Special Issue
EU Citizenship: Twenty Years On

The Content of European Citizenship

By Pavlos Eleftheriadis[*]

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.[1] Some sociological accounts present a model of citizenship with many components *disaggregated* and broken down as overlapping identifications.[2] 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.[3]

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[1] 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).

[2] *See, e.g.*, Jean Cohen, *Changing Paradigms of Citizenship and the Exclusiveness of the Demos*, 14 INT'L SOC. 245–268 (1999).

[3] 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).

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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."[4] 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."[5]

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

[4] 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].

[5] CATHERINE BARNARD, EC EMPLOYMENT LAW 49 (2006).

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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.[6] 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."[7] 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.[8]

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

[6] 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."

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

[8] *Id.*

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this status.[9] 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,*[10] 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.[11] 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"[12] 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."[13] 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."[14] 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.[15]

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.[16] It was clear that Mrs. McCarthy could not claim rights under the Directive. The Court concluded:

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[9] 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.

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

[11] *Id.* at para. 39.

[12] *Id.* at para. 41.

[13] *Id.* at para. 42.

[14] *Id.* at para. 44.

[15] *Id.*

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

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> 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.[17]

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.[18]

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.[19] 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

[17] *Id.* at para. 39.

[18] *Id.* at para. 49.

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

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"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.[20]

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.[21]

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."[22] In *Zambrano* Advocate General Sharpston had said that "lottery rather than logic would seem to be governing the exercise of EU citizenship rights."[23] 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.[24] 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,

[20] *Id.* at para. 43.

[21] *Id.* at para. 66.

[22] *Id.* at para. 67.

[23] *Zambrano*, CJEU Case C-34/09 at para. 88.

[24] *See* Armin von Bogdandy, *Founding Principles*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 11–54 (Armin von Bogdandy & Jurgen 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 & Jurgen Bast eds., 2009).

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

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."[26] 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

[25] Armin von Bogdandy, *Founding Principles*, *in* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 54 (Armin von Bogdandy & Jurgen 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.

[26] 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.[27]

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

[27] THOMAS H. MARSHALL, CITIZENSHIP AND SOCIAL CLASS AND OTHER ESSAYS 28–29 (1950).

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> is not proportionate to the market value of the claimant.[28]

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.[29]

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."[30] The various rights are of course interconnected. Marshall wrote, for example, that education is a precondition of civil freedom.[31] 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.[32] Finally, the EU and its institutions do not have the power to

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[28] *Id.* at 29.

[29] 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).

[30] *See* MARSHALL, *supra* note 27.

[31] *Id.* at 26.

[32] 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.*,

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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 form 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*,[33] *Zambrano*, *Baumbast*,[34] and *Zhu and Chen*.[35] 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.[36] 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.[37] 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.

[33] *Grzelczyk*, CJEU Case C-184/99.

[34] 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.

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

[36] *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).

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

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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.[38] 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.[39] 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

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

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

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contract insist that active reliance on a promise is something different from simply receiving a promise.[40]

In the philosophical literature, reciprocity commonly refers to the requirement that one returns a benefit they have received from another on account of fairness.[41] 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."[42] 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."[43] 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

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

[41] *See* John Rawls, *Justice as Reciprocity*, *in* COLLECTED PAPERS 190 (Samuel Freeman ed., 2001).

[42] ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW 2 (1999).

[43] *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."[44] 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."[45] 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.[46] 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.[47] 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

[44] JOHN RAWLS, POLITICAL LIBERALISM 50 (1993).

[45] *Id.* at 137.

[46] *See, e.g.*, Robert O. Keohane, *Reciprocity in International Relations*, 40 INT'L REL. 1 (1986).

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

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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.[48]

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.[49] 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:

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

[49] 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.

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> [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.[50]

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.[51]

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

[50] DAVID MILLER, ON NATIONALITY 70–71 (1995).

[51] Koen Lenaerts, *European Union Citizenship, National Welfare Systems and Social Solidarity*, 18 JURISPRUDENCIJA 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."[52] 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."[53] 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.[54] 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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[52] Koen Lenaerts, *European Union Citizenship, National Welfare Systems and Social Solidarity*, 18 JURISPRUDENCIJA 397 (2011).

[53] 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).

[54] 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 . . . .[55]

[55] *Id.* at paras. 87–90.

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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*.[56] 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."[57] 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.[58] 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.[59]

[56] *See* Collins v. Sec'y of State for Work and Pensions, CJEU Case C‑138/02, 2004 E.C.R. I–2703.

[57] *Id.* at para. 58.

[58] *See id.* at para. 66.

[59] *See id.* at para. 67.

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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."[60] 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.[61] 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:

[60] 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/.

[61] *See* Andrea Sangiovani, *Solidarity in the EU,* 33 OXFORD J. LEGAL STUD. 1 (2013).

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> 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.[62]

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*.[63] 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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[62] Robert O. Keohane, *Reciprocity in International Relations*, 40 INT'L REL. 4 (1986).

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

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