Special Issue
EU Citizenship: Twenty Years On

A Citizenship in Movement

By Michelle Everson[*]

A. The Quest for Citizenship as Universal Good

From its inception, the philosophical-legal vehicle of citizenship has exhibited Janus-like qualities. For Karl Marx, the "first" citizenship of the classical world was a lodestone in the edifice of the "symbolic city"; a legally-delineated status that, just as surely as it included Greeks within the unitary polis, condemned the vast mass of the classical population to servility.[1] The particularism within an originating citizenship paradoxically survived the Enlightenment, as a result of which, the figure of the *citoyen* became the point at which a Judaic-Christian preoccupation with the inalienable personality of man could be conceptually reconciled with the perceived need to maintain a secular community of horizontal bondage within the republican state. Exclusionary impulses similarly only hardened in an age of nationalism. Even the most inclusive of "industrial" citizenships, just as they expanded the liberating potential of socialized belonging,[2] continued to exclude the alien from their New Jerusalem with direct reference to his lack of communitarian, contractual or "accidental" concordance with the nation. [3]

The philosophical-legal vehicle of citizenship encompasses its own tragedy, as well as its own persisting project. Its failure is not merely a conceptual one; the miscarriage of the universalizing Enlightenment aspiration, or its dissolution within the territory and the history of the particularizing nation and the subsequent creation of a nationalized focus for socially-liberating redistribution, have generated their own very real victims. Hannah Arendt's "spatiality," her emphasis upon the temporal and geographical parameters of belonging, or her regretful observation that "freedom," or the freedom of the politically-enabled and protected citizen, "where it existed as tangible reality, has always been spatially limited,"[4] must now remind us, not only of the murdered dead, or "non-citizens"

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[1] *See* DEREK HEATER, CITIZENSHIP: THE CIVIC IDEAL IN WORLD HISTORY, POLITICS AND EDUCATION (1990).

[2] *See* THOMAS H. MARSHALL, CITIZENSHIP AND SOCIAL CLASS (1953); RALF DAHRENDORF, DER MODERNE SOZIALE KONFLIKT (1992).

[3] *See* HEATER, *supra* note 1 (explaining the case of British citizenship, an accident of birth).

[4] HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 262 (1994); *see also* Hans Lindahl, *Finding a Place for Freedom, Security and Justice: The European Union's Claim to Territorial Unity*, 29 EUROPEAN L. REV. 461 (2004).

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of the Europe of the dictators, but also of the non-western casualties, first, of a subjugating colonialism, and then of the blind distributive neglect of the decolonizing, post-colonial and neo-colonial eras. Conversely, and despite the paradox of exclusionary tragedy, the citizenship telos endures, determined both to restore the Enlightenment promise of universality and to establish universal welfare.

Such potent aspirations may in part explain the impossible expectations leveled at the new legal status of "citizenship of the European Union" established by the Maastricht Treaty of 1992. Outside of the colonial context, EU citizenship represents the first attempt to establish a formal status for, initially, Europeans above and beyond their own national communities. To this extent, it is also unsurprising that EU citizenship, adopted due to a functional need to establish an ancillary status for EU citizens to ease completion of the single market,[5] has generated a vast aspirational literature dedicated to philosophical perfection of this novel form of post-national citizenship.[6] At the same time, the emergence of EU citizenship has been accompanied by a counter-movement that academically disdains philosophical re-entrenchment of "deep" concepts of citizenship at the European level, even in their most universal or contractarian variants.[7] In pragmatic institutional-judicial terms, the realization of European citizenship is pursued with a notable lack of regard for the conceptual restraints of the past.

EU citizenship is different from any other.[8] To this day, the core of EU citizenship is formed—all federalist aspirations apart—not by grand concepts, but by the economically-oriented rights of free movement laid down in the European Treaties.[9] With its functional emphasis, EU citizenship appears to offer a new potential for pursuit of a universal citizenship unfettered by exclusionary conceptual concerns. Above all, for the Court of Justice of the European Union (CJEU), the imperative of free movement has overcome all barriers to the enjoyment of the entitlements that were historically provided by national

[5] *See* Michelle Everson, *The Legacy of the Market Citizen*, *in* NEW LEGAL DYNAMICS OF EUROPEAN UNION 73–89 (Jo Shaw & Gillian More eds., 1995).

[6] *See* Jürgen Habermas, *Citizenship and National Identity: Some Reflections on the future of Europe*, 12 PRAXIS INT'L 1, 1–12 (1992); E.O. ERIKSEN, MAKING THE EUROPEAN POLITY: REFLEXIVE INTEGRATION IN THE EU (2005).

[7] *See* Adrian Favell & Virginie Guiraudon, *The Sociology of the European Union: An Agenda*, 10 EUROPEAN UNION POLS. 550 (2009).

[8] *See* EU CITIZENSHIP AND THE MARKET 2 (Richard Bellamy & Uta Staiger eds., 2011), http://www.ucl.ac.uk/european-institute/analysis-publications/publications/Final.pdf.

[9] *See, e.g.*, *Report From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region: On Progress Towards Effective EU Citizenship 2011–2013*, COM (2013) 270 final (Aug. 5. 2013) (explaining the general treatment of citizenship, whereby its major resources are dedicated to ensuring the free movement of European citizens and only ancillary resources are dedicated to realizing the political content of EU citizenship).

law, establishing a new emphasis in citizenship matters upon the tangible, or the real circumstances of individual want, rather than the posited communal gains of deep concepts of national citizenship. In its functionalist, universalizing character and its preoccupation with the real rather than the imagined, the legal-functional vehicle of EU citizenship might arguably embody one part of a post-modern *zeitgeist*, wherein universality is no longer sought in philosophical design, but, rather, in material circumstance.

