition of discrimination on grounds of nationality should be interpreted as prohibiting reverse discrimination caused by the interaction between the right to move and reside freely within the territory of the Member States and national law

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<sup>21</sup> WILLEM MAAS, CREATING EUROPEAN CITIZENS, SUPRA NOTE 19.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> See *Zambrano*, CJEU Case C-34/09.

<sup>26</sup> *Id.* at para. 33.



that entails a violation of a fundamental right protected under EU law, where at least equivalent protection is not available under national law.<sup>27</sup>

This argument was grounded on the theory that “transparency and clarity require that one be able to identify with certainty what ‘the scope of Union law’ means for the purposes of EU fundamental rights protection” and the concomitant idea that, “in the long run, the clearest rule would be one that made the availability of EU fundamental rights protection dependent neither on whether a Treaty provision was directly applicable nor on whether secondary legislation had been enacted, but rather on *the existence and scope of a material EU competence*.”<sup>28</sup> In other words, “provided that the EU had competence (whether exclusive or shared) in a particular area of law, EU fundamental rights should protect the citizen of the EU *even if such competence has not yet been exercised*.”<sup>29</sup> The Advocate General refers to the Treaty’s affirmation that the EU “is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights” to argue—and it is noteworthy that here she cites John Locke’s *Two Treatises of Government*—that this:

Treaty guarantee ought not to be made conditional upon the actual exercise of legislative competence. In a European Union founded on fundamental rights and the rule of law, protection should not depend on the legislative initiative of the institutions and the political process. Such contingent protection of rights is the antithesis of the way in which contemporary democracies legitimize the authority of the State.<sup>30</sup>

In framing the question of reverse discrimination in terms of its relationship with EU citizenship, this opinion follows a long line of opinions and rulings emphasizing EU citizenship’s importance,<sup>31</sup> which the Court of Justice has ruled is “destined to be the fundamental status of nationals of the Member States,” conferring on them, in the fields covered by Community law, equality under the law, irrespective of their nationality.<sup>32</sup> Note the important qualifier: equality under the law for Union citizens is limited to fields

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<sup>27</sup> *Id.* at para. 144.

<sup>28</sup> *Id.* at para. 163 (emphasis in original).

<sup>29</sup> *Id.* at para. 163 (emphasis in original).

<sup>30</sup> *Id.* at para. 165.

<sup>31</sup> See generally MAAS, *supra* note 19.

<sup>32</sup> Rudy Grzelczyk v. Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve, CJEU Case C-184/99, 2001 E.C.R. I-6193, para. 31.

covered by Community law. Thus the key question becomes the precise extent of Community law in protecting fundamental rights. Reverse discrimination arose because the Court of Justice did not want to intrude on the prerogatives of Member States in areas outside the scope of Community law.

The Treaty of Rome prohibited any discrimination based on nationality,<sup>33</sup> and as early as the early 1970s the Court was quite clear that any discrimination based on nationality was outlawed “whatever be its nature and extent.”<sup>34</sup> The expansive wording of the prohibition on discrimination based on nationality and its expansive interpretation led many commentators to wonder why the Court was reluctant to apply the prohibition to cases of reverse discrimination.<sup>35</sup>

Indeed, some early commentators concluded (in retrospect, prematurely) that Community law would ensure that reverse discrimination (in French, *des discriminations à rebours*) would not affect the free movement of people because the Court of Justice would be careful to ensure that equal treatment and non-discrimination would be followed.<sup>36</sup>

Against such optimistic expectations, the *Knoors* decision made clear that reverse discrimination would be disallowed only in cases where there was a sufficient connection with Community law.<sup>37</sup> The Court ruled that, although the provisions of the Treaty relating to establishment and the provision of services “cannot be applied to situations which are purely internal to a Member State,”<sup>38</sup> the Treaty’s reference to “nationals of a Member State” who wish to establish themselves in the territory of another Member State:

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<sup>33</sup> See Treaty of Rome art. 7 (“Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.”).

<sup>34</sup> *Marine Labour Code* (Commission v. France), CJEU Case C-167/73, 1974 E.C.R. 373, para. 44.

<sup>35</sup> Thus Schermers notes:

[I]t is striking that the Court has been reluctant until now to apply [the prohibition on discrimination on the basis of nationality] to cases of reverse discrimination to the detriment of the nationals of the Member State concerned. It is unclear how this limitation can be justified both in terms of fairness and of uniform application of Community law, as well as in view of the large wording of EC Article 12.

HENRY G. SCHERMERS, *JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES* 92 (1992).

<sup>36</sup> See Gérard Druesne, *Remarques Sur Le Champ D’application Personnel Du Droit Communautaire: Des «discriminations À Rebours» Peuvent-Elles Tenir En Échec La Liberté de Circulation Des Personnes?*, 15 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 429–39 (1979).

<sup>37</sup> See *J. Knoors v. Staatssecretaris van Economische Zaken*, CJEU Case C-115/78, 1979 E.C.R. 399.

<sup>38</sup> *Id.* at para. 24.

Cannot be interpreted in such a way as to exclude from the benefit of community law a given Member State's own nationals when the latter, owing to the fact that they have lawfully resided on the territory of another Member State and have there acquired a trade qualification which is recognized by the provisions of community law, are, with regard to their state of origin, in a situation which may be assimilated to that of any other persons enjoying the rights and liberties guaranteed by the treaty.<sup>39</sup>

However, the ruling continued, "it is not possible to disregard the legitimate interest which a Member State may have in preventing certain of its nationals, by means of facilities created under the treaty, from attempting wrongly to evade the application of their national legislation as regards training for a trade."<sup>40</sup> In this case, Mr. Knoors, a Dutch citizen wanting to establish himself in the Netherlands after having obtained a professional qualification in Belgium, was subject to Community law. But only individuals with sufficient connection to Community law would be able to avail themselves of these rights.

Similarly to the right of establishment, the right to free movement was restricted to cases involving Community law:

The application by an authority or court of a Member State to a worker who is a national of that same state of measures which deprive or restrict the freedom of movement of the person concerned within the territory of that state as a penal measure provided for by national law by reason of acts committed within the territory of that state is a wholly domestic situation which falls outside the scope of the rules contained in the EEC treaty on freedom of movement for workers.<sup>41</sup>

And as with the right to establishment and the right to free movement, so too family reunification under Community law was restricted. Member State nationals who had not made use of the right of free movement and were thus in a "purely internal situation" could not rely on Community law to obtain a right of residence for their family members:

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at para. 25.

<sup>41</sup> *The Queen v. Vera Ann Saunders*, CJEU Case C-175/78, 1979 E.C.R. 1129, summary.

the Court dismissed the attempt by two Dutch citizens to apply Community law (which extended residence rights to certain family members of a worker who is a national of one member state and employed in another member state) to allow their dependent parents to reside with them, concluding that the “treaty provisions on freedom of movement for workers and the rules adopted to implement them cannot be applied to cases which have no factor linking them with any of the situations governed by community law.”<sup>42</sup>

Reverse discrimination was restricted somewhat by the decision that, in cases of dual or plural nationality, an individual could claim the application of Community law against any Member State of nationality.<sup>43</sup> But it remained striking that “court challenges that would anywhere else have been fundamental rights cases were in Europe cases about economic integration.”<sup>44</sup> This peculiar situation persisted because the jurisprudence was based not on a commitment to upholding fundamental rights but rather on the aim of establishing a free market. This tension between rights and markets continues, as the divergent decisions in the *Ruiz Zambrano* and *McCarthy* cases illustrate.<sup>45</sup>

The announcement in the Treaty of Maastricht that “Citizenship of the Union is hereby established”<sup>46</sup> altered the situation in which legal cases were decided on the basis of an economic connection to European law. Henceforth, a new legal category was created, the category of citizen of the Union. In light of the introduction of Union citizenship, Advocate General Jacobs argued that the right to equality and non-discrimination “raises the expectation that citizens of the Union will enjoy equality, at least before Community law.”<sup>47</sup>

Similarly, Advocate General Colomer argued that the creation of citizenship of the Union “represents a considerable qualitative step forward” because it separates freedom of

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<sup>42</sup> *Morson v. State of the Netherlands and Head of the Plaatselijke Politie* within the meaning of the *Vreemdelingenwet*; *Jhanjan v. State of the Netherlands*, Joined CJEU Cases C-35 & 36/82, 1982 E.C.R. 3723, para. 16.

<sup>43</sup> See *Claude Gullung v. Conseil de l’Ordre des Avocats du Barreau de Colmar et de Saverne*, CJEU Case C-292/86, 1988 E.C.R. 111.

<sup>44</sup> Ian B. Lee, *In Search of a Theory of State Liability in the European Union* (Harvard L. Sch. Jean Monnet, Working Paper No. 9/99, 2000).

<sup>45</sup> See *infra* notes 53–70 and accompanying text.

<sup>46</sup> Maastricht Treaty art. 8.

<sup>47</sup> *Faccini Dori v. Recreb Srl*, CJEU Case C-91/92, para. 53 (Feb. 9, 1994), <http://curia.europa.eu/>; Cf. F.G. Jacobs, *Citizenship of the European Union: A Legal Analysis*, 13 Eur. L.J. 591 (2007).

movement from its functional or economic need and “raises it to the level of a genuinely independent right inherent in the political status of the citizens of the Union.”<sup>48</sup>

Others concur. as Advocate General Kokott has noted, “Union citizens can assert their right to free movement even if the matter concerned or the benefit claimed is not governed by Community law.”<sup>49</sup> Advocate General Mazák agrees: “Union citizenship, as developed by the case law of the Court, marks a process of emancipation of Community rights from their economic paradigm.”<sup>50</sup>

As might be expected, it is not only Advocates General who takes this line of argument. As the Court ruled first in *D’Hoop* and has repeated consistently since:

[Because] a citizen of the Union must be granted in all Member States the same treatment in law as that accorded to the nationals of those Member States who find themselves in the same situation, it would be incompatible with the right of freedom of movement were a citizen, in the Member State of which he is a national, to receive treatment less favorable than he would enjoy if he had not availed himself of the opportunities offered by the Treaty in relation to freedom of movement.<sup>51</sup>

Such cases, while combatting reverse discrimination, continue to be based on the fundamental freedoms (such as freedom of movement) rather than on Union citizenship. The incongruity has led some commentators to advocate eliminating the distinction.<sup>52</sup> The

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<sup>48</sup> The Queen v. Sec’y of State for the Home Dep’t ex parte Shingara and Radiom, CJEU Case C-65/95 & C-111/95, para. 34 (June 17, 1997), <http://curia.europa.eu/>.

<sup>49</sup> Tas-Hagen and Tas v. Raadskamer WUBO van de Pensioen- en Uitkeringsraad, CJEU Case C-192/05, para. 33 (Oct. 26, 2006), <http://curia.europa.eu/>.

<sup>50</sup> Förster v. IB-Groep, CJEU Case C-158/07, para. 54 (Nov. 18, 2008), <http://curia.europa.eu/>.

<sup>51</sup> Marie-Nathalie D’Hoop v. Office National de l’emploi, CJEU Case C-224/98, 2002 E.C.R. I-6191, para. 30. See also, Heikki Antero Pusa v. Osuuspankkien Keskinäinen Vakuutusyhtiö, CJEU Case C-224/02, 2004 E.C.R. I-5763, para. 18; Pirkko Marjatta Turpeinen, CJEU Case C-520/04, 2006 E.C.R. I-10685, para. 20; Herbert Schwarz and Marga Gootjes-Schwarz v. Finanzamt Bergisch Gladbach, CJEU Case C-76/05, 2007 E.C.R. I-06849, para. 88.

<sup>52</sup> Tryfonidou writes:

[T]he situation that now exists, under which there are different Treaty provisions governing the position of Member State nationals (i.e., the fundamental freedoms provisions, on the one hand, and the citizenship provisions on the other) should no longer be maintained; a vast topic which would appropriately form the basis of another

*Ruiz Zambrano* decision prohibited reverse discrimination not only the basis of economic logic (as in the past) but rather on the basis of the fundamental rights attached to Union citizenship.<sup>53</sup>

Thus there is a need to delimit the scope of the fundamental rights attached to EU citizenship: EU citizens enjoy such a wide assortment of sources of rights that it is not clear what kinds of cases would not fall under some sort of fundamental right. Relevant for this problem is the discussion by Advocate General Poiares Maduro in *Centro Europa 7*.<sup>54</sup> Poiares Maduro recalls arguments for extending the Court's role in reviewing Member State measures to assess their conformity with fundamental rights, starting with Advocate General Jacobs's view that any national of a Member State who pursues an economic activity in another Member State may, as a matter of Community law, invoke the protection of his fundamental rights.<sup>55</sup> Noting that the Court did not follow this suggestion, Poiares Maduro nevertheless suggests that all now share:

[T]he profound conviction that respect for fundamental rights is intrinsic in the EU legal order and that, without it, common action by and for the peoples of Europe would be unworthy and unfeasible. In that sense, the very existence of the European Union is predicated on respect for fundamental rights. Protection of the 'common code' of fundamental rights accordingly constitutes an existential requirement for the EU legal order.<sup>56</sup>

He continues that, while the Court of Justice does not have jurisdiction to review any national measure in the light of fundamental rights, it does have "jurisdiction to examine whether Member States provide the necessary level of protection in relation to fundamental rights in order to be able adequately to fulfill their other obligations as

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extensive study and therefore will not be further discussed in this work.

ALINA TRYFONIDOU, REVERSE DISCRIMINATION IN EC LAW 160–61 (2010).

<sup>53</sup> See *Gerardo Ruiz Zambrano v. Office National de l'emploi*, CJEU Case C-34/09, 2011 E.C.R. I-01177.

<sup>54</sup> See *Centro Europa 7 Srl v. Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni*, CJEU Case C-380/05 (Sept. 12, 2007), <http://curia.europa.eu/>.

<sup>55</sup> See *Centro Europa 7 Srl v. Ministero delle Comunicazioni e Autorità per le Garanzie nelle Comunicazioni and Direzione Generale Autorizzazioni e Concessioni Ministero delle Comunicazioni*, CJEU Case C-380/05, 2008 E.C.R. I-349.

<sup>56</sup> *Id.* at para. 19.

members of the Union.”<sup>57</sup> This type of review, he argues, “flows logically from the nature of the process of European integration. It serves to guarantee that the basic conditions are in place for the proper functioning of the EU legal order and for the effective exercise of many of the rights granted to European citizens.”<sup>58</sup> After raising this suggestion, though, Poiares Maduro qualifies it by arguing that:

[O]nly serious and persistent violations which highlight a problem of systemic nature in the protection of fundamental rights in the Member State at issue, would . . . qualify as violations of the rules on free movement, by virtue of the direct threat they would pose to the transnational dimension of European citizenship and to the integrity of the EU legal order.<sup>59</sup>

Significant here is the reference to the transnational dimension of Union citizenship; reverse discrimination concerns its non-transnational dimension.

In her *McCarthy* opinion, Advocate General Kokott challenges Advocate General Sharpston’s *Ruiz Zambrano* opinion.<sup>60</sup> “I am not of the view that Union citizens can derive from Article 21(1) TFEU a right of residence *vis-à-vis* the Member State of which they are a national even where—as in the case of Mrs. McCarthy—there is no cross-border element.”<sup>61</sup> Kokott thus argues that a Union citizen who has always resided in a Member State of which she is a national and has also never exercised her right of free movement guaranteed by EU law does not fall within the scope of EU law and that the right of free movement of Union citizens does not (in her view) alter this. Kokott admits that reverse discrimination exists, because Union citizens who have made use of their right of free movement may rely on more generous EU rules on the right of entry and of residence than nationals of the host Member State who have always resided in its territory. She notes that “Generally this problem is referred to as *discrimination against one’s own nationals* or called *reverse discrimination*.”<sup>62</sup> In her view, however, there is nothing to be done because reverse discrimination falls outside the scope of EU law:

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<sup>57</sup> *Id.* at para. 20.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at para. 22.

<sup>60</sup> *Shirley McCarthy v. Secretary of State for the Home Department*, CJEU Case C-434/09 (Nov. 25, 2010), <http://curia.europa.eu/>.

<sup>61</sup> *Id.* at para. 31.

<sup>62</sup> *Id.* at para. 39.

In accordance with settled case-law, however, EU law provides no means of dealing with this problem. Any difference in treatment between Union citizens as regards the entry and residence of their family members from non-member countries according to whether those Union citizens have previously exercised their right of freedom of movement does not fall within the scope of EU law.<sup>63</sup>

Kokott continues: “It is true that in the legal literature consideration is given from time to time to inferring a prohibition on discrimination against one’s own nationals from citizenship of the Union.”<sup>64</sup> Here she cites Advocate General Sharpston’s position, but notes her disagreement: “as the Court has stated on a number of occasions, citizenship of the Union is not intended to extend the scope *ratione materiae* of EU law to internal situations which have no link with EU law.”<sup>65</sup>

Kokott admits that this reliance on the distinction between a “purely internal situation” and one subject to EU law may change: “It cannot of course be ruled out that the Court will review its case-law when the occasion arises and be led from then on to derive a prohibition on discrimination against one’s own nationals from citizenship of the Union.”<sup>66</sup> But, for Kokott, *McCarthy* does not “provide the right context for detailed examination of the issue of discrimination against one’s own nationals” because “a ‘static’ Union citizen such as Mrs. McCarthy is not discriminated against at all compared with ‘mobile’ Union citizens.”<sup>67</sup> Kokott reasons that a Union citizen in Mrs. McCarthy’s position “cannot rely on EU law in order to obtain for him or herself and his or her family members a right of residence in the Member State in which that Union citizen has always lived and of which he or she is a national.”<sup>68</sup> Her solution is to appeal to the European Convention on Human Rights:

[T]he United Kingdom might be obliged, by virtue of being a party to the ECHR, to grant Mr. McCarthy a right of residence as the spouse of a British national living in England. This is not, however, a question of EU

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<sup>63</sup> *Id.* at para. 40.

<sup>64</sup> *Id.* at para. 41.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at para. 52.

<sup>67</sup> *Id.* at para. 53.

<sup>68</sup> *Id.* at para. 58.



law, but only a question of the United Kingdom's obligation under the ECHR, the assessment of which falls exclusively within the jurisdiction of the national courts and, as the case may be, the European Court of Human Rights.<sup>69</sup>

Unlike Advocate General Sharpston's call for "seamless protection of fundamental rights under EU law in all areas of exclusive or shared EU competence" in order to match the concept of EU citizenship, there is little in Advocate General Kokott's proposals to suggest an active role for the European Court in Luxembourg or a review of fundamental rights as founded on Union citizenship. Advocate General Kokott thus does not (here at least) appear to share the views of her colleague AG Sharpston or of AG Poiares Maduro, who argues that the prohibition of discrimination on the basis of nationality

is no longer merely an instrument at the service of freedom of movement; it is at the heart of the concept of European citizenship and of the extent to which the latter imposes on Member States the obligation to treat Union citizens as national citizens. Though the Union does not aim to substitute a 'European people' for the national peoples, it does require its Member States no longer to think and act only in terms of the best interests of their nationals but also, in so far as possible, in terms of the interests of all EU citizens.<sup>70</sup>

#### D. EU Citizenship's Political Objectives

Citizenship denotes an intrinsic status and a set of rights that adhere inherently and equally to all citizens. Because governments increasingly approach citizenship as a policy tool that is subject to variation and modification, identifying which individuals are citizens is as important as the question of what the status of citizenship entails.<sup>71</sup> The pluralism of contemporary societies, bounded political communities in which the processes of state-building and nation-building have never been perfectly synonymous, increases the instability of citizenship as the demands of creating and operating a functioning state clash

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<sup>69</sup> *Id.* at para. 60.

<sup>70</sup> Heinz Huber v. Bundesrepublik Deutschland, CJEU Case C-524/06, para. 18 (Dec. 16, 2008), <http://curia.europa.eu/>.

<sup>71</sup> See Willem Maas, *Unrespected, Unequal, Hollow?: Contingent Citizenship and Reversible Rights in the European Union*, 15 COLUM. J. EUR. L. 265–80 (2009).

with those of maintaining or building a common identity.<sup>72</sup> The result is the constant creation and re-creation of exceptions and partial or contingent citizenships and policy changes such as those now occurring in Europe.<sup>73</sup>

In federal states such as the United States and Canada, the introduction of federal rights empowered individuals and redrew the relationship between the central government and subsidiary governments. Citizenship limits the power of Member States to treat their own nationals worse than nationals of other Member States. This does not eliminate the tension between center and unit (or federal and regional; EU and Member State) law but should give extra weight to former over the latter. Thus it is not surprising but rather expected that Union citizenship represents an expansion of the Union citizens' social rights and well-being that sometimes outmatches the social protection offered at the national level. Jurisdictional issues remain, but the growth of Union citizenship means that EU law should grow to encompass any right protected or promoted by shared citizenship.

The details of the various cases concerning reverse discrimination are noteworthy because they exhibit the expansive rights logic that citizenship entails. The expansive logic of shared citizenship helps explain why populist parties in Europe tend to be opposed to EU citizenship and most of what it entails, including free movement rights and the Schengen system doing away with border controls.<sup>74</sup> Comparative federalism is an appropriate lens for examining reverse discrimination, and the political development of federal rights in federal states such as the United States and Canada provides a useful historical parallel with current and future developments in the EU.<sup>75</sup> Perhaps the development of the incorporation doctrine in the United States, a development which Advocate General Sharpston discusses in her *Ruiz Zambrano* opinion, is difficult to compare because it is historically distant and the focus was not primarily on individuals.<sup>76</sup>

The case of Canada, however, provides a parallel which is more contemporary because the Canadian Charter of Rights and Freedoms was introduced relatively recently, in 1982, and

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<sup>72</sup> See *id.* at 265.

<sup>73</sup> See Maarten Peter Vink & Rainer Bauböck, *Citizenship Configurations: Analysing the Multiple Purposes of Citizenship Regimes in Europe*, 11 COMP. EUR. POL. 621–48 (2013).

<sup>74</sup> See Willem Maas, *Freedom of Movement Inside 'Fortress Europe'*, in GLOBAL SURVEILLANCE AND POLICING: BORDERS, SECURITY, IDENTITY 233–45 (Elia Zureik & Mark B. Salter eds., 2005). The Dutch populist Pim Fortuyn campaigned to reintroduce border controls within the EU, a perspective shared at various points by France's Front Nationale, the Austrian Freedom Party, the Danish People's Party, and others.

<sup>75</sup> See, e.g., DEMOCRATIC CITIZENSHIP AND THE FREE MOVEMENT OF PEOPLE (Willem Maas ed., 2013); Willem Maas, *Free Movement and Discrimination: Evidence from Europe, the United States, and Canada*, 15 EUR. J. MIGRATION & L. 91–110 (2013).

<sup>76</sup> See Matthew Longo, *Right of Way? Defining Freedom of Movement within Democratic Societies*, in DEMOCRATIC CITIZENSHIP AND THE FREE MOVEMENT OF PEOPLE (Willem Maas ed., 2013).

challenged the constitutional division of powers between the federal and provincial governments. In the *Labour Conventions* case, the Privy Council infamously held that the federal government lacked the constitutional authority to implement treaty obligations which encroached on provincial jurisdiction. Lord Atkin concluded that “an incursion by the federal government into provincial jurisdiction by means of the treaty power” was “as much an affront to the self-government principle” as any attempt would be for the executive to make domestic laws in a unitary state.<sup>77</sup> The result was that only when provinces agreed could the federal government encroach on provincial responsibilities.

This delicate constitutional balance was upset with the introduction of the Charter of Rights and Freedoms:

At the most abstract level, the Charter elevates citizenship to a constitutional category. The citizens’ possession of rights changes the relationship between the governors and the governed. This is true in the obvious sense that the rights of the latter are judicially enforceable against the rights violations perpetrated by the former. Citizens participate not only as voters influencing the composition of legislatures, but also in their capacity to trump the majority legally by resorting to the courts.<sup>78</sup>

The possession of rights by individual Union citizens on the basis of their Union citizenship similarly changes the relationship between the Member States and individual Union citizens: citizens may now resort to the courts to enforce their rights against their governments. The Maastricht Treaty’s introduction of EU citizenship similarly elevated citizenship into a constitutional category, even if the substance of the rights (primarily freedom of movement) was not particularly new. In this light, CJEU cases since 1993 can be seen as attempts to grapple with the new constitutional status of EU citizenship.<sup>79</sup>

The most recent cases illustrate the tension between desires for Member State control and the common rights of Union citizenship. One early commentator notes that the *Ruiz Zambrano* judgment may have unintended consequences on national migration and nationality law. Extending the scope of Union rights may entice member states “to render it all the more difficult for individuals to gain access to European citizenship in the first place,” by tightening the conditions for admission of third country nationals and other

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<sup>77</sup> *Canada v. Ontario*, [1937] 1 D.L.R. 673 (Can.).

<sup>78</sup> Alan C. Cairns, *The Charter: A Political Science Perspective*, 30 OSGOODE HALL L.J. 619 (1992).

<sup>79</sup> See, e.g., *Dori*, CJEU Case C-91/92; *Hagen*, CJEU Case C-192/05.

categories of potential immigrants to compensate for their lack of control over the admission of family members of EU citizens.<sup>80</sup> Furthermore, considering “the vast implications of obtaining Union citizenship, Member States may be inclined to restrict the possibilities for second generation immigrant children to acquire citizenship upon birth in their territory as well as making it more difficult for first generation migrants to become naturalised.”<sup>81</sup>

Populist parties foster such political backlash. For example, the Freedom Party in the Netherlands issued a press release on *Ruiz Zambrano* predicting “anchor babies” and claiming the ruling will “lead to a new wave of migration to Europe and unwanted parenthood. Having children thus becomes simply a means of obtaining a residence permit and that is not in the interests of these children, their parents, and the European population.”<sup>82</sup> This view is misguided from the perspective of European law because obtaining Union citizenship continues to depend on obtaining national citizenship, which remains the prerogative of Member States.<sup>83</sup> Yet it may lead to the political dynamics described above, where the growth of European rights prompts Member States to limit access to those rights by restricting access to national citizenship.

Just as important as the potential political backlash to the growing rights of EU citizenship is division within the legal community, as illustrated by the judgment in *McCarthy*. Both judgments closely follow the recommendations laid out by the respective Advocate General opinions which, as noted above, contain contradictory elements. One early commentator notes that *McCarthy* appears to limit the application of *Ruiz Zambrano*:

Contrary to some readings the ‘purely internal’ rule has not been abolished but persists, if in a modified form. Only in exceptional cases, where ‘the very enjoyment of the substance of rights conferred by the status of EU citizenship’ is in question does a situation with no cross-border element fall within the scope of EU law.<sup>84</sup>

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<sup>80</sup> Anja Wiesbrock, *The Zambrano Case: Relying on Union Citizenship Rights in ‘Internal Situations’*, EUR. UNION DEMOCRACY OBSERVATORY ON CITIZENSHIP, <http://eudo-citizenship.eu/citizenship-news/449-the-zambrano-case-relying-on-union-citizenship-rights-in-internal-situations>.

<sup>81</sup> *Id.*

<sup>82</sup> The post was removed from the PVV’s website but may be accessed via the Internet Archive: <https://web.archive.org/web/20110311032141/http://pvv-europa.nl/index.php/component/content/article/38-daniel-van-der-stoep/2669-stop-de-ankerbabys.html> (Willem Maas trans.).

<sup>83</sup> See Willem Maas, *Migrants, States, and EU Citizenship’s Unfulfilled Promise*, 12 CITIZENSHIP STUD. 583–95 (2008).

<sup>84</sup> Stephen Coutts, *Case C-434-09: Shirley McCarthy v. Secretary of State for the Home Department*, EUR. UNION DEMOCRACY OBSERVATORY ON CITIZENSHIP (Nov. 26, 2013), <http://eudo-citizenship.eu/citizenship-news/475-case-c-434-09-shirley-mccarthy-v-secretary-of-state-for-the-home-department>.

The *McCarthy* decision opposes the more expansive logic in *Ruiz Zambrano* because, unlike in *Ruiz Zambrano* where the EU residence rights of the two children who had EU citizenship by virtue of their Belgian citizenship was found to depend on granting rights to their parents, Mrs. McCarthy's EU residence rights were found not to depend on a residence permit for her spouse.<sup>85</sup> Mrs. McCarthy never moved outside her Member State and was receiving social assistance. Yet this does not negate the issue of fairness. Someone in Mrs. McCarthy's position who was not a UK citizen but a citizen of any other EU state would receive a spousal residence permit on the basis of EU law. Indeed, what would happen if Mrs. McCarthy moved to denounce her UK citizenship and then claimed, on the basis of her Irish citizenship, the right that the *McCarthy* outcome denied her? A comparison of the two cases concludes correctly that "[e]xtending rights to non-citizens without extending the same to citizens risks undermining the concept of citizenship."<sup>86</sup>

These two cases and similar ones that the Court will undeniably be asked to consider in the future demonstrate the unresolved and perhaps unresolvable tension between different levels of citizenship and different ideas about what Union citizenship should mean. Of course, the EU is not a unitary state but rather has more in common with a federal political system. Thus the tensions between difference and equality existing in federal states also continue to exist in the Union. Federations—the form of political system the EU appears to be becoming—must manage the strains between the need for local community and an overarching federal citizenship that guarantees the same rights to all members of the polity.<sup>87</sup>

The *Ruiz Zambrano* decision raises foundational questions about the relationship between Union citizenship and fundamental rights. Advocate General Sharpston expresses these questions clearly:

[I]s the exercise of rights as a Union citizen dependent—like the exercise of the classic economic 'freedoms'—on some trans-frontier free movement (however accidental, peripheral or remote) having taken place before the claim is advanced? Or does Union citizenship look forward to the future, rather than back to the past, to define the rights and

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<sup>85</sup> See *Shirley McCarthy v. Secretary of State for the Home Department*, CJEU Case C-434/09, 2011 E.C.R. I-03375.

<sup>86</sup> Helena Wray, *Family Life and EU Citizenship: A commentary on McCarthy C-434/09 5 May 2011*, EUR. UNION DEMOCRACY OBSERVATORY ON CITIZENSHIP (Nov. 26, 2013), <http://eudo-citizenship.eu/citizenship-news/479-family-life-and-eu-citizenship-a-commentary-on-mccarthy-c-43409-5-may-2011>.

<sup>87</sup> See Willem Maas, *Varieties of Multilevel Citizenship*, in *MULTILEVEL CITIZENSHIP* (Willem Maas ed., 2013).

obligations that it confers? To put the same question from a slightly different angle: is Union citizenship merely the non-economic version of the same generic kind of free movement rights as have long existed for the economically active and for persons of independent means? Or does it mean something more radical: true citizenship, carrying with it a uniform set of rights and obligations, in a Union under the rule of law in which respect for fundamental rights must necessarily play an integral part?<sup>88</sup>

## E. Conclusion

The process of constitutionalizing the rights of EU citizenship is slow, as is the process of reducing the possibilities for reverse discrimination. Advocate General Sharpston's *Ruiz Zambrano* recommendation that EU citizenship should become "true citizenship, carrying with it a uniform set of rights and obligations"<sup>89</sup> would repudiate the principle that EU citizenship complements and does not replace national citizenship, the formulation of the Amsterdam Treaty. Recognizing the *finalité politique* of EU citizenship as true citizenship would recognize the reality that rights are expansive and not easy to contain. Indeed, an expansive rights logic is inherent in the principle of equality: recognizing EU citizens as fellow citizens means recognizing that they have rights on the same basis as "our" citizens.<sup>90</sup>

An essay almost 25 years old, entitled *Is Reverse Discrimination Still Possible Under the Single European Act?*, concluded that "aiming at an internal market, or completing it, while at the same time continuing to attach importance to the crossing of national frontiers is

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<sup>88</sup> Gerardo Ruiz Zambrano v. Office National de l'emploi, CJEU Case C-34/09, para. 3 (Sept. 30, 2010), <http://curia.europa.eu/>.

<sup>89</sup> *Id.*

<sup>90</sup> Thus, Herwig Verschueren argues:

All EU citizens, including those who find themselves in a purely internal situation, should be able to rely on the prohibition of discrimination based on nationality and they should also be able to invoke the right not to be obliged to migrate if they want to claim the status which applies to those EU citizens who have made use of the right to free movement.

Herwig Verschueren, *Reverse Discrimination: An Unsolvable Problem?*, in *RETHINKING THE FREE MOVEMENT OF WORKERS: THE EUROPEAN CHALLENGES AHEAD* 118 (Paul Minderhoud & Nicos Trimikliniotis eds., 2009).

itself contradictory.”<sup>91</sup> This presages the eventual elimination of the distinction between movers and non-movers, grounded not on economic logic but on the common status of Union citizenship. A more recent commentator states boldly that “reverse discrimination is no longer a justified difference in treatment and thus should no longer be permissible in the EC legal system.”<sup>92</sup> But she then prevaricates by concluding that:

[The EU] is, and will always be, a supranational organization of limited scope and aims and, accordingly, its general principles and rules should only apply to situations that fall within its scope. Therefore, reverse discrimination will be able to fall within the scope of the Community principle of equality only if it conflicts with one of the (broader) aims of the Community and thus comes within the general scope of EC law.<sup>93</sup>

Yet the continuing tensions between the universalizing function of a central citizenship and decentralized sources of local rights highlights the contingent nature of all rights in compound polities; the promise of Union citizenship is membership in a polity that is not simply multinational but that also supersedes nationality.<sup>94</sup>

Because it introduces rights that apply directly to individuals which individuals may invoke, Union citizenship is not simply another international treaty: the rights it introduces, coupled with the nature of the enforcement mechanisms in place to ensure that these rights are respected, mean that EU citizenship approximates Member State citizenship more than a treaty between states to establish supranational organization of limited scope and aims would.<sup>95</sup> This fits with the historical reality that the introduction of economic rights in the European Community was coupled with a political project, and that the effort to entrench and expand a set of supranational rights into a supranational citizenship reflects the will to create a community of people rather than simply a free market area.<sup>96</sup>

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<sup>91</sup> Hans Ulrich Jessurun d'Oliveira, *Is Reverse Discrimination Still Permissible Under the Single European Act?*, in FORTY YEARS ON: THE EVOLUTION OF POSTWAR PRIVATE INTERNATIONAL LAW IN EUROPE 84 (1990).

<sup>92</sup> TRYFONIDOU, *supra* note 52, at 162.

<sup>93</sup> TRYFONIDOU, *supra* note 52, at 166.

<sup>94</sup> See Maas, *supra* note 83.

<sup>95</sup> See Maas, *supra* note 71, at 270–71.

<sup>96</sup> See MAAS, *supra* note 19, at 5, 7.

The limits on reverse discrimination are simultaneously the limits of Member State sovereignty in the face of European law, particularly the ability of member states to deny their nationals the rights enjoyed by other Union citizens. Debate about what EU citizenship is and should be matters because EU citizenship is intricately tied to the wider European project. EU citizenship's success or failure will determine the future of European integration. Thus the question of the *finalité politique*, or political aim, of EU citizenship raised in the introduction is worth repeating. European Council President Herman van Rompuy captures the idea:

Europe is much more than a product for a customer, a consumer that allows you to cross borders without identity documents or no longer needing to exchange money on vacation. We are more than customers. We are European citizens. The first is about an interest. The second a value. We have gained an identity beyond that of our country or our people.<sup>97</sup>

This is the realization of Churchill's dream of a Europe in which people "will be proud to say 'I am a European,'" but the process of constitutionalizing EU citizenship continues.

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<sup>97</sup> Herman Van Rompuy, Toespraak van de heer Herman Van Rompuy, Voorzitter van de Europese Raad n.a.v. Koningsdag met als thema 'Het Europees burgerschap' EUCO 235/13 (Nov. 15, 2013) (Willem Maas trans.), available at <http://www.consilium.europa.eu/searchresults?lang=en&search=235/13>.





## Twenty Years of CJEU Jurisprudence on Citizenship

By Prof. Dr. Gerard-René de Groot<sup>\*</sup> & Ngo Chun Luk, LL.M.<sup>\*\*</sup>

### A. Introduction

The history of the European Union has been fraught with constant friction between the sovereignty of the Member States and the supranational powers of the Union, with the Union gaining terrain in fields of law traditionally belonging to the Member States. Despite this tension, certain legal fields are steadfastly asserted as belonging to the Member States. Notably, Member States regulate the grounds of the acquisition and loss of nationality. The Treaty of Lisbon highlights that the nationality of Member States is scarcely governed by European Union law, if at all. The sole provision governing the relationship between Member State nationality and Union law, i.e., Article 20 of the Treaty on the Functioning of the European Union (TFEU) stresses the primacy of Member State nationality.<sup>1</sup>

Reality, however, is often not as simple as such a cursory reading implies. European Union citizenship, once a mere complementary facet of the national citizenships, has transformed into an institution in its own right, forming a symbiotic relationship between the Member State nationality and the European Union.

This article traces the development of the European Union citizenship, beginning with its inception within the Treaty of Maastricht to the overwhelming judgment of the CJEU in *Rottmann* and beyond. On the basis of the trend established, this article also examines the possible ramifications of the European Union citizenship in the various Member States by formulating a list of principles concerning the loss and deprivation of nationality flowing therefrom, as well as from international law.

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<sup>1</sup> See Consolidated Version of the Treaty on the Functioning of the European Union art. 20(1), May 9, 2008, 2008 O.J. (C 115) 56 [hereinafter TFEU] (“Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be *additional to and not replace* national citizenship.”) (emphasis added).

## **B. The Road of European Union Citizenship**

### *I. The Beginning: The Maastricht Treaty*

When addressing European Union citizenship, the formal starting point is its creation by the Maastricht Treaty in 1992. The then-Article 8(1) EC describes the European Union citizenship as, "Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union."<sup>2</sup>

At first blush, this provision seems more superficial and symbolic rather than functional. Yet this simple institution, at that time a paper tiger, caused the alarmed Member States to include a common declaration regarding its interpretation. This infamous declaration reads as follows:

The Conference declares that, wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned. Member States may declare, for information, who are to be considered their nationals for Community purposes by way of a declaration lodged with the Presidency and may amend any such declaration when necessary.<sup>3</sup>

Clearly, the Member States feared this new institution would infringe upon their sovereign space and ultimately govern the acquisition and loss of their nationalities. At this moment in time, it was still unclear whether this fear was justified. European Union citizenship, however, has unmistakably created room for development, particularly through case law of the CJEU.

### *II. The Cases of Micheletti, Kaur, and Zhu and Chen: A Bumpy Road*

In the early life of European Union citizenship, at least three important judgments were issued by the CJEU concerning European Union citizenship. Some may say that the Court seems to be unable to make up its mind, swinging back and forth between a liberalistic and a conservative reading of European Union Citizenship. Others might perceive a line of

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<sup>2</sup> Treaty Establishing the European Community art. 8(1), Aug. 31, 1992, 1992 O.J. (C 224) 10.

<sup>3</sup> *Id.* at Declaration No. 2. It is remarkable that this declaration is not included in the consolidated TEU or TFEU after Lisbon nor attached to these treaties.

thought starting to develop in this haze of uncertainty. In any event, the case law of the CJEU in *Micheletti*,<sup>4</sup> *Kaur*,<sup>5</sup> and *Zhu and Chen*<sup>6</sup> can be understood as essential in the development of the European Union citizenship.

*Micheletti* revolved around an Argentinian/Italian dual-national who was rejected in his application for residency and work in Spain as a Community national. The main issue in this case was whether Spain could, in the case of dual nationals not possessing Spanish nationality, enforce a test of effective nationality, in this case, the nationality of the last country in which the person concerned was habitually resident.<sup>7</sup>

The CJEU started by reiterating the international legal principle of sovereignty of States with regard to the acquisition and loss of nationality.<sup>8</sup> While the Court mitigated this absolute right somewhat by placing it within the boundaries set by Community law, according to Jessurun d'Oliveira, other Member States are prohibited from imposing an additional requirement of nationality for the exercise of a Community right by a dual national who possesses *the nationality of a Member State*.<sup>9</sup>

It is this very part of the dictum that played a central role in the *Kaur* judgment. Ms. Kaur, born in Kenya, had the status of British Overseas Citizen. As such, she did not have the right to reside in the United Kingdom. When her re-application for leave to remain within the United Kingdom was refused, she sought a ruling by the High Court of Justice of England and Wales. In particular, she indicated her desire to take up gainful employment within the UK and, more importantly, to travel to other Member States to purchase goods and services and/or to work there.<sup>10</sup>

While this case presents a fundamental issue—i.e., whether Union citizens can invoke their citizenship rights against their own Member State—the Court left this question unanswered. Instead, the CJEU ruled that under international law, it was completely within

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<sup>4</sup> Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria, CJEU Case C-369/90, 1992 E.C.R. I-4239.

<sup>5</sup> The Queen v. Secretary of State for the Home Department, ex parte: Manjit Kaur, CJEU Case C-192/99, 2001 E.C.R. I-1237.

<sup>6</sup> Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department, CJEU Case C-200/02, 2004 E.C.R. I-9925.

<sup>7</sup> *Micheletti*, CJEU Case C-369/90 at paras. 2–6.

<sup>8</sup> *Id.* at para. 10.

<sup>9</sup> *Id.* at paras. 10–11. See Hans Ulrich Jessurun d'Oliveira, *Case C-369/90, M. V. Micheletti and others v. Delegacion del Gobierno en Cantabria, Judgment of 7 July 1992*, 30(3) COMMON MKT. L. REV. 623, 624–625 (1993).

<sup>10</sup> *Kaur*, Case C-192/99 at paras. 11–15.

the UK's competence to delineate the scope of the "nationality of a Member State" to only those British citizens who had the right of residence within the territory of the UK.<sup>11</sup> The Court further stated that this decision would not have the effect of depriving persons of their EU citizenship, as the persons concerned, including Ms. Kaur, were never Union citizens.<sup>12</sup>

The final case in this trio, *Zhu and Chen*, concerned the (second) child of Ms. Chen and her husband, both Chinese nationals. Ms. Chen gave birth to Catherine Zhu in Belfast, Ireland. As a result, the child was born with Irish nationality because the Republic of Ireland maintained, at the time, the *ius soli* principle for persons born on the island of Ireland.<sup>13</sup> The main question is whether Catherine, as an Irish national and European citizen, and Ms. Chen, as the care-giver for an EU citizen, could invoke European Union law to take up residence within the United Kingdom.<sup>14</sup>

The judgment contains several important considerations. As a preliminary consideration, the CJEU noted that "[t]he situation of a national of a Member State who was born in the host Member State and has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation."<sup>15</sup> The Court continued with its famous dictum that, "Union citizenship is destined to be the fundamental status of nationals of the Member States."<sup>16</sup> Having considered that Catherine fulfilled the conditions stipulated by EU law regarding her right to reside within the host Member State, the Court further noted that, in line with the international legal principle of sovereignty in nationality matters, Catherine's legally unchallenged status as an Irish citizen could not be limited in its effect within the UK by the imposition of additional requirements for its recognition.<sup>17</sup>

The judgment ended with the Court's observation that, in cases such as those of Catherine and Ms. Chen, Member States may not refuse a Member State national or a third-country national, upon whom a Union citizen exercising her Union rights is dependent, the right of residence with the Union citizen, because this "would deprive the child's right of residence

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<sup>11</sup> *Id.* at paras. 20–24.

<sup>12</sup> *Id.* at para. 25.

<sup>13</sup> Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department, CJEU Case C-200/02, 2004 E.C.R. I-9925, paras. 7–12.

<sup>14</sup> *Id.* at para. 15.

<sup>15</sup> *Id.* at para. 19.

<sup>16</sup> *Id.* at para. 25.

<sup>17</sup> *Id.* at paras. 37–40.

of any useful effect.”<sup>18</sup> This argument became a standard remark in subsequent cases before the CJEU, particularly in *Ruiz Zambrano*.<sup>19</sup>

### *III. Eman and Sevinger: Two Steps Forward, One Step Back*

As seen in *Zhu and Chen*, though it did not play a prominent role there, one of the main weaknesses of the EU citizenship is its inability to govern the “purely internal situations.” In *Eman and Sevinger*,<sup>20</sup> this purely internal situation becomes one of the key points around which the issue revolves.

Mr. Eman and Mr. Sevinger, both of Dutch nationality and habitual residents of the island of Aruba, were denied their application to be enrolled on the register of electors for the election of members of the European Parliament (EP) on the ground of their habitual residence in a territory of an overseas countries and territories (OCT). They challenged this decision up to the Council of State.<sup>21</sup>

The Court began by emphasizing that every person in possession of the nationality of a Member State is a Union citizen, regardless of whether they are habitually resident within an OCT, and thus enjoy the rights conferred by the Treaty.<sup>22</sup> The Court, however, declined to determine the rules regarding the persons qualified to vote and to stand in elections for the EP and whether elections should be held in the OCTs to the individual Member States. This deference is compounded by the observation of the Court that, failing express provisions to the contrary, Articles 189 and 190 EC Treaty on the European Parliament do not apply to OCTs.<sup>23</sup>

Despite this setback, the situation is not completely lost. The Court has held that the present situation, in which Dutch nationals are not allowed to vote in elections for the EP if they are resident on Aruba (or another OCT), while other Dutch nationals residing in a non-Member State are accorded this right, violates the principle of equal treatment, and is thus in violation of Community law.<sup>24</sup>

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<sup>18</sup> *Id.* at para. 45.

<sup>19</sup> Gerardo Ruiz Zambrano v. Office national de l’emploi (ONEm), CJEU Case C-34/09, 2011 E.C.R. I-01177.

<sup>20</sup> M. G. Eman and O. B. Sevinger v. College van burgemeester en wethouders van Den Haag, CJEU Case C-300/04, 2006 E.C.R. I-08055.

<sup>21</sup> *Id.* at para. 16.

<sup>22</sup> *Id.* at paras. 27–28.

<sup>23</sup> *Id.* at paras. 40–54.

<sup>24</sup> *Id.* at paras. 56–60.

*IV. Rottmann: A First Crack in the Sovereignty in Nationality Matters*

To date, European Union citizenship has come a long way. It has become both the key to the territory of other Member States as well as the wall against discrimination by the Member States, including the citizen's own State. However, none of these cases have dealt with the question of whether European Union citizenship can affect the rules on acquisition and loss of the nationality of a Member State. The seminal *Rottmann* judgment,<sup>25</sup> however, concerned precisely the loss of the nationality of a Member State. The facts of the case were as follows.

Dr. Janko Rottmann, an Austrian national, was being prosecuted in Austria in the 1990s for fraud. He fled to Germany in 1995, where he applied for and was granted German nationality through naturalization in 1999. This resulted in the automatic loss of his Austrian nationality. Rottmann, however, failed to disclose the on-going criminal prosecution in Austria to the German authorities. When the City of Munich was informed of the criminal proceedings against Rottmann, it decided to revoke the naturalization on the grounds that it had been obtained by fraudulent conduct.<sup>26</sup>

While this case appears purely internal at first glance, the fact that Rottmann had lost Austrian nationality when he acquired the German nationality meant he would lose his European Union citizenship as a result of the revocation of the naturalization. The German court found this loss of EU citizenship sufficiently troubling. It stayed the proceedings and referred the case to the CJEU through a preliminary reference.

The legal questions in this case can be summarized in two main questions. The first legal hurdle is the determination of whether the present case falls within the sphere of Union law. This question was answered positively by both the Advocate General (A-G) and the CJEU, even though each reached the same conclusion differently. The A-G considered that Rottmann's invocation of his free movement rights was the principal factor leading to the possibility of the situation at hand, where Rottmann was confronted with the loss of his European Union citizenship. Therefore, the A-G concluded that this was more than just a "wholly internal situation" and thus fell within the sphere of Union law.<sup>27</sup>

The CJEU, however, found a shorter path to the same conclusion. The Court determined that:

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<sup>25</sup> Janko Rottmann v. Freistaat Bayern, Case C-135/08, 2010 E.C.R. I-1449.

<sup>26</sup> *Id.* at paras. 22–28; see also Jo Shaw, *Setting the scene: the Rottmann case introduced, in HAS THE EUROPEAN COURT OF JUSTICE CHALLENGED MEMBER STATE SOVEREIGNTY IN NATIONALITY LAW?* 1 (2011).

<sup>27</sup> *Rottmann*, CJEU Case C-135/08 at paras. 11–13.

[I]t is clear that the situation of a citizen of the Union who . . . is faced with a decision withdrawing his naturalisation . . . and placing him . . . in a position capable of causing him to lose the status conferred by Article 17 EC and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law.<sup>28</sup>

This begs the question of the extent to which the loss of the nationality of a Member State falls within the ambit of EU law.<sup>29</sup> Davies argued that a logical reading of the Court's decision must lead to the conclusion that the loss of the nationality of a Member State by a person not possessing the nationality of another Member State always falls within the scope of EU law.<sup>30</sup>

The second central question is the consequence of EU law being applicable as regards the rules on (the loss of) nationality of the Member States. Here again it is important to take note of both the Court's ruling and the opinion of the A-G. The Court again stressed the fundamental status of European Union citizenship and the corollary, namely that Member States must have due regard to EU law when exercising their powers in the sphere of nationality.<sup>31</sup> The Court further considered the compatibility of the deprivation of nationality on the grounds of fraud in general with European Union law and international law—in particular, Article 15(2) of the UDHR and Article 4(2) of the ECN on the right not to be arbitrarily deprived of one's nationality.<sup>32</sup>

More importantly, though, the CJEU considered that each individual decision to deprive a person of a Member State's nationality must be in line with the European principle of proportionality, notwithstanding the existence of any national tests of proportionality.<sup>33</sup> The Court further concretized this principle by indicating the factors the national courts should take into consideration. These include the "consequences that the decision entails for the person concerned and . . . for the members of his family with regard to the loss of

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<sup>28</sup> *Rottmann*, CJEU Case C-135/08 at para. 42.

<sup>29</sup> See Gerard-René de Groot & Anja Seling, *The Consequences of the Rottmann Judgment on Member State Autonomy - The Court's Avant-Gardism in Nationality Matters*, 7:1 EUR. CONST. L. REV. 138, 152 (2011).

<sup>30</sup> Gareth T. Davies, *The Entirely Conventional Supremacy of Union Citizenship and Rights, in HAS THE EUROPEAN COURT OF JUSTICE CHALLENGED MEMBER STATE SOVEREIGNTY IN NATIONALITY LAW?* 7 (Jo Shaw ed., 2011).

<sup>31</sup> *Janko Rottmann v. Freistaat Bayern*, Case C-135/08, 2010 E.C.R. I-1449, paras. 43–45.

<sup>32</sup> *Id.* at paras. 50–54.

<sup>33</sup> *Id.* at para. 55.



the rights enjoyed by every citizen of the Union,” whether that loss is justified in relation to the “gravity of the offence committed by that person” and “to the lapse of time between the naturalisation decision and the withdrawal decision,” and “whether it is possible for that person to recover his original nationality.”<sup>34</sup>

Interestingly, the A-G goes much further than the CJEU. In the eyes of A-G Poaires Maduro, it is theoretically possible to invoke “any rule of the Community legal order . . . if the conditions for the acquisition and loss of nationality laid down by a Member State are incompatible with it.”<sup>35</sup> This includes rules of international law, provisions of primary Community legislation, and the general principles of EU law.<sup>36</sup> It is particularly the latter which may be the most important factor in the boundary-setting of Union law in the field of nationality law, as these principles are many and varied in scope and content. A-G Poaires Maduro mentioned the possible role of the principle of equality, the avoidance of statelessness, the principle of sincere cooperation, and the protection of legitimate expectations.<sup>37</sup> De Groot further considered that the principles of legal certainty may play a role in this regard.<sup>38</sup>

Future cases before the CJEU specifically dealing with the acquisition or loss of European Union citizenship will likely revolve around the scope of the *Rottmann* judgment. It is therefore interesting to look at the EU case law after *Rottmann* as it might give some clues on how this scope should be interpreted.

#### V. The Scope of *Rottmann*: The Cases of Ruiz Zambrano, McCarthy, and Dereci

A brief look at the jurisprudence of the CJEU post-*Rottmann* leads to a number of similar cases concerning migration law and European Union citizenship. The first in this series, *Ruiz Zambrano*,<sup>39</sup> sets the tone for the others. *Ruiz Zambrano* concerned Mr. Ruiz Zambrano and his wife, both Colombian nationals, who applied for asylum in Belgium. Even though their applications were rejected, they could not be sent back to Colombia because of the *non-refoulement* clause. Numerous attempts by Mr. Ruiz Zambrano to regularize his

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<sup>34</sup> *Id.* at para. 56.

<sup>35</sup> *Rottmann*, CJEU Case C-135/08 at para. 28.

<sup>36</sup> *Id.* at paras. 29–30.

<sup>37</sup> See Ngo Chun Luk, *Het Nederlanderschap na Rottmann. Over de gevolgen van Janko Rottmann v. Freistaat Bayern voor de verliesbepalingen van de Rijkswet op het Nederlanderschap* (2012) (unpublished Master's Thesis, University of Aruba, Oranjestad) (on file with author).

<sup>38</sup> Gerard-René de Groot, *Overwegingen over de Janko Rottmann-beslissing van het Europese Hof van Justitie*, 5/6 ASIEL- EN MIGRATIERECHT 297 (2010).

<sup>39</sup> Gerardo Ruiz Zambrano v. Office national de l'emploi, CJEU Case C-34/09, 2011 E.C.R. I-1177.

situation in Belgium had proven unsuccessful. In the meantime, Mr. Ruiz Zambrano's wife gave birth to two children. Mr. Ruiz Zambrano failed to register the birth of these children at the Colombian embassy, and thus the children could not obtain Colombian nationality. Accordingly, Belgian nationality law granted both children Belgian nationality.

The main question in the proceedings was whether Mr. Ruiz Zambrano, upon whom his children, both of Belgian nationality, were dependent, could derive a right to reside and work in Belgium on the basis of EU law. The Court chose to answer this question from the perspective of the minor European citizens. Reiterating that "citizenship of the Union is intended to be the fundamental status of nationals of the Member States," the Court considered that Article 20 TFEU precludes measures by Member States which could deprive European citizens of "the *genuine enjoyment* of the substance of rights conferred by virtue of their status as citizens of the Union."<sup>40</sup> This short consideration can be seen as the key factor in determining whether national measures fall within the scope of EU law (by way of European Union citizenship).<sup>41</sup>

When does a measure of a Member State deprive a European Citizen of the genuine enjoyment of his or her EU Citizenship rights? In *Ruiz Zambrano*, the Court considered that the refusal to grant a third-country national the right to reside and work in a Member State, as a result of which the minor Member State nationals who were dependent on the third-country national would be forced to leave the territory of the Union, leads to the deprivation of the genuine enjoyment of Citizenship rights by Union Citizens.<sup>42</sup> The crucial difference between *Ruiz Zambrano* on the one hand, and *McCarthy*<sup>43</sup> and *Dereci*<sup>44</sup> on the other, may be the dependency of the Member State nationals on a third-country national. In both *McCarthy* and *Dereci*, the CJEU concluded that the Member State nationals were not in danger of being deprived of their genuine enjoyment of their Citizenship rights.<sup>45</sup>

### **C. A Road Map for European Union Citizenship: Principles on Loss and Deprivation of Nationality**

As shown in *Rottmann*, European Union law defines, in certain situations, the margins in which Member States may exercise their sovereignty in matters of nationality. The proportionality principle plays a key role. This guiding principle is strongly related to the

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<sup>40</sup> *Id.* at paras. 40–42 (emphasis added).

<sup>41</sup> See Luk, *supra* note 37, at 22–23.

<sup>42</sup> *Zambrano*, CJEU Case C-34/09 at paras. 43–44.

<sup>43</sup> Shirley McCarthy v. Secretary of State for the Home Department, CJEU Case C-434/09, 2011 E.C.R. I-3375.

<sup>44</sup> Murat Dereci and Others v. Bundesministerium für Inneres, CJEU Case C-256/11, 2011 E.C.R. I-11315.

<sup>45</sup> *McCarthy*, CJEU Case C-434/09 at paras. 49–50; see also *id.* at para. 68.

right of every person not to be arbitrarily deprived of their nationality.<sup>46</sup> From this right, and the ruling of the Court in *Rottmann*, the authors propose a number of guiding principles that the courts of the various Member States should consider when dealing with cases of deprivation of nationality falling within the ambit of EU law. Several of these principles are also mentioned in an inspiring report on “*Human Rights and Arbitrary Deprivation of Nationality*”<sup>47</sup> which the Secretary General of the United Nations submitted to the Human Rights Council on 14 December 2009, less than three months before the *Rottmann* ruling by the CJEU.

(1) *Loss or deprivation of nationality must have a firm legal basis.*<sup>48</sup>

This principle seems self-evident in the legal order of the Member States of the EU, as all Member States adhere to the rule of law. A closer look at the rules of the Member States leads to the conclusion that this principle is not consistently applied. For example, Article 14(5) of the Kingdom Act on the Dutch Nationality (RWN)<sup>49</sup> states that the Dutch nationality can only be lost on the basis of the provisions in the RWN. However, literature on Dutch nationality law commonly points out that, per the ruling of the Supreme Court of the Netherlands on 30 June 2006, Dutch nationality can be lost—by way of the construction of void *ab initio*—in cases of identity fraud committed during naturalization procedures prior to 1 April 2003, despite the lack of a legal provision to that effect.<sup>50</sup>

(2) *A legal provision regarding loss or allowing deprivation of nationality may not be enacted retroactively: “Nulla perditio, sine praevia lege.”*<sup>51</sup>

The loss or deprivation of nationality is often experienced by the person concerned as a form of sanction. Furthermore, loss or deprivation of nationality, especially that of a Member State, can have far-reaching consequences, not only for the person concerned but

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<sup>46</sup> See Universal Declaration of Human Rights art. 15(2), G.A. Res. 217 (III) A, U.N. doc. A/RES/217(III) (Dec. 10, 1948); European Convention on Nationality art. 4(2), E.T.S. No. 166 (Nov. 6, 1997).

<sup>47</sup> U.N. Secretary-General, *Human rights and arbitrary deprivation of nationality: Rep. of the Secretary-General*, U.N. Doc. A/HRC/13/34 (Dec. 14, 2009).

<sup>48</sup> See U.N. Secretary-General, *supra* note 47, at para 24; The Arab Charter of Human Rights (providing explicitly that “no one shall be arbitrarily or *unlawfully* deprived of his nationality” (emphasis added). However, it should be noted that “arbitrary” deprivation also can extend to interference provided for by law.).

<sup>49</sup> *Rijkswet op het Nederlanderschap*, OVERHEID 628, <http://wetten.overheid.nl/BWBR0003738/>.

<sup>50</sup> See, e.g., GERARD-RENÉ DE GROOT & MATJAZ TRATNIK, *NEDERLANDS NATIONALITEITSRECHT* 119–123 (2010). Similarly, other Member States, such as the United Kingdom, allow for the voidance *ab initio* of the their nationality without a legal basis providing for such a loss.

<sup>51</sup> Literally: No loss without previous law. Compare the *nulla poena sine praevia lege poenali*- principle in criminal law (literally: No punishment without previous criminal law).

also family members. Particularly, where the family members are third-country nationals and derive their right to reside in a Member State from their European citizen family member, the loss of the Member State nationality (and therefore the European Citizenship) means that the entire family can no longer reside in the European Union.

Consequently, Member States should not enact laws resulting in the retroactive loss or deprivation of nationality. Though, this does not preclude the possibility of Member States enacting laws retroactively to restrict the loss or deprivation of their nationality.<sup>52</sup>

*(3) In case of the introduction of a new ground of loss a reasonable transitory provision has to be made.*

In order to avoid that an individual loses his nationality due to an act which started already before the introduction of the new ground of loss, the legislature should include a reasonable transitory provision to cover possible unwanted consequences. If, for example, a State introduces voluntary acquisition of a foreign nationality as a new ground for loss of nationality, no such loss should occur if the foreign nationality is acquired after the introduction of this ground, but the application to acquire the nationality was already made prior to its introduction.

*(4) A legal provision regarding the acquisition of nationality may not be repealed with retroactivity.*

This principle is closely related to principle two above, as the retroactive repeal of a legal provision regarding the acquisition of nationality has the same result as the retroactive loss of nationality.

*(5) The principle of “tempus regit factum.”<sup>53</sup>*

To establish whether a person acquired or had a nationality withdrawn by certain acts or facts, the legislation in force at the moment these acts or facts took place should be applied. Article 17-2(1) of the French Code civil excellently expresses this principle: “Acquisition and loss of French nationality are governed by the law that is in force at the time of the act or fact to which legislation attributes those effects.”<sup>54</sup> Transitory provisions may allow exceptions to be made to this principle but not contrary to principles four and five above.

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<sup>52</sup> Compare the restriction of the loss of Netherlands nationality by minors by an introduction of some exceptions in 2003 with retroactivity from 1985.

<sup>53</sup> Literally: The time governs the fact.

<sup>54</sup> *L’acquisition et la perte de la nationalité française sont régies par la loi en vigueur au temps de l’acte ou du fait auquel la loi attache ces effets.*

*(6) Loss or deprivation provisions must be predictable.*

The principle of legal certainty requires that laws, particularly those regarding loss or deprivation provisions, must be predictable. The same situations must always lead to the same result, and different situations may not lead to the same result (the principle of equality). This also means that provisions on loss or deprivation of nationality may not be interpreted by analogy (applied on facts not evidently covered by the wording of the provisions involved).<sup>55</sup>

*(7) The administrative practice based on loss or deprivation provisions may not be discriminatory.*<sup>56</sup>

Loss or deprivation of nationality may not be based on discrimination on any ground prohibited in international human rights law, either in law or practice. These include all the grounds established in Article 2 of the ICCPR: “[R]ace, color [sic], sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

*(8) It must be possible to challenge the application of loss-provisions or acts of deprivation in court.*

The UN Secretary-General underpinned in his 2009 Report, “Procedural safeguards are essential to prevent abuse of the law. States are thus expected to observe minimum procedural standards in order to ensure that decisions on nationality matters do not contain any element of arbitrariness.”<sup>57</sup> More specifically, “[v]iolations of the right to a nationality must be open to an effective remedy.”<sup>58</sup>

*(9) Finally, the grounds given for a deprivation-decision must be proportional.*

This principle flows directly from *Rottmann*. According to the European principle of proportionality, a measure must be necessary, effective, and proportional to the goal to be achieved. This is also mentioned in the 2009 Report of the UN Secretary-General, underscoring in this respect:

Measures leading to the deprivation of nationality must serve a legitimate purpose that is consistent with international law and, in

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<sup>55</sup> See also U.N. Secretary-General, *supra* note 47, at para 25 (remarking on “predictability”).

<sup>56</sup> See U.N. Secretary-General, *supra* note 47, at para 21.

<sup>57</sup> *Id.* at para. 43

<sup>58</sup> *Id.* at para. 46.

particular, the objectives of international human rights law. Such measures must be the least intrusive instrument of those that might achieve the desired result, and they must be proportional to the interest to be protected. In this respect, the notion of arbitrariness applies to all State action, legislative, administrative and judicial. The notion of arbitrariness could be interpreted to include not only acts that are against the law but, more broadly, elements of appropriateness, injustice and lack of predictability also.<sup>59</sup>

The proportionality principle would have the following consequences for procedures on deprivation of nationality due to fraud committed during the naturalization procedure:

- a. No deprivation should take place in cases of minor offences.
- b. Consideration should be given to: The individual's situation, culpability of the act(s), and the circumstances in which the act(s) serving as the basis for the deprivation were committed.<sup>60</sup> Deprivation should not take place, for instance, if the person was not aware and could not have been aware of the fact that (a part of) the information provided during naturalization was untrue. Furthermore, due consideration should be paid to the reasons why a person committed the act(s). This is, for instance, the case if incorrect information was provided during a naturalization procedure because of fear for the safety of family members in another country.
- c. The amount of time which has elapsed from when an act was committed until it is discovered by the competent authorities must be taken into consideration. The period between the time the act was discovered and the time the deprivation decision is issued is also relevant. Regrettably, only a minority of States uses such time limits, and, when doing so, these limits vary greatly.<sup>61</sup> The time that has passed since the act was committed is also relevant for the assessment as to whether the gravity of the act justifies deprivation of nationality. If this time period is lengthy, only very grave offenses may justify a deprivation of nationality.<sup>62</sup>

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<sup>59</sup> *Id.* at para. 25, 27.

<sup>60</sup> *See, e.g.*, Nationality Act art. 33 (Fin.).

<sup>61</sup> From two years in France to fifteen years in Spain. Attention to the existing ties of the person concerned with the country is expressly mentioned in Article 33 of Finland's Nationality Act. In Portugal, the Nationality Act does not provide a time limit for a declaration of nullity of the entry in the register on which attribution or acquisition of nationality depends. However, in 2004 the Appeals Court decided in a case about a declaration of nullity initiated after 20 years from the entry in the register, that when the false registration is due to an error of the authorities, the principles of legal certainty and the prohibition of abuse of law would prevent the declaration of nullity. *Acórdão do Tribunal da Relação de Lisboa*, Case 8640/2003-6 (Jan. 29, 2004) (Portugal).

<sup>62</sup> In this sense, the official instruction on the application of article 14 of the Nationality Act of the Netherlands.

- d. Attention needs to be paid to the consequences of the deprivation of nationality for the person involved and his/her family members, in particular whether or not they might lose their right to reside in the country in which the person held the nationality. This includes situations where family members are third-country nationals who derive their right of residence from their relationship with the person facing deprivation of EU citizenship.
- e. The proportionality test must be applied individually for each person affected by the deprivation of nationality. If, for example, a couple was naturalized in one naturalization decree, and this naturalization extended to their two children, separate deprivation decisions need to be made for all the persons involved in case.
- f. Special consideration should be given to the nationality status of children of a person who committed fraud during the naturalization procedure,<sup>63</sup> particularly if the deprivation of nationality would make them stateless.

In conclusion, the case law of the CJEU, but also developments in the international arena, such as the 2009 Report of the UN Secretary General, show that the acquisition and loss of nationality is not and should not be solely left to the individual states. EU citizenship and the corresponding rulings of the CJEU, as well as international sources such as the aforementioned Report of the UN Secretary General, can be seen as articulating rules that the Member States of the European Union should observe in respect of the formulation and application of their rules of loss and deprivation of nationality. It will be fascinating to witness whether new judgments of the CJEU will shed more light on the limits of the autonomy of Member States in respect of their grounds for loss and deprivation of nationality.

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<sup>63</sup> See Nationality Act art. 33 (Fin.).

## **Nationality and Identity Issues—A Danish Perspective**

*By Eva Ersbøll\**

### **A. Introduction**

According to the European Convention on Nationality (1997), nationality—or the term “citizenship” used as synonymous with nationality—means a legal bond between a person and a state. As such, nationality is linked to nation building. Nationality can also be defined as equal membership in a political community, and as a status to which rights and duties, participatory practices and a sense of national identity are attached.<sup>1</sup> In other words, nationality constitutes an important element of a person’s identity.<sup>2</sup>

European Union citizenship is linked to nationality in an EU Member State. Union citizenship grants rights to the Member State nationals and may be defined as membership in a larger political community, the EU. Union citizenship is meant to foster a feeling of European identity. The third report of the Commission on Citizenship of the Union described citizenship as “both a source of legitimation of the process of European integration, by reinforcing the participation of citizens, and a fundamental factor in the creation among citizens of a sense of belonging to the European Union and of having a genuine European identity.”<sup>3</sup>

Surveys, though, indicate that EU nationals do not share strong feelings of belonging to and solidarity with the EU. If we measure membership in a political community by participatory practices, it is striking that the participation of European voters in European

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<sup>1</sup> See, e.g., Dora Kostakopoulou, *Co-creating European Union Citizenship*, in EUROPEAN COMMISSION POLICY REVIEW 14 (2013).

<sup>2</sup> See, e.g., United Nations Convention on the Rights of the Child art. 8, Nov. 20, 1989, 1577 U.N.T.S. 3 (concerning the child’s right to preserve his or her identity, including nationality, name and family relations).

<sup>3</sup> See *Report from the Commission—Third Report from the Commission on Citizenship of the Union*, at 7, COM (2001) 506 final (Jul. 9, 2001).



Parliament elections has steadily decreased since the first direct European election in 1979, last documented at 43 % in 2009 and 43.9 % in 2014.<sup>4</sup>

The literature is rich with analyses of nationality, Union citizenship and identity issues. Among the important works is Elspeth Guild's analysis of the legal elements of European identity.<sup>5</sup> Elspeth Guild points to citizenship and migration as ways of classifying types of identity and belonging, identifying rights of residence and equal treatment as the core of identity and citizenship.<sup>6</sup> She expects that the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) will contribute to clarifying the meaning of the legal elements of identity in Europe while maintaining that the most important test is whether the people of Europe embrace the concept as it is developing and accepts its legitimacy.<sup>7</sup>

This paper deals with some of the latest judgments from these two European courts and offers a Danish perspective as to the relationship of the individual to the EU through EU citizenship as introduced by the Maastricht Treaty. The structure of the paper is as follows: Part B. gives an account of citizenship and identity issues based on the case law of the European Court of Human Rights. Part C. focuses on the citizens' view of EU citizenship and Union citizenship rights. Part D. is devoted to the introduction of Union citizenship in the Maastricht Treaty. Part E. examines the development of Union citizenship, mainly through the case law of the European Court of Justice. Part F. focuses on national versus European identity. Part G. discusses the possibilities for European coordination in matters of nationality, and part H. contains the concluding remarks.

## **B. Citizenship and Identity Issues and the Perspective of the ECtHR**

As mentioned above, citizenship constitutes an important element of a person's identity. It signifies belonging to a political community usually in the form of a State and classifies identity. Within the last few years, the concept "personal identity" has come to play a role in international law. The European Court of Human Rights has established that "private life" as protected in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights or ECHR) is a term that is broad enough to embrace multiple aspects of the person's physical and social identity. In *Dadouch v. Malta*, the ECtHR found that "private life" may include means of

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<sup>4</sup> See *Results of the 2014 European Elections*, EUR. PARLIAMENT (May 25, 2014), <http://www.results-elections2014.eu/en/turnout.html>.

<sup>5</sup> ELSPETH GUILD, *THE LEGAL ELEMENTS OF EUROPEAN IDENTITY—EU CITIZENSHIP AND MIGRATION LAW* (2004).

<sup>6</sup> *Id.* at 1.

<sup>7</sup> *Id.* at xi.

personal identification, for instance “ethnic identification.”<sup>8</sup> And in *Genovese v. Malta*, the ECtHR found that a refusal of nationality had such impact on the applicant’s social identity as to bring it within the general scope and ambit of Article 8 and consequently, render Article 14 on non-discrimination applicable.<sup>9</sup> Thus, arguably, nationality or citizenship may be a means of personal identification.

