The Social Contract between the State and the Citizen-as-Migrant: EU Free Movement under a Cosmopolitan Statist Lens

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Abstract

How does EU free movement alter the role of the sovereign state? While this question may not sound new, this article addresses it from a novel angle. If from the perspective of host Member States free movement upgrades a class of migrants to the status of 'migrant citizens', from the perspective of home Member States free movement instead splits the class of the citizens into citizen-settlers and citizen-migrants. The article explores how the social contract between the state and the citizen is rewritten in the wake of this latter transformation. It articulates the duty of the states as agents for the citizen-migrants. It flashes out the implications for the relation between citizen-migrants and citizen-settlers. And it points to the partly reflexive nature of duties of states and citizens towards non-citizen migrants. It thus ultimately sheds light on how free movement prompts the sovereign state to embrace cosmopolitan obligations towards others 'from within', as an indirect effect of advancing the transnational interests of the citizen-migrants. The findings ultimately add to the cosmopolitan statist vision of European integration, while also rephrasing

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some of the questions of solidarity, non-discrimination and participation that remain unanswered in the literature on Union citizenship and free movement.

Keywords

Free movement law

EU citizenship

Mutual recognition

Migration

Social contract

1. Introduction

Romania has recently been told that it cannot require its nationals who reside in another Member State to have a domicile in state in order to issue them with an identity card.[1] Germany has recently been told that it has to calculate periods of child raising that its nationals have completed in another Member State in order to determine the amount of an incapacity pension it pays to them.[2] And diplomatic representations of EU Member States in the UK have just rested their case after years of pushing, behind

[1] Case C-491/21, *WA*, ECLI: EU:C:2024:143.

[2] Case C-283/21, *VA v Deutsche Rentenversicherung Bund*, ECLI:EU:C:2024:144.

the scenes of official Brexit negotiations, for the protection of their nationals who had exercised free movement in the UK.

These stories point to the different ways in which free movement commits the Member States to protect their nationals abroad, or their nationals willing to go abroad, in novel ways and according to novel rationales in comparison to the traditional tools of international law, such as diplomatic protection or the protection of a right to emigrate.[3] As a legal fact, it is at this point well-known that home Member States have a fundamental role in implementing their citizens' free movement rights.[4] However the significance of this role as evidence of the changing nature of the sovereign state in the European Union has remained under-explored. The vast legal literature on EU free movement has mostly focused on host Member States and borrowed the conceptual frame of immigration law in questioning their role: what are the duties of host Member States towards

[3] See A Vermeer-Kunzli, 'Diplomatic Protection and Consular Assistance of Migrants', in V Chetail and C Bauloz (eds) *Research Handbook On International Law And Migration* (Edward Elgar 2015), 265-280; also see C A Casey, *Nationals Abroad – Globalization, Individual Rights and the Making of Modern International Law* (Cambridge University Press 2020).

[4] For a comprehensive analysis, F Strumia, Supranational Citizenship's Enablers: Free Movement from the Perspective of Home Member States 4 (2020) European Law Review 507; also see A Lazowski, ''Darling You Are Not Going Anywhere": The Right to Exit in EU Law' 40 (2015) European Law Review 887.

migrant citizens? How are they justified? What should be the limits to those duties? What rights should European migrants have in host States?[5]

This article searches a different set of questions: what should intra-EU migrants legitimately expect of their home Member State? Why? And how do these expectations relate to those of the non-migrants, and those of the non-citizens?

Through these questions, the article ultimately aims at understanding how free movement alters the role of the European sovereign state. In approaching this latter question it starts from the same assumptions as the literature that situates the project of European integration at the intersection of the values of statism and cosmopolitanism: the sovereign state remains the main associative unit in the EU, but it embraces responsibilities towards citizens of different states whom it

[5] For a small sample of a vast field, see N Nic Shuibhne, "Reconnecting the Free Movement of Workers and Equal Treatment in an Unequal Europe" 43 (2018) European Law Review 477; G. Davies, "Brexit and the Free Movement of Workers: A Plea for National Legal Assertiveness" 41 (2016) European Law Review 925; P Koutrakos, N Nic Shuibne, P Syrpis (eds), *Exceptions from EU Free Movement Law: Derogation, Justification and Proportionality* (Hart Publishing 2016); D Thym (ed), *Questioning EU Citizenship, Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing 2017). S Giubboni, 'Free Movement of Persons and European Solidarity. A Melancholic Eulogy' in H Verschueren (ed), *Residence, Employment and Social Rights of Mobile Persons: On How EU Law Defines Where They Belong* (Intersentia 2016), 75-88.

recognizes as having the same moral worth, and the same legal claims as its own. [6]

In exploring how this role of the state changes, the article deploys the frame of the social contract: it searches for the terms of coexistence that the state, its citizen-settlers (the citizens who do not exercise free movement), its citizen-migrants (the citizens who do exercise free movement), and as a lateral party its incoming migrant citizens (the nationals of other Member States who come to the Member State in question in the exercise of free movement),[7] are likely to agree to if the