The achievements of a tangible European citizenship cannot be doubted. Nevertheless, with its emphasis upon the material circumstances of free movement, EU citizenship also raises its very own points of concern. Above all, for primary European law, fact-based judicial activism has not only strained the conceptual coherence of law,[10] but more importantly, has also placed in doubt the quality of the *interpositio auctoritatis*, or the authoritative judicial intervention, concomitantly implicating EU constitutional jurisprudence and architecture within the posited, but false universalisms of science or modern economics. Right to free movement coalesces seamlessly with the efficiency postulates of new economic liberalisms, presenting opportunities for new forms of citizenship participation[11] but simultaneously undermining the socially-cohesive achievements of traditional citizenship.[12] Accordingly, it will be argued here that, although we must continue to seek to address the exclusionary externalities of the deep conceptual citizenships of the national era, tangible citizenship constructs, forged in functionality, should never be pursued without continuing regard for the insolubly confrontational couplets of individualism versus community, sovereignty versus subjection and entitlement versus provision,[13] which have historically accompanied citizenship discourse, both in theory and, vitally, in reality.

B. EU Citizenship: A Material Achievement

For Adrian Favell, writing from the sociological perspective, the collation of market rights of free movement and concomitant declaration of the miraculous birth of European citizenship by the Treaty of European Union merely made the EU a hostage to fortune. "[T]hey thus engaged in a dangerous game of rhetoric in relation to this core notion at the heart of the modern nation state," triggering, on the part of scholarship, "grandiose

[10] *See* Niamh Nic Shuibhne, *Seven Questions for Seven Paragraphs*, 36 EUROPEAN L. REV. 161 (2011).

[11] *See* Adrian Favell, *European Citizenship in Three Eurocities: A Sociological Approach to the European Union*, 30 POLITIQUE EUROPÉENNE 187 (2010).

[12] *See* Michelle Everson, *A Very Cosmopolitan Citizenship; But Who Pays the Price?*, *in* EMPOWERMENT AND DISEMPOWERMENT OF THE EUROPEAN CITIZEN (Michael Dougan, Niamh Nic Shuibhne, & Eleanor Spaventa eds., 2012); NEIL FLIGSTEIN, EURO-CLASH: THE EU, EUROPEAN IDENTITY AND THE FUTURE OF EUROPE (2008).

[13] *See* Michelle Everson & U.K. Preuß, *Konzeptionen von Bürgerschaft in Europa*, 26 PROKLA 543 (1996).

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cosmopolitan illusions of a post-national European state and polity,"[14] as well as furnishing Eurosceptic thinkers with a further stick with which to beat European integration processes. The packaging of functional market rights as a European citizenship unleashed a normative maelstrom of overblown expectations and matching skepticism. A market-based citizenship could never mimic the contractarian allegiance of an individual to the state, especially with regards to political inclusion within EU decision-making processes that had historically been postulated in the national setting[15] and which ambitious scholarship now sought to re-establish at EU level.

Refreshingly, Favell, in a sociological agenda for European citizenship research, calls for an academic divorce from an "industry," which is preoccupied, on the basis of Eurobarometer data, with the perceptions of individual European citizens of their own identities.[16] Instead, a new material focus should be one of how Europeans exercise their rights in practice. For Favell, though not yet constructed or even construed as a polity, the EU may be considered to be a "space in reality" or to have established its own material counterpoint to conceptual spatiality. This, to the exact degree that individuals have used European rights or "opportunities" to:

> [D]o new things across national borders; go shopping for cheaper petrol or wine; buy cottages in charming rustic villages; look for work in a foreign cosmopolitan city; take holidays in new destinations, move to retire in the sun, buy cheaper airline tickets; plan international rail travel; join cross-national associations between twinned towns; use a common currency without having 5% stolen by the bank—and a thousand other actions facilitated by the free movement accords.[17]

The demand for a "behaviorally," rather than an "attitudinally"-based approach to European citizenship, is a distinct methodological choice.[18] At the same time, for Europeanists, the academic approach also evokes the political functionality of the Community Method, at least to the degree that the grand normative schemes of European

[14] Favell, *supra* note 11, at 192.

[15] *See* Everson, *supra* note 5.

[16] *See e.g.*, NEIL FLIGSTEIN, EURO-CLASH: THE EU, EUROPEAN IDENTITY AND THE FUTURE OF EUROPE (2008).

[17] Favell, *supra* note 11, at 190.

[18] *See* Everson, *supra* note 5.

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Union are routinely pursued, not as stated projects, but in the incrementalism of limited integrationalist steps, such as functionalist completion of the free market, wherein behavioral change throughout European civil society becomes the platform for a further deepening of Europeanization. Similarly, pragmatic behavioralism also recalls the legal methodology of the CJEU, or its efforts to secure the rights of individual Europeans—and non-Europeans—to do what European treaties promise them that they can do, and thereby to extend the reach of EU citizenship beyond many institutional expectations.

Returning briefly to the philosophical level, the recent history of EU citizenship accordingly reveals a vital disjunction between the attitudes of the Member States of the European Union, in their guise as the Council, and the CJEU, wherein the Court has sought to expand the benefits of European Union citizenship often against the wishes of national authorities. Hans Lindahl has written of Europe's renewed political recourse to spatiality. For Lindahl, the notion of space is a powerful one:

> [N]ot merely a geographical term. It relates not so much, and not primarily, to a piece of land as to the space between individuals in a group whose members are bound to, and at the same time separated and protected from each other by all kinds of relationships, based on a common language, religion, a common history, customs, and laws.[19]

Spatiality, with its emphasis upon identity writ large, is commensurate with deep concepts of national citizenship and may be argued to find a renewed place in the differentiations made between individuals present within the European space by European legislation on the movement of persons. For Lindahl, a regime whereby Union citizens are afforded specific rights of free movement, third country nationals are afforded limited recognition,[20] and asylum seekers are subject to a common framework of control[21] has not ended exclusion in Europe. Instead, exclusion has been reinforced within a binary legal code, whereby the "legally resident" take their stratified place within a European space. This protects individual Europeans from one another and Europeans from the other, such that "the illegal," both within Europe and without, are left bereft, knocking at the firmly closed doors of recognition and solidarity. The European other dies daily in the waters of the Mediterranean, or languishes in the no-man's-land of detention centers, just as the Lisbon

[19] Lindahl, *supra* note 4.

