



## ARTICLES

# HOW CITIZENSHIP DIVIDES: THE NEW LEGAL CLASS OF TRANSNATIONAL EUROPEANS

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ABSTRACT: Union Citizenship is intended to bring Europeans together. This *Article* explores one of the ways in which it may divide them. It argues that Union Citizenship creates a new transnational class, and gives the members of that class a legal status with the following characteristics: they are legally *separate*, or differentiated, from other Europeans; they are *privileged*, and they are *threatening*, in the sense that their rights have the potential to disrupt or undermine institutions and laws in a way that is disadvantageous to non-members of that class, or at least likely to seem so. The members of that class share certain qualities: they are economically self-sufficient, they live lives in which their families or work or study are cross-border, and they are only partially allowed to share in the solidarity of static national majorities. On the other hand, their link with the EU is legally direct and important, and they often have more in common with each other than with locals: they form a European community. They could be described as economically successful, partially uprooted, truly European, cosmopolitan outsiders. It is almost as if EU law has set out to create a class whose role in Europe is an echo of that fulfilled by the Jews that the continent lost.

KEYWORDS: European Union citizenship – free movement – European integration – cosmopolitanism – inequality – individualism.

## I. INTRODUCTION

Union Citizenship is intended to bring Europeans together. It is often commented that the extent to which it can, and does, achieve this is limited, and that it can even have exclusionary and anti-egalitarian effects.<sup>1</sup> This *Article* develops that latter idea, examin-

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<sup>1</sup> E.g. M. EVERSON, *The Legacy of the Market Citizen*, in J. SHAW, G. MORE, *The New Legal Dynamics of European Union*, New York: Clarendon Press, 1995, p. 73 *et seq.*; F. SCHARPF, *The Asymmetry of European Integration, or Why the EU Cannot Be a "Social Market Economy"*, in *Socio-Economic Review*, 2010, p. 211 *et seq.*; A. SOMEK, *Solidarity Decomposed: Being and Time in European Citizenship*, in *European Law Review*, 2007, p. 787

ing the way in which Union Citizenship law actively divides Europeans into groups, and gives legal effect to the differences and conflicts between those groups. The suggestion made is that Union Citizenship delineates a distinct sub-set of Europeans, a transnational class, and gives the members of that class a legal status with the following characteristics: they are legally *separate*, or differentiated, from other Europeans; they are *privileged*, and they are *threatening*, in the sense that their rights have the potential to disrupt or undermine institutions and laws in a way that is disadvantageous to non-members of that class, or at least likely to seem so.

This is obviously problematic, even if there are also justifications that can be put forward. A conclusion considers some of the reactions which the legal picture described here might inspire, as well as attempting to contextualise it: in a time of nationalism, and in a European Union built as a response to tribal conflict, what reflections are inspired by a regime that treats Europe's cosmopolitans as a group apart, and defines that group partially in terms of its economic vigour, its externality to local moral and social norms, the foreignness of its families, and its limited and conditional right to access the solidarity of the mass?

The core argument, however, is about the working of law. The *Article* treats Union Citizenship as a legal construct, a bundle of rights with a label. For while it may have social, personal, ideational, and political consequences, the pathways to these all begin from the laws which bring that Citizenship into being and give it a certain form and scope.

More specifically, Union Citizenship is discussed here as a legal intervention in the rights, status, and relationships of people in Europe, and the aim is to characterize that intervention. What lines are drawn, which privileges are granted and to whom, and how are the positions of Europeans changed relative to each other? In other words, citizenship is treated as relational, and there is an attempt to map the legal relational changes and new relational networks which Union Citizenship brings about.

Conclusions from this about the social consequences of Union Citizenship must be cautious. Whether the legal shape of Union Citizenship corresponds to public perceptions or responses is a further, and very different, question. However, this *Article* tries to show the direction in which the law is pushing, revealing what one might call the implicit preferences of the law. It gives us a glimpse of the vision of Europe that is inherent in Union Citizenship, as it is currently built. The hope is that this will contribute to thinking about whether the legal vision of Union Citizenship matches the one that policy, politics

*et seq.*; D. KOCHENOV, *Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights*, in *Columbia Journal of European Law*, 2009, p. 169 *et seq.*; E. SPAVENTA, *Earned Citizenship: Understanding Union Citizenship Through its Scope*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism: The Role of Rights*, 2014, p. 204 *et seq.*; C. O'BRIEN, *I Trade, Therefore I Am: Legal Personhood in the European Union*, in *Common Market Law Review*, 2013, p. 1643 *et seq.*; M. RUHS, "Migrants", "Mobile Citizens", and the Borders of Exclusion in the European Union, in F. DE WITTE, R. BAUBÖCK, J. SHAW (eds), *Freedom of Movement Under Attack: Is it Worth Defending as the Core of EU Citizenship?*, in *EUI Working Papers*, 2016, p. 39 *et seq.*

or indeed European integration promote and desire. It will add to understanding of the kind of citizenship that we are creating, and should be trying to create.

Given the emphasis on Union Citizenship as a legal construct, discussion is structured around the major rights attached to it; the rights to reside in another Member State, to be treated equally there (rights to work, study and do business being specific instances of this), to be accompanied by one's family, and to have disagreements about these rights heard by the Court of Justice. For each of these, it will be shown how they keep mobile Citizens as a group apart. A preliminary section considers the personal scope of Union Citizenship, and how its apparent application to all Europeans conceals a more selective substance.

## II. THE SELECTIVE NATURE OF UNION CITIZENSHIP

Union Citizenship is granted to all citizens of the Member States.<sup>2</sup> This universality is important to the task that it is often hoped it will achieve – bringing Europeans together.<sup>3</sup> It is a shared, common, status, which perhaps will stimulate some degree of shared, common identity.<sup>4</sup>

However, the fact that a legal status is shared does not mean that it does not also create differences, and in the discussion below the emphasis will be on the way in which Citizenship law nevertheless allows some persons to assert rights that others cannot, and in this way creates new legal divisions.

Is this idea that a shared status also creates differences in rights paradoxical? Not really. All citizens of a state may be born with the same legal rights to become Members of Parliament, police officers, or wealthy. However, as a matter of fact only some will, and the members of those groups may enjoy specific rights, privileges or law-based advantages that non-members do not. Formal equality of opportunity translates inevitably, almost by definition, into substantive inequality of outcome.

Union Citizenship law has some elements shared by all EU citizens – the right to vote in European Parliament elections, write to the ombudsman, and, most importantly, to become a mobile Citizen,<sup>5</sup> or to put it more accurately, since physical movement is not always necessary to engage substantive Citizenship law, to live a transnational life within the EU.<sup>6</sup> If that life is lived, then other rights are activated and come into force, the ones to

<sup>2</sup> Art. 20 TFEU.

<sup>3</sup> A. MENÉNDEZ, E. OLSEN, *Challenging European Citizenship: Ideas and Realities in Contrast*, London: Palgrave Macmillan, 2020, pp. 86-89.

<sup>4</sup> *Ibid.*; J. HABERMAS, *Citizenship and National Identity*, in B. VAN STEENBERGEN (ed.), *The Condition of Citizenship*, London: SAGE Publications Ltd, 1996, ch. 3; S. O'LEARY, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship*, The Hague: Kluwer, 1996.