EU citizenship was meant to foster popular support and allegiance to the EU through its institutions and policies and thus also a sense of European identity.<sup>10</sup> In the European Year of Citizens 2013, it is natural to ask to which extent EU citizenship really has the potential to promote the development of a genuine EU identity.<sup>11</sup> Moreover, to the extent that a European identity can be considered a means of personal identification, another interesting question is whether the CJEU will deal with this issue as far as it finds that a member state’s refusal of nationality and thus EU citizenship falls within the ambit of EU law.

In order to discuss these questions, a closer look must be taken of the CJEU’s reasoning exhibited in case law concerning the denial of citizenship. In *Rottmann*, the CJEU established that a Member State’s decision on loss of nationality and consequently also EU citizenship by reason of its nature and consequences falls within the ambit of EU law.<sup>12</sup> In this regard, the Court focused on the rights conferred by EU law that would be lost. So far the approach of the CJEU is in line with modern citizenship thinking: That rights—that are rights of residence and equality of treatment—are at the core of identity and indeed citizenship.<sup>13</sup> The question is how this corresponds to the ECtHR’s reasoning on nationality as an expression of national identity as a means of personal identification.

The *Genovese* case was about denial of nationality/citizenship by descent *a patre* based on the fact that the applicant was born out of wedlock.<sup>14</sup> The applicant’s complaint alleged that Maltese law regulating the acquisition of citizenship by descent discriminated against him, contrary to ECHR Article 14 in conjunction with Article 8.<sup>15</sup> The ECtHR reiterated that

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<sup>8</sup> *Dadouch v. Malta*, ECHR App. No. 38816/07, para. 47 (Oct. 20, 2010), <http://hudoc.echr.coe.int/>.

<sup>9</sup> *Genovese v. Malta*, ECHR App. No. 53124/09, paras. 33–34 (Jan. 11, 2012), <http://hudoc.echr.coe.int/>.

<sup>10</sup> See Andreas Føllesdal, *Union Citizenship: Unpacking the Beast of Burden* (Arena Center for European Studies, Working Paper No. 01/9, 2001).

<sup>11</sup> See the launch of the European Year of Citizens by the Irish Presidency at <http://eu2013.ie/ireland-and-the-presidency/abouttheeu/theeuandyou/europeanyearofcitizens/>

<sup>12</sup> *Janko Rottmann v. Freistaat Bayern*, CJEU Case C-135/08, 2010 E.C.R. I-1449.

<sup>13</sup> See ELSPETH GUILD, *THE LEGAL ELEMENTS OF EUROPEAN IDENTITY—EU CITIZENSHIP AND MIGRATION LAW* 17 (2004)

<sup>14</sup> *Genovese v. Malta*, ECHR App. No. 53124/09, paras. 12, 41 (Jan. 11, 2012), <http://hudoc.echr.coe.int/>.

<sup>15</sup> *Id.* at para. 22.

although Article 8 does not guarantee a right to acquire a particular nationality or citizenship, its concept of “private life” is a broad term not susceptible to exhaustive definition but rather covers the physical and psychological integrity of a person.<sup>16</sup> It can therefore embrace multiple aspects of the person’s physical and social identity. While the right to citizenship is not a convention right, and while its denial in the present case was not such as to give rise to a violation of Article 8, the ECtHR found that its impact on the applicant’s social identity brought it within the general scope and ambit of Article 8.<sup>17</sup>

Consequently, Article 14 ECHR was applicable; the prohibition of discrimination enshrined in Article 14 extends beyond the enjoyment of the rights and freedoms that the convention and its protocols require each state to guarantee. It also applies to those additional rights falling within the general scope of any convention article for which the state has voluntarily decided to provide. Because Maltese legislation expressly granted the right to citizenship by descent for children born abroad to a Maltese national and established a procedure to that end, the State, which had gone beyond its obligations under Article 8 in creating such a right—a possibility open to it under Article 53 ECHR—must ensure that the right was secured without discrimination within the meaning of Article 14.<sup>18</sup>

In *Karashev v. Finland*, the ECtHR stated that it could not be ruled out that an arbitrary denial of citizenship in certain circumstances might raise an issue under Article 8 ECHR because of its impact on the private (or family) life of the individual.<sup>19</sup> The applicant in *Karashev* was a child of Russian origin, born in Finland. He had among other things complained about the Finnish authorities’ procrastination in regularizing his stay in Finland and the resultant effects on his entitlement to various benefits. In spite of views obtained from the Russian authorities on the applicant’s insecure status under the Russian Citizenship Act, the Finnish authorities refused to consider the applicant a Finnish citizen by birth.<sup>20</sup> The applicant invoked both Articles 8 and 14 in this respect.

In *Karashev*, the ECtHR examined the complaints under Article 8 ECHR and concluded that the decision not to recognize the applicant as a Finnish citizen was not arbitrary in a way that could raise issues under Article 8.<sup>21</sup> As to the consequences of the denial of

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<sup>16</sup> *Id.* at para. 30.

<sup>17</sup> *Id.* at para. 33.

<sup>18</sup> *Id.* at paras. 34–36.

<sup>19</sup> *Karashev v. Finland*, ECHR App. No. 31414/96 (Jan. 12, 1999), <http://hudoc.echr.coe.int/>.

<sup>20</sup> The Finnish Nationality Act entitled a child born in Finland who did not at birth receive the citizenship of any other country to Finnish nationality.

<sup>21</sup> *Karashev v. Finland*, ECHR App. No. 31414/96, para. 1b (Jan. 12, 1999), <http://hudoc.echr.coe.int/>.

citizenship, the Court noted that the applicant was not threatened with expulsion from Finland, either alone or together with his parents.<sup>22</sup> His parents had residence permits and alien's passports, and similar documents could also be issued to him at their request. The applicant also enjoyed social benefits such as municipal day care and child allowance.<sup>23</sup> His mother also received unemployment allowance that included the applicant in its calculation. Based on this, the Court did not find that the consequences of the refusal of citizenship, taken separately or in combination with the refusal itself, could be considered sufficiently serious so as to raise an issue under Article 8.<sup>24</sup> In addition, leaving open the question whether the applicant's complaint fell within the ambit of Article 8 so as to make Article 14 applicable, the ECtHR did not find any substantiation for the allegation that the refusal of citizenship was discriminatory based on the ethnic and national background of the complainant's parents as well as their status as displaced persons.<sup>25</sup>

Through the judgment in *Genovese*, the ECtHR clarified that the right to citizenship by descent—and probably also by other means—falls within the general scope and ambit of Article 8.<sup>26</sup> The underlying reasoning is that denial of citizenship has an impact on a person's social identity. Thus, if a State's national legislation grants the right to citizenship by descent conferred from parents or other means and a procedure has been established to that end, the State must assure that the right to citizenship is secured without discrimination within the meaning of Article 14 ECHR.<sup>27</sup> In this judgment, the ECtHR assessed citizenship's informal significance rather than the formal. The Court seems to focus on the refusal's impact as to the applicant's feelings of belonging and social identity rather than its consequences in the form of lost rights, contrary to what the parties actually had focused on. The Maltese government had submitted that the case did not fall within the ambit of Article 8, as the applicant was already an EU citizen and as such could visit, reside and also work in Malta. The applicant, on the other hand, had submitted that the circumstances of the case fell within the ambit of "private life," irrespective of his father's lack of will to foster a relationship with him because Maltese citizenship would enable him to spend an unlimited time in Malta which he could devote to fostering and deepening a relationship with his father.<sup>28</sup> In applicant's opinion, his Union citizenship had

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at para. 2.

<sup>26</sup> See also Rene de Groot & Oliver Vonk, *Non-discriminatory access to the nationality of the father protected by the ECHR, A comment on Genovese v. Malta (European Court of Human Rights, Oct. 11, 2011)*, <http://eudocitizenship.eu/caselawDB/docs/Case%20Law%20Notes/Genovese%20case%20comment.pdf>.

<sup>27</sup> See *Genovese v. Malta*, ECHR App. No. 53124/09, para. 34 (Jan. 11, 2012), <http://hudoc.echr.coe.int/>.

<sup>28</sup> *Id.* at para. 28.

no bearing on the facts of the case since it did not allow him to acquire Maltese citizenship, and since the relevant EU directives created a series of residence rights subject to conditions and formalities and could not be comparable to outright citizenship.<sup>29</sup> Thus, the parties seemed to focus on what one could call the utility of citizenship.

The ECtHR did not touch upon the significance of EU citizenship. Instead the Court maintained that refusal of Maltese citizenship had such an impact on the applicant's social identity as to bring it within the general scope and ambit of Article 8 ECHR.<sup>30</sup> Additionally, since the applicant had been subjected to different treatment as a person born out of wedlock, and since the Court found no reasonable or objective grounds to justify such difference, the Court resolved that there had been a violation of Article 14 in conjunction with Article 8 ECHR.<sup>31</sup>

In a dissenting opinion, Justice Valenzia argued that the Court had not defined social identity nor explained how citizenship defined the applicant's identity.<sup>32</sup> Neither had the applicant produced proof "to show how this deprivation of Maltese citizenship has affected his private life and impacted on his social identity."<sup>33</sup> The effect was being presumed and taken for granted by the Court. Justice Valenzia noted that the applicant was born in 1996 and that already then his mother had started proceedings; and the constitutional proceedings started in Malta in 2006 when the applicant was nine years old.<sup>34</sup> Nowhere in the proceedings did Justice Valenzia find any proof of or claim made as to how the applicant was affected. Therefore, in his opinion, the facts in the case did not warrant the Court pushing that concept too far.

In this author's opinion, Justice Valenzia rightly argues that the ECtHR has taken the general viewpoint that acquisition of citizenship—at least acquisition by descent from parents—has such impact on a person's social identity that it falls within the ambit of Article 8 ECHR.<sup>35</sup> This is a general assumption and not something that must be established in every concrete case.

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<sup>29</sup> *Id.* at para. 28.

<sup>30</sup> *Id.* at para. 33.

<sup>31</sup> *Id.* at paras. 48–49.

<sup>32</sup> *Genovese v. Malta*, ECHR App. No. 53124/09 (Jan. 11, 2012), <http://hudoc.echr.coe.int/> (Valenzia, J., dissenting).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

In contrast, the CJEU in *Rottmann* focused on Mr. Rottmann's loss of Union citizenship rights.<sup>36</sup> The CJEU has repeatedly stressed that EU citizenship is destined to be the fundamental status of nationals of the member states, however, what matter in a loss situation are "the consequences that the decision entails for the person concerned and, if relevant, for the members of his family *with regard to the loss of the rights enjoyed by every citizen of the Union*."<sup>37</sup>

The scope of the CJEU's review in these kinds of cases is not yet known. It could be argued that an approach applied to cases of loss of citizenship might also apply to refusals of acquisition.<sup>38</sup> If so, there is a link to EU law, and a refusal of citizenship must be in accordance with the applicant's fundamental right to respect for family and private life and the non-discrimination principle laid down in the Charter of Fundamental Rights Article 7 and 21(1),<sup>39</sup> which are consistent with Articles 8 and 14 ECHR. In this context identity issues may arise.

In any case, the two European Courts' case law reinforces each other. Genovese has already convinced Denmark and Sweden that they have to place all children born of their nationals on an equal footing in regard to acquisition of nationality at birth.<sup>40</sup> Consequently, more children born out of wedlock outside these countries will acquire their nationality, and more children may take up residence in their country of nationality according to the principles established by the CJEU in *Zambrano*.<sup>41</sup>

Before trying to assess the applicability of the ECtHR's viewpoints in relation to EU citizenship, we will have to take a closer look at the public opinion of EU citizenship and

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<sup>36</sup> Janko Rottmann v. Freistaat Bayern, CJEU Case C-135/08, 2010 E.C.R. I-1449, paras. 42, 49.

<sup>37</sup> *Id.* at para. 56 (emphasis added).

<sup>38</sup> See Jo Shaw, *Setting the scene: the Rottmann case introduced*, 1–4 (Robert Schuman Center for Advanced Studies, EUI Working Paper No. 62, 2011), available at [http://eudo-citizenship.eu/docs/RSCAS\\_2011\\_62.pdf](http://eudo-citizenship.eu/docs/RSCAS_2011_62.pdf); Gareth T. Davies, *The entirely conventional supremacy of Union citizenship and rights*, 5–10 (Robert Schuman Center for Advanced Studies, EUI Working Paper No. 62, 2011), available at [http://eudo-citizenship.eu/docs/RSCAS\\_2011\\_62.pdf](http://eudo-citizenship.eu/docs/RSCAS_2011_62.pdf).

<sup>39</sup> Charter of Fundamental Rights of the European Union, Mar. 30, 2010, 2010 O.J. (C 83/389) arts. 7, 21(1).

<sup>40</sup> Read about the Swedish reform at [http://www.regeringen.se/download/07304fa5.pdf?major=1&minor=215710&cn=attachmentPublDuplicator\\_0\\_attachment](http://www.regeringen.se/download/07304fa5.pdf?major=1&minor=215710&cn=attachmentPublDuplicator_0_attachment); see Danish Nationality Act, Consolidation Act No. 422, July 1, 2014, § 1 available at <https://www.retsinformation.dk/Forms/R0710.aspx?id=163631>.

<sup>41</sup> Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEM), CJEU Case C-34/09, 2011 E.C.R. I 2011 I-01177; see also Gareth T. Davies, *The Family Rights of European Children: Expulsion of Non-European Parents* (Robert Schuman Center for Advanced Studies, EUI Working Paper No. 4, 2012), available at [http://cadmus.eui.eu/bitstream/handle/1814/20375/RSCAS\\_2012\\_04.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/20375/RSCAS_2012_04.pdf?sequence=1).

Union citizenship rights in order to assess to which extent the status and the rights attached to the status have stimulated European or EU identities.

### C. EU citizenship: The Public Opinion

According to a Flash Eurobarometer survey from 2012 on EU citizenship, the vast majority of EU citizens/respondents say that they are familiar with the term “citizen of the European Union” (81 %) and almost as many know that as citizens of a Member State, they are automatically Union citizens.<sup>42</sup> Although, less than one-half of all respondents (46 %) say that they are familiar with the term “citizen of the EU” and know what it means—an improvement by five percentage points since 2007.<sup>43</sup> The respondents’ awareness of their rights ranks even lower. Just over one third (36 %) state that they feel informed about their rights as EU citizens.<sup>44</sup> The respondents are most familiar with their right to free movement (88 %) and their right to petition key EU institutions (89 %).<sup>45</sup> Moreover, just over 80 % know that Union citizens residing in a member state other than their own have a right to be treated in the same way as nationals of that State.<sup>46</sup>

In the spring of 2013, the European Year of Citizens, a standard European survey measuring public opinion in the EU was carried out.<sup>47</sup> According to that survey, just over six out of ten Europeans see themselves as citizens of the European Union (62 %). The reverse is that more than one-third (37 %) do not share the feeling of being citizens of the EU.<sup>48</sup> Wide differences exist between countries.<sup>49</sup>

The Standard Eurobarometer (71) from 2009/2010 on the future of Europe, designed with a view to “reveal” Europeans’ feelings of identity with their own nation, the EU and the world should be compared to the 2013 survey of the public opinion in the European

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<sup>42</sup> EUR. COMM’N, *European Citizenship Report 4* (2013), [http://ec.europa.eu/public\\_opinion/flash/fl\\_365\\_en.pdf](http://ec.europa.eu/public_opinion/flash/fl_365_en.pdf).

<sup>43</sup> *Id.* at 6.

<sup>44</sup> *Id.* at 21.

<sup>45</sup> *Id.* at 26–27.

<sup>46</sup> *Id.*

<sup>47</sup> See EUR. COMM’N, *Public Opinion in the European Union, First Results* (2013), [http://ec.europa.eu/public\\_opinion/archives/eb/eb79/eb79\\_first\\_en.pdf](http://ec.europa.eu/public_opinion/archives/eb/eb79/eb79_first_en.pdf).

<sup>48</sup> *Id.* at 5.

<sup>49</sup> *Id.* More than three in four respondents in Luxembourg, Malta and Slovakia feel that they are citizens of the EU, while less than half do so in Bulgaria, the United Kingdom, Cyprus and Greece. However, these are the only four Member States where a majority of respondents do not feel that they are citizens of the EU.

Union.<sup>50</sup> The respondents were asked to which extent they personally felt that they were “European.” A majority (74 %) felt that they were European, while one-quarter of the respondents (25 %) did not share that feeling.<sup>51</sup> These respondents were also asked about the two most important elements “that go to make up a European identity.”<sup>52</sup> Here, the respondents selected “democratic values” (41 %) above all other options, while “geography” was the next most defining feature of a European identity (25 %).<sup>53</sup> Thus, what was measured was not so much “feelings of identity with the EU,” but rather feelings of belonging to Europe as compared to belonging to a nation/state and being a “citizen of the world.”<sup>54</sup> Interestingly enough, when asked about the factors that affect a national versus a European identity, two answers tied in top place, namely “to feel” a particular nationality and “to be born in” the country (both 42 %) and “to feel” European (41 %) and “to be born in” Europe (39 %).<sup>55</sup> Exercising citizen rights, for example, voting rights, was selected by 29 % as an important characteristic of being both a national and a European.<sup>56</sup> Unfortunately, the respondents were not asked about the importance of having a national or European citizenship. One can hardly rule out that the respondents’ opinion on citizenship, national and European, as an identity marker could have influenced the survey’s conclusion. As matters stood, the conclusion was how “remarkably” alike the respondents found the characteristics of national and European identity.

According to the 2013 Standard European survey, a majority of European citizens would like to know more about their rights as citizens of the EU (59 %).<sup>57</sup> This proportion has decreased since 2010, when 72 % shared this opinion. Conversely, the proportion saying that they are not interested in knowing more about their rights has increased (from 26 % in 2010 to 39 % in 2013). When asked about the most positive results of the EU cooperation, more than one-half of the respondents point to the free movement of people, goods and services (56 %) and peace among member states (53 %).<sup>58</sup> All other items (such as the euro, the ERASMUS program, EU’s influence in the world, the welfare level and the common agricultural policy) are selected by around one-quarter and one-fifth of the

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<sup>50</sup> See EUR. COMM’N, *Eurobarometer 71: Future of Europe* (2010), [http://ec.europa.eu/public\\_opinion/archives/eb/eb71/eb713\\_future\\_europe.pdf](http://ec.europa.eu/public_opinion/archives/eb/eb71/eb713_future_europe.pdf).

<sup>51</sup> *Id.* at 34.

<sup>52</sup> *Id.* at 39.

<sup>53</sup> *Id.*

<sup>54</sup> Compare *id.* at 35–36, with *id.* at 37–38.

<sup>55</sup> *Id.* at 42–50.

<sup>56</sup> *Id.*

<sup>57</sup> EUR. COMM’N, *supra* note 47, at 5.

<sup>58</sup> *Id.* at 8.



respondents.<sup>59</sup> The survey also highlighted that trust levels in national political institutions are decreasing (25-26%) while trust in EU institutions is increasing (31 %).<sup>60</sup> The image of the EU is stable (39 % say they are neutral and 30 % that they are positive; 29 % are negative).<sup>61</sup> In relation to the EU's future, 49 % are optimistic and 45 % are pessimistic.<sup>62</sup> At the individual level, about two-thirds of the respondents felt that their voices do not count in the EU (67 %).<sup>63</sup> This proportion has increased since the crisis started in 2009.<sup>64</sup> Unemployment is the main concern of Europeans. Regarding the consequences of the crisis, there is still a large majority of Europeans who say that the EU countries will have to work more closely together (84 %).<sup>65</sup> An absolute majority of Europeans say that the objectives of the Europe 2020 strategy are important.<sup>66</sup> The feeling of being closer to citizens in other European countries as a consequence of the crisis has, however, lost some ground (from 44 % in 2012 to 42 % in 2013).<sup>67</sup>

The surveys suggest that most Europeans are aware of their status as Union citizens and of the most important rights that follow from this status. Europeans recognize the importance of free movement rights and see the EU as a peace-keeping institution. All the same, they do not have much trust in the EU, but neither do they trust their own governments and parliaments. Thus, from an overall perspective there does not seem to be a general EU opposition.

Although, it appears worrisome that about two-thirds of the EU citizens do not think that their voices count in the EU and that less than one-half say that they are familiar with the term "citizen of the EU" and know what it means.<sup>68</sup> Moreover, an increasing proportion (now 39 %) expresses that they have no interest in learning more about their rights as EU citizens—although they admit that they do not know these rights.<sup>69</sup> This apparent apathy

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 9.

<sup>61</sup> *Id.* at 10.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 11.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 27.

<sup>66</sup> *Id.* at 29.

<sup>67</sup> *Id.* at 27.

<sup>68</sup> *Id.* at 11; EUR. COMM'N, *supra* note 42, at 21.

<sup>69</sup> EUR. COMM'N, *supra* note 42, at 6; EUR. COMM'N, *supra* note 47, at 7.

may be reflected in the fact that 37 % do not feel like “a citizen of the EU.”<sup>70</sup> There seems to be a discrepancy between EU citizens’ reactions and the general perception that a sense of belonging depends on the entitlements and obligations assigned to an individual. Likewise, from the outset it is not easy to reconcile citizens’ reactions with the general assumption that a legal link can foster a sense of a “common identity and shared destiny” and that this particularly may apply in the EU, where law has played a significant role in the integration process.<sup>71</sup>

The following discusses whether there are inherent problems in the architecture and/or development of the EU citizenship that hamper its ability to foster popular support and a feeling of belonging to the EU. As a starting point, we will take a Danish perspective.

#### **D. Introduction of EU citizenship, a Danish Perspective**

In order to understand the concept of “EU citizenship,” its functioning and the reactions it has provoked, it is necessary to look back to its introduction. It is a well-known fact that the idea of introducing a European citizenship emerged very early on during EC cooperation. In 1990, Spain came to play an active role in its preparation with the publication of a Spanish Memorandum entitled “Towards a European citizenship.”<sup>72</sup> In Danish, the title was translated to “Mod et EF-statsborgerskab.” *Statsborgerskab* is the Danish word for “citizenship”; however, in an EU context and literally spoken, *statsborgerskab* may indicate a (new) citizen-state relation—in line with the German word *staatsangehörigkeit*.

In any case, when the Maastricht Treaty introduced Union citizenship and Union citizens’ rights in the EC Treaty through Articles 8-8(e), it gave occasion for a Danish opt-out from the treaty. Union citizenship was considered an element in nation or state building and taken as one of the explanations for the Danish “no” vote in the 1992-referendum on ratification of the Maastricht Treaty.<sup>73</sup> The same applied to three other areas where Denmark wanted to stay outside the development of the European Union; namely in defense, the Economic and Monetary Union (EMU) and the Justice and Home Affairs-cooperation (JHA).<sup>74</sup> After the grant of four opt-outs from the Maastricht treaty, the Danish

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<sup>70</sup> EUR. COMM’N, *supra* note 47, at 5.

<sup>71</sup> See Karolina Rostek & Gareth Davies, *The Impact of Union Citizenship on National Citizenship Policies*, 22 TUL. EUR. & CIV. L. F. 95, 96 (2007).

<sup>72</sup> See *Spanish Memorandum: Towards a European Citizenship*, Council Doc. SN 3940/90 (Feb. 21, 1991), <http://eudo-citizenship.eu/inc/policydoc/Spanish%20Memorandum.pdf>.

<sup>73</sup> See DANSK INSTITUT FOR INTERNATIONALE STUDIER, *DE DANSKE FORBEHOLD, UDVIKLINGEN SIDEN 2000*, 30, 34 (2008).

<sup>74</sup> *Id.*; see also Henrik Larsen, *British and Danish policies in the 1990s: A Discourse Approach*, 5(4) EUR. J. OF INT’L. REL. 464, 466 (1999).

voters voted “yes” to the ratification of the treaty.<sup>75</sup> Prior to this, a “national compromise” had been agreed upon. All Danish political parties stood behind the compromise, except the right-wing Progress Party. The compromise was set down in a document entitled “Denmark in Europe” listing the four opt-outs that should reassure the Danish no-voters.<sup>76</sup> It was the general understanding that a majority among the Danes did not want “the United States of Europe.”<sup>77</sup>

The Danish opt-out from Union citizenship was formally introduced with the conclusion of the Edinburgh European Council on 12<sup>th</sup> December 1992 and worded as follows:

The provisions of Part Two of the Treaty establishing the European Community relating to citizenship of the Union give nationals of the Member States additional rights and protection as specified in that Part. They do not in any way take the place of national citizenship. The question whether an individual possesses the nationality of a Member State will be settled solely by reference to the national law of the Member State concerned.<sup>78</sup>

In fact, there was no disagreement among the member states as to this understanding of EU citizenship. The Birmingham declaration of 16 October 1992 made it clear that Union citizenship brings the member states’ citizens additional rights and protection without in any way taking the place of the states’ national citizenship.<sup>79</sup>

For the Danish political parties, however, it seemed to be important to demonstrate detachment to Union citizenship as a traditional citizenship concept. According to the national compromise, Denmark was not committed by the citizenship of the Union, and a Danish unilateral declaration, associated to the Danish ratification of the Maastricht Treaty, supported this viewpoint by stating as follows:

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<sup>75</sup> See DANSK UDENRIGSPOLITISK INSTITUT, *UDVIKLINGEN I EU SIDEN 1992 PÅ DE OMRÅDER, DER ER OMFATTET AF DE DANSKE FORBEHOLD* 31 (2000).

<sup>76</sup> See *The National Compromise: Denmark in Europe* (1992), <http://www.eu-oplysningen.dk/dokumenter/traktat/eu/nationalkompromis/>.

<sup>77</sup> *Id.* at § A. Introductory Remarks.

<sup>78</sup> See *Edinburgh Agreement*, FOLKETINGET (1992), [http://www.eu-oplysningen.dk/emner\\_en/forbehold/edinburgh/](http://www.eu-oplysningen.dk/emner_en/forbehold/edinburgh/).

<sup>79</sup> See EUROPEAN COUNCIL, *Birmingham Declaration* (Oct. 16, 1992), [http://europa.eu/rapid/press-release\\_DOC-92-6\\_en.htm](http://europa.eu/rapid/press-release_DOC-92-6_en.htm).

(1) Citizenship of the Union is a political and legal concept which is entirely different from the concept of citizenship within the meaning of the Constitution of the Kingdom of Denmark and of the Danish legal system. Nothing in the Treaty on European Union implies or foresees an undertaking to create a citizenship of the Union in the sense of citizenship of a nation-state. The question of Denmark participating in any such development does, therefore, not arise.

(2) Citizenship of the Union in no way in itself gives a national of another Member State the right to obtain Danish citizenship or any of the rights, duties, privileges or advantages that are inherent in Danish citizenship by virtue of Denmark's constitutional, legal and administrative rules. Denmark will fully respect all specific rights expressly provided for in the Treaty and applying to nationals of the Member States.<sup>80</sup>

The last paragraph in the unilateral declaration deals with the Maastricht Treaty's Article 8(e) and the possibilities to strengthen and add to Union citizens' rights as established in the treaty. The explanatory memorandum to the Danish Act on ratification of the Maastricht Treaty stressed that Denmark would not participate in any possible development or strengthening that might follow from the Union objective within the areas dealt with in the Edinburgh Declaration.<sup>81</sup> According to the Danish Minister for Foreign Affairs, it would under any circumstances be natural to settle any such question on Danish participation, if raised in the future, by a binding referendum.<sup>82</sup>

In 1997, the Amsterdam Treaty embodied the Danish opt-out on Union citizenship in the Union citizenship provision stating that, "Citizenship of the Union is a supplement to national citizenship and not a replacement."<sup>83</sup> Implicitly, the amendment might suggest that Union citizenship could be misunderstood.<sup>84</sup> Arguably, by the amendment the other EU countries followed the signal sent by Denmark in its formulation of the Danish opt-out

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<sup>80</sup> See Denmark and the Treaty on European Union, Dec. 31, 1992, 1992 O.J. (C 348).

<sup>81</sup> *Id.*

<sup>82</sup> Stated in the preparatory work to the Danish Act on ratification of the Maastricht Treaty, see Betænkning Mar. 19, 1993 in FT 1992–93 tillæg B 977.

<sup>83</sup> Treaty of Amsterdam Amending the Treaty of The European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) art. 2(9) [hereinafter Treaty of Amsterdam].

<sup>84</sup> See Francis G. Jacobs, *Citizenship of the European Union—A Legal Analysis*, 13(5) EUR. L. J. 592 (2007).

with regard to Union citizenship.<sup>85</sup> The Amsterdam Treaty reflects the wording of the Danish opt-out from Union citizenship, and in a sense, the Danish opt-out has become general EU law.<sup>86</sup> Among Danish politicians and officials working with EU matters, it is the general opinion that with the Amsterdam Treaty, the Danish Union citizenship opt-out is without any significance.<sup>87</sup>

This does not mean, though, that there are no misunderstandings in relation to the EU citizenship. Neither does it signify that the Danish citizens are aware of Denmark's position in the EU cooperation as to Union citizenship matters. To give one example, the rating agency Greens Analyseinstitut continuously surveys the Danish population's view on the opt-outs through telephone and web-based surveys.<sup>88</sup> The latest survey covers the period 23–28 August 2013 and a total of 1215 persons participated.<sup>89</sup> The respondents were asked what they would vote if there was a new referendum the next day on Danish participation in the EU-cooperation within the four areas that are covered by the opt-outs.<sup>90</sup> More specifically they were asked whether they would vote "yes" or "no" or "don't know/will not answer" in referenda regarding one or more of the opt-outs or the whole package (all four opt-outs simultaneously).<sup>91</sup>

The problem with the survey is that while it makes sense to ask voters about Danish participation and thus abolishment of the opt outs regarding the Euro, defense or JHA-cooperation, it does not make sense to ask about the abolishment of the Union citizenship opt-out. The first mentioned three opt-outs are highly influential in regard to Danish participation in the EU cooperation, while the Union citizenship opt-out is insignificant. Denmark is bound by the Union citizenship cooperation on equal footing with the other member states. Still, at the opinion poll in August 2013, only 28 % of the respondents wanted to abolish the opt-out on Union citizenship.<sup>92</sup> Among the rest, 53 % rejected Danish participation and 27 % did not know or would not answer the question.<sup>93</sup>

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<sup>85</sup> DANSK INSTITUT FOR INTERNATIONALE STUDIER, *supra* note 73.

<sup>86</sup> See DANISH INSTITUTE FOR INTERNATIONAL STUDIES, *DE DANSKE FORBEHOLD OVER FOR DEN EUROPÆISKE UNION, UDVIKLINGEN SIDEN 2000*, 244–45 (2008).

<sup>87</sup> *Id.*

<sup>88</sup> See Opinion Poll (2013), [http://img.borsen.dk/img/cms/tuksi4/media/cmsmedia/2273\\_content\\_2\\_2266.pdf](http://img.borsen.dk/img/cms/tuksi4/media/cmsmedia/2273_content_2_2266.pdf).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> In total the respondents were asked five questions: one for each opt-out and one for "the whole package."

<sup>92</sup> Opinion Poll, *supra* note 88.

<sup>93</sup> Opinion Poll, *supra* note 88.

It is noteworthy that the share in favor of abolishing the Union citizenship opt-out has decreased by 10 % since the then Danish Prime Minister in 2008 made known that the government considered abolishing the opt-outs.<sup>94</sup> The reason may be that many Danes still see the Union citizenship opt-out as a safety net securing that Union citizenship will not develop into a status comparable to national citizenship or even replace it.

The “history” of the Union citizenship opt-out may be reflected in the Danish results of the 2012/2013 Flash Eurobarometer survey on European Union Citizenship where only 37% of the Danish respondents said that they were familiar with the term “citizen of the European Union” and knew what it meant against an average of 46%.<sup>95</sup>

Still, it is remarkable that a relatively high percentage of the Danes feel that they are citizens of the EU (71% against an average of 62%), know their rights as citizens of the EU (59% against an average of 46), and are interested in knowing more about these rights (67% versus an average of 59%).<sup>96</sup> Additionally, the 2012/2013 survey shows that Denmark has the highest proportion of citizens who feel informed about their rights as citizens of the European Union (49 % against an average of 36 %).<sup>97</sup>

This mixed picture as to the meaning of Union citizenship may be explained by a Danish confusion and/or uncertainty resulting from the Danish opt-out from the Union citizenship. In the official Danish language, the terms “Union citizen” and “Union citizenship” are relatively seldom used.<sup>98</sup> In the surveys mentioned above, the respondents were told that it was about *statsborgerskab i EU*, but they were asked whether they were familiar with the term *borger i EU* and whether they felt informed about their rights as *borger i EU*.<sup>99</sup> The Danish word *borger* may be translated to “citizen,” but not in the sense “a person with citizenship,” rather in the sense “a resident.” Danes use *borger* when referring to inhabitants of a town, state etc. Thus, they may, without consciously identifying themselves as “citizens with an EU citizenship,” share the feeling of being citizens/*borgere* in the EU.

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<sup>94</sup> Opinion Poll, *supra* note 88.

<sup>95</sup> See EUR. COMM’N, *supra* note 42.

<sup>96</sup> See EUR. COMM’N, *supra* note 47.

<sup>97</sup> See EUR. COMM’N, *supra* note 42.

<sup>98</sup> Cf., *supra*, the confusion created by the translation of the Spanish memorandum where EU citizenship was translated to EU *statsborgerskab*.

<sup>99</sup> EUR. COMM’N, *supra* note 42, at question 2 in the Danish version, [http://ec.europa.eu/public\\_opinion/flash/fl\\_365\\_fact\\_dk\\_da.pdf](http://ec.europa.eu/public_opinion/flash/fl_365_fact_dk_da.pdf).

Another important factor may be that Danes have not been taught much about Union citizenship and Union citizenship rights. It follows from the Danish unilateral declaration, associated with the ratification of the Maastricht Treaty, that Denmark will fully respect all specific rights expressly provided for in the Treaty. Still, many important rights are not expressly provided for in the Treaty. Rather, they are developed through the case law of the CJEU, especially during its interpretation of the free movement rights.<sup>100</sup> These rights are not always foreseeable for neither the governments nor the citizens. Moreover, governments may be reluctant as to inform about the rights. By way of illustration, in 2008 the Danish Ombudsman had to criticize the Danish Immigration Service's guidance concerning access to family reunification according to EU law.<sup>101</sup> The Ombudsman criticized that the Immigration Service was not current with the developing EU rights, that there were misunderstandings and that the interpretation of the rights was too restrictive.<sup>102</sup>

#### E. The Development of EU Citizenship

The turbulence that the introduction of Union citizenship occasioned in Denmark—and consequently also in the rest of the EU—was, as mentioned in part C, mainly explained by the introduction of the Union citizenship concept. The rights attached to Union citizenship did not play a major role, one of the reasons being that foreigners in Denmark had already been granted voting rights in local elections.<sup>103</sup>

In the Maastricht Treaty, the rights reserved exclusively for Union citizens were the free movement rights, the rights to vote and stand as candidate in municipal and European Parliament elections and the right to seek help from consular authorities of other member states.<sup>104</sup> They were limited in numbers and in principle could only be enjoyed by the Union citizens who were outside their own home state. As Advocate General Francis G. Jacobs has stated:

[T]he specific rights set out in the TEU seemed to add little to the existing rights flowing from the Treaties, the legislation, and the case-law. Indeed the

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<sup>100</sup> See, e.g., *infra*, judgments in Section D.

<sup>101</sup> See Kirsten Talevski, *God vejledning styrker borgernes retssikkerhed* [Good Guidance Strengthens the Legal Rights of Citizens], PARLIAMENTARY OMBUDSMEN REPORT (2009), [http://beretning.ombudsmanden.dk/artikler/god\\_vejledning\\_styrker\\_borgernes\\_retssikkerhed](http://beretning.ombudsmanden.dk/artikler/god_vejledning_styrker_borgernes_retssikkerhed).

<sup>102</sup> See *Vejledningssagen er slut* [The case on guidance is brought to an end], FOLKETINGETS OMBUDSMAND (Nov. 21, 2008), [http://www.ombudsmanden.dk/find/nyheder/alle/Vejledningssagen\\_er\\_slut/Vejledningssagenerslut.pdf](http://www.ombudsmanden.dk/find/nyheder/alle/Vejledningssagen_er_slut/Vejledningssagenerslut.pdf).

<sup>103</sup> Francis G. Jacobs, *Citizenship of the European Union – A Legal Analysis*, 13(5) EURO. L.J. 592 (2007).

<sup>104</sup> See Treaty of Maastricht on European Union, Nov. 1, 1993, O.J. (C 191) art. 8(a)-(f).

introduction of EU citizenship in the Treaty was regarded in some quarters as a false prospectus. However, the CJEU was able to give the concept a more substantial content than the authors of the Treaty provisions may have envisaged.<sup>105</sup>

Union citizenship has acquired great importance through the right to free movement and the principle of non-discrimination. It follows from the treaty, now TFEU Article 18, that within the scope of the application of the treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.<sup>106</sup>

The CJEU has in several cases established that Union citizenship is intended to be the fundamental status of nationals of the member states.<sup>107</sup> The Court has found it useful to invoke Union citizenship in order to invoke a broad interpretation of the scope of the treaty for the prohibition of discrimination whether *ratione persona* or *ratione materiae*.<sup>108</sup> In this way, the Court has secured the economic and social rights of Union citizens.

Yet the CJEU has maintained that EU law cannot be applied to situations that are wholly internal to a member state. It has maintained the traditional viewpoint that its application is dependent on a “cross-border-element.” This element has been softened in so far as the Court has found “cross-border” elements in cases where there has been no physical movement from one member state to another.<sup>109</sup> Still, there must be a link with EU law.<sup>110</sup>

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<sup>105</sup> Jacobs, *supra* note 103, at 592.

<sup>106</sup> Consolidated Version of the Treaty on the Functioning of the European Union, May 9, 2008, 2008 O.J. (C 115) art. 18 [hereinafter TFEU] (stating, “[w]ithin the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt rules designed to prohibit such discrimination.”).

<sup>107</sup> See Gerardo Ruiz Zambrano v. Office national de l’emploi (ONEM), CJEU Case C-34/09, 2011 E.C.R. I-01177, para. 41.

<sup>108</sup> See Jacobs, *supra* note 103

<sup>109</sup> See, e.g., Kunqian Catherine Zhu and Man Lavette Chen v. Sec’y of State for the Home Dep’t, CJEU Case C-200/02, 2004 E.C.R. I-9925; Janko Rottmann v. Freistaat Bayern, CJEU Case C-135/08, 2010 E.C.R. I-1449; Zambrano, CJEU Case C-34/09.

<sup>110</sup> See Justice Koen Leenaerts, “Civis europaeus sum”: *From the Cross-Border Link to the Status of Citizen of the Union*, 3 ONLINE J. FREE MOVEMENT OF WORKERS WITHIN THE EUR. UNION 6 (2011).



Advocate General Jacobs has rightly characterized the case law of the CJEU on Union citizenship as complex, rapidly evolving, and often highly technical.<sup>111</sup> For lawyers who are familiar with EU law, the Court's approach, techniques, and interpretation methods may make sense, but for European citizens who may not be familiar with the techniques, the Court's judgments may appear inconceivable and sometimes even unfair.<sup>112</sup> If citizens in general feel uncertain or lack appreciation of the consequences of EU citizenship, this may explain why a relatively high percentage of them have difficulties seeing themselves as Union citizens or even dissociate themselves from learning more about their Union citizenship rights.<sup>113</sup>

On the one hand, the underlying problem may be the CJEU's interpretative style and, on the other hand, EU law and the way that Union citizenship is constructed. The following focuses on two inherent problems, raising questions on inequality and lack of fairness.

Firstly, it is for each member state to decide in its own legislation whom shall become its nationals and thereby Union citizens.<sup>114</sup> States use different admission criteria that may be both under and over inclusive. For instance, states with restrictive naturalization criteria may exclude large groups of third country nationals from EU citizenship and Union citizenship rights, while states with lenient criteria for acquisition of citizenship by descent may include the remotest descendants of earlier generations of expatriates. These conflicting regulatory practices may create problems of experienced inequality and injustice.

Secondly, in some member states, nationals who have not availed themselves of their free movement rights may experience reverse discrimination when they compare themselves to resident Union citizens from other EU member states or co-nationals who have invoked their freedom of movement rights. In relation to family reunification, for instance, nationals of a country with a very restrictive immigration policy may find themselves prevented from being united with their foreign family, while resident EU citizens *a priori* have a right to reside with their family, because a separation might hamper their free movement within the EU territory.<sup>115</sup> Again, the architecture of Union citizenship and the

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<sup>111</sup> See Jacobs, *supra*, note 103.

<sup>112</sup> See Jo Shaw, *Concluding Thoughts: Rottmann in Context*, EUR. UNIVERSITY INSTITUTE 8 (2011).

<sup>113</sup> See *supra* Part B.

<sup>114</sup> See European Convention on Nationality, Nov. 6, 1997, E.T.S. No. 166 art. 3.

<sup>115</sup> See Anne Zacho Møller, *Network Formation and Sense of Belonging: An Investigation of Social Boundaries and Trifocal Affiliation*, 7 (Spring 2009) (unpublished Master's Thesis, Malmö Högskola), [http://www.aegteskabudengraenser.dk/uploads/files/thesis\\_gathered.pdf](http://www.aegteskabudengraenser.dk/uploads/files/thesis_gathered.pdf) (explaining how Danish citizens move to Sweden with a foreign spouse with a view to acquire Swedish citizenship after two years' residence—possible for Nordic citizens—in order to move back to Denmark as EU citizens with a TCN spouse (so far, Danish citizenship is lost by the acquisition of a foreign citizenship)).

attached Union citizen rights may lead to situations of experienced discrimination and injustice.

Some CJEU judgments are examined in the following paragraphs and are compared with a few Danish cases, illustrating inequality problems that follow from the interpretation of national law in interaction with EU law. The chosen examples address the two aforementioned problems.

The first problem is the interdependence of member states' nationality law and the fact that states may grant their citizenship and thereby Union citizenship to persons from third countries without a genuine link to any EU member state.<sup>116</sup> By way of example, some member states offer their citizenship to large populations abroad who are of emigrant decent, generation after generation. For immigrants who regardless of their genuine link to a state are excluded from being granted said state's citizenship and thereby Union citizenship and Union citizenship rights, it lies close at hand to feel discriminated.

The other problem is the "reverse discrimination" created by the interaction of EU law with national law. In these situations, a state offers better treatment to mobile EU citizens than it offers to its own "static" citizens.

The examples below illustrate how Union citizenship, once acquired, may provide for extensive rights from which both resident third country nationals and, to a certain extent, nationals in a member state may be excluded.

The first case mentioned is *Micheletti*.<sup>117</sup> Mr. Micheletti was born in Argentina of Italian parents. Since birth he had possessed both an Argentinian and Italian citizenship. As an adult he moved to Spain where he wanted to establish himself as a dentist.<sup>118</sup> He had not before resided in Europe, but as an Italian citizen and thus a citizen of an EU member state, he claimed freedom of establishment. At first, this was refused because Spanish law in force at that time identified the citizenship of a foreign dual citizen as the citizenship corresponding to the habitual residence of that person before his arrival in Spain. The CJEU, though, ruled that it is not permissible for the legislation of a member state to

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<sup>116</sup> See Costanza Margiotto & Olivier Vonk, *Nationality Law and European Citizenship: The Role of Dual Nationality* 7 (Eur. Univ. Institute, Eur. Union Democracy Observatory on Citizenship, Working Paper No. RSCAS 66, 2010), available at [http://eudo-citizenship.eu/docs/RSCAS%202010\\_66.pdf](http://eudo-citizenship.eu/docs/RSCAS%202010_66.pdf) (explaining Italian Citizenship policy that allows Italian citizenship to be passed on after emigration without restrictions, even a person who can prove descent from an Italian who emigrated before the unification of Italy in 1861 is entitled to Italian nationality, provided that the Italian ancestor was alive at the time of the unification).

<sup>117</sup> Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria, CJEU Case C-369/90, 1992 E.C.R. I-04239 (This case was decided before the Maastricht Treaty entered into force.).

<sup>118</sup> *Id.* at paras. 2-4.

restrict the effects of granting citizenship of another member state by imposing an additional condition for the recognition of that citizenship with a view to the exercise of the fundamental freedoms provided for in the Treaty.<sup>119</sup> Thus, as citizen of an EU member state, Mr. Micheletti could establish himself as a dentist in Spain.

Mr. Micheletti had acquired his Italian citizenship at birth by descent from Italian parents; thus in his case, his Italian citizenship may have had an impact on his social identity and thus have been a means of personal identification, in the same way as did Maltese citizenship in the *Genovese* case.<sup>120</sup> The fact of having parents who have emigrated from Europe to Argentina may also have been a means of personal identification, creating a sense of belonging to the EU. The question, however, is whether the same would have been the case if Mr. Micheletti had not been the child of Italian emigrants, but the grandchild, great-grandchild or great-great-grandchild. He could still have been an EU citizen with free movement rights because Italy belongs to the group of states granting citizenship by descent without any residency qualifications.<sup>121</sup> This potentially creates an endless proliferation of citizenship across generations born abroad, which is problematic insofar as later generations in most cases do not have a genuine link to their ancestors' country of emigration.<sup>122</sup>

The grant of such extensive rights based on a member state's over inclusive citizenship policy seems unfair in comparison with the lack of rights that persons with a genuine link to a member state may experience in a state with an under inclusive citizenship policy. A Danish case is illustrative here. A young woman at the age of 22 fled from the civil war and violence in Syria.<sup>123</sup> Being a dual Danish and Syrian citizen by birth out of a Danish-Syrian marriage, she enters Denmark with a Danish passport, issued to her after her 18th birthday and valid for a ten-year period. In Denmark, though, she discovers that a Danish citizen who is born abroad and has never lived in Denmark nor stayed in Denmark under circumstances indicating some association with Denmark loses Danish citizenship automatically *ex lege* on attaining the age of 22. The Minister for Justice may grant an application for retention of Danish nationality, if submitted before the applicant's 22nd

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<sup>119</sup> *Id.* at para. 10.

<sup>120</sup> See *Report from the Commission—Third Report from the Commission on Citizenship of the Union*, at 7, COM (2001) 506 final (Jul. 9, 2001).

<sup>121</sup> See Margiotta & Vonk, *supra* note 116.

<sup>122</sup> See Rainer Bauböck & Bernhard Perchinig, *Evaluations and Recommendations, in ACQUISITION AND LOSS OF NATIONALITY, VOL. 1: COMPARATIVE ANALYSES* 454 (Rainer Bauböck et al. eds., 2006).

<sup>123</sup> Information about the case given during counseling at the Danish Institute for Human Rights in 2013.

birthday.<sup>124</sup> Although, as the woman had turned 22 a few months before she came to Denmark, she could not avail herself of this possibility.

This case has not yet been decided by the Danish Ministry of Justice. In general the Ministry accepts that a foreign-born Danish national has maintained Danish citizenship if said person has stayed in Denmark for a period at 12 months in total. If the association requirement is not fulfilled, and loss of Danish citizenship is assumed to have occurred automatically at the age of 22, the case potentially could be brought before the CJEU. The Court would then have to decide whether the woman's situation falls within the ambit of EU law.<sup>125</sup> The Court arguably would take that position.<sup>126</sup> Even though her situation is different from *Rottmann*, her possible loss of Union citizenship and Union citizenship rights may by reason of its nature and consequences fall within the ambit of EU law. In principle, Danish nationality is lost *ex lege* automatically at the age of 22 if the person concerned has not stayed in Denmark in a way indicating some association with Denmark.<sup>127</sup> If Danish citizenship is lost automatically at the age of 22, the authorities are prevented from applying the principle of proportionality as concerns the consequences the loss entails for the situation of the person concerned in the light of EU law. Such an arrangement may be contrary to EU law.<sup>128</sup> In any event, from an equality perspective, the strongly contrasting Italian and Danish legislation speaks in favor of a common interest in coordinating the member states' citizenship acts.

Another CJEU case, *Zhu and Chen*,<sup>129</sup> illustrates a similar problem. In this case, the CJEU used Union citizenship as an independent legal source.<sup>130</sup> The case concerns a married

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<sup>124</sup> See Consolidated Act on Danish Nationality, No. 422, July 1, 2004, § 8(1) (stating, "[a]ny person born abroad who has never lived in Denmark nor been staying in Denmark under circumstances indicating some association with Denmark will lose his or her Danish nationality on attaining the age of 22 unless this will make the person concerned stateless. The Minister for Refugee, Immigration and Integration Affairs [now the Minister of Justice] or the person he so authorises may grant an application, submitted before the applicant's 22nd birthday, for retention of Danish nationality.").

<sup>125</sup> See *Janko Rottmann v Freistaat Bayern*, CJEU Case C-135/08, 2010 E.C.R. I-1449, para 42.

<sup>126</sup> *Id.* at paras. 45-46 (regarding the CJEU's possibility to rule on questions concerning the conditions in which a citizen of the Union may, due to loss of citizenship, lose his or her status of citizen of the Union and thereby be deprived of the rights attaching to that status).

<sup>127</sup> See *supra* text accompanying note 123.

<sup>128</sup> See *Rottmann*, CJEU Case C-135/08 at paras. 50-52 (holding it is for the national court to ascertain whether a withdrawal decision observes the principle of proportionality so far as concerns the consequences it entails for the situation of the person concerned in the light of European Union law, in addition, where appropriate, to examination of the proportionality of the decision in the light of national law).

<sup>129</sup> See *Zhu and Chen*, CJEU Case C-200/02, 2004 E.C.R. I-09925.

<sup>130</sup> *Id.* at para. 26.

couple of Chinese origin, Mrs. Chen and her husband. For the purpose of work, the husband travelled frequently to EU Member States, particularly to the UK. When Mrs. Chen was about six months pregnant, she joined her husband in the UK. Later, she went to Belfast, Northern Ireland, to give birth to her child, who according to Irish law in force at that time acquired Irish nationality at birth based on the *ius soli* principle. Thereby the child became a Union citizen, and based on the child's Union citizenship, Mrs. Chen applied for a British permanent residence permit for the child and herself. After the British Authorities refused her request, the case was brought before the CJEU.<sup>131</sup>

The CJEU reiterated that every person holding the nationality of a member state is a citizen of the Union, and that Union citizenship is destined to be the fundamental status of nationals of the Member States.<sup>132</sup> Because Union citizens have the right to reside in a member state other than their own, subject to certain conditions as to health insurance and sufficient resources that were fulfilled, the child had, as a citizen of Ireland and a Union citizen, the right to reside in the UK.<sup>133</sup> Additionally the mother had a derived residence right because she was the caretaker of the child, and a refusal of allowing her to reside in the UK would deprive the child's residence right of any useful effect.<sup>134</sup>

There is good reason to assume that the Chen child and her mother did not *a priori* have an Irish or British identity—or a European identity for that matter. In their case, neither Irish citizenship nor EU citizenship seems to have been a means of personal identification but rather a means for securing the family's residence within the EU. Thus, it was instrumental. The family had no genuine link to Ireland or the UK. Rather, they took advantage of EU law and the way Union citizenship is constructed. Again, for resident third country nationals who cannot acquire similar residence rights, the differential treatment may appear unfair. For certain other groups, it may appear even more unfair. Among these groups are persons deprived of both residence and citizenship rights. For example, the *Kaur* case concerned the UK's immigration legislation providing for a refusal to grant leave to remain in the UK to a British Overseas Citizen.<sup>135</sup>

Another Danish case may illustrate the problematic differences between the member states' citizenship over and under inclusive policies. A pregnant stateless woman, resident in Denmark, went to Sweden to visit a friend on a one-day trip.<sup>136</sup> Unexpectedly, her labor

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<sup>131</sup> *Id.* at paras. 7–14.

<sup>132</sup> *Id.* at para. 25.

<sup>133</sup> *Id.* at paras. 36–41.

<sup>134</sup> *Id.* at para. 45.

<sup>135</sup> See *The Queen v. Sec'y of State for the Home Dep't, ex parte Manjit Kaur*, CJEU Case C-192/99, 2001 E.C.R. I-1237, paras. 19–27.

<sup>136</sup> Information about the case given during counseling at the Danish Institute for Human Rights in 2011–2013.

pains began and she was brought to a Swedish hospital where she prematurely gave birth to a daughter. The following day she returned to Denmark with the baby. Unlike her siblings, the child born in Sweden could not acquire Danish citizenship according to the Danish provision implementing Article 7 of the Convention on the Rights of the Child.<sup>137</sup> According to Danish law, a stateless child's acquisition of citizenship is conditioned by birth on Danish territory.<sup>138</sup> The child's application for citizenship was refused by different ministers under two governments until eventually she was granted Danish citizenship at the age of 16, after her case had been taken up by politicians in the Parliamentary Naturalisation Committee.<sup>139</sup>

The last illustrative CJEU judgment to be introduced here is *Metock*.<sup>140</sup> In this case, the Court used the non-obstruction test.<sup>141</sup> The case comprised four cases in which the Irish Ministry of Justice had refused to grant a residence card to a national of a non-member state married to a Union citizen from another member state residing in Ireland. One of these four cases concerned Mr. Metock, a national of Cameroon, who had moved to Ireland and applied for asylum. In Ireland he married a woman of Cameroon origin with UK nationality, who worked and resided in Ireland. After his application for asylum in Ireland was refused, he applied for a residence card as spouse of an established Union citizen. This was also refused because he did not satisfy a condition of prior lawful residence in another EU member state.<sup>142</sup> The Irish requirement of prior lawful residence was based on the CJEU's judgment in *Akrich*.<sup>143</sup> However, the CJEU in *Metock* found that the refusal of a host member state to grant rights of entry and residence to the family member of a Union citizen is such as to discourage that citizen from moving to or residing in that member state. Therefore, the requirement of prior lawful residence was not valid.<sup>144</sup>

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<sup>137</sup> Convention on the Rights of the Child art. 7, Nov. 20, 1989 (establishing that the child shall have the right from birth to a name and the right to acquire a nationality).

<sup>138</sup> See the Ministry of Justice's Circular Letter No. 9253 of 6 June 2013 on naturalisation, available at <https://www.retsinformation.dk/Forms/R0710.aspx?id=152087>, § 17, (stating that in accordance with the 1989 Convention on the Rights of the Child, children who are born stateless in Denmark may be listed in a naturalisation bill, regardless of whether they fulfil the ordinary conditions, if they are resident in Denmark.).

<sup>139</sup> *Folketinget underkender Morten Bødskov i sag om statsløs pige [The Parliament does not approve (the Minister of Justice) in case on stateless girl]*, INFORMATION (Apr. 25, 2013), <http://www.information.dk/458535>.

<sup>140</sup> See *Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform*, CJEU Case C-127/08, 2008 3 C.M.L.R. 39.

<sup>141</sup> *Id.* at paras. 62-65.

<sup>142</sup> The other three cases dealt with applicants who had not been lawfully residing in another member state before moving to Ireland.

<sup>143</sup> See *Sec'y of State for the Home Dep't v. Hacene Akrich*, CJEU Case C-109/01, 2003 E.C.R. I-9607, para.50.

<sup>144</sup> See *Metock*, CJEU Case C-127/08 at para. 80.

The CJEU based its judgment on an interpretation of Directive 2004/38/EC on rights of Union citizens and their family members to move and reside freely in the territory of a Member State. According to the Court, the directive confers on all third country nationals, who are family members of Union citizens within the meaning of the directive and accompany or join the Union citizen in a host member state, rights of entry into and residence in the member state regardless of prior lawful residence. The Court emphasized that even before the adoption of the Directive, the Community legislature recognized the importance of protecting the family life of Union citizens in order to eliminate obstacles to the exercise of among others their right to free movement.<sup>145</sup>

The right of entry and residence is based on the axiom that a state must not refuse entry and/or residence of a Union citizen's spouse because this may seriously obstruct the exercise of free movement by discouraging the Union citizen from exercising his or her right of entry and residence. According to the Court's reasoning, the establishment of an internal market signifies that the right to entry and residence of family members cannot vary from one member state to another because this would influence the right of Union citizens to establish themselves in any of the member states under the same conditions.<sup>146</sup>

It is noteworthy that only Union citizens who have exercised their right of freedom of movement and have established themselves in another member state other than their own can rely on Directive 2004/38EC.<sup>147</sup> In contrast, static citizens who have not availed themselves of their free movement rights may in family reunification cases be subjected to their own state's maybe very restrictive migration control.<sup>148</sup> As mentioned, this may lead to reverse discrimination.

The scholarly literature on this topic argues that analyzing the Court's case law on family reunification through a "non-restriction lens" brings helpful insight. The Court adopted a "non-restriction approach" in cases on free movement of goods and came to apply this logic to free movement of persons as well. It concluded that if Union citizens were not allowed to lead a normal family life in a host member state, the exercise of the freedoms they are granted by the treaties would be seriously obstructed. Anne Staver argues that, from this perspective, reverse discrimination is practically an expected outcome. So called

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<sup>145</sup> *Id.* at para. 56.

<sup>146</sup> *Id.* at para. 68.

<sup>147</sup> See *Zambrano*, CJEU Case C-34/09 at para. 39.

<sup>148</sup> See *Murat Dereci and Others v. Bundesministerium für Inneres*, CJEU Case C-256/11, 2011 E.C.R. I-11315, paras. 54, 74.

static citizens are not restricted from using their free movement rights; rather, the Court's rulings could encourage them to use their free movement rights.<sup>149</sup>

In this context it may be helpful to keep in mind what the rationale is behind free movement rights. The Single Market gives citizens the capacity to travel freely, to settle, and to work where they wish without unjustified restrictions. Mobility is at the heart of European integration and the Single Market. Especially in a time with economic and financial crisis with unemployment at a record level in many member states, it is deplorable that unfilled job vacancies have been rising since mid-2009.<sup>150</sup> Still, citizens who are filling in adequate job positions must not necessarily move, from a Single Market perspective. Rather, it may in some cases be advisable, at least at a particular point in time, that they remain in their position.

Though, in this relation EU law, as interpreted by the CJEU, may be counteracting. For example, two Union citizens established in a member state, in the same environment and with similar work, may consider themselves in the same factual situation with regard to family reunification. Except, if only one of them has migrated within the EU, only that person may be entitled to family reunification, while his companion who has always resided in the member state of which he is a national may be excluded from being united with his close family. In order to be treated equally with the mobile Union citizen, the static Union citizens may feel forced to move abroad. Around Europe, there are several "routes" across borders that can be used in order to acquire such equal treatment. For instance, citizens from Denmark move to Sweden, citizens from the Netherlands move to Belgium and citizens from the UK move to Ireland.<sup>151</sup> One could argue that this is not "free movement."<sup>152</sup> It is movement most often reluctantly initiated by unequal treatment in a member state. As such, it may run counter to the idea behind the internal market, signifying that the right to entry and residence of family members cannot vary, because this would influence the right of Union citizens to reside in any of the member states. Though, reverse discrimination may discourage Union citizens from residing in their own state regardless of whether they discharge their duties here in the most optimal way.

Union citizens should arguably have a right to reside under the same conditions in any state, including their own. Advocate General Sharpston, who in the case *Government of*

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<sup>149</sup> See Anne Staver, *Reverse Discrimination in European Family Reunification Policies*, in *DEMOCRATIC CITIZENSHIP AND THE FREE MOVEMENT OF PEOPLE* 57 (Willem Maas ed., 2013).

<sup>150</sup> See The Single Market Act II, Together for New Growth (Oct. 3, 2012), [http://ec.europa.eu/internal\\_market/smact/docs/single-market-act2\\_en.pdf](http://ec.europa.eu/internal_market/smact/docs/single-market-act2_en.pdf).

<sup>151</sup> See European Convention on Nationality, Nov. 6, 1997, E.T.S. No. 166 (referring to the Danish-Swedish route).

<sup>152</sup> Staver, *supra* note 149, at 85 (opining that this use of free movement is arguably by no means "free" and that one may go so far as to call it a new type of forced movement).



*the French Community and the Walloon Government*, raised the question whether on a proper construction, the “right to move and reside freely within the territory of the Member States” means “freedom to move and then reside” (e.g., freedom to reside derives from/flows from prior exercise of the freedom to move) or whether it means “freedom both to move and to reside” (so that it is possible to exercise the freedom to reside/go on residing without first exercising the freedom to move between Member States).<sup>153</sup>

The right to freedom of movement may also be seen as including both a positive and a negative right: A right to move and a right not to move. By way of comparison, the right to freedom of association includes a positive right to join an association and the negative right to refrain from doing so, such as the right to stay out of a certain trade union. This was established by the ECtHR in *Sørensen and Rasmussen v. Denmark*,<sup>154</sup> where the applicants had complained that the existence of pre-entry closed-shop agreements in Denmark and their application to the applicants violated their right to freedom of association guaranteed by Article 11 ECHR encompassing a negative right to freedom of association on an equal footing with the positive right. In the applicants’ view, Danish law violated the (negative) right to freedom of association, because it allowed an employer to require an employee to be a member of a trade union or a specific trade union in order to obtain employment. The Court agreed that Denmark had failed to protect the applicants’ negative right to trade union freedom.<sup>155</sup>

A third and final Danish example illustrates the problem in which Union citizens feel obliged by EU law to move across borders. They are not pulled by tempting job offers but pushed by EU law and a wish for family reunion. A case brought before the Danish Supreme Court concerns a Danish citizen of Ghanaian origin who married a Ghanaian woman.<sup>156</sup> The husband had stayed in Denmark for ten years and been a Danish citizen for two years before he married and applied for family reunification. The application was refused because the applicants could not fulfill the Danish attachment requirement stipulating that the couple’s “overall attachment” to Denmark must be stronger than the couple’s attachment to any other country.<sup>157</sup> The Danish Ministry of Integration found that the husband had some attachment to Ghana, where he had attended school, and his wife had always stayed in Ghana. The wife had come to Denmark on a tourist visa, and when it

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<sup>153</sup> See Opinion of Advocate General Sharpston at para. 144; *Government of the French Community and Walloon Government v. Flemish Government*, CJEU Case C-212/06, 2008 E.C.R. I-1683.

<sup>154</sup> See *Sørensen and Rasmussen v. Denmark*, ECHR App. No. 52562/99, 52620/99 (Jan. 11, 2006), <http://hudoc.echr.coe.int/>.

<sup>155</sup> *Id.* at para. 77.

<sup>156</sup> See *Biao v. Denmark*, ECHR App. No. 10 (Mar. 25, 2014), <http://hudoc.echr.coe.int>.

<sup>157</sup> See Danish Aliens Act, Consolidation Act No. 785, Aug. 10, 2009, § 9(7).

expired, as a last measure the couple moved to Sweden where they settled and had a son. The movement to and residence in Sweden was exclusively motivated by their wish to live a family life together. The husband kept his job in Denmark and commuted between Denmark and Sweden, and later, when he lost the job, he found new positions in Denmark. The Danish Supreme Court found no violation of Denmark's human rights obligations according to Article 8 ECHR, or (by four votes to three) Article 14 in conjunction with Article 8 due to the fact that the attachment requirement applied to the husband who recently had naturalized, but was lifted for sponsors who have held Danish citizenship for at least 28 years.<sup>158</sup> Marts 2014, the European Court of Human Rights hold that there had been no violation of ECHR Article 8 nor (by four votes to three) of Article 14 of the Convention in conjunction with Article 8.<sup>159</sup> In June 2014 the applicant made a request that the case be referred to the Grand Chamber. It will be decided by five judges of the Grand Chamber whether it fulfills the conditions of Article 43(2) of the ECHR.

The reasoning behind the different treatment of mobile and static Union citizens is difficult to reconcile with principles of equality and fairness. It may even be difficult to reconcile this different treatment with internal market thinking. In any case, it is arguable that a Union citizenship concept that may enforce EU citizens to move across borders hardly has the potential to make them feel closer to and heard by the EU.<sup>160</sup>

#### **F. Identity Issues in a National and European Context**

On the basis of that presented above, the author contends that there are substantial differences between national citizenship and European citizenship as identity markers. Both may have a formal and informal meaning, but the informal significance of national citizenship may overshadow the informal significance of European citizenship. Rahter, Union citizenship may be about formal Union citizenship rights.

National citizenship may entail a feeling of being accepted by the state or the community, as emphasized by applicants for naturalization.<sup>161</sup> As to Union citizenship, its construction

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<sup>158</sup> The refusal of family reunion based on the 28-years rule and the attachment requirement was not invalid, neither the ECHR nor the European Convention on nationality had been violated., Sup Ct. Den., Case No. U.20101035H (Jan. 3, 2010), available at <http://eudo-citizenship.eu/databases/citizenship-case-law/#>.

<sup>159</sup> See, e.g., *Biao*, ECHR App. No. 10; Eva Ersbøll, *Biao v. Denmark – Discrimination Among Citizens?* (Eur. Univ. Inst., EUDO Citizenship Observatory, Working Paper No. 79, 2014 available at <http://www.eudo-citizenship.eu/publications/working-papers>).

<sup>160</sup> See ELSPETH GUILD, *THE LEGAL ELEMENTS OF EUROPEAN IDENTITY – EU CITIZENSHIP AND MIGRATION LAW* 244 (2004) (stating the fact that EU law prevents some from living together and privileges others is unlikely to command respect from those who suffer from its effects).

<sup>161</sup> See Tineke Strike, Anita Böcker, Maaïke Luiten, & Ricky van Oers, *Integrations and Naturalisation Tests: The New Way to European Citizenship* (Centre for Migration Law, Radboud Univ. Nijmegen 2010).

makes such effect unlikely, because the EU as such is not in a position and has no competence to “accept” applicants for Union citizenship. National citizenship may bring along identity, self-esteem, and solidarity with the state. As expressed by immigrants in Sweden, it contributes to a feeling of being included and makes it easier to say “this is my country and our *skärgård* [archipelago].” This is symbolic and important for the feeling of belonging.<sup>162</sup>

If this divergence is accepted, and if there still is a desire for a Union citizenship that contributes to the European citizens’ feeling of having a genuine European identity, more should be done with a view to secure that citizens experience Union citizenship and the rights attached as equal and fair. Citizens’ understanding of and respect for the Union citizenship project seems to be indispensable.

### G. European Coordination in Matters of Nationality

This article offers support for the many arguments already existing in the scholarship for a harmonization of the EU member states’ nationality law and for the introduction of means to avoid reverse discrimination. Among others, the NATAC research recommends that the EU Commission should clarify in a communication how it expects member states to take into account Community law in their legislation on acquisition and loss of nationality.<sup>163</sup> It recommends applying the open method of coordination to the nationality laws of member states and argues that membership of the EU adds considerable weight to a call for common minimum standards, mutual adaptation, and learning across international borders.<sup>164</sup> Other researchers have suggested the application of the theory of reflexive harmonization, considering the necessity of transnational harmonization of laws, and suggest combining self-regulation with external regulation.<sup>165</sup> More specifically, Rainer Bauböck has suggested a stakeholder principle to guide citizenship policies<sup>166</sup> and a use of “citizenship constellations” as a structure in which individuals are simultaneously linked to several political entities, so that their legal rights and duties are determined not by one political authority but by several.<sup>167</sup>

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<sup>162</sup> See *report on Swedish citizenship: SLUTBETÄNKANDE AV 1997 ÅRS MEDBORGERSKAPSKOMMITTÉ: SVENSKT MEDBORGARSKAP* (SOU 1999:34).

<sup>163</sup> See Rainer Bauböck & Bernhard Perchinig, *Evaluations and recommendations, in ACQUISITION AND LOSS OF NATIONALITY, VOL. 1: COMPARATIVE ANALYSES* 442 (Rainer Bauböck et. al. eds., 2006).

<sup>164</sup> *Id.*

<sup>165</sup> See Karolina Rostek & Gareth Davis, *The Impact of Union Citizenship on National Citizenship Policies*, 22 TUL. EUR. & CIV. L.F. 89-156 (2007).

<sup>166</sup> See Rainer Bauböck, *Stakeholder Citizenship: An Idea Whose Time Has Come?* (Migration Policy Institute 2008).

<sup>167</sup> See Rainer Bauböck, *Studying Citizenship Constellations*, 36(5) J. ETHNIC & MIGRATION STUD. 847-859 (May 2010).

Regarding the avoidance of reverse discrimination in cases of family reunification, Anne Walter emphasizes that such discrimination contradicts the prohibition of discrimination under fundamental law.<sup>168</sup> The “gap” under EU law for static Union citizens neglects the human rights dimension.<sup>169</sup> The lack of applicability of EU law alone cannot justify reverse discrimination. Common principles for family reunification are needed.<sup>170</sup>

As to the avoidance of reverse discrimination more generally, Advocate General Sharpston suggests in her opinion in the *Zambrano* case that Article 18 TFEU on non-discrimination should be interpreted as prohibiting reverse discrimination caused by the interaction between Article 21 TFEU on the right to move freely and reside within the EU territory and national law.<sup>171</sup> Such reverse discrimination should entail a violation of a fundamental right protected by EU law, where at least equivalent protection is not available under national law.<sup>172</sup>

This author supports the proposals for harmonization and for the Commission encouraging member states to reform their nationality laws on a common basis. This was successfully done by the Nordic countries for a century, and the Nordic cooperation provided fruitful results.<sup>173</sup> A similar proposal aiming at international law was put forward by the eminent Jurists Weiss and Oppenheim during the League of Nation’s preparation of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws.<sup>174</sup>

At that time, the International Law Association had prepared a draft regarding a uniform regulation of questions of nationality, which was adopted by the Thirty-third Conference held in 1924. Its proposal of a “model Statute,” however, was rejected as irrational on the basis that nationality law in many countries was of a constitutional nature.<sup>175</sup> Moreover, it was considered doubtful whether such rules would really be uniform, as the practical application and the interpretation would not always be the same in different countries.<sup>176</sup>

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<sup>168</sup> See ANNE WALTER, REVERSE DISCRIMINATION AND FAMILY REUNIFICATION 58 (2008).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> See Opinion of Advocate General Sharpston at para. 144; *Zambrano*, CJEU Case C-34/09.

<sup>172</sup> *Id.* at para. 155.

<sup>173</sup> See The Nordic Agreement on Citizenship, Den.-Fin.-Ice.-Nor.-Swed., Sept. 10, 2013.

<sup>174</sup> See LEAGUE OF NATIONS: COMMITTEE FOR THE PROGRESSIVE CODIFICATION OF INTERNATIONAL LAW DOCUMENTS [1925-1928], VOL.Two 46 (Shabtai Rosenne ed., 1972).

<sup>175</sup> *Id.* at 48.

