Special Issue
EU Citizenship: Twenty Years On

Dimensions of Citizenship

By Patricia Mindus[*]

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

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

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

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

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

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

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

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

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

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

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

[3] BERTOLT BRECHT, FLÜCHTLINGSGESPRÄCHE 7 (1998).

[4] Rainer Bauböck, *Citizenship and National Identities in the European Union*, *in* INTEGRATION DURCH DEMOKRATIE. NEUE IMPULSE FÜR DIE EUROPÄISCHE UNION 302–20 (Eugen Antalosvky, Josef Melchior & Sonja Puntscher-Riekmann eds., 1997).

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

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

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

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

[5] HANS KELSEN, GENERAL THEORY OF LAW AND STATE (1945).

[6] JEAN BODIN, LES SIX LIVRES DE LA RÉPUBLIQUE 68 (Scientia Verlag 1977) (1583); PATRICIA MINDUS, CITTADINI E NON. CITTADINI E NO. FORME E FUNZIONI DELL'INCLUSIONE E DELL'ESCLUSIONE (2014).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[11] Rottmann v. Bayern, CJEU Case C-135/08, 2010 E.C.R. I-1449.

[12] Baden-Württemberg v. Tsakouridis, CJEU Case C-145/09, 2010 E.C.R. I-1345.

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

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

[13] Micheletti v. Delegación del Gobierno en Cantabria, CJEU Case C-369/90, 1992 E.C.R. I-4239.

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

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

[16] Eman v. College van Burgemeester, CJEU Case C-300/04, 2006 E.C.R. I-08055.

[17] *Rottmann*, CJEU Case C-135/08.

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

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

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

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

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

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

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

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

[18] MARSHALL, *supra* note 9.

[19] LOÏC AZOULAI, LA CITOYENNETE EUROPEENNE, UN STATUT D'INTEGRATION SOCIALE, IN CHEMINS D'EUROPE : MELANGES EN L'HONNEUR DE JEAN PAUL JACQUE 1–28 (2010).

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

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

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

[20] MICHEL FOUCAULT, BIRTH OF BIOPOLITICS: LECTURES AT THE COLLEGE DE FRANCE 1978–79 (2008).

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

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

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

[22] KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME (1944).

[23] CARL SCHMITT, DER HÜTER DER VERFASSUNG (1931).

[24] ARISTOTLE, POLITICS BOOK III § 1274b, 33–42 (H. Rackham trans., Harvard Univ. Press 1944).

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

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