<sup>5</sup> Arts 20 and 24 TFEU.

<sup>6</sup> E.g. Court of Justice: judgment of 2 October 2003, case C-148/02, *Garcia Avello*; Court of Justice, judgment of 8 March 2011, case C-34/09, *Ruiz Zambrano*; D. KOCHENOV (ed.), *A Real European Citizenship: A*

be discussed here. Thus Citizenship can be understood as containing two levels: the right to join a club, and the rights that are accorded to those who do actually join.

The right to join is however a very abstract concept for many, and most Europeans have no intention, ambition or capacity to become members: their lives are national, and they see them remaining this way.<sup>7</sup> The most powerful Citizenship rights are, for these people, marginal features of their life. Just like a Supreme Court ruling granting the right to go topless on the beach or give children home-schooling might be important to a few, upsetting to a few others, and utterly unimportant to most, the Citizenship rights which form the substance of the enormous legal and political science scholarship, and which are at the heart of Court of Justice judgments and Commission policy considerations, are really just important for a relatively small percentage of people: those who are in, or want to be in, the club.<sup>8</sup>

This is unusual. National citizenship is, for most national citizens, the legal basis of much of their life: it is the source of the right to live where they do, and to work, be treated at least equally to those around them, and to enjoy everyday economic and social rights as well as political rights – and even if they are not candidates for office they may well take their voting seriously. If they lost that status, they would suddenly find their lives turned upside down. By contrast, Union Citizenship is the legal basis of almost nothing in the lives of most Europeans.<sup>9</sup> Only when they join the transnational club does it become real, and then it takes on a role equivalent to national citizenship: in a host state it is the basis of their everyday rights of participation. If we were then to use the idea of citizenship in similar ways in the national and European context we might then say that all nationals of the Member States are potential Union Citizens, but only members of the transnational club are actual ones. Union Citizens are those whose lives cross borders.

At once a picture emerges of how Union Citizenship creates a new legal class of Europeans. However, for those who object to the twisting of terminology, it is not necessary to the argument. Let us concede that the status of Union Citizen is universal and make the point above in a more conservative way. Union Citizenship contains two levels of rights. Some are exercisable by all nationals of Member States. However, the most important and impactful Citizenship rights are only exercisable by a transnational sub-

*New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe*, in *Columbia Journal of European Law*, 2011, p. 55 *et seq.*

<sup>7</sup> R. BAUBÖCK, *The New Cleavage Between Mobile and Immobile Europeans*, in F. DE WITTE, R. BAUBÖCK, J. SHAW (eds), *Freedom of Movement Under Attack*, cit., p. 19 *et seq.*

<sup>8</sup> M. GRANGER, *Revisiting the Foundations of European Union Citizenship: Making it Relevant to All European Union Citizens*, *EUcitizen Policy Brief*, 2016, available at [www.publications.ceu.edu](http://www.publications.ceu.edu).

<sup>9</sup> F. STRUMIA, *Individual Rights, Interstate Equality, State Autonomy: European Horizontal Citizenship and Its (Lonely) Playground from a Trans-Atlantic Perspective*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: Cambridge University Press, 2017, p. 634 *et seq.*

set of these nationals.<sup>10</sup> Looking at the substance of these latter rights shows *i)* who has the right to exercise them, and *ii)* how the legal position of this selected group compares with and interacts with the rights of those around them.

### III. THE RIGHT TO LIVE IN ANOTHER MEMBER STATE

The most fundamental right granted to Union Citizens is to move and reside throughout the EU.<sup>11</sup> The movement right as such is less controversial and less litigated, and less radical: it is not unusual that citizens of wealthy countries can enter other wealthy countries and stay there for short periods with minimal formalities. However, the right to stay for longer, to live, in a host state of one's choice, is a significant innovation and a right that has transformed the lives of many Europeans. Particularly for citizens of poorer or smaller Member States, but also for any citizen with interests or connections beyond their own nation, it expands the borders of their world enormously.

As the scholarship tells us, this right is subject to conditions.<sup>12</sup> They will not be rehearsed here in detail, but broadly speaking the right to live abroad is subject to the requirement that a Citizen either be economically active to a non-marginal extent, or be self-sufficient in resources.<sup>13</sup> These are intended to be, and to a great extent are, co-extensive: they capture the person who either through their work, or their resources, is capable of a materially autonomous life and does not need the assistance of the state.<sup>14</sup>

The scholarly emphasis when considering these conditions has been on the excluded: the poor and the sick and those who are unable to get an adequate job or start a business.<sup>15</sup> These weaker members of society do not enjoy residence rights in another state, and those who through bad luck or other causes fall out of the category of self-sufficient and into the weaker group risk losing those rights.

<sup>10</sup> A. MENÉNDEZ, E. OLSEN, *Challenging European Citizenship*, cit., p. 111 *et seq.*; F. DE WITTE, *Kick Off Contribution*, in F. DE WITTE, R. BAUBÖCK, J. SHAW (eds), *Freedom of Movement Under Attack*, cit., p. 1 *et seq.*

<sup>11</sup> Art. 21 TFEU; Art. 7 of the Directive 2004/58/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

<sup>12</sup> N. SHUIBHNE, *Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship*, in *Common Market Law Review*, 2015, p. 889 *et seq.*; S. SANKARI, S. FRERICHs, *From Resource to Burden: Rescaling Solidarity with Strangers in the Single Market*, in *European Law Journal*, 2017, p. 806 *et seq.*; G. DAVIES, *Migrant Union Citizens and Social Assistance: Trying to Be Reasonable About Self-Sufficiency*, in *College of Europe Research Papers in Law*, No. 2, 2016, available at [www.coleurope.eu](http://www.coleurope.eu).

<sup>13</sup> Art. 7 of Directive 2004/58, cit.

<sup>14</sup> Court of Justice: judgment of 3 June 1986, case C-139/85, *Kempf v. Staatssecretaris van Justitie*; judgment of 21 February 2013, case C-46/12, *N.*; G. DAVIES, *Migrant Union Citizens and Social Assistance*, cit.; C. O'BRIEN, *I Trade, Therefore I Am*, cit., p. 1643 *et seq.*; C. O'BRIEN, *Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights*, in *Common Market Law Review*, 2016, p. 937 *et seq.*

<sup>15</sup> N. SHUIBHNE, *Limits Rising, Duties Ascending*, cit., p. 889 *et seq.*; A. ILIOPOULOU-PENOT, *Deconstructing the Former Edifice of Union Citizenship? The Alimanovic Judgment*, in *Common Market Law Review*, 2016, p. 1007 *et seq.*; E. SPAVENTA, *Earned Citizenship*, cit., p. 204 *et seq.*; C. O'BRIEN, *Civis Capitalist Sum*, cit., p. 937 *et seq.*

The policy of this is easy enough to understand: Member States only wish to admit those who are not a burden, and who are net contributors. However, it has made the very idea of Union Citizenship vulnerable to critique – that it is not a real citizenship at all, because at the heart of citizenship is an idea of universality, which is not present.<sup>16</sup> It is a market citizenship, where rights are linked to socio-economic status, and are only for market actors: for those who can flourish on their own in the market.<sup>17</sup>

Yet while it is quite right to pay attention to the victims of this rule, to the excluded, it is also worthwhile to consider what the distinction means for the *included*. What are the consequences for those who *do* enjoy free movement rights of the fact that others do *not*? What message is sent to these lucky ones by the fact that they are among the selected? What self-image are they invited to embrace? What is the character of the group that comes into being once the boundaries have been drawn?