<sup>176</sup> *Id.*

It was assumed that the operation of such uniform legislation necessitated the creation of a universal jurisdiction—that was to say, an international court with compulsory jurisdiction and thus a common jurisprudence.<sup>177</sup> Adopting a model statute would undoubtedly be more realistic in an EU context. The EU member states' nationality laws are in many respects based on similar principles, and there is a possibility of bringing questions on acquisition and loss of nationality under the scope of the CJEU's review.

In the mid-twentieth century, with the aim of a Nordic Union, the Danish civil servant Knud Larsen, who negotiated UN conventions in the 1950s, submitted a proposal for the adoption of a Nordic Union Citizenship similar to EU citizenship in a publication *Nordisk Statsborgerret* (Nordic Citizenship law).<sup>178</sup> Larsen's thoughts about not jeopardizing the countries' different values and about the benefits of diversity resembled the thoughts behind the EU citizenship. All the same, Larsen recognized the need for a harmonization of the Nordic countries' different nationality acts in a way acceptable for all (five) countries.<sup>179</sup>

Much evidence indicates that the EU member states from an overall perspective would benefit from acting together and solving the problems created by the interaction between the member states' nationality legislation and EU law; in addition, they may nationally and as members of the EU legislature seek to address the problem of reverse discrimination.<sup>180</sup>

## H. Conclusion

Union citizenship is premised on the idea that it can be a source of legitimacy for the European integration process and a fundamental factor in creating among citizens a sense of belonging to the European Union and of having a genuine European identity. Some groups, though, who consider themselves as belonging to the EU, experience discrimination and even injustice stemming from the application of Union citizenship. To that extent, Union citizenship can hardly promote understanding and respect for the sake of the good, not forgetting that discrimination appears incompatible with the inherent principles of equality in EU and human rights law. In brief, the results may counteract the idea of a Union citizenship destined to create a sense of belonging to the EU and/or a sense of having a genuine EU identity.

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<sup>177</sup> *Id.*

<sup>178</sup> See KNUD LARSEN, *NORDISK STATSBORGERRET* (1944).

<sup>179</sup> *Id.* at 83.

<sup>180</sup> See Leanaerts, *supra*, note 110.

These problems constitute significant challenges. Although, there are solid proposals as to how the challenges can be met. Surveys on Europeanism indicate that European citizens feel some sense of a European identity. Such feelings may not necessarily relate directly to EU citizenship, and they may go beyond legal rights.

The two European courts have already issued important judgments concerning citizenship that have influenced the member states' nationality laws and practice. By way of example, *Zhu and Chen*, *Rottmann*, *Zambrano*, and *Genovese* have led to changes in member states' legislation and jurisprudence. No doubt, more will follow, possibly allowing the CJEU to touch upon identity issues.

Furthermore, many EU member states legislate with a view to avoid reverse discrimination. Among the further steps to be taken, the EU and the member states should ensure that EU citizens are informed about their Union citizenship status and the benefits following from this status. Decision makers should commit themselves to the Union citizenship idea and take the actions necessary to combat its inherent weaknesses. There is an enormous quantity of knowledge on nationality and Union citizenship issues and numerous suggestions for improvements. As of now, member states could formalize their cooperation on nationality matters with a view to reforming their legislation on a common basis.



## Special Issue

### EU Citizenship: Twenty Years On

## Citizenship in Europe and the Logic of Two-Level Political Contracts

By Albert Weale\*

### A. Introduction

How are we to understand the state of citizenship in Europe twenty years after the implementation of the Maastricht Treaty? When answering this question, I focus particularly on *social citizenship*. Social citizenship may be understood as a form of political relationship among citizens extending to each collective protection against the financial risks associated with the life cycle, including dependency when young, ill health, accidents, and the vulnerabilities of old age. Collective protection against these financial risks takes the form of social rights within the welfare state, including rights to income protection, access to health care, and the provision of education. Within the most economically developed European states, securing these rights has since 1945 been seen as central to the democratic legitimacy of these states, as well as an aspirational standard for democratizing societies seeking to achieve “the concrete substance civilised life” and the associated “general reduction of risk and insecurity”<sup>1</sup> at all levels that the welfare state provides.

Policies securing these collective goods entail either the raising of revenue through taxation or the imposition of a legally mandated requirement on citizens to contribute to social insurance schemes, or, most typically, some combination of these two policy instruments. Despite the existence of some provisions at the EU level to help with particular cases of social disadvantage, the primary responsibility for the securing of social rights belongs to the Member States. Citizens of those states who benefit from social rights

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<sup>1</sup> THOMAS H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS AND OTHER ESSAYS* 56 (1951).



enjoy a form of “club good,” in which benefits are extended to citizens of other Member States—each of which has its own club—on a reciprocal basis.<sup>2</sup>

Social citizenship requires that states be able to exercise their revenue-raising responsibilities effectively. Since 2008, the Eurozone crisis has placed enormous strain upon the fiscal capacity of EU Member States—all Member States, not just those within the Eurozone—to sustain the conditions of social citizenship. The strain is brought about by a substantial downturn in economic activity, revealed in high—in some countries very high—rates of unemployment, particularly among the young, together with programs cutting back provisions in matters such as pensions, health care, and education. The strain is augmented by the requirements of Eurozone membership and the political commitments that states in the Eurozone have made to one another to balance their public budgets.

Fiscal pressures on the welfare state are not new, of course. Since the 1970s, various analysts have drawn attention to the “contradictions” contained within welfare states; namely, that those states need to balance their spending on social policies with the requirements of securing the capital accumulation essential to the economic development upon which spending ultimately depends.<sup>3</sup> What is new is that the constitution of economic governance—originating in the Maastricht Treaty and developed through both the Stability and Growth Pact and the fiscal compact contained in the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union—places distinct and onerous requirements upon Member States, who are required to restrain the spending upon which collective protection depends in order to meet the obligations imposed by the single currency.

Within some traditions of analysis, a conflict between the political imperative of social spending and the requirements of fiscal rectitude imposed by a soundly constructed economic constitution is only to be expected. Buchanan<sup>4</sup> and Hayek,<sup>5</sup> for example, hold that in order to ensure fiscal responsibility, it is necessary to break the link between public expenditure and political responsiveness to the preferences of citizens because those preferences are biased to the short-term. They propose the establishment of strict economic constitutionalism, in which a set of powerful counter-majoritarian institutions acting with little discretionary power operate according to the rule of law rather than the norms of democratic legitimacy.

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<sup>2</sup> See James M. Buchanan, *An Economic Theory of Clubs*, 32 *ECONOMICA* 125 (1965).

<sup>3</sup> See IAN GOUGH, *THE POLITICAL ECONOMY OF THE WELFARE STATE* (1979); JAMES O’CONNOR, *THE FISCAL CRISIS OF THE STATE* (1973).

<sup>4</sup> JAMES M. BUCHANAN, *LIBERTY, MARKET AND STATE: POLITICAL ECONOMY IN THE 1980s* (1986).

<sup>5</sup> FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY* (1982).

According to this view, democratic competition creates deficit financing that undermines the long-term stability of the currency and the public finances. Indeed, this tradition of analysis fed into the construction and management of the single currency.<sup>6</sup> In contrast to this line of analysis, it is possible to interpret the supposed tension between political responsiveness and fiscal rectitude in an entirely different way; holding that precisely because there is a tension between economic constitutionalism and political responsiveness in the national welfare state, the project of economic and monetary union was always inherently flawed because it subordinates the democratic determination of political and policy priorities to an inflexible and unnecessarily rigid set of rules and procedures. As Pascal said, "The extremes touch."<sup>7</sup>

In this paper, I will argue for a third interpretation that falls in between these two lines of analysis. In particular, I will show that, when correctly understood, the logic of the international commitments imposed by the economic and monetary union presupposes a democratic legitimacy that can only be secured by the maintenance of social rights. Where there is freedom of political association, social groups can organize and campaign against policies of fiscal austerity imposed by international commitments, thereby weakening the capacity of governments to secure implementation of those policies. Without a credible capacity to implement an international agreement, there are no rational grounds for the agreement in the first place. In matters of international relations, political representation should be understood as the state's power to make commitments on behalf of its population; unless those commitments are domestically feasible, no commitment can be credible. Therefore, credible fiscal prudence presupposes the political legitimacy that comes with social rights.

Conversely, social rights presuppose a regime of fiscal prudence. There is no conflict between fiscal prudence and social citizenship in the long term. Without governments accepting an imperative of national fiscal responsibility, citizens lack credible reason to think that they can order their affairs in such a way that permits them to rely upon the social rights promised by collective protection. Fiscal responsibility is a necessary condition for a state to solve the collective action dilemmas associated with the provisions of social and economic security. It would be wrong to view the question of fiscal responsibility in the economic constitution of the EU as merely an issue about conformity to a set of rules agreed upon by the Member States. It is also a question that goes to the credibility of the promises contained within the collective provisions for financial security among citizens and the long-term sustainability of the European social model—a model that is a central element in any justifiable conception of citizenship.

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<sup>6</sup> See HAROLD JAMES, *MAKING THE EUROPEAN MONETARY UNION: THE ROLE OF THE COMMITTEE OF CENTRAL BANK GOVERNORS AND THE ORIGINS OF THE EUROPEAN CENTRAL BANK* 6–7 (2012).

<sup>7</sup> "Les sciences on deux extrémités qui se touchent." BLAISE PASCAL, *PENSÉES* 95 (Michel Le Guern ed., 1977).

## B. Democratic Contractarianism

I will approach this question through a normative theory of political legitimacy and citizenship that I term *democratic contractarianism*. Democratic contractarianism is a form of social contract theory. According to social contract theory, political organization is to be understood as a contract of mutual advantage implicitly or explicitly agreed upon by the members of a political association. Thus, political organization is to be understood as the solution to dilemmas of collective action.<sup>8</sup> These dilemmas arise when uncoordinated action by individuals gives rise to a potential gain from cooperation, such as agreement on weights and measures or the rules of the road. These dilemmas also arise when uncoordinated individual action leads to harmful side effects from otherwise legitimate human activity, of which pollution and resource depletion are the obvious examples.

According to the democratic contractarian theory, political organization resolves these collective action dilemmas as though it were a social contract negotiated under conditions of procedural democracy, in which the members of a self-governing community advance their common interests through collective deliberation under conditions of political equality.<sup>9</sup> From this perspective, the domestic political order of the EU Member States is to be understood as though it were grounded in a social contract. Well-functioning social contracts are ones in which all social groups are regarded as cooperating partners in a scheme of mutual advantage. The extent to which the actual domestic political orders of the Member States are “well-functioning” in this sense varies, of course, from case to case.

The logic of contractarian analysis can also be applied to the relationships between states. Harmful effects of uncoordinated individual action resolved at one level of political organization can reappear at a higher level of political organization. States can impose harmful externalities on other states and their populations through cross-boundary pollution, trade restrictions, or population movements, thus failing to secure common advantages through lack of political coordination. When democratic states join together to deal with these spillover effects by forming an international association, such as the European Union, the legitimacy of the resulting association is to be understood by reference to a contractarian logic that gives rise to a contractual association of contractual associations.

The union between a social contract at the level of states and a contractual association among those states must then be understood in terms of the normative logic of two-level games. In political associations following the norms of two-level games, the political

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<sup>8</sup> See JAMES BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962); DAVID GAUTHIER, *MORALS BY AGREEMENT* (1986).

<sup>9</sup> See ALBERT WEALE, *DEMOCRATIC JUSTICE AND THE SOCIAL CONTRACT*, 31–64 (2013).

representatives of each state simultaneously owe obligations to both the political representatives of other states and their own populations.<sup>10</sup> Properly understood, the normative logic of two-level legitimacy in an association of political associations reinforces the norm of fiscal responsibility at the Member State level.

The outline of the argument presented in this article runs as follows: Section C sets out in a schematic way the basic logic of contractual associations at the state level—the level at which individuals and social groups create a political contract that shapes the basic structure of their social and economic organization. That logic interprets the role of social rights in a political community as collectively agreed upon protections against the financial risks associated with all stages of life. In light of this analysis, Section D then examines the higher-order logic of political association among EU Member States, using the economic and monetary union as its reference point. It suggests that such a union requires credible commitment and the precondition of democratic political legitimacy. Political legitimacy in turn requires politically demanding conditions on fiscal balances within Member States—conditions with implications for the protection of the European social model. I argue that, although politically demanding, these requirements are legitimate provided that they imply no more than is required by the basic logic of association. Section E draws out some practical implications for the current political situation of the EU.

### C. Political Contracting and Social Citizenship

How are we to understand social rights within the welfare state? And what is their rationale and justification? In order to answer these questions, it is helpful to contrast the welfare state with a non-welfare state, and identify the deficiencies of the latter. Suppose an economic and social order that conforms to the basic principles of classical liberal political theory. In such a situation, the members of the association enjoy the liberal rights of non-interference. They have a right to the physical integrity of their person and their property. They also have rights to freedom of conscience, freedom of movement, and freedom from arbitrary arrest and imprisonment. Suppose also that they conduct their business with one another in ways that avoid force and fraud.

Classical political liberals suppose that if these conditions are met, then there would only be a need for a minimum night-watchman state.<sup>11</sup> However, such an inference is premature. Even when individuals respect the classical liberal rights of others, the cumulative effects of their uncoordinated actions create the need for purposive political

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<sup>10</sup> See Deborah Savage & Albert Weale, *Political Representation and the Normative Logic of Two-Level Games*, 1 EUROPEAN POLITICAL SCIENCE REVIEW 1, 63–81 (2009).

<sup>11</sup> For the best-known modern statement of this position, see ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974).

control, as would the opportunities for joint gains in welfare through cooperation. For example, in communities in which each producer intends to carry on production according to norms that respect the rights of others, the cumulative effect of all producers acting in this way may be the over-exploitation of resources, the generation of externalities, and unresolved conflicting claims. In short, the deficiencies of even an ideally operating liberal order require a social contract in which participants accept common terms of political association in order to address their problems of collective action.

This argument does not suggest that, in practice, there could be conditions in which all agents voluntarily respect the liberal principles of dealing with others free of force or fraud. It does, however, establish a reference point—akin to a competitive equilibrium in economic theory—by which we can assess the properties of a classical liberal regime and identify the circumstances in which there is a need for legislative political control.

Democratic contractarian political theory offers a distinctive account of the underlying principles of redistribution within the welfare state. Because a social contract must offer gains to all, it follows that the welfare state should not aim at a general redistribution of income across social classes. Rather, welfare state programs are best understood as a form of income smoothing across the life cycle in situations in which uncoordinated market mechanisms suffer various efficiency failures arising largely from asymmetric information.

Redistribution within the welfare should not be regarded primarily as a device by which earned income is transferred from the more productive to the less productive, but rather as a device by which the income of all productive workers—including those doing the work of reproduction—is spread over the course of their life cycles. In practice, a large part of welfare state redistribution does actually take the form of redistribution within social classes across the life cycle rather than vertical redistribution between classes. For instance, Falkingham and Hills have shown that for the UK welfare state—which is not a very highly developed welfare state—in the mid-1980s, “between two-thirds and three-quarters of gross lifetime benefits are effectively self-financed.”<sup>12</sup> Whether funded by social insurance or general taxation, the institutions of the welfare state can be thought of as devices by which the financial risks associated with periods of need at particular points in the life cycle are pooled. As Nicholas Barr crisply put it, “even if the entire population were middle class, there would still be a need for institutions for people to insure themselves and redistribute income over the life cycle.”<sup>13</sup> Redistribution in the welfare state is thus a social device for spreading the product of labor over the course of one’s life in a way that is both individually prudent and dependent upon a social contract than

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<sup>12</sup> Jane Falkingham & John Hills, *Redistribution Between People or Across the Life Cycle?* in *THE DYNAMIC OF WELFARE: THE WELFARE STATE AND THE LIFE CYCLE* 137–49 (1995).

<sup>13</sup> NICHOLAS BARR, *THE WELFARE STATE AS PIGGY BANK: INFORMATION, RISK, UNCERTAINTY AND THE ROLE OF THE STATE* 1 (2001).

mandates cooperation. The rights of social citizenship are a form of “social savings”<sup>14</sup> accessible to citizens on a universal basis to cover the financial risks associated with dependency over the life cycle, including childhood, old age and sickness, dependencies that create forms of need that cannot adequately be dealt with by market arrangements.

What does this democratic contractarian conception of a political order enable us to say about the conditions of social citizenship? In particular, what does it have to say about the European social model? There is, of course, no one European social model, and the policy instruments associated with European welfare states vary according to historic conditions and political choice, taking many forms with complex modes of organization.<sup>15</sup>

However, abstracting inductively from the details of well-developed welfare states, including those in Europe, we can identify certain shared general principles of operation. Welfare states raise income from those in paid employment and redistribute that income in cash to certain categories of beneficiaries, including, most importantly, the elderly, those whose employment is interrupted by ill health or accidents at work, the disabled, and those responsible for caring for children, either as single or joint parents. Through its revenues, the welfare state also finances a range of services, most notably education and health care, which are provided with the intention of removing financial barriers to access of those services.

In the case of health care, for example, the provision may not be free at point of use, since items like pharmaceutical prescriptions are often charged for in many welfare states, but the idea is that such charges, though they may raise revenue and have a deterrent effect on frivolous use, do not prevent those who need the medicines from obtaining them. Similarly, with education, parents may be responsible for paying for transport, school uniforms and some learning materials, but such payments are intended to be incidental to the financing of the service, not one of its central features.

In highly developed welfare states, the distribution of cash benefits and services in kind is universal. That is to say that the cash and services are given to those in need—as indicated by age, state of health, or inability to find paid employment—without regard to income or wealth. The benefits are regarded as a right of citizenship rather than as mere provisions for the poor or destitute who cannot otherwise provide for themselves. The universal allocation principle is modified in a number of highly developed welfare states by excluding

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<sup>14</sup> JOSEPH WHITE, *COMPETING SOLUTIONS: AMERICAN HEALTH CARE PROPOSALS AND INTERNATIONAL EXPERIENCE* 25 (1995).

<sup>15</sup> For good discussions, see GØSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* (1990); *THE DEVELOPMENT OF WELFARE STATES IN EUROPE AND AMERICA* (Peter Flora & Arnold J. Heidenheimer eds., 1981); THEODORE MARMOR, JERRY L. MASHAW AND PHILIP L. HARVEY, *AMERICA'S MISUNDERSTOOD WELFARE STATE: PERSISTENT MYTHS, ENDURING REALITIES* (1990). For an excellent account of the implicit ethical principles of the welfare state, see J. Donald Moon, *The Moral Basis of the Welfare State in DEMOCRACY AND THE WELFARE STATE* 27–52 (Amy Gutmann ed., 1988).

the very wealthy from access to benefits. For example, in Germany and the Netherlands, those with very high incomes are excluded from access to the social insurance scheme for healthcare. However, these are modifications to the general principle—and relatively minor ones—rather than a breach of the principle, and they do not apply in the case of education.

When welfare states function well, participants benefit from the joint gains of economic security and income smoothing more so than they would from the returns on an individualistic minimum that they could otherwise obtain. This fact, I conjecture, is one reason why social citizenship has proved so hard to dismantle across the developed world—including in the United States—despite there being strong currents of ideological opinion favoring a reduction of state intervention. Experience suggests that there simply is no way of achieving the economic and social security associated with income smoothing over the life cycle other than through use of the instruments associated with politically mandated social savings. Note, however, that in order to function well, welfare states presuppose that there is no long-term high level of unemployment. A system of social saving is only viable if citizens are in a position to contribute resources to a fund—whatever form it takes—that pools contributions in order to provide benefits at an appropriate time.

Within the social contract of a political association, individuals have two distinct sets of interests.<sup>16</sup> The first is their own separate and distinct interest, which, while it may be shared with kith and kin, is in competition with the interests of other parties to the social contract. For example, with healthcare, individuals may have an interest in securing access to very expensive pharmaceuticals that will impose a substantial opportunity cost, as measured by the value of the other uses to which the resources could be put.

The second interest of individuals is in the integrity of the institutions that embody the social contract. This is a collective interest that they share with all other participants in the social contract, and which includes matters such as the long-term financial viability of the institutions securing social rights and a concern for the efficient and effective operation of those institutions. So, while from the individual's point of view there is an interest in securing the maximum benefit possible from the institutions of the welfare state, there is also a corresponding general interest in ensuring that those institutions are maintained in a way that allows the benefits that they provide to come in the right quantity and quality for each individual when needed. This tension between competing individual and common collective interests is at the heart of social citizenship politics.

An important—indeed, the fundamental—common interest of citizens resides in the fiscal prudence of social and economic security programs. In the conventional literature on the

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<sup>16</sup> ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 38–39 (1990).

fiscal crisis of the welfare state, emphasis is placed upon the conflict between spending in order to secure political legitimacy, and restraint on expenditure in order to maintain the conditions for capital accumulation.<sup>17</sup> However, this misconstrues the tension by focusing only on what is true at any one time. The continuing political legitimacy of the welfare state depends upon its long-term financial viability. A welfare state that is forced into emergency programs of spending reductions or the termination of key policies does not provide conditions that allow individuals to rely upon certain services being available in sufficient quantity and quality, and thereby be able to plan their lives over the course of time.

The clearest example of this condition is in the case of retirement pensions, which is typically the largest component of public expenditure within developed welfare states. If individuals are to plan properly for income protection in old age, they need reliable information regarding the portion of their income that is to come from shared savings and the portion they need to provide for themselves. For this reason, fiscal responsibility and the prudent use of resources in the management of social savings schemes are not in conflict with the functioning of the welfare state, but rather are the only credible bases for its existence. If the central principles of social citizenship are to be realized, then the collective balancing of the books over time is essential. The club should not be allowed to go bankrupt.

#### **D. Political Contracting in the EU**

The logic of political association among states is structurally identical to the logic of contractual association among individuals and social classes. So long as there are gains to political association over a baseline of non-cooperation, those states will find it advantageous to make a political contract with one another. As Sidgwick pointed out, the international equivalent to a liberal political order at the domestic level is a system of international relations based upon Grotian norms of territorial integrity and the equality of states in the international system.<sup>18</sup>

In such a world, states may gain from establishing more extensive forms of international political cooperation, ranging from international regimes with rules and institutions governing specific issues such as the management of the oceans or air sheds, to deeper forms of association such as confederations or federations. For example, the creation of a single market requires the cooperation of common institutions with some authority to regulate non-tariff barriers to trade, even when the single market in question rests upon a principle of mutual recognition.

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<sup>17</sup> See IAN GOUGH, *THE POLITICAL ECONOMY OF THE WELFARE STATE* (1979); JAMES O'CONNOR, *THE FISCAL CRISIS OF THE STATE* (1973).

<sup>18</sup> HENRY SIDGWICK, *THE ELEMENTS OF POLITICS* 230 (1891).



The gains available to Member States must be gains that in principle are available to all, and make each of the contracting parties better off than they would be in the baseline situation of non-cooperation. The sequence of treaties establishing and expanding the EU since the Treaty of Rome can be viewed as “grand bargains” where agreement is secured through states negotiating with one another for advantages in different issue areas. For example, in the 1980s, northern countries wanted the single market without the structural funds, and southern countries wanted the structural funds without the single market.

According to the logic of a classic logroll, agreement could be reached on the single market with the structural funds because it was the second best option for each of the negotiating parties.<sup>19</sup> So long as concessions can be traded across issue areas, the potential for expanding the scope of the political contract is enhanced.

In any political contract among states, the fundamental problem to be solved is that of credible commitment. Although any successful contract will enable each party to gain over the status quo, there are many circumstances in which one contracting party gains even more by free-riding on the compliance of others while shirking its own obligations. Of course, this option cannot be available to all; otherwise there would be no way the contract could ever be rationally agreed upon. To overcome the free rider problem, states must be able to make credible commitments to one another about their willingness to fulfill their obligations even when such fulfillment is onerous. Thus, in a monetary union, states must be able to make a credible commitment to others about the maximum deficits that they are willing to tolerate in their public spending plans.

This is the rationale for the no bailout rule of the EU monetary union. This rule is intended to ensure that no Member State seeks the advantages of the monetary union without a corresponding willingness to carry the associated costs. National players enjoy the political benefits—gaining votes—of deficit spending, while the potential negative effects, in terms of higher interest rates, are felt by all Member States. The alternative to a no bailout rule is to leave discipline to the markets. However, within a currency union, credit risk accrues because the exchange rate risk of deficit financing is not present and borrowing premiums remain low over a period of time.<sup>20</sup> Thus, the commitment of states in regard to their budget deficits can only be made credible if each state gives all other states good reason to think that it can deliver on its promises.

A necessary condition of such credibility, however, is that states enjoy the requisite political confidence of their citizens. When a state enters into commitments with other states, each party to that agreement has to recognize that all the state parties are acting as

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<sup>19</sup> ALBERT WEALE, ET AL., ENVIRONMENTAL GOVERNANCE IN EUROPE: AN EVER CLOSER ECOLOGICAL UNION? 45 (2000).

<sup>20</sup> OTMAR ISSING, THE BIRTH OF THE EURO 193–94 (2008).

representatives of their citizens. The state parties are thus engaged in a two-level game, in which the conditions of agreement have to be simultaneously acceptable to both other negotiating parties and domestic constituents. In their representative capacity, states are subject to normative rules and constraints that need to be respected if the representation is to be successful. Simultaneity in this context does not mean “occurring at the same time,” but rather indicates that any international agreement must fulfill two sets of conditions.

On the one hand, an international agreement requires “fair dealing” among states as the representatives of their people; on the other hand, states in relation to their people must be able to justify their international commitments as being a reasonable way of advancing the common interests of those populations, including any provisions for side payments if the agreement is to be made generally acceptable. Unless this second condition concerning the general acceptability of the agreement to domestic constituents is maintained, no other state party to the putative contract can be confident that commitment to the agreement at the international level is credible. International negotiating partners need assurance that the governments with whom they are negotiating are authorized to enter into potentially onerous commitments and that this authorization can be sustained over time. However, such assurance depends on their estimate of their potential partner states’ abilities to ensure that the costs of meeting collective obligations can reliably be imposed upon the populations they supposedly represent.

In the context of economic and monetary policy, some are tempted to think that the requirements of credibility impose a heavier burden of fiscal responsibility on states sharing a single currency than on states with their own currency. However, this seemingly sharp contrast needs modifying. Outside of a monetary union, a state faces the discipline of maintaining financial solvency through its ability to finance its government deficit on the international money markets as well as the need to avoid falls in the value of its currency that lead to domestic inflation. Successful financing in these circumstances requires either higher productivity to finance repayments or a short-term growth stimulus by means of devaluation. Both entail lower levels of consumption by citizens in the face of the need to repay international loans.

It should be remembered that a significant initial impetus to the monetary union came when the redistributive Keynesianism of the early Mitterrand administration gave way to the need for austerity in the face of the precipitate fall in the value of the franc from 1982 onwards. In this respect, France in the 1980s merely recapitulated the experience of the UK in the 1960s, when the commitment of the Labour government to Keynesian expansion was destroyed by the pressure on the currency that eventually led to devaluation in 1967.<sup>21</sup> It was the experience of the failure of Keynesianism in one country that led the

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<sup>21</sup> PETER A. HALL, *GOVERNING THE ECONOMY: THE POLITICS OF STATE INTERVENTION IN BRITAIN AND FRANCE* (1986).

French government to revive its interest in the plan for a single currency. The difference between an international agreement on a monetary union with strong fiscal discipline on the one hand, and funding on the international money markets on the other, is not that the former involves a reduction in consumption whereas the latter does not. Rather, the difference is that the former requires explicit and open commitments, whereas the latter can take advantage of the “money illusion” to pretend that painful adjustments are not taking place.

Because fiscal responsibility can impose severe limits on public expenditure, it is often regarded as a constraint on social citizenship. However, this interpretation is not warranted. In the welfare state, requirements of credible fiscal commitment between governments and their populations are a precondition of social citizenship itself. Responsible public spending is integral to the social contracts of which Member States themselves are agents. Leaving aside any concerns about international lenders, in order for the social savings schemes embodied in the welfare state to be credible for domestic populations, the schemes need to secure their own financial integrity because no participant in a social savings scheme can rationally have confidence in an arrangement lacking long-term financial viability. Principles of fiscal responsibility ought to be regarded as conditions of political legitimacy. They reinforce the requirement of collective prudence that is required for the domestic social contract to be an object of reasonable commitment on the part of citizens.

#### **E. The Future Conditions of Social Citizenship in Europe**

The argument thus far can be stated as follows: At the center of the EU’s political contract formulated in the Maastricht Treaty, the Stability and Growth Pact, and the Treaty on Stability, Coordination and Governance is the problem of establishing conditions of credibility within a monetary union that participants need to respect if that union is going to be sustainable. However, there must also be conditions of credibility within welfare states if they are to be sustainable over time. In principle, and insofar as normative legitimacy is central to stable political legitimacy, these two sets of conditions ought to reinforce one another. International credibility is premised on the democratic legitimacy of the welfare state. Credibility at the international level requires each state to believe that other states can meet their obligations, and a presupposition for this belief is that each state believes that all the other states party to the agreement have sufficient political legitimacy to be able to meet the obligations that the international agreement imposes upon the participants.

However, these two imperatives that ought to reinforce one another over time have been turned into political contradictions as they relate to our present dilemmas. The fiscal conditions of the monetary union are such that the level of savings in public expenditure necessary to meet its criteria reaches levels damaging to the economic growth that is a condition of reducing the public debt. Member States are reducing the social spending that

is one of the principal grounds for their right to levy taxation and other forms of contribution upon their populations. At the same time, total government debt levels are rising rather than falling in the countries that need fiscal adjustment the most. This in turn leads to a voter backlash, resulting in street protests, flash parties, and ousting from office those who are responsible for imposing the internationally agreed upon terms and conditions of continuing membership in the currency union. The problem is that if leaders are ousted from office under these circumstances, then there are no reasonable grounds for holding that governments can enter into credible commitments with one another, for the governments that make the commitments may have undertaken obligations that their successors are unwilling to meet.

Central to the functioning of welfare is the avoidance of large scale and persistent unemployment. Unemployment not only reduces the capacity of people over the course of their working lives to make contributions to the social savings that are the main mechanism of welfare state provisions, but it also reduces the stock of human capital when, for example, skills acquired earlier in life atrophy through lack of use. Rates of unemployment have soared in the EU since the crash of 2007 and 2008. Not only is the general unemployment rate high, it is also concentrated in the southern European states and among relatively young workers—just the sort of citizens who should be building up a contribution record towards social savings. Moreover, if the structural reforms of the labor markets in which there is so much interest are to be successful, they need to take place in a way that does not lead to the destruction of the human capital of those currently working. So, if we are to understand the future of social citizenship in Europe, we need to understand the ways in which this unemployment is related to the political constitution of the EU and the processes of decision making that occur as a consequence of that political constitution.

It follows that in policy terms, the problem is securing fiscal balance for the foreseeable future without at the same time creating levels of unemployment that undermine contributions to social savings. In other words, fiscal responsibility requires maintaining political credibility across time. Here the issue of credibility takes the form of Augustine's problem: "Oh Lord, make me chaste—but not yet."<sup>22</sup> This problem is highlighted by the fiscal compact negotiations over the speed and intensity of budget reductions that demonstrate bias towards a fiscal consolidation that does little to deal with the problem of unemployment.

Does it make a difference to the argument that there are competing theories of political economy about the relationship between public action and unemployment, and that few today will accept that there can be a simple direct relationship between a public

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<sup>22</sup> ST. AUGUSTINE, *He Deplores His Wretchedness, that Having Been Born Thirty-Two Years, He Had Not Yet Found Out the Truth*, in *THE CONFESSIONS: BOOK VIII* (1960).

expenditure stimulus to the economy and a permanent increase in employment without the danger of inflationary expectations becoming embedded in the minds of economic agents? Unless one entirely dismisses the possibility that there can be a sub-optimal economic equilibrium at less than full employment, employment can be increased by short-term government stimulus to the economy. Conceptually, the solution is to distinguish between two components of the public budget: A public services part, which should generally be balanced and used solely to finance the social savings and provisions of public goods that are the heart of the welfare state; and a stabilization part, which should engage in deficit financing in times when sub-optimal unemployment is high and secure returns to balance out the deficits when unemployment is low. However, institutionalizing this distinction—and in particular, institutionalizing it in such a way that there is no incentive for policymakers to reclassify income and expenditure in distorting ways—seems a major task.

Both the welfare state and the monetary union of the EU, as political contracts, are ways of organizing the problems of social and economic interdependence. Citizens share the financial risks associated with the life cycle with one another, and states share the economic risks and advantages of a single market and the single currency that are associated with that market. Within a political union, risks are never eliminated. If the union works well, they are merely transformed and managed in a better way. As the externalities associated with creating a common national market and economy are dealt with through political consolidation, new externalities are created and dealt with by being incorporated into social savings systems. A political community can be defined by the willingness of its members to share negative externalities. In some deep sense, there are economies of scale within a society by which its members can do better collectively than they can do individually, but the price that they have to accept for securing these economies of scale is that they display a willingness to share risks with associates. Interdependence cannot be avoided; it can only be politically managed.

Presently in the EU, we are muddling through to mutualization, despite the insistence by powerful voices that the political union of the EU should not become a “transfer union.” This maintains the two-level political contract, but accepts that the need to mobilize resources was not envisaged in the Maastricht Treaty and subsequent agreements, and rests upon forging an elite political consensus on how to manage through the pressures. The chief elements in this muddling through are Draghi’s commitment on behalf of the European Central Bank (ECB) “to do anything it takes”<sup>23</sup> to save the Euro, including the prospect of purchasing bonds issued by distressed governments, the willingness of the German Constitutional Court to accept the constitutionality of the ESM, the hope that economies will recover sufficiently to pay down their debts, a willingness to tolerate some

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<sup>23</sup> See Mario Draghi, President, European Central Bank, Address at the Global Investment Conference in London (July 26, 2012), <http://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html>.

marginal adjustments in the timetable for restoring fiscal balance, and the failure of those who oppose austerity to be able to articulate a clear storyline about how to reconcile conflicting demands, so that opposition takes the form of street protests and flash parties.

Only time will tell whether muddling through will prove sufficient to maintain both the domestic political contracts of the welfare state and the international political contract of the EU's monetary union. The principle of fiscal responsibility as a necessary condition of both the monetary union and the long-term sustainability of the welfare state—a principle set out in Article 1 of the Treaty on the Stability, Coordination and Governance in the Economic and Monetary Union—is derivable from the fundamental logic of political association in which credible commitments on the part of all cooperating parties are essential. However, it is one thing to set out the abstract logic of complementary principles; it is another matter to manage the day-to-day and month-to-month development of a political union in such a way as to reconcile the operation of those principles in practice.

To say that the reconciliation of social citizenship and the management of the single market is a dilemma of political legitimacy is to say that political leadership is an essential element in dealing with the problem. The political constitutions of the monetary union owe their intellectual inspiration to the political theory of liberal constitutionalism, according to which the central element of a successful political order is the formulation of general rules impartially and firmly applied. Clear rules play an indispensable role in any society governed according to the principles of the rule of law. However, when the circumstances in which they were crafted turn out not to be the circumstances in which they are applied, something beyond rules is needed. At the time leading up to the Maastricht Treaty, it was often said that what Europe needed was its own James Madison, as though the idea that a constitutional draft could be conceived at one time and implemented over successive periods was a feasible one—and let us remember that the Civil War took place only some seventy years after the acceptance of the United States Constitution. What Europe needs now is not the imposition of more rules, but shared political leadership that realizes that politics is not the art of the possible, but rather the art of making things possible. If that does not happen, we will not be able to discuss European social citizenship twenty years from now; the conditions for its maintenance will have been destroyed.



## **Communicating with the European Composite Administration**

*By Jane Reichel\**

### **A. Introduction**

One of the reasons for introducing a “Union” citizenship in the 1993 Maastricht Treaty was to provide a direct channel between the citizens of the Member States and the EU. In contrast to many other international organizations, the role of the individual has been central to the European project since its inception. In its famous 1962 judgment given in *Van Gend en Loos*,<sup>1</sup> the Court of Justice of the European Union (CJEU) underscored the importance of the “vigilance of individuals concerned” seeking to protect their European rights in the new legal order through judicial control.<sup>2</sup> The right to directly vote on the representatives of the European Parliament had already been introduced in the 1970s. The citizens of the Member States were thus equipped with two classic forms of political participation even prior to the introduction of Union citizenship: law making and the legal adjudication of individual cases. Nonetheless, whether these channels are sufficient to guarantee the citizens effective democratic means to influence legislation and exercise control of EU institutions in the rather complex multilevel legal system of the EU has been continuously debated.

During the twenty years since Union citizenship was introduced in 1993, the constitutional setting of the Union and its relations to the Member States have evolved. The subject of this paper is the developing administrative cooperation between administrative organs within the EU and its Member States. The implementation of EU law at the national level has changed from being mainly an issue for the Member States to decide, to becoming an issue of shared responsibility for the EU and the Member States. In most sectors of EU law, national authorities work closely together as well as with EU organs, not only at the implementation stage, but also to a certain extent at the policy-making and rule-making stages. This intense cooperation has provided many new sector-specific arenas for participation and communication. The objective here is to analyze from a legal perspective

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<sup>1</sup> *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, CJEU Case C-26/62, 1963 E.C.R. 1.

<sup>2</sup> *Id.* at para. 13.



the current channels for communication—direct and indirect—between the Union citizen and the European composite administration. The point of departure is that democracy presupposes the possibility for citizens to participate and communicate in one way or another with the decision-making organs of the polity at hand. The values of communication have been recognized by the Member States when drafting the legal foundation of the EU. Article 10.3 of the Treaty of the European Union (TEU) states that every citizen shall have the right to participate in the democratic life of the Union and that decisions shall be taken as openly and as closely as possible to the citizen.<sup>3</sup>

The analysis here begins with the democratic foundations of the EU, as laid down in the Treaties. One of the novelties of the Lisbon Treaty is the list of democratic sources given for the EU introduced in Articles 9–12 TEU. The subject of European democracy is identified in Article 9 TEU as the Union Citizen: The Union shall in all its activities observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies.<sup>4</sup> This Article goes on to define the Union citizen, the nationals of the Member States. Importantly, this Article also reaffirms the derived status and complementary nature of Union citizenship. Citizenship of the Union is in addition to, and does not replace, national citizenship.<sup>5</sup> The democratic basis for the EU is laid down in TEU Articles 10–12. The classic form of democracy, representative democracy through directly elected parliaments, is declared in Article 10 TEU to be the foundation of the democratic functioning of the Union.<sup>6</sup> This form of democracy is further complemented by a participatory form of democracy as given in Article 11 TEU. Lastly, the national parliaments reappear in Article 12 TEU, given a specific role in the political life of the EU beyond their function in the representative democracy of Article 10 TEU.

The two classic mechanisms for Union citizens to communicate with the EU, parliamentary elections and judicial control, are here analyzed in light of the more innovative form of democracy as set out in Article 11 TEU: participatory democracy. The presentation is structured as follows. A brief introduction to the European composite administration is given in Section B. The representative form of democracy and the role of national parliaments are discussed in Section C. Section D. focuses on the rights of the Union citizen to engage in administrative and judicial proceedings in individual cases in order to protect their rights. These rights are codified in Articles 41 and 47 of the EU Charter of Fundamental Rights (hereinafter the Charter), corresponding to Article 19 TEU. The

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<sup>3</sup> See Consolidated Version of the Treaty on European Union, Oct. 26, 2012, 2012 O.J. (C 326) art.10.3 [hereinafter TEU].

<sup>4</sup> See TEU art. 9.

<sup>5</sup> See TEU art. 9; Consolidated Version of the Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) art. 20.1 [hereinafter TFEU].

<sup>6</sup> See TEU art. 10.

participatory forms of democracy introduced in the Lisbon Treaty, where the institutions of the EU are to engage in open dialogues with the citizens and their representative organizations, are analyzed in Section E. The question put forward here is whether the current legal framework merely provides an *ad hoc* approach, diluting any possibility of effective democratic or judicial control over the administration, or whether it enables a flexible and pragmatic form of control via Union citizen participation in the multi-faceted legal and political reality of the EU. Conclusions and final thoughts are given in Section F.

## **B. The Development of a Composite European Administration**

The starting point for implementing EU law within the Member States generally has been that this is a matter for Member States to resolve independent of the EU.<sup>7</sup> Traditionally, EU law has mainly been implemented by national authorities, creating a situation where the EU decides and the Member States implement.<sup>8</sup> The legal basis for this is found in the Treaties, Article 5.2 TEU and the principle of the conferral of powers, stating that the EU can only take action in areas where the Member States have transferred competence to the EU.<sup>9</sup> This Article is to be read in conjunction with Article 6g TFEU, introduced in the Lisbon Treaty, stating that EU competence in the field of administrative cooperation is limited to carrying out actions to support, coordinate or supplement the actions of the Member States.<sup>10</sup> Articles 4.3 TEU and 291 TFEU stress that Member States shall take all measures of national law necessary to implement legally binding Union acts, and that the European Commission (Commission) may adopt implementing legislation only in cases where uniform conditions for implementation are necessary.<sup>11</sup> From this it seems to follow that the main responsibility for the implementation of EU law at the national level rests securely with the Member States and their respective constitutional orders.

Though, the implementation of EU law has not been left to the Member States to take care of separately from the EU. Article 197.1 TFEU, where EU competence under Article 6g TFEU is specified, also maintains that the effective implementation of EU law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest.<sup>12</sup> It is up to Member States to implement EU law, but it is a

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<sup>7</sup> The principle of the institutional autonomy of the Member States was introduced in *International Fruit Company v. Produktschap voor groenten en fruit*, CJEU Case 51-54/71, 1971 E.C.R. 1107, para. 4. The principle of procedural autonomy was established in *Rewe-Zentralfinanz v. Landwirtschaftskammer für das Saarland*, CJEU Case 33/76, 1976 E.C.R. 1989, para. 5.

<sup>8</sup> See HERWIG C.H. HOFMANN ET AL., *ADMINISTRATIVE LAW AND POLICY OF THE EUROPEAN UNION* 259 (2011).

<sup>9</sup> See TEU art. 5.2.

<sup>10</sup> See TFEU art. 6g.

<sup>11</sup> See TEU art. 4.3; TFEU art. 291.

<sup>12</sup> See TFEU art. 197.1.

matter of common interest that—and not seldom how—this is done. Considering the issue from a more practical perspective, the implementation of EU law is usually divided into three parts: Direct, indirect or shared administration. EU institutions themselves thus provide direct administration, particularly the Commission. Indirect administration is when implementation is taken care of by the Member States, while the shared administration is carried out by the Member States in cooperation with EU institutions and agencies.<sup>13</sup> Even though the competence of the EU to regulate the internal administrative functions of the Member States is very limited, there has long been an acceptance that the EU may introduce minimum rules of functions and procedures on the basis of substantive EU law, for example, with respect to the internal market, agriculture, and so forth.<sup>14</sup> One example is that within EU food policy, the EU has adopted a regulation with common rules for monitoring the implementation of EU food regulations.<sup>15</sup> Nowadays, EU law is mainly implemented through various forms of shared administration with national administrative organs working closely with EU institutions and agencies.<sup>16</sup>

Another relevant factor is that the EU's own administration has grown significantly through the establishment of over thirty independent European agencies. The EU authorities have different characteristics, but the majority, the "regulatory" agencies, have the overall task of promoting the implementation of EU law in different ways.<sup>17</sup> The regulatory agencies may provide technical or scientific advice to the Commission and the Member States, be responsible for operational activities, or create networks between administrations.

The growing cooperation between the European and national administrative bodies in various forms has come to be regarded as an administrative organization in itself, referred to as an integral or composite administration.<sup>18</sup> The different functions and competences of the organs involved vary from one area to another, but it is not unusual for the

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<sup>13</sup> See *id.*; Carol Harlow, *Three Phases in the Evolution of EU Administrative Law*, in *THE EVOLUTION OF EU LAW* 443 (Paul Craig & Grainne de Búrca eds., 2011).

<sup>14</sup> See Francois Lafrage, *Administrative Cooperation Between Member States and Implementation of EU Law*, 16 *EUROPEAN PUBLIC* 597–616 (2010).

<sup>15</sup> See Regulation 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules, 2004 O.J. (L 191).

<sup>16</sup> See Eduardo Chiti, *The Relationship Between National Administrative Law and European Administrative Law in Administrative Procedures*, in *WHAT'S NEW IN EUROPEAN ADMINISTRATIVE LAW* 7 (EUI Working Paper Law No. 10, 2005).

<sup>17</sup> See *Communication from the Commission to the European Parliament and the Council: European Agencies – The Way Forward*, COM (2008) 135 final (Mar. 11, 2008).

<sup>18</sup> See Eberhard Schmidt-Aßmann, *Introduction: European Composite Administration and the Role of European Administrative Law*, in *THE EUROPEAN COMPOSITE ADMINISTRATION* (Oswald Jansen & Bettina Schöndorf-Haubold eds., 2011).

administrative organs to be represented in all cycles of the legislative process, from policy-making, to rulemaking and implementation.<sup>19</sup> The role of national officials in comitology procedures has long been important.<sup>20</sup> In such matters, the development of the role of administration within the composite administration follows a general trend in the Western world. As pointed out by Corkin, bureaucratic law-making is found everywhere and is here to stay.<sup>21</sup> The participation of private organizations and undertakings has also been prevalent in the EU.<sup>22</sup>

Another specific feature of the composite administration relevant here is the variety of tools available to the administration. In some policy areas, administrative organs act within composite administrative procedures, whereas national and European administrative organs take part in one and the same procedure for enacting decisions.<sup>23</sup> This is seen in the administrative procedures allowing genetically modified organisms (GMO) to be released into the environment,<sup>24</sup> permitting medical products to be released on the market,<sup>25</sup> enacting technical standards,<sup>26</sup> and within regulations on telecommunications.<sup>27</sup> In the

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<sup>19</sup> See Morten Egeberg, Guenther F Schaefer & Jan Trondal, *EU Committee Governance Between Intergovernmental and Union Administration*, in MULTILEVEL UNION ADMINISTRATION: THE TRANSFORMATION OF EXECUTIVE POLITICS IN EUROPE 66 (Morten Egeberg ed., 2006); Herwig C.H. Hofmann & Alexander Türk, *The Development of Integrated Administration in the EU and its Consequences*, 13 EUR. L. J. 253–71 (2007); Mauro Zamboni, *Globalization and Law-Making: Time to Shift a Legal Theory's Paradigm*, 1 LEGISPRUDENCE 125, 142 (2007).

<sup>20</sup> See generally CARL FREDRIK BERGSTRÖM, COMITOLOGY: DELEGATION OF POWERS IN THE EUROPEAN UNION AND THE COMMITTEE SYSTEM (2005).

<sup>21</sup> See Joseph Corkin, *Constitutionalism in 3D: Mapping and Legitimizing Our Lawmaking Underworld*, 19 EUR. L. J. 636, 642 (2013).

<sup>22</sup> See *id.* at 648; JOANNA MENDES, PARTICIPATION IN EUROPEAN UNION RULEMAKING: A RIGHTS-BASED APPROACH 120 (2011); MARIA WIBERG, THE SERVICES DIRECTIVE – LAW OR SIMPLY POLICY 235 (2013); *infra* section D.

<sup>23</sup> See HOFMANN ET AL., *supra* note 8, at 406.

<sup>24</sup> See Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the Deliberate Release into the Environment of Genetically Modified Organisms, 2001 O.J. (L 106); Regulation 1829/2003 of the European Parliament and the Council of 22 September 2003 on Genetically Modified Food and Feed, 2003 O.J. (L 268).

<sup>25</sup> See Regulation 726/2004 of the European Parliament and of the Council of 31 March 2004 Laying Down Community Procedures for the Authorization and Supervision of Medicinal Products for Human and Veterinary Use and Establishing a European Medicines Agency, 2004 O.J. (L 136).

<sup>26</sup> See Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 Laying Down a Procedure for the Provision of Information in the Field of Technical Standards and Regulations, 1998 O.J. (L 204).

<sup>27</sup> See Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a Common Regulatory Framework for Electronic Communications Networks and Services (Framework Directive), 2002 O.J. (L 108). In a proposal from the Commission, the composite elements are suggested to be strengthened to be able to grant a single EU authorization to provide electronic communications across the Union. Proposal for a Regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC,

proposal for a new Data Protection Regulation, the national data protection authorities—who are to be independent<sup>28</sup>—are provided with a specific “consistency mechanism” to be applied in matters having a cross-border element, or otherwise having an EU-wide impact.<sup>29</sup> In such cases, the European Data Protection Board and the Commission will also be involved in the handling of the matter, according to a specific scheme laid down in the regulation.<sup>30</sup> Yet another area with close cooperation between national and EU authorities is the area of social security. EU secondary law provides for procedures to coordinate social security benefits in the Member States, including conflict resolution mechanisms.<sup>31</sup>

In other areas where EU competence is more limited, the national authorities cooperate mainly by non-binding legal tools, also known as soft law. For example, in the area of research and innovation, the EU has only the competence to take complementary and coordinated actions *vis-à-vis* national policies.<sup>32</sup> Despite this, the EU has been described as a supranational organization in the international field of research.<sup>33</sup> This can be explained by the available programs for research grants, organizational regimes, and soft law mechanisms that the EU can utilize within the European research area. In the 2020 strategy, the EU has defined several steps to achieve a sustainable economy and growth in Europe, among them research and innovation.<sup>34</sup> The EU has introduced several agencies, programs, and instruments to facilitate research. One of them is the European Strategy Forum on Research Infrastructures (ESFRI), a Commission instrument to support a coherent and strategic policy for research infrastructures in Europe.<sup>35</sup> The ESFRI identifies and describes the scientific needs for research infrastructures within the EU through

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2002/21/EC, and 2002/22/EC and Regulations (EC) No. 1211/2009 and (EU) No. 531/2012, COM (2013) 627 final (Sept. 11, 2013).

<sup>28</sup> See TFEU art. 16; Charter of Fundamental Rights of the European Union, Dec. 14, 2007, 2007 O.J. (C 303) art. 8.

<sup>29</sup> Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), arts. 57–62, COM (2012) 11 final (Jan. 25, 2012).

<sup>30</sup> See *id.* arts. 58–59.

<sup>31</sup> See Regulation 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, art. 76, 2004 O.J. (L 314); Regulation 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, art. 5, 2009 O.J. (L 284); Henrik A. Wenander, *A Network of Social Security Bodies – European Administrative Coordination Under Regulation No. 883/2004*, 6 REALAW 39, 67 (2013).

<sup>32</sup> See TFEU arts. 4.3, para. 3.

<sup>33</sup> See MATTHIAS RUFFERT & SEBASTIAN STEINECKE, *THE GLOBAL ADMINISTRATIVE LAW OF SCIENCE* 65 (2011).

<sup>34</sup> See Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth, COM (2010) 2020 final (Mar. 3, 2010).

<sup>35</sup> See European Commission, *Research & Innovation* (May 26, 2014), [http://ec.europa.eu/research/infrastructures/index\\_en.cfm?pg=esfri](http://ec.europa.eu/research/infrastructures/index_en.cfm?pg=esfri).

roadmaps.<sup>36</sup> Within the ESFRI, the national competent authorities in the research area are represented and the needs identified at the EU level will also influence the priorities made at the national level. For example, in the Swedish equivalent to the ESFRI road map, the Research Council guide to infrastructures 2012, it is stated that the ESFRI road map has been used as an important basis.<sup>37</sup> The national research grants are subsequently distributed in line with the road map, so that research identified as valuable at the European level is supported by the national research institution.<sup>38</sup>

An important difference between this composite European administration and national administration is that the composite administration is not organized under one coherent political structure. Neither the EU nor the Member States can by themselves steer or control the European composite administration as a whole. Instead, the composite administration is part of all twenty-nine constitutional orders at the same time—the EU and the twenty-eight Member States.<sup>39</sup> A specific feature of the composite administration is its fragmented structure; the organization and relationships between its constituent bodies vary from one policy area to another. As seen, this heterogeneous administrative model, with its indistinct boundaries between the European and national bodies, as well as between the private and the public, may in itself open the doors for the use of alternative regulatory methods, using soft governance tools rather than distinct legal rules. One of the main driving forces behind the development of a composite administration is its ability to resolve common European problems that are out of reach for the individual entities, the EU and the Member States.<sup>40</sup> By coordinating European and national policies and infrastructures, a more efficient outcome of policies may be attained. On the other hand, the ability to steer and control the heterogeneous administration may prove more difficult, as it is not directed by one coherent policymaker. The development has thus led to an intermingling of the mandates and responsibilities of the EU and its Member States. With this further follows a risk of fragmentation, because different policy areas develop rather independently of each other.

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<sup>36</sup> Three roadmaps have been published to date: The European Roadmap for Research Infrastructures 2006 and two updated versions in 2008 and 2010. They are published on the Commission's webpage, [http://ec.europa.eu/research/infrastructures/index\\_en.cfm?pg=esfri](http://ec.europa.eu/research/infrastructures/index_en.cfm?pg=esfri).

<sup>37</sup> See VETENSKAPSRÅDETS GUIDE TILL INFRASTRUKTUREN 3 (2012).

<sup>38</sup> See Jane Reichel, *BBMRI-ERIC – An Analysis of a Multi-Level Institutional Tool for the EU and Beyond*, in *ADMINISTRATIVE LAW BEYOND THE STATE - NORDIC PERSPECTIVES* 92 (Anna-Sara Lind & Jane Reichel eds., 2013).

<sup>39</sup> See JANE REICHEL, *ANSVARSTUTKRÄVANDE – SVENSK FÖRVALTNING I EU* 213 (2010).

<sup>40</sup> See Hofmann & Türk, *supra* note 19, at 262.

### C. The Representative Democratic Model and the Role of Parliaments

Article 10 TEU and representative democracy are the first of the three sources of democratic legitimacy listed in the EU Treaty, and can be labeled as the main source of democracy in the EU. This Article structures the representation of Union citizens into two channels, direct representation via the European Parliament<sup>41</sup> and indirect representation via the members of the European Council and the Council, where Union citizens are represented by their Heads of State or Government and by their governments, respectively.<sup>42</sup> These organs are further said to be democratically accountable either to their national Parliaments, or to their citizens. The national parliaments thus represent the citizens and hold the executive accountable for their doings within and beyond the state. This form of democracy constitutes the traditional form of democracy and of cooperation of sovereign nations beyond the state; the sovereign people is represented by a parliament, who in turn appoint a government—or, as the case may be, also elect a president—who represents the sovereign people in international affairs.<sup>43</sup>

With globalization in general and Europeanization in particular, more and more of the public power of each state is exercised beyond its borders. The question of representing the sovereign people beyond the nation state has been widely discussed in the legal literature and elsewhere for some time now.<sup>44</sup> Here, two aspects are highlighted. First, with the development towards a composite European administration as described in the previous section, national parliaments will encounter difficulties in holding their own executive branches accountable. Instead of the classic international law situation, where the state is represented by its government in international affairs, the Member States can today to a large extent be described as perforated, as opposed to unified, in their relations to the world outside their borders. It has become increasingly problematic for national parliaments to follow the public power of the nation state when crossing borders and intermingling with public powers emanating from other states. The parliaments can thus experience major difficulties when attempting a comprehensive view of all the influences reaching the national legal order, in order to hold the responsible actors accountable for actions, or lack of actions.

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<sup>41</sup> See TEU art. 10.2 para 1.

<sup>42</sup> See TEU art. 10.2 para 2.

<sup>43</sup> For a discussion on these issues, see DEIRDRE CURTIN, EXECUTIVE POWER OF THE EUROPEAN UNION: LAW, PRACTICES, AND THE LIVING CONSTITUTION (2009) and Leonard F.M. Besselink, *Shifts in Governance: National Parliaments and Their Governments' Involvement in European Union Decision-Making*, in NATIONAL PARLIAMENTS AND THE EUROPEAN UNION: THE CONSTITUTIONAL CHALLENGE FOR THE OIREACHTAS AND OTHER MEMBER STATES LEGISLATURES 30 (Gavin Barrett ed., 2008).

<sup>44</sup> See, e.g., Neil McCormick, *Beyond the Sovereign State*, 56 MOD. L. REV. 1 (1993); Neil Walker, *Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders*, 6 INT'L J. OF CONST. L. 373–96 (2008); THE WORLDS OF EUROPEAN CONSTITUTIONALISM (Gráinne de Búrca & Joseph H.H. Weiler eds., 2012).

Second, no parliament exists with the mandate to hold the composite administration as a whole accountable. As set out above, the composite administration is part of twenty-nine constitutional orders simultaneously, the EU and the twenty-eight Member States, and thus is to be held accountable by twenty-nine parliaments simultaneously. As mentioned, Article 10 TEU states that Member States are represented in the European Council and the Council and that these organs are themselves democratically accountable either to their national Parliaments or to their citizens. One could read this as a call to the national parliaments to collaborate in order to hold the European Council or the Council as a whole accountable in an effective way, perhaps even in collaboration with the other directly elected organ of the Union, the European Parliament. However, this interpretation has very little to do with the reality of cooperation between parliaments within the Union. Already in the preamble to the 1997 Protocol on the National Parliaments, scrutiny by individual national parliaments of their own governments in relation to the activities of the Union was deemed a matter for the particular constitutional organization and practice of each Member State, thus an issue with which the EU could or should not interfere.<sup>45</sup> As pointed out by Harlow, there is a marked difference between how national courts interact with the Court of Justice in comparison to how national parliaments interact with each other and with the European Parliament: "The remarkable measure of trust and co-operation which generally exists between national courts and the ECJ provides a sharp contrast to the general negative parliamentary relationships."<sup>46</sup>

There has been some development in the cooperation since the 1997 protocol and since Harlow made this statement in 2002. With the Lisbon Treaty, the position of the parliaments in the EU has been strengthened in several ways. The powers of the European Parliament in the legislative and budgetary procedures have been extended, as well as the Parliament's role in international affairs.<sup>47</sup> More importantly here, the Parliament's control of the implementation powers of the Commission in comitology procedures has been strengthened.<sup>48</sup> However, the mechanisms for the European Parliament to check the exercise of power by the Commission are not very strong. The current constitutional theory on which the EU builds, the Community method, does not provide for any real parliamentary control.<sup>49</sup> However, the European Parliament has clearly advanced their

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<sup>45</sup> See Protocol on the Role of the National Parliaments in the European Union, Oct. 26, 2012, 2012 O.J. (C 326).

<sup>46</sup> CAROL HARLOW, ACCOUNTABILITY IN THE EUROPEAN UNION, THE COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 157 (2002).

<sup>47</sup> See Juan Mayoral, *Democratic Improvements in the European Union Under the Lisbon Treaty: Institutional Changes Regarding Democratic Government in the EU*, EUROPEAN UNION DEMOCRACY OBSERVATORY (EUDO) (Feb. 2011), <http://www.eui.eu/Projects/EUDO-Institutions/Documents/EUDOREport922011.pdf>.

<sup>48</sup> See *id.*; TFEU arts. 290–91.

<sup>49</sup> See John Temple Lang, *Checks and Balances in the European Union: The Institutional Structure and the Community Method*, 12 EUR. PUB. L. 127 (2006).



position regarding the appointment of the President of Commission, by claiming that the candidate of the winners of the election to the Parliament in May 2014 should be appointed.<sup>50</sup> This constitutes quite extensive reading of Article 17.7 TEU, which merely states that the European Council shall take into account the election to the European Parliament in the process.<sup>51</sup> At the time of the writing of this article, July 2014, the outcome of this process is still not settled. The national parliaments have also been given a stronger role beyond holding the national representatives accountable as set out in Article 10 TEU.<sup>52</sup> The national parliaments are given in Article 12 TEU an independent role also as bearers of democratic legitimacy within the EU, by involvement in the EU decision-making procedures outside the traditional passive role of national parliaments' international affairs.<sup>53</sup> This Article lists six different ways by which the national parliaments "contribute actively to the good functioning of the Union," including the task of "seeing to it that the principle of subsidiarity is respected," which can be deemed as the most inventive and novel form.<sup>54</sup> This mechanism allows the national parliaments to participate in the EU

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<sup>50</sup> See, Debating Europe, *Who Are the Presidential Candidates?*, <http://www.debatingeurope.eu/focus/presidential-candidates/#.U7QXU02KC70> (last visited July 15, 2014).

<sup>51</sup> See TEU art. 17.7.

<sup>52</sup> See TEU art. 10.

<sup>53</sup> See TEU art. 12.

<sup>54</sup> *Id.* at para. B. The other five are:

(a) Through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union; . . .

(c) By taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area, in accordance with Article 70 of the Treaty on the Functioning of the European Union, and through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles 88 and 85 of that Treaty;

(d) By taking part in the revision procedures of the Treaties, in accordance with Article 48 of this Treaty;

(e) By being notified of applications for accession to the Union, in accordance with Article 49 of this Treaty;

(f) By taking part in the inter-parliamentary cooperation between national Parliaments and with the European Parliament, in accordance with the Protocol on the role of national Parliaments in the European Union.

legislative process at an early stage, and to cast a negative vote in cases where the national parliament finds the proposed legislative act to contravene the principle of subsidiarity. If a sufficient number of parliaments cast negative votes, the Commission can be given either a yellow or an orange card.<sup>55</sup> Even though this is not a question of a veto from the national parliaments, the Commission is to find it difficult to proceed with a high number of national parliaments against a proposal. To date, two yellow cards have been given by national parliaments, one in 2012 concerning a proposal on the rights of posted workers<sup>56</sup> and one in 2013 regarding the introduction of a European Public Prosecutor Office (EPPO).<sup>57</sup> In the first case, the Commission retracted its proposal,<sup>58</sup> whereas in the second case the Commission withheld its proposal and the legislative procedure is currently ongoing.<sup>59</sup>

Even with the strengthened positions of the parliaments of the EU after Lisbon, it does not seem possible for either the European parliament or the national parliaments to control the composite administration single-handedly. The existing mechanisms for cooperation available, for example COSAC,<sup>60</sup> have not yet developed into an arena for pooling parliamentary power control over the common work of the national and European authorities. To date, the effect on parliamentary control over the European composite administration remains weak. However, as discussed further in Section E, these strengthened powers and new forms of collaboration for the parliaments of the EU can very well turn out to be progressive tools enabling an efficient parliamentary control in the EU.

#### D. Administrative and Judicial Procedures in Individual Cases

The role of the courts within the EU legal order has been important from the start. The combination of the doctrines of “direct effect” and “primacy,” as well as the preliminary ruling mechanism under Article 267 TFEU, have created a direct channel between the

<sup>55</sup> See Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality, March 30, 2010, 2010 O.J. (C 83/206); Marco Goldoni, *The Early Warning System and the Monti II Regulation: A Political Interpretation*, EUR. CONST. L. REV., 90–108 (2014).

<sup>56</sup> See Goldoni, *supra* note 55, at 97.

<sup>57</sup> See *National MPs Protest EU Public Prosecutor Idea*, EU OBSERVER (Nov. 1, 2013), <http://euobserver.com/justice/121959>.

<sup>58</sup> See Withdrawal of Obsolete Commission Proposals, Apr. 16, 2013, 2013 O.J. (C 109) 7.

<sup>59</sup> See Proposal for a Council Regulation on the Establishment of the European Public Prosecutor's Office, COM (2013) 534 final (Jul. 17, 2013).

<sup>60</sup> See Morten Knudsen & Yves Carl, *COSAC: Its Role to Date and Its Potential in the Future*, in NATIONAL PARLIAMENTS AND THE EUROPEAN UNION: THE CONSTITUTIONAL CHALLENGE FOR THE OIREACHTAS AND OTHER MEMBER STATES LEGISLATURES (Gaven Barrett ed., 2008).

national courts and the CJEU, entirely disconnected from the political levels in both the EU and the Member States.<sup>61</sup> The emphasis on judicial control in the interpretation of the rule of law in the jurisprudence of the CJEU is quite apparent. In the famous cases *Les Verts*, the Court gave the European Parliament standing to act as defendant before the Court based on an understanding of the rule of law, stating that neither the Member States of the EU nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.<sup>62</sup> In connection with acts of the administration, the possibility of judicial control has also been deemed of fundamental importance, both in regards to individual decisions<sup>63</sup> and in regards to the rule-making capacity of the administration.<sup>64</sup>

The rights of Union citizens to engage in lawful and legitimate procedures before the administration as well as before the courts are laid down in Articles 41 and 47 of the Charter respectively. According to the case law of the CJEU, there is further a strong connection between the right to good administration in Article 41 and the right to an effective and a fair trial remedy in Article 47,<sup>65</sup> also noted in the semi-official explanations relating to the Charter.<sup>66</sup>

There are several explanations for the strong position of judicial control in the EU constitutional order. Craig has underlined the fact that even though the concept of rule of law has diverse meaning within the Member States, the idea that the administration should be procedurally and substantively accountable before the courts has nonetheless been central.<sup>67</sup> This core idea has had special force in Union law. Further, it may be readily accepted that it is the effective mechanisms provided for in the Treaty, in the preliminary

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<sup>61</sup> See TORBJÖRN ANDERSSON, RÄTTSSKYDDSPRINCIPEN: EG-RÄTT OCH NATIONELL SANKTIONS- OCH PROCESSRÄTT UR ETT SVENSKT CIVILPROCESSUELLT PERSPEKTIV 276 (1997); Anthony Arnall, *The Rule of Law in the European Union, in* ACCOUNTABILITY AND LEGITIMACY IN THE EUROPEAN UNION 242 (Anthony Arnall & Daniel Wincott eds., 2002).

<sup>62</sup> See *Les Verts v. European Parliament*, CJEU Case C-294/83, 1986 E.C.R. I-1339, para. 23; *Parliament v. Council (Chernobyl)*, CJEU Case C-70/88, 1990 E.C.R. I-2041. It may be remarked that even though the CJEU in these two cases strengthened the role of the European Parliament, the cases should be seen as evidence of the importance of judicial control in the EU constitutional system. The European Parliaments procedural rights were merely lifted to the level of the other EU institutions.

<sup>63</sup> At the EU level, see *TU München v. Hauptzollamt München-Mitte*, CJEU Case C-269/90, 1991 E.C.R. I-5469, and at the national level, see *UNECTEF v. Heylens*, CJEU Case C-222/86, 1987 E.C.R. 4097.

<sup>64</sup> See *Pfizer Animal Health v. Council*, CJEU Case T-13/99, 2002 E.C.R. II-3305, paras. 199–201 (regarding a consultation of a scientific committee in law-making); *Germany v. the Commission*, CJEU Case C-263/95, 1998 E.C.R. I-441, para. 31 (regarding comitology procedures).

<sup>65</sup> See *UNECTEF*, CJEU Case 222/86 at paras. 14–16.

<sup>66</sup> Explanations Relating to the Charter of Fundamental Rights, Dec. 14, 2007, 2007 O.J. (C 303/02) art 41.

<sup>67</sup> See PAUL CRAIG, *EU ADMINISTRATIVE LAW* 270 (2006).

ruling system, together with the case law of the CJEU with its dynamic doctrine of direct effect and supremacy, and the weight laid upon ensuring the loyal cooperation of the national courts, that has enabled the EU to escape the implementation trap of traditional international law.<sup>68</sup> But, as the mechanisms for implementing EU law become more elaborated, involving actors from several Member States and the EU, as well as private parties, the limits of judicial control have also become apparent. Article 267 TFEU allows a comprehensive control of more than one legal order at the time, but only as long as the procedure involves actors from one Member State and the EU.

Even though neither the CJEU nor the national courts have any competence to review acts emanating from legal orders other than their own, the CJEU has in its case law developed mechanisms to allow for an integrated review. Accordingly, if a decision taken at the European level will have legal effects at the national level, the EU-decision can be reviewed by way of a preliminary ruling. This was the situation in the well-known *TU München* case, where a decision from the Commission not to allow an exemption from import duties in accordance with the Common Customs Tariff was reviewed—and declared invalid—within a preliminary ruling.<sup>69</sup> The opposite situation may also occur, where a national authority enacts a decision, or even a non-binding measure such as an opinion, that has effects within a decision-making procedure at the EU level. In the *Borelli* case the CJEU held that it is an obligation for the Member States to ensure that the measure can be reviewed by a national court, even if the domestic rules of procedure do not provide for this in an equivalent national case.<sup>70</sup>

Even if *TU München/Borelli* does allow for an effective judicial control in bilateral composite procedures, there may still be a number of situations that remain difficult for courts and litigants to approach. First, when authorities in different spheres cooperate closely, the delineation of public powers involved may be difficult to trace. Even though the CJEU in *Borelli* held that Member States could be under the obligation to provide judicial scrutiny also for non-binding measures, this has not always been upheld at the Union level. Non-binding measures at one level giving rise to legally enforceable measures at a national level, may render the allocation of responsibilities unclear. The situation can be illustrated by the *Tillack* case, where a German journalist, Hans-Martin Tillack, had published articles in the *Stern* magazine on alleged irregularities regarding the activities of OLAF, the EU anti-fraud organ, connected to the van Buitenen affair.<sup>71</sup> Based on the

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<sup>68</sup> See CAROL HARLOW, ACCOUNTABILITY IN THE EUROPEAN UNION 147 (2002); SIONAIDH DOUGLAS-SCOTT, CONSTITUTIONAL LAW OF THE EUROPEAN UNION 225 (2002).

<sup>69</sup> See *TU München v. Hauptzollamt München-Mitte*, CJEU Case C-269/90, 1991 E.C.R. I-5469.

<sup>70</sup> See *Borelli v. Comm'n*, CJEU Case C-97/91, 1992 E.C.R. I-6313, para. 13.

<sup>71</sup> See *Tillack v. Comm'n*, 2006, CJEU Case T-193/04, E.C.R. II-3995.

suspicion that Tillack had bribed officials at OLAF, OLAF initiated an investigation into the matter, and contacted judicial authorities in Belgium and Germany under the regulation concerning investigations conducted by OLAF,<sup>72</sup> handing over information. On the basis of this information, the Belgian police carried out a search at the applicant's home and office and seized or sealed professional documents and personal belongings. The suspicions were also included in a press release from OLAF.<sup>73</sup> Tillack first lodged a complaint with the EU ombudsman, who found that OLAF, by making allegations of bribery without a factual basis that was both sufficient and available for public scrutiny, had gone beyond that which was proportionate to the purpose pursued by its action, and that this constituted an instance of maladministration.<sup>74</sup> Tillack then turned to the General Court, seeking annulment of the act by which OLAF forwarded information to the German and Belgian judicial authorities and a claim for compensation for the alleged damages.<sup>75</sup> However, the Tribunal found that the measures undertaken by OLAF, to ask assistance of national judicial authorities, did not produce any legal effects:

That duty implies that, when OLAF forwards them information pursuant to Article 10(2) of Regulation No 1073/1999, the national judicial authorities have to examine that information carefully and draw the appropriate consequences from it in order to comply with Community law, if necessary by initiating legal proceedings if they consider such action justified. Such a duty of careful examination does not, however, require an interpretation of that provision to the effect that the forwarded information in dispute has binding effect, in the sense that the national authorities are obliged to take specific measures, since such an interpretation would alter the division of tasks and responsibilities as prescribed for the implementation of Regulation No 1073/1999.<sup>76</sup>

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<sup>72</sup> See Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 Concerning Investigations Conducted by the European Anti-Fraud Office (OLAF), May 31, 1999, 1999 O.J. (L 136/1).