[20] *See* Council Directive 2004/38, 1994 O.J. (L 158) 77 (EC); Council Directive 2003/109, 2004 O.J. (L 16) 44 (concerning the status of third country nationals who are long-term residents).

[21] *See* Lindahl, *supra* note 4.

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Treaty promises its citizens "an area of freedom, security and justice" without internal frontiers.[22]

It is this renewed recall to notions of European belonging, whereby only certain individuals, defined by their positive legal status, are given access to European benefits, that is so strikingly absent from the jurisprudence of the CJEU. By now, the cases are legendary, but still deserve brief recall here, insofar as the Court has rejected establishment of a nation of European belonging and has instead responded materially and emotionally to the constellation of facts thrown up by the movement of individuals into and throughout the European continent. From the inception of EU citizenship in the Maastricht Treaty, the Court's citizenship jurisprudence has acted as counterweight to the establishment of European spatiality. First, the Court decoupled the right of free movement of European citizens[23] from the more restrictive status of "European as worker" under Article 45 in the Treaty on the Functioning of the European Union (TFEU).[24] Second, the Court cut the Gordian knot between citizenship and nationality, extending "associative" rights of EU citizenship to third country nationals (TCNs).[25] Third, the Court questioned constructed solidarity and opened up closed national benefits systems to EU nationals and their associates.[26] Finally, albeit in a very restricted formulation, the Court even seems to suggest that rights of EU citizenship have "substance" of their own and will accrue even where there is no question of movement across national borders.[27]

More specifically, at the level of legal methodology, where the Court has made unlimited use of its own effet utile doctrine and has borrowed extensively from the universal jurisdiction of human rights, the CJEU has broken down the exclusionary "blind-side" of traditional citizenship constructs to treat persons in movement within the European space, not as philosophical constructs, but rather as individuals captured in their own material circumstances which dictate their need for enjoyment of European rights. In this construction, facts and emotions matter. The decoupling of enjoyment of citizenship rights from nationality follows as the CJEU responds emotionally to a simple human happening,

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[22] *See* Consolidated Version of the Treaty of the Functioning of the European Union art. 67, Oct. 26, 2012, 2012 O.J. (C 326).

[23] *See id.* art. 20(2)(a).

[24] *See* Maria Martinez Sala v. Freistaat Bayern, CJEU Case C-85/96, 1998 E.C.R. I-2691.

[25] *See* Kunqian Catherine Zhu & Man Lavette Chen v. Sec'y of State for the Home Dep't., CJEU Case C-200/02, 2004 E.C.R. I-9925.

[26] *See* Baumbast and R v. Sec'y of State for the Home Dep't., CJEU Case C 413/99, 2002 E.C.R. I-7091.

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

the birth of a child within the EU, allowing her mother and "primary care-giver," a Chinese national, to travel freely with her across Member State frontiers so that she might in fact enjoy her newly won EU citizenship granted by virtue of then unlimited Irish *ius soli*. The nation, founded either in pre-communitarian bounds of belonging or in concordance with the ideals of the founding republican moment, is hostile to both child and mother. The CJEU and its EU citizenship are not. The human right to a family life demands that Mrs. Zhu must be allowed to travel with her daughter.[28]

Hostile meaning and indifferent history are similarly forgotten, as the *ius Europeaum* furnishes a "good" outcome, or engages with a visible and tangible other far beyond imagined solidarity communities, thereby extending the EU citizenship regime to matters of access to welfare. Directive 2004/38 on free movement predictably re-emphasizes the closed nature of the national solidarity collective—or the exclusionary notion that the redistributive social benefits of citizenship are reserved for members of the nation alone—by granting EU citizens and their family members a right of residence throughout Europe only "as long as they do not become an unreasonable burden on the social assistance system of the host Member State."[29]

The operative word here, the measure of the willingness of the Member States to open up national solidarity to afford real succor to the indigent Union citizen, is to be found in the word "unreasonable";[30] and it is here, too, that the determination of the CJEU to pry that door further open is demonstrated. Prior to the implementation of Directive 2004/38, the Court had already firmly signaled its universalist welfare aspirations in cases such as *Grzelczyk*.[31] In *Baumbast*, where a German national had not satisfied the UK requirement that he maintain sufficient sickness insurance for himself and his family, the Court accordingly declared that national legislation must be proportionate. The imposition of the Union law principle of proportionality to all subsequent national legislation implementing Directive 2004/38 thus also amounts to a "constitutional review" of Council efforts. The Court set the legislative limits to national solidarity by judicial frontline assessment of the impacts of a notion of "unreasonable burden" in the light of everyday cases in individual Member States.[32]

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[28] *See Kunqian*, CJEU Case C-200/02

[29] *See supra* note 22, art. 6.

[30] *See* Michael Dougan, *The Constitutional Dimension to the Case Law on Union Citizenship*, 31 EUROPEAN L. REV. 613 (2006).

[31] *See* Grzelcyk v. Centre Public d"aide sociale d"Ottignies-Louvain-la-Neuve, CJEU Case C-184/99, 2001 E.C.R. I-6193 (stating that the fact that Dir 93/96 regulating movement of students (1993 O.J. L317/59) did not provide for benefits for students, similarly did not preclude extension of national benefits to EU students where such students found themselves in the same needy circumstances as national students).