Perhaps most obviously, the (lawfully) mobile are the strong, a social elite.<sup>18</sup> They are, by definition, the successful, the entrepreneurial, the self-makers. This is what the law demands of them – a corollary thus, of who the group excludes – but it is also the character of the voluntary migrant: those who move are, the scholarship tells us, more likely to be individualist, to have a frontier mentality, and to be young and well-educated.<sup>19</sup> To call them an elite invites criticism from those who point to the many Eastern European workers doing poorly paid jobs in the West, and the situations of employment exploitation that are disproportionately filled by foreigners.<sup>20</sup> Yet if we do not compare the factory worker or farm labourer's life with that of the doctor, but instead with what it would have been if they had not moved to another Member State, then their choice to move may be more understandable, and it becomes apparent that in most cases they took a brave step towards improving their life. In that step lies their privilege: they had the courage, the character, and the personal resources to do so, whereas others in their position in their home state may not have. Free movers are primarily those who judge that they can improve their lives by their own actions, and who are able to actually do this. They feel – and are – capable of surviving and flourishing in a new state. Whether this capacity is because of their youth and qualifications, their energy and optimism, their courage, or their vulgar wealth, they are, in a humanly

<sup>16</sup> D. KOCHENOV, *On Tiles and Pillars: EU Citizenship as a Federal Dominator*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 3 *et seq.*; C. O'BRIEN, *Civis Capitalist Sum*, cit., p. 937 *et seq.*

<sup>17</sup> M. EVERSON, *The Legacy of the Market Citizen*, cit., p. 73 *et seq.*; N. SHUIBHNE, *The Resilience of EU Market Citizenship*, in *Common Market Law Review*, 2010, p. 1597 *et seq.*; A. SOMEK, *On Cosmopolitan Self-Determination*, in *Global Constitutionalism*, 2012, p. 405 *et seq.*

<sup>18</sup> P. NEUVONEN, *Free Movement as a Means of Subject-Formation: Defending a More Relational Approach to EU Citizenship*, in F. DE WITTE, R. BAUBÖCK, J. SHAW (eds), *Freedom of Movement Under Attack*, cit., p. 13 *et seq.*

<sup>19</sup> G. DAVIES, *European Union Citizenship and the Sorting of Europe*, in *Journal of European Integration*, 2020, forthcoming, preview available at [www.doi.org](http://www.doi.org).

<sup>20</sup> C. O'BRIEN, *Civis Capitalist Sum*, cit., p. 937 *et seq.*

important sense, a privileged group.<sup>21</sup> Union Citizenship sets them free, liberates them from the constraints of their home state.<sup>22</sup>

Yet in using their freedom they become outsiders in new ways: they have only a limited claim on the solidarity of the native mass in their host state.<sup>23</sup> The implicit contract in their residence is: “As long as you look after yourself, you are also contributing to us, and will be accepted. But if you fail to look after yourself, you should go”. The relationship to the host community is not really one of membership, but more in the nature of a transaction.<sup>24</sup> Two messages are sent to the mobile citizen. One is that their self-interest is also an act of contribution – the better they serve themselves, the better they serve their host. The other is that there is no need for them to feel commitment beyond their legal obligations – because there is none in the other direction. If better opportunities come up elsewhere, they should feel free to go. Indeed, they have almost a moral imperative to go: for following the logic of citizenship, they can contribute more there. The lawful mobile citizen is defined as one who gives by taking.<sup>25</sup>

This is an interestingly toxic mix of self-interest and moral superiority,<sup>26</sup> comparable in some ways to the obligation to make as much profit as possible which is experienced by firms. Just as the director may respond to social critique by saying “but we have an obligation to serve the economic interests of the firm, and the shareholders”, the Union Citizen must look after themselves first. Since their relationship with their host state is conditional on the possibility of personal success, it follows easily that they must, above all, follow the path of that success. The mobile citizen is, in essence, an itinerant entrepreneur.<sup>27</sup>

<sup>21</sup> P. NEUVONEN, *Free Movement as a Means of Subject-Formation*, cit., p. 13 et seq.

<sup>22</sup> F. DE WITTE, *Emancipation Through Law?*, in L. AZOULAI, S. BARBOU DES PLACES, E. PATAUT (eds), *Constructing the Person in EU Law*, Oxford, Portland: Hart, 2016, p. 15 et seq.

<sup>23</sup> Art. 7 of Directive 2004/58, cit.; Court of Justice, judgment of 20 September 2001, case C-184/99, *Grzelczyk*; F. STRUMIA, *From Alternative Triggers to Shifting Links: Social Integration and Protection of Supranational Citizenship in the Context of Brexit and Beyond*, in *European Papers*, Vol. 3, 2018, No 2, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 733 et seq.

<sup>24</sup> D. KRAMER, *Earning Social Citizenship in the European Union: Free Movement and Access to Social Assistance Benefits Reconstructed*, in *Cambridge Yearbook of European Legal Studies*, 2016, pp. 11-12; J. HANDLER, *Social Citizenship and Workfare in the United States and Western Europe: The Paradox of Inclusion*, Cambridge: Cambridge University Press, 2004.

<sup>25</sup> D. KRAMER, *From Worker to Self-Entrepreneur: The Transformation of Homo Economicus and the Freedom of Movement in the European Union*, in *European Law Journal*, 2017, p. 172 et seq.

<sup>26</sup> J. WEILER, *Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy*, in *International Journal of Constitutional Law*, 2014, p. 94 et seq.; A. SOMEK, *Alienation, Despair and Social Freedom*, in L. AZOULAI, S. BARBOU DES PLACES, E. PATAUT (eds), *Constructing the Person in EU Law*, cit., p. 35 et seq.

<sup>27</sup> A. SOMEK, *On Cosmopolitan Self-Determination*, cit., p. 405 et seq.; D. KRAMER, *From Worker to Self-Entrepreneur*, cit., p. 172 et seq.

#### IV. THE RIGHT TO EQUAL TREATMENT

The core right for a mobile citizen settled in a host state is the right to be treated equally to nationals of that state.<sup>28</sup> Conceptually, this encompasses the rights to work, study and start a business, even though the Treaty frames those as autonomous rights. It also encompasses all the other social, personal and economic interactions with the state: it is well-established that there are no fields of national law outside the reach of the non-discrimination principle.<sup>29</sup>

At first glance this would seem to be an integration principle par excellence: it would seem to allow the foreigner to legally merge with the locals, and facilitate their doing so socially.<sup>30</sup> Non-discrimination is typically understood precisely as the abolition of distinctions.