<sup>73</sup> As recorded in *Tillack*, CJEU Case T-193/04 at para. 19.

<sup>74</sup> See Decision of the European Ombudsman on Complaint 1840/2002/GG Against the European Anti-Fraud Office, Nov. 20, 2003 (European Ombudsman), <http://www.ombudsman.europa.eu/en/cases/decision.faces/en/1810/html.bookmark>.

<sup>75</sup> See *Tillack*, CJEU Case T-193/04 at para. 43.

<sup>76</sup> *Id.* at para. 72.

Neither did the Tribunal find any grounds for liability, because a sufficiently serious breach of Union law could not be attributable to OLAF.<sup>77</sup> From the perspective of Tillack, it is quite obvious that the real conflict was between him and OLAF, and the involvement of the national judicial authorities was secondary. References to the national judicial systems would therefore not quite answer Tillack's request for judicial scrutiny of the actions undertaken in the conflict.

In *Tillack*, the issue was mainly allocating the legal responsibility for actions undertaken by clearly identified European and national authorities working together. Even if *Tillack* is a bit out of the ordinary, the situation as such is not all that unusual. There are plenty of examples in the case law of the CJEU where individuals have sought redress at the incorrect court system. The most common situation seems to be that an individual turns to its national court regarding measures undertaken by the EU institutions, and the national court may not always identify the problem.<sup>78</sup> On other occasions, it may be altogether more difficult to trace who has done what in a procedure. Hofmann points to the situation where information is registered in database systems, where it might be nearly impossible for the individual to choose the proper defendant and competent forum for proceedings.<sup>79</sup> Some Union acts thus contain special provisions affording individuals an extended right to turn to any partner in the database system in order to have his or her data corrected or removed, namely the CIS, the EU customs information system, and the EURODAC, a database of fingerprints of applicants for asylum and illegal immigrants found within the EU.<sup>80</sup> The Data Protection Directive does not go as far, even though the proposed Regulation contains provisions to circumscribe difficulties arising from over-lapping competences between several national data protection authorities.<sup>81</sup> The current Directive specifically obliges the supervisory authorities to cooperate with each other,<sup>82</sup> and as seen

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<sup>77</sup> See *Id.* at para. 135.

<sup>78</sup> See, e.g., *Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini*, CJEU Case C-119/05, 2007 E.C.R. I-6199; *P. Mediocurso v. Comm'n*, CJEU Case C-462/98, 2000 E.C.R. I-7183.

<sup>79</sup> See Jens Hofmann, *Legal Protection and Liability in the European Composite Administration*, in *THE EUROPEAN COMPOSITE ADMINISTRATION* 451 (Oswald Jansen & Bettina Schöndorf-Haubold eds., 2011).

<sup>80</sup> See *id.*; Council Regulation (EC) No 515/97 of 13 March 1997 on Mutual Assistance Between the Administrative Authorities of the Member States and Cooperation Between the Latter and the Commission to Ensure the Correct Application of the Law on Customs and Agricultural Matters, Mar. 22, 1997, 1997 O.J. (L 082) art. 36; Council Regulation 2725/2000 of 11 December 2000 Concerning the Establishment of 'Eurodac' for the Comparison of Fingerprints for the Effective Application of the Dublin Convention, Dec. 11, 2000, 2000 O.J. (L 316) art. 18.

<sup>81</sup> See Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation), arts. 55–56, 74, COM (2012) 11 final, (Jan. 25, 2012); Jane Reichel & Anna-Sara Lind, *Regulating Data Protection in the EU*, in *PERSPECTIVE ON PRIVACY* 30 (Dieter Dörr & Russell L. Weaver eds., 2014).

<sup>82</sup> See Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, Nov. 21 1995, 1995 O.J. (L 281) arts. 28.6–7.

above, the proposed Regulation provides for a new mechanism for the authorities to receive guidance from the Commission in cross-border matters through the consistency mechanism. Further, according to Article 76 of the proposal, a national court that has reasonable grounds to believe that parallel proceedings are being conducted in another Member State, is to contact the court in the other Member State to confirm the existence of such parallel proceedings. If so, the court may suspend the proceedings.<sup>83</sup>

Lastly, a further problematic area for individual proceedings within the European composite administration can be highlighted. Through the principles of mutual recognition and of home state control, national authorities in many cases have to rely on decisions from authorities in other Member States as the basis for their own assessment.<sup>84</sup> Many internal market directives require Member States to provide contact points to enable communications between national authorities,<sup>85</sup> but still there is no mechanism to enable an authority or court in one Member State to receive an authoritative statement of the legality of a decision from a competent court, equivalent to the preliminary ruling mechanism available for national courts to refer questions to the CJEU. The complex and fragmented administrative landscape may prove to be too difficult for many individuals to navigate.

#### E. Participatory Democracy

As set out above, Article 11 TEU introduces a participatory form of democracy as one of the foundations of the EU constitutional order. This Article begins by stating that “the institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action.”<sup>86</sup> In the following paragraphs, the Article sets forth three requirements.<sup>87</sup> The first

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<sup>83</sup> See Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation), COM (2012) 11 final, (Jan. 25, 2012).

<sup>84</sup> See Henrik Wenander, *Recognition of Foreign Administrative Decisions: Balancing International Cooperation, National Self-Determination, and Individual Rights*, 71 ZAÖRV 755 (2011).

<sup>85</sup> Horizontal free movement acts regularly contain organizational frameworks, such as contact points, etc. See, e.g., Directive 2004/38/EC of the European Parliament and 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, Apr. 30, 2004, 2004 O.J. (L 158/77); Directive 2006/123/EC of the European Parliament and the Council of 12 December 2006 on Services in the Internal Market, Dec. 27, 2006, 2006 O.J. (L 376/36); Regulation (EC) No 764/2008 of the European Parliament and the Council of 9 July 2008 Laying Down Procedures Related to the Application of Certain National Technical Rules to Products Lawfully Marketed in Another Member State, Aug. 13, 2008, 2008 O.J. (L 218/21); Directive 2005/36 EC of the European Parliament and the Council of 7 September 2005 on the recognition of professional qualifications, Sept. 30, 2005, 2005 O.J. (L 255/22)..

<sup>86</sup> TEU art. 11.1.

<sup>87</sup> See TEU art. 11.2–4.

is that the EU institutions shall maintain an open, transparent and regular dialogue with the representatives, associations and civil society. Secondly, the Commission is to carry out broad consultations with the parties concerned. Lastly, no less than one million citizens from a significant number of Member States may take the initiative of inviting the Commission, within the frameworks of its powers, to submit any proposal on matters where citizens consider that a legal act of the Union is required.

Except for the last mechanism, the citizens' initiative, the other forms of participation by citizens and their organizations are no newcomers to the history of European law-making. As Mendes explains, the concept of policy-making underpinned by participation was well developed in the European Coal and Steel Community already in 1951<sup>88</sup> and was also present in the EEC Treaty from 1957.<sup>89</sup> Thus, the Economic and Social Committee, ECOSOC, functioned as an advisory board for social interests of the Union already from the start. Other organs were introduced later, such as the Committee of Regions with the Maastricht Treaty 1993.<sup>90</sup> The independent agencies of the EU also include different forms of interest representation within their constitutive set-up, such as advisory boards and working groups connected to the agencies.<sup>91</sup> The social partners of the EU, representing enterprise and labor, are also involved in EU-decision-making, first introduced with the Protocol on Social Policy as part of the Maastricht Treaty, and then later included in the Treaty itself by the Amsterdam Treaty.<sup>92</sup> A further example of the EU openness to non-state actors is the development of rule-making within the Internal Market, and especially concerning the adoption of technical standards. According to the New Approach launched in the 1980s, technical standards are developed in form of voluntary rules by private entities and according to procedures laid down in a Council resolution.<sup>93</sup>

These longstanding customs of participation were further developed in the 2001 Commission White Paper on Governance, where the Commission underscored the general importance of involving the civil society, stakeholders and business in the EU legislative processes.<sup>94</sup> These ideas have been further developed in later documents. The Commission

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<sup>88</sup> See MENDES, *supra* note 22, at 80 (referring among others to Article 5 of the ECSC Treaty, which states that the competences of the Community were to be carried out by the institutions with a minimum of administrative machinery and in close cooperation with the parties concerned).

<sup>89</sup> See MENDES, *supra* note 22, at 81.

<sup>90</sup> See MENDES, *supra* note 22, at 88, 90.

<sup>91</sup> See MENDES, *supra* note 22, at 104.

<sup>92</sup> See TFEU arts. 151–61; CRAIG, *supra* note 67, at 235.

<sup>93</sup> See Council Resolution 85/C 136/01 of 7 May 1985 on a New Approach to Technical Harmonization and Standards, June 4, 1985, 1985 O.J. (C 136); Corkin, *supra* note 21, at 650; MENDES, *supra* note 22, at 120.

<sup>94</sup> *Commission White Paper on Governance*, at 14, COM (2001) 428 final (July 25, 2001). See also Communication from the Commission Towards a Reinforced Culture of Consultation and Dialogue - General Principles and



declares in the 2011 Internal Market Act its intention to strengthen the governance of the Single Market, among other things by involving private actors in a Single Market Forum: "Forum will periodically gather together market participants, e.g. businesses, social partners, non-governmental organizations and those representing citizens, public authorities at various levels of government and parliaments. It will examine the state of the single market (in particular the transposition and application of directives) and will exchange best practice."<sup>95</sup>

Another type of involvement of private parties in the EU legislative procedures widely used is lobbying. The main difference between lobbying and the democratically-based participation seems to be who initiates the contact; at least this is the dividing line for the voluntary registry for lobbyists that the Commission and the European Parliament has enacted, the transparency register, where lobbyists are expected to register.<sup>96</sup> If a private organization, either business or NGO, contacts an EU institution with the objective of directly or indirectly influencing the formulation or implementation of policy or decision-making processes of the institutions, it is thus labelled lobbying. If the contact is initiated by the institution, it is a democratically-based form of participation.

With Article 11 TEU, mechanisms where EU institutions contact private parties to invite them to participate have gained a status of a democratic underpinning of the EU. Mendes, however, points to the obscure language of the Article, where the first three paragraphs seem to be a bit unclear as to whom the participatory procedures are addressed.<sup>97</sup> Article 11 TEU refers to citizens, representative organizations, civil society and parties concerned in what seems to be a random manner. The forms of communication are further referred to as "opportunity to make known and publicly exchange ideas" in paragraph 1, "open, transparent and regular dialogue" in paragraph 2 and "broad consultations" in paragraph

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Minimum Standards for Consultation of Interested Parties by the Commission COM (2002) 704 final (Dec. 11, 2002).

<sup>95</sup> Commission Communication on Single Market Act: Twelve Levers to Boost Growth and Strengthen Confidence "Working Together to Create New Growth," at 20, COM (2011) 206 final. See also Commission Communication on the Single Market Act II: Together for New Growth, at 5, COM (2012) 573 final; MARIA WIBERG, SERVICES DIRECTIVE – LAW OR SIMPLY POLICY? 295 (2013).

<sup>96</sup> Agreement Between the European Parliament and the European Commission on the Establishment of a Transparency Register for Organisation and Self-employed Individuals engaged in EU Policy-making and Policy Implementation, arts. 8–10, 2010/2291 (ACI) final (June 23, 2011), <http://www.europarl.europa.eu/oeil/popups/summary.do?id=1346318&t=f&l=en>. According to Article 10, organizations involved in three activities are excluded from the expectations to register: activities concerning the provision of legal and other professional advice, activities of the social partners as participants in the social dialogue, and activities in response to direct and individual requests from EU institutions or Members of the European Parliament.

<sup>97</sup> See Joanna Mendes, *Participation and the Role of Law after Lisbon: A Legal View on Article 11 TEU*, 48 CMLREV 1849, 1852 (2011).

3.<sup>98</sup> Lastly, the only institution that is specifically mentioned to have an obligation to carry out consultations in paragraph 3 is the Commission.<sup>99</sup> The question is thus: If Member States when drafting the Treaty had a clear view on what kind of participation Article 11 TEU sought to protect. It may also be reiterated that the Treaties have included other forms of communication with specific interest groups in other parts, such as the above-mentioned social partners as well as Article 17 TFEU, which provides for specific grounds for maintaining an open, transparent, and regular dialogue with churches and religious associations or communities in the Member States. Whatever the case may be, the introduction of participatory forms of democracy as a part of the democratic foundation of the EU is today a fact and may in itself foster further constitutionalization of this specific form of communication between Union citizens and the EU. This is discussed further in section E, but before that, some words should be said on the fourth paragraph of Article 11, the citizens' initiative and the specific meaning that may be attributed to this procedure.

As pointed out above, the only new element in Article 11 TEU is the citizens' initiative. According to this Article and to the applicable secondary legislation,<sup>100</sup> no less than one million citizens, representing at least one-quarter of the Member States, with a minimum number of signatures from each of the states involved, can invoke such an initiative.<sup>101</sup> From the time of the registration of the initiative, its organizers must collect the necessary signatures within twelve months.<sup>102</sup> After this, the Member States must within three months verify the statements of support submitted on the basis of appropriate checks, in accordance with national law and practice.<sup>103</sup> Once the initiative is validated, the Commission has three months to examine the initiative and decide how to act upon it.<sup>104</sup> The organizers will also have the opportunity to present their initiative at a public hearing organized at the European Parliament.<sup>105</sup> According to a press release from the

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<sup>98</sup> TEU arts. 11.1–3.

<sup>99</sup> See Mendes, *supra* note 97, at 1852.

<sup>100</sup> See Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the Citizens' Initiative, Mar. 11, 2011, 2011 O.J. (L 65/1); Commission Implementing Regulation (EU) No 1179/2011 of 17 November 2011 Laying Down Technical Specifications for Online Collection Systems Pursuant to Regulation (EU) No 211/2011 of the European Parliament and of the Council on the Citizens' Initiative, Nov. 18 2011, 2011 O.J. (L 301/3).

<sup>101</sup> See Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the Citizens' Initiative, Mar. 11, 2011, Annex, 2011 O.J. (L 65/1)

<sup>102</sup> See *id.* art. 5.5.

<sup>103</sup> See *id.* art. 8.2.

<sup>104</sup> See *id.* art. 9.1(c).

<sup>105</sup> See *id.* art. 11.

Commission, the organizers of the first eight initiatives ran out of time to collect statements of support by 1 November 2013.<sup>106</sup> Three groups claimed to have reached the target of one million signatures.<sup>107</sup> In the Spring 2014, the two firsts initiatives were answered by the Commission.<sup>108</sup>

#### **F. Communicating with a European Composite Administration—Is It at All Possible?**

Directly elected parliaments are commonly perceived as the basic democratic form of communication between a people and decision-makers. The parliament, in the form of the legislature, is bestowed democratic legitimation which the government, its administration, and the courts can rely on when enforcing the enacted legislation. But, if this is considered the ultimate form of democracy, there is an inherent problem in envisaging democratic procedures beyond the nation state. Here, citizens are traditionally represented by members of the government, merely indirectly accountable to the citizens. When the administration also starts acting beyond the state, the possibilities for the parliament to effectively hold accountable the executive powers will become difficult, if not to say illusory. Problems related to representative democracy *vis-à-vis* administration are thus mainly related to the processes of globalization, or more specifically in our case, the Europeanization. In regards to the European composite administration, development is complemented by a processes of bureaucratization, where non-elected officials are allocated more and more responsibilities that previously belonged to the elected legislature, or at least, a more intensely controlled government. The processes of privatization are also relevant in this context.<sup>109</sup> These processes have thus given room for a multitude of actors to engage in European policy-making, regulatory, or administrative procedures, representing either a state, in the form of officials from public agencies at national, regional or local levels, or their own interests, in the form of private actors, businesses, or NGOs. Even when private actors represent themselves, they do not act within a vacuum, but are part of the civil society in their respective states, or perhaps international representatives of national actors. Representing the state and the interest of the citizens and the civil society in each state is no longer the sole responsibility of the government. As Teubner points out, national societies were hardly homogenous before globalization and it has always been a question for constitutional law whether and how the constitution should also govern non-state actors.<sup>110</sup> The question is how to organize the

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<sup>106</sup> See Press Release, Brussels European Commission, Time's Up for Supporters of the First European Citizens' Initiatives – What Happens Next? (Oct. 31, 2013), [europa.eu/rapid/press-release\\_IP-13-1012\\_en.pdf](http://europa.eu/rapid/press-release_IP-13-1012_en.pdf).

<sup>107</sup> See *id.*

<sup>108</sup> Water and Sanitation Are a Human Right! Water Is a Public Good, Not a Commodity!, COM (2014) 177 final (Mar. 24, 2014); One of Us, COM (2014) 355 final (May 28, 2014).

<sup>109</sup> See Corkin, *supra* note 21 (analyzing these three processes).

<sup>110</sup> See GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION 5 (2012).

representation of different societal spheres acting beyond the nation state and how the national parliaments, as representatives of the people, can organize communications between the multitude of actors representing the state and itself, and thereby also the people.

As democratic representation in the EU has been weak, attention has turned to the other traditional form for Union citizens to communicate with state entities, via judicial control. Private enforcement and judicial control have played an important role in the development of the EU legal order and it now seems to be commonly accepted that national courts in many Member States have gained power with the EU, as well as with globalization in general.<sup>111</sup> Still, even the effective mechanism of the preliminary ruling system cannot connect all angles of the European composite administration, even if the CJEU has come a long way in developing solutions for bilateral composite administrative procedures involving EU institutions and one Member State at a time.<sup>112</sup> The EU-legislature has also tried to develop mechanisms, such as in the proposed Data Protection Regulation. However, providing for a complete system of judicial control, covering the entire composite administration, would probably entail a significant waiver of sovereignty on the part of the Member States.

The question thus is how can the participatory democratic model contribute? Is it possible to overcome the geographical and legal boundaries that both the parliaments and the courts encounter by engaging in open, inclusive, and informal dialogues over borders? One obvious advantage for citizens in communicating with a parliament or a court is that these organs have been vested with true powers to hold the executive accountable for its actions, or non-actions as the case may be. To a large extent, communication via a participatory democratic mechanism lacks this quality. Instead, it may be posited that too much reliance on participatory models of decision-making renders traditional forms of accountability more difficult.<sup>113</sup> One inherent difficulty with open and participatory decision-making procedures from an accountability point of view is the allocating of powers to the potentially multiple actors involved. If there is not one identifiable entity that may ultimately take decisions on behalf of others, the possibilities of holding decision-

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<sup>111</sup> See Arbetsdomstolen [AD] [Labor Court] 2009-12-02 Case no. A 268/04 (Swed.), <http://www.arbetsdomstolen.se/upload/pdf/2009/89-09.pdf>.

<sup>111</sup> See, e.g., David Edward, *National Courts—the Powerhouse of Community Law*, 5 CAMBRIDGE Y.B. OF EUR. LEGAL STUD. 1 (2002); Lech Garlicki, *Cooperation of Courts: The Role of Supranational Jurisdictions in Europe*, 6 INT'L J. OF CONST. L. 509 (2008); XAVIER GROUSSOT ET AL., REPORT NO. 3, EMPOWERING NATIONAL COURTS IN EU LAW (2009).

<sup>112</sup> See, e.g., TU München v. Hauptzollamt München-Mitte, CJEU Case C-269/90, 1991 E.C.R. I-5469; Borelli v. Comm'n, CJEU Case C-97/91, 1992 E.C.R. I-6313.

<sup>113</sup> See Jane Reichel & Agnes Eklund, *Representing the Public in Environmental Matters—NGOs and the Aarhus Convention*, in FUNDAMENTAL RIGHTS IN EUROPE: ONE MATTER FOR TWO COURTS (Sonia Morano-Foadi & Lucy Vickers eds., forthcoming 2014).

makers accountable for regulatory choices decrease. When public authority is exercised beyond the state and outside of the classic international legal procedures of unanimity, there is a risk that the powers from each and every one of the actors involved first are intermingled and then scattered and dispersed beyond recognition. The citizens, interested parties, and stakeholders may very well change their minds about the outcome of the composite procedures if things do not turn out the way expected. But how can citizens, parties, and stakeholders communicate their wishes for changes of power when the public authority is exercised in deliberate and participatory procedures beyond the state? One tempting way to circumvent these difficulties might be to adopt a more flexible definition of that which constitutes accountability. Accountability could thus be perceived of as an umbrella concept, also including other specific concepts such as transparency, justice, democracy, efficiency, accessibility, responsibility, and integrity.<sup>114</sup> A broad interpretation of the concept can imply that the requirement of specific ex-post procedures for accountability is excessive because the decision-making processes themselves guarantee that the interests of the people have been taken into account.<sup>115</sup> But this is hardly a convincing path to take. As Harlow has elegantly formulated the issue in relation to global regulatory regimes, “[d]ecision-makers all too easily insulate themselves from accountability. Democracy is fragile.”<sup>116</sup> She continues:

Sceptics of legal globalization are in the main more concerned with structures than with principles. In the modern nation-state, power is ‘billeted’ and powers are ‘bounded’; in global space, power is diffused to networks of private and public actors, escaping the painfully established controls of democratic government and public law.<sup>117</sup>

The introduction of mechanisms of participation and deliberation at the international level, or in our case within the European composite administration, accordingly cannot in itself and automatically be expected to render the regimes legitimate from an accountability perspective. Something more is needed. What could be helpful is whether these different forms of communication could be connected in some form. By focusing on participation and the possibilities of citizens to engage in a constructive dialogue regarding the

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<sup>114</sup> See Mark Bovens, *Analysing and Assessing Accountability: A Conceptual Framework*, 13 EUR. L.J. 447, 449 (2007); Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 35 (2005).

<sup>115</sup> For a critical analysis of these arguments, see CAROL HARLOW, *ACCOUNTABILITY IN THE EUROPEAN UNION* 185 (2002) and Bovens, *supra* note 114, at 453.

<sup>116</sup> Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EUR. J. INT’L L. 187, 212 (2006).

<sup>117</sup> *Id.*

European composite administrative regimes, the conditions for other accountability mechanisms available at the national or regional levels could be enhanced. According to Article 12 TEU, the national parliaments contribute to the well-functioning of the Union by being informed by the institutions of the Union, by taking part in evaluation mechanisms and Treaty revisions, by being notified of applications for accessions to the Union, and last but not least, by taking part in the inter-parliamentary cooperation within COSAC.

These mechanisms can be seen as a specific form of participatory democracy for the parliament where the national parliaments constitute a privileged form of representative organization. On one hand, unlike the other representative organizations of Union citizens, the national parliaments are geographically-bound and can only represent a predetermined group, their own Union citizens, those who are nationals of their Member State. On the other hand, national parliaments have a democratic legitimacy that other representative organizations lack. Thus, it seems appropriate to give the parliaments a privileged forum of dialogue with each other and the EU institutions. Not surprisingly, the Swedish parliament has been strongly opposed to any interpretation of its role even approaching the one suggested here. The Committee on the Constitution of the Swedish parliament has repeatedly maintained that it is the task of the Swedish government to represent the state in international affairs and that the Swedish constitution does not provide for any procedures allowing the parliament to communicate directly with EU institutions, here mainly the Commission.<sup>118</sup> Obviously, an interpretation of the national parliament as being something less than the ultimate representative of its sovereign people could be interpreted as a step backwards, entailing a further loss of sovereign rights. Then again, the present form of representative democracy as foreseen in Article 10 TEU does not seem to be effective with too many parliaments controlling one and the same entity in a rather uncoordinated manner. Further, through the sometimes extensive lobbying activities before the EU institutions, many organizations already today chose to direct themselves to the EU legislator instead of their national parliament.<sup>119</sup> The parliaments of Europe deserve a better role and should have a greater importance.

As referred to above, the introduction of a participatory form of democracy may in itself foster further constitutionalization of these procedures for communications between Union citizens, their associations and interest groups and the EU institutions. These mechanisms in fact entail the only form of communication that may easily transcend national borders, and which is not bound by specific time limits and a narrow division of competence between different institutions in the Member States and the EU. The future role of Article 11 TEU and participatory democracy in the EU could first and foremost be foreseen to be complementary. The channel of communication would thus function as an

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<sup>118</sup> See, e.g., Konstitutionsutskottet utlåtande 2012/13:KU15 [parliamentary committee report] (Swed.).

<sup>119</sup> See JÖRGEN HETTNE & JANE REICHEL, REPORT NO. 4, ATT GÖRA RÄTT OCH I TID – BEHÖVS NYA METODER FÖR ATT GENOMFÖRA EU-RÄTT I SVERIGE? (2012).

addition to other traditional forms of communication, with a special emphasis on the function of translator as to discussions out of earshot of the parliaments. Courts have had this function for a long time, as a channel for citizens and individuals to display to the elected parliaments those consequences that their legislation has had on individuals in specific cases. The informal and elastic ways of communicating via Article 11 procedures may prove to be a very relevant translating mechanism for Union citizens affected by EU legislative and administrative actions, or lack thereof. In this way the vague networks of actors in diffuse procedures beyond the national constitutional arenas could become more visible to other constitutional organs within the EU and its Member States.

In the future, the participatory form of democracy could possibly also achieve an independent function within the EU democracy. Article 11 TEU may have the potential to develop into a specific channel for Union citizens over time to communicate with the EU institutions. Mindus and Goldoni have posited that the citizens' initiative introduced by the Treaty of Lisbon was framed specifically for giving voice to cross-national political concerns on the basis of a political conception of the EU citizenship.<sup>120</sup> The Commission often functions as a spider in the web of the European composite administration and is thereby a relevant actor for Union citizens to communicate with regarding European administrative issues. Interpreted this way, the mechanisms of Article 11 TEU could be the starting point for a new relationship for Union citizens, with direct communication via the channels provided for by the institutions themselves, leaving the national parliaments outside the conversation. Lobbyists have since long found their way to Brussels. Tomorrow, Union citizens may also follow this path. After all, this was the intention when introducing Union citizenship twenty years ago: To create a direct channel between the EU and its citizens. If and when this occurs, the democratic basis of the European composite administration and the EU as a whole may need to be again revised.

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<sup>120</sup> See Patricia Mindus & Marco Goldoni, *Between Democracy and Nationality: Citizenship Policies in the Lisbon Ruling*, 18 EUR. PUB. L. 351, 370 (2012).

## Special Issue

### EU Citizenship: Twenty Years On

## Which Citizenship? Whose Europe?—The Many Paradoxes of European Citizenship

By Agustín José Menéndez \*

*If you want to go in pilgrimage to the place where your constitution was born, you should go to the mountains where the resistance fighters were killed, to the prisons where they were jailed, to the fields where they were hanged. Wherever an Italian died trying to win back the freedom and dignity of our nation, there you should go, young Italians, because it was there that your constitution was born.*

— Piero Calamandrei<sup>1</sup>

### A. Introduction

The three central theses of this article are as follows. First, “European citizenship” has become an unhappy misnomer. The set of rights and obligations that make up the status of European citizenship fall wide short the mark of those proper of citizenship in a normatively demanding sense.<sup>2</sup> To put it differently, European citizenship is no citizenship. Second, European citizenship is rapidly becoming a dangerous misnomer. The “gap” between European citizenship and citizenship in a normative sense has been customarily accounted by reference to either the “embryonic” character of European citizenship (European citizenship will be a citizenship in the making) or to the innovative character of European citizenship (part of the radically new constitutional grammar of the post-national world in which we would have allegedly entered). But twenty years after the formal introduction of the status of European citizenship, and in the eight year of a deep and grave economic, social and political crisis, it has become increasingly evident that the gap

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<sup>1</sup> Piero Calamandrei, The “Constitution” Speech (Jan. 26, 1955). Se voi volete andare in pellegrinaggio nel luogo dove è nata la nostra Costituzione, andate nelle montagne dove caddero i partigiani, nelle carceri dove furono imprigionati, nei campi dove furono impiccati. Dovunque è morto un Italiano per riscattare la libertà e la dignità della nazione, andate là, o giovani, col pensiero, perché là è nata la nostra costituzione.

<sup>2</sup> The yardstick by reference to which I pass normative judgment is that of the Social and Democratic Rechtsstaat. The term is, quite obviously, of German origin. Neil MacCormick proposed to translate it as Law-State. But in this article, I will stick to German term, only giving it an English twist, so that I will speak of Rechtsstaats and not of Rechtsstaaten.



between European citizenship and a normatively demanding conception of citizenship is not transitory, but structural. Some of the fundamental rights that make up the status of “European citizenship” do undermine the very ground on which a normatively demanding conception of citizenship rests. In particular, the economic rights that are a crucial component of European citizenship (the four economic freedoms as constructed by the European Court of Justice and applied by the European Commission) undercut the collective goods that constitute the backbone of the Social and Democratic *Rechtsstaat*.<sup>3</sup> Third, it is urgent that European citizenship is redefined in line with the normative ideal of citizenship in the Social and Democratic *Rechtsstaat*. This would require redefining European citizenship in the semblance of the Social and Democratic *Rechtsstaat*. For that purpose, what may well be needed right at present is not a further centralization of power (“more Europe” in the pseudo-federalist language of key European institutional actors), but a reconfiguration of the European Union which would recreate the capacity for effective political decision-making at all levels of government.

The structure of the paper is as follows. The first section clarifies the key normative baseline of the paper, namely the normatively demanding understanding of citizenship proper of the Social and Democratic *Rechtsstaat*. Citizenship is both a legal status and a normative ideal. The “formalisation” of the status of European citizenship, the creation of a legal status explicitly labelled European citizenship had a two-fold aim: to contribute to the democratization and politicization of the European Union and to entrench a post-national understanding of political belonging. To meet such objectives, European citizenship would have to be an instrument of realization of the post-national normative ideal of the Social and Democratic *Rechtsstaat* as enshrined in the constitutional law common to the Member States of the European Union. The second section individuates why European citizenship has not held its normative promise. European citizenship has been largely shaped by the European judges (the European Court of Justice) and not by the European legislator. This has had major implications. Any judge-made citizenship is bound to be a rump citizenship. The set of plaintiffs and the set of substantive issues that come before courts are bound to be but a fraction of the total set of citizens and of the whole of socio-economic problems on which citizenship should bear. As a result, a judicially defined citizenship is likely to be over-individualistic and to reflect the substantive interests and concerns of those who actually litigate before courts. But a European judge-made citizenship was bound to be more acutely biased. This is so because Union law overfocuses on those who engage in economic activities across borders, while pays little or no attention to those who do not engage in transnational socio-economic interactions. At the

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<sup>3</sup> The tragic character of “European citizenship” has become more obvious in the last years. European institutions (crucially, the European Central Bank, the Eurozone Summit and the Commissioner of Economic and Monetary Affairs) have mandated austerity policies that have deprived many Europeans, very especially those Europeans resident in countries suffering acute fiscal crises, of most of the rights that make up the status of citizenship. To the point that some Europeans are close to becoming *de facto stateless*. This is clearly the case of Greek citizens, and to a large extent, of Italian and Spanish citizens. The present understanding of European citizenship does not hold much promise as a means to fight such policies.

same time that the peculiar nature and historical trajectory of European integration explains why Court of Justice has characterized economic freedoms as the fundamental yardstick of European constitutionality, which has resulted in the constitutional devaluation of some of the collective goods and socio-economic rights at the core of the Social and Democratic Rechtsstaat.

In the third section, I claim that the normative potential of European citizenship has been lost in two key constitutional moments. Firstly, the transformation of the understanding of economic freedoms in *Cassis de Dijon* (and the subsequent set of cases confirming the transformation of economic freedoms in self-standing constitutional yardsticks).<sup>4</sup> Secondly, the radicalization of the economic and monetary “constitution” of the Eurozone in the aftermath of the 2007 crises.

The last section sets out the conclusions and some brief reflections on how the normative potential of European citizenship could be rescued from European citizenship as currently understood in European law.

### **B. Three Fundamental Premises**

My first premise is that citizenship is both a legal status, defined by the rights and duties that appertain to all those who are indeed acknowledged to be citizens, and a normative ideal. The latter transcends the concrete present legal status through which it is concretized and legally operationalized.

The dual character of citizenship is, quite obviously, far from exclusive of citizenship. It is indeed characteristic of all fundamental constitutional institutions.<sup>5</sup> As in the case of citizenship, democratic legitimacy, progressive taxation, and equality (to name only a handful) are at the same time (1) principles and (2) sets of specific rules through which the principle is operationalized, institutionalized and concretized. It goes without saying that the most interesting political and legal questions concern the tensions and eventually the contradictions emerging between the normative ideal and the concrete normative operationalization of the ideal.

My second premise is that the normative ideal of European citizenship is (and cannot but be) the same normative ideal as the citizenship of the Social and Democratic *Rechtsstaat* that the Member States of the European Union claim to be. Citizenship in the Social and Democratic *Rechtsstaat* is made of political bonds rendering all members of the political

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<sup>4</sup> Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, CJEU Case C-120/78, 1979 E.C.R. 649.

<sup>5</sup> And potentially, perhaps, of all legal institutions; while it may take us quite some time to think about the normative ideal that is relevant when it comes to, say, *emphyteusis* or *usucaption*, we could work that out—and rather quickly—given a set of “problematicues” and given sufficient time.

community equally free. Bonds that rely on the understanding of the political community as a scheme of cooperation based on reciprocity, giving rise to solidaristic obligations and entitlements. In other words, the Social and Democratic *Rechtsstaat* aims at the reconciliation of the three normative ideals: (1) The Rule of Law (*Rechtsstaat*, *Stato di Diritto*, *Estado de Derecho*); (2) the democratic state; and (3) the social state.<sup>6</sup>

Each of these ideals has been shaped not only, and not primarily, by abstract scholarly writings, but by actual political struggles.<sup>7</sup> Civic rights were not so much shaped by philosophical tracts, as by the actual fight against religious oppression and the infliction of torture and arbitrary imprisonment by royal lackeys. Welfare rights were not shaped by wise men or scholarly workshops, but by acts of civil disobedience and strikes. The acceptance of the obligation to pay the costs of the welfare state through steep progressive taxation was clearly fostered by the traumatic experience of two world wars in one generation in Europe.

The reconciliation of these three ideals is far from easy. While the meta-regulatory ideal of the Social and Democratic *Rechtsstaat* can already be found formalized in the Weimar Constitution of 1919<sup>8</sup> or the Spanish Constitution of 1931,<sup>9</sup> it was only in the post-war period that a stable combination of the regulatory ideal and an effective institutional embodiment was indeed achieved. To reiterate what has just been said, this was done not only in the shadow of major political struggles, but also of two great world wars.

The stabilization and later the flourishing of the Social and Democratic *Rechtsstaat* were closely associated to two basic lessons as learned from major disasters. First, the post-war democratic constitutional state was premised on the need of simultaneously realizing the three ideals of the *Rechtsstaat*, the democratic state and the social state. To put it differently, the post-war constitutional state could not be a liberalist state aimed exclusively at the protection of civic and political rights, trusting market forces to ensure

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<sup>6</sup> See MANUEL GARCÍA PELAYO, *DERECHO CONSTITUCIONAL COMPARADO* (1984); MANUEL GARCÍA PELAYO, *LAS TRANSFORMACIONES DEL ESTADO CONTEMPORÁNEO* (1977).

<sup>7</sup> In which ideas have played a major role. Such ideas, however, were rarely produced by scholars as we have come to understand them—at least not by professional scholars—and clearly not by legal scholars.

<sup>8</sup> According to the Weimar Constitution, Germany was a Social *Rechtsstaat*. It included provisions such as article 145, which made education compulsory up to eighteen years of age; article 153, that mandated private property to also serve the common good; article 161, that foresaw the creation of a comprehensive scheme of insurance, covering among other risks disability to work, motherhood, the consequences of old age, weaknesses and vicissitudes of life; and article 163, which established that every national should have the chance to “employ her intellectual and physical powers in such a manner as the welfare of all demands.” If handicaps prevented that, some basic income should be available.

<sup>9</sup> Article 1 of the 1931 Spanish Constitution defined Spain as a “democratic republic of workers of all classes”. Article 44 established that the whole wealth of the nation, independently of who may be its proprietor, should be placed at the service of the collective welfare.

proper provision of the socio-economic needs of citizens. Public authorities had a major role in creating and maintaining the fundamental socio-economic institutions and in ensuring that they delivered fundamental collective goods. This premise was part of the political platform not only of social-democratic and Christian-democratic parties, but was also supported by German ordoliberals who did not share the liberalist belief in the spontaneous self-ordering and self-stabilization of markets. Markets were to be created and maintained—the *ordo* in ordoliberalism—and in discharging these tasks, public institutions and public authorities had a fundamental role to play.<sup>10</sup>

Second, the post-war constitutional state needed to be open and cooperative in order to contribute to the creation and maintenance of supranational institutions that could organize and discipline trans-border interests. The interwar period came close to a natural experiment proving the impossibility of democratic autarchy in Europe given the high level of cross-border social and economic integration. In the absence of supranational institutions and decision-making processes, formally democratic national decisions had massive effects across borders, which could end up destabilizing the neighbors on the receiving end. Autarchic democracy was not really democratic because it allowed everybody to make decisions without considering a relevant part of those affected by the decisions. This resulted in the abandonment of the belief in the possibility of realizing the Social and Democratic *Rechtsstaat* in one country. In contrast, European post-war constitutions not only rendered possible,<sup>11</sup> but mandated supranational integration. This accounts for the novel constitutional commitment to supranational integration, which was either explicitly written in the new or amended post-war constitutions of European states, or made part of the national constitutional tradition through key constitutional decisions, typically crystallized by constitutional or high courts.<sup>12</sup> That mandate was, however, conditioned on supra-national and trans-national arrangements being effectively conducive to the realization of the constitution.

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<sup>10</sup> On the postwar consensus, the key reference is now TONY JUDT, *POSTWAR* (2005). On ordoliberalism, the most acute and nuanced analysis in English is in my opinion to be found in MAURICE GLASSMAN, *UNNECESSARY SUFFERING. MANAGING MARKET UTOPIA* (1996).

<sup>11</sup> Very especially and very intensely, the constitutions of the countries that had to rebuild themselves after years of devastating fascist dictatorships. For example Italy, Germany, and France had to rebuild in the second half of the forties, Greece, Portugal, and Spain in the seventies, and later, Eastern European countries.

<sup>12</sup> See Preamble, 1946 CONST. (Fr.); Art. 11 Costituzione [Cost.] (It.); GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG - BASIC LAW], May 23, 1949, BGBl. I, art. 24.1–2 (Ger.); Opinion of the Luxembourgish Council of State (April 9, 1952), *available at* [http://www.cvce.eu/obj/avis\\_du\\_conseil\\_d\\_etat\\_sur\\_le\\_projet\\_de\\_loi\\_portant\\_approbation\\_du\\_traite\\_instituant\\_la\\_ceca\\_9\\_avril\\_1952-fr-7b079966-2de6-4f4d-a566-049abaf07037.html](http://www.cvce.eu/obj/avis_du_conseil_d_etat_sur_le_projet_de_loi_portant_approbation_du_traite_instituant_la_ceca_9_avril_1952-fr-7b079966-2de6-4f4d-a566-049abaf07037.html); Grondwet voor het Koninkrijk der Nederlanden art. 63, 67 (1815) (amended 1953) (Neth.); Constitution du Grand-Duché de Luxembourg art. 49bis (amended 1956) (Lux.).

As a result, the ideal of citizenship in the post-war Western European democratic constitutional states was not only an ideal aimed at dealing with the *questione sociale* (the social question) but also at redefining citizenship in a post-national sense (that is, clearing it of the nationalistic overtones that had been glorified by the fascist regimes of the interwar period). This accounts not only for the entrenchment of progressive taxation, the welfare state, and the empowerment of trade unions in industrial relations, but for the progressive transformation of the rules of acquisition of citizenship and nationalization, rendering it less difficult to become a citizen on the basis of the effective incorporation into the life of the political community, and the relaxation of the prohibition of dual citizenship.

It is worth repeating that European citizenship *had* to be geared towards the very same normative ideal of citizenship in the Social and Democratic *Rechtsstaat*. The peculiar constitutional path followed first in the creation, consolidation, and expansion of the European Communities and then of the European Union, rendered loyalty to the regulatory ideal of the Social and Democratic *Rechtsstaat* a necessity. The fundamental legitimacy basis of Union law was and remains in national constitutions. In the absence of an explicit and democratically legitimate process of constitution making, the legitimacy of European Union law could only be grounded in national constitutions. Not in each national constitution in *itself* and *by itself* (on account of its being the *national* constitution). Not in the mere juxtaposition of national constitutions (in a sort of minimum common constitutional denominator), but in the collective of national constitutions. Indeed national constitutions, is worth repeating, were written on the clear understanding that integration was necessary to realize the key values of the constitution. European law was to (*and had to be*) to be the key vehicle for the realization of the normative ideals of the collective of national constitutions at the supranational level. Given that all the constitutions of the Member States of the Union defined (and keep on defining) citizenship by reference to the ideal of the Social and Democratic *Rechtsstaat*, European citizenship should contribute to the realization of the ideal of the Social and Democratic *Rechtsstaat*. The founding states of the European Communities aimed at sharing powers, at creating institutional structures, decision-making processes and substantive norms through which to solve conflicts and coordinate actions so as to ensure collective common goods. But the project of integration through law did not merely stop at achieving peace. That peace had to be the peace of the Social and Democratic *Rechtsstaat*. Because the law through which Europe should integrate could not be the formal law of the XIXth century *Rechtsstaat*. It had to be the constitutional law of the Social and Democratic *Rechtsstaat*.

My third premise concerns the specific tasks that the formalization of the status of European citizenship aimed at. It is quite obvious that the addressees of Community law acquired bundles of rights and obligations at the time the European Communities were created. Rights to which they were entitled on the basis of their being nationals of one of the Member States of the European Communities—or eventually, on the basis of being resident in the territory of the Communities even if they were nationals of a third state—.

Such bundles of rights made up the personal status of the addressees of Community law from the very moment the Paris Treaty entered into force. This status could be said, materially speaking, to be an incipient status of citizenship, even if there was not yet a formal status labeled European citizenship. By 1976, the European legislator had granted to the citizens of and residents in EEC Member States quite comprehensive civic and economic rights, especially as interpreted (and actually expanded) by the European Court of Justice. In that date some political rights were added, and in particular, the right to vote in the elections to the European Parliament. This rendered quite natural to speak of “European citizenship,” even if the status would only be formally introduced in Treaty of Maastricht, fifteen years later. It could be said that the talk of citizenship was politically loaded, or even that it was part of a political marketing campaign. But citizenship talk was more than a mere publicity stunt.<sup>13</sup> It reflected the ongoing process of constitutionalization of European law.<sup>14</sup> A constitutionalisation that for a long time was anchored to and normatively propelled by the constitutional law common to the Member States of the European Communities.

If we can speak of an incipient status of European citizenship since the beginning of the process of integration and of European citizens in a fuller sense since the direct election of the Members of the European Parliament, what could be the point of formally introducing the concept of European citizenship in the Treaty of Maastricht? Firstly, to entrench and hasten the post-national transformation of citizenship implicit in and resulting from the self-definition of European states as open and cooperative Social and Democratic *Rechtsstaats*, which dated, as we saw, from the postwar era. By creating a status not tied to a pre-political national identity,<sup>15</sup> and by creating a political bond unsupported by a pre-political national identity, the assumption that pre-political national identities are the only basis on which to ground citizenship could be shown to be false.<sup>16</sup> A key point of European

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<sup>13</sup> See Richard Plender, *An Incipient Form of European Citizenship*, in *EUROPEAN LAW AND THE INDIVIDUAL* 39–53 (Francis Jacobs ed., 1976).

<sup>14</sup> On the complexities of constitutionalization of European law, and the different forms of constitutionalization, I refer to JOHN ERIK FOSSUM & AGUSTÍN JOSÉ MENÉNDEZ, *THE CONSTITUTION’S GIFT* (2011).

<sup>15</sup> Contrary to the case with most national identities during the processes of nation-making, it would be very hard to tie a national identity by constructing it.

<sup>16</sup> The normative ideal of national citizenship—of a citizenship anchored to pre-political appurtenance to the nation—in brief, of a citizenship based on blood was extremely influential for many decades in Europe. This was especially true during the tragic interwar years after the collapse of the old empires, especially the Austro-Hungarian Empire which had many normative shortcomings (not in the least it being an empire), but not the shortcoming of associating the status of citizen with that of national. It is not surprising that the national ideal of citizenship persisted for decades in the political imagination after the constitutional self-definition of European states implied abandoning the ideal of national citizenship. Consequently, social opinion and specific legal rules have lagged behind. In some countries, the realization of the normative ideal of citizenship coming hand in hand with the move from autarchic nation-state to Member State of the European Union has been slower than in others (Germany for a long time being the clear outlier in this regard). See Simon Green, *Citizenship Policy in Germany: The Case of Ethnicity over Residence*, in *TOWARDS A EUROPEAN NATIONALITY: CITIZENSHIP, IMMIGRATION AND*

citizenship is thus the existence of a citizenship status that actually resonates with political practice and that challenges the monopoly of national, pre-political citizenship. An understanding that may have persisted due to the strength of national ideas and beliefs in Europe's recent past, but was hard to square with the identity of the state as an open and cooperative Social and Democratic *Rechtsstaat*. However, it is important to keep in mind that this post-national promise of European citizenship can only be redeemed if European citizenship is capable of being regarded as a status that motivates citizens to discharge their obligations, and very especially, its solidaristic obligations towards others in ways similar to national, pre-political citizenship. To reiterate the point: European citizenship cannot be limited to the realization of the ideal of rule of law, or even of the rule of law and the democratic state. The way we define citizenship should allow us to reconcile the rule of law, the democratic state *and* the social state. The social question (*la question sociale*) cannot be expected to evaporate, but on the contrary to reappear ever more strongly, when we move from the national to the European level of politics. To be a credible post-national alternative to pre-political citizenship, European citizenship has also to be a *social* citizenship.<sup>17</sup>

Second, the formal articulation of the legal status of European citizenship should contribute to the democratization of the European Union. As already hinted, the constitution and consolidation of the European Union has followed a peculiar constitutional path.<sup>18</sup> The founding of the Union took place over at least three different points in time—Paris in 1951, Rome in 1957 and Brussels in 1965) and was enshrined in four international treaties (the Paris Treaty of 1951,<sup>19</sup> the two Rome Treaties of 1957,<sup>20</sup> and the Merger Treaty of 1965.<sup>21</sup> However, these international treaties contained a ragbag of legal norms, only some of which were of a material constitutional character. Supranational institutions, not only the Court of Justice, but also the Commission and the Parliament, together with some national institutions, were soon constructing European law as a constitutional order. Indeed, the several rounds of Treaty reform taking place from the

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NATIONALITY LAW IN THE EU 26–29 (Randall Hansen & Patrick Weil eds., 2001).

<sup>17</sup> Nobody has put this better recently than Barbara Spinelli. See BARBARA SPINELLI, L'EUROPA DI CUI ABBIAMO BISOGNO (2013), [http://download.repubblica.it/pdf/2013/repidee/barbara\\_spinelli.pdf](http://download.repubblica.it/pdf/2013/repidee/barbara_spinelli.pdf).

<sup>18</sup> In a previous work co-authored with John Erik Fossum, I have claimed that this peculiar path can be described as a synthetic constitutional path. See FOSSUM & MENÉNDEZ, *supra* note 14.

<sup>19</sup> Treaty Constituting the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140.

<sup>20</sup> Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11.

<sup>21</sup> Treaty Establishing a Single Council and a Single Commission of the European Communities, Apr. 8, 1965, 967 J.O. 152/1.

early 1980s to the Nice Intergovernmental Conference in 2000 became closer to the template of a process of constitutional reform.<sup>22</sup>

This peculiar path—the synthetic path, if I am allowed to use this label—had its advantages. Foremost, it allowed for integration to start, avoiding the almost certain failure of a direct constitution-making process and the many risks involved in pursuing that option. In the absence of supranational institutions, intergovernmental coordination could prevent a replay of the interwar succession of unstable democracies and warmongering fascist states. Still, there were major shortcomings resulting from the peculiar constitutional nature and development of the European Union. The Union was and remains not only extremely exposed to external shocks, lacking the institutional structures and resource basis to correct the socio-economic imbalances resulting from the said shocks, but is also prone to self-subversion as a result of the depoliticizing effects of having constituted itself in the absence of a “full” democratic constitution-making process.<sup>23</sup> To overcome the ambivalences and weaknesses characteristic of the unconventional constitutional path trailed by the European Union, it is imperative that the Union clarifies its constitutional identity. The formal explication of the status of European citizenship had the potential of making a major contribution to this process, fostering the overt politicization and democratization of the European Communities. By identifying the status of Europeans as citizens of the Communities, European citizenship could be a powerful reminder of the fact that the purely economic, commercial, and trade policies of the European Union were a consequence of the peculiar constitutional path followed by the Union rather than the true nature of the policies and their implications.

If in the post-war period European integration had contributed to the rescue of national democracies, creating the socio-economic framework within which national Social and Democratic *Rechtsstaats* could flourish, by 1991 the Communities had long reached the point where the supranational level of government had to be explicitly reshaped by reference to the normative ideals of the Social and Democratic *Rechtsstaat*. The urgency of that transformation has only become more acute with the passing of time. The competences and powers exerted—and sometimes even more decisively, not being exerted—at the supranational level have rendered it impossible to avoid the fundamental constitutional questions. The pervasive talk about the need to overcome the “narrow” economic character of the Communities, transcend the “market citizen” status and go beyond the Europe of traders and multinationals, is most of the time mere posturing by European institutional actors. But no matter the intention of the speaker, the just

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<sup>22</sup> See John Erik Fossum & Agustín José Menéndez, *The Constitution's Gift*, 11 EUROPEAN L.J. 380 (2005).

<sup>23</sup> Proven by the present crises. See FOSSUM & MENÉNDEZ, *supra* note 14; Menéndez, *supra* note **Error! Bookmark not defined.**



mentioned themes reflect the unease about the present constitutional state of the process of European integration.<sup>24</sup>

### C. Two Highly Problematic Biases When Analyzing and Assessing European Citizenship

In this section, I explore two flaws that, often frequently and simultaneously, can be found in the scholarly literature on European citizenship: (1) the focus on the implications that European citizenship has for those making active use of the status of being a European citizen, leaving aside and marginalizing the systematic and structural effects of the evolving legal status of European citizenship; and (2) the focus on the case law of the Court of Justice failing to consider the many filters that ensure that only a certain set of the social problems closely tied to the normative ideal of citizenship in the Social and Democratic *Rechtsstaat* ends up before the Court of Justice.

First, the legal and politico-scientific analysis of European citizenship often privileges the perspective of those making active use of the rights comprising the status of European citizenship. Much less attention is paid to the structural and systemic effects of European citizenship over the shape of the state and public policy, and almost none is paid to the obligations that European citizens have.

The stories we are told, the data which is being studied, the aspirations which are taken into account, and the rulings upon which we comment tend to involve those of us who are not only formally European citizens, but who are *de facto* European citizens making use of the rights of European citizens *qua* European citizens including, neither last not least, the right to move themselves and to move their capital holdings. Or to make use of a more precise term, European citizenship privileges the perspective of transnational citizens, of those citizens who in fact have personal, social, or economic ties in more than one Member State.

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<sup>24</sup> The very success of integration may have rendered it inconvenient, undesirable, and impractical to constrain integration to purely economic policies. To put it in the language of functionalism and neo-functionalism, which were consistently popular in the first decades of integration, spillovers had reached the “political” stage and it made sense to mark the shift from an integration path through economic policies to an integration path with an overt, clear, and explicit political nature. The need to shift from the implicit to the explicit political character and means of integration became urgent due to developments external to the European Union. The collapse of the Bretton Woods system implied that the public good “monetary stability” was no longer ensured at the global (essentially Western, transatlantic) level. Monetary stability, at least between the Member States of the then European Communities, was essential to avoid undermining what had already been achieved in the process of European integration, and the supranational level should be capable of providing such collective good. The collapse entailed transferring powers from the Member States to the Communities, creating new institutions, and developing new policies. The overt political nature of these policies could be hardly questioned given the massive potential distributive and redistributive effects of such policies. On the resulting riddles, see Christian Joerges, *Europe’s Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation*, in *EUROPE IN CRISES OR EUROPE AS THE CRISES* 279 (John Erik Fossum & Agustín José Menéndez eds., 2014).

There is no doubt that any assessment of European citizenship has to incorporate the perspective of transnational citizens,<sup>25</sup> but there are also very good reasons to doubt that it has to incorporate only their perspective. What about the consequences that shaping European citizenship has for those who do not move, who cannot or do not want to become transnational citizens?<sup>26</sup> What about the structural implications that empowering transnational citizens have over the rights of those who are not transnational citizens? What about the obligations that European citizens have, both *qua* Europeans and *qua* nationals?

Let me illustrate my point by referring to two of the leading cases on European citizenship—cases that are once and again presented as evidence of the normative qualities of the unfolding case law of the Court of Justice.

The first case addressed here is the *Grzelczyk* judgment.<sup>27</sup> After years of hard study in Belgium, Mr. Grzelczyk applied for a short-term temporary subsidy to complete his studies. It is not sure, but it is also not unlikely that Mr. Grzelczyk, or the many Mr. and Ms. Grzelczyks that moved to study in another Member State of the Union, would stay in Belgium (or their country of destination) after completing his (or her) studies. Should Mr. Grzelczyk be denied a subsidy granted to his Belgian counterparts, some of whom may have been poorer students than Mr. Grzelczyk, and some of whom may not stay in Belgium after completing their studies? Absolutely not, in the view of the Court of Justice. European integration required a modicum of “solidarity”. This was one of the cases in which that modicum of solidarity should make a difference. Being part of the European Union and having created the status of European citizenship Belgium (and for that matter all Member States, quite obviously) had to regard citizens of other Member States as part of the Belgian community of insurance against risks, of the Belgian welfare state in brief. This is in principle a claim very much in line with the ideal of the Social and Democratic *Rechtsstaat*, both on what concerns its post-national and social character. However, what the CJEU failed to consider is that neither Belgium nor any other Member State has a positive obligation to provide any concrete social benefit. What if extending benefits to

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<sup>25</sup> Or better, perspectives, because the category of transnational citizen reveals itself to be a plural and complex one the moment in which we consider socio-economic cleavages and so on.

<sup>26</sup> Any analysis of property rights should consider the perspective of those holding property, including those who hold massive amounts of property. But it would be hard to deny that it should also include the perspective of those who do not make much use of their rights to property, beyond perhaps owning a limited number of personal goods or their own homes, and quite clearly also of those who lack any property, or who may claim to be disposed by the very institution of private property (to refer to an obvious example, of the Native Americans who suffered the understanding of private property that John Locke famously supported—to a large extent rationalized—in the Second Essay on Government). See BARBARA ARNEIL, *JOHN LOCKE AND AMERICA: THE DEFENCE OF ENGLISH COLONIALISM* (1996).

<sup>27</sup> See *Rudy Grzelczyk v. Centre public d’aide sociale Ottignies-Louvain-la-Neuve*, CJEU Case C-184/99, 2001 E.C.R. I-06193.

students who are nationals of other countries leads to such a high cost that most Belgians would prefer to see the subsidy abolished result or provided on a less generous basis? Would that really contribute to the realization of a social and post-national citizenship? Moreover, if some Member States were to pay such benefits while others did not (because there was no political support for the policy or resources would be found to be better spent on something else) would not the compulsory extension of benefits to all European citizens result in some Member States becoming net receivers of students from other Member States? But would this be fair?

Furthermore, what about the risk of a “brain drain” in the states with less generous social benefits? The growing exodus of young people from Southern to Northern Europe is partially motivated by lower university fees and better working prospects; better social benefits are also part of the equation; the same could be said of the exodus of young people from Eastern Europe since the early 1990s. Whatever the proper assessment of the case, the fact of the matter is that it is unclear whether the extension of social benefits to non-nationals would really contribute to strengthening solidaristic bonds, even less solidaristic bonds *across* borders. It may be likely to foster talk of free riding, social benefits in the “generous” welfare states and of free-riding (this time by richer states) the costs of forming qualified workers in the “less generous” welfare states.

The second case that I would like to briefly consider is *Ruiz Zambrano*.<sup>28</sup> Mr. and Mrs. Ruiz Zambrano were Colombian citizens who became established in Belgium. Mr. Ruiz Zambrano entered a stable labor relationship with a Belgian employer. Despite the fact that Mr. Ruiz Zambrano did not have a work permit, he regularly and punctually paid taxes and social security contributions that would have been due if he had a working permit. The couple had one child, who was acknowledged to be a Belgian citizen at first and who they could support without applying for social benefits. But then Mr. Ruiz Zambrano lost his job. The Belgian authorities denied the couple social benefits. Mr. Ruiz Zambrano may have contributed while he was working, but he was not supposed to be working, and thus the contributions should earn him no benefits. Then the Belgian authorities denied the Ruiz Zambranos the right to reside in Belgium. They were Colombian citizens that could not support themselves, and could thus be expelled from Belgium. The child had Belgian nationality because the parents had not sought, indeed had consciously avoided, his being recognized as a Colombian citizen. The Court of Justice affirmed the entitlement of the Ruiz Zambranos’ child to Belgian citizenship, and on that basis, established the right of the parents to reside in Belgium, and to be provided with a working permit. Otherwise, the child’s right to European citizenship would be imperiled.

This seems again at first a clear case in which European citizenship contributes to the further realization of the ideal of a post-national Social and Democratic *Rechtsstaat*. The

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<sup>28</sup> See Gerardo Ruiz Zambrano v. Office national de l’emploi, CJEU Case C-34/09, 2011 E.C.R. I-1177.

Belgian authorities—as indeed the German authorities in the Martínez Sala case—seem to want to have their cake, the taxes and the social security contributions of Mr. Ruiz Zambrano, and eat it too, by denying the Ruiz Zambranos social benefits and the right to residence.<sup>29</sup> Moreover, if the Belgian authorities took seriously their international obligations, they should protect at the very least the child of the Ruiz Zambranos, if not the couple themselves. They could simply pretend to solve a problem, which the very authorities themselves have contributed to create by expelling the three. Especially in view of the quasi-civil war raging in Colombia at the time. If the Belgian authorities had to protect the child, and there were no good grounds to deny the Ruiz Zambranos that they were good parents so they should keep their rights as parents, then the best interest of the child demanded that the Ruiz Zambranos be provided with residence and working permits.

And indeed, I would have claimed that this is the solution that the Belgian authorities, in view of its own constitutional and legal norms, should have reached. But what if they did otherwise? Can the rights of the Ruiz Zambranos recognized by Belgian law be realized through European citizenship? There are good reasons to doubt whether the Court of Justice can do that and at the same time continue arguing that it respects the derivative character of European citizenship. Perhaps we should abandon the derivative character of European citizenship for good. This author would have been very much in favor of following the proposals made in the late 1980s and early 1990s arguing for making third-country long-term residents European citizens. Or perhaps we should claim that the derivative character of European citizenship is incompatible with the normative ideal of an open and cooperative Social and Democratic *Rechtsstaat*. But this has not happened yet. In the absence of a constitutional change of the definition of European citizenship, what is the authority on which the Court of Justice can justify a decision such as Ruiz Zambrano? What implications would subjecting national citizenship rules to a test of European constitutionality have? The Ruiz Zambrano child should be regarded as a European citizen. But perhaps others who are regarded as nationals by some Member States should not. Should European law have a say on the terms of naturalization in Member States? Or on the conditions under which illegal immigrants are periodically regularized, so that they may afterwards become naturalized, and thus European citizens?

To sum up, in both cases it is hard to deny European citizenship has made the law more humane. At the very least for Grzelczyks and for the Ruiz Zambranos. Why is this not sufficient evidence of the positive normative effects of European citizenship, or to put it differently, of the fostering of the rights of all the Grzelzycks and of the Ruiz Zambranos of Europe, and not only of the particular individuals involved in these two cases? The obvious answer is that the case law of the Court of Justice affects not only the plaintiffs in the cases, or the set of persons who find themselves under circumstances sufficiently similar as to allow for the application of the *ratio decidendi* of the judgments. Still, the structural

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<sup>29</sup> See Martínez Sala v. Freistaat Bayern, CJEU Case C-85/96, 1998 E.C.R. I-2691.

implications of the case law cannot be elucidated if we focus on the plaintiffs only, if we merely consider the impact that changes in the law have in subjective fundamental rights, if we do not take into account the effects the rulings have on collective goods. More subjective rights for some, as Marcel Gauchet famously and rightly put it, cannot but entail less powers for all, and most of the time, less collective goods for all.<sup>30</sup>

Second, focusing on the case law of the Court of Justice may easily lead to neglecting social problems that do not come before the Court of Justice. Judicial processes tend to filter out some problems in systematic ways. The way in which constitutional and ordinary laws are understood, the sheer costs of litigating, and the relevance of the benefits that may be obtained from litigating are among the factors that may have a major impact in determining which problems remain invisible to an individual using litigation to see all socio-economic conflicts. Who goes before the Court of Justice is something that is highly influenced by these three factors. For one, the yardstick of constitutionality of European Union law—basically comprising the four economic freedoms, the right to undistorted competition, and the right to non-discrimination on the basis of gender—is much narrower than that prevailing in Member States where constitutional courts review the constitutionality of laws, coupled with the allocation of competences between the Union and its Member States, by reference to a rather different yardstick of constitutionality. In national constitutions, the right to private property and the right to freedom of enterprise are either not acknowledged as fundamental rights, or at any rate are not the fundamental rights with the highest “abstract” weight. Subjective fundamental rights (such as the right to live, the right to personal integrity, the freedom of speech, the freedom of thought, the right to strike, the right to political association) and collective rights of fundamental character (such as the right to the protection of the environment, to a social environment characterized by freedom and equality, to the protection of the fiscal interests of the collectivity) have a higher “abstract” weight than private property and freedom of enterprise. Consequently, it is far from obvious that when in conflict with other fundamental rights and collective goods, private property and freedom of enterprise will prevail. Which is not exactly the most obvious outcome in the case law of the ECJ, because, as just said, the yardstick of European constitutionality is much narrower and consequently tilted towards the protection of the right to private property and freedom of enterprise. This results in a major structural filter, as many plaintiffs are prevented from going before the ECJ if they wish to have their socio-economic rights protected, because they (rather rightly) assume their chances are slim.

For two, plaintiffs obtain access to the Court of Justice through national courts posing a preliminary question to the European Union. This is costly, due to the extra cost of legal

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<sup>30</sup> See MARCEL GAUCHET, *LA DÉMOCRATIE D’UNE CRISE À L’AUTRE* 42 (2007); see *infra* Part D (contesting that the case law on citizenship has to be assessed in its proper constitutional context: a context made up of the wider development of the European yardstick of constitutionality and of the contribution that the case law on citizenship has made to it).

assistance that this entails and the time it takes to receive a ruling. Preliminary rulings delay national proceedings for the many months—regularly years—as the Court of Justice produces its ruling. For three, it is the plaintiffs who can claim a “cross-border” element to their case that have a solid basis on which to mobilize the yardstick of European constitutionality in their favor. It is certainly true the “cross-border” element has become more “potential” than “real”—thus extending the breadth and scope of Union law—and the shift from non-discrimination to other obstacles (such as the paradigm of understanding economic freedoms) has plunged a good deal of the relationships between the Member States and its citizens into the realm of the European Union. Still, it keeps on being the case that those citizens who live in one Member State and only occasionally cross borders are less likely to get new rights and entitlements from EU law. EU law had quite obvious relevance when Mr. Kamberaj,<sup>31</sup> an Albanian citizen who was a long-term resident in Italy, challenged a regional administrative decision. It is less obvious that EU law would have been a card to play if Mr. Kamberaj would have acquired Italian citizenship. The European Court of Justice has established that EU law protects European citizens who work in Flanders without living there. European citizens do have the right to receive the same social benefits as residents in Flanders.<sup>32</sup> The only exceptions to the rule are Belgian citizens resident in Wallonia. This entails that EU law should not meddle in internal Belgian constitutional affairs. Similarly, EU law allows EU citizens to claim the restitution of the expenses incurred when seeking medical treatment in Piedmont while residing in France. But EU law does not have much to say about Greeks and Italians who cannot afford to pay the “health tickets” which “ration” health care treatment in post-austerity Greece and Italy. Indeed, as I will point out later, EU law has had a heavy hand in imposing such restrictions.<sup>33</sup> European law may protect plaintiffs that claim that national taxes discriminate against them. But it is only taxpayers who can claim to engage into economic activity in several Member States who can try to reduce their tax burden playing the EU law card. In brief, European law is a better shield for those who move, who have a certain level of material and symbolic resources, who can afford to risk the money it costs to litigate to obtain ex-post compensation, and who want to see their individual rights as capital holders, entrepreneurs, workers, would be workers—students as seen by EU law—protected.

Why should citizenship be about those who move, those who have resources, and those who participate actively in the economy. The normative ideal of citizenship in the Social and Democratic *Rechtsstaat* is much wider, more comprehensive. Indeed, it is about

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<sup>31</sup> Servet Kamberaj v. Istituto per l’Edilizia sociale della Provincia autonoma di Bolzano (IPES), CJEU Case C-571/10, (April 24, 2012), <http://curia.europa.eu/>.

<sup>32</sup> See Government of the French Community and Walloon Government v. Flemish Government, CJEU Case C-212/06, 2008 E.C.R. I-1683.

<sup>33</sup> See DAVID STUCKLER & SANJAY BASU, *THE BODY ECONOMIC: WHY AUSTERITY KILLS* (2013) (describing these restrictions as literally deadly).

collective action that provides real protection, real shelter to those who are unlikely to be sheltered through individual complaints before the courts. And, it should be said, protecting all citizens entails forcing the better off to comply in full with their duties as citizens. Which is not what EU law does. As a matter of fact, it actually helps the better off escape their obligations.

But let us leave aside the normative dimensions of the bias for the time being. The key observation I want to make at this stage is that certain social problems, certain categories of plaintiffs, certain kind of arguments are filtered out by the CJEU. Consequently, an analysis of the case law of the Court of Justice does not alert us to the whole set of socio-economic problems which, by reference, allow us to assess the relevance of European citizenship, rendering any conclusion on the matter at the very least incomplete.

#### **D. Putting European Citizenship to Demanding Tests: The Structural Implications of the CJEU Case Law and the Relevance of European Citizenship in Times of Crisis**

In the previous section, I contested that the analysis and assessment of European citizenship by reference to the jurisprudence of the Court of Justice because it focuses on individuals more keen to become active and more frequently use the rights of European citizenship. The shortcomings of this approach can be further explored in two steps.

First, I will try to show in a systematic manner the structural implications of the CJEU case law on citizenship. The case law on citizenship is not a self-encapsulated part of the overall case law of the CJEU. The contrary is indeed a much more plausible conclusion. The shape of the jurisprudence on citizenship is arguably closely related to the shift towards a disembedded conception of economic freedoms. Citizenship provides both a general label to the ensuing “new” legal status of the addresses of European law while facilitating the radical expansion of the set of national statutes that the CJEU feels entitled to review by reference to the European yardstick of constitutionality.

Second, the salience and relevance of European citizenship cannot be determined by exclusive reference to the CJEU case law. Indeed, the present existential crisis of the European Union can be regarded as a quasi-natural test of the extent to which European citizenship is perceived by European citizens as realizing the normative ideal of the Social and Democratic *Rechtsstaat* and/or providing the means to shelter such an ideal.

##### *I. European Citizenship as Market Citizenship Redivivus*

The CJEU case law on citizenship has played a major role in consolidating and legitimating the shift in the understanding of economic freedoms from *embedded* freedoms whose substantive content was defined by reference to national constitutional norms to *disembedded* freedoms, the substantive content of which is autonomously established at the supranational level. While during the initial stages of this shift the “importation” of the

formal aspects of the proportionality test as the structural framework in which to sort out constitutional conflicts was of essence, citizenship has played a major role in consolidating the shift. The new legal status of European citizenship not only provided a positively loaded concept with which to label the status of European law after economic freedoms were disembedded, but the review of European constitutionality of national laws regarded as an obstacle to the realization of economic freedoms was clearly more palatable if national laws were found in breach of the requirements of European citizenship. This was especially the case when said national laws were statutes dealing with public policies which had long been regarded as beyond the limits of Union competence.

### *1. From Embedded to Disembedded Economic Freedoms*

The four economic freedoms—free movement of goods, workers (later of persons), establishment, and capital—have come to be understood as the operationalization of a supranational right to individual—if not individualistic—autonomy. This right has been elevated by the Court of Justice to the status of yardstick of European constitutionality, defining the substantive validity of all national norms in full autonomy from national constitutional law. This implies a major break with the original understanding of economic freedoms as the operationalization of the principle of non-discrimination, something that not only entailed the respect of the socio-economic choices of the Member States, but also the primacy of the decisions of representative institutions when it came to the shaping of the emerging supranational socio-economic order.<sup>34</sup> As a result, economic freedoms have ceased being embedded into national constitutional law (requiring not that national constitutional law has a specific substantive content, but that it is equally applied to Community nationals), and have become disembedded (embodying a specific set of substantive choices).

I have already presented the basic contours of the way by which economic freedoms were reinterpreted and reconstructed by the Court of Justice in these pages. Suffice it here to say that contrary to the embedded understanding of economic freedoms, the project of the single market presented economic freedoms as the concretization of an individual right to private autonomy that was hypothesized as always having been enshrined in the Treaties, a right autonomous from and transcending national constitutional law. As a result, European integration would not only require rendering porous national economic borders—extending to European economic actors the treatment provided to nationals—but actually reshaping the national socio-economic order in a way compatible with the European right to private autonomy. The politically driven creation of a single market was substituted by the vision of the single market to be created through the mutual recognition of regulatory structures.

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<sup>34</sup> See generally ALEXANDER SOMEK, *INDIVIDUALISM* (2008); ALEXANDER SOMEK, *ENGINEERING EQUALITY* (2011).