[32] *See* Dougan, *supra* note 30.

And it is here that the Court's factual-emotional response to citizenship adjudication becomes most apparent. Contractual citizenship and solidarity is blind to Mr. Baumbast's, or the geographical stranger's, need for immediate medical care for his family. This need not be so declares the CJEU: the measure of solidarity within Europe is not to be negated by spatially-bounded belonging. Instead, a miracle of extra-European recognition is invoked as the Court's sympathetic act of observing and responding to the needs of individual citizens transforms proportionality from a technical yardstick of procedural legal review into a far more indistinct instrument of material adjudication, open to an emotionally-founded response to individual circumstance, and an *interposito auctoritas* within which a miracle of European solidarity might be born.

A burgeoning—judicially-driven—citizenship, founded in response to material circumstance, is an undoubted achievement, most importantly because it begins to answer the final demand, famously made by Ralf Dahrendorf, that traditional notions of citizenship should be opened up in response to globalization and social fragmentation.[33] A material universalism, given force by functionality and emotion, seemingly allows us to escape the double-binds of conceptual history and to respond to a real world of material circumstance. Nevertheless, the approach is vulnerable in various respects, especially in terms of the European legal system. In addition to precipitating its own embroilment in a vast number of technical cases on social assistance,[34] it now also suffers from powerful critique, highlighting the inconsistency and incoherence in own jurisprudence.

The primary focus for this criticism has been the case of *Zambrano*. While generally regarded as having furnished the "correct result" in simple terms of reactive justice, *Zambrano* also causes concern within formalist legal thinking, seemingly overturning the CJEU's established line of jurisprudence limiting enjoyment of EU citizenship rights to instances of cross-border movement.[35] As a consequence, the Court has been required to clarify and limit its revolutionary jurisprudence, whereby Mr. and Mrs. Zambrano, failed Colombian asylum seekers in Belgium, who had never moved across European frontiers, were nevertheless afforded the protection of the *ius Europeaum* as primary caregivers of their children who were Belgian by virtue of their birth in that country. In the Austrian case of *Dereci*,[36] the Court reiterated that, in *Zambrano*, the operative point was that the

[33] Ralf Dahrendorf, *Citizenship and Social Class*, *in* THE MODERN SOCIAL CONFLICT: THE POLITICS OF LIBERTY (Ralf Dahrendorf ed., 2008).

[34] *See* Everson, *supra* note 12.

[35] *See* Shuibhne, *supra* note 10.

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

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children of the Zambrano family remained dependent upon their parents such that, as Union citizens, they would still have been required to leave the European continent. The five TCNs of *Dereci*, wishing to join their families in Austria, were non-dependents and therefore not so fortunate. As much as family re-unification might be desirable, it was not "necessary" for the settled Austrian families to maintain their residency within the European space.

Reserving for itself, rather than national courts, the right to review each individual set of facts, the *Dereci* Court decisively foreclosed the potential for a human right of enjoyment of family life to become an automatic basis for the universalization of EU citizenship. At the same time, and in addition to increasing its own emotional workload, the Court also unmasked its own particularism: the continuing tension between norms and fact within EU law and the inherent weakness within an emotionally-founded *interpositio auctoritatis* which inexorably makes "Judge-Kings" of courts.[37] The question of who guards the guardians is a perennial one. It becomes a critical question where the selfsame primary legal—or quasi-constitutional—jurisdiction that reserves to itself the right to review the subjective interpretation by Member States of the term "unreasonable burden," also takes unto itself a highly emotional function of ascertaining the exact nature of the personal circumstances which will force removal, voluntary or otherwise, from the Union. The potential for empathy failure is ever present. The Court's rationale in a second qualifying case, whereby Mrs. McCarthy, a UK national, whose Jamaican husband was denied leave to remain in the UK, on the basis that she was not exercising her right of free movement under Directive 2004/38, such that an ancillary citizenship status could not be established for her husband,[38] leaves us with continuing concerns. Certainly the Court might state that Mrs. McCarthy, unlike the Zambranos, will not be forced by UK law to leave the EU, but surely she will be so by sentiment. Equally, it would prove difficult to regularize the residency of Belgium children in Colombia, but so too might it prove difficult to regularize the status of Mrs. McCarthy in Jamaica. Max Weber's eternal concerns about the inconsistency of material jurisprudence returns to haunt a European law which, even in its qualifying jurisprudence, strays from strictly formalist paths.[39] How might it maintain its own legitimacy in a necessarily irrational process of emotional response to the tangible demands for universal justice thrown up by globalization processes?

[37] *See* Everson, *supra* note 12.

[38] McCarthy v. Sec'y of State for the Home Dep't., CJEU Case C-434/09, (May 5, 2011), http://curia.europa.eu/.

[39] *See* Everson, *supra* note 12.

C. Scientific Universalism and the Entrenchment of *Homo Economicus*

Karl Deutsch, paraphrased by Neil Fligstein,[40] reminds us of the calculated cynicism inherent to the development of deep concepts of national citizenship: "[T]he historical 'trick' to the rise of a nation state will be to find a horizontal solidarity for the existing [class] stratification and a rationale that using a state apparatus to protect the nation makes sense." And, once again, in his technical choice of sociological methodology, Adrian Favell cannot but also implicitly hint at the far broader normative point that the "Marshallian triptych"[41] of industrial citizenship, in its deification of the progressive historical emergence of civic, political, and social rights, can be seen as entrenching outmoded and oppressive constructs of social organization. Social stratifications extend far beyond divisions of labor to shape and control—in nationalized narratives—dominant modes of cultural expression. Should, paraphrasing Favell, "doing new things," buying into bucolic dreams, motoring across the border to locate cheaper wine be viewed, for example, within the UK class-based narrative as an act of betrayal, as a siding with the propertied classes of a golden pre-war era?