Yet equality can be understood in different ways, and the Court of Justice has given it a substantive meaning. It can at times be called in aid to ensure formal identity of treatment, to enforce uniformity, but the most influential and important case law has concerned indirect discrimination, where equally applicable rules cause disadvantage for the foreigner, and these foreigners have been able to rely on the Aristotelian principle that discrimination is also found where “different situations are treated similarly”. Substantive equality provides a legal basis for the argument that “I should be exempted from this rule, because it causes me particular inconvenience, because of some characteristic that I have connected to the fact that I come from abroad”. This is almost the opposite of integration: it is a right to participation without assimilation, to be an outsider within.<sup>31</sup>

There are striking examples of this, but before moving to those it should be noted that this person-centred approach is typical of EU law more generally.<sup>32</sup> The Court places a low value on the social and administrative merits of having a clear rule which applies to all persons in the same way – Republican uniformity, we might call it – and in many contexts insists on the importance of examining the particular facts, seeing whether the application of the rule is proportionate and justifiable in that particular sit-

<sup>28</sup> Art. 18 TFEU.

<sup>29</sup> A. TOTH, *The Principle of Subsidiarity in the Maastricht Treaty*, in *Common Market Law Review*, 1992, p. 1079 *et seq.*; Garcia Avello, *cit.*

<sup>30</sup> L. AZOULAI, *The European Individual as Part of Collective Entities*, in L. AZOULAI, S. BARBOU DES PLACES, E. PATAUT (eds), *Constructing the Person in EU Law*, *cit.*, p. 203 *et seq.*; S. COUTTS, *The Absence of Integration and the Responsibilisation of Union Citizenship*, in *European Papers*, Vol. 3, 2018, No 2, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 761 *et seq.*

<sup>31</sup> D. ACOSTA, J. MARTIRE, *Trapped in the Lobby: Europe’s Revolving Doors and the Other as Xenos*, in *European Law Review*, 2014, p. 362 *et seq.*

<sup>32</sup> D. KOCHENOV, *EU Citizenship: Some Systemic Constitutional Implications*, in *European Papers*, Vol. 3, 2018, No 3, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 1061 *et seq.*; G. DAVIES, *Bureaucracy and Free Movement*, in *Nederlands Tijdschrift voor Europees Recht*, 2003, p. 81 *et seq.*



uation.<sup>33</sup> Thus despite the general rule that a non-economic migrant cannot access social assistance, the Court has said that a blanket-ban may be disproportionate, and it is necessary to look at all the individual circumstances of the person concerned, to see whether in fact a degree of public assistance to an individual may be justified.<sup>34</sup> In an individual case this gives an impression of greater justice than an inflexible rule, but it also reverses the burden of adaption that is normally present in law: instead of individuals being eligible if they meet the relevant criteria, criteria are assessed to see if it is reasonable to apply them to the mobile citizen in the case. This casuistic approach is applied to benefit rules more generally and makes them inherently conditional and subject to doubt in as much as they are applied to cross-border situations.<sup>35</sup>

Within the right to equal treatment, the substantive approach amounts to a right to be seen as one is – a right to recognition as different.<sup>36</sup> It puts the presumptive burden of adaption on the state, in a striking difference with the relationship of the non-mobile to national rules: the non-mobile must simply comply. It is in the nature of rules that they are blunt instruments of policy, and in many situations will work sub-optimally, yet the efficiency and transparency of having a universal rule typically outweighs the inefficiencies inherent in applying a one-size-fits-all approach to the diversity of human contexts. In general, the citizen cannot say “but I am special: this rule causes me unreasonable inconvenience”. The mobile citizen, however, can. Their difference is more special than others.<sup>37</sup>

The most common, and perhaps least controversial, example of substantive equality is in the field of qualifications, where mutual recognition ensures that foreign qualifications are treated as equivalent to domestic ones, irrespective of the differences that of course exist.<sup>38</sup> This approach is not absolute, and major differences are taken account of, but minor differences are glossed over in the interests of practicality. Inevitably, knowledge and skills required to obtain a qualification are not identical across the Member States, and a student who could not quite manage to get her degree in State A, or even to get admitted to the course, might have been able to in State B. Yet if she is

<sup>33</sup> C. O'BRIEN, *Real Links, Abstract Rights and False Alarms: The Relationship Between the ECJ's "Real Link" Case Law and National Security*, in *European Law Review*, 2008, p. 643 *et seq.*

<sup>34</sup> Court of Justice, judgment of 19 September 2013, case C-140/12, *Brey*; D. KOCHENOV, *The Citizenship of Personal Circumstances in Europe*, in D. THYM (ed.), *Questioning EU Citizenship*, Oxford: Hart, 2018, p. 37 *et seq.*

<sup>35</sup> Court of Justice: judgment of 11 July 2002, case C-224/98, *D'Hoop*; judgment of 26 February 2015, case C-359/13, *Martens*; judgment of 20 June 2013, case C-20/12, *Giersch and Others*; judgment of 13 December 2012, case C-379/11, *Caves Krier Frères*; C. O'BRIEN, *Real Links, Abstract Rights and False Alarms*, *cit.*, p. 643 *et seq.*

<sup>36</sup> C. TAYLOR, *The Politics of Recognition*, in A. GUTMANN (ed.), *Multiculturalism and the Politics of Recognition*, Princeton: Princeton University Press, 1992, p. 25 *et seq.*

<sup>37</sup> D. KOCHENOV, *On Tiles and Pillars*, *cit.*, p. 3 *et seq.*

<sup>38</sup> C. BARNARD, *The Substantive Law of the EU*, Oxford: Oxford Press University, 2016, pp. 276-284.

studying in A that will be her bad luck, and she can choose a different career, whereas the equally able student from B will have their degree recognized as equivalent. It is a minor injustice, necessary in the cause of making movement possible, but it shows the rough edges of the principle of mutual recognition.

It was in the context of qualifications however that the Court developed the idea of the U-turn: that when a citizen returns to their home state after exercising rights abroad they should be treated not as a national once again, but as a migrant.<sup>39</sup> Their legal status is not akin to those of their countrymen who stayed but to “other” foreigners in their home state. Thus the Dutchman who returns to the Netherlands can rely on mutual recognition to have his Belgian qualifications recognized. This seems, and is, quite reasonable but it has since been extrapolated to a general free movement principle with far-reaching consequences.<sup>40</sup> Thus the migrant who returns is treated by EU law not as a national in their home state, but in almost all respects – most importantly regarding family rights, below – in the same way as a foreigner, enjoying all of the rights of a mobile citizen. For they are, of course, mobile: they have proved it.

The striking aspect of this is that it redefines the group who enjoy Union Citizenship rights. That group is no longer defined by their (relative) nationality or their foreignness, but by their mobility, or, by the fact of their cross-border lives.<sup>41</sup> To enter the club, it does not matter where you are, or where you come from, but only whether your life straddles borders – whether you are a functional cosmopolitan. It is no longer sufficient to understand Union Citizenship rights in terms of integrating or protecting foreigners in host states. That is just a part of their effect. Their effect globally is more accurately described as protecting the mobile from the norms and preferences of the immobile.<sup>42</sup> They provide an opt-out from certain aspects of national norms where these norms fail to take account of the particular needs or characteristics of mobile persons.<sup>43</sup>

A more sensitive example of substantive equality occurs in naming law. For various reasons many Member States have rules on surnames, both for children and couples. These are often legacy laws, reflecting past traditions rather than current strong public feeling, but there is also generally little public appetite for change. They entrench cus-

<sup>39</sup> Court of Justice, judgment of 7 February 1979, case C-115/78, *Knoors v. Staatssecretaris van Economische Zaken*.

