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 were 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[1]

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.[2] 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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[1] 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.

[2] 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*.

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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.[3] 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

[3] 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. T*his 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.

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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).[4] 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.[5] 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

[4] Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, CJEU Case C-120/78, 1979 E.C.R. 649.

[5] 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 "problematiques" and given sufficient time.

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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.[6]

Each of these ideals has been shaped not only, and not primarily, by abstract scholarly writings, but by actual political struggles.[7] 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[8] or the Spanish Constitution of 1931,[9] 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

[6] *See* MANUEL GARCÍA PELAYO, DERECHO CONSTITUCIONAL COMPARADO (1984); MANUEL GARCÍA PELAYO, LAS TRANSFORMACIONES DEL ESTADO CONTEMPORÁNEO (1977).

[7] 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.

[8] According to the Weimar Constitution, Germany was a Social *Rechsstaat*. 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.

[9] 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.

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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.[10]

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, [11] 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.[12] 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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[10] 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).

[11] 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.

[12] *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 Luxembourgeois 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; Grondwet voor het Koninkrijk der Nederlanden art. 63, 67 (1815) (amended 1953) (Neth.); Constitution du Grand-Duche 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 Rechtstaat. 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 aformal 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.[13] It reflected the ongoing process of constitutionalization of European law.[14] 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,[15] 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.[16] A key point of European

[13] *See* Richard Plender, *An Incipient Form of European Citizenship*, *in* EUROPEAN LAW AND THE INDIVIDUAL 39–53 (Francis Jacobs ed., 1976).

[14] 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).

[15] 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.

[16] 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

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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.[17]

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.[18] 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,[19] the two Rome Treaties of 1957,[20] and the Merger Treaty of 1965.[21] 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).

[17] 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.

[18] 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.

[19] Treaty Constituting the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140.

[20] Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11.

[21] 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.[22]

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.[23] 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 *Rechtsstaat*s 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

[22] *See* John Erik Fossum & Agustín José Menéndez, *The Constitution's Gift*, 11 EUROPEAN L.J. 380 (2005).

[23] Proven by the present crises. *See* FOSSUM & MENÉNDEZ, *supra* note 14; Menéndez, *supra* note **Error! Bookmark not defined.**.

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mentioned themes reflect the unease about the present constitutional state of the process of European integration.[24]

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.

[24] 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).

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There is no doubt that any assessment of European citizenship has to incorporate the perspective of transnational citizens,[25] 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?[26] 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.[27] 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

[25] 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.

[26] 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).

[27] *See* Rudy Grzelczyk v. Centre public d'aide sociale Ottignies-Louvain-la-Neuve, CJEU Case C-184/99, 2001 E.C.R. I-06193.

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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*.[28] 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

[28] *See* Gerardo Ruiz Zambrano v. Office national de l'emploi, CJEU Case C-34/09, 2011 E.C.R. I-1177.

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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.[29] 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

[29] *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.[30]

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

[30] *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).

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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,[31] 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.[32] 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.[33] 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

[31] 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/.

[32] *See* Government of the French Community and Walloon Government v. Flemish Government, CJEU Case C-212/06, 2008 E.C.R. I-1683.

[33] *See* DAVID STUCKLER & SANJAY BASU, THE BODY ECONOMIC: WHY AUSTERITY KILLS (2013) (describing these restrictions as literally deadly).

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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

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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.[34] 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.

[34] *See generally* ALEXANDER SOMEK, INDIVIDUALISM (2008); ALEXANDER SOMEK, ENGINEERING EQUALITY (2011).

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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*.[35] 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,[36] 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 *Rechtsstaat*s. 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?

[35] *See* Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon), CJEU Case C-120/78, 1979 E.C.R. I-649.

[36] *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.[37]

The second is that the ways by which the CJEU and national constitutional courts fill proportionality—which is by itself a purely structural principle[38]—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 *dérapage"* 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

[37] *See* Agustín José Menéndez, *A Proportionate Constitution? Economic Freedom, Substantive Constitutional Choices and Dérapages 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).

[38] 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—[39] 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.[40]

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

[39] *But see* Futura Participations and Singer v. Administration des Contributions, CJEU Case C-250/95, 1997 E.C.R. I-2471, paras. 31, 33.

[40] *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.[41] 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 illusionary, because the key point of any

[41] *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.[42]

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,[43] the re-characterization of market-making as a competence basis in *Tobacco Advertising*[44] and the upper hand given to freedom of establishment to the detriment of collective socio-economic rights in *Viking*[45] and *Laval*.[46]

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*.[47] 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*.

[42] *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).

[43] Comm'n v. Portugal (Golden Shares), CJEU Case C-367/98, 2002 E.C.R. I-4731.

[44] Germany v. Parliament & Council (Tobacco Advertising), CJEU Case C-376/98, 2000 E.C.R. I-8419.

[45] 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.

[46] 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).

[47] *See* Menéndez, *supra* note 3.

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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.[48] 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 "*Grandola 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.[49] 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

[48] *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).

[49] *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 "Grandola Villa Morena").

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Portuguese Republic brought before the Constitutional Court fundamental budgetary laws proposed by the government thrice.[50] 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.[51]

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

[50] *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.

[51] 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.

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.

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