The point is far from being a facetious one: the ossification of historically-conditioned stratifications within bounded societies, governed by their own inspirational and often class-based narratives of citizenship evolution, have similarly obscured a myriad of social cleavages founded, for example, in gender, sexual orientation, or ethnicity, and have played their own part in retarding material claims for justice that are not expressed within traditional national narratives of belonging and cohesion.[42] The ability to engage in "new" acts—e.g. the explicit sexualization of consumption within the establishment of a highly visible pink lifestyle[43]—might, by the same token, be viewed as avant-garde establishing potential for vital social change. The Janus-like character of citizenship, or its exclusionary potential, is not limited to exclusion on the basis of nationality. Instead, exclusion may also occur—sometimes in a highly oppressive manner—within the spatial confines of an "inclusive" citizenship narrative.

Set against this background of internal, as well as external exclusion, the liberating emphasis—also implicit in Favell's research—upon transaction and exchange opportunities, is thus far from a surprising one. Market forces are famously non-

[40] Fligstein, *supra* note 16, at 130.

[41] *See* Adrian Favell, *The Changing Face of "Integration" in a Mobile Europe*, *in* COUNCIL FOR EUROPEAN STUD. NEWSLETTER (2013).

[42] *See* Dahrendorf, *supra* note 33.

[43] *See* FRANK C. MORT, CULTURES OF CONSUMPTION: MASCULINITIES AND SOCIAL SPACE IN LATE-TWENTIETH CENTURY BRITAIN (1996).

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philosophical, blind to the antecedents, characters, desires and intentions of producers, service-providers, employees or consumers. To this degree, the rights of free movement at the core of EU citizenship, designed to facilitate establishment of the single market, might be argued—and this in isolation from a judicial activism which has also diluted the economic character of EU citizenship as in *Martinez Sala*[44]—to contain their own material universalism of opportunity, allowing Union citizens in their characters as workers, entrepreneurs or simple shoppers to challenge the established stratifications of their own and adopted Member States, not simply in theory, but also in fact. Nonetheless, a citizenship grounded within the fact of market process also poses its own dangers.

At least since the financial crisis, new forms of social organization, founded in liberalizing market forces, have often found themselves under attack and all-too-easily dismissed as neo-liberal chimeras that mask the disenfranchising interests of private economic power. The argument has validity, especially as regards the misdeeds of various sectors of the banking sector. Nevertheless, with an equal eye to liberating marketing potential, the risks inherent to a marketized society necessarily also deserve a more differentiated treatment, especially insofar as an institutionally-driven transition from concepts of political citizenship to notions of market citizenship may also be identified as a part of a materializing trend. This trend continues to seek a universal justice in its treatment of the individual and individual rights, but does so in processes, which—initially at least—are founded not in conceptual restraint, but rather in scientific appraisal of the circumstances of exchange.

In the recent case of *Alfa Vita*, Advocate General Poiares Maduro has reiterated the close connection within the European Union between the rights-driven evolution of the European market and the establishment of European citizenship:

> [I]t would be neither satisfactory nor true to the development of the case law to reduce freedom of movement to a mere standard of promotion of trade freedoms of movement fit into the broader framework between member states. It is important that the be understood to be one of the essential elements of the objectives of the internal market and European citizenship. At present, freedoms of movement must the 'fundamental status of nationals of the member states.' They represent the cross-border dimension of

[44] *See* Maria Martinez Sala v. Freistaat Bayern, CJEU Case C-85/96, 1998 E.C.R. I-2691.

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> the economic and social status conferred on European citizens.[45]

Considering the centrality of the European market within the integration project, it is equally unsurprising that the jurisprudence of the CJEU has similarly endowed and continues to endow the individual European with an economic character. From the very inception of the EEC, judicial extrapolation of the European treaties has perforce entailed the re-allocation of economic opportunities within an emerging European market. Individual economic potential is no longer constrained by national borders. Instead, reformulation of primary EU laws guaranteeing cross-border movement of labor, services, economic undertakings, and capital as individual rights (the "four freedoms"), is an indispensable weapon within a judicial armory dedicated to the dismantling of the barriers to trade that distinctive national regulatory regimes constitute. The European economic citizen accordingly emerged, in its infant form, as a "frontier-busting" pioneer of European market formation.[46]

The persona of the European economic citizen must likewise be viewed in a positive light or, at least, must be so to the degree that promotion of her rights by the CJEU has often freed the European from the "infantilizing" excesses of post-war regulation.[47] Equally, the surprising degree of acceptance won by an activist court for its ground-breaking judgments may be argued to have been a reflection of the Court's ready deployment of the universal truths of the scientific discipline, or the happy marriage established by the CJEU between science and the principles of European law, and especially so, between science and the principle of proportionality. Where the Court deployed the forensic power of science to unmask fiction, or the paternalistic incoherence of member state regulation, national legal systems were persuaded to lend it their implementing vigor: a ban on whole-meal pasta could not, after all, be demonstrated to be proportionate and could not be shown to protect the health of Italian diners.[48] In short, in a quest for materialization beyond mere emotionalism, the scientific *interpositio auctoritatis* reveals its own legitimating universality, as legal norm is informed by scientific methods of fact recognition. Nevertheless, in its materialization efforts, the historic Court also imbued its jurisprudence with a scientific outlook, which has subsequently hardened—or been misapplied—with the notable result that the CJEU has slowly denatured the European economic citizen and

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[45] Opinion of Attorney General Maduro at I-8148, Alfa Vita Vassilopoulos AE v. Greece, CJEU C-158 & CJEU 159/04, 2006 E.C.R. I-8135.