<sup>40</sup> Court of Justice: judgment of 7 July 1992, case C-370/90, *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for the Home Department*; judgment of 12 March 2014, case C-456/12, *O.*; judgment of 14 October 2008, case C-353/06, *Grunkin and Paul*; judgment of 5 June 2018, case C-673/16, *Coman and Others*.

<sup>41</sup> On the idea of decoupling Union Citizenship from nationality see: D. KOCHENOV, *Ius Tractum of Many Faces*, cit., p. 169 *et seq.*; F. STRUMIA, *From Alternative Triggers to Shifting Links*, cit., p. 733 *et seq.*

<sup>42</sup> F. DE WITTE, *Emancipation Through Law?*, cit., p. 15 *et seq.*

<sup>43</sup> L. MADURO, *We the Court: The European Court of Justice and the European Economic Constitution*, Oxford, Portland: Hart, 1998; K. LENAERTS, J. GUTIÉRREZ-FONS, *Epilogue on EU Citizenship: Hopes and Fears*, in D. KOCHENOV, *EU Citizenship and Federalism*, cit., p. 751 *et seq.*

toms that are so widely accepted as to be uncontroversial – except for a few people for whom they cause inconvenience, amongst whom are the mobile, who navigate between the norms of different states. Thus the Court finds consistently that where Citizens adopt names in one state, and then move to another that does not allow such names, that latter state must not apply its rules to them.<sup>44</sup> It can, of course, continue to apply those rules to the immobile. Naming traditions are legitimate, but the mobile citizen – foreign or not – cannot be expected to be part of them.

The naming case law is striking, but for impact it pales beside the case law on recognition of marriages. The Court never tires of emphasizing that it is for Member States to decide whether they wish to marry same sex couples or not.<sup>45</sup> However, in *Coman* it found that this freedom of moral choice does not extend to their approach to foreign same sex marriages: these must be recognized.<sup>46</sup> The gay couple with a valid Dutch marriage must be recognized as married, and enjoy the associated residence rights, even in Member States that have no gay marriage.

This is a matter of considerable political salience, where feelings run high. The policy logic of the decision is easy enough – otherwise it would be difficult for some couples to move to some states – but that does not diminish the divisive social consequences: there are now two legal marriage regimes, one for the immobile and one for the mobile. Any person who does not accept the norms of their home state has merely to become a cosmopolitan – live abroad – and they acquire a new legal status, with different and more far-reaching rights. The traditions, values and customs which Member States like to argue are the basis of rules such as these, are the traditions, values and customs of the immobile. The mobile belong to a more individualistic, liberal, and pan-European norm-world. They can essentially take rights that they have exercised in one Member State to other Member States, creating a personal value-bubble that is insulated from the details and variation of local laws.

## V. THE FAMILY RIGHTS OF MOBILE CITIZENS

For many mobile citizens the most significant right granted by EU law is that to be accompanied by their family. The reason why this has become so important, and so litigated, is because it extends not just to family members who are not themselves EU citizens, but even to those who are not yet in the EU.<sup>47</sup> Thus by moving to another Member State, a Union Citizen gains the right to bring in their spouse and children, and sometimes other

<sup>44</sup> *Garcia Avello*, cit.; *Grunkin and Paul*, cit.; Court of Justice: judgment of 12 May 2011, case C-391-09, *Runevič-Vardyn and Wardyn*; judgment of 2 June 2016, case C-438/14, *Bogendorff von Wolffersdorff*.

<sup>45</sup> Court of Justice, judgment of 1 April 2008, case C-267/06, *Maruko*; *Coman and Others*, cit.

<sup>46</sup> *Coman and Others*, cit.

<sup>47</sup> Art. 7 of Directive 2004/58, cit.; Court of Justice, judgment of 25 July 2008, case C-127/08, *Metock and Others*.

family members, from outside the EU.<sup>48</sup> In a time when immigration law is often strict, and even spouses are not easily imported to many Member States, and language and income requirements are increasingly common, this ability to simply avoid national immigration law is potentially life-changing and much valued by those who use it.

Exile is perhaps a high price to pay for love, however, and so it is particularly significant that this right, as others, can be brought home: the returning migrant is, as discussed above, assimilated to foreigners.<sup>49</sup> They have joined the transnational club, and are not thrown out of it because they are back in their home state. As with marriage, the regime for immigration in any given Member State now divides into two: there is a typically strict one, for the immobile, and a much more generous one for the self-sufficiently mobile. These market entrepreneurs exist entirely outside national immigration rules, even to the extent of procedure: not only do their family members enjoy an almost unconditional right to be with them, but the associated formalities are limited, and not constitutive of their right, often in contrast with the sacred paperwork that is a common part of national immigration law.<sup>50</sup>

There are practical reasons for this generous approach: a more restrictive one could be hard to police. However, it goes beyond merely establishing the migrant as an equal in their host state, and emphasizes their separateness. It also seems to go beyond merely removing obstacles to movement, and to actively stimulate it.<sup>51</sup> The right to bring in family from outside the EU seems like a reward for exercising free movement rights, suggesting the idea that in moving the Citizen is benefitting Europe, and so deserves every facility to ease that movement. There is something almost diplomat-like in the legal construction which ensures that wherever these people go they must not have to engage with the details or restrictions of local immigration law. One element of this is the privilege, and the other is the recognition of the mobile citizen as an outsider, not assimilated to locals but isolated within them in their special status.

The U-turn as a technique to avoid national immigration law has now become a staple of every immigration lawyer, and is widely known. Yet it has not reached the massive scale that one might expect. Numbers using it are limited, and most citizens prefer to work slowly and painfully through the national legal requirements if they wish to bring family in from outside the EU. This, if anything, shows how separate the mobile are: for some, the idea of moving across the border in order to facilitate rights is a no-brainer, an easy step. For most, it is huge and intimidating. How people feel about lead-

<sup>48</sup> *Metock and Others*, cit.

<sup>49</sup> *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for the Home Department*, cit.; *O.*, cit.; *Grunkin and Paul*, cit.; *Coman and Others*, cit.

<sup>50</sup> Court of Justice, judgment of 25 July 2002, case C-459/99, *MRAX*; judgment of 8 April 1976, case C-48-75, *Royer*.

<sup>51</sup> C. COSTELLO, *Metock: Free Movement and "Normal Family Life" in the Union*, in *Common Market Law Review*, 2009, p. 587 *et seq.*

ing a cross-border life is a significant dividing factor between Europeans, and most do not want to, or cannot, do it.<sup>52</sup> The class that Union Citizenship constructs legally appears to correspond to real social differences – the world of mobility is not suited to everyone, although for those used to it, it is hard to imagine or remember what a nationally bounded life entails.