The reconstruction of Community law in the semblance of this new and disembedded understanding of economic freedoms was a long process in which the Court of Justice played a leading role under the instigation of the Commission. It was the Commission (to be precise, the DG Internal Market) that started bringing Member States to court for breaching economic freedoms *even if* they were not discriminating against non-nationals. This encouraged big companies to emulate the Commission. And then the Court of Justice turned the new understanding of the Commission into authoritative law, starting in *Cassis de Dijon*.<sup>35</sup> The new conception of economic freedoms was at first only applied to free movement of goods. But after the implicit endorsement of the European Council (which supported the Commission's drive towards the single market and promoted the Single European Act), the Court also revisited its understanding of all other economic freedoms. In the wake of the transformation of free movement of capital into a full blown economic freedom by Directive 88/361,<sup>36</sup> and with the prospect of Economic and Monetary Union, the new understanding was definitely entrenched.

## 2. The Key Role of the Formal Use of Proportionality

A key operative part of the shift towards the disembedded understanding of the economic freedoms was and remains a bold proportionality review of national statutes, the formal and structural elements of which were basically transplanted from the practice of national constitutional courts when protecting fundamental rights in the post-war Social and Democratic *Rechtsstaats*. Given the key role that such courts played in some Member States in the consolidation of national democracies in the critical early decades of the post-war period, the European "copying and pasting" of the national constitutional syntax would seem *prima facie* to be entirely commendable.

However, there were and are two major and decisive differences.

The first concerns how the CJEU and national constitutional go about applying the proportionality test. There are no major differences when it comes to the three steps that usually are distinguished in the literature: adequacy, necessity and proportionality. There are major differences in regard to two steps that tend to be missed in the standard rendering of proportionality, but which are of essence: (1) the elucidation of the constitutional principles underlying the colliding norms; and (2) the assignment of argumentative benefits and burdens. In these two steps, courts contribute to the concretization—or conceptualization—of the conflicting principles and determine how the conflict is to be understood and from which principle are we going to start the argument?

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<sup>35</sup> See *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, CJEU Case C-120/78, 1979 E.C.R. I-649.

<sup>36</sup> See Council Directive 88/361/EEC of 24 June 1988 for the Implementation of Article 67 of the Treaty, 1988 O.J. (L 178) 5 (EC).

The way in which the CJEU and national constitutional courts go about these two steps is radically different. National constitutional courts base their judgments on the unity of fundamental rights, on the equal constitutional dignity of civil, political and socio-economic rights. The Court of Justice privileges economic freedoms over other fundamental rights per se, on the basis—no longer even formally plausible after the formal incorporation of the Charter of Fundamental Rights to the primary law of the Union—of the direct effect of the provisions where economic freedoms are enshrined in the Treaties, and the lack of similar provisions when it comes to fundamental rights. Moreover, national courts assign argumentative burdens after determining that which is the normative center of gravity of the case, whether the case is mainly about social rights and incidentally about civil rights, or vice versa. The Court of Justice assigns always and without exception the argument benefit to economic freedoms.<sup>37</sup>

The second is that the ways by which the CJEU and national constitutional courts fill proportionality—which is by itself a purely structural principle<sup>38</sup>—are very different in at least three respects. First, the Court of Justice sustains that economic freedoms are fundamental subjective rights. While this characterization seems to have been endorsed—even if *ex post casu*—by the Treaty amendments introduced by the Single European Market and the Treaty of Maastricht, it remains difficult to reconcile with the constitutional identity of the European Union and impossible to square with the constitutional identity of the Member States as social and democratic *Rechtsstaats*. Indeed, it seems to me much more plausible to conclude that the jurisprudence of the European Courts took a wrong turn when it shifted from one conception of economic freedoms to the other, or what is the same, that *Cassis de Dijon* and the later jurisprudence expanding the “obstacles” conception of breaches to economic freedoms are properly characterized as part of a “constitutional *dérapiage*” in the development of Community law.

Second, the standards that the Court of Justice employs to determine the probability of events when assessing the adequacy and necessity of the norms colliding with an economic freedom can be and—in my view—should be contested. While the CJEU assumes, without paying much attention to any evidence, that all breaches of economic

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<sup>37</sup> See Agustín José Menéndez, *A Proportionate Constitution? Economic Freedom, Substantive Constitutional Choices and Dérapiages in European Union Law*, in FEAR, RELUCTANCE AND HOPE: THE DEMOCRATIC CONSEQUENCES OF THE CASE LAW OF THE COURT OF JUSTICE 167 (Flavia Carbonell et al. eds., 2011) (providing a detailed reconstruction).

<sup>38</sup> Observance of proportionality guarantees the formal correctness of the decision but cannot ensure the substantive correctness of the decision. The correctness of a decision cannot but depend on the substantive justifiability of the substantive choices with which the formal argumentative syntax of proportionality is “filled in.” Indeed, far from being a legitimizing principle, proportionality must be understood as a critical analytical tool with which we can reveal the substantive choices made by a court and assess whether they are properly grounded on previous legal authoritative decisions, on good substantive reasons put forward by a court, or on the contrary, are largely unjustified.

freedoms would result in a grave infringement, the CJEU eventually sets a too-high threshold to prove the adequacy and necessity of infringing norms. This can be illustrated by reference to the fully unrealistic assumptions the CJEU makes on the alternative means at the hands of Member States to ensure the effectiveness of fiscal supervision—<sup>39</sup> flatly contradicted by the several legislative initiatives of the Commission, only partially successful, to increase the degree of tax assistance, especially in the form of automatic exchange of tax data.<sup>40</sup>

Third, the Court of Justice tends to fail to approach on its own terms the principles underpinning the norms colliding with economic freedoms. The breadth and scope of these principles is not only defined in the most restrictive manner, but the inner normative logic of these principles tends to be neglected. This may well be exemplified by considering the peculiar characterization of the overriding national interest in the coherence of the national tax system.

### *3. The Cloaking Role of Citizenship*

Citizenship has played a key role in consolidating the disembedded understanding of economic freedoms in two different ways. First, citizenship provides both a general label to the ensuing “new” legal status of the addressees of European law, while facilitating the radical expansion of the set of national statutes that the CJEU feels entitled to review by reference to the European yardstick of constitutionality.

The shift from an embedded to a disembedded conception of economic freedoms entails a major change in the rights and obligations that the addressees of Union law have. For one, it changes the level of government and the legal system at which the rights and obligations of the addressees of European law are defined. As already indicated, moving from non-discrimination also entails emancipating the substantive content of economic freedoms from national law. As long as the standard breach of an economic freedom was to result from treating non-nationals unequally, the substantive content of economic freedom was left in the hands of each Member State of the Union. Once obstacles, even if non-discriminatory, are said to constitute violations of Community law, the substantive content of economic freedoms can no longer be national and will no longer differ from Member State to Member State. Second, economic freedoms come to be regarded as the key

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<sup>39</sup> *But see Futura Participations and Singer v. Administration des Contributions*, CJEU Case C-250/95, 1997 E.C.R. I-2471, paras. 31, 33.

<sup>40</sup> *Cf. Council Directive 2011/16/EU of 15 February 2011 on Administrative Cooperation in the Field of Taxation and Repealing Directive 77/799/EEC*, 2011 O.J. (L 64); *Proposal for a Council Directive Ending Directive 2011/16/EU as Regards Mandatory Automatic Exchange of Information in the Field of Taxation*, COM (2013) 348 final (June 12, 2013).

institutional means through which markets are created and “ordered,” downplaying and repudiating the role of public institutions in the regulation and maintenance of markets.

But while the substantive content of the status changed in the aftermath of *Cassis de Dijon*, and was to change even more deeply and rapidly as the Court of Justice expanded the disembedded understanding to all four economic freedoms, there was no obvious label that could be used to refer to this new set of rights. When European citizenship was formally introduced at Maastricht as an umbrella of largely existing rights, the conditions for a potential “perfect” match were created.<sup>41</sup> European citizenship started to be filled by the Court while it explored the substantive implications of its new conception of economic freedoms.

Moreover, citizenship has served as the Trojan horse of the disembedded understanding of economic freedoms, in the very precise sense that it has rendered more palatable the expansion of the scope of national laws subject to a review of European constitutionality by reference to economic freedoms. This is especially the case in what concerns intensively redistributive policies, such as personal taxation and non-contributory pensions. Indeed, the absorption of a given policy area within the scope of Community law tends to lead judges to reframe the relevant issues in the mold characteristic of economic freedoms, namely by means of identifying the subjective, individualistic rights at stake, and policing the observance of principles of commutative justice. The nature of many of the underlying questions is thus simply distorted, resulting in what could be labeled as a “surreptitious economization.” The formal logic of economic rights hides in plain sight the substantive logic of solidaristic obligations, which are founded on collective goods, not individual rights, and which are characterized by complex multilateral relations to be governed according to principles of distributive, not commutative justice.

This can indeed be observed in the judgments of the Court of Justice on the implications of European citizenship for the granting of non-contributory welfare benefits to supranational citizens. Whereas the extension of economic freedoms to non-nationals may result in a positive sum game, that is not necessarily the case when we are dealing with welfare benefits, which institutionalize what some citizens owe others and thus necessarily entail a redistribution of resources. It is surely the case that a common citizenship should entail a modicum of solidarity towards the nationals of other Member States, but that does not wipe out the million euro question of any welfare policy which determines who is and who is not eligible. Pretending that the extension of welfare rights does always lead to a better protection of the welfare objective is simply illusory, because the key point of any

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<sup>41</sup> Cf. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community arts. 8, 8a, Dec. 13, 2007, 2007 O.J. (C 306).

redistributive program is to use the tax collected from some to comply with the obligations of distributive justice they had towards others.<sup>42</sup>

Indeed, it could be argued that the rhetoric of European citizenship has provided a nicer value ground to the process of transformation of economic freedoms, from concretizations of the principle of non-discrimination to transcendental freedoms which require setting aside all national laws that may be an obstacle to the operation of the single market; no matter what aim they pursue. Although this is not the place to do so, it would be worth exploring the relationship between the leading cases on European citizenship, the redefinition of the importance of free movement of capital in the *Golden Shares* judgments,<sup>43</sup> the re-characterization of market-making as a competence basis in *Tobacco Advertising*<sup>44</sup> and the upper hand given to freedom of establishment to the detriment of collective socio-economic rights in *Viking*<sup>45</sup> and *Laval*.<sup>46</sup>

## *II. Testing Crises: National and European Citizenship as Guardians of the Social and Democratic Rechtsstaat*

Six years into a structural crisis with major economic, fiscal, financial, macroeconomic, and political dimensions, and after many issue-based decisions and structural reforms with massive constitutional implications taken at the supranational level, it is difficult to avoid the conclusion that the constitutional law of the European Union has changed. These changes have not only been deeper in quantitative terms than those resulting from any previous round of Treaty-making reform, including the changes brought about by the Lisbon Treaty—which was said by their promoters to fix Union law for the next half a century—but also have posed major challenges to the three ideals of the Social and Democratic *Rechtsstaat*.<sup>47</sup> The quantity and quality of the changes could not but have an impact on the rights and obligations of all citizens. To illustrate the depth and salience of the changes, it may suffice to refer to some of the most salient challenges to the three ideals of the Social and Democratic *Rechtsstaat*.

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<sup>42</sup> See ROBERT E. GOODIN, BRUCE HEADEY & RUUD MUFFELS, *THE REAL WORLDS OF WELFARE CAPITALISM* (1999) (restating that this does not mean that overall a well-funded and generous welfare system may not increase the overall wealth of a society; there is wide and ample proof of that being the case).

<sup>43</sup> *Comm'n v. Portugal (Golden Shares)*, CJEU Case C-367/98, 2002 E.C.R. I-4731.

<sup>44</sup> *Germany v. Parliament & Council (Tobacco Advertising)*, CJEU Case C-376/98, 2000 E.C.R. I-8419.

<sup>45</sup> *Int'l Transport Workers' Federation & Finnish Seamen's Union v. Viking Line ABP & OÜ Viking Line Eesti*, CJEU Case C-438/05, 2007 E.C.R. I-10779.

<sup>46</sup> *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet*, CJEU Case C-341/05, 2007 E.C.R. I-11767; See *Rechtsanwalt Rüffert v. Land Niedersachsen*, CJEU Case C-346/06, 2008 E.C.R. I-01989; SOMEK, *supra* note 34 (providing the most persuasive theoretical account of European integration in recent years and beginning to connect the dots in this regard).

<sup>47</sup> See Menéndez, *supra* note 3.

First, the central role played by law in social integration—a role that used to be said especially intense at the supranational level, keeping in mind the integration through law thesis—has been massively challenged. For one, the “soft governance” mechanisms which were developed to coordinate fiscal, macroeconomic, social, and monetary policies in the aftermath of the Maastricht Treaty—and which by themselves could be seen as a challenge to the rule of law—have been replaced by “hard governance” mechanisms as a result of the enactment of the Stability Treaty, the six and the two packs. While the lack of legal form of the common action norms has been if anything heightened—think about the legally indeterminate concept of “structural deficit” that now has become pivotal in the process of determining whether Member States comply or not with fiscal targets—the means of fostering compliance with under formalized common action norms have been upgraded to a coercion that usually is coupled to legal norms.

Second, the rule of European constitutional law—and of national constitutional law—has been challenged by the search for spaces in which to organize a peculiar form of intergovernmental cooperation “free” from European and national constitutional law. This is indeed what the point of the Union method is: An empty constitutional space where Eurozone Member States are not fully disciplined by Union or national constitutional law—while the CJEU and national constitutional courts attempt to extend to this space the disciplining force of constitutional law.

Democratic government has been seriously questioned by the simultaneous shift of fiscal, macroeconomic, and macro and micro prudential supervisory powers to the supranational level of government and the empowering at that level of non-representative institutions—the European Central Bank, the Commissioner of Economic and Monetary Affairs, the turning of the IMF into an institution having voice within the Union decision-making process. It has been furthered challenged by the turn towards minoritarian decision-making—which is what the reversed qualified majority is—when taking momentous decisions during the process of supervising and monitoring the national fiscal and macroeconomic policies of the Eurozone Member States. The reversed qualified majority is not only government by the minority, but a rather precise minority. Not only has the identity of the “creditor” states remained basically unchanged in the last three decades—the reading of the preamble to the Directive 831/1988 which transformed the understanding of free movement of capital in the European Union is very telling in this regard—but their votes, obviously by sheer chance, make up a reversed qualified majority within the Eurozone.

Finally, the entrenchment of internal deflation as the policy of choice for Member States of the Eurozone suffering structural crises implies turning the Social state upside down. Internal deflation requires public intervention that not only reduces the tax burden on some of the members of society with the highest levels of economic wealth and income—to create “incentives” for their investment of their wealth and income, so as to improve

the overall “competitiveness” of the economy—but also a structural reduction of welfare benefits. This is to balance budgets which were imbalanced by direct or indirect redistributions of resources to the better off in society, by underpinning failed financial institutions, or by dealing with the social consequences of unsustainable economic activities after their promoters have extracted massive rents from them. This also entails a radical change in the design of industrial relations, which results in the disempowerment of trade unions, and the consequent weakening of collective labor rights.

This massive quantitative and qualitative transformation of the European Union provides a good testing ground for the constitutional and political relevance of the present configuration of European citizenship. If European citizenship as defined at present through the secondary legislation and the case law of the Court of Justice has actually entrenched a post-national form and citizenship, and has or could contribute to the politicization and democratization of the European Union, it would be fair to expect the frequent invocation of the rights of European citizens when assessing, praising, and contesting the punctual decisions and the structural decisions through which the crises have been governed. As was famously put by AG Jacobs, European citizens were expected to claim *civis Europaeus sum* when in need.<sup>48</sup> The present crises are clearly a time at which many European citizens are in need.

But have European citizens actually mobilized their status as European citizens when engaging in political debates on what to do, how to govern the crises? The answer seems to be negative. Even more tellingly, national constitutional norms and rights have been invoked once and again by citizens and institutional actors, while reference to European citizenship has been far and between.

Consider the case of Portugal. Singing the song “*Grândola Villa Morena*,” a theme strongly associated with the coming of democracy in 1974 and with the new constitutional beginning that ensued, has quickly become a popular way of challenging politicians who support austerity policies.<sup>49</sup> It is not far-fetched to construe the singing as a way of claiming back the Portuguese constitution against the policies that are perceived—at least by some—to undermine it. This is the societal context in which the President of the

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<sup>48</sup> See *Konstantinidis v. Stadt Altensteig*, CJEU Case C-168/91, 1993 E.C.R. I-1191, para. 46; *Centro Europa v. Ministero delle Comunicazioni e Autorità per le Garanzie Nelle Comunicazioni*, CJEU Case C-380/05, 2008 E.C.R. I-349, para. 16 (showing how the phrase has proven rather popular with another Advocate General—AG Maduro); *Petersen v. Landesgeschäftsstelle des Arbeitsmarktservice Niederösterreich*, CJEU Case C-228/07, 2008 E.C.R. I-6989, para. 16 (using the same language—AG Ruiz-Jarabo Colomer); *Ruiz Zambrano v. Office National de l’Emploi*, CJEU Case C-34/09, E.C.R. I-01177, para. 83 (using the same language—AG Sharpston).

<sup>49</sup> See *Passos Interrompido por “Grândola Vila Morena,”* ESQUERDANET (Feb. 15, 2013), <https://www.youtube.com/watch?v=M53-cxC8B1E> (showing perhaps the most well-known instance, which happened at a session of the Portuguese Parliament when Prime Minister Coelho was interrupted by people in the audience singing the “*Grândola Villa Morena*”).

Portuguese Republic brought before the Constitutional Court fundamental budgetary laws proposed by the government thrice.<sup>50</sup> In all three occasions, the Constitutional Court declared the budgetary acts unconstitutional, despite the fact that the contents of the budgetary acts were strongly favored, to say the least, by the troika. It goes without saying that the Portuguese Court ruled on the basis of the national constitutional, and the national constitution only. When contesting austerity policies, protesters invoke the Constitution singing *Grandola Villa Morena* while institutional actors urge the constitutional court to consider whether austerity measures pass the test of constitutionality. References to European constitutional law are, if anything, not exactly positive.

On such a basis, the test of the crises does not support the claim that European citizenship has become a fundamental status as Europeans. When in need, Europeans have not rushed to claim *cives Europeaus sum*. European institutions have not subject the policy proposals made by the troika or by the Commission to a review of constitutionality; they have not checked whether the policies they have proposed undermine civic, political and socio-economic rights. It can be argued, and it has been argued, that the Charter of Fundamental Rights has been undermined by the decisions take in the name of overcoming the crises.<sup>51</sup>

It could still be thought that this telling absence of European citizenship from the debates concerning the governing of the crisis is reflective either of ignorance on the side of citizens and institutions or is due to the “incompleteness” and the “insufficiently developed” character of European citizenship. Certainly, it is not hard to conceive some arguments that could have been made on the basis of European citizenship in order to contest or challenge the way in which the crises have been governed. It could well be, though, that the reason why national citizenship and national fundamental rights have been mobilized, but not European citizenship and European fundamental rights, is more complex.

## E. Conclusion

In this chapter, I have questioned the ‘optimistic’ narrative according to which the creation of the status of “European citizen” has led to a better protection of the rights of the

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<sup>50</sup> See Tribunal Constitucional [Portuguese Constitutional Court] Dec. 19, 2013, Ruling 862/13, *available at* <http://www.tribunalconstitucional.pt/tc/acordaos/20130862.html>; Portuguese Constitutional Court, Sept. 20, 2013, Ruling 602/13, *available at* <http://www.tribunalconstitucional.pt/tc/acordaos/20130602.html>; Tribunal Constitucional [Portuguese Constitutional Court] Apr. 5, 2013, Ruling 187/2013, *available at* <http://www.tribunalconstitucional.pt/tc/acordaos/20130187.html>.

<sup>51</sup> ANDREAS FISCHER-LESCANO, HUMAN RIGHTS IN TIMES OF AUSTERITY POLICY: THE EU INSTITUTIONS AND THE CONCLUSION OF MEMORANDA OF UNDERSTANDING (2014), *available at* [http://www.etuc.org/sites/www.etuc.org/files/press-release/files/legal\\_opinion\\_human\\_rights\\_in\\_times\\_of\\_austerity\\_policy\\_final.pdf](http://www.etuc.org/sites/www.etuc.org/files/press-release/files/legal_opinion_human_rights_in_times_of_austerity_policy_final.pdf).



citizens of the Member States of the European Union—of European citizens; and according to which the ECJEU has provided an interpretation of citizenship that has made of the European Union more than a mere economic arrangement: a true political union. If we take seriously the normative ideal of European citizenship, and perhaps even more importantly, if we analyze in depth the structural implications of the affirmation of citizenship in the Treaties and of the ensuing case law of the European Court of Justice, we may come to a rather different conclusion. In this paper I put forward two major reasons to be highly critical with European citizenship as stands. First, the transformation of economic freedoms, from the operationalization of the principle of non-discrimination, the substantive content of which was determined by national constitutional law, into yardsticks of meta-constitutionality fully emancipated from national constitutional law, has damaged the substance of citizenship in Europe. It has empowered individuals to challenge the fabric of the key collective goods on which the Social and Democratic *Rechtsstaat* is built. This transformation is still to be registered in mainstream European law scholarship. This may well be due to the fact that the Court of Justice has mimicked the formal structure of national constitutional reasoning when reviewing the constitutionality of statutes, decrees, and other legal norms—e.g., balancing and weighing by reference to proportionality. The family resemblance to national constitutional review has led to the wrong conclusion that proportionality is the grammar of the Social and Democratic *Rechtsstaat*. But it may not be. Moreover, the very emotional appeal of the term citizenship has facilitated its use as rhetorical label with which to hide the striking differences between the present status of European citizen and the status of citizen in a Social and Democratic *Rechtsstaat*. Second, the rights and duties that come hand in hand with the status of European citizen as stands have proven inadequate to shelter European citizens from the European crises. The European Union and its Member States, in many cases at the de facto urge if not command of the European Union, have taken decisions and undertaken structural reforms that have challenged the three dimensions of the ideal of the Social and Democratic *Rechtsstaat*. The rights granted by European supranational law have yet to be proven capable of countering the very decisions and reforms that risk undermining the Social and Democratic *Rechtsstaat*.

The reasons are plentiful for being critical, and even radically critical, of European citizenship as constructed by the Court of Justice and as implicitly defined in the wake of the crisis by the European Council, the European Central Bank, and the European Commission. That understanding is simply incompatible with the normative ideal of citizenship in the Social and Democratic *Rechtsstaat*. It not only unravels the ideal of the welfare state without providing any replacement for it; but it also undermines the democratic ideal by means of substituting democratic will-formation for the decree of the *epistemon*, the wise technocrat and creates the conditions under which the rule of law is replaced by a mixture of hard governance and punctual administrative decisions.

Does this mean that we should repudiate European citizenship? It seems to me not yet. As I made clear when discussing the premises on which this chapter is based, the normative

ideal is one thing; another thing is the set of legal norms through which the normative ideal is operationalized. The normative drive to create a post-national political community, to render liberty, equality, and solidarity beyond pre-political identities possible remains an essential task. But the institutionally enforced understanding of European citizenship has become so distant and so alien to the normative ideal of European citizenship that it is difficult to escape the conclusion that it has become part of the problem. It is time to mobilize the normative understanding of citizenship underlying the common constitutional law against the going supranational understanding. It is time for mobilizing national understandings of citizenship against European citizenship, not because they are national—indeed, as I claimed, they should be understood also as post-national—but because they reflect more loyally the ideals of the Social and Democratic *Rechtsstaat*. The legacy of the *sui generis* understanding of European Union law which led to confounding the rejection of methodological nationalism with the license to throw away the grammar of democratic constitutional law should be overcome. The legacy of a “hippie” constitutional pluralism formulated at such levels of abstraction that it loses touch with socio-economic realities should be overcome. European citizenship should be reclaimed. But as was the case in the forging of the Social and Democratic *Rechtsstaat* at the national levels, the process has to be deeply political. It was in open political fights—including resistance to fascism—that citizenship was forged, and not in exhilarating debates among legal scholars. We may well not need “more Europe”. We clearly should not favour “more Europe” if that “more” is a deepening of the authoritarian traits already visible in the economic and monetary “constitution” of the European Union, especially in its “post-crisis” version. What we need is a very different Europe indeed. Perhaps more of a European Community than a European Union.



## **European Citizenship and Social Rights in Times of Crisis**

*By Stefano Giubboni\**

### **A. Introduction**

European citizenship celebrated its twentieth anniversary during the most difficult and uncertain moment of the Union's crisis. The real economy has now been fully saturated by the financial crisis far beyond the borders of the Euro-Mediterranean area, with devastating social effects in those countries most affected. The prolonged vertical drop of the gross domestic product in Greece—the epicenter of the crisis—has been intertwined with a dramatic and unprecedented growth of levels of unemployment and social suffering in a vortex destructive to the point of validating the perception, now widespread not only within the bewildered public opinion of that unfortunate country, that the “rescue” of the Union has been based on a cure that is worse than the disease.<sup>1</sup> The recent general elections in Italy, a country key for the stability and indeed the survival of the Euro-zone, have produced a situation of fragmentation and political instability that is both unprecedented and disquieting. Among the few elements of certainty in Italy can be found a widespread Euro-skepticism, if not an openly anti-European mood, that is also unprecedented in the history of the country's public opinion, which historically is among the most favorable towards a strengthening of the integration process. With the worsening of the economic and social crisis, the very tenacious confidence in Europe as a positive “external constraint” which has supported Italy's efforts towards reforms, commencing with its admission into the Euro-zone in the latter 1990s<sup>2</sup> until the most recent experience of the technocratic government headed by Mario Monti,<sup>3</sup> seems to have declined. Everywhere in Europe, a sense of frustration and distrust in recent years has grown against the Union and its frantically sought capacity to respond to the crisis without finding truly effective outcomes.

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\* University of Perugia. This article was first presented as a paper during a guest lecture held at the Law Faculty of the Antwerp University on 6 March 2013 and then in Uppsala at the international conference European Citizenship—Twenty Years On (20–22 March 2013). I am grateful to all the participants to both events, and in particular to Marc Riguax, Herwig Verschueren, Patricia Mindus, and Floris De Witte for their insightful comments on an earlier draft of the paper. The usual disclaimer applies.

<sup>1</sup> See Fritz W. Scharpf, *Monetary Union, Fiscal Crisis and the Pre-emption of Democracy* (LEQS Paper No. 35, 2011).

<sup>2</sup> See MAURIZIO FERRERA & ELISABETTA GUALMINI, *SALVATIDALL'EUROPA?* (1999).

<sup>3</sup> See SYLVIE GOULARD & MARIO MONTI, *LA DEMOCRAZIA IN EUROPA. GUARDARE LONTANO* (2012).

In such a scenario—as one keen observer of the European scene elegantly noted—the idea of European citizenship as a *statut d'intégration sociale*<sup>4</sup> seems to take on the *savour* of a counter-intuitive paradox that is if anything capable of illuminating by contrast the miserable state reached by the integration process more than twenty years after the entry into force of the Maastricht Treaty. But like any apparent paradox, such a representation also contains an essential core of truth. This paper commences in order to place the relationship between European citizenship, labor law, and social rights in a perspective broader than the one prompted by a resigned look at the current crisis of the Union. That is what will be accomplished in the following pages. First through the apparently contradictory lines along which the case law of the Court of Justice of the European Union (CJEU) has built the relationship between European citizenship, labor law, and access to social rights.

Moreover, this relationship—which has been structured by the Court primarily around the transnational dimension of European citizenship—is today part of a political-institutional framework. In some respects this framework is much more complex and articulated than the one established by the Maastricht Treaty, which nonetheless had foreshadowed scenarios of differentiated integration into the inner core of a project for an ever closer union among the European peoples. On one hand, this relationship is in fact destined to be affected by the new constraints arising from the complex architecture of the European economic and monetary governance, which has been redesigned—most recently with the entry into force of the *Fiscal Compact*<sup>5</sup>—to counteract the effects of the financial crisis. On the other hand, such an architecture widely entrusted to unprecedented intergovernmental mechanisms lying outside the institutional framework of the Union opens up new scenarios for prospects of differentiated integration to resume effect, with potential consequences on the “social dimension” of European citizenship. These scenarios will have to be carefully explored, along with the new framework of the reformed economic constitution of the Union, before attempting to submit any concluding remarks on the relationship between European citizenship, labor law, and social rights in times of crisis.

This article proceeds as follows: First, the potential of European citizenship as a transnational form of social integration is outlined, taking as a comparison Marshall's classical analysis of the historical development of social rights in the context of the national Welfare State. From this perspective, Union citizenship may arguably play a potential role as a transnational guarantee for the basic social and labor rights underpinning the

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<sup>4</sup> Loïc Azoulai, *La citoyenneté européenne, un statut d'intégration sociale*, in CHEMINS D'EUROPE: MELANGES EN L'HONNEUR DE JEAN PAUL JACQUE, 1–28 (2010).

<sup>5</sup> Treaty on Stability, Coordination and Governance of the Economic and Monetary Union, Dec. 2, 2012, EC PRES/12/551 (The treaty was signed on 2 March 2012 by all the member countries of the Union except United Kingdom and Czech Republic.).

European project. Though, this potential is currently frustrated by the prevailing negative integration dimension as the interplay between Union citizenship and national systems of Welfare State. This negative dimension pervades the entire CJEU case law on Union citizenship, even becoming dominant—after the famous *Viking* and *Laval* judgments<sup>6</sup>—by the ways in which the justices in Luxembourg have built and set limits. In Marshall's terms this might be called the European collective dimension of "industrial citizenship." The new architecture of the economic and monetary governance of the Union—based as it is on an unprecedented effort towards a creeping constitutionalization of a neo-liberal politics of austerity and welfare retrenchment<sup>7</sup>—is destined to strengthen the de-structuring pressures on the industrial relation and the social protection systems of the Member States. The conclusion sums-up the main critical arguments and offers some suggestions for an alternative path for re-politicizing the social question in Europe.

### B. Union Citizenship as a Transnational Status for Social Integration

The idea of citizenship as a status for social integration is still owed to the seminal reconstruction done by Thomas H. Marshall in the early 1950s.<sup>8</sup> When Marshall first described the notion of social citizenship in the aftermath of the Second World War "in the context of the great transformation of organized labor rights and systems of protection of individuals against the typical risks of the proletarian condition,"<sup>9</sup> it bore the promise of integration and recognition of the majority of the population living from its work. Further, the European Constitutions of the time founded the revival of the State as a democratic and social "Welfare State."<sup>10</sup>

In Marshall's reconstruction, the full embodiment of social rights in the citizenship status, with the recognition of "a universal right to real income which is not proportionate to the

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<sup>6</sup> See *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti*, CJEU Case C-438/05 (Dec. 11 2007), <http://curia.europa.eu/>; *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, CJEU Case C-341/05 (Dec. 18, 2007), <http://curia.europa.eu/>.

<sup>7</sup> See EMILIANO BRANCACCIO & MARCO PASSARELLA, *L'AUSTERITÀ È DI DESTRA. E STA DISTRUGGENDO L'EUROPA* 83 (2012); WOLFGANG STREECK, *GEKAUFTE ZEIT. DIE VERTAGTE KRISE DES DEMOKRATISCHEN KAPITALISMUS* 79 (2013).

<sup>8</sup> See THOMAS H. MARSHALL & TOM BOTTOMORE, *CITIZENSHIP AND SOCIAL CLASS* (1992). The first edition of this work dates 1950.

<sup>9</sup> ETIENNE BALIBAR, *CITTADINANZA* 66 (Giovanni Grillo trans., 2012).

<sup>10</sup> Think of the Italian Constitution of 1948 and the German one of 1949. See PIETRO COSTA, *CIVITAS. STORIA DELLA CITTADINANZA IN EUROPA VOL. 4 - L'ETÀ DEI TOTALITARISMI E DELLA DEMOCRAZIA* 369 (2001); ALAN S. MILWARD, *THE EUROPEAN RESCUE OF THE NATION-STATE* (2000); TONY JUDT, *POSTWAR: A HISTORY OF EUROPE SINCE 1945* (2005).

market value of the claimant,”<sup>11</sup> presupposes the full maturity of “a secondary system of industrial citizenship.”<sup>12</sup> There the role performed by the trade union through collective bargaining is directly linked to the assertion of fundamental rights, and along with the role played by the State, it assumes “the guise of an action modifying the whole pattern of social inequality.”<sup>13</sup> But before that, as recently emphasized by Maurizio Ferrera,<sup>14</sup> the making of a modern system of social citizenship presupposed, in that analysis, the accomplishment of a double process. On one hand, a “geographical fusion” of Welfare State structures within national borders, in which the action of equalization based precisely on the status of citizenship could operate, and on the other hand, a “functional separation,” with the creation of administrative bodies responsible for the provision of social benefits and the parallel emergence of a system of industrial citizenship, based on the collective action of organized labor.

Even today these assumptions are clearly inapplicable to the notion of European citizenship because the CJEU has decisively reconfigured it as a privileged key for accessing national social spheres. The European integration process, in fact, has been historically founded on assumptions somewhat reversed compared to the dual process of geographical fusion and functional separation within the Nation State, described by Marshall in his historical analysis on the gradual building of social citizenship rights in Europe during the twentieth century.<sup>15</sup> This diversity of assumptions has preempted the scope of relevance of European citizenship, which today may accomplish the function of social integration—as effectively suggested by Loïc Azoulay—only in the specific and limited sense of defining a transnational status of access to social rights as guaranteed within the different solidarity-redistributive national systems in favor of Member States nationals moving within the Union.<sup>16</sup>

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<sup>11</sup> THOMAS H. MARSHALL & TOM BOTTOMORE, *CITIZENSHIP AND SOCIAL CLASS* 28 (1992). Marshall then continues, “in this way, social rights in their modern form imply an invasion of contract by status, the subordination of market price to social justice, and the replacement of the free bargain by the declaration of rights.” *Id.* at 40.

<sup>12</sup> *Id.* at 26.

<sup>13</sup> *Id.* at 28.

<sup>14</sup> Maurizio Ferrera, *Modest Beginnings, Timid Progresses: What’s Next for Social Europe?*, in *SOCIAL INCLUSION AND SOCIAL PROTECTION IN THE EU: INTERACTION BETWEEN LAW AND POLICY* 17–40 (Bea Cantillon, Herwig Verschueren & Paula Ploscar eds., 2012).

<sup>15</sup> See MAURIZIO CINELLI & STEFANO GIUBBONI, *CITTADINANZA, LAVORO, DIRITTI SOCIALI: PERCORSI NAZIONALI ED EUROPEI*, 3 (2014); MAURIZIO FERRERA, *THE BOUNDARIES OF WELFARE. EUROPEAN INTEGRATION AND THE NEW SPATIAL POLITICS OF SOCIAL PROTECTION* 111 (2005).

<sup>16</sup> Compare Azoulay, *supra* note 4, with STEFANO GIUBBONI, *DIRITTI E SOLIDARIETÀ IN EUROPA. I MODELLI SOCIALI NAZIONALI NELLO SPAZIO GIURIDICO EUROPEO* 177 (2012).

The Rome Treaty of 1957 envisioned the integration process along a path of geographical fusion and functional separation in some ways specular (and complementary) to the one described by Marshall in relation to the building of a national social citizenship.<sup>17</sup> The unification process was limited to the construction of a common market geographically co-extended to the territory of the founding Member States of the Community and based on the free movement of factors of production. In particular, the freedom of movement of workers and enterprises, and the guarantee of competition not distorted by unfair practices of private economic actors or unlawful interference by public authorities.<sup>18</sup> The idea of the Rome Treaty was that the unification process, under the aegis of the fundamental principles of the Community economic constitution,<sup>19</sup> was to be limited to the market sphere, without the involvement of the social systems of the founding States, which were supposed to maintain their functional separation within the national borders.<sup>20</sup> Geographical fusion of the common market and functional separation of the national Welfare State systems constituted the European Economic Community (EEC) as a “dual” system.<sup>21</sup> Here the full effectiveness of the principles enshrined in the Community economic constitution should have been rooted in an equivalent guarantee of social rights at the national level without affecting social and redistribution policies democratically undertaken by the several Member States.<sup>22</sup>

Social systems autonomously structured according to the different preferences of the democratic processes taking place in single Member States were seen as a necessary prerequisite of legitimacy of the same Community economic constitution. Insofar as they allowed it to perform its function as a legal constriction of the common market without trespassing in areas characterized by the discretion lying in redistributive policies based on social justice. That could be accomplished according to criteria of efficient allocation of

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<sup>17</sup> See STEFANO GIUBBONI, SOCIAL RIGHTS AND MARKET FREEDOMS IN THE EUROPEAN CONSTITUTION: A LABOUR LAW PERSPECTIVE 7–93 (2006).

<sup>18</sup> See MICHELLE EGAN, CONSTRUCTING A EUROPEAN MARKET (2002).

<sup>19</sup> In this context, the concept of economic constitution represented, on a supranational scale, the projection of the principles developed by German Ordoliberal theorists, who were very influential at the time the European integration process started, well beyond the borders of their country, also thanks to some prominent figures of Germany's political life in the 1950s and 1960s. See Simon Deakin, *The Lisbon Treaty, the Viking and Laval Judgments and the Financial Crisis: In Search of New Foundations for Europe's "Social Market Economy,"* in THE LISBON TREATY AND SOCIAL EUROPE 19, 21 (Niklas Bruun ed., 2012); Christian Joerges, *What Is Left of the European Economic Constitution? A Melancholic Eulogy*, 30 EUR. L. REV. 461 (2004); Florian Rödl, *The Labour Constitution*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 623 (Armin von Bogdandy & Jürgen Bast eds., 2010).

<sup>20</sup> See MAURIZIO FERRERA, THE BOUNDARIES OF WELFARE. EUROPEAN INTEGRATION AND THE NEW SPATIAL POLITICS OF SOCIAL PROTECTION 205 (2005).

<sup>21</sup> Fritz W. Scharpf, *The European Social Model: Coping with the Challenges of Diversity*, J. OF COMMON MKT. STUD. 645, 646 (2002).

<sup>22</sup> See FERRERA, *supra* note 20, at 111.



factors of production and guarantee of fair competition between economic agents.<sup>23</sup> The legal order of the common market was being embedded—and therefore legitimized—within the systems of national social protection able to absorb negative social effects deriving from the economic integration process. The main idea, expressed in the Ohlin Report and also in the one drawn by Paul Henri Spaak for the Messina Conference, was that if implemented with the necessary gradualism, economic integration would have automatically promoted a harmonization in the progress of national social systems (Art. 117 EEC Treaty).<sup>24</sup> In principle, such a spontaneous expansion of national social systems did not require supranational measures of social policy. These were only provided for in exceptional cases where social dumping (i.e., exceptionally low levels of labor and social security protection) had prevented the unfolding of the dynamics of convergence towards higher standards of protection.

The reasons, starting from the early 1990s and by decisive aspects, leading to the crisis of the model inspired by canons of classical *Ordoliberalism* are discussed below. The embryo of today's idea of European citizenship as a transnational status of social integration was already present *in nuce* in that model, and particularly in the provisions that the Rome Treaty delegated to the freedom of movement of workers in the terms specified by secondary Community legislation.<sup>25</sup> In fact, along with the right to access the labor market of the host country, the Community migrant worker has always benefited from a guarantee of full integration, or rather of assimilation,<sup>26</sup> within the social protection system of the host State.

The CJEU has always assured the highest *effet utile* to migrant workers' transnational entitlements to social integration within the host State. Such a guarantee of socio-economic integration served as a means for the full deployment of one of the fundamental freedoms of movement enshrined in the Treaty. At the same time, it was included in a model for the construction of an integrated market based on the full preservation of the autonomy of national social protection systems.<sup>27</sup> Equal access of migrant workers to the social rights laid down by the host Member State through the coordination of the social

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<sup>23</sup> See GIUBBONI, *supra* note 17, at 29.

<sup>24</sup> Treaty Establishing the European Economic Community, Mar 25, 1957, 1957 O.J. (C 321E).

<sup>25</sup> In particular by Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community repealed and replaced today by Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.

<sup>26</sup> See Michael Dougan & Eleanor Spaventa, "Wish You Weren't Here . . ." *New Models of Social Solidarity in the European Union*, in SOCIAL WELFARE AND EU LAW 181–218, 189 (Michael Dougan & Eleanor Spaventa eds., 2005).

<sup>27</sup> See STEFANO GIUBBONI & GIOVANNI ORLANDINI, LA LIBERA CIRCOLAZIONE DEI LAVORATORI NELL'UNIONE EUROPEA 139 (2007).

security systems of the countries involved (as provided for since Regulation 3/1958),<sup>28</sup> not only did not interfere with the “social sovereignty” of the Member States, but also helped to guarantee it by assuring full territorial application of national labor law and social welfare. This explains precisely why such a guarantee has been precociously and extensively interpreted by the case law of the Court of Justice since the early 1960s.

This well-known jurisprudence does not need to be analyzed in this context.<sup>29</sup> Here it is sufficient to recall how on one hand, and in the absence of an express legal definition, the Court adopted a very broad notion of “employee,” encompassing all activities having any minimal effective economic consistency carried out under the direction of another person. On the other hand, the Court allowed holders of this fundamental freedom of movement, and their families, to access the whole panoply of social rights guaranteed to the citizens of the host State in conditions of full equality, even beyond situations and entitlements linked to the protection of the employment relationship. The Court was first able to extend the guarantee of equal treatment in the host State to atypical workers, particularly part-time (even minimal) and fixed-term workers, well in advance of the unstoppable expansion of non-standard types of employment in national labor markets during the last decade. Moreover, according to Art. 7 of Regulation 1612/68,<sup>30</sup> the notion of “social advantage” undoubtedly included social security benefits, such as the guarantee of a minimum income provided for on the basis of a universal principle of national solidarity. In this vein, as has been aptly said:

Social integration into the host society is seen by the CJEU as an instrument of promoting participation in the EU internal market and its economic goals of free movement of factors of production, even if their productivity would be rather low. The rationale behind this case law has to do more with the internal market than with combating against social exclusion, even if this actually contributes to the latter.<sup>31</sup>

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<sup>28</sup> The rules governing the coordination of national social security systems are now contained in Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (text with relevance for the EEA and for Switzerland) and Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems.

<sup>29</sup> Within the vast literature on the subject, see CATHERINE BARNARD, *THE SUBSTANTIVE LAW OF THE EU. THE FOUR FREEDOMS* 263 (2010); GIUBBONI & ORLANDINI, *supra* note 27, at 11.

<sup>30</sup> Regulation EEC No. 1612/68 on Freedom of Movement for Workers Within the Community, Oct. 15, 1968, O.J. (L 257) 2–12.

<sup>31</sup> Herwig Verschueren, *Union Law and the Fight against Poverty: Which Legal Instruments?*, in *SOCIAL INCLUSION AND SOCIAL PROTECTION IN THE EU: INTERACTION BETWEEN LAW AND POLICY* 205–31, 217 (Bea Cantillon, Herwig Verschueren & Paula Ploscar eds., 2012).

A form of social integration in the host Member State is already firmly assured by the classic CJEU case law on the freedom of movement of workers. Moreover, it is extended to individuals whose contribution to the internal market was actually only potential or very indirect. This expansive tread of the CJEU's case law has been further expanded by secondary Community law, particularly by the rules on the coordination of the national social security systems. Ever since the 1970s, they have followed a line of further expansion of the sphere of application and inclusion *ratione personae* of the tools of transnational access to the welfare systems of the Member States.

Starting from the leading case *Martínez Sala* to the more recent *Zambrano* judgment,<sup>32</sup> the Court has extended the principle of equal treatment in the access to social rights recognized in the host country to all economically inactive European citizens. In the light of the historical evolution briefly presented here, it seems fair to say that this case law does nothing but generalize the status of social integration already widely acquired by EU law on the free movement of workers. By considering being a citizen of the Union as the fundamental status of a person in the supranational order,<sup>33</sup> this case law undoubtedly has the merit of universalizing<sup>34</sup> the social integration logic hitherto anchored to the functioning of the internal market. It also includes people who do not carry out an economic activity in its protective status, centered on the principle of equal treatment. In fact, the main innovation in this case law is the universal projection of the transnational model of social solidarity already foreshadowed by the Rome Treaty in favor of migrant workers within the Community in a way that, as such, was still related to the actual functioning of the common or internal market.

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<sup>32</sup> See *María Martínez Sala v. Freistaat Bayern*, CJEU Case C-85/96, 1998 ECR I-02691; *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, CJEU Case C-34/09 (Mar. 08, 2011), <http://curia.europa.eu/>.

<sup>33</sup> According to the well-known formula consolidated by the judgment of the Court of Justice in *Rudy Grzelczyk v. Centre public d'aide sociale Ottignies-Louvain-la-Neuve*, CJEU Case C-184/99, 2001 ECR I-06193.

<sup>34</sup> In some cases, far beyond a literal interpretation of secondary law, and particularly of Directive 2004/38/EC 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 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, and 93/96/EEC (Text with EEA relevance) would allow, but, obviously, still within the scope of the European membership, which requires the possession of the citizenship of a Member State of the Union (and, therefore, excludes citizens of third countries). This is a serious limitation that tends to exclude citizens of third countries from the social integration status entitled to by European citizenship, undermining its effectiveness as fundamental status of individuals in the Union. The matter cannot be dealt with here. For a recent analysis of the intermediate status guaranteed to long-term resident third countries' immigrants by Directive 2003/109/EC, see Maurizio Ferrera, *Free Movement, Immigration and Access to Welfare: Trends and Perspectives* (CENTRO EINAUDI—LABORATORY OF COMPARATIVE POLITICS AND PUBLIC PHILOSOPHY, Working Paper LPF No. 3, 2011), <http://www.centroeinaudi.it/lpf/working-papers/wp-all/8287-free-movement-immigration-and-access-to-welfare-trends-and-perspectives.html>.

In the evolution undergone by the CJEU case law—based on the constitutional recognition of the freedom of movement contained in Art. 21 TFEU as a pivot of the freedom of movement of persons within the Union—some commentators have recognized a change in the legal paradigm of European social solidarity.<sup>35</sup> If access to social protection systems in the Member States was initially functional to the effectiveness of the common labor market, according to this case law it now becomes a self-constitutive element of Union citizenship, as a status of social integration completely separate from a market rationale and the original idea of *homo oeconomicus*.<sup>36</sup> According to this analysis, a paradigm-shift has to be drawn from a selective and category-based model of “market solidarity”<sup>37</sup> to the recognition of “a transnational personal status.”<sup>38</sup> This establishes a general claim of social integration in the Member State of the Union where European citizens freely decide to settle, not unlike what happens in federal found in federal states.

Even by sharing such an opinion, we cannot avoid highlighting the intrinsic limits of a model of solidarity that—being transnational and not supranational<sup>39</sup>—fails to ensure economically inactive European citizens an unconditional freedom of residence in the host country; nor, correspondingly, the right to access the social protection system of that State on the basis of complete equality of treatment with its citizens, at least until the person has acquired the status of long-term resident under Article 16 of Directive 2004/38/EC. In fact, on one hand, the right to reside in another Member State for a period exceeding three months is, at least in theory, conditional upon the “reverse means-test” of having a comprehensive health insurance and, more importantly, sufficient economic resources to ensure that the economically inactive citizen does not become a burden on the welfare system of the host State (Article 7 of Directive 2004/38/EC).<sup>40</sup> On the other hand, transnational access to the systems of social solidarity in the Member States under equal treatment follows an incremental criterion, also in the Court’s case law, according to which, whenever the Union citizen does not carry out an activity that is useful for the

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<sup>35</sup> See, e.g., OXANA GOLYNKER, *UBIQUITOUS CITIZENS OF EUROPE: THE PARADIGM OF PARTIAL MIGRATION* (2006).

<sup>36</sup> See Cesare Pinelli, *Cittadinanza Europea*, in *ENCICLOPEDIA DEL DIRITTO - ANNALI*, I 181, 186 (2007).

<sup>37</sup> Floris De Witte, *Transnational Solidarity and the Mediation of Conflicts of Justice in Europe*, 18:5 EUR. L.J. 694 (2012).

<sup>38</sup> Azoulai, *supra* note 4, at 8.

<sup>39</sup> Pinelli, *supra* note 36, at 190.

<sup>40</sup> European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing 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, and 93/96/EEC. This implies the right of the host State to expel those who become an unreasonable burden for its social assistance system (although such a power cannot be exercised in the guise of an automatic punitive reaction against the needy European citizen and must be yielded in accordance with the principle of proportionality according to Article 14.3 of the Directive).

internal market, according to the specific context, he or she shall prove a sufficient degree of integration in the society of the host country (or, for those seeking employment, the existence of a real link with the labor market of that country).

These limits have a precise rationale. We are not dealing with a supranational form of social solidarity based on the partial pooling of the resources deriving from the different national social protection systems, but rather with the creation of a certain degree of financial solidarity towards needy migrant citizens of another Member State.<sup>41</sup> The host State may legitimately require that access to its welfare system be based on a minimum substrate of social integration already legitimately acquired by the individual—in order to prevent an opportunistic use of the freedom of movement for the mere sake of benefit tourism. This does not turn into an unreasonable burden for the national social assistance system. In this perspective, the genuine link of integration within the society of the host country becomes a sort of “counter-limit applied by the Court against the limits that Member States can legitimately be opposing to their financial solidarity obligations towards Union citizens.”<sup>42</sup>

Therefore, the exclusively transnational dimension of social solidarity connected to European citizenship must deal with an inherent tension that inevitably reappears every time that the freedom of movement, not functional to the internal market, ends up impinging on the public finances of the national welfare system. This tension cannot be resolved from the perspective of a status of social integration (and, thus, of a solidarity system) that is truly supranational (e.g., regulated and at least partly financed directly at the Union level). It must be dealt with by using similar techniques to those characterizing the balance between fundamental freedoms and limits founded on overriding reasons of general interest legitimately raised by the Member State concerned. The peculiarity in this case is that public interest—in light of which the States are authorized to limit the freedom of movement and the subsequent claim to equal social treatment of economically inactive European citizens—is based on the need to ensure the sustainability of their social protection systems, or rather to preserve the redistributive capacity of their national systems of social solidarity. In this perspective, it can be said that the active or expansive use of the principle of European transnational solidarity becomes tense, and therefore needs to be balanced with the defensive use of the principle of national social solidarity<sup>43</sup> in a similar way to that happening in the context of the internal market.<sup>44</sup> Not surprisingly,

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<sup>41</sup> Grzelczyk, CLEU Case C-184/99 at para. 44.

<sup>42</sup> Azoulay, *supra* note 4, at 18.

<sup>43</sup> See Catherine Barnard, *EU Citizenship and the Principle of Solidarity, in Social Welfare and EU Law* 157–80 (Michael Dougan & Eleanor Spaventa eds., 2005).

<sup>44</sup> See Ségolène Barbou des Places, *Solidarité et Mobilité des Personnes en droit de l'Union Européenne: Des Affinités Sélectives?*, in *LA SOLIDARITÉ DANS L'UNION EUROPÉENNE*, 217–44 (Chahira Boutayeb ed., 2011).

similar to this context, the core of these balancing attempts is represented by the graduation in the principle of proportionality in relation to concrete facts of individual cases. Similar to the context of the free provision of services in the internal market, such attempts of balancing the interests at stake are systematically biased by virtue of a strict application of the principle of proportionality,<sup>45</sup> in favor of the individual freedom of movement of the (economically inactive) European citizen.

Thus, the individualistic root of the status of social integration conferred on the individual through European citizenship comes into conflict with the collective foundation of the solidarity systems operating within the Nation State.<sup>46</sup> The result becomes that, even on behalf of social integration for European citizens in light of the principle of equal treatment, the constitutional social freedom entrusted to the European mobile citizen is likely to exert additional pressure on the heavily burdened welfare systems of the Member States, fostering the social-levelling-down dynamics going on within these systems. While there is little evidence of the emergence of a supranational dimension of Union citizenship,<sup>47</sup> the de-bounding logic of openness dominant in its transnational dimension is likely to become an additional destabilizing factor for the national Welfare State systems. These systems are already burdened by the consequences of the economic and financial crisis and by the measures that the Union itself demands to adopt in order to cope with them. Lacking the socio-political requirements for the emergence of an even minimal pan-European solidarity system at the Union level, “the paradox of the *civis europaeus* status, which has not reached a complete legal consistency yet, and which could already summarize the crisis of the whole European project, is no surprise.”<sup>48</sup>

### **C. Free Movement of Services, Labor Law, and Collective Social Rights in the Internal Market**

The fragility of the status of social integration guaranteed by the Union citizenship in a merely transnational dimension emerges in a conspicuous way when its important

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<sup>45</sup> See, e.g., *Déborah Prete v. Office national de l’emploi*, CJEU Case C-367/11 (Oct. 25, 2012), <http://curia.europa.eu/>.

<sup>46</sup> See ANDREW WILLIAMS, *THE ETHOS OF EUROPE: VALUES, LAW AND JUSTICE IN THE EU* 132 (2010); Alexander Somek, *The Social Question in a Transnational Context*, 14 (LEQS PAPER No. 39, 2011).

<sup>47</sup> Attempts to strengthen the supranational dimension of Union citizenship by applying the rights connected to this status in situations lacking any degree of trans-nationality and cross-border elements were ambiguously made in the *Zambrano* judgment. The potential scenarios envisioned by that ruling, immediately downsized by *McCharty*, Case C-434/09 (May 5, 2011), were nonetheless further limited by subsequent rulings of the Court of Justice. See *Murat Dereci v. Bundesministerium für Inneres*, CJEU Case C-256/11 (Nov. 15, 2011), <http://curia.europa.eu/>; *O., S. v. Maahanmuttovirasto and Maahanmuttovirasto v. L. Cf. Spinaci*, CJEU Cases C-356/11, C-357/11 (Dec. 6, 2012), <http://curia.europa.eu/>.

<sup>48</sup> Pinelli, *supra* note 36, at 198.

“external” limits of application are taken into account. The example of posting workers under a cross-border provision of services within the internal market is paradigmatic of those limits, and illustrates better than any other case study the contradictory outcomes of a notion of European social citizenship that is framed within the individualistic conceptual landscape of the freedom of movement.

The four well-known judgments, *Viking Line*, *Laval*, *Rüffert*, and *Commission vs. Luxembourg* became famous for having altered, probably irreversibly, the relationship between national social systems and internal market law, as originally configured by the Rome Treaty with the system-decision of “de-coupling”<sup>49</sup> the two spheres by maintaining a strict functional separation between them. That case law—which brings to completion the transformation of the constitutional doctrines of the internal market implemented by the Court at the beginning of the 1990s with leading cases, such as *Rush Portuguesa* and *Säger*—has inverted the original constitutional balance between market unification and the preservation of the autonomy of the national systems of labor law, with a paradigm-shift “from ordoliberal to neoclassical conceptions of the market in EU law.”<sup>50</sup>

As originally conceived, the autonomy of the social systems of the Member States is a prerequisite for the establishment of the common market, as it is capable of providing the necessary social counterbalance to the phenomena of economic dislocation induced by the European market integration at national levels. In this context, accepted in the Treaty of 1957 on the basis of the theoretical-political infrastructure contained in the Ohlin and Spaak Reports, a European labor code is neither necessary nor desirable,<sup>51</sup> because the diversity of the national regulatory models in itself is not a factor of distortion of competition and of free movement of resources of production within the common market. Within this concept, a Community selective harmonizing intervention—in an upward logic of harmonization of national systems—may be rather appropriate in exceptional cases in which the different labor law standards of protection do not reflect a real difference in the levels of work productivity nor can they be neutralized by adjusting the exchange rates, therefore being able to determine an actual distortion of competition in the form of social dumping.

This idea is simply overturned by the neo-liberal or neoclassical judicial turn undertaken by the Court of Justice: “The common idea underpinning *Viking*, *Laval* and the subsequent case law in the same line is that national-level labour law rules are capable of constituting a distortion of competition within the internal market and, as such, must be justified by

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<sup>49</sup> Scharpf, *supra* note 21.

<sup>50</sup> Deakin, *supra* note 19, at 21.

<sup>51</sup> See Luca Nogler, *Why Do Labour Lawyers Ignore the Question of Social Justice in European Contract Law?*, 14:4 EUR. L.J. 483 (2010).

reference to a strict test of proportionality.”<sup>52</sup> In particular, the strict application of the “market access test” to the obstacles to free provision of services deriving from the higher standards of labor protection in force in the country in which the service is supposed to be carried out<sup>53</sup> puts the system of labor law of that State under a justified pressure which is completely inconceivable in the constitutional design originally taken up by the Rome Treaty. In the system laid down by the EEC Treaty, as promptly implemented by Regulation no. 1612/68,<sup>54</sup> no exception was made to the full territorial application of national labor law of the host country according to the principle of equal treatment on grounds of nationality in cases of temporary mobility of posted workers within a transnational provision of services. On the contrary, the new *Laval* ideology not only bars the full application of the whole labor law (legal and collective) rules of the host country to the worker temporarily posted within a provision of services, but, according to the Court’s interpretation of Article 3.7 of Directive 96/71/EC,<sup>55</sup> it even prohibits raising the standard of protection above the threshold set by the rules on minimum protection of that State. These rules, therefore, also determine the maximum level of protection within the very broad context of a transnational posting of workers as defined by Article 3.1 of the Directive. In this way, “in *Laval* and in its later judgment *Rüffert*, the Court overturned the presumption in favour of the territorial effect of labour legislation, at least in the context of freedom to provide services.”<sup>56</sup> Therefore, with the only exception of the core of mandatory rules of minimum protection, labor law was attracted within the regulatory competition in the internal market of services at the time when, with the great EU enlargement, the Eastern countries with weaker standards of protection and industrial relation systems entered the Union. The possibility, at least partially, of applying to posted workers the less protective rules of labor law and the lower collective standards of the service provider’s country of origin has been considered essential to a proper functioning of the enlarged internal market, as a legitimate option of exploitation of the competitive advantage gained by eastern European companies.

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<sup>52</sup> Deakin, *supra* note 19, at 24.

<sup>53</sup> See Gareth Davies, *Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law*, 11 GERMAN L.J. 671 (2010).

<sup>54</sup> Directive 96/71/EC Concerning the Posting of Workers in the Framework of the Provision of Services, Jan. 1, 1997, 1997 O.J. (L 18).

<sup>55</sup> See *Laval un Partneri Ltd v, Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, CJEU Case C-341/05 (Dec. 18, 2007), <http://curia.europa.eu/>; *Dirk Rüffert v. Land Niedersachsen*, CJEU Case C-346/06 (Apr. 3, 2008), <http://curia.europa.eu/>.

<sup>56</sup> Catherine Barnard & Simon Deakin, *European Labour Law after Laval*, in *BEFORE AND AFTER THE ECONOMIC CRISIS. WHAT IMPLICATIONS FOR THE “EUROPEAN SOCIAL MODEL”?* 252–69 (Marie-Ange Moreau ed., 2011).



The overturning of the original idea of the founding Treaties produced by the affirmation of this neoclassical—or “ultra-liberal”<sup>57</sup>—conception of internal market law has important and only apparently indirect consequences on the idea of a European citizenship as a status of social integration. The first obvious consequence is the rupture of the universalistic and unifying claims of that idea which actually requires the founding character of a European *status civitatis* in the new constitutional order of the Union, according to the same fundamental rights language of the Court’s case law. With the sole exception of the minimum rules of mandatory protection in the host State, a worker posted within a transnational provision of services is not entitled to benefit from this fundamental status entrusted to him or her by European Union law, but is attracted towards the protective status of the economic freedom of the enterprise that is employing him or her in the cross-border provision of the service. We are in the presence of a subtle attempt of re-commodification of the posted worker, whose labor force tends to be assimilated to the other productive factors organized by the employer provider of the service, and indeed, considered an important element of the competitive advantage enjoyed by the company in the internal market for its lower cost.

The Court’s main argument for that purpose is that a worker posted within a temporary provision of services does not belong to the labor market of the host Member State, but rather to the one of the country of origin. It is a weak argument, at least in relation to all the cases in which the work carried out under the posting, although temporary when considered in the very broad and quite indeterminate sense endorsed by the Court’s case law, lasts for a long time, years even, in the territory of the host country. The key point is that the mobility of the worker posted within the employment relationship formally established in the country of origin is no longer qualified under the aegis of the free movement of workers protected by Article 45 TFEU, as originally conceived, but according instead to the freedom to provide services under Article 56 TFEU.<sup>58</sup> In the Court’s reasoning, this justifies an otherwise clear rupture of the principle of equal treatment, on which the idea of European citizenship as a transnational status of social integration for the person moving within the Union is based, even when such free movement takes place for reasons unrelated to market integration. The worker posted in the Member State in which the service is carried out is not to be treated the same way as workers belonging to the labor market of that country (and with whom, in fact, he carries out his work). The full extension of labor law of the host country would determine an illegitimate, disproportionate obstacle to the economic freedom of the provider of the service. But this

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<sup>57</sup> Alain Supiot, *Conclusion: Europe’s Awakening*, in *BEFORE AND AFTER THE ECONOMIC CRISIS. WHAT IMPLICATIONS FOR THE “EUROPEAN SOCIAL MODEL”?* 292–309, 292 (Marie-Ange Moreau ed., 2011).

<sup>58</sup> See Antonio Lo Faro, *Diritto al Conflitto e Conflitto di Diritti nel Mercato Unico: Lo Sciopero al Tempo della Libera Circolazione*, in 1 *RASSEGNA DI DIRITTO PUBBLICO EUROPEO* 45 (2010).

“gross violation of the principle of equality,”<sup>59</sup> in eroding the territoriality of national labor law,<sup>60</sup> excludes workers posted under the different elusive modes of a transnational provision of services from the status of social integration, to which Union citizenship would otherwise give access.

A second and no less important implication of the Court of Justice’s new course of law—returning to the historical analysis by Marshall—can be found in what we might call the fundamental conceptual aversion of the Luxembourg justices to the idea of “industrial citizenship” as an essential element of the gradual affirmation of social rights in Europe within the framework of a national Welfare State. In *Viking* and *Laval* the innovative affirmation of direct horizontal enforceability of the freedom of establishment and the freedom to provide services deprived of meaning the concomitant statement for which strike must be guaranteed as an EU fundamental right, also in relation to the ways in which the Court carried out the alleged “balancing” between conflicting interests. Indeed, it is difficult to find traces of a true constitutional balancing of rights that are at least equally important at the EU level in the Court’s reasoning. In evaluating the Court’s reasoning in *Viking* and *Laval* in light of the balancing of rights notion that is prevalent within highly developed national constitutional cultures<sup>61</sup> and the most reliable European theoretical thinking,<sup>62</sup> we cannot find any proper kind of balancing exercise in the two judgments. There is no balancing exercise because the Court’s *modus operandi* did not deviate from the classical logical framework of fundamental economic freedom in any of the situations in which the national measure—that is obstructing its exercise—is properly related to any interests worthy of protection within the legal order of the Member State. The Court, as always, will acknowledge these interests insofar as they comply with the principles of adequacy, necessity, and strict proportionality. In spite of the declared reallocation of the rights to strike and take collective action within the circle of EU fundamental rights, “what the Court has accomplished is not a balancing-act between two equally-footed rights, but a much more traditional scrutiny of compatibility between national rules and Community law.”<sup>63</sup> And in this logic, the aim is not to balance between equally standing rights, but

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<sup>59</sup> Supiot, *supra* note 57, at 301; Antonio Lo Faro, *Toward a De-fundamentalisation of Collective Labour Rights in European Social Law?*, in *BEFORE AND AFTER THE ECONOMIC CRISIS. WHAT IMPLICATIONS FOR THE “EUROPEAN SOCIAL MODEL”?* 203, 207 (Marie-Ange Moreau ed., 2011).

<sup>60</sup> Barnard & Deakin, *supra* note 56, at 252, 260; GIUBBONI, *supra* note 16, at 91.

<sup>61</sup> For the Italian constitutional culture, see A. Morrone, *Bilanciamento (giustizia cost.)*, in *ENCICLOPEDIA DEL DIRITTO - ANNALI*, II, VOL. II 185 (2008).

<sup>62</sup> See ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* 100 (2010).

<sup>63</sup> Lo Faro, *supra* note 58, at 54.

rather to reaffirm a principle of hierarchy among legal systems according to the classical view of the primacy of Union law as affirmed by the Court of Justice.<sup>64</sup>

Thus, the recognition of the right to strike as an EU fundamental right is concretely, and paradoxically, resolved in its “de-fundamentalization.”<sup>65</sup> If compared to economic freedom, the right to take collective action—through which the constitutional systems of Finland and Sweden protect strike-actions according to a logic that essentially relies on the self-regulation of the collective actors themselves—loses its constitutional or fundamental nature. It is evaluated “the same way as any other national legal provision.”<sup>66</sup> In the Court’s approach, the only fundamental right is economic freedom, while strike actions—considered for their concrete effects as a national measure restricting access to the internal market—are basically downgraded to an exception to the exercise of the freedom of establishment or the freedom to provide services. This exception is only allowed under very limited circumstances due to a strict proportionality test.

This actual de-fundamentalization of the right to strike reveals a very simplistic proto-liberal, rather than neoclassical,<sup>67</sup> view of the function of industrial conflict and more generally of the action of organized labor within the dynamics of the internal market. Obviously, if the right to take collective action is not abruptly denied by the Court—as in the classical proto-liberal model of post-revolutionary France symbolized throughout Europe by the *Le Chapelier* law<sup>68</sup>—then certainly the idea of that right sterilizing its potential effects is accepted. Such acceptance significantly reduces its margins of feasibility. Moreover, it discourages—or at least makes it very difficult to pursue—the construction of a social counter-power at a transnational level that is able to effectively counteract the increased market power of enterprises,<sup>69</sup> which are strategically advantaged by the new options opened up by regulatory and fiscal competition in the

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<sup>64</sup> *Id.* See also Nikitas Aliprantis, *What Remedies for Social Derivatives and Expansionism of the Court of Justice of the European Union?*, in *BEFORE AND AFTER THE ECONOMIC CRISIS. WHAT IMPLICATIONS FOR THE “EUROPEAN SOCIAL MODEL”?* 89–98 (Marie-Ange Moreau ed., 2011).

<sup>65</sup> Lo Faro, *supra* note 59, at 203–16.

<sup>66</sup> Lo Faro, *supra* note 58, at 45.

<sup>67</sup> In criticizing this case law, Christian Joerges has provocatively evoked the “authoritarian liberalism” formula coined by Hermann Heller at the beginning of the 1930s. See Christian Joerges, *Rechtsstaat and Social Europe: How a Classical Tension Resurfaces in the European Integration Process*, 9 *COMPARATIVE SOC.* 65, 75 (2010).

<sup>68</sup> See Vittorio Angiolini, *Laval, Viking, Rüffert e lo spettro di Le Chapelier*, in *LIBERTÀ ECONOMICHE E DIRITTI SOCIALI NELL’UNIONE EUROPEA* 51 (Amos Andreoni & Bruno Veneziani eds., 2009). Vittorio Angiolini provocatively makes such a reference in this work.

<sup>69</sup> See MARC RIGAUX, *LABOUR LAW OR SOCIAL COMPETITION LAW? ON LABOUR LAW IN ITS RELATION WITH CAPITAL THROUGH LAW* 47 (2009).

internal market.<sup>70</sup> In particular, the extension of the strict proportionality test to union collective action—which is already conceived as limiting the intrusiveness of the State public powers—threatens to undermine the effectiveness of the recourse when industrial conflict vigorously favors the employer’s interests. In fact, such a test quite naturally leads to a tendentious and paradoxical assessment of the illegitimacy of the strike action at hand and how effective it is in pursuing the trade unions’ or workers’ collective strategies.<sup>71</sup>

The de-fundamentalization of collective rights entails an inevitable weakening of the collective dimension in the construction of strong systems of social rights. Marshall effectively summarized this effect with the “secondary industrial citizenship” formula in his historical analysis of the national Welfare State. But even in the different European and transnational contexts, the construction of new forms of solidarity among strangers—which respond to the demands of the economic crisis and the challenges of global markets—would still require the acknowledgement of strong collective rights<sup>72</sup> to an extent that the Court of Justice does not yet seem ready to accept. In this restrictive approach taken by the Court on the rights to collective action in the internal market, we can grasp a thin, but strong, *fil rouge* with the case law on access to welfare benefits in favor of economically inactive EU citizens. This case law is entirely framed and enclosed within the individualistic paradigm of the freedom of movement. Furthermore, even when the Court opens the doors of transnational social justice to migrant EU citizens, it always does so in the name of the underlying preeminence of individual actors’ life chances rather than in the name of the reciprocity bonds of collective solidarity on which national welfare systems are based. Even when the Court favors opportunities of social integration in the solidarity welfare communities of the Member States,<sup>73</sup> the right to move within the European legal space—imagined as a “springboard” to overcome the limitations imposed by national decision-making processes<sup>74</sup>—ends up depreciating the essential collective dimension of the solidarity systems in the different countries. The depreciation implies bonds and constraints of reciprocity between rights and corresponding duties as well as

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<sup>70</sup> See Catherine Barnard & Simon Deakin, *European Labour Law after Laval*, in *BEFORE AND AFTER THE ECONOMIC CRISIS: WHAT IMPLICATIONS FOR THE “EUROPEAN SOCIAL MODEL”?* 252, 252–69 (Marie-Ange Moreau ed., 2011); see also Ulrich Mückenberger, *Towards a Post-Viking/Laval Manifesto for Social Europe*, in *BEFORE AND AFTER THE ECONOMIC CRISIS: WHAT IMPLICATIONS FOR THE “EUROPEAN SOCIAL MODEL”?* 239, 245 (Marie-Ange Moreau ed., 2011).

<sup>71</sup> See Alexander Somek, *The Social Question in a Transnational Context* 37 (LEQS Discussion Paper Series, Working Paper No. 39, 2011).

<sup>72</sup> See SYLVANA SCIARRA, *L’EUROPA E IL LAVORO. SOLIDARIETÀ E CONFLITTO IN TEMPI DI CRISI* 64 (2013).

<sup>73</sup> See Loïc Azoulay, *La citoyenneté européenne, un statut d’intégration sociale*, in *CHEMINS D’EUROPE* 1, 16 (Mélanges Jean Paul Jacqué ed., 2010); see also Maurizio Ferrera, *Free Movement, Immigration and Access to Welfare: Trends and Perspectives* 3–4 (Centro Einaudi—Laboratory of Comparative Politics and Public Philosophy, Working Paper No. LPF 3/11, 2011).

<sup>74</sup> See Thorsten Kingreen, *Fundamental Freedoms*, in *PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW* 515 (Amin von Bogdandy & Jürgen Bast eds., 2010).

inevitable compromises between the different interests at stake in the distributive conflicts mediated by the national Welfare State.