[46] *See* Marco Dani, *Assembling the Fractured European Consumer*, 36 EUROPEAN L. REV. 362 (2011).

[47] *See id.*

[48] *See id.*

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finally remodeled individuals throughout the Continent as the highly troubling *homo economicus* of cases such as *Laval* and *Viking*.[49]

A core problem in this regard is also one of the growing dominance of a form of economic liberalism, which construes itself as a science, locating its claim to a universal applicability and justice within the posited facts of market operations alone rather than the place that the market is afforded within society as whole. The impact of this form of economic liberalism, or in Michel Foucault's language, "anarcho-liberalism,"[50] is most strongly felt—and also most strongly critiqued[51]—in the sphere of application of the precepts of the law and economics movement. It also extends to influence, by means of application of efficiency postulates, national constitutional jurisdictions and, in the case of the CJEU, the quasi-constitutional jurisprudence of post-national law. For critical opponents, in particular those of a Hayekian persuasion,[52] the law and economics movement—to the degree that it mimics anarcho-liberal faith in the ability of rational market exchange to maximize individual and joint outcomes—represents, *grosso modo*, "a legal theory without law." In all of its materializing over-ambition, or its "idolatry of the factual," law and economics has emerged as a totalizing force of its own, negating of an original economically-liberal (and legal) project to limit state power through "normative" delineation of an (economic) civil society, and fatally disregarding of the Hayekian demand for a re-establishment of moment self-limitation within rational choice analysis. Where cost-benefit analysis can be and is applied far beyond limited spheres of rational individual interaction, it too becomes "counterfactual," with the result that the scientification of law project is traduced and reversed. Where it is modeled or applied to operations where markets and competition are "arbitrarily mimicked,"[53] the claim to re-found legal morality in universal reality is displaced by a totalizing rationality that makes its impossible claim to capture all uncertainty within human relations in its counterfactual models of operation. Where Foucault warns of the "bio-power" inherent in a form of economic liberalism that construes all of human actions as market operations, hinting also that such an operation might overcome all human subjectivity or potential for political voice, Ernst-Joachim Mestmäcker, remains true to his Hayekian roots. Mestmäcker forcefully dismisses a positivistic scheme of law that allows individual judges to dispense with a core rule of legal

[49] *See* International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti, CJEU Case C-438/05, 2007 E.C.R. I-1079; Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet and Svenska Byggnadsarbetareförbundets avdelning 1 and Byggettan and Svenska Elektrikerförbundet, CJEU Case C-341/05, 2007 E.C.R. I-11767.

[50] *See* MICHEL FOUCAULT, BIRTH OF BIOPOLITICS: LECTURES AT THE COLLEGE DE FRANCE 1978–79 161, 329 (2008).

[51] Michelle Everson, *The Fault of (European) Law in (Political and Social) Economic Crisis*, 24 LAW & CRITIQUE (2013).

[52] *See* Ernst-Joachim Mestmäcker, *A Legal Theory Without Law—Posner v. Hayek on Economic Analysis of Law*, *in* BEITRÄGE ZUR ORDNUNGSTHEORIE UND ORDNUNGSPOLITIK (2007).

[53] *See id.*

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certainty in line with a Grundnorm of modeled economic transactions, as acceptance of "ideology in the service of unlimited government and socialism [sic]; the refutation of a concept of justice ignoring viable negative tests of justice that identify unjust norms."[54]

The totalizing effects of efficiency postulates within the quasi-constitutional jurisdiction of the CJEU may thus also be identified in its increasingly undifferentiated approach to economic citizenship and in its pursuit of an absolute universal justice within the factual. Where European jurisprudence once paid due attention to delineation of its own Economic Constitution, the normative measure of which was the degree to which the European economic order continued—in the absence of its own redistributive function—to co-exist with residual national social competences given their own democratic legitimation,[55] recently radical CJEU market jurisprudence has recalibrated the principle of proportionality, ironed out "efficiency-jarring" elements within precedent and moved explicitly to a marketized conception of redistribution as redistributive opportunity. Such jurisprudence might be attributable to the pressures of eastern enlargement or the need to bind new Member States quickly into the Union.[56] Nonetheless, it is still striking that recent free movement case law and the growing power of a new jurisprudential logic that national regulation, regardless of its purpose, must cede to the European principle of the free movement of goods where a product would otherwise be impeded in its access to the market, transforms the principle of proportionality from a revealing rule of reason applied to national regulatory motivations to an absolute standard of "trade above all."[57] Similarly, by now infamous judgments on services provision have also subjected conduct of industrial disputes to marketized proportionality,[58] revealing the extent to which economic efficiency postulates have emerged within CJEU thinking as a putatively universal yardstick against which national regulation will be measured.

For many, the most concerning aspect within the *Laval* and *Viking* cases is the CJEU's failure to maintain the European legal tradition that labor and economic constitutions are distinct orders which may not be weighed against one another within the adjudicative

[54] *Id.* at 55.

[55] *See* Christian Joerges, *What is Left of the Integration Project? A Reconstruction in Conflcts Law Perspective*, *in* LEGAL CULTURES, LEGAL TRANSFER AND LEGAL PLURALISM (Stefan Kadelbach ed., 2013).

[56] *See* Michelle Everson & Christian Joerges, *Reconfiguring the Politics—Law Relationship in the Integration Project through Conflicts–Law Constitutionalism*, 18 EUROPEAN L.J. 644 (2012).

[57] *See* Alina Tryfonidou, *Further Steps on the Road to Convergence Among the Market Freedoms*, 35 EUROPEAN L. REV. 36 (2010).

[58] *See* Brian Bercusson, *The Trade Union Movement and the European Union: Judgment Day*, 13 EUROPEAN L.J. 279 (2007).