## VI. ADJUDICATION RIGHTS

The preliminary reference procedure is usually described in terms of its importance for the uniformity and coherence of the EU legal system as a whole.<sup>53</sup> However, it is also a guarantor of individual rights.<sup>54</sup> In the context of citizenship, it ensures that the mobile citizen whose rights are infringed by a Member States does not have to rely purely on the national judiciary to vindicate their rights. The obligation on final courts to refer ensures that, by appealing, any Union Citizen who feels that they are not getting the right answer in the national courts can obtain a reference, and hear the views of the Court of Justice on their case.<sup>55</sup>

Formally, as we know, the Court merely rules on the interpretation of EU law, leaving its application to the national court.<sup>56</sup> However, in practice it often indicates whether a given national measure or rule should be seen as compatible with EU law, or at least provides a framework for that consideration which is often determinative of the outcome and usually influential.<sup>57</sup> The Court has been a consistent friend of self-sufficient migrants, repeatedly expanding and guaranteeing their rights against Member States pushing for restrictive interpretations.<sup>58</sup>

National courts are not always migrant-hostile, nor hostile to EU law. However, the quality and character of their use of EU law varies greatly, and few would doubt that a mobile citizen generally has a better chance of a favourable outcome with a reference than without one. One reason is that the rights that a mobile citizen exercises are important to integration. Free movement is where individual goals and the goals of EU law

<sup>52</sup> R. BAUBÖCK, *The New Cleavage Between Mobile and Immobile Europeans*, cit., p. 19 et seq.; A. AZMANOVA, *After the Left-Right (Dis)continuum: Globalization and the Remaking of Europe's Ideological Geography*, in *International Political Sociology*, 2011, p. 384 et seq.

<sup>53</sup> K. LENAERTS, I. MASELIS, K. GUTMAN, *EU Procedural Law*, Oxford: Oxford University Press, 2014, p. 48 et seq.

<sup>54</sup> *Mouvement contre le racisme, l'antisémitisme et la xénophobie MRAX*, cit.; *Royer*, cit.; C. COSTELLO, *Metock: Free Movement*, cit., p. 587 et seq.

<sup>55</sup> Art. 267, para. 3, TFEU.

<sup>56</sup> T. TRIDIMAS, *Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction*, in *International Journal of Constitutional Law*, 2011, p. 737 et seq.; J. WEILER, *Van Gend en Loos*, cit., p. 94 et seq.

<sup>57</sup> J. WEILER, *Van Gend en Loos*, cit., p. 94 et seq.

<sup>58</sup> G. DAVIES, *Has the Court Changed, or Have the Cases? The Deservingness of Litigants as an Element in Court of Justice Citizenship Adjudication*, in *Journal of European Public Policy*, 2018, p. 1442 et seq.

come together.<sup>59</sup> Thus in serving their own desires and self-interests, the mobile citizen is also acting as an agent of integration. Restrictive national measures are not just an inconvenience for the claimant but also an obstacle to the achievement of EU policy.

The Court is thus structurally predisposed to a mobility-friendly reading of EU law.<sup>60</sup> It is then a considerable advantage to the mobile citizen that they have access to this sympathetic court, and in some ways a remarkable advantage: that they can go to a tribunal whose function is not to approach the state-citizen dispute from some hands-off, neutral, perspective, but to ensure that free movement is protected.

This could be seen as just redressing a disadvantage: national laws and institutions, and to some extent national judges, are inevitably permeated by national values and traditions. The choices and perspectives that construct the national society have also constructed them. The same, on the other hand, can be said *mutatis mutandis* about the Court of Justice and free movement in Europe – the values that construct the transnational also permeate that Court and its legal system. Thus just as a typical immobile national citizen has access to an adjudicator embedded in his life-world, so too has a mobile citizen access to one embedded in hers. To each their court.

## VII. SEPARATE, PRIVILEGED, THREATENING

As has been shown above, in all the important aspects of the law concerning mobile Citizens, EU law does not simply assimilate them to the locals around them, but instead gives them a distinct legal status. It allows their difference to be asserted and protected, and enables them to challenge local laws which fail to take account of that difference and which cause them unnecessary inconvenience. The mobile citizen is, in this way, not just legally distinct, but also privileged. Their family, procedural and equality rights are superior to those of the immobile, and the burden of adaption is reversed. Unlike the ordinary citizen who must accept his anonymity in the face of a rule, the mobile citizen has the right to recognition of his individual characteristics. This is not just a practical legal advantage. In giving greater recognition to their personhood and particularity it also amounts to the treatment of mobile Citizens as persons of higher status.

All they have to do for this is move, and give up their right to call on the local community for financial assistance. This emphasizes their outsider status – that their relationship with the national community has changed, with the obligations on both sides

<sup>59</sup> D. KOSTAKOPOULOU, *European Union Citizenship: Writing the Future*, in *European Law Journal*, 2007, p. 623 *et seq.*; J. WEILER, *Van Gend en Loos*, cit., p. 94 *et seq.*; G. DAVIES, *Nationality Discrimination in the European Internal Market*, The Hague: Kluwer Law International, 2003, p. 187 *et seq.*: “It could be said that the citizen has been co-opted by the Community as a tool to restructure the European state, via his exercise of free movement and non-discrimination. From a Community perspective, the Citizen’s primary obligation may then be to use and assert these rights”.

<sup>60</sup> G. DAVIES, *Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time*, in *Common Market Law Review*, 2006, p. 63 *et seq.*

reduced. It is a trade-off that is worth it for those whose lives and interests cross borders, and who are strong. EU law has created a portable, personally adapted, protective and privileged legal status for the cosmopolitan social elite.

The threat which this creates for the immobile is multifaceted. At its most concrete and vulgar, mobility of persons puts pressure on public institutions and the welfare state to change and reform. Union Citizenship is a part of the mobility regime, overlapping with free movement of workers and services. All of these aspects of mobility potentially destabilize public institutions by requiring them to adapt to the needs of the cross-border client, who often wishes to opt-out of a universal national system and participate in a foreign one.<sup>61</sup> The law here is nuanced, and the effects of this adaption on the quality of services or the financing of institutions may be minimal or positive: it is not the case that in allowing individuals to seek healthcare or education abroad, or to transfer their pensions or social security, the law constructs a directly extractive regime. Rather it simply exposes rigidities and over-regulation and compels flexibility and openness.

However, this apparently harmless or even beneficial effect may not seem so benign to all, for the adaption that is encouraged is often in the direction of more market-based provision, fragmentation of state monopolies, and a more individualistic and diverse conception of the provision of essential public services – for these are the adaptations that make mobility easier to encompass.<sup>62</sup> However welcome those changes may be for some, for those most dependent on solidarity and collective provision they create an atmosphere of insecurity; freedom of choice always has its losers.<sup>63</sup>

As Somek has commented, the law on how mobility and welfare interact invariably puts the welfare state in the defensive position, requiring institutions to make arguments of threat and impending disaster, and to think up justifications for excluding individual requests.<sup>64</sup> The law here is a series of stories in which the mobile Citizen is in the sympathetic role, and the institutions are the bad guys, having to plead poverty and fragility. In doing so they construct an image of themselves as on the edge of collapse,

<sup>61</sup> F. DE WITTE, *Justice in the EU: The Emergence of Transnational Solidarity*, Oxford: Oxford University Press, 2015; S. GREER, S. RAUSCHER, *Destabilization Rights and Restabilization Politics: Policy and Political Reactions to European Union Healthcare Services Law*, in *Journal of European Public Policy*, 2011, p. 220 et seq.; A. SOMEK, *Solidarity Decomposed*, cit., p. 787 et seq.; G. DAVIES, *The Process and Side-Effects of Harmonisation of European Welfare States*, in *Jean Monnet Working Paper*, No. 02, 2006, p. 1 et seq.