Fundamental freedoms, including the one protected under Article 21 of the TFEU, play a typical anti-majority role that is of crucial importance in correcting the “parochialism” of national decision making and forcing an internalization—in the name of the principle of non-discrimination—of the legitimate distributive interests of those who, although unrelated to national communities, are entitled to be socially integrated in those spheres of solidarity as members of the broader and more inclusive European polity.<sup>75</sup> As a project of transnational civilization, this is obviously a fundamental—or rather founding—function of EU law and European integration itself.<sup>76</sup>

Although, the Court’s jurisprudence raises a distinct issue that is made more visible and acute today by the most serious social and economic crisis in Europe since World War II. The seemingly unstoppable spillover of the anti-majoritarian logic of transnational opening to outsiders—which is typical of the fundamental freedoms guaranteed by the Court’s case law—in fact challenges the capability of the Member States to maintain adequate levels of social protection and distributive justice within their borders. This issue arises at the same time as the new economic and monetary constitution of the Union—in responding to the financial crisis—imposes increasingly severe and pervasive supranational constraints on the national democratic Welfare State systems. Union law deprives Member States of decisive levers of political-democratic control over their welfare systems and does not compensate for this partial loss by delivering distributive social justice at a supranational level. The asymmetry between negative and positive integration, classically analyzed by Fritz Scharpf,<sup>77</sup> has never been so evident in the history of the integration process. And with the deepening of this asymmetry, the social deficit of European integration is at risk of converting into a crisis for the Union’s democratic legitimacy.

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<sup>75</sup> See MIGUEL POIARES MADURO, WE THE COURT: THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION (1998); Thorsten Kingreen, *Fundamental Freedoms*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 515 (Amin von Bogdandy & Jürgen Bast eds., 2010); Floris De Witte, *Transnational Solidarity and the Mediation of Conflicts of Justice in Europe*, 18 EUR. L.J. 694 (2012).

<sup>76</sup> See JOSEPH H.H. WEILER, THE CONSTITUTION OF EUROPE 324 (1999); Joseph H.H. Weiler, *In Defence of the Status Quo: Europe’s Constitutional Sonderweg*, in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 7 (Joseph H.H. Weiler & Marlene Wind eds., 2003).

<sup>77</sup> See FRITZ W. SCHARPF, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC? 10 (1999).

**D. National Social Citizenship and New Economic and Monetary Governance of the Union**

We cannot analyze in detail the complex measures by which the Member States of the Union, particularly those that are part of the Euro-zone, have tried to come out of the financial crisis. These measures include efforts to reform the European economic and monetary governance and introduce instruments of financial aid for the most affected countries, especially those in risk of default. From the initial measures taken in 2010 in response to the Greek debt crisis up until the adoption of the Treaty on the European Stability Mechanism (ESM) and the entry into force of the *Fiscal Compact*, the Union has undoubtedly made a considerable effort to provide appropriate instruments to counter the unprecedented crisis that has put the survival of the single currency project at risk.<sup>78</sup> These reforms—both those implemented within the institutional framework of the Union and those adopted through the recourse of the intergovernmental method and the subtly revised instruments of international law—present a common trait that is important to highlight in this analysis. The common trait—critically stressed in many analyses, though carried out under different inspirations<sup>79</sup>—can be described as the radicalization of the already noted trend to compress the autonomy of the Member States. Especially those whose common currency is the Euro, with respect to the management of their social policies and in an almost complete overturn of the constitutional constellation originally designed by the Rome Treaty. This trend is intensified—particularly within the new rules of the Stability Pact and the *Fiscal Compact*—when it assumes the shape of a creeping depoliticization of the social and distributive justice issues that are central to the definition and very identity of the different welfare systems of the Member States.

It is well known that the single currency project—as conceived by the framers of the Maastricht Treaty—has been built on a model that is the exact opposite of the models with a solidarity nature *lato sensu* that generally characterize federal systems, although according to very different variations. The establishment of a European Central Bank totally independent from national governments and modeled on the German *Bundesbank* ensures the stability of the single currency. The single currency was not based on a partial centralization of competencies regarding fiscal and budget policies at the Union level—as in federal entities—nor on a federal budget as was suggested in the 1970s by the

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<sup>78</sup> This has become an essential part of the political project of an ever-closer Union among the European people since the 1990s. See THE SINGLE CURRENCY AND EUROPEAN CITIZENSHIP: UNVEILING THE OTHER SIDE OF THE COIN (Giovanni Moro ed., 2013).

<sup>79</sup> See, e.g., Fritz W. Scharpf, *Monetary Union, Fiscal Crisis and the Pre-emption of Democracy* (LEQS Discussion Paper Series, Working Paper No. 35, 2011); Alexander Somek, *The Social Question in a Transnational Context* (LEQS Discussion Paper Series, Working Paper No. 39, 2011); Kaarlo Tuori, *The European Financial Crisis: Constitutional Aspects and Implications* (EUI Working Papers LAW, Paper No. 2012/28, 2012); Floris De Witte, *EU Law, Politics, and the Social Question*, 14 GERMAN L.J. 581 (2013).

McDougall Report.<sup>80</sup> As dramatically demonstrated by the financial crisis still under way, without a common fiscal and economic policy or a federal budget, the Union is also completely devoid of the automatic stability mechanisms necessary to cope with asymmetric shocks. This is due to the fact that the introduction of the single currency was based on a concept “that is clearly alien to the idea of solidarity,”<sup>81</sup> particularly as demonstrated by the central bailout prohibition rule in the monetary union.<sup>82</sup> The reforms undertaken by the Union to tackle the financial crisis basically confirm this model, though with some important corrections and additions.

A first type of corrective measure, introduced as part of the *Stability Compact*,<sup>83</sup> is designed to support the instruments already outlined by the Maastricht Treaty. The purpose is to provide the Union with the ability to prevent systemic crises of the Euro-zone by strengthening the rules on budgetary constraints and fiscal austerity. The new legislation—partly of EU law nature, partly of international law character—introduces significant innovations, which are aimed firstly at placing limits on the deficit and public debt. In providing the legislation, the Maastricht Treaty and the Stability and Growth Pact allow for the effective liability to be sanctioned. On the one hand, the signatory States of the Fiscal Compact are bound to insert the new rigorous golden rule of budgetary balance into their respective legal orders, preferably through rules of constitutional status.<sup>84</sup> On the other hand, the procedure concerning excessive deficits—which can also be activated if the limits of public debt are exceeded—is decisively strengthened through the introduction of a reverse majority rule. By inverting the voting rule traditionally provided for by Union law and contemplated by the Stability Pact, a qualified majority in the Council becomes

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<sup>80</sup> That in designing a possible path of monetary integration among EEC countries, had suggested a gradual construction of a federal budget in stages that should have been completed, in the final stage, with the allocation of 25% of the European GDP to the Community budget.

<sup>81</sup> See Jean-Victor Louis, *Solidarité budgétaire et financière dans l'Union européenne*, in *LA SOLIDARITÉ DANS L'UNION EUROPÉENNE* 107, 110 (Chahira Boutayeb ed., 2011).

<sup>82</sup> See Consolidated Version of the Treaty on the Functioning of the European Union art. 125, Oct. 26, 2012, 2012 O.J. (C 326) 1 [hereinafter TFEU].

<sup>83</sup> See Council Regulation (EU) 1173/2011, 2011 O.J. (L 306) 1; Council Regulation (EU) 1174/2011, 2011 O.J. (L 306) 8; Council Regulation (EU) 1175/2011, 2011 O.J. (L 306) 12; Council Regulation (EU) 1176/2011, 2011 O.J. (L 306) 25; Council Regulation (EU) 1177/2011, 2011 O.J. (L 306) 33; Council Directive (EU) 2011/85, 2011 O.J. (L 306) 41 (comprising the “Six Pack”). See also Treaty on Stability, Coordination and Governance of the Economic and Monetary Union, Jan 1, 2013, 2013 O.J. (L 306) [hereinafter Treaty on Stability]. In November 2011, the European Commission submitted two further proposals for regulation in jargon known as the *Two-Pack*, see *Proposal for a Regulation of the European Parliament and of the Council*, COM (2011) 819, 821 final (Nov. 23, 2011); see also Catherine Barnard, *The Financial Crisis and the Euro Plus Pact: A Labour Lawyer's Perspective*, 41 *INDUS. L.J.* 98, 102 (2012).

<sup>84</sup> See Treaty on Stability art. 3. Italy has proceeded to adapt by modifying Article 81 of the Constitution with the Constitutional Law no. 1/2012. Germany had introduced the *Schuldenbremse* already in 2009, by modifying Articles 109 and 115 of its Fundamental Law.

necessary to reject a proposal by the Commission. Thus, once initiated by the Commission, the sanctioning procedure assumes a semi-automatic course of action, making it much more difficult for the Member State concerned to form blocking minorities. In addition to the procedure referred to in Article 126 of the TFEU—on the basis of Article 121—the 2011 EU law reform also introduces a new procedure for the prevention and correction of macroeconomic imbalances. This procedure broadens the Commission's power to intervene far beyond the borders of fiscal policy by extending it to the whole range of national governments' economic policies. And even in this case, any failure to comply with the corrective actions planned by the Member State—according to the recommendations made by the Commission and the Council—is liable to be sanctioned by a procedure marked by a reverse majority voting.<sup>85</sup>

By the same token, the *Euro Plus Pact*,<sup>86</sup> although having the nature of a political intergovernmental agreement, essentially ends up integrating those new supranational constraints given its close bond with the new legislation on macroeconomic surveillance. The *Euro Plus Pact* intends *inter alia* to have a direct impact on the wage-setting systems operating at the Member States level, which are per se excluded from the sphere of the Union's legislative competencies in the field of social policy.<sup>87</sup> In the chapter on productivity—which is central to the general objective of increasing competitiveness and employment within the Union—the *Euro Plus Pact*, while promising to preserve the different national traditions in the social dialogue and industrial relations fields, indicates the precise measures that Member States should apply in relation to wage-setting arrangements, both in the public and private sectors. Particularly important is the recommendation to align wages with productivity by proceeding, if necessary, to a decentralization of the collective bargaining systems and, if appropriate, by reviewing the mechanisms for automatic indexation.

A second and more creative type of legal innovation—totally absent in the structure of the Maastricht Treaty and therefore subject to bitter controversy—concerns the introduction of suitable tools in order to provide the Union, and in particular the Euro-zone, with the effective ability to manage financial crises through various financial aid mechanisms for countries in difficulty. Unlike the first modest measures adopted in the *European Financial Stabilisation Mechanism* (EFSM)<sup>88</sup>—these instruments of financial assistance all operate

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<sup>85</sup> See Kaarlo Tuori, *The European Financial Crisis: Constitutional Aspects and Implications* 17 (EUI Working Papers Law, Paper No. 2012/28, 2012).

<sup>86</sup> See Catherine Barnard, *The Financial Crisis and the Euro Plus Pact: A Labour Lawyer's Perspective*, 41 *INDUS. L.J.* 98, 103 (2012).

<sup>87</sup> See TFEU art. 153(5).

<sup>88</sup> See European Financial Stabilization Mechanism, COM (2010) 713 final (May 10, 2010). Established with Council Regulation no. 407/2010 according to Article 122 of the TFEU.



outside the institutional framework of the Union. The *European Financial Stability Facility* (EFSF), a precursor to the ESM, is outside the legal framework of the founding Treaties because it was actually established as a limited liability company registered in Luxembourg, according to a very inventive and uneven combination of contract and financial market law and public international law rules.<sup>89</sup> By providing Euro-zone States with a fairly strong permanent instrument of financial aid, the ESM was established as a body of public international law expressly not subjected to the application of EU law.

The highly debated *Pringle* judgment<sup>90</sup> was delivered by the Court of Justice after the German Constitutional Court, under specific conditions, authorized Germany's ratification of the ESM.<sup>91</sup> In this ruling the Luxembourg justices basically dismissed all of the objections raised by the plaintiff, an independent deputy of the Irish Parliament, regarding the compatibility of the ESM with EU law. The most problematic issue concerned the very suspicious compatibility of the ESM with the bailout prohibition laid down by Article 125 of the TFEU.<sup>92</sup> The Court of Justice excluded a violation of Article 125 thanks to an innovative and restrictive interpretation of the no bailout clause, stating that the not yet operational amendment of Article 136 of the TFEU<sup>93</sup> has a merely confirmatory value for the competencies of Member States in this field. According to the Court's interpretation, Article 125 is only intended to prevent Member States from relying on redemption of their public debt by other members of the Euro-zone. In this way, Member States are encouraged to maintain sound fiscal policies and, most importantly, moderate budget policies. The ESM's terms do not contradict the rationale and substance of this prohibition because the financial solidarity that the Member States ensure to fellow countries whose difficulties jeopardize the stability of the whole Euro-zone is subordinate to a strict conditionality requirement specified by the same reformulation of Article 136.<sup>94</sup> On the one hand, the ESM is fundamentally committed to guaranteeing the collective European

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<sup>89</sup> See Kaarlo Tuori, *The European Financial Crisis: Constitutional Aspects and Implications* 13–14 (EUI Working Papers Law, Paper No. 2012/28, 2012).

<sup>90</sup> See *Pringle v. Ireland*, CJEU Case C-370/12 (Nov. 27, 2012), <http://curia.europa.eu/>. The judgment delivered by the Court in plenary session, with critical comments by Tomkin (2013) and Van Malleghem (2013).

<sup>91</sup> See Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BVR 1390/12 (Sep. 12, 2012), [http://www.bverfg.de/entscheidungen/rs20120912\\_2bvr139012en.html](http://www.bverfg.de/entscheidungen/rs20120912_2bvr139012en.html); Susanne K. Schmidt, *A Sense of Déjà Vu? The FCC's Preliminary European Stability Mechanism Verdict*, 14 GERMAN L.J. 1 (2013); Mattias Wendel, *Judicial Restraint and the Return to Openness: The Decision of the German Federal Constitutional Court on the ESM and the Fiscal Treaty of 12 September 2012*, 14 GERMAN L.J. 21 (2013).

<sup>92</sup> See TFEU art. 125.

<sup>93</sup> TFEU art. 136 was modified according to Decision 2011/99, not yet in force, using for the first time the simplified revision procedure introduced by the Amsterdam Treaty. The amendment was intended to clarify the competence of the Member States to adopt an instrument of the type of ESM.

<sup>94</sup> See TFEU art. 136.

interest of protecting the stability of the Euro-zone as a whole—without definitely burdening itself with the public debt of the subsidized Member States, which are to remain individually liable. On the other hand, the strict conditionality requirement for acceding to ESM financial aid provides adequate guarantees so that this does not result in a disincentive to pursuing sound fiscal and budget policies. Thus, the conditionality requirement circumvents the “moral hazard” temptation for the assisted countries.

From the brief review above, it is evident that the reforms introduced within and especially outside the structure of the founding Treaties to cope with the financial crisis of the Euro-zone in fact contribute to a significant compression of Member State autonomy in the field of social and labor law and policy. The new supranational constitutional constraints to the Member States’ fiscal and budget policies limit the redistributive options available to the national democratic processes and have strong repercussions on the national Welfare State arrangements.<sup>95</sup> Overall, the new rigid neo-liberal structure of the European economic and monetary constitution can be characterized as a monumental exercise undertaken by “the economic” to rule “the political,” which is unprecedented in the history of democracies, at least in the pervasiveness of its ramifications. Having pushed itself to this point, the Union—as has been critically remarked—is not far from the Hayekian ideal of a “limited democracy” based on dethroning politics in the name of market discipline as the supreme arbiter.<sup>96</sup>

The suspicion that such a design is resting on fragile assumptions of democratic legitimacy is dangerously powered by the dramatically ineffective measures adopted by the Union to overcome the economic and financial crisis. The austerity policies—adopted under the pervasive guise of the new European economic and fiscal governance<sup>97</sup>—have so far produced prolonged recession and mass unemployment, especially among young people, in the countries where they have been more or less mechanically adopted, starting with Greece. In other cases, such as Italy, the policies have made the ratio between gross domestic product and public debt even worse. In the words of one of the most lucid critics of this disquieting state of affairs, if compared to a fully-fledged federal State regime or even to the European Monetary System that was in force until the introduction of the single currency, “Member States in the reformed Monetary Union will indeed find themselves in the worst of these three worlds.”<sup>98</sup> While the EMU does not have the ability

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<sup>95</sup> See the first comparative analysis by ARNE HEISE & HANNA LIERSE, BUDGET CONSOLIDATION AND THE EUROPEAN SOCIAL MODEL: THE EFFECTS OF EUROPEAN AUSTERITY PROGRAMMES ON SOCIAL SECURITY SYSTEMS (2011) and LABOUR MARKET FLEXIBILITY AND PENSIONS REFORMS (Karl Hinrichs & Mattias Jessoula eds., 2012).

<sup>96</sup> ALAIN SUPLOT, L’ESPRIT DE PHILADELPHIE: LA JUSTICE SOCIAL FACE AU MARCHÉ TOTAL 33 (2010).

<sup>97</sup> For an effective definition of the *Fiscal Compact* as a form of constitutionalization of austerity, see Floris De Witte, *EU Law, Politics, and the Social Question*, 14 GERMAN L.J. 581 (2013).

<sup>98</sup> Fritz W. Scharpf, *Monetary Union, Fiscal Crisis and the Pre-emption of Democracy* 31 (LEQS Discussion Paper Series, Working Paper No. 35, 2011).

to undertake the economic and fiscal maneuvers that only a truly federal budget is allowed to draw unto, the Union does not even let its Member States autonomously use such residual macroeconomic levers—especially those in the Euro-zone—that have lost all competency related to monetary policy. And while the new instruments of economic governance accentuate its institutional fragmentation, the Union is faced with a double deficit of democratic legitimacy<sup>99</sup> as a direct consequence of the asymmetry between a poor ability to give political answers—positive integration—and strong constraints on the autonomy of the Member States in the name of the stability of the market’s negative integration. The Union’s already tenuous input-oriented legitimacy—utterly weakened by the marginalization of the European Parliament’s role within the structure of the new economic governance—is further aggravated by a dramatic, and perhaps more serious, crisis of output-oriented democratic legitimacy, as demonstrated by the widespread anti-European resentment shown by the national public opinion of the countries most affected by the crisis.

## E. Conclusion

The disheartening debate on the Union’s new financial perspectives for 2014–2020—in regards to which the European Parliament has been called upon to decide on a proposal aimed at reducing the Union budget for the first time in the history of integration—shows that Europe is further than ever from a possible “Hamiltonian moment.”<sup>100</sup> Although there are different theoretical approaches and perspectives, many political and intellectual circles have determined that a sharp turn in the direction of federalism is the only effective way out of the Union’s systemic crisis. As Giuliano Amato has suggested, “[A] federal model to enjoy more freedom”<sup>101</sup> should create a different tradeoff between greater integration—with the transfer to the Union of additional shares of State sovereignty in the field of fiscal, economic, and social policies, and the creation of an adequate budget at the central level—and the reinforcement of European solidarity.<sup>102</sup> The model of “post-democratic executive federalism”<sup>103</sup> devised by the “reformed” European economic and monetary governance currently generates a dangerous and visibly precarious asymmetric

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<sup>99</sup> See Fritz W. Scharpf, *The Double Asymmetry of European Integration – Or: Why the EU Cannot Be a Social Market Economy* (Max-Planck-Institut für Gesellschaftsforschung, MPIfG Working Paper No. 09/12, 2012), <http://www.mpifg.de/pu/workpap/wp09-12.pdf>.

<sup>100</sup> Barbara Spinelli, *Un programma per l’Europa*, 7 MICROMEGA 9 (2011).

<sup>101</sup> GIULIANO AMATO, *EUROPA* 61 (2012).

<sup>102</sup> See also the articulate proposal by Miguel Poiras Maduro, *A New Governance for the European Union and the Euro: Democracy and Justice* (European University Institute—Robert Schuman Centre for Advanced Studies, RSCAS Policy Paper No. 2012/11, 2012), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2180248](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2180248).

<sup>103</sup> JÜRGEN HABERMAS, *QUESTA EUROPA È IN CRISI* 43 (C. Mainoldi trans., 2012).

imbalance between integration and solidarity.<sup>104</sup> Though, a correction of these imbalances appears as necessary as it is difficult.

There is no point in undertaking a theoretical speculation on the effective perspectives on the construction of a European federal core as a culmination of a complete economic and monetary Union. At present, these perspectives are highly uncertain and, in any case, must atone for the almost certain unavailability of at least the United Kingdom. Therefore, however framed and conceptualized, a model of a federal political Union should most likely be imagined in a logic of differentiated integration with a central core—or a “cluster,” as Amato would say—that is fully integrated and a series of larger political and economic spheres—including the internal market—that are open to participation from the other Member States of the Union. After all, the institutional devices employed to cope with the crisis—especially the crucial side of the financial aid mechanisms—are already decisively moving in the direction of a differentiated integration led by Euro-zone countries and guided by Germany and France.<sup>105</sup>

Concluding remarks on the idea of European citizenship as a status of social integration must be considered. On the one hand, the dominant transnational dimension constitutes a matter of both strength and weakness for Union citizenship because it limits the potential for integration into the national social spheres of the rights conferred to the European mobile citizen, who must balance these access rights with the need to protect the redistributive ability of the Member State welfare systems. This presupposes the maintenance of bounded worlds of social justice based on some criterion of territorial belonging. On the other hand, the trajectory imprinted on the European integration process by the Court of Justice’s case law on the internal market and by the recent reforms of the Union’s economic governance has created an unfriendly, if not openly hostile, regulatory environment for the national democratic Welfare State. If its survival is not questioned, as Joerges provocatively wondered,<sup>106</sup> then what is at stake here are rather the normative pre-conditions for what Maurizio Ferrera has called the “virtuous nesting scenario”<sup>107</sup> of the national Welfare State within the European integration.

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<sup>104</sup> The first proposals presented in the report written up by the President of the European Council in collaboration with the Presidents of the Commission, of the Euro-group, and of the European Central Bank do not seem to actually be able to change this balance and abandon the prevailing logic of “executive federalism.” See Herman Van Rompuy, *Towards a Genuine Economic and Monetary Union* (June 26, 2012), [http://ec.europa.eu/economy\\_finance/crisis/documents/131201\\_en.pdf](http://ec.europa.eu/economy_finance/crisis/documents/131201_en.pdf).

<sup>105</sup> See Matej Avbelj, *Differentiated Integration—Farewell to the EU-27?*, 14 GERMAN L.J. 191 (2013).

<sup>106</sup> See Christian Joerges, “*Mitbrennender Sorge*”: *Può lo Stato sociale sopravvivere all’integrazione europea?*, in *IL MODELLO SOCIALE EUROPEO DAVANTI ALLE SFIDE GLOBALI* 29 (Luciano Gallino & Christian Joerges eds., 2012).

<sup>107</sup> Maurizio Ferrera, *From Neo-liberalism to Neo-welfarism? Ideologies and Social Reforms in Europe* (Centro Einaudi—Laboratory of Comparative Politics and Public Philosophy, Working Paper No. LPF 2/12, 2012).

According to keen observers, the reconstruction of a virtuous balance between national Welfare State systems and European integration requires a re-appropriation of the new European social question within the realm of politics and of the political democratic process at both supranational and national levels.<sup>108</sup> So far, national labor law and social security systems have shown a remarkable degree of “resilience” when facing de-regulative pressure judicially driven by the negative integration of the internal market.<sup>109</sup> For example, the remarkable adaptability demonstrated by the Nordic labor law and industrial relation systems in response to *Viking* and *Laval* is proof of this.<sup>110</sup> Except, during the worst economic crisis since the years after the Second World War, this resilience is currently being challenged again within the context of the reformed neo-liberal Union’s economic and monetary governance.<sup>111</sup> The *Memoranda of Understanding* signed by Greece, Ireland, and Portugal that allows access to the Union’s financial aid provides a vivid example of what “negotiating in the shadow of bankruptcy”<sup>112</sup> really means for the “nesting” of a national Welfare State within the EMU’s reformed constitution. The wide-ranging reforms of the labor market approved in Italy and Spain between 2011 and 2012 are also an indirect but telling example of the new EU politics of conditionality.<sup>113</sup>

A re-politicization of the social issue capable of counterbalancing these new powerful external constraints to the benefit of Union’s democratic legitimacy requires the rediscovery of the positive integration function of European labor law, beyond the open method of coordination. The recent European minimum pay proposal by the former Euro-Group President Jean Claude Juncker as well as the less recent proposal for guaranteed minimum income regulated at the EU level are very effective in demonstrating the acute

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<sup>108</sup> See Floris De Witte, *EU Law, Politics, and the Social Question*, 14 GERMAN L.J. 581 (2013).

<sup>109</sup> Simon Deakin, *The Lisbon Treaty, the Viking and Laval Judgments and the Financial Crisis: In Search of New Foundations for Europe’s “Social Market Economy,”* in THE LISBON TREATY AND SOCIAL EUROPE 19, 40 (Niklas Bruun et al. eds., 2012).

<sup>110</sup> See Jonas Malmberg, *Posting Post-Laval: Nordic Responses*, in BEFORE AND AFTER THE ECONOMIC CRISIS: WHAT IMPLICATIONS FOR THE “EUROPEAN SOCIAL MODEL”? 23 (Marie-Ange Moreau ed., 2011); Catherine Barnard & Simon Deakin, *European Labour Law after Laval*, in BEFORE AND AFTER THE ECONOMIC CRISIS: WHAT IMPLICATIONS FOR THE “EUROPEAN SOCIAL MODEL”? 252, 263 (Marie-Ange Moreau ed., 2011).

<sup>111</sup> See Simon Deakin, *The Lisbon Treaty, the Viking and Laval Judgments and the Financial Crisis: In Search of New Foundations for Europe’s “Social Market Economy,”* in THE LISBON TREATY AND SOCIAL EUROPE 19 (Niklas Bruun et al. eds., 2012).

<sup>112</sup> Niklas Bruun, *Economic Governance of the EU Crisis and its Social Policy Implications*, in THE LISBON TREATY AND SOCIAL EUROPE 261, 270 (Niklas Bruun et al. eds., 2012).

<sup>113</sup> See Antonio Ojeda Aviles, *Diritti fondamentali, concorrenza, competitività e nuove regole per il lavoro in una prospettiva di diritto comparato*, in NUOVE REGOLE DOPO LA LEGGE N. 92 DEL 2012 DI RIFORMA DEL MERCATO DEL LAVORO COMPETIZIONE VERSUS GARANZIE? 9 (Giappichelli ed., 2013); Stefano Giubboni & Antonio Lo Faro, *Crisi finanziaria, governance economica europea e riforme nazionali del lavoro: quale connessione?*, in NUOVE REGOLE DOPO LA LEGGE N. 92 DEL 2012 DI RIFORMA DEL MERCATO DEL LAVORO COMPETIZIONE VERSUS GARANZIE? 41 (Giappichelli ed., 2013).

awareness that the “virtuous nesting” of national Welfare States needs to undergo a re-discovery of supranational social harmonization in new forms. Beyond their legal-political impracticability,<sup>114</sup> both of these proposals signal the need to set a common minimum floor of labor and social rights to protect against the risks of de-regulative competition and social leveling-down pressures inherent in the new EU constitutional landscape. While waiting for Croatia’s adhesion, a new minimum harmonization strategy obviously must take into account the increased social and economic dis-homogeneity and differentiation of the Union “at Twenty-seven.” Therefore, we need to imagine it under the new guise of framework directives and legislation by general principles<sup>115</sup> open to flexible national implementation even in the context of principled differentiation through the enhanced cooperation route envisaged by the Lisbon Treaty.<sup>116</sup> A complementary route would be rediscovering at the EU level the forgotten virtues of auxiliary legislation. This rediscovery would foster a process of minimum standard setting through European collective bargaining of sectorial or transnational nature in the shadow of EU law.

Moreover, the re-politicization of the European social issue passes through the discovery of a truly autonomous sphere of national social regulators—States and social partners—against the excessive intrusiveness of the EU fundamental freedoms and the tinged logic of negative integration. At least in theory, the Lisbon Treaty provides the Luxembourg justices with a wide range of conceptual tools and new hermeneutic opportunities to reconsider the constitutional doctrines of the internal market in order to assure a broader “margin of appreciation” for the Member States in relation to sensitive choices regarding social policy and distributive justice within their welfare systems.<sup>117</sup> In connection with the meta-principle of the inviolability of human dignity that is enshrined in Article 1 of the EU Charter of Fundamental Rights,<sup>118</sup> a well-crafted interpretation of the provisions of Chapter IV of the Nice Charter would enable the Court of Justice—at least in theory—to effectively recast its way of understanding the “balancing” of social rights and economic freedoms.<sup>119</sup>

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<sup>114</sup> See Herwig Verschueren, *Union Law and the Fight Against Poverty: Which Legal Instruments?*, in *SOCIAL INCLUSION AND SOCIAL PROTECTION IN THE EU: INTERACTION BETWEEN LAW AND POLICY* 205 (Bea Cantillon, Herwig Verschueren & Paula Ploscar eds., 2012).

<sup>115</sup> See S. Klosse, *Balancing Europe’s Economic and Social Goals: Fighting a Losing Battle?*, 3 *EUR. J. Soc. L.* 176 (2012).

<sup>116</sup> See Niklas Bruun, *Economic Governance of the EU Crisis and its Social Policy Implications*, in *THE LISBON TREATY AND SOCIAL EUROPE* 261, 275 (Niklas Bruun et al. eds., 2012).

<sup>117</sup> See Alain Supiot, *Conclusion: Europe’s Awakening*, in *BEFORE AND AFTER THE ECONOMIC CRISIS: WHAT IMPLICATIONS FOR THE “EUROPEAN SOCIAL MODEL”?* 292, 303 (Marie-Ange Moreau ed., 2011) (arguing how a greater deference for these choices is required by the provision on the national constitutional identities now contained in TEU art. 4.2).

<sup>118</sup> See STEFANO. RODOTÀ, *IL DIRITTO DI AVERE DIRITTI* 39 (2012).

<sup>119</sup> See Bruno Caruso, *I diritti socialifondamentalinell’ordinamentocostituzionaleeuropeo*, in *IL LAVORO SUBORDINATO, VOL. V DEL TRATTATO DI DIRITTO PRIVATO DELL’UNIONE EUROPEA* 707 (Silvana Sciarra & Bruno Caruso eds., 2009); Giuseppe

Even proper reference and due deference to the Strasbourg Court's advanced new case law on the right to strike and the right of collective bargaining<sup>120</sup> could offer the Luxembourg justices a fresh constitutional starting point under Article 6 of the TEU that would allow them to overcome, or at least mitigate, the interpretative *aporia* of the *Viking* and *Laval* cases on the standards of international protection of collective rights.<sup>121</sup> A dialogue between the two courts, renewed on these grounds, would allow them to overcome the "crisis of trust"<sup>122</sup> regarding the "social" jurisprudence of the European Court of Justice that was triggered by the *Viking* and *Laval* cases.

In *Sindicato dos Bancários do Norte and others*,<sup>123</sup> the Court of Justice was asked for a preliminary ruling that, for the first time, explicitly raised the question of the compatibility of national measures for strong compression of workers' rights—implemented by a Member State within the scope of EU fiscal consolidation policies—with the EU Charter of Fundamental Rights. The reference for a preliminary ruling indeed raised the question of the compatibility with Articles 20, 21.1, and 31.1 of the EU Charter<sup>124</sup> with the measures taken by Portugal at the end of 2010, especially with those concerning the reduction of public employee salaries as a condition of gaining access to Union financial aid. Although, in early 2013, the Court declared its incompetence to rule on such a question, concluding that no specific element suggesting that Portuguese law was intended to implement EU law could be identified in the case at hand. But beyond the technical contingencies of this case, the matter raised by the Labor Court in Oporto is destined to recur. The central constitutional issue is whether the rigors of the new European conditionality politics have to be balanced with the social values, objectives, rights, and principles enshrined by the Lisbon Treaty, in particular with the provisions of Articles 2 and 3 of the TEU, and also with the horizontal clause provided for under Article 9 of the TFEU<sup>125</sup> and the endowment of full

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Bronzini, *Solidarietà, coesione, diritti fondamentali nel calvario istituzionale dell'Unione*, in *IL NODO GORDIANO TRA DIRITTO NAZIONALE E DIRITTO EUROPEO* 129 (Elena Falletti & Valeria Piccone eds., 2012).

<sup>120</sup> See the well-known judgments of the European Court of Human Rights, *Demir and Baykara v. Turkey*, ECHR App. No. 34503/97, ECHR 1345 (2008) and *Enerji Yapi-Yol Sen v. Turkey*, ECHR App. No. 68959/01, ECHR 2251 (2009).

<sup>121</sup> See Filip Dorssemont, *How the European Court of Human Rights Gave us Enerji to Cope with Laval and Viking*, in *BEFORE AND AFTER THE ECONOMIC CRISIS: WHAT IMPLICATIONS FOR THE "EUROPEAN SOCIAL MODEL"?* 217 (Marie-Ange Moreau ed., 2013); SILVANA SCIARRA, *L'EUROPA E IL LAVORO. SOLIDARIETÀ E CONFLITTO IN TEMPI DI CRISI* 92 (2013).

<sup>122</sup> Marzia Barbera, *Diritti sociali e crisi del costituzionalismo europeo* 6 (Centro Studi Diritto del Lavoro Europeo "Massimo D'Antona," Working Paper No. INT—95/2012, 2012).

<sup>123</sup> *Sindicato dos Bancários do Norte v. Banco Português de Negócios*, CJEU Case C-128/12 (Mar. 7, 2013), <http://curia.europa.eu/>.

<sup>124</sup> See Charter of Fundamental Rights of the European Union, Oct. 26, 2012, 2012 O.J. (C 364) 2.

<sup>125</sup> See Stefano Giubboni, *Social Europe after the Lisbon Treaty. Some Sceptical Remarks*, 4 EUR. J. SOC. L. 244 (2011); Filip Dorssemont, *Values and Objectives*, in *THE LISBON TREATY AND SOCIAL EUROPE* 45 (Niklas Bruun et al. eds., 2012); Franck Lecomte, *Embedding Employment Rights in Europe*, 17 COLUM. J. EUR. L. 1 (2011).

legal force to the Nice Charter. And the hope is that, in the future, the Court will overcome its negative and elusive attitude and, at least for the Fiscal Compact, reconsider the bold statement made in *Pringle* that the EU Charter is essentially inapplicable to the measures of the ESM.<sup>126</sup> A change in approach seems necessary in order to avoid possible “constitutional collisions” of a new type. The spectrum of these possible collisions clearly hovers over the recent judgment in which the Portuguese Constitutional Court declared the unconstitutionality of a substantial part of the measures adopted by Portugal through the Financial Law for 2013, again within the austerity policies agreed upon with the Troika.<sup>127</sup>

Finally, the same CJEU jurisprudence on the transnational access of economically inactive European citizens to the Member States’ welfare systems should take care of conceptualizing in a more balanced way the interdependence of the territorially bounded dimension—and delimitation—of these social solidarity systems and the redistributive choices—and tradeoffs—democratically expressed therein by the national legislatures. It has been persuasively suggested that a re-conceptualization of the freedom of movement protected under Article 21 of the TFEU<sup>128</sup> should better take into account the bonds of political reciprocity underpinning national systems of social solidarity. Such a re-conceptualization should only allow transnational access to the guaranteed benefits for those EU citizens who can actually meet the necessary conditions of reciprocity as a consequence of the degree of integration achieved and the contribution given to the host country’s social life. In this way, it has been argued, “the internal capability of electorates to decide on the social question [would be] to a large extent insulated from external pressures, while at the same time preventing discriminatory assessments (by including those migrants who deserve access, by virtue of meeting the preconditions of reciprocity).”<sup>129</sup>

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<sup>126</sup> See Treaty Establishing the European Stability Mechanism (ESM), Feb. 2, 2012, 2011 O.J. (L 91) 1 [hereinafter ESM].

<sup>127</sup> See Tribunal Constitucional [T.C. – Constitutional Court], Case No. 187/2013 (Apr. 2013) (Portugal).

<sup>128</sup> See TFEU art. 21.

<sup>129</sup> Floris De Witte, *EU Law, Politics and the Social Question*, 14 GERMAN L.J. 581 (2013).





## Special Issue

### EU Citizenship: Twenty Years On

## A Citizenship in Movement

By Michelle Everson\*

### A. The Quest for Citizenship as Universal Good

From its inception, the philosophical-legal vehicle of citizenship has exhibited Janus-like qualities. For Karl Marx, the “first” citizenship of the classical world was a lodestone in the edifice of the “symbolic city”; a legally-delineated status that, just as surely as it included Greeks within the unitary polis, condemned the vast mass of the classical population to servility.<sup>1</sup> The particularism within an originating citizenship paradoxically survived the Enlightenment, as a result of which, the figure of the *citoyen* became the point at which a Judaic-Christian preoccupation with the inalienable personality of man could be conceptually reconciled with the perceived need to maintain a secular community of horizontal bondage within the republican state. Exclusionary impulses similarly only hardened in an age of nationalism. Even the most inclusive of “industrial” citizenships, just as they expanded the liberating potential of socialized belonging,<sup>2</sup> continued to exclude the alien from their New Jerusalem with direct reference to his lack of communitarian, contractual or “accidental” concordance with the nation.<sup>3</sup>

The philosophical-legal vehicle of citizenship encompasses its own tragedy, as well as its own persisting project. Its failure is not merely a conceptual one; the miscarriage of the universalizing Enlightenment aspiration, or its dissolution within the territory and the history of the particularizing nation and the subsequent creation of a nationalized focus for socially-liberating redistribution, have generated their own very real victims. Hannah Arendt’s “spatiality,” her emphasis upon the temporal and geographical parameters of belonging, or her regretful observation that “freedom,” or the freedom of the politically-enabled and protected citizen, “where it existed as tangible reality, has always been spatially limited,”<sup>4</sup> must now remind us, not only of the murdered dead, or “non-citizens”

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<sup>1</sup> See DEREK HEATER, *CITIZENSHIP: THE CIVIC IDEAL IN WORLD HISTORY, POLITICS AND EDUCATION* (1990).

<sup>2</sup> See THOMAS H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS* (1953); RALF DAHRENDORF, *DER MODERNE SOZIALE KONFLIKT* (1992).

<sup>3</sup> See HEATER, *supra* note 1 (explaining the case of British citizenship, an accident of birth).

<sup>4</sup> HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 262 (1994); see also Hans Lindahl, *Finding a Place for Freedom, Security and Justice: The European Union’s Claim to Territorial Unity*, 29 *EUROPEAN L. REV.* 461 (2004).

of the Europe of the dictators, but also of the non-western casualties, first, of a subjugating colonialism, and then of the blind distributive neglect of the decolonizing, post-colonial and neo-colonial eras. Conversely, and despite the paradox of exclusionary tragedy, the citizenship telos endures, determined both to restore the Enlightenment promise of universality and to establish universal welfare.

Such potent aspirations may in part explain the impossible expectations leveled at the new legal status of “citizenship of the European Union” established by the Maastricht Treaty of 1992. Outside of the colonial context, EU citizenship represents the first attempt to establish a formal status for, initially, Europeans above and beyond their own national communities. To this extent, it is also unsurprising that EU citizenship, adopted due to a functional need to establish an ancillary status for EU citizens to ease completion of the single market,<sup>5</sup> has generated a vast aspirational literature dedicated to philosophical perfection of this novel form of post-national citizenship.<sup>6</sup> At the same time, the emergence of EU citizenship has been accompanied by a counter-movement that academically disdains philosophical re-entrenchment of “deep” concepts of citizenship at the European level, even in their most universal or contractarian variants.<sup>7</sup> In pragmatic institutional-judicial terms, the realization of European citizenship is pursued with a notable lack of regard for the conceptual restraints of the past.

EU citizenship is different from any other.<sup>8</sup> To this day, the core of EU citizenship is formed—all federalist aspirations apart—not by grand concepts, but by the economically-oriented rights of free movement laid down in the European Treaties.<sup>9</sup> With its functional emphasis, EU citizenship appears to offer a new potential for pursuit of a universal citizenship unfettered by exclusionary conceptual concerns. Above all, for the Court of Justice of the European Union (CJEU), the imperative of free movement has overcome all barriers to the enjoyment of the entitlements that were historically provided by national

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<sup>5</sup> See Michelle Everson, *The Legacy of the Market Citizen*, in *NEW LEGAL DYNAMICS OF EUROPEAN UNION* 73–89 (Jo Shaw & Gillian More eds., 1995).

<sup>6</sup> See Jürgen Habermas, *Citizenship and National Identity: Some Reflections on the future of Europe*, 12 *PRAXIS INT’L* 1, 1–12 (1992); E.O. ERIKSEN, *MAKING THE EUROPEAN POLITY: REFLEXIVE INTEGRATION IN THE EU* (2005).

<sup>7</sup> See Adrian Favell & Virginie Guiraudon, *The Sociology of the European Union: An Agenda*, 10 *EUROPEAN UNION POLS.* 550 (2009).

<sup>8</sup> See *EU CITIZENSHIP AND THE MARKET 2* (Richard Bellamy & Uta Staiger eds., 2011), <http://www.ucl.ac.uk/european-institute/analysis-publications/publications/Final.pdf>.

<sup>9</sup> See, e.g., *Report From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region: On Progress Towards Effective EU Citizenship 2011–2013*, COM (2013) 270 final (Aug. 5. 2013) (explaining the general treatment of citizenship, whereby its major resources are dedicated to ensuring the free movement of European citizens and only ancillary resources are dedicated to realizing the political content of EU citizenship).

law, establishing a new emphasis in citizenship matters upon the tangible, or the real circumstances of individual want, rather than the posited communal gains of deep concepts of national citizenship. In its functionalist, universalizing character and its preoccupation with the real rather than the imagined, the legal-functional vehicle of EU citizenship might arguably embody one part of a post-modern *zeitgeist*, wherein universality is no longer sought in philosophical design, but, rather, in material circumstance.

The achievements of a tangible European citizenship cannot be doubted. Nevertheless, with its emphasis upon the material circumstances of free movement, EU citizenship also raises its very own points of concern. Above all, for primary European law, fact-based judicial activism has not only strained the conceptual coherence of law,<sup>10</sup> but more importantly, has also placed in doubt the quality of the *interpositio auctoritatis*, or the authoritative judicial intervention, concomitantly implicating EU constitutional jurisprudence and architecture within the posited, but false universalisms of science or modern economics. Right to free movement coalesces seamlessly with the efficiency postulates of new economic liberalisms, presenting opportunities for new forms of citizenship participation<sup>11</sup> but simultaneously undermining the socially-cohesive achievements of traditional citizenship.<sup>12</sup> Accordingly, it will be argued here that, although we must continue to seek to address the exclusionary externalities of the deep conceptual citizenships of the national era, tangible citizenship constructs, forged in functionality, should never be pursued without continuing regard for the insolubly confrontational couplets of individualism versus community, sovereignty versus subjection and entitlement versus provision,<sup>13</sup> which have historically accompanied citizenship discourse, both in theory and, vitally, in reality.

## B. EU Citizenship: A Material Achievement

For Adrian Favell, writing from the sociological perspective, the collation of market rights of free movement and concomitant declaration of the miraculous birth of European citizenship by the Treaty of European Union merely made the EU a hostage to fortune. “[T]hey thus engaged in a dangerous game of rhetoric in relation to this core notion at the heart of the modern nation state,” triggering, on the part of scholarship, “grandiose

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<sup>10</sup> See Niamh Nic Shuibhne, *Seven Questions for Seven Paragraphs*, 36 EUROPEAN L. REV. 161 (2011).

<sup>11</sup> See Adrian Favell, *European Citizenship in Three Eurocities: A Sociological Approach to the European Union*, 30 POLITIQUE EUROPÉENNE 187 (2010).

<sup>12</sup> See Michelle Everson, *A Very Cosmopolitan Citizenship; But Who Pays the Price?*, in EMPOWERMENT AND DISEMPOWERMENT OF THE EUROPEAN CITIZEN (Michael Dougan, Niamh Nic Shuibhne, & Eleanor Spaventa eds., 2012); NEIL FLIGSTEIN, *EURO-CLASH: THE EU, EUROPEAN IDENTITY AND THE FUTURE OF EUROPE* (2008).

<sup>13</sup> See Michelle Everson & U.K. Preuß, *Konzeptionen von Bürgerschaft in Europa*, 26 PROKLA 543 (1996).

cosmopolitan illusions of a post-national European state and polity,”<sup>14</sup> as well as furnishing Eurosceptic thinkers with a further stick with which to beat European integration processes. The packaging of functional market rights as a European citizenship unleashed a normative maelstrom of overblown expectations and matching skepticism. A market-based citizenship could never mimic the contractarian allegiance of an individual to the state, especially with regards to political inclusion within EU decision-making processes that had historically been postulated in the national setting<sup>15</sup> and which ambitious scholarship now sought to re-establish at EU level.

Refreshingly, Favell, in a sociological agenda for European citizenship research, calls for an academic divorce from an “industry,” which is preoccupied, on the basis of Eurobarometer data, with the perceptions of individual European citizens of their own identities.<sup>16</sup> Instead, a new material focus should be one of how Europeans exercise their rights in practice. For Favell, though not yet constructed or even construed as a polity, the EU may be considered to be a “space in reality” or to have established its own material counterpoint to conceptual spatiality. This, to the exact degree that individuals have used European rights or “opportunities” to:

[D]o new things across national borders; go shopping for cheaper petrol or wine; buy cottages in charming rustic villages; look for work in a foreign cosmopolitan city; take holidays in new destinations, move to retire in the sun, buy cheaper airline tickets; plan international rail travel; join cross-national associations between twinned towns; use a common currency without having 5% stolen by the bank—and a thousand other actions facilitated by the free movement accords.<sup>17</sup>

The demand for a “behaviorally,” rather than an “attitudinally”-based approach to European citizenship, is a distinct methodological choice.<sup>18</sup> At the same time, for Europeanists, the academic approach also evokes the political functionality of the Community Method, at least to the degree that the grand normative schemes of European

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<sup>14</sup> Favell, *supra* note 11, at 192.

<sup>15</sup> See Everson, *supra* note 5.

<sup>16</sup> See e.g., NEIL FLIGSTEIN, *EURO-CLASH: THE EU, EUROPEAN IDENTITY AND THE FUTURE OF EUROPE* (2008).

<sup>17</sup> Favell, *supra* note 11, at 190.

<sup>18</sup> See Everson, *supra* note 5.

Union are routinely pursued, not as stated projects, but in the incrementalism of limited integrationalist steps, such as functionalist completion of the free market, wherein behavioral change throughout European civil society becomes the platform for a further deepening of Europeanization. Similarly, pragmatic behavioralism also recalls the legal methodology of the CJEU, or its efforts to secure the rights of individual Europeans—and non-Europeans—to do what European treaties promise them that they can do, and thereby to extend the reach of EU citizenship beyond many institutional expectations.

Returning briefly to the philosophical level, the recent history of EU citizenship accordingly reveals a vital disjunction between the attitudes of the Member States of the European Union, in their guise as the Council, and the CJEU, wherein the Court has sought to expand the benefits of European Union citizenship often against the wishes of national authorities. Hans Lindahl has written of Europe's renewed political recourse to spatiality. For Lindahl, the notion of space is a powerful one:

[N]ot merely a geographical term. It relates not so much, and not primarily, to a piece of land as to the space between individuals in a group whose members are bound to, and at the same time separated and protected from each other by all kinds of relationships, based on a common language, religion, a common history, customs, and laws.<sup>19</sup>

Spatiality, with its emphasis upon identity writ large, is commensurate with deep concepts of national citizenship and may be argued to find a renewed place in the differentiations made between individuals present within the European space by European legislation on the movement of persons. For Lindahl, a regime whereby Union citizens are afforded specific rights of free movement, third country nationals are afforded limited recognition,<sup>20</sup> and asylum seekers are subject to a common framework of control<sup>21</sup> has not ended exclusion in Europe. Instead, exclusion has been reinforced within a binary legal code, whereby the “legally resident” take their stratified place within a European space. This protects individual Europeans from one another and Europeans from the other, such that “the illegal,” both within Europe and without, are left bereft, knocking at the firmly closed doors of recognition and solidarity. The European other dies daily in the waters of the Mediterranean, or languishes in the no-man's-land of detention centers, just as the Lisbon

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<sup>19</sup> Lindahl, *supra* note 4.

<sup>20</sup> See Council Directive 2004/38, 1994 O.J. (L 158) 77 (EC); Council Directive 2003/109, 2004 O.J. (L 16) 44 (concerning the status of third country nationals who are long-term residents).

<sup>21</sup> See Lindahl, *supra* note 4.

Treaty promises its citizens “an area of freedom, security and justice” without internal frontiers.<sup>22</sup>

It is this renewed recall to notions of European belonging, whereby only certain individuals, defined by their positive legal status, are given access to European benefits, that is so strikingly absent from the jurisprudence of the CJEU. By now, the cases are legendary, but still deserve brief recall here, insofar as the Court has rejected establishment of a nation of European belonging and has instead responded materially and emotionally to the constellation of facts thrown up by the movement of individuals into and throughout the European continent. From the inception of EU citizenship in the Maastricht Treaty, the Court’s citizenship jurisprudence has acted as counterweight to the establishment of European spatiality. First, the Court decoupled the right of free movement of European citizens<sup>23</sup> from the more restrictive status of “European as worker” under Article 45 in the Treaty on the Functioning of the European Union (TFEU).<sup>24</sup> Second, the Court cut the Gordian knot between citizenship and nationality, extending “associative” rights of EU citizenship to third country nationals (TCNs).<sup>25</sup> Third, the Court questioned constructed solidarity and opened up closed national benefits systems to EU nationals and their associates.<sup>26</sup> Finally, albeit in a very restricted formulation, the Court even seems to suggest that rights of EU citizenship have “substance” of their own and will accrue even where there is no question of movement across national borders.<sup>27</sup>

More specifically, at the level of legal methodology, where the Court has made unlimited use of its own *effet utile* doctrine and has borrowed extensively from the universal jurisdiction of human rights, the CJEU has broken down the exclusionary “blind-side” of traditional citizenship constructs to treat persons in movement within the European space, not as philosophical constructs, but rather as individuals captured in their own material circumstances which dictate their need for enjoyment of European rights. In this construction, facts and emotions matter. The decoupling of enjoyment of citizenship rights from nationality follows as the CJEU responds emotionally to a simple human happening,

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<sup>22</sup> See Consolidated Version of the Treaty of the Functioning of the European Union art. 67, Oct. 26, 2012, 2012 O.J. (C 326).

<sup>23</sup> See *id.* art. 20(2)(a).

<sup>24</sup> See *Maria Martinez Sala v. Freistaat Bayern*, CJEU Case C-85/96, 1998 E.C.R. I-2691.

<sup>25</sup> See *Kunqian Catherine Zhu & Man Lavette Chen v. Sec’y of State for the Home Dep’t.*, CJEU Case C-200/02, 2004 E.C.R. I-9925.

<sup>26</sup> See *Baumbast and R v. Sec’y of State for the Home Dep’t.*, CJEU Case C 413/99, 2002 E.C.R. I-7091.

<sup>27</sup> *Gerardo Ruiz Zambrano v. Office National de L’emploi (ONEm)*, CJEU Case C-34/09, (Mar. 8 2011), <http://curia.europa.eu/>.

the birth of a child within the EU, allowing her mother and “primary care-giver,” a Chinese national, to travel freely with her across Member State frontiers so that she might in fact enjoy her newly won EU citizenship granted by virtue of then unlimited Irish *ius soli*. The nation, founded either in pre-communitarian bounds of belonging or in concordance with the ideals of the founding republican moment, is hostile to both child and mother. The CJEU and its EU citizenship are not. The human right to a family life demands that Mrs. Zhu must be allowed to travel with her daughter.<sup>28</sup>

Hostile meaning and indifferent history are similarly forgotten, as the *ius Europeum* furnishes a “good” outcome, or engages with a visible and tangible other far beyond imagined solidarity communities, thereby extending the EU citizenship regime to matters of access to welfare. Directive 2004/38 on free movement predictably re-emphasizes the closed nature of the national solidarity collective—or the exclusionary notion that the redistributive social benefits of citizenship are reserved for members of the nation alone—by granting EU citizens and their family members a right of residence throughout Europe only “as long as they do not become an unreasonable burden on the social assistance system of the host Member State.”<sup>29</sup>

The operative word here, the measure of the willingness of the Member States to open up national solidarity to afford real succor to the indigent Union citizen, is to be found in the word “unreasonable”;<sup>30</sup> and it is here, too, that the determination of the CJEU to pry that door further open is demonstrated. Prior to the implementation of Directive 2004/38, the Court had already firmly signaled its universalist welfare aspirations in cases such as *Grzelczyk*.<sup>31</sup> In *Baumbast*, where a German national had not satisfied the UK requirement that he maintain sufficient sickness insurance for himself and his family, the Court accordingly declared that national legislation must be proportionate. The imposition of the Union law principle of proportionality to all subsequent national legislation implementing Directive 2004/38 thus also amounts to a “constitutional review” of Council efforts. The Court set the legislative limits to national solidarity by judicial frontline assessment of the impacts of a notion of “unreasonable burden” in the light of everyday cases in individual Member States.<sup>32</sup>

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<sup>28</sup> See *Kunqian*, CJEU Case C-200/02

<sup>29</sup> See *supra* note 22, art. 6.

<sup>30</sup> See Michael Dougan, *The Constitutional Dimension to the Case Law on Union Citizenship*, 31 EUROPEAN L. REV. 613 (2006).

<sup>31</sup> See *Grzelczyk v. Centre Public d’aide sociale d’Ottignies-Louvain-la-Neuve*, CJEU Case C-184/99, 2001 E.C.R. I-6193 (stating that the fact that Dir 93/96 regulating movement of students (1993 O.J. L317/59) did not provide for benefits for students, similarly did not preclude extension of national benefits to EU students where such students found themselves in the same needy circumstances as national students).

<sup>32</sup> See Dougan, *supra* note 30.



And it is here that the Court's factual-emotional response to citizenship adjudication becomes most apparent. Contractual citizenship and solidarity is blind to Mr. Baumbast's, or the geographical stranger's, need for immediate medical care for his family. This need not be so declares the CJEU: the measure of solidarity within Europe is not to be negated by spatially-bounded belonging. Instead, a miracle of extra-European recognition is invoked as the Court's sympathetic act of observing and responding to the needs of individual citizens transforms proportionality from a technical yardstick of procedural legal review into a far more indistinct instrument of material adjudication, open to an emotionally-founded response to individual circumstance, and an *interposito auctoritas* within which a miracle of European solidarity might be born.

A burgeoning—judicially-driven—citizenship, founded in response to material circumstance, is an undoubted achievement, most importantly because it begins to answer the final demand, famously made by Ralf Dahrendorf, that traditional notions of citizenship should be opened up in response to globalization and social fragmentation.<sup>33</sup> A material universalism, given force by functionality and emotion, seemingly allows us to escape the double-binds of conceptual history and to respond to a real world of material circumstance. Nevertheless, the approach is vulnerable in various respects, especially in terms of the European legal system. In addition to precipitating its own embroilment in a vast number of technical cases on social assistance,<sup>34</sup> it now also suffers from powerful critique, highlighting the inconsistency and incoherence in own jurisprudence.

The primary focus for this criticism has been the case of *Zambrano*. While generally regarded as having furnished the "correct result" in simple terms of reactive justice, *Zambrano* also causes concern within formalist legal thinking, seemingly overturning the CJEU's established line of jurisprudence limiting enjoyment of EU citizenship rights to instances of cross-border movement.<sup>35</sup> As a consequence, the Court has been required to clarify and limit its revolutionary jurisprudence, whereby Mr. and Mrs. Zambrano, failed Colombian asylum seekers in Belgium, who had never moved across European frontiers, were nevertheless afforded the protection of the *ius Europeum* as primary caregivers of their children who were Belgian by virtue of their birth in that country. In the Austrian case of *Dereci*,<sup>36</sup> the Court reiterated that, in *Zambrano*, the operative point was that the

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<sup>33</sup> Ralf Dahrendorf, *Citizenship and Social Class*, in *THE MODERN SOCIAL CONFLICT: THE POLITICS OF LIBERTY* (Ralf Dahrendorf ed., 2008).

<sup>34</sup> See Everson, *supra* note 12.

<sup>35</sup> See Shuibhne, *supra* note 10.

<sup>36</sup> See *Murat Dereci and Others v. Bundesministerium für Inneres*, CJEU Case C-256/11, (Nov. 15, 2011), <http://curia.europa.eu/>.

children of the Zambrano family remained dependent upon their parents such that, as Union citizens, they would still have been required to leave the European continent. The five TCNs of *Dereci*, wishing to join their families in Austria, were non-dependents and therefore not so fortunate. As much as family re-unification might be desirable, it was not “necessary” for the settled Austrian families to maintain their residency within the European space.

Reserving for itself, rather than national courts, the right to review each individual set of facts, the *Dereci* Court decisively foreclosed the potential for a human right of enjoyment of family life to become an automatic basis for the universalization of EU citizenship. At the same time, and in addition to increasing its own emotional workload, the Court also unmasked its own particularism: the continuing tension between norms and fact within EU law and the inherent weakness within an emotionally-founded *interpositio auctoritatis* which inexorably makes “Judge-Kings” of courts.<sup>37</sup> The question of who guards the guardians is a perennial one. It becomes a critical question where the selfsame primary legal—or quasi-constitutional—jurisdiction that reserves to itself the right to review the subjective interpretation by Member States of the term “unreasonable burden,” also takes unto itself a highly emotional function of ascertaining the exact nature of the personal circumstances which will force removal, voluntary or otherwise, from the Union. The potential for empathy failure is ever present. The Court’s rationale in a second qualifying case, whereby Mrs. McCarthy, a UK national, whose Jamaican husband was denied leave to remain in the UK, on the basis that she was not exercising her right of free movement under Directive 2004/38, such that an ancillary citizenship status could not be established for her husband,<sup>38</sup> leaves us with continuing concerns. Certainly the Court might state that Mrs. McCarthy, unlike the Zambranos, will not be forced by UK law to leave the EU, but surely she will be so by sentiment. Equally, it would prove difficult to regularize the residency of Belgium children in Colombia, but so too might it prove difficult to regularize the status of Mrs. McCarthy in Jamaica. Max Weber’s eternal concerns about the inconsistency of material jurisprudence returns to haunt a European law which, even in its qualifying jurisprudence, strays from strictly formalist paths.<sup>39</sup> How might it maintain its own legitimacy in a necessarily irrational process of emotional response to the tangible demands for universal justice thrown up by globalization processes?

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<sup>37</sup> See Everson, *supra* note 12.

<sup>38</sup> *McCarthy v. Sec’y of State for the Home Dep’t.*, CJEU Case C-434/09, (May 5, 2011), <http://curia.europa.eu/>.

<sup>39</sup> See Everson, *supra* note 12.

**C. Scientific Universalism and the Entrenchment of *Homo Economicus***

Karl Deutsch, paraphrased by Neil Fligstein,<sup>40</sup> reminds us of the calculated cynicism inherent to the development of deep concepts of national citizenship: “[T]he historical ‘trick’ to the rise of a nation state will be to find a horizontal solidarity for the existing [class] stratification and a rationale that using a state apparatus to protect the nation makes sense.” And, once again, in his technical choice of sociological methodology, Adrian Favell cannot but also implicitly hint at the far broader normative point that the “Marshallian triptych”<sup>41</sup> of industrial citizenship, in its deification of the progressive historical emergence of civic, political, and social rights, can be seen as entrenching outmoded and oppressive constructs of social organization. Social stratifications extend far beyond divisions of labor to shape and control—in nationalized narratives—dominant modes of cultural expression. Should, paraphrasing Favell, “doing new things,” buying into bucolic dreams, motoring across the border to locate cheaper wine be viewed, for example, within the UK class-based narrative as an act of betrayal, as a siding with the propertied classes of a golden pre-war era?

The point is far from being a facetious one: the ossification of historically-conditioned stratifications within bounded societies, governed by their own inspirational and often class-based narratives of citizenship evolution, have similarly obscured a myriad of social cleavages founded, for example, in gender, sexual orientation, or ethnicity, and have played their own part in retarding material claims for justice that are not expressed within traditional national narratives of belonging and cohesion.<sup>42</sup> The ability to engage in “new” acts—e.g. the explicit sexualization of consumption within the establishment of a highly visible pink lifestyle<sup>43</sup>—might, by the same token, be viewed as avant-garde establishing potential for vital social change. The Janus-like character of citizenship, or its exclusionary potential, is not limited to exclusion on the basis of nationality. Instead, exclusion may also occur—sometimes in a highly oppressive manner—within the spatial confines of an “inclusive” citizenship narrative.

Set against this background of internal, as well as external exclusion, the liberating emphasis—also implicit in Favell’s research—upon transaction and exchange opportunities, is thus far from a surprising one. Market forces are famously non-

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<sup>40</sup> Fligstein, *supra* note 16, at 130.

<sup>41</sup> See Adrian Favell, *The Changing Face of “Integration” in a Mobile Europe*, in COUNCIL FOR EUROPEAN STUD. NEWSLETTER (2013).

<sup>42</sup> See Dahrendorf, *supra* note 33.

<sup>43</sup> See FRANK C. MORT, *CULTURES OF CONSUMPTION: MASCULINITIES AND SOCIAL SPACE IN LATE-TWENTIETH CENTURY BRITAIN* (1996).

philosophical, blind to the antecedents, characters, desires and intentions of producers, service-providers, employees or consumers. To this degree, the rights of free movement at the core of EU citizenship, designed to facilitate establishment of the single market, might be argued—and this in isolation from a judicial activism which has also diluted the economic character of EU citizenship as in *Martinez Sala*<sup>44</sup>—to contain their own material universalism of opportunity, allowing Union citizens in their characters as workers, entrepreneurs or simple shoppers to challenge the established stratifications of their own and adopted Member States, not simply in theory, but also in fact. Nonetheless, a citizenship grounded within the fact of market process also poses its own dangers.

At least since the financial crisis, new forms of social organization, founded in liberalizing market forces, have often found themselves under attack and all-too-easily dismissed as neo-liberal chimeras that mask the disenfranchising interests of private economic power. The argument has validity, especially as regards the misdeeds of various sectors of the banking sector. Nevertheless, with an equal eye to liberating marketing potential, the risks inherent to a marketized society necessarily also deserve a more differentiated treatment, especially insofar as an institutionally-driven transition from concepts of political citizenship to notions of market citizenship may also be identified as a part of a materializing trend. This trend continues to seek a universal justice in its treatment of the individual and individual rights, but does so in processes, which—initially at least—are founded not in conceptual restraint, but rather in scientific appraisal of the circumstances of exchange.

In the recent case of *Alfa Vita*, Advocate General Poiares Maduro has reiterated the close connection within the European Union between the rights-driven evolution of the European market and the establishment of European citizenship:

[I]t would be neither satisfactory nor true to the development of the case law to reduce freedom of movement to a mere standard of promotion of trade freedoms of movement fit into the broader framework between member states. It is important that the be understood to be one of the essential elements of the objectives of the internal market and European citizenship. At present, freedoms of movement must the ‘fundamental status of nationals of the member states.’ They represent the cross-border dimension of

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<sup>44</sup> See *Maria Martinez Sala v. Freistaat Bayern*, CJEU Case C-85/96, 1998 E.C.R. I-2691.

the economic and social status conferred on European citizens.<sup>45</sup>

Considering the centrality of the European market within the integration project, it is equally unsurprising that the jurisprudence of the CJEU has similarly endowed and continues to endow the individual European with an economic character. From the very inception of the EEC, judicial extrapolation of the European treaties has perforce entailed the re-allocation of economic opportunities within an emerging European market. Individual economic potential is no longer constrained by national borders. Instead, reformulation of primary EU laws guaranteeing cross-border movement of labor, services, economic undertakings, and capital as individual rights (the “four freedoms”), is an indispensable weapon within a judicial armory dedicated to the dismantling of the barriers to trade that distinctive national regulatory regimes constitute. The European economic citizen accordingly emerged, in its infant form, as a “frontier-busting” pioneer of European market formation.<sup>46</sup>

The persona of the European economic citizen must likewise be viewed in a positive light or, at least, must be so to the degree that promotion of her rights by the CJEU has often freed the European from the “infantilizing” excesses of post-war regulation.<sup>47</sup> Equally, the surprising degree of acceptance won by an activist court for its ground-breaking judgments may be argued to have been a reflection of the Court’s ready deployment of the universal truths of the scientific discipline, or the happy marriage established by the CJEU between science and the principles of European law, and especially so, between science and the principle of proportionality. Where the Court deployed the forensic power of science to unmask fiction, or the paternalistic incoherence of member state regulation, national legal systems were persuaded to lend it their implementing vigor: a ban on whole-meal pasta could not, after all, be demonstrated to be proportionate and could not be shown to protect the health of Italian diners.<sup>48</sup> In short, in a quest for materialization beyond mere emotionalism, the scientific *interpositio auctoritatis* reveals its own legitimating universality, as legal norm is informed by scientific methods of fact recognition. Nevertheless, in its materialization efforts, the historic Court also imbued its jurisprudence with a scientific outlook, which has subsequently hardened—or been misapplied—with the notable result that the CJEU has slowly denatured the European economic citizen and

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<sup>45</sup> Opinion of Attorney General Maduro at I-8148, *Alfa Vita Vassilopoulos AE v. Greece*, CJEU C-158 & CJEU 159/04, 2006 E.C.R. I-8135.

<sup>46</sup> See Marco Dani, *Assembling the Fractured European Consumer*, 36 EUROPEAN L. REV. 362 (2011).

<sup>47</sup> See *id.*

<sup>48</sup> See *id.*

finally remodeled individuals throughout the Continent as the highly troubling *homo economicus* of cases such as *Laval* and *Viking*.<sup>49</sup>

A core problem in this regard is also one of the growing dominance of a form of economic liberalism, which construes itself as a science, locating its claim to a universal applicability and justice within the posited facts of market operations alone rather than the place that the market is afforded within society as whole. The impact of this form of economic liberalism, or in Michel Foucault's language, "anarcho-liberalism,"<sup>50</sup> is most strongly felt—and also most strongly critiqued<sup>51</sup>—in the sphere of application of the precepts of the law and economics movement. It also extends to influence, by means of application of efficiency postulates, national constitutional jurisdictions and, in the case of the CJEU, the quasi-constitutional jurisprudence of post-national law. For critical opponents, in particular those of a Hayekian persuasion,<sup>52</sup> the law and economics movement—to the degree that it mimics anarcho-liberal faith in the ability of rational market exchange to maximize individual and joint outcomes—represents, *grosso modo*, "a legal theory without law." In all of its materializing over-ambition, or its "idolatry of the factual," law and economics has emerged as a totalizing force of its own, negating of an original economically-liberal (and legal) project to limit state power through "normative" delineation of an (economic) civil society, and fatally disregarding of the Hayekian demand for a re-establishment of moment self-limitation within rational choice analysis. Where cost-benefit analysis can be and is applied far beyond limited spheres of rational individual interaction, it too becomes "counterfactual," with the result that the scientification of law project is traduced and reversed. Where it is modeled or applied to operations where markets and competition are "arbitrarily mimicked,"<sup>53</sup> the claim to re-found legal morality in universal reality is displaced by a totalizing rationality that makes its impossible claim to capture all uncertainty within human relations in its counterfactual models of operation. Where Foucault warns of the "bio-power" inherent in a form of economic liberalism that construes all of human actions as market operations, hinting also that such an operation might overcome all human subjectivity or potential for political voice, Ernst-Joachim Mestmäcker, remains true to his Hayekian roots. Mestmäcker forcefully dismisses a positivistic scheme of law that allows individual judges to dispense with a core rule of legal

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<sup>49</sup> See International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti, CJEU Case C-438/05, 2007 E.C.R. I-1079; Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet and Svenska Byggnadsarbetareförbundets avdelning 1 and Byggettan and Svenska Elektrikerförbundet, CJEU Case C-341/05, 2007 E.C.R. I-11767.

<sup>50</sup> See MICHEL FOUCAULT, BIRTH OF BIOPOLITICS: LECTURES AT THE COLLEGE DE FRANCE 1978–79 161, 329 (2008).

<sup>51</sup> Michelle Everson, *The Fault of (European) Law in (Political and Social) Economic Crisis*, 24 LAW & CRITIQUE (2013).

<sup>52</sup> See Ernst-Joachim Mestmäcker, *A Legal Theory Without Law—Posner v. Hayek on Economic Analysis of Law*, in BEITRÄGE ZUR ORDNUNGSTHEORIE UND ORDNUNGSPOLITIK (2007).

<sup>53</sup> See *id.*

certainty in line with a Grundnorm of modeled economic transactions, as acceptance of “ideology in the service of unlimited government and socialism [sic]; the refutation of a concept of justice ignoring viable negative tests of justice that identify unjust norms.”<sup>54</sup>

The totalizing effects of efficiency postulates within the quasi-constitutional jurisdiction of the CJEU may thus also be identified in its increasingly undifferentiated approach to economic citizenship and in its pursuit of an absolute universal justice within the factual. Where European jurisprudence once paid due attention to delineation of its own Economic Constitution, the normative measure of which was the degree to which the European economic order continued—in the absence of its own redistributive function—to co-exist with residual national social competences given their own democratic legitimation,<sup>55</sup> recently radical CJEU market jurisprudence has recalibrated the principle of proportionality, ironed out “efficiency-jarring” elements within precedent and moved explicitly to a marketized conception of redistribution as redistributive opportunity. Such jurisprudence might be attributable to the pressures of eastern enlargement or the need to bind new Member States quickly into the Union.<sup>56</sup> Nonetheless, it is still striking that recent free movement case law and the growing power of a new jurisprudential logic that national regulation, regardless of its purpose, must cede to the European principle of the free movement of goods where a product would otherwise be impeded in its access to the market, transforms the principle of proportionality from a revealing rule of reason applied to national regulatory motivations to an absolute standard of “trade above all.”<sup>57</sup> Similarly, by now infamous judgments on services provision have also subjected conduct of industrial disputes to marketized proportionality,<sup>58</sup> revealing the extent to which economic efficiency postulates have emerged within CJEU thinking as a putatively universal yardstick against which national regulation will be measured.

For many, the most concerning aspect within the *Laval* and *Viking* cases is the CJEU’s failure to maintain the European legal tradition that labor and economic constitutions are distinct orders which may not be weighed against one another within the adjudicative

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<sup>54</sup> *Id.* at 55.

<sup>55</sup> See Christian Joerges, *What is Left of the Integration Project? A Reconstruction in Conflicts Law Perspective*, in *LEGAL CULTURES, LEGAL TRANSFER AND LEGAL PLURALISM* (Stefan Kadelbach ed., 2013).

<sup>56</sup> See Michelle Everson & Christian Joerges, *Reconfiguring the Politics—Law Relationship in the Integration Project through Conflicts—Law Constitutionalism*, 18 *EUROPEAN L.J.* 644 (2012).