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balance.[59] Collective bargaining agreements may no longer be imposed upon "posted" workers through regulation or strikes if they are deemed to influence disproportionately on cross-border trade. Conversely, seen together with the Court's new market access test for goods, *Laval* and *Viking*—as Attorney General Maduro's economic evocation of citizenship demonstrates—are also one further example of the manner in which orders governing citizenship, as well as those governing the economic, have now coalesced within CJEU jurisprudence in accordance with a "justice standard" of allocative efficiency. The emergence of this standard has its own inspirational roots. The posted workers of *Laval* and *Viking* were from the new Member States, and found themselves denied access by western labor practices to the sole route to prosperity which the old Member States had afforded them: their competitive labor advantage. Compensating perhaps for the lack of a European Marshall Plan, but establishing a compensatory measure of justice for new Member States that is founded in an idolatry of cheap labor, the Justices of the CJEU have similarly undone the collectively-established universalisms of the social legal entitlements enshrined within national social orders and replaced them with European rights which deny western European workers access to their own jobs just as they empower eastern European workers to work for less money.

In contrast, the most jarring note in this rebirth of the European economic citizen as a *homo economicus*, whose life chances are to be pursued and determined within the totalizing rationality of law as an economic technology may be noted, not in the market itself, but rather in a sphere of political citizenship. Just as development of the *homo economicus* conditions individual behavior within the market, it similarly limits the sphere of opportunity for effective political expression in relation to and outside that market. Primary European law may promote the "confident" consumer, but ensconced within its own scientific outlook it cannot even recognize the political concerns of the "ethically-informed" consumer.[60] Equally, in limiting strikes, the EU legal order has similarly deprived the European *homo economicus* of a final means of politically asserting her collectively established values above market forces in the traditionally—disproportionate—manner.

D. An Economy of Exclusion

The emergence of a European *homo economicus* within CJEU jurisprudence allows us to relativize the critique made of the existing academic industry of European citizenship. Above all, the facts and impacts of *Viking* and *Laval* confirm the perceptions of an industrial class within Europe of skilled and unskilled workers, identified by Neil Fligstein,[61]

[59] *See* A. Supiot, *A Legal Perspective on the Economic Crisis of 2008*, 149 INT'L LAB. REV. 151 (2010).

[60] *See* Michelle Everson & Christian Joerges, *Consumer Citizenship in Postnational Constellations?*, *in* CITIZENSHIP AND CONSUMPTION (Kate Soper & Frank Trentmann eds., 2007).

[61] *See* FLIGSTEIN, *supra* note 16.

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that they are, in good measure, excluded from the benefits of European Union. Exclusion is not simply due to the fact that a western European industrial class is unwilling to make use of its European rights through movement. Instead, exclusion extends to the sphere of the political as protest in defense of local jobs against agency workers is easily dismissed, for example, in the case of UK protests against agency workers.

> For many, complaints about foreign workers coming here and taking their jobs are disturbingly reminiscent of the atmosphere whipped up in Britain's cities during the 1960s and 1970s, when the backlash against Commonwealth immigration was reflected both in the ballot box—in support for extreme right-wing parties—and, in many cases, in street violence.[62]

The tragedy inherent to traditional notions of industrial citizenship is undoubtedly one of structural exclusion and racism: the differentiated welfare capitalisms of the post-war era[63] just as surely as they ossified hierarchies of class within the nation state also consolidated existing stratifications of global, economic and social inequality. To the degree that nationalized welfarism erected its own regulatory barriers to trade and an original allocation of global resources, the class struggles of the socially-democratic nation state, universalist in aspiration, but still bounded in spatiality, were likewise to be felt outside a dominant west as an extension of colonial domination into a decolonizing and post-colonial era. Yet, in our modern European struggles of adaptation to allocative efficiency across a former iron curtain, tragedy nonetheless persists and does so, above all, in our depiction of a subjective and collectively-expressed act of protest against the persona of the *homo economicus*, solely and uniquely as an act of xenophobia. Foucault's hints and is concerned that the spread of bio-power, made at the dawn of our new economically-liberal era, would appear to have found their practical expression in the totalizing scientification of current public discourse. Perceptions do matter and do so to the degree that materializing rationalism can and does pre-empt human subjectivity. Perceptions can and do make us wholly blind to the manifestation of any form of political discourse or human expression founded in opposition to a dominant *homo economicus*.

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[62] *See* Kevin Maguire, *New and Comment on UK Politics,* Comment to *Fair Chance of a Job*, U.K. MIRROR (January 30, 2009, 2:01 PM), http://blogs.mirror.co.uk/maguire/2009/01/fair-chance-of-a-job.html ("For many, complaints about foreign workers coming here and taking their jobs are disturbingly reminiscent of the atmosphere whipped up in Britain's cities during the 1960s and 1970s, when the backlash against Commonwealth immigration was reflected bothin the ballot box — in support for extreme right-wing parties — and, in many cases, in street violence. As unemployment starts to edge up to levels last seen in the mid-1980s, the hunt is on for scapegoats.'").

[63] *See* GÖSTA ESPING-ANDERSEN, THE THREE WORLDS OF WELFARE CAPITALISM (1989).

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The material treatment of a functionally-founded European citizenship has brought positive gains, especially as regards the position of the indigent stranger in a position of real need. Yet, the obvious limits to the universality of the emotionally-founded *interpositio auctoritatis* and the lure of the putative universalisms of scientific and economic discourse may be argued to have established their own economy of exclusion. Conversely, this form of exclusion may not be limited to those who do make use of their rights of movement, typically an (western) industrial class. Instead, a citizenship founded in movement may also, to the degree that it promotes the character of the *homo economicus*, disenfranchise the "stars," or cosmopolitan and pro-active citizens of European integration identified by Favell,[64] on whom our hopes for future political union within Europe are based.