<sup>62</sup> M. DANI, *The Subjectification of the Citizen in European Public Law*, in L. AZOULAI, S. BARBOU DES PLACES, E. PATAUT (eds), *Constructing the Person in EU Law*, cit., p. 55 et seq.; G. DAVIES, *The Process and Side-Effects of Harmonisation*, cit., p. 1 et seq.; S. REYNOLD, *Aim and Duty, Sword and Shield: Analysing the Cause and Effects of the Malleability of "Social Integration" in EU Law*, in *European Papers*, Vol. 3, 2018, No 2, www.europeanpapers.eu, p. 693 et seq.; F. SCHARPF, *The Asymmetry of European Integration*, cit., p. 211 et seq.

<sup>63</sup> A. MENÉNDEZ, *European Citizenship After Martínez Sala and Baumbast. Has European Law Become More Human But Less Social?*, in L. MADURO, L. AZOULAI (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50<sup>th</sup> Anniversary of the Rome Treaty*, Oxford: Hart, 2010, p. 363 et seq.

<sup>64</sup> A. SOMEK, *Solidarity Decomposed*, cit., p. 787 et seq.

unable to be kind, incapable of meeting needs. Free movement humiliates welfare institutions, and in doing so frightens those who need them most.<sup>65</sup>

Narrowing in on the specific Union Citizenship rights that are the subject of this *Article*, their effects on the immobile are also better described in terms of insecurity and humiliation than in terms of quantifiable harm. After all, nothing in Citizenship law changes the legal rights of the immobile, and their position may well be benefitted in as much as mobile Citizens tend to contribute economically to host states. The immobile are primarily left alone by EU law, and perhaps made a little richer. Nevertheless, they have a number of reasons to understandably fear Union Citizenship.

One threat that it creates is demographic. The exit of the young, often well educated, and entrepreneurial creates economic and social problems as well as portraying the state as failed and unattractive.<sup>66</sup> How is that for those left behind? The discussion above focused on the mobile Citizen in their state of residence, but the states of departure are no less affected by Citizenship law because they are not the subject of its litigation. That they are absent from the law is a corollary of the fact that they are not chosen by the mobile, but it is also a compounding of the effects of that fact: first a loss of youth, then of voice.

Within the destination states, Union Citizenship also creates a loss of status for the immobile. Their absolute rights may not be changed, but their relative rights are.<sup>67</sup> They are no longer first in their own nation.<sup>68</sup> Outsiders have a superior legal position in socio-economic matters.<sup>69</sup> That is not the case in political rights, yet this may be little comfort when, as has been noted, politics is both bounded by the requirements of the EU and disproportionately influenced by the needs of the cross-border.<sup>70</sup> There is legal degradation in being an immobile citizen in a legal system which grants hierarchically superior rights to the mobile, and which requires the choices of the immobile mass to be adapted to their

<sup>65</sup> *Ibid.*; G. DAVIES, *The Humiliation of the State as a Constitutional Tactic*, in F. AMTENBRINK, P. VAN DEN BERG (eds), *The Constitutional Integrity of the European Union*, The Hague: TMC Asser Press, 2010, p. 147 *et seq.*

<sup>66</sup> I. KRASDEV, *Eastern Europe's Illiberal Revolution: The Long Road to Democratic Decline*, in *Foreign Affairs*, 2018, p. 49 *et seq.*; A. SOMEK, *Solidarity Decomposed*, *cit.*, p. 787 *et seq.*

<sup>67</sup> D. KOCHENOV, *On Tiles and Pillars*, *cit.*, p. 3 *et seq.*; A. MENÉNDEZ, E. OLSEN, *Challenging European Citizenship*, *cit.*, p. 3 *et seq.*

<sup>68</sup> See discussion of the implications of this in: D. KOSTAKOPOULOU, *European Union Citizenship*, *cit.*, p. 630 *et seq.*

<sup>69</sup> A. MENÉNDEZ, E. OLSEN, *Challenging European Citizenship*, *cit.*, p. 3 *et seq.*

<sup>70</sup> M. DANI, *The Subjectification of the Citizen*, *cit.*, p. 55 *et seq.*; G. DAVIES, *Democracy and Legitimacy in the Shadow of Purposive Competence*, in *European Law Journal*, 2013, p. 2 *et seq.*; F. DE WITTE, *Interdependence and Contestation in European Integration*, in *European Papers*, Vol. 3, 2018, No 3, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 475 *et seq.*; F. DE WITTE, *Transnational Solidarity and the Mediation of Conflicts of Justice in Europe*, in *European Law Journal*, 2012, p. 694 *et seq.*



needs and convenience. This fragmenting of the normative order, Somek argues, creates a society of alienation, in which for most people it is harder to be free.<sup>71</sup>

If national democracy then seems to entail an element of charade, many would respond that this is not really because of the EU or its citizenship, but the pressures of the modern global world: nations that want prosperity must accept the changes required to flourish in the global marketplace.<sup>72</sup> However, without entering into that debate, it is EU law, partly via Citizenship, which is the immediate bearer of this message. The messenger, whether we think this fair or not, is often the most convenient target to shoot at. How else can a distant and anonymous sender be reached?

Finally, there is a threat to culture and identity. Local traditional values are subordinated to those of cosmopolitan outsiders. Thanks to the U-turn, nationals who reject prevailing norms have an alternative to the democratic process: they can avoid them.<sup>73</sup> Those who value those prevailing norms cannot use democracy to fully protect them. Conservative norms are not just undermined, but defined as obstacles to movement, and thereby positioned by EU law in opposition to freedom, to progress, to European values – and thus to Europe.

It is really the very fabric of the national community that is being changed. From closed, solidaristic, normative, and defined, it becomes more open, liberal, conditional and up for challenge.<sup>74</sup> For the strong that may be emancipatory, but for others, those who thrive on boundedness, it makes their social, economic and cultural place seem uncertain, and threatens their security.<sup>75</sup> The conditions for them to flourish in the nation state are diminished, without these being reproduced on a European scale.

## VIII. THE LOGIC OF UNION CITIZENSHIP

If Union Citizenship cannot be well explained as a mechanism to create unity, or a shared identity, by any direct means, it can nevertheless be understood as an integrative measure – but a more indirect one. In providing strong rights and protection from local immobile norms it actively encourages and facilitates the movement of the selected, the self-sufficient, and in doing so actively promotes diversity of a kind within Member States. It prevents them from compelling adaption by the mobile Citizen, and re-

<sup>71</sup> A. SOMEK, *Alienation, Despair and Social Freedom*, cit., p. 35 et seq.; A. SOMEK, *On Cosmopolitan Self-Determination*, p. 405 et seq.