<sup>57</sup> See Alina Tryfonidou, *Further Steps on the Road to Convergence Among the Market Freedoms*, 35 *EUROPEAN L. REV.* 36 (2010).

<sup>58</sup> See Brian Bercusson, *The Trade Union Movement and the European Union: Judgment Day*, 13 *EUROPEAN L.J.* 279 (2007).

balance.<sup>59</sup> Collective bargaining agreements may no longer be imposed upon “posted” workers through regulation or strikes if they are deemed to influence disproportionately on cross-border trade. Conversely, seen together with the Court’s new market access test for goods, *Laval* and *Viking*—as Attorney General Maduro’s economic evocation of citizenship demonstrates—are also one further example of the manner in which orders governing citizenship, as well as those governing the economic, have now coalesced within CJEU jurisprudence in accordance with a “justice standard” of allocative efficiency. The emergence of this standard has its own inspirational roots. The posted workers of *Laval* and *Viking* were from the new Member States, and found themselves denied access by western labor practices to the sole route to prosperity which the old Member States had afforded them: their competitive labor advantage. Compensating perhaps for the lack of a European Marshall Plan, but establishing a compensatory measure of justice for new Member States that is founded in an idolatry of cheap labor, the Justices of the CJEU have similarly undone the collectively-established universalisms of the social legal entitlements enshrined within national social orders and replaced them with European rights which deny western European workers access to their own jobs just as they empower eastern European workers to work for less money.

In contrast, the most jarring note in this rebirth of the European economic citizen as a *homo economicus*, whose life chances are to be pursued and determined within the totalizing rationality of law as an economic technology may be noted, not in the market itself, but rather in a sphere of political citizenship. Just as development of the *homo economicus* conditions individual behavior within the market, it similarly limits the sphere of opportunity for effective political expression in relation to and outside that market. Primary European law may promote the “confident” consumer, but ensconced within its own scientific outlook it cannot even recognize the political concerns of the “ethically-informed” consumer.<sup>60</sup> Equally, in limiting strikes, the EU legal order has similarly deprived the European *homo economicus* of a final means of politically asserting her collectively established values above market forces in the traditionally—disproportionate—manner.

#### D. An Economy of Exclusion

The emergence of a European *homo economicus* within CJEU jurisprudence allows us to relativize the critique made of the existing academic industry of European citizenship. Above all, the facts and impacts of *Viking* and *Laval* confirm the perceptions of an industrial class within Europe of skilled and unskilled workers, identified by Neil Fligstein,<sup>61</sup>

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<sup>59</sup> See A. Supiot, *A Legal Perspective on the Economic Crisis of 2008*, 149 INT’L LAB. REV. 151 (2010).

<sup>60</sup> See Michelle Everson & Christian Joerges, *Consumer Citizenship in Postnational Constellations?*, in CITIZENSHIP AND CONSUMPTION (Kate Soper & Frank Trentmann eds., 2007).

<sup>61</sup> See FLIGSTEIN, *supra* note 16.



that they are, in good measure, excluded from the benefits of European Union. Exclusion is not simply due to the fact that a western European industrial class is unwilling to make use of its European rights through movement. Instead, exclusion extends to the sphere of the political as protest in defense of local jobs against agency workers is easily dismissed, for example, in the case of UK protests against agency workers.

For many, complaints about foreign workers coming here and taking their jobs are disturbingly reminiscent of the atmosphere whipped up in Britain's cities during the 1960s and 1970s, when the backlash against Commonwealth immigration was reflected both in the ballot box—in support for extreme right-wing parties—and, in many cases, in street violence.<sup>62</sup>

The tragedy inherent to traditional notions of industrial citizenship is undoubtedly one of structural exclusion and racism: the differentiated welfare capitalisms of the post-war era<sup>63</sup> just as surely as they ossified hierarchies of class within the nation state also consolidated existing stratifications of global, economic and social inequality. To the degree that nationalized welfarism erected its own regulatory barriers to trade and an original allocation of global resources, the class struggles of the socially-democratic nation state, universalist in aspiration, but still bounded in spatiality, were likewise to be felt outside a dominant west as an extension of colonial domination into a decolonizing and post-colonial era. Yet, in our modern European struggles of adaptation to allocative efficiency across a former iron curtain, tragedy nonetheless persists and does so, above all, in our depiction of a subjective and collectively-expressed act of protest against the persona of the *homo economicus*, solely and uniquely as an act of xenophobia. Foucault's hints and is concerned that the spread of bio-power, made at the dawn of our new economically-liberal era, would appear to have found their practical expression in the totalizing scientification of current public discourse. Perceptions do matter and do so to the degree that materializing rationalism can and does pre-empt human subjectivity. Perceptions can and do make us wholly blind to the manifestation of any form of political discourse or human expression founded in opposition to a dominant *homo economicus*.

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<sup>62</sup> See Kevin Maguire, *New and Comment on UK Politics*, Comment to *Fair Chance of a Job*, U.K. MIRROR (January 30, 2009, 2:01 PM), <http://blogs.mirror.co.uk/maguire/2009/01/fair-chance-of-a-job.html> ("For many, complaints about foreign workers coming here and taking their jobs are disturbingly reminiscent of the atmosphere whipped up in Britain's cities during the 1960s and 1970s, when the backlash against Commonwealth immigration was reflected both in the ballot box — in support for extreme right-wing parties — and, in many cases, in street violence. As unemployment starts to edge up to levels last seen in the mid-1980s, the hunt is on for scapegoats.").

<sup>63</sup> See GÖSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* (1989).

The material treatment of a functionally-founded European citizenship has brought positive gains, especially as regards the position of the indigent stranger in a position of real need. Yet, the obvious limits to the universality of the emotionally-founded *interpositio auctoritatis* and the lure of the putative universalisms of scientific and economic discourse may be argued to have established their own economy of exclusion. Conversely, this form of exclusion may not be limited to those who do make use of their rights of movement, typically an (western) industrial class. Instead, a citizenship founded in movement may also, to the degree that it promotes the character of the *homo economicus*, disenfranchise the “stars,” or cosmopolitan and pro-active citizens of European integration identified by Favell,<sup>64</sup> on whom our hopes for future political union within Europe are based.

The ambivalence inherent within Adrian Favell’s ground-breaking research on European citizenship, on how Europeans exercise their rights, has often been noted.<sup>65</sup> At the same time, perhaps too much emphasis has been placed upon Favell’s conclusion that very few of the Eurostars of the continent, exercising their movement-based rights of European citizenship within the most cosmopolitan and Europe-friendly of European cities, establish any form of connection to the traditional structures of local political discourse. Favell is correct: the act of politics extends far beyond our presence in the voting booth, and just as the strike asserts a collective voice outside the parliamentary chamber, purchasing run-down houses to rejuvenate inner city areas, establishing and supporting new cultural ventures, or exercising purchasing power impacts just as surely on general cultural discourse and changes the societies in which we live. Yet, in the limits of Favell’s methodologies, we also find a seed of concern: certainly very few of his Eurostars explicitly reveal themselves in interviews to be the “bandits” of neo-liberal critique of rights of free movement, concerned only for their own material betterment and with no regard for the societies in which they briefly settle. But what of the unrecognized unsaid in personal Eurostar narratives? To what degree are our “political” acts of exchange and transaction subjective acts of cultural liberation, undertaken on our own part, both as a means of escape from our own experience of cultural stagnation as well as with an informed eye to the “betterment” of society around us. To what degree are they simply our sole option, an expression of the only unthinkingly “efficient” impact which we can have in a denatured world of scientification?

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<sup>64</sup> See Adrian Favell, *EUROSTARS AND EUROCITIES: FREE MOVEMENT AND MOBILITY IN AN INTEGRATING EUROPE* (2008).

<sup>65</sup> See Christian Joppke, *EU Citizenship and Identity: Sociological and Legal-Institutional Views*, in *EU CITIZENSHIP AND THE MARKET* (Richard Bellamy & Uta Staiger eds., 2011).

### E. Beyond and Towards Citizenship

Deep concepts of national citizenship are exclusionary. Nevertheless, at least insofar as the quasi-constitutional jurisdiction of the CJEU reflects the materializing scientification of governing social relations throughout Europe, the material liberation of EU citizenship may also be argued to be accompanied by its own form of economic exclusion. The problem is complex, far more than a mere neo-liberal matter of the powerful dominance of one form of economic interest. Instead, the de-naturizing and de-politicizing potential of *homo economicus* has its own inspirational roots: the continuing quest for a universal form of justice to govern relations within a globalizing world that recognizes the negative exclusionary externalities<sup>66</sup> of the traditional nation state. The chimera of universalism promised by the efficiency postulates of our new economic liberalism has been partially revealed by the financial crisis. At the same time, however, the false lure of universalizing scientification remains powerful, especially where it coalesces with the liberating potential of markets experienced by a variety of once disregarded identities since the period of economic liberalization of the 1980s. It still presents itself to the law as a ready tool to prosecute the Enlightenment project of universalism beyond its conceptually-bounded limitations.

Nevertheless, the lure of universalism is also its curse. In a real world of response to material circumstance and want, the effort to move beyond the constraints of traditional notions of belonging might, in a final assessment, better be approached with a vital shift in emphasis away from the universal potential of citizenship, to a renewed concern with its institutional status as an impossible fulcrum, holding irreconcilable interests and values in fragile equilibrium. In addition to its redistributive characteristics, the often overlooked functionality of T.H. Marshall's sociologically-established conception of industrial citizenship resides in its reconciliation but equal perpetuation of historical and contemporary antagonisms between the market and those who reject its inequalities and in its provision of stable institutions within which perpetual agonism might unfold. The current obsession with pursuit of universal justice similarly detracts from the existence of confrontational citizenship couplets of individualism versus community or sovereignty versus subjection as well as, in the language of Ralf Dahrendorf, entitlement versus provision; wherein provisions capture the entrepreneurial impulse of a citizenship which encourages individual—economic but contingent—enterprise, and entitlements represent a collective counter-interest—existing in permanent tension with individualism—in the permanent guarantee of subjective rights.

Seen in this confrontational light, one in which the citizenship emphasis is shifted away from philosophical concerns with communitarian or contractual belonging, the primary

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<sup>66</sup> See Joerges, *supra* note 55.

issue at a European, but also at global, level, must be one of which are the institutions which both reconcile and perpetuate the impossible, but also creative, tensions of a world in movement. Real and never imagined tensions between traditional or class-based expressions of collective interest and the cosmopolitan and entrepreneurial impulses of the global citizen, between the wealth-creating provisions of a globalized market and demands, not only, in the terms deployed by Karl Polanyi,<sup>67</sup> for the “market-embedding” entitlements that mitigate revolutionary rejection of market inequalities, but also—and vitally so—for the space to create “different” exchange relations, or emerging markets, outside of, and in collective defense—including environmental defense—against totalizing economic technologies and brute economic power; and finally, between an always extant human desire to rebel, escape, renew and destroy in an expression of (self-) sovereignty against an equally necessary human want for the security and stability found in—collective—subjugation.

Adrian Favell is right to call for evolution of sociological research agendas which reveal the material circumstances of a world in movement. Yet, a norming and normative response to globalization is also indispensable. In a prosaic world of law, this response must per force be cautious and tedious: first, reigning in the universalist aspirations of grandiose, rights-based legal methodologies, and second, working slowly, and in response to wider European and global cultural, political and economic discourses, creating the institutions of a perpetually agonistic citizenship within the globalized legal order. There is no space here to detail a new legal research agenda for a citizenship of “global agonism.” Nevertheless, an immediate observation is one that the institutions of European and global citizenship must be embedded across the entire material of the legal systems that make up European and global legal orders. That is, from competition law to labor law, state aids law, or the law of economic subvention (e.g. traditionalized trading regimes) to social security law, from nationality law to voting law and from consumer law to the law of environmental protection.

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<sup>67</sup> See Joerges, *supra* note 55.



## **Europe's Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation**

*By Christian Joerges\**

### **A. Introduction**

The European Union rides through troubled waters. Its original reliance on law as the object and agent of the integration project and on the “economic constitution,” which the Economic and Monetary Union (EMU)—as accomplished by the Treaty of Maastricht—expected to complete, have proven unsustainable. Following the financial and sovereign debt crises, individuals perceive the EMU, with its commitments to price stability and monetary politics, as a failed construction precisely because of its reliance on inflexible rules. The European crisis management seeks to compensate for these failures by means of regulatory machinery which disregards the European order of competences, takes power from national institutions, and burdens—in particular—Southern Europe with austerity measures; it establishes pan-European commitments to budgetary discipline and macroeconomic balancing. This abolishes the ideal of a legal ordering of the European economy, while the economic and social prospects of these efforts appear gloomy and the Union’s political legitimacy becomes precarious. A fictitious debate between Carl Schmitt and Jürgen Habermas addresses the present critical constellation, where a number of Schmittian notions seem alarmingly realistic. This essay pleads for a more modest Europe committing itself to “unity in diversity,” the motto of the ill-fated Constitutional Treaty of 2003.

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## B. Preliminary Note on the Course of the Debate

Europe faces troubling times. Constructive suggestions—such as the federal finality that Joschka Fischer sought to promote in his legendary lecture at the Humboldt University in Berlin<sup>1</sup> more than ten years ago—no longer sound credible. They now stand in contrast with the endless and frenzied crisis management that has placed its stamp of rigid austerity policy on the “periphery” of what was to evolve into an “ever closer Union.” The rule of law and the project of “integration through law” are at stake, concepts which characterized and connected European law scholarship transnationally<sup>2</sup> in the formative phase of the integration project and for a good while thereafter. Europe is far from hosting “the most competitive, knowledge-based economy in the world” as the Lisbon Council proclaimed in the year 2000;<sup>3</sup> its economy stands at the core of the present crisis. European constitutionalism, which dominated academic discussions for a decade and thoroughly neglected the inherently political dimensions of the “Economic,” has been silenced.

Paradoxically, the same holds true for Germany’s Ordo-liberalism and its project of an “economic constitution.” According to this school of thought, the legitimacy of the European project rested upon the legal ordering of the economy,<sup>4</sup> the economic freedoms of the EEC Treaty—a system of undistorted competition—and an economic policy “complying with justiciable criteria.”<sup>5</sup> These stood as the potential cornerstones of this order, to orient the integration process in a way by which the European polity would be legitimized by—and reduced to—an economic *ordo* whose validity did not depend upon

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<sup>1</sup> Joschka Fischer, *Vom Staatenverbund zur Föderation—Gedanken über die Finalität der europäischen Integration [From Confederacy to Federation: Thoughts on the Finality of European Integration]* (May 12, 2000), <http://whi-berlin.de/documents/fischer.pdf>. See also WHAT KIND OF CONSTITUTION FOR WHAT KIND OF POLITY? RESPONSES TO JOSCHKA FISCHER (Christian Joerges et al. eds., 2000) (illustrating how widely the lecture was noted).

<sup>2</sup> A chapter from Joseph H.H. Weiler’s Ph.D. thesis was ground-breaking, see Joseph H.H. Weiler, *The Community System: The Dual Character of Supranationalism*, 1 Y.B. EUR. L. 257–306 (1981), and then the seminal work he orchestrated, *INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE* (Mauro Cappelletti et al. eds., 1985).

<sup>3</sup> See Presidency Conclusions of the Lisbon Council of Mar. 23–24 2000, EUR. PARL. DOC., [http://www.europarl.europa.eu/summits/lis1\\_en.htm](http://www.europarl.europa.eu/summits/lis1_en.htm).

<sup>4</sup> See Christian Joerges, *What is left of the European Economic Constitution? A Melancholic Eulogy*, 30 EUR. L. REV. 461, 465 (2005); Christian Joerges, *Europa nach dem Ordoliberalismus: Eine Philippika*, 43 KRITISCHE JUSTIZ 394 (2010).

<sup>5</sup> Ernst-Joachim Mestmäcker, *Macht-Recht-Wirtschaftsverfassung*, 137 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT 97, 106 (1973). The essay is the elaboration of the lecture which he gave at the Verein für Socialpolitik conference in Bonn in 1972. Ernst-Joachim Mestmäcker, *Power, Law and Economic Constitution*, 11 GERMAN ECON. REV. 177–192 (1973).

democratic credentials, let alone upon the transformation of Europe into a fully-fledged federal state.<sup>6</sup>

This idea guided and accompanied Ordo-liberalism's path to Europe. Nobody championed or developed it more consistently than Ernst-Joachim Mestmäcker. One of his seminal essays explained that the pressure to harmonize, stemming from integration, would become stronger.<sup>7</sup> A Common Monetary Policy would mean "ultimately giving up" the opportunity to maintain far-reaching differences between the economic orders.<sup>8</sup>

The Community for which the original ordo-liberal concepts were conceived—and to which Mestmäcker referred—looks nothing less than idyllic from today's perspective. It was both smaller and more homogeneous than the current Union. For this reason alone, the incorporation of the project of integration through law, particularly its commitments to a legal ordering of economic policy (*Ordnungspolitik*), no longer seem viable. By now, individuals see the symptoms of a deep crisis and the necessity for developing new perspectives for the European project appears irrefutable. One cannot reverse the course of history, but one can analyze and try to understand how and why the configuration of the relationship between law and politics in the integration project has contributed to the "integration failure" which we are now witnessing in the current crisis. This essay proceeds in five steps.

The first step, taken somewhat in haste, concerns the Weberian notion of the nation-state and its pursuit of power through economic strength. The second involves the taming of the self-same nation-state by law and the de-coupling of the European economic constitution from the labor and social constitutions of the nation-states, which presents itself to the one—Ordo-liberal—side as nothing but a logical implication of the establishment of a European economic order, while other political quarters perceive this disconnection as a threat to the legacy of the welfare state. This is followed by an analysis of the various

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<sup>6</sup> See MILÈNE WEGMANN, *FRÜHER NEOLIBERALISMUS UND EUROPÄISCHE INTEGRATION* (2002) (re-constructing this scenario thoroughly). Her work corresponds instructively to Wolfgang Fikentscher's earlier *magnum opus* on *Wirtschaftsrecht* (economic law). *Id.* Decades before the studies on global governance, European governance, the relation between the levels and the impact of transnational governance on national statehood became *en vogue* in political science, and "constitutionalism beyond the state" became everybody's concern in legal scholarship, Fikentscher had conceptualized *WIRTSCHAFTSRECHT* (1983) in truly transnational and constitutional perspectives, and composed the two monumental volumes accordingly: The first volume is dedicated to *Weltwirtschaftsrecht* (world economic law) and *Europäisches Wirtschaftsrecht* (European economic law); national economic law (*Deutsches Wirtschaftsrecht*) is presented upon this basis. This conceptualization documents the truly universalist commitments of the ordo-liberal tradition which Wegmann emphasises in her reconstruction of the ordo-liberal tradition.

<sup>7</sup> Ernst-Joachim Mestmäcker, Address at the Verein für Socialpolitik Conference: Macht-Recht-Wirtschaftsverfassung [Power-Law-Economic Constitution] (1972); Mestmäcker, *supra* note 5, at 109.

<sup>8</sup> Mestmäcker, *supra* note 5, at 109.



dimensions of the integration project's problems, referring to Karl Polanyi's economic sociology. The next section elaborates on these remarks, dealing with the establishment and the crisis of Europe's EMU and including an overview of Europe's new "crisis law" and its assessment by the German Constitutional Court (FCC) and the Court of Justice of the European Union (CJEU). The dramatic nature of our current situation will then be illustrated by means of a fictitious debate between Carl Schmitt and Jürgen Habermas. In the analysis of this debate, Carl Schmitt's theorems will prove to be frighteningly realistic: "But where danger threatens, that which saves from it also grows."<sup>9</sup> What kind of regime did Europe impose on itself, and what does this mean for European citizenship? These challenges will be addressed in the Epilogue, which will also tentatively consider an alternative vision to both the frightening as well as the possibly merely voluntarist scenarios on the future of the European integration project.

### C. Max Weber's *Nationalstaat*

The steps towards European integration after World War II document how we overcame our bellicose past. At the same time, the designers of the project wanted to rein in the economic militancy of the nation-state. Max Weber formulated his perception of that nation-state in his 1895 inaugural Freiburg address as follows:

Our successors will not hold us responsible before history for the kind of economic organization we hand over to them, but rather for the amount of elbow-room we conquer for them in the world and leave behind us. Processes of economic development are in the final analysis also power struggles, and the ultimate and decisive interests at whose service economic policy must place itself are the interests of national power, where these interests are in question. The science of political economy is a political science. It is a servant of politics, not the day-to-day politics of the individuals and classes who happen to be ruling at a particular time, but the lasting power-political interests of the nation. And for us the national state is not, as some people believe, an indeterminate entity raised higher and higher into the clouds in proportion as one clothes its nature in mystical darkness, but the temporal power-organization of the nation, and in this national

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<sup>9</sup> FRIEDRICH HÖLDERLIN, *PATMOS DEM LANDGRAFEN VON HOMBURG ÜBERREICHTE HANDSCHRIFT* (1802), *quoted in* FRIEDRICH HÖLDERLIN *WERKE* 379 (1954), *translated in* MICHAEL HAMBURGER, *FRIEDRICH HÖLDERLIN, SELECTED POEMS AND FRAGMENTS* 243 (1994).

state the ultimate standard of value for economic policy is “reason of state”. There is a strange misinterpretation of this view current to the effect that we advocate “state assistance” instead of “self-help; state regulation of economic life instead of the free play of economic forces. We do not. Rather we wish under this slogan of “reason of state” to raise the demand that for questions of German economic policy—including the question of whether, and how far, the state should intervene in economic life, and when it should rather untie the economic forces of the nation and tear down the barriers in the way of their free development—the ultimate and decisive voice should be that of the economic and political interests of our nation’s power, and the vehicle of that power, the German national state.<sup>10</sup>

“It was not the agreement of many audience members with the following remarks, but their dissent that prompted me to publish them,” Weber wrote in the preliminary notes to the publication of his lecture.<sup>11</sup> This text has weathered these concerns well. He developed a profoundly thought-through in terms of economic theory, sociology, and history, and—despite all its jingoistic pronouncements—also stands as a critique of the lack of political capacity of the German political class.<sup>12</sup> The martial tone of Weber’s lecture clearly spells out a target of the European project as people understood it later, particularly in Freiburg when that city had become the intellectual *Heimat* of the Ordo-liberal School.

#### **D. The Civilizing Accomplishment and Asymmetry of the EEC Treaty**

In his seminal lecture of 1972, Mestmäcker has explained succinctly how Ordo-liberalism has liberated itself from the legacy of Weber’s *Nationalstaat*. He stated:

What is historic about the EEC Treaty is that it integrates the internationality of economic relationships into the internationality of law and political institutions. In this sense, the EEC Treaty

<sup>10</sup> Max Weber, *The National State and Economic Policy (Freiburg Address)*, 9 *Econ. & Soc’y* 428, 438 (Ben Fowkes trans., 1980) (1895).

<sup>11</sup> Max Weber, *Inaugural Lecture at Freiburg: Der Nationalstaat und die Volkswirtschaftspolitik* (May 1895), at 1–2.

<sup>12</sup> See Rita Aldenhoff, *Nationalökonomie, Nationalstaat und Werturteile. Wissenschaftskritik in Max Webers Freiburger Antrittsrede im Kontext der Wissenschaftsdebatten in den 1890er Jahren*, in *DEUTSCHE RECHTS- UND SOZIALPHILOSOPHIE UM 1900* 79–90 (Gerhard Sprenger ed., 1991).

includes an economic constitution . . . Expressed in terms of state and society, the EEC takes as its starting point the law of bourgeois society and its institutions as the first manifestation of the universal in the international realm.<sup>13</sup>

This all now has a price. The liberation from the Weberian *Nationalstaat* came about through the imposition of legal commitments and constraints on the political autonomy of sovereign states. Due to these constraints, it became possible “to conceptualise an economic policy that can be bound to legal and constitutional norms.”<sup>14</sup> Not only are the contents of economic policy affected by these demands, but the competencies of legislation and its scope<sup>15</sup> and the details of free collective-bargaining and co-determination.

This touches upon a sensitive issue. Even if we assume that the Treaties of Rome have established a European economic constitution, they nonetheless remain silent concerning labor and social law. This is why a functional equivalent of the “social *Rechtsstaat*,” in the sense of Article 20(1) German Basic Law or of the “social market economy,” as Alfred Müller-Armack programmatically developed it<sup>16</sup> could not establish itself at the European level. Fritz W. Scharpf considers the implications of this finding—the separation of the economic and social constitutions—to be a design-flaw that places Europe’s social integration at long-term risk.<sup>17</sup> These statements are sociologically based, and meant in a socio-political way. A different question concerns explaining how this decision came about; another concerns whether such explanations are normatively instructive and what legally binding effect may be granted to this initial situation. People widely view the reduction of the European social and labor constitution to the EEC Treaty’s principle of non-discrimination as a successful negotiation on the part of Germany, supposed to have been worth attaining at the expense of agricultural policy. Now, the parties agreed upon the

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<sup>13</sup> Mestmäcker, *supra* note 5, at 108–09.

<sup>14</sup> Mestmäcker, *supra* note 5, at 102.

<sup>15</sup> Mestmäcker, *supra* note 5, at 103.

<sup>16</sup> See ALFRED MÜLLER-ARMACK, WIRTSCHAFTSORDNUNG UND WIRTSCHAFTSPOLITIK. STUDIEN UND KONZEPTE ZUR SOZIALEN MARKTWIRTSCHAFT UND ZUR EUROPÄISCHEN INTEGRATION (1966); ALFRED MÜLLER-ARMACK, GENEALOGIE DER SOZIALEN MARKTWIRTSCHAFT. FRÜHSCHRIFTEN UND WEITERFÜHRENDE KONZEPTE (1974).

<sup>17</sup> Fritz W. Scharpf, *The Asymmetry of European Integration, or Why the EU Cannot be a “Social Market Economy,”* 8 SOCIO-ECON. REV. 211–250 (2010) (including references to earlier works); see Florian Rödl, *Die Idee demokratischer und sozialer Union im Verfassungsrecht der EU* [The Idea of a Democratic and Social Union in the Constitutional Law of the EU], in WOHLFAHRTSSTAATLICHKEIT UND SOZIALE DEMOKRATIE IN DER EU [Welfarism and Social Democracy in the EU] 1 EUROPARECHT 179–204 (Jürgen Bast & Florian Rödl eds., 2013).

*quid pro quo* under the influence of the welfare promises of the Ohlin Report,<sup>18</sup> impressing the political left at the time and taking place in the era of “embedded liberalism,”<sup>19</sup> in which the opening up of national economies seemed compatible with the establishment of welfare-state systems.<sup>20</sup>

What does all this mean in legal terms? Is this an irreversible “decision” about the alternatives of a planned economy versus a market economy? Or is this a constitutional compromise, similarly to how Hermann Heller found the Weimar Constitution to be a compromise; permanently binding guidelines for developing the relationship between the economic and labor constitutions in Europe?<sup>21</sup> Both positions suffer from the same difficulty. They treat the results of political negotiations as though they were the results of an assembly convened to draw up a constitution. So, is this merely a piece of history, whose further course is to be accepted as a kind of normative fact that we no longer can influence retroactively? This sequence of question marks indicates that there is no conclusive answer available. The constitutional configuration of the integration project is in permanent flux. Consolidated constitutional democracies too have to adapt to changing contextual conditions. But they tend to be more disciplined in the processes of adaptation.<sup>22</sup> In the EU Treaty, changes have become so burdensome that they are no longer conceivable. This is why the European praxis resorts ever-more evasive techniques and informal transformations of its order.

To put this slightly differently: European integration as a project without a defined *finalité*; it is adjusting to the dynamics of a development whose decoding is impossible without extra-legal means. We encounter such undertakings everywhere. Undoubtedly, the resort to Karl Polanyi—which now follows—is so far unusual. We submit that this is a promising encounter.

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<sup>18</sup> Int'l Lab. Org., *Social Aspects of European Economic Co-operation: Report by a Group of Experts*, 74 INT'L LAB. REV. 99–123 (1956).

<sup>19</sup> John G. Ruggie, *International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 375, 392 (1982).

<sup>20</sup> See Claire M. O'Brien, *The UN Special Representative on Business and Human Rights: Re-embedding or dis-embedding transnational markets?*, in KARL POLANYI: GLOBALISATION AND THE POTENTIAL OF LAW IN TRANSNATIONAL MARKETS 323–357 (Christian Joerges & Josef Falke eds., 2011) (discussing Ruggie's later view).

<sup>21</sup> Florian Rödl, *Labour Constitution*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 605–640 (Armin von Bogdandy & Jürgen Bast eds., 2010); STEFANO GIUBBONI, *SOCIAL RIGHTS AND MARKET FREEDOMS IN THE EUROPEAN CONSTITUTION: A LABOUR LAW PERSPECTIVE* 7–15 (2006).

<sup>22</sup> In principle, Hans Peter Ipsen's term “continuous re-configuration,” (*Wandelverfassung*) means nothing else. See Hans Peter Ipsen, *Europäische Verfassung—Nationale Verfassung*, in EUROPARECHT 195, 201 (1987).

### E. Symptoms of Europe's Crisis in the Light of Karl Polanyi's Economic Sociology

Karl Polanyi is one of the three Viennese *émigrés* who grappled with fascism towards the end of World War II. The other two are Friedrich August von Hayek<sup>23</sup> and Karl Popper.<sup>24</sup> Polanyi took up the issue in his brief monograph, first published in 1944.<sup>25</sup> His analysis is specific, "embedded" in a re-construction of the core instability of industrial capitalism. This analysis lays heavy emphasis on the role played within capitalist society by three "fictitious commodities:" Money, labor, and land. These three fictitious commodities denote "goods" (*Waren*) which nonetheless predate and transcend "the market," and whose subsequent "commodification" not only provokes crises both within and around capitalism, but also prove to be an impetus for counter-movements to the market.<sup>26</sup> In view of the chronic instability within the EMU, the steady erosion of national labor and social constitutions, and continuing conflicts in the area of energy policy, Polanyi's theses and conclusions have gained a remarkable degree of general topicality. The following analysis limits itself within this paradigm to the European "integration through law project," and to the question of what European law has experienced, is experiencing, and what it has precipitated. This is not a matter, for example, of a generalized condemnation of market processes, at least not for strong voices in the Polanyian tradition.<sup>27</sup> Polanyi's thesis that treating fictitious goods as marketable products cannot come about smoothly is anything but comforting: Marketization of labor, land and money, he warned, will trigger crises and counter-movements. In view of the present state of the European Union, the erosion of the labor and social constitution, and the looming conflicts about the future of atomic energy, Polanyi's diagnoses are astonishingly topical.<sup>28</sup>

In the present constellation of conflict inter-dependencies, we must remain sensitive towards pertinent problems in their specific contexts. Drawing a line from Polanyi's

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<sup>23</sup> FRIEDRICH AUGUST VON HAYEK, *THE ROAD TO SERFDOM* (1944).

<sup>24</sup> KARL POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* (1945).

<sup>25</sup> KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* (2001). See, e.g., Jens Beckert, *MPIfG Discussion Paper 07/6: The Social Order of Markets*, MAX PLANCK INSTITUTE FOR THE STUDY OF SOCIETIES (2007); WOLFGANG STREECK, *RE-FORMING CAPITALISM: INSTITUTIONAL CHANGE IN THE GERMAN POLITICAL ECONOMY* 154–156 (2009); Fred Block & Marget E. Somers, *Karl Polanyi and the Writing of The Great Transformation*, in *THE POWER OF MARKET FUNDAMENTALISM: KARL POLANY'S CRITIQUE* 73–97 (2014) (discussing Polanyi's topicality).

<sup>26</sup> KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 69 (2001).

<sup>27</sup> See Alexander Ebner, *Transnational Markets and the Polanyi Problem*, in *KARL POLANYI: GLOBALISATION AND THE POTENTIAL OF LAW IN TRANSNATIONAL MARKETS* 19, 29 (Christian Joerges & Josef Falke eds., 2011).

<sup>28</sup> See Christian Joerges, *Law and Politics in Europe's Crisis: On the History of the Impact of an Unfortunate Configuration*, 21 *CONSTELLATIONS* (forthcoming 2014). The growing interest in Polanyi and the renaissance of economic sociology is due to current events, but is nonetheless more robust. See references *supra* note 25.

fictitious commodities to atomic energy is a stretch and may go too far, but it is not absurd to regard atomic energy as a non-marketable good.<sup>29</sup> In any case, the insight that the economic success of this type of energy is due not to natural evolutionary processes, but to the establishment of markets by political fiat instead, is irrefutable. European law plays an unfortunate role here. The Euratom Treaty of 1957<sup>30</sup> was in a position to declare atomic energy the technology of the future *par excellence*, but did not Europeanize it, leaving the decision about its use to the nation-states.<sup>31</sup> The Treaty of Lisbon did not change this in any way,<sup>32</sup> with the consequence that a phasing-out of atomic energy in Europe can only take place if all the Member States were to implement it, a scenario that definitely is nowhere in sight.

The consequences of de-coupling the labor and economic constitutions from one another either remained unobserved for a long time or parties presented them as being rectifiable. The notion that a "European social model" would take the place of the diverse variants of the Western European welfare states stood as no more than a pale utopian dream. This became apparent after the enlargement towards the East. At that juncture, the socio-economic disparities became so pronounced that a continuation of integration was feasible only in the form of "negative integration by reducing the social protection provided by welfare states. This strategy was initiated by the European Commission in collaboration with actors representing relevant interests in both the old and new Member States. The *Viking*, *Laval*, and *Rüffert*<sup>33</sup> decisions are the most striking legal, partial-victories, which can be viewed together as a confirmation of the decision to treat an economic constitution as a "pure" market constitution and as the abandonment of the

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<sup>29</sup> Polanyi states: "To allow the market mechanism to be the sole director of the fate of human beings and their natural environment, indeed, even of the amount and use of purchasing power, would result in the demolition of society . . . [N]o society could stand the effects of such a system of crude fictions even for the shortest stretch of time unless its human and natural substance as well as its business organization was protected against the ravages of this satanic mill." See KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 73 (2001).

<sup>30</sup> Euratom Treaty, Consolidated Version of the Treaty Establishing the European Atomic Energy Community, Mar. 30, 2010, 2010 O.J. (C 84) 1 [hereinafter Euratom Treaty].

<sup>31</sup> The silence of the Euratom Treaty is deafening: The EAEC Treaty did not grant the Community the competence to "authorise the construction or operation of nuclear installations." See *Comm'n v. Council*, CJEU Case C-29/99, 2002 E.C.R. I-11281/11311, para. 89. See Christian Joerges, *The Timeliness of Direct Democracy in the EU* – and the contest over atomic energy in conflicts-law perspectives in *INTERNATIONAL CONSTITUTIONAL LAW IN LEGAL EDUCATION: PROCEEDINGS OF THE ERASMUS INTENSIVE PROGRAMME NICLAS 2010–2012*, 89-100 (Jürgen Busch et al. eds., 2014) (criticizing this legal situation)..

<sup>32</sup> Consolidated Version of the Treaty on the Functioning of the European Union art. 194, Oct. 26, 2010, 2010 O.J. (C 326) 47 [hereinafter TFEU].

<sup>33</sup> *Int'l Transp. Workers' Fed'n v. Viking Line ABP*, CJEU Case C-438/05, 2007 E.C.R. I-10779; *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet*, CJEU Case C-341/05, 2007 E.C.R. I-11767; *Rüffert v. Land Niedersachsen*, CJEU Case C-346/06, 2008 E.C.R. I-01989.

common European constitutional compromise. One must also keep in mind, although, what this means with regard to the acceptance of the project of integration. If Polanyi's diagnoses are correct, then we must anticipate counter-movements seeking to restore perspectives calling for social protection, and such signals are becoming ever more visible after Europe's transformation into an "austerity union."

#### **F. The Crisis of Economic and Monetary Union and the European Rule of Law**

These very brief remarks must suffice so that space remains for the financial crisis that overshadows everything now.<sup>34</sup>

##### *I. Juridification of Monetary Union*

The financial crisis concerned the EMU as it took shape in the 1992 Treaty of Maastricht. The EMU was doubtless a political project, albeit one strictly from the influence of daily politics and entrusted instead to the medium of law. It was not "*alternativlos*" (without alternative), as is claimed today. In the 1970s, the Werner-Davignon Plans had attempted to synthesize the economic and social constitutions.<sup>35</sup> During these years, a general departure from Keynesianism came about; Keynesianism had been legally anchored in Germany in the 1967 Stability Act (*Stabilitätsgesetz*),<sup>36</sup> realizing the "magical quadrant"—price stability, high employment, balance of payments, and appropriately increasing economic growth—a balancing act that seemed very precarious to many renowned German constitutionalists at the time because it had to be entrusted to the evaluation and discretionary decision-making of the political authorities. While German traditionalists worried about rule-guided *Ordnungspolitik*, in Great Britain, the post-war welfare-state *acquis* was revoked. Such a background constellation provided a strong political basis for a new European consensus that was expressed in the project of the single market and the turn to monetarist concepts. Paradigm shifts of this kind do not simply follow theoretical reason, nor should their effective rejection be regarded as evidence of the success of the prevailing paradigm without further ado.<sup>37</sup>

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<sup>34</sup> Christian Joerges, *Unity in Diversity as Europe's Vocation and Conflicts Law as Europe's Constitutional Form*, in *THE CHANGING ROLE OF LAW IN THE AGE OF SUPRA- AND TRANS-NATIONAL GOVERNANCE* 125, 151–61 (Rainer Nickel & Andrea Greppi eds., 2014) (discussing this issue more extensively).

<sup>35</sup> HAGEN SCHULZ-FORBERG & BO STRÄTH, *THE POLITICAL HISTORY OF EUROPEAN INTEGRATION: THE HYPOCRISY OF DEMOCRACY-THROUGH-MARKET* 43 (2010).

<sup>36</sup> Christian Joerges, *The Idea of a Three-dimensional Conflicts Law as Constitutional Form*, in *CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND INTERNATIONAL ECONOMIC LAW* 413, 420 (Christian Joerges & Ernst-Ulrich Petersmann eds., 2011).

<sup>37</sup> See MAURICE GLASMAN, *UNNECESSARY SUFFERING: MANAGING MARKET UTOPIA* 96, 98 (1996); FRITZ W. SCHARPF, *Monetary Union, Fiscal Crisis, and the Pre-emption of Democracy*, 2–24 (5 MPIfG Discussion Paper 11/11, 2011) (discussing this in the context of the 1970s); see also COLIN CROUCH, *THE STRANGE NON-DEATH OF NEO-LIBERALISM* 49–

In the case of Europe's economic-policy orientation, individuals can discern two stages of re-orientation. First, Commission President Jacques Delors obtained broad support for his project of a single market, perceived as an institutionalization of economic rationality: A commitment to principles designed to guide all political action.<sup>38</sup> The Monetary Union and the Stability Pact<sup>39</sup> were understood as complementary projects, as institutionalizing an independent central bank outside all political spaces and beyond the institutional structure of the Union designed to consummate the new architecture and fossilize a supranational economic constitution.

This understanding is deeply flawed. What the Treaty of Maastricht has established through the separation of Europeanised monetary policy from national fiscal and economic policy can best be characterised as a "diagonal conflict". This notion requires an explanatory remark:<sup>40</sup> Monetary policy has become an exclusive competence of the Union (Article 3(1) c TFEU). With this provision, the Union claims supremacy in the policy area conferred to it, a conferral which did not include economic and fiscal policies. However, the exercise of these policies by the Member States can have effects which destruct the operation of monetary policy as administered by the European Central Bank (ECB). As experienced so drastically after 1992, the potential and actual tensions between monetary policy and the national policies cannot be controlled. This tension is not a vertical conflict for which arguably the supremacy principle could provide a response. It is a "diagonal conflict" in the just-defined sense because both the Union and the Member States are certainly interested in the functioning of their economies, but the powers required to accomplish this objective are attributed to two distinct levels of governance with often irreconcilable policy preferences. The type of conflict resolution foreseen in Article 119 TFEU is "the adoption of an economic policy which is based on the close coordination of Member States' economic policies" as substantiated in Article 121 TFEU and has proved to unworkable; this deficiency cannot be cured under the provisions of the Treaty of Maastricht and the soft law of the Stability Pact.

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124 (2011); Peter E. Hall, Commentary, *Brother, Can You Paradigm?*, 26 GOVERNANCE: AN INT'L J. OF POL'Y, ADMIN. & INSTITUTIONS 189 (2013) (evaluating this matter in the present).

<sup>38</sup> See M. Rainer Lepsius, *Institutionalisierung und Deinstitutionalisierung von Rationalitätskriterien*, in INSTITUTIONENWANDEL, LEVIATHAN SONDERHEFT 16/1996 57 (Gerhard Göhler ed., 1997); see also M. Rainer Lepsius, *The European Union as a Sovereignty Association of a Special Nature*, in WHAT KIND OF CONSTITUTION FOR WHAT KIND OF POLITY? 213–222 (Christian Joerges, Yves Mény & Joseph H.H. Weiler eds., 2000) (considering how this applies to Europe).

<sup>39</sup> Resolution of the European Council on the Stability and Growth Pact, 1997 O.J. (C 236); TFEU art. 126.

<sup>40</sup> See Christian Joerges, *Rethinking European Law's Supremacy: A Plea for a Supranational Conflict of Laws*, in DEBATING THE DEMOCRATIC LEGITIMACY OF THE EUROPEAN UNION 311, 318 (Beate Kohler-Koch & Berthold Rittberger eds., 2007); see also GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM IN GLOBALIZATION 158–163 (2012) (discussing this issue further).



The decision by the FCC on the Treaty of Maastricht literally had a decisive part in making this misfortune come about, when it declared replacing politics by legal rules to be a *sine qua non* for Germany's participation, both in terms of content and institutionally.<sup>41</sup> The remarkably complex reasoning of the Court's Second Senate first dealt with the plaintiff's argumentation that the European Union had, under the new provisions, such far-reaching competence that the nation-states were no longer in a position to discharge important tasks. This called the continuing existence of "democratic statehood" into question. This argumentation also referred to monetary policy. But the Court then responded by occupying the spaces for democratically shaping policy with law. In so doing, it embraced the—in this instance, compatible—Ordo-liberal and monetarist theorems, and gave them a legal form: Economic integration, the Court said, was an apolitical process that both could and was permitted to take shape autonomously and beyond the Member States. Monetary Union was constituted appropriately via a constitutional duty to guarantee price stability and regulations to counter excessive budget deficits. In this way, the objections to the democratic legitimacy of economic integration seemed to resolve themselves. In the public-law divisions of European legal studies in both Germany and in the larger quarters of European constitutionalism, scholars either did not even realize this, or they did not deem it worthy of mention.<sup>42</sup>

## II. Processes of Erosion

In Mestmäcker's account, what is at stake is power struggle between the political and the economic, which in his view, its law which must enjoy the highest authority.<sup>43</sup> Yet, this authority proved unable to prevail. The situation is more dramatic today. But the rules agreed upon were flawed in substance, and if they had been enforced, this would have caused harm. In line with this widely shared view, the very short life of the new legal

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<sup>41</sup> Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 2134/92 & 2 BvR 2159/92, 89 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 155 (Oct. 12, 1993). See Christian Joerges, *States Without a Market: Comments on the German Constitutional Court's Maastricht-Judgment and a Plea for Interdisciplinary Discourses* (NISER Working Paper, 1996), available at <http://eiop.or.at/eiop/pdf/1997-020.pdf>; Michelle Everson, *Beyond the Bundesverfassungsgericht: On the Necessary Cunning of Constitutional Law*, 4 EUR. L. J. 389 (1998).

<sup>42</sup> Instead, the Court was confronted with its talk of an "association of states," its announcement that it would refuse to follow *ultra vires* legal acts, but above all, the statement that its democratic rule presupposes that a "relatively homogeneous people" has the opportunity "to give legal expression to what unifies them—intellectually, socially, and politically." Joseph H.H. Weiler, *Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision*, 1 EUR. L. J. 219 (1995); see *infra* text accompanying notes 44–50.

<sup>43</sup> See Ernst-Joachim Mestmäcker, *Europäische Prüfsteine der Herrschaft und des Rechts*, 58 ORDO: Jahrbuch für die Ordnung von Wirtschaft und Gesellschaft 3, 3–5 (2007) (restating this position).

edifice did not give rise to much concern.<sup>44</sup> When Germany, France, and the Netherlands, as well as others, failed to respect the rules of the Stability Pact, the Commission's much-vaunted efforts to take action against them dwindled into nothing. Barry Eichengreen, a renowned US observer of European monetary policy since the negotiations on the Treaty of Maastricht,<sup>45</sup> commented frankly on the breach of the law: "How can one expect compliance with a threshold which has no sound conceptual basis?"<sup>46</sup> Occasionally, he used even stronger language<sup>47</sup> and was by no means alone in voicing such principled criticism.<sup>48</sup> The Monetary Union was poorly designed and the enforcement of its rules would not prevent the damage, but increased it.

Things were to become much worse during the current crisis. The Union experiences a state of emergency where the law is losing its integrity. The all-too-meager points of reference provided in Article 122(2) TFEU, amended under the simplified revision procedures of Article 48(6) which "shall not increase the competences conferred on the Union in the Treaties,"<sup>49</sup> must justify incalculable solidarity payments.<sup>50</sup> The European Central Bank is disregarding its statutes as they used to be read;<sup>51</sup> parliaments are convened to make fast-tracked decisions that cannot be meaningfully discussed; Greece and other members of the Union are being told that their sovereignty is now "limited." Changes of government take place under exceptional circumstances. Polanyi and his analyses of monetary policy are only rarely mentioned during all this. Yet, bear in mind his qualification of money as a fictitious commodity,<sup>52</sup> and of the risks of destroying the social

<sup>44</sup> See Christian Joerges, *What is Left of the European Economic Constitution: A Melancholic Eulogy*, 30 EUR. L. REV. 461, 465 (2005) (discussing this matter in greater detail).

<sup>45</sup> See Barry Eichengreen, *Should the Maastricht Treaty be Saved?*, 74 PRINCETON STUD. IN INT'L FIN. (1992).

<sup>46</sup> Barry Eichengreen, *Institutions for Fiscal Stability* (Working Paper PEIF No. 6, 2003).

<sup>47</sup> See, e.g., Peter Bofinger, *Are There Alternatives to the Stability Pact? Three Experts Answer*, DIE ZEIT (Nov. 20, 2003), [http://www.zeit.de/2003/49/Oekonom\\_I](http://www.zeit.de/2003/49/Oekonom_I) (contribution of Barry Eichengreen) ("The 3% cap is at best ridiculous and at worst perverse.").

<sup>48</sup> Giandomenico Majone, *Rethinking European Integration After the Debt Crisis* (UCL Working Paper No. 3, 2012), available at <http://www.ucl.ac.uk/european-institute/analysis-publications/publications/WP3.pdf>.

<sup>49</sup> Council Decision 2011/199, 2011 O.J. (L 91) 1 (amending Art. 136 TFEU with regard to a stability mechanism for Member States whose currency is the euro).

<sup>50</sup> See *infra* Part D.III (evaluating the Constitutional Court's decision on Greece). The reasons provided in plaintiff Peter Gauweiler's constitutional complaint by Dietrich Murswiek are available online. UNI FREIBURG: INSTITUTE FOR PUBLIC LAW, <http://www.jura.uni-freiburg.de/institute/ioeffr3/forschung/gutachten>.

<sup>51</sup> Martin Seidel, *Der Euro—Schutzschild oder Falle?* (ZEI Working Paper No. B01, 2010).

<sup>52</sup> "Money . . . is merely a token of purchasing power which, as a rule, is not produced at all, but comes into being through the mechanism of banking or state finance." KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 72 (2001). See Sabine Frerichs, *From Credit to Crisis: Max Weber, Karl Polanyi, and the Other Side of the Coin*, 40 J. OF L. & SOC'Y 7–26 (2013).

conditions under which market societies can function.<sup>53</sup> Ordo-liberal and monetarist standards were Europeanized in the legal constitution of the Monetary Union, although it was not possible to Europeanize their societal conditions for functioning that had developed over time. Majone explains his opinion that the central bank is a “constitutional monstrosity” by reasoning that the bank is supposed to pursue its stated goal of price stability in a political vacuum, and it is unable to take the Union’s socio-economic disparities into account while doing so.<sup>54</sup> As Scharpf adds, the institutionalized inability to do anything other than react to instability and imbalance with intensified austerity programs not only threatens the well-being of European citizens, but also endangers the social acceptance of the Union.<sup>55</sup>

### III. Reactions

The pace at which crisis summits are being held—and the drafting of more and more new legislation and regulatory complements—is breathtaking.<sup>56</sup> It is both important and meritorious to record all this precisely,<sup>57</sup> so that we can become aware of the tensions between our inherited concepts and methodological tools, and the present European *praxis*. Here, though, we must limit ourselves to a few highlights.

In March and May 2010, the Commission developed the “Europe 2020 Strategy”<sup>58</sup> and the “European Semester,”<sup>59</sup> respectively. These were followed by the European Financial

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<sup>53</sup> Wolfgang Streeck, *The Crises of Democratic Capitalism*, 71 NEW LEFT REV. 5 (2011). See also Wolfgang Streeck, *MPIfG Discussion Paper 11/15: The Crisis in Context Democratic Capitalism and Its Contradictions*, MAX PLANCK INSTITUTE FOR THE STUDY OF SOCIETIES (2011), available at [http://www.mpifg.de/pu/mpifg\\_dp/dp11-15.pdf](http://www.mpifg.de/pu/mpifg_dp/dp11-15.pdf).

<sup>54</sup> See Giandomenico Majone, *Europe as the Would-be World Power: The EU at Fifty*, FOREIGN AFFAIRS, Jan. 2010, <http://www.foreignaffairs.com/articles/65854/giandomenico-majone/europe-as-the-would-be-world-power-the-eu-at-fifty>.

<sup>55</sup> Fritz W. Scharpf, *MPIfG Discussion Paper 11/11: Monetary Union, Fiscal Crisis, and the Preemption of Democracy*, 5 MAX PLANCK INSTITUTE FOR THE STUDY OF SOCIETIES (2011).

<sup>56</sup> See Economic and Financial Affairs, COUNCIL OF THE EUR. UNION, <http://www.consilium.europa.eu/press/press-releases/economic-and-financial-affairs?lang=en&BID=93> (updating information continuously).

<sup>57</sup> Suffice it here to refer to just a few examples from the torrent of literature. Christian Calliess, *Perspektiven des Euro zwischen Solidarität und Recht—Eine rechtliche Analyse der Griechenlandhilfe und des Rettungsschirms*, ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN 213 (2011); Matthias Ruffert, *The European Debt Crisis and European Union Law*, 49 COMMON MKT. L. REV. 1777 (2011); PAUL CRAIG, *THE LISBON TREATY: LAW, POLITICS, AND TREATY REFORM* 457–517 (2013) (forthcoming, Chapter 12 on “Financial Crisis, Response, and Europe’s Future”). See also Nicole Scicluna, *EU Constitutionalism in the Twenty-first Century: Politics and Law in Crisis* (2013) (unpublished Ph.D. thesis, La Trobe University) (analyzing Europe’s present constitutional constellation, its *Vefassungswirklichkeit*, in Chapter 5).

<sup>58</sup> *Communication from the Commission*, COM (2010) 2020 final (Mar. 3, 2010).

<sup>59</sup> *Communication from the Commission*, COM (2010) 250 final (May 12, 2010).

Stability Facility (EFSF) Framework Agreement<sup>60</sup> in June 2010 and by the European Council's "Euro Plus Pact"<sup>61</sup> in March 2011. Simultaneously, upon the basis of the simplified revision procedures laid down in Article 48(6) TEU, the European Council also decided on 25 March 2011 to add a new Paragraph 3 to Article 136 TFEU, which permitted the establishment of a stability mechanism and the granting of financial assistance, effective 1 January 2013.<sup>62</sup> This was followed in November 2011 by a bundle of legislative measures aimed at re-enforcing budgetary discipline on the part of the Member States. The package is supposed to go down in history under the catchy title of the "Six Pack" and entered into force on 13 December 2011.<sup>63</sup> The high point of all this is the Treaty on Stability, Co-ordination and Governance (TSCG), drafted in December 2011, approved at an informal meeting of the European Council on 30 January 2012,<sup>64</sup> and signed on 2 March 2012 by twenty-five out of the then twenty-seven Member States. A debt brake according to the German model has been introduced, and will be subject to judicial review by the CJEU in the form of institutional borrowing, with one Member State bringing action against another. Support from the European Stability Mechanism (ESM)—a permanent crisis fund—will be available only to countries in the euro area that have signed the pact. The TSCG has been ratified by the required number of Member States and entered into force on 1 January 2013. Two further Regulations submitted back in November 2011—the "Two-Pack"—were adopted with parliamentary blessing in March 2013. They provide "for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area" and "the strengthening of economic and budgetary surveillance of Member States experiencing or threatened with serious difficulties with respect to their financial stability in the euro area."<sup>65</sup>

There is much to scrutinize here: The legal problems, their treatment in legal scholarship, the analysis and interpretation of what has been established. The law-politics relationship is particularly challenging. Lawyers—practitioners and academics alike—have all

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<sup>60</sup> The Framework Agreement was concluded by the ECOFIN Council and confirmed by the European Council, Brussels on June 17, 2010. Council Conclusion No. 2 of June 17, 2010, EUCO 13/10.

<sup>61</sup> Council Conclusion No. 3 of Mar. 25, 2011, Annex I, EUCO 10/11.

<sup>62</sup> Council Decision 2011/199, 2011 O.J. (L 91) 1 (amending Art. 136 TFEU with regard to a stability mechanism for Member States whose currency is the euro).

<sup>63</sup> Council Regulations 1173–1177/2011, 2011 O.J. (L 91) 1; Council Directive 2011/85, 2011 O.J. (L 91) 1.

<sup>64</sup> See the Communication of the euro area Member States as well as the Treaty on Stability, Co-ordination and Governance in the Economic and Monetary Union in the version of Jan. 20, 2012, *available at*: [http://european-council.europa.eu/media/639235/st00tscg26\\_en12.pdf](http://european-council.europa.eu/media/639235/st00tscg26_en12.pdf).

<sup>65</sup> See Press Release, European Parliament, Green light for economic governance "two pack" (Mar. 12, 2013), [http://www.europarl.europa.eu/pdfs/news/expert/infopress/20130312IPR06439/20130312IPR06439\\_en.pdf](http://www.europarl.europa.eu/pdfs/news/expert/infopress/20130312IPR06439/20130312IPR06439_en.pdf).

traditionally sought to remain on good terms with political power.<sup>66</sup> When it comes to Articles 122–126 TFEU, our discipline can apparently not resist helping political and institutional actors by taking the letter of the law so lightly as to run afoul of it. But just as legally wayward spirits will sometimes fail to finesse a fine legal point and must withdraw without achieving anything, jurisprudence is facing problems that seem to lie beyond the reach of its methodological means and conceptual potential. We are not going to reconstruct these discussions in any detail here, but merely underline three particularly disturbing constitutional issues which will be discussed in the following Sections 1–3. These are:

- (1) The establishment of new regimes of economic governance outside the institutional frameworks of the Treaties and of national constitutions, for which two German lawyers<sup>67</sup> have coined the notion of *völkerrechtliches Ersatzunionsrecht*; the main difficulty here is that *Ersatzunionsrecht* legalizes departures from the European Treaties without their amendment.
- (2) The problem of whether the means by which these regimes have been established may be used to intervene into national constitutions and imposed upon democratically-legitimated governments which require financial support; with this practice, Europe's crisis management is following international examples.<sup>68</sup> The German Constitutional Court was confronted with the query of whether such practices can be employed among the Member States of the Union and/or are even required by Germany's constitution; the main difficulty here is that unelected authorities exercise controls to which the democratic bodies of the state under supervision agree under enormous eternal pressures.
- (3) A third issue is often obscured as a simple matter of methodological interpretation. The difficulty here is that the conceptual basis for EMU is disregarded and replaced a new type of economic governance. If the EMU suffers from a design defect and the implementation of the law as it stands seems to

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<sup>66</sup> See Michael Stolleis, *Reluctance to Glance in the Mirror: The Changing Face of German Jurisprudence After 1933 and Post-1945*, in DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS 1–18 (Christian Joerges & Navraj S. Ghaleigh eds., 2003) (Stolleis' observations concern primarily, but by no means exclusively, Germany's Nazi period).

<sup>67</sup> R. Alexander Lorz & Heiko Sauer, *Ersatzunionsrecht und Grundgesetz – Verfassungsrechtliche Zustimmungsgrundlagen für den Fiskalpakt, den ESM-Vertrag und die Änderung des AEUV*, in 65 DIE ÖFFENTLICHE VERWALTUNG 573–612 (2012), cited in the judgment of the German Constitutional Court of Sept. 12, 2012, *infra* note 89, at para. 257 of the German version, and para. 226 of the English version.

<sup>68</sup> Pertinent practices have been exercised by central banks and the IMF long before the financial crisis. They have been characterised as a feature of the global capital market: "The new conditionality of the global economic system—the requirements that need to be met for a country to become integrated into the global capital market — . . . facilitates the task of instituting a certain kind of monetary policy." Saskia Sassen, *De-Nationalized State Agendas and Privatized Norm-Making*, in PUBLIC GOVERNANCE IN THE AGE OF GLOBALIZATION 51, 56 (Karl-Heinz Ladéur ed., 2004).

cause harm, can its rationale be replaced by some alternative, and who is empowered to decide upon such emergencies? The CJEU did not shy away from handing down clear answers to the queries in the *Pringle* case on 27 November 2012.<sup>69</sup>

### 1. Community Method v. Union Method and Ersatzunionsrecht

The special feature of the European system—as Joseph H.H. Weiler explained in his seminal 1981 essay—is the simultaneity and balance of supranational law and inter-governmental policy.<sup>70</sup> Weiler thus characterized a precarious relationship, but certainly did not seek to grant the Member State governments *carte blanche* to suspend their commitments to Community (now Union) law whenever they believed that doing so would be irrefutable and expedient. And precisely this is the historical achievement of the Treaties of Rome: That they endeavored to rein in the power-political actions of the Weberian nation-state by legal means. The differences between different modes of interaction in the Union have been quite thoroughly explored.<sup>71</sup> The move from arguing and deliberative problem-solving to bargaining and the strategic pursuit of “national” interests and the replacement of the old Community method in which the law provided institutional and procedural protection to the weaker actors make a real difference. Thanks to its domination by the Council, the new “Union method” faithfully mirrors the power asymmetries in the Union. Should the law care? Mark Dawson and Floris de Witte are among the few<sup>72</sup> who have raised this issue.<sup>73</sup>

<sup>69</sup> *Pringle v. Ireland*, CJEU Case C-370/12 (Nov. 27, 2012), <http://curia.europa.eu/>.

<sup>70</sup> Joseph H.H. Weiler, *The Community System: The Dual Character of Supranationalism*, 1 Y.B. OF EUR. L. 257, 257 (1981).

<sup>71</sup> Christine Reh, *European Integration as Compromise: Recognition, Concessions and the Limits of Cooperation*, 47 GOV'T AND OPPOSITION 414–40 (2012).

<sup>72</sup> There are more, but they are rare. For another noteworthy exception with a great sensitivity for the hybrid nature of the Union *praxis*, see Edoardo Chiti & Pedro Gustavo Teixeira, *The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis*, in 50 COMMON MKT. L. REV. 683, 685, 690 (2013). Chiti and Tereiro, throughout their analyses, assess what they lucidly describe through functional and normative yardsticks and thereby soften their critique; their conclusion is nonetheless uncompromising on this point: The new hybrid method “tends to set aside the role of EU institutions in exercising their respective competences within a democratic framework based on EU law in favour of power-based intergovernmental relations.” *Id.* at 708. But this is precisely the reason why not only democracy but also the rule of law in its core transnational function—as we have underlined it in Part B—is at stake.

<sup>73</sup> Mark Dawson & Floris de Witte, *Constitutional Balance in the EU After the Euro-Crisis*, 76 MOD. L. REV. 817–844 (2013) at 838. They conclude that “the rise of executive control via the European Council, the increasing ease of making Treaty and legislative reforms without consulting smaller member states, and the creation of eternal fiscal rules uncontrollable by national parliaments, unable to be fully discussed and legitimated, is now in danger of desensitising the Union . . . .” *Id.* at 842. Indeed, and it is true “that the Union’s existing response . . . does not bode well for the future.” *Id.* at 844. What remains to be explained is Europe’s apparent political inability to organize a legally robust response to these insights. See discussion *infra*.

It is simply amazing that it has become the rule among lawyers not to take these issues seriously. To be sure, the Member States of the Union have conferred their sovereignty only in “limited fields” and retain political autonomy where this does not occur. But they nonetheless remain bound by their common commitments, in particular to democracy and the rule of law (Article 2 TEU). This is why the sovereignty that they have retained does not empower them to enter into *qualsiasi* agreement. The Fiscal Compact requires from its signatories<sup>74</sup> changes of fundamental constitutional importance, and the modes of their implementations are anything but consensual.<sup>75</sup> The methodological reasons invoked in various modes replicate what could be observed earlier in European law, namely a resort to legal formalism which shields law from justifying to what extent it is used:<sup>76</sup> “Intergovernmental cooperation permits Member States to exercise reactive crisis management, but Union law does not provide an instrument for doing so.”<sup>77</sup> “Major

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<sup>74</sup> Least from Germany, which has in 2009 constitutionalized the *Schuldenbremse* in Article 109 Basic Law. Constitutional provisions, however, are easier to amend than multilateral treaties.

<sup>75</sup> Suffice it here to point to the analysis submitted by political scientist Martin Höpner and lawyer Florian Rödl, *Illegitim und rechtswidrig: Das neue makroökonomische Regime im Euroraum*, in ZBW – LEIBNIZ-INFORMATIONSZENTRUM WIRTSCHAFT 219–21 (2012); similarly Jürgen Bast & Florian Rödl, *Jenseits der Koordinierung? Zu den Grenzen der EU-Verträge für eine Europäische Wirtschaftsregierung*, in 39 EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT 269–78 (2012). The authors demonstrate in detail that the Council’s power of surveillance in accordance with Article 136(1) (b) does not provide for the sanctions which the new regime establishes. Although the coordinating competencies in accordance with Article 121 TFEU (3) and (4) provide for reporting requirements on the part of the Member States as well as recommendations by the Commission, Article 121(6) TFEU does not permit mandatory sanctions. Indeed, the multilateral surveillance in accordance with Article 121(3) and (4) TFEU contains provisions for reports, recommendations, and warnings, but no security deposits (whether or not they bear interest) or fines. Article 121(6) is aimed at removing the right to regulate the details of the procedures in accordance with Article 121(3) and (4) TFEU. The assumption that the Council could reject recommendations from the Commission concerning surveillance only with a qualified majority—but also that such a shift in the institutional structure would be up for negotiation by the Member States—is untenable. This arrangement has created a hybrid of justice and injustice by establishing a regulatory machinery which is not provided for in the Union’s legal framework and is to be superimposed on the Member States’ institutions and political procedures. See also ANDREAS FISCHER-LESCANO, *THE EUROPEAN TSCG AND EU LAW* (2012), [http://www.eunews.it/wp-content/uploads/2012/09/2012\\_09\\_06\\_Fischer-Lescano\\_Gutachten-kurz\\_Fiskalpakt\\_060912-EN.pdf](http://www.eunews.it/wp-content/uploads/2012/09/2012_09_06_Fischer-Lescano_Gutachten-kurz_Fiskalpakt_060912-EN.pdf), and Lukas Oberndorfer, *Der Fiskalpakt—Umgehung der ‘europäischen Verfassung’ und Durchbrechung demokratischer Verfahren?*, in JURIDIKUM 168–81 (2012).

<sup>76</sup> See Christian Joerges, *A New Alliance of De-Legalisation and Legal Formalism? Reflections on the Response to the Social Deficit of the European Integration Project*, in DEMOKRATIE IN DER WELTGESELLSCHAFT. SOZIALE WELT SONDERBAND 18, 437–50 (Hauke Brunkhorst ed., 2009).

<sup>77</sup> Daniel Thym, *Euro-Rettungsschirm: zwischenstaatliche Rechtskonstruktion und verfassungsgerichtliche Kontrolle*, in 25 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 167–71 (2011); Daniel Thym, *Annotation to GCC, Judgment of 7.9.2011*, in 66 JURISTENZEITUNG 2011–15 (2011). As a student of the “Darker Legacies of Law in Europe,” I cannot refrain from a plea for linguistic sensitivity. It is one thing for Joseph H.H. Weiler to introduce “total law” as a trademark, or for Loïc Azoulai to write about “total harmonisation”; Germans must not disregard the connotations of such terms. The same holds true for the establishment of secondary legal regimes. Germans are as free as anybody else to approve such developments, but they should make it clear that they are aware of the shadow of Ernst Fränkel’s *Doppelstaat* and Franz Neumann’s *Behemoth*.

sections of the Euro rescue package" were "designed as intergovernmental macro-financial assistance" and "should therefore [sic] not be measured against European-law standards."<sup>78</sup> This move has its methodological precursors in the widely-acclaimed resort to the Open Method of Co-ordination (OMC) in the field of social policy. Its liberation from the straitjacket of the "Union method" and the replacement of hard law by soft law was explicitly targeted at the attainment of social objectives which were unattainable under the old regime.<sup>79</sup> The present case, although, is much more dramatic. While the OMC did not accomplish the noble objectives that its proponents had envisaged, the resort to the "Union method" amounts to a deep transformation of the European constitutional constellation. The stakes are not only higher for this reason, but also because the organizers of the new modes of economic governance fail to provide any theoretical framework within which the means that would be employed to bring the deeply affected Member States "back on track" become visible and comprehensible.<sup>80</sup> It is far from clear

<sup>78</sup> Daniel Thym, *Euro-Rettungsschirm: zwischenstaatliche Rechtskonstruktion und verfassungsgerichtliche Kontrolle*, 25 *Europäische Zeitschrift für Wirtschaftsrecht* 167–71 (2011); Daniel Thym, *Annotation to GCC, Judgment of 7.9.2011*, 66 *JURISTENZEITUNG* 1011, 1014 (Christian Joerges trans., 2011). This is, by now, the dominant position in European constitutionalism. This is a recent *acquis*, however. As late as 2011—and hence in the middle of the crisis—De Witte considered that the German constitutional court might declare the EFSF to be incompatible with German constitutional law and an *ultra vires* act in contravention of the "no-bailout" provision of Article 125 TFEU. Bruno de Witte, *The European Treaty Amendment for the Creation of a Financial Stability Mechanism*, in *EUR. POL'Y ANALYSIS* 1, 6 (2011). This was, indeed, a widely-shared concern; see, e.g., Nikolas Busse, *Unter Aufsicht. Nicht nur im Fall Griechenland: Die Deutsche Europapolitik wartet auf Karlsruhe*, *FRANKFURTER ALLGEMEINE ZEITUNG* (2010). Bruno de Witte has clarified his position on various occasions, particularly succinctly in Loïc Azoulay et al., *Another Legal Monster? An EUI Debate on the Fiscal Compact Treaty*, in *EUI Working Papers Law No. 09*, 6–8 (Anna Kocharov ed., 2012). His argument is far more sophisticated than the one cited in the text. But is not possible to come to terms with the TSCG simply because that Treaty states in Article 2 No. 2: "This Treaty shall apply in full to the Contracting Parties whose currency is the euro. It shall also apply to the other Contracting Parties to the extent and under the conditions set out in Article 14." In the draft circulated until 2 March 2012, one could read: "This Treaty shall apply insofar as it is compatible with the Treaties on which the European Union is founded and with European Union law. It shall not encroach upon the competence of the Union to act in the area of the economic union." What happened to the compatibility with the Union's primary law, one wonders. We must reckon with conflicts between the law of the Union as enshrined in the Treaties on the one hand, and the Fiscal Compact and the regulatory machinery established in response to the crisis on the other. The Fiscal Compact in its latest version simply assumes that, in such conflicts, it will prevail.

<sup>79</sup> See David M. & Luise G. Trubek, *Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-ordination*, 11 *EUR. L. J.* 343–64 (2005), and the critique in Christian Joerges, *Integration Through De-Legalisation?*, 33 *EUR. L. REV.* 219–312 (2008).

<sup>80</sup> By contrast, the proponents of the OMC relied on the well premises of deliberative polyarchy and/or democratic experimentalism: "In deliberative polyarchy, problem-solving depends not on harmony and spontaneous co-ordination, but on the permanent disequilibrium of incentives and interests imperfectly aligned, and on the disciplined, collaborative exploration of the resulting differences." Joshua Cohen & Charles F. Sabel, *Sovereignty and Solidarity: EU and US*, in *PUBLIC GOVERNANCE IN THE AGE OF GLOBALIZATION* 157, 168 (Karl-Heinz Ladeur ed., 2004). This is a formula which is very close to many methodological pronouncements within the conflicts-law approach and its plea for a proceduralisation. See *supra* notes 31, 33. The proponents of the latter approach diagnose, sadly, that conflicts-law constitutionalism has become a critic which can no longer be presented as a re-constructive approach. See Christian Joerges & Maria Weimer, *A Crisis of Executive Managerialism in the EU: No Alternative?*, in *CRITICAL LEGAL PERSPECTIVES ON GLOBAL GOVERNANCE: LIBER AMICORUM FOR*



how the new regime might accomplish what its organizers envisage and promise. Furthermore, the asymmetry between fully-harmonized monetary policy and nation-state competence in economic and fiscal policy diagnosed above remains unaffected. Above all, the stark socio-economic disparities—which have deepened since the Eastern enlargement—remain in place, as do the conflicts resulting from these disparities. As just underlined above, Europe’s crisis management operates without conceptual guidance. And this is anything but fortuitous, as this crisis management is intergovernmental and must hence follow the logic of finding compromises between actors with different interests, institutional preferences, and political perspectives.<sup>81</sup>

## 2. Constitutional Guardianship I: Mutual Non-recognition of the Budgetary Power of National Parliaments?<sup>82</sup>

The German Federal Constitutional Court is by no means the only forum in which Europe’s constitution has been tested.<sup>83</sup> Yet nowhere else does this occur with such regularity, and although the court has, indeed, gained the reputation of a dog “that barks but does not bite,”<sup>84</sup> the anxieties of the many publics in both the EU and elsewhere awaiting its decisions on the management of the financial crisis are easy to explain: This court supervises the economically most powerful Member State whose government underlines again and again how seriously it takes every judicial pronouncement. The FCC is, of course, well aware of all this. The mere fact that it is exposed to political scrutiny from many

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DAVID M TRUBEK (Gráinne de Búrca, Claire Kilpatrick & Joanne Scott eds., 2013). The most prominent proponents of OMC and democratic experimentalism see, apparently, no reason for such modesty and re-design. See Charles F. Sabel & Jonathan Zeitlin, *Experimentalism in the EU: Common Ground and Persistent Differences*, in 6 REGULATION & GOVERNANCE 410–426 (2012).