The ambivalence inherent within Adrian Favell's ground-breaking research on European citizenship, on how Europeans exercise their rights, has often been noted.[65] At the same time, perhaps too much emphasis has been placed upon Favell's conclusion that very few of the Eurostars of the continent, exercising their movement-based rights of European citizenship within the most cosmopolitan and Europe-friendly of European cities, establish any form of connection to the traditional structures of local political discourse. Favell is correct: the act of politics extends far beyond our presence in the voting booth, and just as the strike asserts a collective voice outside the parliamentary chamber, purchasing run-down houses to rejuvenate inner city areas, establishing and supporting new cultural ventures, or exercising purchasing power impacts just as surely on general cultural discourse and changes the societies in which we live. Yet, in the limits of Favell's methodologies, we also find a seed of concern: certainly very few of his Eurostars explicitly reveal themselves in interviews to be the "bandits" of neo-liberal critique of rights of free movement, concerned only for their own material betterment and with no regard for the societies in which they briefly settle. But what of the unrecognized unsaid in personal Eurostar narratives? To what degree are our "political" acts of exchange and transaction subjective acts of cultural liberation, undertaken on our own part, both as a means of escape from our own experience of cultural stagnation as well as with an informed eye to the "betterment" of society around us. To what degree are they simply our sole option, an expression of the only unthinkingly "efficient" impact which we can have in a denatured world of scientification?

[64] *See* Adrian Favell, EUROSTARS AND EUROCITIES: FREE MOVEMENT AND MOBILITY IN AN INTEGRATING EUROPE (2008).

[65] *See* Christian Joppke, *EU Citizenship and Identity: Sociological and Legal-Institutional Views*, *in* EU CITIZENSHIP AND THE MARKET (Richard Bellamy & Uta Staiger eds., 2011).

E. Beyond and Towards Citizenship

Deep concepts of national citizenship are exclusionary. Nevertheless, at least insofar as the quasi-constitutional jurisdiction of the CJEU reflects the materializing scientification of governing social relations throughout Europe, the material liberation of EU citizenship may also be argued to be accompanied by its own form of economic exclusion. The problem is complex, far more than a mere neo-liberal matter of the powerful dominance of one form of economic interest. Instead, the de-naturizing and de-politicizing potential of *homo economicus* has its own inspirational roots: the continuing quest for a universal form of justice to govern relations within a globalizing world that recognizes the negative exclusionary externalities[66] of the traditional nation state. The chimera of universalism promised by the efficiency postulates of our new economic liberalism has been partially revealed by the financial crisis. At the same time, however, the false lure of universalizing scientification remains powerful, especially where it coalesces with the liberating potential of markets experienced by a variety of once disregarded identities since the period of economic liberalization of the 1980s. It still presents itself to the law as a ready tool to prosecute the Enlightenment project of universalism beyond its conceptually-bounded limitations.

Nevertheless, the lure of universalism is also its curse. In a real world of response to material circumstance and want, the effort to move beyond the constraints of traditional notions of belonging might, in a final assessment, better be approached with a vital shift in emphasis away from the universal potential of citizenship, to a renewed concern with its institutional status as an impossible fulcrum, holding irreconcilable interests and values in fragile equilibrium. In addition to its redistributive characteristics, the often overlooked functionality of T.H. Marshall's sociologically-established conception of industrial citizenship resides in its reconciliation but equal perpetuation of historical and contemporary antagonisms between the market and those who reject its inequalities and in its provision of stable institutions within which perpetual agonism might unfold. The current obsession with pursuit of universal justice similarly detracts from the existence of confrontational citizenship couplets of individualism versus community or sovereignty versus subjection as well as, in the language of Ralf Dahrendorf, entitlement versus provision; wherein provisions capture the entrepreneurial impulse of a citizenship which encourages individual—economic but contingent—enterprise, and entitlements represent a collective counter-interest—existing in permanent tension with individualism—in the permanent guarantee of subjective rights.

Seen in this confrontational light, one in which the citizenship emphasis is shifted away from philosophical concerns with communitarian or contractual belonging, the primary

[66] *See* Joerges, *supra* note 55.

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issue at a European, but also at global, level, must be one of which are the institutions which both reconcile and perpetuate the impossible, but also creative, tensions of a world in movement. Real and never imagined tensions between traditional or class-based expressions of collective interest and the cosmopolitan and entrepreneurial impulses of the global citizen, between the wealth-creating provisions of a globalized market and demands, not only, in the terms deployed by Karl Polayni,[67] for the ”market-embedding” entitlements that mitigate revolutionary rejection of market inequalities, but also—and vitally so—for the space to create ”different” exchange relations, or emerging markets, outside of, and in collective defense—including environmental defense—against totalizing economic technologies and brute economic power; and finally, between an always extant human desire to rebel, escape, renew and destroy in an expression of (self-) sovereignty against an equally necessary human want for the security and stability found in—collective—subjugation.

Adrian Favell is right to call for evolution of sociological research agendas which reveal the material circumstances of a world in movement. Yet, a norming and normative response to globalization is also indispensable. In a prosaic world of law, this response must per force be cautious and tedious: first, reigning in the universalist aspirations of grandiose, rights-based legal methodologies, and second, working slowly, and in response to wider European and global cultural, political and economic discourses, creating the institutions of a perpetually agonistic citizenship within the globalized legal order. There is no space here to detail a new legal research agenda for a citizenship of “global agonism.” Nevertheless, an immediate observation is one that the institutions of European and global citizenship must be embedded across the entire material of the legal systems that make up European and global legal orders. That is, from competition law to labor law, state aids law, or the law of economic subvention (e.g. traditionalized trading regimes) to social security law, from nationality law to voting law and from consumer law to the law of environmental protection.

[67] *See* Joerges, *supra* note 55.

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