<sup>72</sup> R. BELLAMY, *State Citizenship, EU Citizenship and Freedom of Movement*, in F. DE WITTE, R. BAUBÖCK, J. SHAW (eds), *Freedom of Movement Under Attack*, cit., p. 9 et seq.

<sup>73</sup> F. DE WITTE, *Emancipation Through Law?*, cit., p. 15 et seq.

<sup>74</sup> C. JOPPKE, *The Inevitable Lightning of Citizenship*, in *European Law Journal of Sociology*, Cambridge: Cambridge University Press, 2010, pp. 9-32.

<sup>75</sup> A. SOMEK, *On Cosmopolitan Self-Determination*, cit., p. 405 et seq.; C. JOPPKE, *Liberal Citizenship is Duty-Free*, in R. BAUBÖCK (ed.), *Debating European Citizenship*, Cham: Springer, 2019, pp. 199-203; A. AZMANOVA, *After the Left-Right (Dis)continuum*, cit., p. 384 et seq.; R. BAUBÖCK, *The New Cleavage*, cit., p. 19 et seq.

quires the state to accept and adapt to difference.<sup>76</sup> This in turn disrupts norms and institutions and poses a challenge to the more inward-looking preferences of the immobile majority and to the boundaries that they construct. The mobile Citizen becomes an agent of change, giving Member States a nudge towards forms more suited to open markets and globalization.<sup>77</sup>

Free movers also have an economic purpose. In encompassing workers, the self-employed, the studying, and the wealthy, Union Citizenship reflects the current understandings of which actors are important to the economy, and ensures that these are freely available across the continent. This in turn helps firms be mobile, so that the mechanism of wealth-creation is, at least to a degree, decoupled from individual states.<sup>78</sup> It is not just certain individuals who are more loosely embedded in their Member States thanks to Union Citizenship, and more able to think and act in a pan-European way, but also firms and universities.

As well as this, mobile Citizens have a political function. They are, at least potentially, clients of the EU. As a new institutional construct, the EU runs the risk of being a government without a people, with associated political fragility. In ensuring that mobile Citizens in a new state continue to exercise EU rights directly, rather than merely being assimilated to locals, Union Citizenship law helps to create a direct Citizen-Union bond. Union Citizenship was originally spoken of as an attempt to bring the Member State citizen closer to the Union. For the immobile person, this is implausible.<sup>79</sup> However, for the mobile class, given the way they are separated and privileged, it is easily imaginable, and means that Union Citizenship can be understood as a mechanism to create a truly European political class, with a degree of identification with, and loyalty to, the EU.

## IX. CONCLUSION

Mobile Union Citizens form a distinct legal class, and the rights they enjoy encourage the formation, or strengthening, of a corresponding distinct social class. That hardly seems like a contribution to unity or integration, and yet via indirect means, somewhat Machiavellian ones, it may have integrative effects. That could be seen as a soft way to leverage change in Europe, exposing Member States to the foreign and letting that work its effects.<sup>80</sup> It could also be a route to backlash, humiliating the immobile and turning the mobile into objects of demonization.

<sup>76</sup> D. KOSTAKOPOULOU, *European Union Citizenship*, cit., p. 623 *et seq.*

<sup>77</sup> R. BELLAMY, *State Citizenship*, cit., p. 9 *et seq.*; C. JOPPKE, *Liberal Citizenship is Duty-Free*, cit., pp. 199-203.

<sup>78</sup> M. FERRERA, *Loyalty Matters: The Delicate Balance Between Jurisdictional Competition and Political Order*, in *European Papers*, Vol. 4, 2019, No 1, [www.europeanpapers.eu](http://www.europeanpapers.eu), p. 169 *et seq.*

<sup>79</sup> M. DANI, *The Subjectification of the Citizen*, cit., p. 55 *et seq.*; D. KOSTAKOPOULOU, *European Union Citizenship*, cit., p. 623 *et seq.*

<sup>80</sup> C. JOPPKE, *The Inevitable Lightning of Citizenship*, cit., p. 9 *et seq.*; D. KOSTAKOPOULOU, *European Union Citizenship*, cit., p. 623 *et seq.*

The characteristics by which this class is defined are striking; they are economically important, relatively successful, self-sufficient, and yet treated as normative and cultural outsiders who are protected from the immobile majority. They have a transactional rather than solidaristic relationship with that majority, with rights that are hierarchically and substantively superior to the immobile, but which are conditional on their economic independence. Above all, in having the right to demand adaption to their foreign characteristics, they destabilise national laws and institutions, potentially giving the immobile majority the feeling that their will is being frustrated, their chosen social forms undermined, and their status in their home state diminished.

The idea of a rootless cosmopolitan elite with many of the social and economic characteristics above, and a similarly tense relationship with more rooted and immobile citizens, is fairly ubiquitous, but the granting of a specific and privileged legal status to that group is a distinctive European step. In this European context it also invites parallels with Europe's Jews. They too were part of European states, and yet often seen as outsiders within them.<sup>81</sup> They too were economically successful, and thanks to their connections with other Jews often distinctively transnational both in identity and lives.<sup>82</sup> They were sometimes seen as the most European of Europeans, but were also vulnerable because of this. Their alleged lack of loyalty to the nation and cosmopolitan rootlessness, as well as their alleged alien values, were, still are, core features of anti-Semitism.<sup>83</sup>

A psychoanalytic perspective might invite us to wonder if the continent is trying to regrow its lost limb, to repair its self-harm, and create a class that is an echo of the one it lost.<sup>84</sup> The way that the law protects the mobile citizen, the stranger within, from identity-denying assimilation demands seems like a lesson learned from the past. However, in entrenching the strangeness of that stranger, it is also a reconstruction of it.

Developing those speculations is outside the scope of this *Article*. Yet it reminds us that to socially engineer the continent by creating mobile Citizens and setting them loose to destabilise the world of the immobile is a dangerous game. At best, it could be a cunning, if not quite transparent, intervention which helps Member States become more open and outward-looking, and thereby more stable and successful and better able to serve all their population, not just the mobile. At worst it could be stimulating perceptions of difference, and pouring oil on the perennially smoldering conflict between those whose interests and character are best served by openness, and those whose nature and circumstances are better suited to a more bounded world. It may be

<sup>81</sup> Z. BAUMAN, *Jews and Other Europeans: Old and New*, Oxford: Berghahn Books, 2008, pp. 121-133.

<sup>82</sup> J. MULLER, *Capitalism and the Jews*, Princeton: Princeton University Press, 2011; C. AUST, *The Jewish Economic Elite: Making Modern Europe*, Indiana: Indiana University Press, 2018.

<sup>83</sup> H. SPECTOR, *The Cosmopolitan Subject and the Question of Cultural Identity: The Case of Crime and Punishment*, in *Crime, Media, Culture*, 2017, pp. 21 *et seq.*

<sup>84</sup> S. CLARKE, *Theory and Practice: Psychoanalytic Sociology as Psycho-Social Studies*, in *Sociology*, 2006, p. 1153 *et seq.*

that this dangerous path is still the best option, in a world where there are no safe policy choices. Certainly, there is much in free movement and Union Citizenship to embrace. However, precisely those lawyers and scholars who do value its positive effects need to pay attention to its risks, to stop them from bringing down the legal edifice of European openness once again.