<sup>81</sup> For a deepened analysis, see Giandomenico Majone, *Rethinking European Integration After the Debt Crisis*, UCL WORKING PAPER NO. 3, at 19 (2012), available at <http://www.ucl.ac.uk/european-institute/highlights/majone>; Fritz W. Scharpf, *Monetary Union, Fiscal Crisis and the Preemption of Democracy*, MPIFG DISCUSSION PAPER 11/11, Cologne 2011; Fritz W. Scharpf, *Legitimacy Intermediation in the Multilevel European Polity and its Collapse in the Euro Crisis*, MPIFG DISCUSSION PAPER 12/6, Cologne 2012. What both authors implicitly confirm is the validity of Polanyi’s insights in the social embeddedness of the economy. See *supra* notes 25–28.

<sup>82</sup> The following passages on the crisis jurisprudence of the GCC and the CJEU draw on Michelle Everson & Christian Joerges, *Who is the Guardian for Constitutionalism in Europe After the Financial Crisis?*, in POLITICAL REPRESENTATION IN THE EUROPEAN UNION: STILL DEMOCRATIC IN TIMES OF CRISIS? 400–28 (Sandra Kröger ed., 2014).

<sup>83</sup> See Darinka Pijani, SUPREMACY OF EU LAW AND THE JURISPRUDENCE OF CONSTITUTIONAL RESERVATIONS IN CENTRAL EASTERN EUROPE AND THE WESTERN BALKANS: TOWARDS A ‘HOLISTIC’ CONSTITUTIONALISM (June 11, 2010) (Ph.D thesis, EUI Florence), and Federico Fabbrini, *The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective*, BERKELEY J. INT’L L. (forthcoming 2014).

<sup>84</sup> Joseph H.H. Weiler, *The ‘Lisbon Urteil’ and the Fast Food Culture*, 20 EUR. J. INT’L L. 505, 505 (2009), commenting on Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09 (June 30, 2009), [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html) [hereinafter *Judgment of June 30, 2009*].

quarters and that its pronouncements are assessed politically means that it is *de facto* performing a political role. But the source of the court's authority is its legal mandate and the quality of its exercise. It is not just the outcome of a litigation that matters. In this respect Joseph Weiler hit the nail on the head with his respectful ridicule. Indeed, how realistic was it to expect that the Court would help Mr. Brunner and his *DM-Partei* overturn the Treaty of Maastricht in 1993?<sup>85</sup> Would Karlsruhe have been in a position to put a sad end to the Treaty of Lisbon, which had been negotiated with so much effort by so many actors over so many years?<sup>86</sup> And yet, these judgments did matter. In particular, the significance of the Treaty of Maastricht decision, which had for the first time raised the previously rather staid discussion about Europe to the level of a true constitutional debate, and which had—albeit only indirectly—imposed Germany's economic philosophy upon the rest of Europe,<sup>87</sup> can hardly be overstated.

Hardly anybody had serious doubts as to the outcome of the proceedings on the rescue package for Greece,<sup>88</sup> and on the ESM Treaty and the Fiscal Compact.<sup>89</sup> What observers were nevertheless anxious to learn was how the FCC would perform the balancing between law and politics, and thereby define its own constitutional guardianship.

### 2.1 *The Rescue Package for Greece*

The plaintiffs in this litigation were the usual suspects: A group of professorial economists and Dr. Gauweiler, a member of the *Bundestag*, as representing the Bavarian branch of the Christian Democratic party (CSU). They challenged both German and European legal instruments as well as further measures related to attempts to solve the current financial and sovereign debt crisis in the area of the European monetary union.<sup>90</sup>

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<sup>85</sup> See *infra* Part D.I.

<sup>86</sup> *Judgment of June 30, 2009.*

<sup>87</sup> See *infra* Part D.I.

<sup>88</sup> Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 987/10, 2 BvR 1485/10, 2 BvR 1099/10 (Sept. 7, 2011), [http://www.bverfg.de/entscheidungen/rs20110907\\_2bvr098710en.html](http://www.bverfg.de/entscheidungen/rs20110907_2bvr098710en.html) [hereinafter *Judgment of Sept. 7, 2011*].

<sup>89</sup> Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 1390/12 (Sept. 12, 2012), [http://www.bundesverfassungsgericht.de/entscheidungen/rs20120912\\_2bvr139012en.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20120912_2bvr139012en.html) [English translation], [http://www.bundesverfassungsgericht.de/entscheidungen/rs20120912\\_2bvr139012.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20120912_2bvr139012.html) [German] [hereinafter *Judgment of Sept. 12, 2012*].

<sup>90</sup> Namely, the *Währungsunion-Finanzstabilisierungsgesetz*, (Monetary Union Financial Stabilisation Act), which grants the authorization to provide aid to Greece, and the *Gesetz zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus*, (Act Concerning the Giving of Guarantees in the Framework of a European Stabilisation Mechanism).

My reading of the judgment on the Greek rescue package focuses on three concerns. The first is the tension between the financial crisis management and the German constitution. In this regard, the message of the Court is strong in principle, but not so constraining in practice: Budgetary powers are a core responsibility of the parliament and a central element of democratic self-rule.<sup>91</sup> This is why the *Bundestag* must remain “the place in which autonomous decisions on revenue and expenditure are made, even with regard to international and European commitments.”<sup>92</sup> But this is where the law’s prerogatives end; parliament enjoys wide latitude in the exercise of its responsibilities, a political prerogative which the Court will respect.<sup>93</sup> A second concern is the compliance with the order of competences. The Court recalls its famous dictum from the Maastricht Judgment: Legal instruments that disregard the order of competences (*ausbrechende Rechtsakte*) do not apply in Germany.<sup>94</sup> But this *monitum* is actually soft, because it needs to be read in the light of the *Mangold/Honeywell* decision.<sup>95</sup> The court refrained, though, from considering the request for a preliminary ruling under Article 267 TFEU with a view to having the CJEU examine the compatibility of the rescue measure/s with Article 125 TFEU. Instead, it contented itself with assuring that Monetary Union was designed to be a “stability community” and hence is one.<sup>96</sup> And we, the citizens? We cannot, in a constitutional democracy, be obliged to comply with European commands that exceed the competences conferred to the Union. Hence, we need to accept that our government takes its commitments to our financial interests seriously.<sup>97</sup> “A crafty and blandishing wink of the eye,” comments Ruffert.<sup>98</sup> In fact, the Court is examining only whether Germany has met its “integration responsibility” (*Integrationsverantwortung*), and then leaves the question unanswered of “under what conditions constitutional complaints against non-treaty changes of primary Union law can be based upon Article 38 Paragraph 1 Sentence 1

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<sup>91</sup> *Judgment of Sept. 7, 2011* at paras. 121–23.

<sup>92</sup> *Id.* at para. 124.

<sup>93</sup> *Id.* at paras. 130–32.

<sup>94</sup> *Id.* at para. 116 (referencing the decisions on *Maastricht* [BVerfGE 89, 155, 175] and *Honeywell* [BVerfGE 126, 286, 302 *et seq.*]); in the Maastricht decision, *see also* paras. 129 & 137 on commitment to the stability concept.

<sup>95</sup> Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 2661/06 (July 6, 2010), [https://www.bundesverfassungsgericht.de/entscheidungen/rs20100706\\_2bvr266106en.html](https://www.bundesverfassungsgericht.de/entscheidungen/rs20100706_2bvr266106en.html).

<sup>96</sup> *Judgment of Sept. 7, 2011* at para. 129. The court adds: “In this connection, particular mention should be made of the prohibition of direct purchase of debt instruments of public institutions by the European Central Bank, the prohibition of accepting liability (bailout clause) and the stability criteria for sound budget management (Articles 123 to 126, Article 136 TFEU).” *Id.* This remark attracted considerable attention but has not been taken too seriously by the ECB.

<sup>97</sup> *Id.* at para. 98.

<sup>98</sup> Mattias Ruffert, *Die europäische Schuldenkrise vor dem Bundesverfassungsgericht – Anmerkung zum Urteil vom 7. September 2011*, EUROPARECHT 842, 844 (2011).

German Basic Law.”<sup>99</sup> The intergovernmental decisions were not “sovereign acts of German public authorities,” “notwithstanding other possibilities for legal review,” which is why they could not be challenged.<sup>100</sup>

Is it adequate to consider the decision’s “lasting merit” to be the fact that it “honestly recognized the limits of its own substantive expertise?”<sup>101</sup> Wise judicial self-restraint is hardly a proper reading of this rescue package judgment—certainly not if it is read in conjunction with the follow-up judgment of 12 September 2012.

## 2.2 The ESM Treaty and the Fiscal Compact

This litigation was more spectacular by far. Not only the usual plaintiffs but also the parliamentary group of *Die Linke* and no less than 37,000 citizens—among them very prominent figures—had filed constitutional complaints with which they primarily requested a temporary injunction, which would inhibit the entering into force of the statutes passed by the *Bundestag* and the *Bundesrat* on 29 June 2012 as measures to deal with the sovereign debt until the decision of the FCC in the principal proceedings.

The outcome was as usual. The government, Brussels, and the market were relieved. The resonance in academic quarters was unusually positive. On closer inspection, though, the judgment turns out to be highly problematical. Its ambivalence stems, unfortunately, from the Court’s renewed defense of the budgetary power of the German *Bundestag* as a democratic essential. As in the previous judgment, one wonders about the *de facto* importance of this principle. Again, the Court underlined that the *Bundestag* enjoyed wide latitude which the judiciary had to respect.<sup>102</sup> Through this move, the rights of the *Bundestag* were re-defined in a proceduralizing mode: The Parliament must be adequately informed, enabled to deliberate, and prevented from delegating its evaluation. It is far from clear, though, to what degree these *caveats* will enable the German Parliament to exercise effective supervision of its government and its transnational activities.<sup>103</sup> Even more important and questionable is the Court’s complacency with the rest of the Union. In the pertinent passages, the Court once again strengthened the link between the *Bundestag*’s budgetary responsibility and a distinctly German philosophy of stability (e.g., price stability and the independence of the ECB above all).<sup>104</sup> As a consequence, the nature

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<sup>99</sup> *Judgment of Sept. 7, 2011* at para. 109.

<sup>100</sup> *Id.* at para. 116.

<sup>101</sup> See Daniel Thym, *Annotation to GCC, Judgment of 7.9.2011*, 66 JURISTENZEITUNG 1015 (2011).

<sup>102</sup> *Judgment of Sept. 12, 2012* at para. 180.

<sup>103</sup> See Christian Geyer, *Anatomie einer Hintergehung* [Anatomy of a Deceit], FRANKFURTER ALLGEMEINE ZEITUNG, June 21, 2012, at 29.

<sup>104</sup> The German version reads:

of the EMU as a stability community (*Stabilitätsgemeinschaft*) is even seen as being protected by the “eternity clause” of Article 79(3) of the German Basic Law as an unamendable core of Germany’s constitutional identity. Thus, the stability principles become the core of a refurbished European economic constitution.<sup>105</sup> All this—the Court hopes—will protect the democratic rights of German citizens. Non-German citizens of the Union, however, should not be amused at all. Why is budgetary autonomy not understood as a “common” European constitutional legacy, respect for which is demanded by Article 4(2) TEU?

The one-sidedness of this argument is all the more disappointing as the Court, in an earlier paragraph of its judgment, had opened another and more constructive perspective: The Court explained that “Article 79(3) seeks to protect those structures and procedures which

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*Die haushaltspolitische Gesamtverantwortung des Deutschen Bundestags wird in Ansehung der Übertragung der Währungshoheit auf das Europäische System der Zentralbanken namentlich durch die Unterwerfung der Europäischen Zentralbank unter die strengen Kriterien des Vertrages über die Arbeitsweise der Europäischen Union und der Satzung des Europäischen Systems der Zentralbanken hinsichtlich der Unabhängigkeit der Zentralbank und die Priorität der Geldwertstabilität gesichert. Ein wesentliches Element zur unionsrechtlichen Absicherung der verfassungsrechtlichen Anforderungen aus Art. 20 Abs. 1 und Abs. 2 in Verbindung mit Art. 79 Abs. 3 GG ist insoweit das Verbot monetärer Haushaltsfinanzierung durch die Europäische Zentralbank.*

*Judgment of Sept. 12, 2012* at para. 116. Paragraph 220 in the English translation reads:

In view of the transfer of monetary sovereignty to the European System of Central Banks, the German *Bundestag*’s overall budgetary responsibility is safeguarded particularly by the fact that the European Central Bank subjects itself to the strict criteria of the Treaty on the Functioning of the European Union and of the Statute of the European System of Central Banks with regard to the independence of the Central Bank and to the priority of monetary stability (see *BVerfGE* 89, 155 <204-205, 207 *et seq.*>; 129, 124 <181-182>). In this context, an essential element of safeguarding the constitutional requirements resulting from Article 20(1) and (2) in conjunction with Article 79(3) of the Basic Law in European Union Law is the prohibition of monetary financing by the European Central Bank (see *BVerfGE* 89, 155 <204-205>; 129, 124 <181-182>).

*Id.* at para 220. Paragraph 170 is not yet translated. The German original reads: “*Da der Bundestag durch seine Zustimmung zu Stabilitätshilfen den verfassungsrechtlich gebotenen Einfluss ausüben und Höhe, Konditionalität und Dauer der Stabilitätshilfen zugunsten hilfeschender Mitgliedstaaten mitbestimmen kann, legt er selbst die wichtigste Grundlage für später möglicherweise erfolgende Kapitalabrufe nach Art. 9 Abs. 2 ESMV.*” *Id.* at para. 170.

<sup>105</sup> See *id.* paras. 219–20, 232–33, 239–79, 300–19.

keep the democratic process open.”<sup>106</sup> The Court did not indicate that it would be prepared to address the tensions between democratic commitments and the integration process, which would include the concerns of all the Member States. Instead, the Court’s reasoning leads to a strengthening of the links between economic stability and social austerity. This form of judicial self-restraint seems even more questionable in the light of—or rather, in the shadow of—the Maastricht Judgment discussed above.<sup>107</sup> Once again, the FCC imposes German views on the rest of Europe, albeit in a significantly modified move. While the *Maastricht* judgment assumed that Europe’s economic constitution could be an essentially legal project, the new judgment is moving from law to governmental and executive managerialism, with requirements defined mainly by Germany and its Northern allies. To put it slightly differently, we find it deplorable that the FCC acted as (only) the guardian of the German constitution. The qualification of financial assistance as a matter not of European monetary but of national economic policy,<sup>108</sup> as well as the somewhat euphemistic statements on the respect of the stability commitments,<sup>109</sup> are anything but robust indicators of truly European commitments. They are embedded in the conditionality of existing crisis management. The FCC talks about democratic essentials—Jürgen Habermas has observed—but has Germany in mind.<sup>110</sup> The one-sidedness of its decision seems, indeed, obvious—and difficult to overcome. The German Court is not entitled to act as the Guardian of Europe. What we would expect, although, is a readiness to define Germany as a Member of a Union in which the concerns of all the Member States and their democratic rights deserve recognition. Only then would the Court document an understanding, or *Integrationsverantwortung*, which might reflect common European commitments.<sup>111</sup>

### 3. Constitutional Guardianship II: The Methodological Failures of the CJEU in the Pringle Case

Thomas Pringle, Member of the Irish Parliament, raised a series of objections against the involvement of his government in the ESM Treaty. Of particular interest in the present context is his assertion that the ESM constitutes an autonomous and permanent international institution, designed to evade restrictive provisions in the TFEU in relation to

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<sup>106</sup> *Id.* at para. 206 in the English extract, para. 222 in the German original.

<sup>107</sup> See *supra* Part F.I.

<sup>108</sup> *Judgment of Sept. 12, 2012* at para 169 [English version].

<sup>109</sup> *Id.* at paras. 201.

<sup>110</sup> JÜRGEN HABERMAS, DREI GRÜNDE FÜR ‘MEHR EUROPA’ [Three Reasons for “More Europe”] (2012), reprinted in JÜRGEN HABERMAS, IM SOG DER TECHNOKRATIE 132–37 (2013).

<sup>111</sup> For a similar critique, see Henning Deters, *National Constitutional Jurisprudence in a Post-National Europe: The ESM Ruling of the German Federal Constitutional Court*, 20 EUR. L. J. 204–20 (2014).

economic and monetary policy, and amounts to a usurpation of competences which were not conferred to the Union. This argument concerns the transformation of the European economic constitution through *Ersatzunionsrecht* which we have discussed in section III above. It is intrinsically linked to Pringle's concern with the rule of law. He argued the new regime has suspended the principle of legal protection. His complaint was rejected in the first instance, but, on appeal, the Irish Supreme Court, in a judgment of 17 July 2012,<sup>112</sup> decided to stay proceeding and submit a reference for a preliminary ruling to the CJEU. The CJEU (Full Court) handed down its judgment on 27 November 2012.<sup>113</sup>

The argument upon which the following analysis focuses is based upon the Court's reading of the bailout prohibition of Article 125 TFEU, and the emergency exception in Article 122(2) TFEU, through which the unrestrained new mode of economic governance is justified; these are key provisions of the economic constitution established under the Treaty of Maastricht and their re-vision through the judiciary is, hence, about the structuring of a new constitutional constellation. The reasons for this transformation have been addressed throughout the previous sections. It has, by now, become a *communis opinio* that European monetary policy—with its pre-defined objectives and institutional frameworks—cannot operate in tandem with the multitude of national actors that are pursuing economic and fiscal policies under a very loosely-constructed machinery of European supervision. The message of the *Pringle* judgment is in line with that which we have observed thus far; the failures of the past justify the efforts of Europe's crisis management which can, therefore, be legalized. The Court's attitude is certainly understandable; its reasoning, however, suffers from serious flaws.

The main flaw is the Court's failure to address the implications of its own explanation of the conceptual background to the "no-bailout" clause:

The prohibition laid down in Article 125 TFEU ensures that the Member States remain subject to the logic of the market when they enter into debt, since that ought to prompt them to maintain budgetary discipline. Compliance with such discipline contributes, at Union level, to the attainment of a higher objective, namely, maintaining the financial stability of the monetary union.<sup>114</sup>

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<sup>112</sup> *Pringle*, CJEU Case C-370/12.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at para. 135.

This is, indeed, a fair re-statement of an ordo-liberal legacy that we can still identify within the Maastricht EMU. Except, the Court is then silent with regard to the philosophy underlying our current cure to the failures of the past. This is by no means to suggest that the Court should have advocated an ordo-liberal renaissance. Nonetheless, what truly disappoints in its presentation of the new modes of economic governance is the lack of any kind of conceptual deliberation about their background and their adequacy. As we have argued in Section III, the new modes of European economic governance amount to nothing less than a deep transformation of the state of the European Union. To put it slightly differently: Is the CJEU legitimated to depart from the law as it stands and to replace it with a new regime?

The Court finds an easy answer:

Since Article 122(1) TFEU does not constitute an appropriate legal basis for any financial assistance from the Union to Member States who [sic] are experiencing, or are threatened by, severe financing problems, the establishment of a stability mechanism such as the ESM does not encroach on the powers which that provision confers on the Council.<sup>115</sup>

This is, in itself, a daring assumption. But precisely if one subscribes to the “bicycle theory” of Europe, and concedes that the constant re-writing of its law is an irrefutable necessity,<sup>116</sup> that one must, all the more, insist both upon an explanation of the new objectives and deliberation on the adequacy of the means which they are employing.

Prior to the *Pringle* judgment, Kaarlo Tuori had developed a transformative theory, which sought to anchor the disregard of the economic philosophy underlying the EMU in a “second order *telos*.”<sup>117</sup>

[A] teleological interpretation should heed not only the particular *telos* of the no-bailout clause but also the more general objective of the regulative whole Article 125(1) is part of. And this ‘second-order’ *telos* of the no-bailout clause undoubtedly includes the financial

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<sup>115</sup> *Id.* at 116.

<sup>116</sup> See *supra* note 22, Part C with the reference to Hans Peter Ipsen.

<sup>117</sup> See, on the defence of the CJEU, Paul Craig, *Pringle: Legal Reasoning, Text, Purpose and Teleology*, 20 MAASTRICHT J. OF COMP. & EUR. L. 3-11, 10 (2013). Craig characterises the Court’s reasoning on Art. 15 as “tenuous” and then uses the two authors cited in the text to strengthen the judicial argumentation whereas I feel that they reveal its weaknesses further. *Id.* at 8.



stability of the euro area as a whole. This argument supports the legal impeccability of Member-State assistance, in spite of the no-bailout clause and the inapplicability of the emergency provision in Article 122(2) TFEU. But it also justifies and even presupposes, at least to a certain extent, the 'strict conditionality' of assistance.<sup>118</sup>

Tuori's argument can be read as a search for rationality, an effort to shield the law, its production, and its application against its replacement by pure politics. His argument was not available to the Court, and the *Pringle* judgment was obviously not available when Tuori developed it. It is all the more illuminating that the core of his *telos* theory is present in the judgment; in the paragraph already cited, the court invokes "the logic of the market" as the rationale of the new regime, and underlines that it is precisely this logic which requires strict conditionality.<sup>119</sup>

In an essay seeking to understand and explain what makes resorting to *topoi* and theorems from economics so attractive for legal scholarship, jurisprudence, and the judiciary in transnational constellations in which the modes of legitimation as we know them from constitutional democracies are not available, Michelle Everson has deciphered the "processes by which law has transformed itself into an economic technology."<sup>120</sup> The *Pringle* judgment provides a stunning illustration of her analysis. There is no sinister conspiracy at work in the argumentation of the court and its supporters, but a serious and desperate effort to defend the law's *proprium*. The tragedy of all these moves remains that "the logic of the market" fails to deliver the kind of objective orientation which the lawyers hope for. The clearest and, at the same time, most disquieting confirmation of that dilemma can be read in Advocate General Kokott's view:

Given the mutual interdependence of the Member States' individual economic activities which is encouraged and intended under European Union law, substantial damage *could be* caused by the bankruptcy of one Member State to other Member States also. That damage *might possibly be* so extensive that an

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<sup>118</sup> Kaarlo Heikki Tuori, *The European Financial Crisis – Constitutional Aspects and Implications*, in EUI WORKING PAPER LAW 2012/28, 34 (Nov. 1, 2012).

<sup>119</sup> "[T]he activation of financial assistance by means of a stability mechanism such as the ESM is not compatible with Article 125 TFEU unless it is indispensable for the safeguarding of the financial stability of the euro area as a whole and subject to strict conditions," *Pringle v. Ireland*, CJEU Case C-370/12, 2012 E.C.R. I-000, para. 135.

<sup>120</sup> Michelle Everson, *The Fault of (European) Law in (Political and Social) Economic Crisis*, 24 L. & CRITIQUE 107 (2013).

additional consequence would be to endanger the survival of monetary union, as submitted by a number of parties to the proceedings.

There is no question here of finding that such a danger to the stability of the monetary union exists or *of examining how such a danger should best be combated*. It must only be emphasized that a broad interpretation of Article 125 TFEU would, also in such circumstances, deprive the Member States of the power to avert the bankruptcy of another Member State and of the ability thereby to attempt to avert damage to themselves. In my opinion, such an extensive restriction on the sovereignty of the Member States to adopt measures for their own protection cannot be founded on a broad teleological interpretation of a legal provision the wording of which does not unambiguously state that restriction.<sup>121</sup>

The rescue measures are political decisions; they need no legal justification: *auctoritas, non veritas, facit legem*. The replacement of law by discretionary political fiat is Schmittianism pure. It is, therefore, unsurprising that the deeply undemocratic nature of conditionality goes unnoticed or fails to be commented upon.

### 3.1 An Interim Conclusion

What would have happened to the European Union had its Court of Justice found: That Thomas Pringle's concerns about Europe's crisis management were well-founded; that the support mechanisms which the EFSF and the ESM have established interfere with the exclusive European competence for monetary policy; that the amendment of Article 136 TFEU was not possible under the simplified revision procedure enshrined in Article 48(6) TEU; that new policies being adopted and pursued by the Member States jeopardized the primacy of price stability; that the bail-out provision of Article 125 TFEU prohibited the granting of financial assistance to Member States whose currency is the Euro; that the functions assumed by the Commission, the ECB, and the IWF were irreconcilable with the principles on the conferral of powers laid down in Article 13 TFEU; or that the mandate allocated to the CJEU in the ESM Treaty exceeded judicial powers? It is simply impossible to predict the dire consequences.

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<sup>121</sup> View of Advocate General Kokott at paras. 139-140; *Pringle*, CJEU Case C-370/12.

It is equally difficult to determine what the judgment has accomplished, both in terms of its contribution to the taming of the crisis, *and* its effect on Europe's constitutional constellation and the role of law. The situation of the FCC is not much different. The Court could not clarify the factual uncertainties of the financial crisis, and no normative guidance was available to help the Court assess the risks of partisanship for or against the European praxis. The German court decided to (re-)delegate responsibility for present and future consequences to the political process. The European court elected to prioritize textual formalism over conceptual reasoning—as though Ernst Steindorff never wrote about the politics of law,<sup>122</sup> and without justifying its departure from the type of teleological interpretation on which it tends to rely so heavily.<sup>123</sup> These are but methodological shortcomings. The substantive theoretical default of both courts is their disregard for Europe's commitments to democracy and the rule of law. This unfortunate complacency is inherent in the politics of conditionality to which both courts subscribe.<sup>124</sup> To rephrase this critique: Do these courts and the academics supporting them “place a thin veneer of legality on the political which allows the executive to do what it wants?”<sup>125</sup> Do they consciously, or at least implicitly, reconstruct the contemporary conditions in which political guidance and rule are provided by the executive, rather than representative institutions, and in which law can no longer be understood as a body of rules, but must instead content itself with providing standards which are sufficiently vague to empower policymakers to act according to their understanding of what needs to be done?<sup>126</sup>

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<sup>122</sup> Ernst Steindorff, *Politik des Gesetzes als Auslegungsmaßstab im Wirtschaftsrecht*, in Festschrift Karl Larenz 217 (1973); Ernst Steindorff, *Wirtschaftsordnung und Steuerung durch Privatrecht?*, in Festschrift Ludwig Raiser 621 (1974).

<sup>123</sup> See generally Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (2012).

<sup>124</sup> See Michael Ioannidis, *EU Financial Assistance Conditionality after “Two Pack”*, 74 *HEIDELBERG JOURNAL OF INTERNATIONAL LAW (ZAÖRV)* (forthcoming 2014); Michelle Everson, *An Exercise in Legal Honesty: Re-writing the Court of Justice and the Bundesverfassungsgericht*, in 136 *POLITICAL SCIENCE SERIES* (Institute for Advanced Studies, Vienna 2014), [http://www.ihs.ac.at/publications/pol/pw\\_136.pdf](http://www.ihs.ac.at/publications/pol/pw_136.pdf);

[C]onditionality irrevocably undermines the status of the Member States as ‘Masters of the Treaties’ ... Just as the Federal Government within Germany respects the democratic integrity of the *Länder* which make up the federal state, the Federal Republic of Germany cannot, in its relations within the European Union, contract with ‘slaves’. It cannot enter into partnership with anything other than fully sovereign states.

*Id.* at 30.

<sup>125</sup> David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* 103 (2006).

<sup>126</sup> Eric Posner and Adrian Vermeule have underlined that they seek to reconstruct Schmitt's work in “generalizable social-scientific terms”; see *Demystifying Schmitt*, (Harvard Public Law Working Paper No. 10-47, 2010, Univ. of Chicago, Public Law Working Paper No. 333, 2010) available at: <http://ssrn.com/abstract=1723191>.

At this point, the critique must reflect upon its own premises, particularly its assumption that the integrity of law could have been defended. It is precisely this speculation which may be overly simplistic and naïve. But how can this be determined? Perhaps it would be best to step back and observe these issues from a more removed perspective.

### E. A Fictitious Debate between Carl Schmitt and Jürgen Habermas

Europe's financial crisis is not an expression of a faulty way of dealing with prevailing law, but an expression of the imperfection of Europe's legal design—including its configuration of the law-politics relationship. A rare, albeit superficial, consensus has emerged regarding this critical evaluation. Beyond this consensus, the crisis has generated challenges for all disciplines engaged in European studies. This is why it would be presumptuous to venture legal and constitutional policy hypotheses here based upon some definite assessment as to the causes of the crisis, as well as forecasts regarding its further course, intending to provide a blueprint for Europe's future constitutional architecture. The following deliberations will examine these ongoing contestations from a distance, in the form of a fictitious debate between Carl Schmitt and Jürgen Habermas. Considering these names, it may be appropriate to begin by stating positions.<sup>127</sup> My personal theoretical home is the discourse theory of law, both in German and European law.<sup>128</sup> It is for an adherent of the Habermasian theory of law and democracy all the more disturbing that Carl Schmitt seems to have gained alarming topicality, not only with his concept of the state of exception and his theorem of a commissarial dictatorship, but also with his theory of the *Großraum* and the diagnosis concerning the "hour of the executive."

#### I. Carl Schmitt's Shadow over Europe

In view of the European dimension of the financial crisis, it seems best to begin with the theory of the *Großraum*, a notion which was explicitly, albeit not exclusively designed to capture the European constellation Carl Schmitt selected a memorable occasion to present it: From 29 March 1939 to 1 April 1939, still half a year before the war against Poland, but after the *Anschluss* of Austria and the invasion of Bohemia and Moravia (the *Sudetenland*)

<sup>127</sup> An explanatory follow-up to the remarks on *Ersatzunionsrecht* in Part III.1 above may be in place here. For obvious reasons, Germans are particularly concerned about the lasting impact of Schmitt and another "hour of the executive." This is by no means to say that the search for administrative legitimacy of European rule as pursued by Peter L. Lindseth (see the references to his work in footnote 143 and his recent *Equilibrium, Democracy, and Delegation in the Crisis of European Integration*, 15 GERMAN L.J. (2014) or by Deirdre Curtin (see her Chorley Lecture on *The Challenge of Executive Democracy in Europe*, 77 MOD. L. REV. 1, 1-32 (2014) would operate in the shadow of that legacy..

<sup>128</sup> See Christian Joerges, *The Science of Private Law and the Nation-State* 47-82 (Florence: European University Institute, Law Department, Working Paper No. 98/4, 1998); Christian Joerges, *Reflections on Habermas' Postnational Constellation*, in JÜRGEN HABERMAS, VOL. 2 XI-XXI (Camil Ungureanu, Klaus Guenther & Christian Joerges eds., 2011).

at the *Reichsgruppe Hochschullehrer des Nationalsozialistischen Rechtswahrer-Bundes* (Reich section of professors in the National Socialist Association of Lawyers) convened in Kiel. Also during this time period, the Institute for Politics und International Law was celebrating its 25th anniversary. Thus, Carl Schmitt gave his lecture entitled “*Völkerrechtliche Großraumordnung mit Interventionsverbot für raumfremde Mächte. Ein Beitrag zum Reichsbegriff im Völkerrecht*” (The *Großraum* Order of International Law with a Ban on Intervention for Spatially Foreign Powers: A Contribution to the Concept of *Reich* in International Law) amidst this momentous setting.<sup>129</sup>

The core argument of Schmitt’s key note was that the *jus publicum europaeum*, which had made the sovereign state its central concept, was no longer in line with the *de facto* spatial order of Europe.<sup>130</sup> Following the model of the Monroe Doctrine, a specific “space” (the *Raum*) had to become the conceptual basis for international law, with the *Reich* constituting the order of that space. To quote directly: “The new ordering concept for a new international law is our concept of the *Reich*, with its *Volk*-based, *völkisch Großraum* order.” But what does this mean for the internal order of the *Großraum*? Schmitt refers to the elasticity of the concept of international law, which could also cover the inter-*völkische* relations within a *Großraum* as well. What the *Großraum* requires and constitutes is an “order that excludes the possibility of intervention on the part of spatially foreign powers and whose guarantor and guardian is a nation that shows itself to be up to this task.”<sup>131</sup>

This claim to leadership was, in Schmitt’s words, “situational,”<sup>132</sup> and the overall notion of the *Großraum*, as he underlined in discussions with his Nazi contemporaries, rivals, and

<sup>129</sup> The lecture was published as early as April 1939 in the Institute’s series; its 4th edition of 1941 refers to translations into five languages. The quotations in the following are either our own translations of the extremely carefully annotated reprint in GÜNTER MASCHKE, CARL SCHMITT, STAAT, GROßRAUM, NOMOS. ARBEITEN AUS DEN JAHREN 1916-1969 269-320 (1995) or, as the title reproduced in this text, CARL SCHMITT, WRITINGS ON WAR 75-124 (Timothy Nunan ed. & trans., 2011).

<sup>130</sup> For more detail on the following, see Christian Joerges, *Europe a Großraum? Shifting Legal Conceptualisations of the Integration Project*, in DARKER LEGACIES OF LAW IN EUROPE: THE SHADOW OF NATIONAL SOCIALISM AND FASCISM OVER EUROPE AND ITS LEGAL TRADITIONS 167-191 (Christian Joerges & Navraj S. Ghaleigh eds., 2003).

<sup>131</sup> See CARL SCHMITT, WRITINGS ON WAR 110 (Timothy Nunan ed. and trans., 2011). Contemporary reactions attested to how the theory of the *Großraum* with its “German Monroe doctrine” suited Nazi policy; for this reason, the theory is considered Schmitt’s way of indicating his return as a leading legal thinker; see LOTHAR GRUCHMANN, NATIONALSOZIALISTISCHE GROßRAUMORDNUNG. DIE KONSTRUKTION EINER “DEUTSCHEN MONROE-DOKTRIN” 11 (1962); WILLIAM E. SCHEUERMAN & CARL SCHMITT: THE END OF LAW 161, 169 (1965).

<sup>132</sup> On the theoretical understanding, but also the determination with which Schmitt championed this claim of leadership, lucidly HASO HOFMANN, LEGITIMITÄT GEGEN LEGALITÄT. DER WEG DER POLITISCHEN PHILOSOPHIE CARL SCHMITTS 215 (1992); later Oliver Eberl, *Großraum und Imperium. Die Entwicklung der ‘Völkerrechtlichen Großraumordnung’ aus dem Geiste des totalen Krieges*, in GROßRAUM-DENKEN. CARL SCHMITTS KATEGORIE DER GROßRAUMORDNUNG 185-206 (Rüdiger Voigt ed., 2008). More complacently, in contrast, see Horst Dreier’s appreciation in *Wirtschaftsraum – Großraum – Lebensraum. Facetten eines belasteten Begriffs*, in FESTSCHRIFT 600 JAHRE WÜRZBURGER JURISTENFAKULTÄT 47, 66-73 (Horst Dreier, Hans Forkel & Klaus Laubenthal eds., 2002).

critics, was a “concrete, historical and politically contemporary concept” (*konkreter geschichtlich-politischer Gegenwartsbegriff*).<sup>133</sup> But in so doing, he emphasized elements which he claimed to be valid long-term. The obviousness of the *Großraum* concept, he argued, resulted from transformations dominated by technical, industrial, and economic developments. Thus, Schmitt outlined, albeit somewhat apocryphally, an erosion of the territorial state as the harbinger of the necessity to adapt international law to the factual re-structuring of international relations and the replacement of classical international law by norm systems which, today, would affirmatively be called “governance structures,” or, distanced and critically, “managerialism.”<sup>134</sup> He underlined two phenomena in particular, namely, the economic interdependencies beyond state frontiers (*Großraumwirtschaft*), and the specific dynamics of technology-driven developments (“technicity” [*Technizität*]).<sup>135</sup> Schmitt had already published on both topics prior to 1933.<sup>136</sup>

Schmitt was silent on the internal “order” of the *Großraum* during the years of war. In the 1941 edition of the *Großraum*, he remained sibylline<sup>137</sup> and only published his famous “*Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*” in 1950, which he had written prior to 1945.<sup>138</sup> But the topic continued to haunt him.<sup>139</sup> When considering Schmitt’s theories within the context of the financial crisis, not only must his diagnoses of the loss of nation states’ sovereignty and the de-legalization of their relationships be taken

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<sup>133</sup> Schmitt, *supra* note 131, at 107.

<sup>134</sup> Martti Koskeniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization*, 8 THEORETICAL INQUIRIES IN L. 9, 16 (2007); Martti Koskeniemi, *Miserable Comforters: International Relations as New Natural Law*, 15 EURO. J. OF INT’L REL. 395, 411 (2009).

<sup>135</sup> Schmitt, *supra* note 131, at 111; see JOHN P. MCCORMICK, CARL SCHMITT’S CRITIQUE OF LIBERALISM. AGAINST POLITICS AS TECHNOLOGY 42-46, 92-105 (1997) (noting the technicity).

<sup>136</sup> Infamous and important, Carl Schmitt, *Starker Staat und gesunde Wirtschaft. Ein Vortrag vor Wirtschaftsführern* (delivered on Nov. 23, 1932), 2 VOLK UND REICH 81-94 (1933).

<sup>137</sup> The preliminary remarks to the 4th edition (Berlin 1941) include the famous motto: “We are like mariners on a continuing journey, and no book can be more than a log book.”

<sup>138</sup> CARL SCHMITT, *DER NOMOS DER ERDE IM VÖLKERRECHT DES JUS PUBLICUM EUROPAEUM* (1950); CARL SCHMITT, *THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPAEUM* (G.L. Ulmen trans., Telos Press 2003).

<sup>139</sup> Carl Schmitt, *Die legale Weltrevolution. Politischer Mehrwert als Prämie auf juristische Legalität und Superlegalität*, in 17 DER STAAT 321-339 (1978). In this tribute to the French economic theorist François Perroux, who examined apparently related economic dimensions of space, we read at 328:

Today, the issue is about the political system for society adequate in relation to scientific-technical-industrial developments. Today, the adage *cujus industria, ejus regio* or *cujus regio, ejus industria* applies”, and on the following page Schmitt went on: “The industrialised society is bound to rationalisation, including the transformation of law into legality.

seriously. His observations on the increase of executive power—broadly supported by comparative legal research—must also be taken into account.<sup>140</sup> But here, above all, we are concerned with his theorems of the state of emergency<sup>141</sup> and the (commissarial) dictatorship.<sup>142</sup> Ernst-Wolfgang Böckenförde was the first to take up the term “state of emergency,”<sup>143</sup> and others followed. “The European Stability Mechanism,” writes Ulrich Hufeld, has “the format of a constitution-breaching measure along the lines of Carl Schmitt’s conceptualization of contrasts,”<sup>144</sup> and adds a quotation from Schmitt’s 1928 *Constitutional Theory*:

Such breakout entities are, by nature, measures, not norms . . . . Their necessity arises from the particular circumstances of an individual case, an unexpected abnormal situation. If, in the interest of the whole, such renegade entities are formed, the superiority of the existential over mere normativity is apparent. Whoever authorised such acts and is capable of acting, is sovereign.<sup>145</sup>

In a tone of urgency, Frank Schorkopf calls the calamity that we are dealing with a “crisis without an alternative”;<sup>146</sup> a constellation in which the actors, including the governments

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<sup>140</sup> Carl Schmitt, *Vergleichender Überblick über die neueste Entwicklung des Problems gesetzgeberischer Ermächtigungen* (legislative Delegationen), 6 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 252–288 (1938); on this, of course under the impression of the American understanding of the executive, see PETER L. LINDSETH, POWER AND LEGITIMACY: RECONCILING EUROPE AND THE NATION-STATE 62 (2010). Lindseth has underlined the importance and topicality of this aspect of Schmitt’s work already in his essay, Peter L. Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy and Dictatorship in Germany and France, 1920s–1950s*, 113 *YALE L.J.*, 1343, 1354, 1382 (2004).

<sup>141</sup> JOHN P. MCCORMICK, CARL SCHMITT’S CRITIQUE OF LIBERALISM. AGAINST POLITICS AS TECHNOLOGY 122–156 (1997); Ellen Kennedy, *Emergency Government Within the Bounds of the Constitution: An Introduction to Carl Schmitt, ‘The Dictatorship of the Reich president according to Article 48 R.V.’*, 18 *CONSTELLATIONS* 284–297 (2011).

<sup>142</sup> CARL SCHMITT, DIE DIKTATUR. VON DEN ANFÄNGEN DES MODERNEN SOUVERÄNITÄTSGEDANKENS BIS ZUM PROLETARISCHEN KLASSENKAMPF [1921] (1989). As examples of the copious literature compare the explanations in HASSO HOFMANN, LEGITIMITÄT GEGEN LEGALITÄT. DER WEG DER POLITISCHEN PHILOSOPHIE CARL SCHMITTS (1992).

<sup>143</sup> Ernst-Wolfgang Böckenförde, *Kennt die europäische Not kein Gebot? Die Webfehler der EU und die Notwendigkeit einer neuen politischen Entscheidung*, *NEUE ZÜRCHER ZEITUNG*, June 21, 2010; also Ernst-Wolfgang Böckenförde, *Wissenschaft, Politik, Verfassungsgericht*, in 67 *JURISTENZEITUNG* 197 (2012).

<sup>144</sup> Ulrich Hufeld, *Zwischen Notrettung und Rüttelschur: der Umbau der Wirtschafts- und Währungsunion in der Krise*, 34 *INTEGRATION* 117, 122 (2011).

<sup>145</sup> CARL SCHMITT, *VERFASSUNGSLEHRE* 107 (1928) (this author’s translation, 2010).

<sup>146</sup> Frank Schorkopf, *Gestaltung mit Recht – Prägekraft und Selbststand des Rechts in einer Rechtsgemeinschaft*, 136 *ARCHIV DES ÖFFENTLICHEN RECHTS* 136, 323, 341 (2011); Frank Schorkopf, *Finanzkrisen als Herausforderung der*

and the executive branches, “merely have power within the existing conditions, but not over them.”<sup>147</sup> Anna-Bettina Kaiser arrives at her position following a precise reconstruction of the debates around Article 48(2) of the Weimar Constitution.<sup>148</sup> The handling of this provision and the extensive interpretation of Article 122(2) TFEU today are in her view equally dubious and can be placed at the same level.<sup>149</sup> Furthermore, the rules laid down in the Six-Pack, the Two-Pack, and the TSCG must not be sugar-coated.<sup>150</sup> Yet, is the academic community fulfilling its responsibility by merely accepting that the provisions of the EMU are dysfunctional, and abstracting from the dilemma of the political in the EU?

We cannot escape from Carl Schmitt's shadow that easily. The concept of “commissarial dictatorship” is most plausible to except to. After all, in the current management of the crisis, the actors are not alone. They must not only come to an arrangement at a supranational level, but also between the levels of the multilevel governance system, as well as internationally—the dictator has been replaced by technicity. But how comforting is this? The fact remains that the new form of European government collides with democratically-legitimized institutions and processes. Thus, it is anything but comforting that the new European practice coincides with ideas of prominent American constitutionalists who draw upon Carl Schmitt in order to turn away from James Madison and argue the case for a plebiscitary democracy in place of a representative one; theorists who advocate delegating political power to the executive in case of need.<sup>151</sup> And are we,

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*internationalen, europäischen und nationalen Rechtssetzung*, 71 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRICHTSLEHRE 183 (2012).

<sup>147</sup> *Id.* at 225.

<sup>148</sup> Anna-Bettina Kaiser, *Die Verantwortung der Staatsrechtslehre in Krisenzeiten – Art. 48 WRV im Spiegel der Staatsrechtslehrertagung und des Deutschen Juristentages 1924*, in *ZUR AKTUALITÄT DER WEIMARER STAATSRICHTSLEHRE* 119–142 (Ulrich Jan Schröder & Antje V. Ungern-Sternberg eds., 2011).

<sup>149</sup> *Id.* at 140.

<sup>150</sup> See *supra* Parts D.III & D.IV.

<sup>151</sup> ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND. AFTER THE MADISONIAN REPUBLIC* 8 (2010): “When emergencies occur, legislatures acting under real constraints of time, expertise, and institutional energy typically face the choice between doing nothing at all or delegating new powers to the executive to manage the crisis.” This book is riddled with such pronouncements; on this, see NADIA URBINATI, *DEMOCRACY DISFIGURED: OPINION, TRUTH, AND THE PEOPLE* 171–227 (2012); for a critical discussion of the empirical dimensions and claims of *The Executive Unbound*, see Aziz Z. Huq, *Binding the Executive (by Law or by Politics)*, 79 U. CHI. L. REV. 777 (2012). In an earlier essay, Posner and Vermeule have underlined that they seek to re-construct Schmitt's work in “generalizable social-scientific terms”; see Posner & Vermeule, *supra* note 126. I am by no means the only one to underline, and to relativize, the topicality of Schmittian notions in the present state of the European project: “Without a modicum of legitimacy derived from any European treaties, the austerity dictates of the Troika (comprised of the EU, the ECB, and the IMF) have insinuated themselves as the sovereign acts in the distinctly Schmittian sense of the term, i.e., as extra-legal decisions on the exception.” *Id.* Thus, Michael Marder, *Carl Schmitt and the De-Constitutionalisation of Europe*, contribution to Conference on “Europe after the Euro-crisis: Legitimacy, Democracy and Justice, organised by the Institute for Democratic Governance, Bilbao, September 2–3, 2013 (ms. on file with the author).



perhaps, exchanging Scylla for Charybdis? Anyone who observes the busy activities of the Commission's Services—their tireless production of additional lists of criteria for ever-more policy fields, in ever-more regions—will remember Carl Schmitt's words about the "total," but by no means "strong" state, which he linked with a polemic against all technocratic efforts that believe they can decide "all issues according to technical and economic expert knowledge following supposedly purely substantive, purely technical and purely economic considerations."<sup>152</sup> Ironically, Schmitt's late essay,<sup>153</sup> quoted above, provides a situational, theoretical interpretation of this. Reading Hans Peter Ipsen's 1,000-page tome on European law, Schmitt confessed, he was "stricken with deep sorrow," for the following reason: the approach of European law, which "legalizes" a technocratic-functional administration of European associations, has no concept of a "legitimate political" project.<sup>154</sup> Therefore, one cannot speak of the rule of law (*Rechtsstaatlichkeit*), much less of democracy. Now, one must take into account what *Rechtsstaatlichkeit*<sup>155</sup> and democracy meant to Schmitt. In *Constitutional Theory*, he writes that democracy "is a state form that is consistent with the principle of identity (e.g., of the concretely existing people identified with itself as a political unit)"—and consequently, it cannot apply to an ethnically diverse Europe.<sup>156</sup> After all this, Jürgen Habermas' reply is all the more important.<sup>157</sup>

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<sup>152</sup> Carl Schmitt, *Die Wendung zum totalen Staat* (The turn to the total state), reprinted in CARL SCHMITT: *POSITIONEN UND BEGRIFFE IM KAMPF MIT WEIMAR-GENÈVE-VERSAILLES, 1923-1939*, 146–153 (1988) (quoted according to the reprint). On this see also CARL SCHMITT, *DER HÜTER DER VERFASSUNG* 78 (1969); on this WILLIAM E. SCHEUERMAN, *CARL SCHMITT: THE END OF LAW* 85 (1965).

<sup>153</sup> Carl Schmitt, *Die legale Weltrevolution. Politischer Mehrwert als Prämie auf juristische Legalität und Superlegalität*, 17 *DER STAAT* 335 (1978).

<sup>154</sup> Italics are used for German terms and a book title. Italics added. On the recourse to the duality of legality and legitimacy in the present context, see Reinhard Mehring, *Der 'Nomos' nach 1945 bei Carl Schmitt und Jürgen Habermas*, in *FORUM HISTORIAE IURIS*, paras. 20–26.

<sup>155</sup> On the theory of the *Rechtsstaat*, see INGEBORG MAUS, *RECHTSTHEORIE UND POLITISCHE THEORIE IM INDUSTRIEKAPITALISMUS* 40 (1986). Schmitt's differentiation of the categories of "formal" and "political" concepts of law and legislation, see CARL SCHMITT, *VERFASSUNGSLEHRE* 143 (1928) (reprinted in 2010), between the generality of laws and the concrete political act of will, leads him to executive and governmental law-making in the Carl Schmitt, *Vergleichender Überblick über die neueste Entwicklung des Problems gesetzgeberischer Ermächtigungen* (legislative Delegationen), 6 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 252 (1938); see HASSO HOFMANN, *LEGITIMITÄT GEGEN LEGALITÄT. DER WEG DER POLITISCHEN PHILOSOPHIE CARL SCHMITTS* 83 (1992).

<sup>156</sup> CARL SCHMITT, *VERFASSUNGSLEHRE* 223 (1928) (reprinted in 2010); see Ulrich K. Preuß, *Die Weimarer Republik – ein Laboratorium für neues verfassungsrechtliches Denken*, in *METAMORPHOSEN DES POLITISCHEN: GRUNDFRAGEN POLITISCHER EINHEITSBILDUNG SEIT DEN 20ER JAHREN* 177, 180. (Andreas Göbel ed., 1995).

<sup>157</sup> This exploration is no contribution to the *les-extrêmes-se-touchent* debate around the relationship of Habermas to Schmitt [for an attempt to update it, see Ernst Vollrath, *Proteus und Medusa. Die politische Apperzeption der deutschen Staatsrechtslehre im Werk von Jürgen Habermas*, 37 *POLITISCHE VIERTELJAHRESSCHRIFT* 197 (1996); see also Reinhard Mehring, *Der 'Nomos' nach 1945 bei Carl Schmitt und Jürgen Habermas*, in *FORUM HISTORIAE IURIS*, para. 26.

## *II. The Crisis as Opportunity According to Jürgen Habermas*

In view of the crisis, Jürgen Habermas has brought his prestige and powerful eloquence to bear. His countless public interventions have been published across Europe in many languages. "Democracy is at stake," he has warned time and time again,<sup>158</sup> and Europe risks establishing a post-democratic regime of "executive federalism."<sup>159</sup> These drastic messages, though, are always accompanied by signals of hope and political appeals. He intends listeners to view the crisis as an opportunity to strengthen the European project. The "strength" which he advocates is not merely Europe's managerial potential; to Habermas, "more Europe" also means a deepening of Europe's democratic credentials.

In contrast to so many commentators on the debate regarding the financial crisis and the future of Europe, in his passionate pronouncements Habermas pursues a demanding and coherent agenda based upon his long-term explorations of the many facets of the European project. His work on this theoretical basis started with the essay *Citizenship and National Identity*,<sup>160</sup> just prior to the publication of his *magnum opus* on legal theory.<sup>161</sup> Since then, Habermas has ceaselessly occupied himself with the European project, both as a citizen and a theoretician. As a theoretician, he conceives of the process of Europeanization as a challenge to his theory of the democratically constituted nation-state; from the perspective of the citizen, he views the process as a response to the catastrophes of the Twentieth century, for which Germany bears so much responsibility. This intent is manifested in the project, as well as the objective to defend democratic welfare-state accomplishments in the processes of globalization and European integration. As a theoretician on the constitutionalization of Europe, Habermas seeks to accomplish a type of analysis that not only grasps the facticity of the processes of Europeanization, but also achieves a normative concept that both provides criteria and identifies the institutional

<sup>158</sup> See e.g., *Rettet die Würde der Demokratie*, FRANKFURTER ALLGEMEINE ZEITUNG, Nov. 4, 2011. A number of these statements are reprinted in JÜRGEN HABERMAS, ZUR VERFASSUNG EUROPAS: EIN ESSAY 97-129 (2011); a more recent example can be found in his essay in *Le Monde* of Oct. 27, 2011 (English version available at <http://www.presseurop.eu/en/content/article/1106741-juergen-habermas-democracy-stake>). Habermas' entire work is comprehensively documented and updated weekly in the Habermas Forum: <http://www.habermasforum.dk>, the most recent being, Jürgen Habermas, *Merkel's European Failure: Germany Dozes on a Volcano*, in DER SPIEGEL, 5 (July 2013). A great number of his pertinent essays have recently been reprinted in the Journal *Blätter für deutsche und internationale Politik* 3/2014, 85-416 under the title *Drer Aufklärer Jürgen Habermas* at the occasion of his 85<sup>th</sup> birthday on June 18, 2014. They can be downloaded freely at <http://habermas-rawls.blogspot.dk/2014/06/e-book-der-aufklar-er-juergen-habermas.html>.

<sup>159</sup> See Jürgen Habermas, *A Pact for or against Europe?* in WHAT DOES GERMANY THINK ABOUT EUROPE? 83-89 (Ulrike Guérot & Jacqueline Hénard eds., 2011).

<sup>160</sup> Jürgen Habermas, *Citizenship and National Identity*, in STAATSBÜRGERSCHAFT UND NATIONALE IDENTITÄT (1991), reprinted in BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 491-516 (1999).

<sup>161</sup> *Id.* In German: FAKTIZITÄT UND GELTUNG. BEITRÄGE ZUR DISKURSTHEORIE DES RECHTS UND DES DEMOKRATISCHEN RECHTSSTAATS (1992).

conditions for the question of whether the configurations emerging in the process of Europeanization “deserve recognition.”<sup>162</sup>

Following his more recent interventions as a citizen, Habermas has approached this aspiration again.<sup>163</sup> He identifies the institutional causes for the crisis and states his polemics against the crisis management in Europe in terminology that critically transforms Schmitt’s affirmative observations on the steadily growing power of the executive into critical objections to the present course of the process of Europeanization.<sup>164</sup> “Post-democratic executive federalism” is the term he uses to denote—and to criticize—Europe’s *praxis*.<sup>165</sup> The European Union must not continue on the path it has taken due to the pressure of the crisis, but cease to coordinate the relevant policies in the gubernative/governative-bureaucratic style which has been customary until now and take the path of adequate democratic legalization.

The theoretical core of Habermas’s essay is found in the reasons he gives for this postulate, in which Habermas specifically continues deliberations by Armin von Bogdandy, Claudio Franzius, and Ulrich K. Preuß.<sup>166</sup> He places a dual role for Europe’s citizens alongside the recognition that these rights are equally rooted in the democratic constitutional state: They remain citizens of their states, but become citizens of the Union as well. With this construct, Europe’s ability to be a democracy becomes more theoretically plausible. In addition, however, the construct promises to provide criteria for democratic constitutionalization of European governance and to come to terms with its functional requirements. But it is precisely at this point that it remains under specified. It is difficult to imagine which institutional architecture might satisfy Habermas’s normative ideas.<sup>167</sup> As

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<sup>162</sup> For a reconstruction of Habermas’ works, which, however, seeks to (re-) interpret the author for his own ends, see Christian Joerges, *Reflections on Habermas’ Postnational Constellation*, in JÜRGEN HABERMAS, VOL. 2 XI–XXI (Camil Ungureanu, Klaus Guenther & Christian Joerges eds., 2011).

<sup>163</sup> Jürgen Habermas, *The Crisis of the European Union in the Light of a Constitutionalization of International Law*, 23 EURO. J. OF INT’L L. 335, 335–348 (2012). One can no longer be sure about the seriousness of this distinction. In the preface to his most recent book, JÜRGEN HABERMAS, IM SOG DER TECHNOKRATIE. KLEINE POLITISCHE SCHRIFTEN XII 8 n. 2 (2013), Habermas expresses some discontent with the fact that his public interventions did not make it into the general academic discourses.

<sup>164</sup> *Pringle*, CJEU Case C-370/12 at para. 296.

<sup>165</sup> See, e.g., Jürgen Habermas, *Bringing the Integration of Citizens into Line with the Integration of States*, 18 EURO. L. J. 485, 487 (2012).

<sup>166</sup> See Armin von Bogdandy, *Basic Principles*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 13, 44 (Armin von Bogdandy & Jürgen Bast eds., 2010); CLAUDIO FRANZIUS, EUROPÄISCHES VERFASSUNGSDENKEN 49 (2010); CLAUDIO FRANZIUS & ULRICH K. PREÜß, DIE ZUKUNFT DER EUROPÄISCHEN DEMOKRATIE 33 (2012).

<sup>167</sup> See Nicole Scicluna, *EU Constitutionalism in the Twenty-first Century: Politics and Law in Crisis* 101 (2013) (unpublished Ph.D Thesis, La Trobe University):

long as extreme uncertainties as to the causes of the crisis and the possibility of its democratic cure persist, it is even more difficult to understand which kind of practical guidance they might provide. We are witnessing instead a reemergence of age-old animosities in Europe's publics, the rise of populist movements and an erosion of the legitimacy of the governments in precisely those countries most deeply affected by the crisis. It remains unclear how a political European leadership with secure democratic legitimation could be established. "Until these questions and problems are addressed," American political scientist John McCormick noted in much more tranquil times, "Schmitt's work and career haunts the study of European integration like a spectre."<sup>168</sup>

#### F. Epilogue: From "One Size Fits All" to "Unity in Diversity!"

The debate on the transformation of Europe's constitutional constellation, its new *Verfassungswirklichkeit*,<sup>169</sup> has only just begun and is bound to continue. Pertinent characterizations oscillate between Executive Federalism (Jürgen Habermas),<sup>170</sup> a Distributive Regulatory State or New Sovereignty with Largely Unfettered Power of Rule (Damian Chalmers),<sup>171</sup> a *Konsolidierungsstaat* (Consolidating State, Wolfgang Streeck),<sup>172</sup> Authoritarian Managerialism (Christian Joerges and Maria Weimer),<sup>173</sup> an Unconstrained

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So far it has proved difficult, if not impossible, to have a full and inclusive debate on the lofty ideal of 'political union' while the Eurozone crisis is still in its emergency phase. As long as this state of emergency persists, European politicians and officials will continue to be heavily focused on the pragmatic, day-to-day steps that (in their opinions) are necessary to save it.

See also Nicole Scicluna, *EU constitutionalism in flux? Is the Eurozone crisis precipitating centralisation or diffusion?*, 18 *EURO. L. J.* 489, 500 (2012).

<sup>168</sup> John P. McCormick, *Carl Schmitt's Europe: Cultural, Imperial and Spatial, Proposals for European Integration, 1923-1955*, in *DARKER LEGACIES OF L. IN EURO.* 133, 141 (Christian Joerges & Navraj S. Ghaleigh eds., 2003).

<sup>169</sup> The contrast between *Verfassungsrecht* (constitutional law) and *Verfassungswirklichkeit* (constitutional reality) is another problematical German legacy—again with root in CARL SCHMITT, *VERFASSUNGSLEHRE* 107 (1928) (reprinted in 2010).

<sup>170</sup> Jürgen Habermas, *A Pact for or against Europe?*, in *WHAT DOES GERMANY THINK ABOUT EUROPE?* 83–89 (Ulrike Guérot & Jacqueline Hénard eds., 2011).

<sup>171</sup> Damian Chalmers, *The European Redistributive State and the Need for a European Law of Struggle*, 18 *EUROPEAN LAW JOURNAL* 667 (2012) and Damian Chalmers, *European Restatements of Sovereignty*, (LSE Working Paper No. 10, 2013).

<sup>172</sup> WOLFGANG STREECK, *BUYING TIME: THE DELAYED CRISIS OF DEMOCRATIC CAPITALISM* 97–164 (2014).

<sup>173</sup> Christian Joerges and Maria Weimer, *A Crisis of Executive Managerialism in the EU: No Alternative?* (2012).

Expertocracy (Fritz W. Scharpf),<sup>174</sup> an Unbound Executive (Deirdre Curtin),<sup>175</sup> and *Krisenkapitalismus* (Crisis Constitutionalism, Hans-Jürgen Bieling).<sup>176</sup> None of these characterizations are in line with the ever-so positive and optimistic presentation of the integration project which we have been reading for decades.<sup>177</sup> Among the features underlined include the lack of a theoretical/conceptual paradigm; a radical disregard of Friedrich A. von Hayek's warnings against the "pretence of knowledge,"<sup>178</sup> a disregard of the rule of law, and a thorough de-legalization of governance.<sup>179</sup>

What does all this mean for European citizenship? What was once a cherished accomplishment is now characterized by inequalities between the North and the South, the social exclusions of a large part of the European population, and political disempowerment. The present calamities are not without precursors,<sup>180</sup> but the ambivalences of the vision of transnational, albeit nationally dis-embedded, citizenship have, by now, become increasingly apparent and disquieting. I am not trying to go, in this already overly lengthy paper, into any detailed analysis and refer instead to the contributions by Giubboni.<sup>181</sup> Just as it is misconceived to subject a socio-economically and politically diverse Union to the discipline of one currency, the construction of a uniform "European social model" is a similarly misconceived project.<sup>182</sup>

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<sup>174</sup> Fritz W. Scharpf, *Political Legitimacy in a Non-optimal Currency Area*, in *Adjusting to European Diversity: ADJUSTING TO EUROPEAN DIVERSITY: THE END OF THE EUROCRATS' DREAM* (Damian Chalmers, Markus Jachtenfuchs & Christian Joerges eds. (forthcoming 2015)).

<sup>175</sup> Deirdre Curtin, *The Challenge of Executive Democracy in Europe*, 77 *MODERN L. REV.* 1, 1–32 (2014).

<sup>176</sup> Hans-Jürgen Bieling, *Das Projekt der Euro-Rettung und die Widersprüche des europäischen Krisenkonstitutionalismus*, 20 *ZEITSCHRIFT FÜR INTERNATIONALE BEZIEHUNGEN* 89, 89–103 (2013).

<sup>177</sup> For a critique of the European "political culture of total optimism" and its weak underpinnings, see Giandomenico Majone, *RETHINKING THE UNION OF EUROPE POST-CRISIS. HAS INTEGRATION GONE TOO FAR?* 74–80 (2014).

<sup>178</sup> Friedrich A. von Hayek, Nobel Memorial Lecture (Dec. 11, 1974), <http://pavroz.ru/files/hayekpretence.pdf>.

<sup>179</sup> This is why law should not be called the culprit here; but see K.A. Armstrong, *New Governance and the European Union: An Empirical and Conceptual Critique*, in *CRITICAL LEGAL PERSPECTIVES ON GLOBAL GOVERNANCE: LIBER AMICORUM DAVID M TRUBEK* n. 10 and accompanying text (Gráinne de Búrca, Claire Kilpatrick & Joanne Scott eds., 2013), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2244762](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2244762).

<sup>180</sup> See Michelle Everson, *A very cosmopolitan citizenship; but who pays the price?* in *MICHAEL DOUGAN, NIAMH NIC SHUIBHNE AND ELEANOR SPAVENTA, EMPOWERMENT AND DISEMPOWERMENT OF THE EUROPEAN CITIZEN* 145 (2013).

<sup>181</sup> Stefano Giubboni, *European citizenship, labour law and social rights in times of crisis?*, this GLJ Special Issue.

<sup>182</sup> It is worth noting that very similar disappointments are also becoming a concern in the accession states; see for an instructive analysis Bojan Bugarić, *Europe Against the Left? On Legal Limits to Progressive Politics* (LEQS Paper No. 61, 2013).

All foregoing, disheartening diagnoses notwithstanding, this epilogue should not conclude without an outline of what has been announced in the introductory remark: "But where danger threatens, that which saves from it also grows."<sup>183</sup> The present state of the Union is unsustainable. The efforts to force Member States and their citizens into the straitjacket of new economic governance are bound to fail. The Euro-crisis, somewhat paradoxically and inadvertently, underlines the urgent need for pluralistic variety—the toleration of disagreement and contestation—rather than an ever-more centralized executive Europe. The failures of Europe generate growing unrest and protest among dis-empowered citizens who are exposed to austerity measures, experienced as hopeless, and, to a considerable degree, useless suffering. They increasingly provoke the political public, national parliaments, and even the EP. It will become progressively more apparent that it is impossible for the great majority of signatories of the Fiscal Compact to comply with the requirements imposed upon them. It will also become ever more apparent that it is simply impracticable for the great majority of signatories to comply with the requirements imposed upon them, and the "*die neue Umständlichkeit*" (cumbersomeness) of all these procedures will affect their impact.<sup>184</sup>

Hence, there is room for maneuver. And yet, to date, any substantial transformation of the established regime remains out of sight. Is it nevertheless conceivable that, in the not-too-distant future, the new policy coordination within the annually repeating European Semester, the reporting and multilateral surveillance obligations, the macro-economic imbalance procedures, and the responses to country-specific recommendations will lead to new assessments of the weight of socio-economic diversity. Growing awareness of the social embeddedness of markets, acknowledgement of the different regulatory, social, and economic cultures in the Member States, may well generate a search for innovative responses to Europe's complex conflict constellations—and sooner or later, even to the developments of standards and criteria which discipline authoritarian managerialism.

It would be absurdly pretentious to promise a "solution" to these difficulties. But we must not shy away from the construction of projects which seek to respond to the problems which we have identified. The project which I have pursued for more than a decade is "conflicts-law constitutionalism."<sup>185</sup> Its analytical and normative core can be briefly summarized as follows: As long as the shape of a pan-European democracy lacks contours, and the conditions for its realization remain entirely unclear, we must explore alternatives which take the difficulties the European project must not, and cannot, avoid into account.

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<sup>183</sup> FRIEDRICH HÖLDERLIN, note 9 *supra*.

<sup>184</sup> For a thorough reconstruction see BEATE BRAAMS, KOORDINIERUNG ALS KOMPETENZKATEGORIE 15–49 (2013).

<sup>185</sup> See *supra* notes 31 & 33. For an evaluation see the contributions in *Conflicts Law as Constitutional Form in the Postnational Constellation*, 2:2 TRANSNATIONAL LEGAL THEORY (Christian Joerges, Poul F. Kjaer & Tommi Ralli eds., 2011). The core premises of the approach are explained in the introductory chapter by the three editors on "A New Type of Conflicts Law as Constitutional Form in the Postnational Constellation," 153–165.

How should we respond to the reality that the socio-economic disparities in the expanded Union are not melting away? Which conclusions should be drawn from the insight that the neo-liberal interventions to which the “varieties of capitalism” in the Union have been exposed have repeatedly disintegrative effects? If it is impossible to construct a uniform welfare-state model, is it then advisable to dismantle Europe’s welfare-state traditions altogether? If it is not our goal to suppress the painful memories of Europeans, to not iron out the differences between their bitter historical experiences, to not waste the wealth of their cultures, must not tolerance therefore determine the status of European citizens, tolerance which is established in law and based upon the principle of mutual acceptance? These questions are not merely rhetorical. They have a normative point of reference in the optimistic “motto” of the ill-fated Treaty establishing a Constitution for Europe as “United in Diversity,”<sup>186</sup> which need not remain an empty phrase. My proposal for putting this motto into practice is as follows: Europe must find its constitutional form in a new type of “conflicts law,” which is characterized by two guiding principles. Firstly, the supranational European conflict of laws is to require Member States of the Union to take their neighbors’ concerns seriously—in this respect, it aims at compensating the structural democratic deficits of nation-statehood. Secondly, this European conflicts law should structure cooperative solutions to problems in specific areas—thereby reacting to the interdependencies of modern societies. Suffice it here to underline three points.

We should shift our attention from the democratic deficit of the EU to the structural democracy deficit of its Member States. Nation states continuously, and unavoidably, violate the principle that those affected by their laws can “in the last instance” understand themselves as their authors. The Member States of the Union can be requested to take the impact of their own policies on other jurisdictions into account and *vice versa*—they can expect that their concerns be included in the decision-making processes of the others. In the Union, these commandments correspond to the common commitments to democracy which European law is legitimated to implement. European law has the vocation, and some potential, to compensate these deficits. It can derive its legitimacy from its capacity to correct the democracy deficits of Member States.<sup>187</sup>

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<sup>186</sup> Draft European Constitutional Treaty arts. 1–8 (Dec. 16, 2004).

<sup>187</sup> It seems worth noting that Habermas expresses the same ideas in his recent work on the constitutionalisation of international law:

Nation-states . . . encumber each other with the external effects of decisions that impinge on third parties who had no say in the decision-making process. Hence, states cannot escape the need for regulation and coordination in the expanding horizon of a world society that is increasingly self-programming, even at the cultural level.

See Jürgen Habermas *Does the Constitutionalization of International Law still have a Chance?*, in JÜRGEN HABERMAS, *THE DIVIDED WEST* 113, 176 (Ciaran Cronin trans., 2007).

The second vocation and task stems from the erosion of the potential of the nation state to resolve problems autonomously. In the Union, this dependence upon the other transforms itself into duties of cooperation which European law is legitimated to organize. The “constitutionalization of co-operation”<sup>188</sup> must then seek to derive its validity from the normative credentials of the very interactions that it organizes.

Conflicts-law constitutionalism was meant to be elaborated further and to proceed as a “re-constructive project.” For example, a re-conceptualization of European law which would, to a considerable degree, be compatible with European law as it stood, and be able to orient its further development. The re-constructive status was based upon its sociological premises which reflect the European constellation more adequately than the orthodoxy of European law. It seems, indeed, overdue to reconsider the integration project in the light of Europe’s ever-growing diversity, to take the conflicts which this diversity generates into account, and to re-orient Europe’s agenda from harmonization and unity to the management of complex conflict constellations.

The last point is the most difficult to defend. The reconstructive status of the conflicts-law approach was based on its sociological premises which reflect the conflict-laden European constellation more adequately than the orthodoxy of European law. All that seemed needed, and indeed overdue, was to reconsider the integration project in the light of Europe’s ever growing diversity, to take the conflicts which this diversity generated into account, and to re-orient Europe’s agenda from harmonization and unity to the management of complex conflict constellations. Following the financial crisis, such hopes and ambitions are obviously unrealistic, with substantial backing in already existing European law. This bold assertion has suffered numerous setbacks. For example, through the de-legalization and de-formalization of European governance.<sup>189</sup> At present, under the pressures of European crisis management, it continues to dwindle, and conflicts-laws constitutionalism is, for the time being, a merely critical project.<sup>190</sup> What can nevertheless be explored are the conflict constellations which the new modes of economic governance and the imposition of austerity politics on a large part of the Union generate—together with the space for counter-movements which the unfortunate state of the Union may generate. That, although, requires another project.

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<sup>188</sup> See Christian Joerges, Poul F. Kjaer & Tommi Ralli *A New Type of Conflicts Law as Constitutional Form in the Postnational Constellation*, in *CONFLICTS LAW AS CONSTITUTIONAL FORM IN THE POSTNATIONAL CONSTELLATION*, 2:2 *TRANSNATIONAL LEGAL THEORY* 159–160.

<sup>189</sup> See *supra* notes 73, 76.

<sup>190</sup> See Christian Joerges & Maria Weimer, *A Crisis of Executive Managerialism in the EU: No Alternative?*, in *CRITICAL LEGAL PERSPECTIVES ON GLOBAL GOVERNANCE: LIBER AMICORUM DAVID M TRUBEK* 295 (Gráinne de Búrca, Claire Kilpatrick & Joanne Scott eds., 2013).