[6] See e.g. R Bellamy, *A Republican Europe of States-Cosmopolitanism, Intergovernmentalism and Democracy in the EU* (CUP 2019); K Nicolaïdis, 'The Idea of European Demoicracy', in Julie Dickinson and Pavlos Eleftheriadis (eds) *Philosophical Foundations of European Union Law* (2012), 247-274; K Nicolaïdis, 'European Demoicracy and its Crisis' 51 (2013) Journal of Common Market Studies 351; K Nicolaidis 'Kant's Mantle: Cosmopolitanism, Federalism and Constitutionalism as European Ideologies' 27 (2020) Journal of European Public Policy 1307; R Bellamy and J Lacey, 'Balancing the Rights and Duties of Union and National Citizenship: a Demoicratic Approach' 25 (2018) Journal of European Public Policy 1403; R Bellamy, 'Sovereignty, Post-Sovereignty and Pre-Sovereignty: Three Models of the State, Democracy and Rights within the EU' in N Walker (ed) *Sovereignty in Transition* (Hart Publishing, 2003), 167-190.

[7] The latter three terms are specifically chosen to capture the three classes of citizens that any given time are present in an EU Member State. The latter two are commonly referred to in the literature as migrant citizens; the former one as sedentary or non-mobile citizens.

citizens' unconstrained mobility becomes a foundational principle of society.

The resulting social contract, that embraces the duty of the state to the citizen-migrants, articulates the cosmopolitan role of the state from within: duties of Member States as host to migrant 'others' follow, by reflexion, from the duty of Member States to protect in novel ways the citizen-migrants to whom they are home. As both citizen-migrants and citizen-settlers are parties, the contract also commits the Member States to act as agents for both classes of citizens and to continuously mediate among their respective interests so that neither class can exploit a position of dominance to displace the interests of the other.

The article findings suggest that the embracing of citizens' free mobility as part of the social contract is the very prompt for the cosmopolitan turn of the European state. In this respect, the article reverses the premises of the cosmopolitan statist understanding of European integration, which interprets the system of free movement as an expression of the duties towards others that EU Member States have agreed to. Its findings speak in particular to the literature on demoicracy and republican intergovernmentalism:[8] they suggest a source for the duties of mutual concern and mutual recognition that these accounts place at the heart of the

[8] Bellamy, *A Republican Europe of State* (n 6); Nicolaïdis 'European Demoicracy' (n 6); Nicolaïdis 'The Idea of European Demoicracy' (n 6).

role of the European state. Those duties are not just the result of a reinforced duty of hospitality of Kantian inspiration. They follow at least in part as an indirect effect from the pursuit of their own interests on the part of citizens who are stakeholders in a transnational community, and on the part of states who are the primary agents in that community. In interrogating the relevant duties, the article also brings a stir to the literature on Union citizenship and free movement. It brings novel categories - citizenship, the social contract, recognition, non-domination -, and with these a fresh perspective, to bear on some of the questions that remain at the heart of that literature: the tension within the frame of Union citizenship between the position of the sedentary and the mobile; the cleavage between the treatment of second and third country nationals;[9] and ultimately the 'fissures' in the unfinished project of Union citizenship, such as lack of participation and stagnant solidarity.[10]

[9] See e.g. I Goldner Lang, 'Freedom of Movement of EU Citizens and Mobility Rights of Third-Country Nationals: Where EU Free Movement and Migration Policies Intersect or Disconnect?*'* in E Tsourdi and P de Bruycker (eds), *Handbook on EU Migration and Asylum Law* (Edward Elgar 2022), 98-113.

[10] See M Steinfeld, *Fissures in EU Citizenship: The Deconstruction and Reconstruction of the Legal Evolution of EU Citizenship* (CUP 2022). For a recent take on the solidarity side of EU citizenship see R Barbulescu and A Favell, 'Commentary: A Citizenship without Social Rights? EU Freedom of Movement and Changing Access to Welfare Rights' 58 (2020) International Migration 151.

Ultimately, the article lays the roots of a free movement paradigm distinct and autonomous from the migration one: while migration forces a relation between the state and the non-citizen, free movement problematizes the relation between the state and its citizens.

The article's quest proceeds in four steps. First, it frames the inquiry and situates it within a cosmopolitan statist vision of European integration (Section 2). Second, it introduces the perspective of the social contract and explores from this perspective the terms of the relation between the state and the citizen-migrant (Section 3). Third, it focuses on the implications for the citizen-settler and clarifies the demands of non-domination between the citizen-migrants and the citizen-settlers (Section 4). Fourth, it explores the role of the non-citizen migrants as lateral parties to the social contract between the state, the citizen-settler and the citizen-migrant (Section 5). The conclusion weighs the cosmopolitan potential of a model of international movement based on mobility as an element of the citizen's experience (Section 6).

2. European integration, free movement and the sovereign state

The EU treaties recognize the right to free movement to every national of a Member State.[11] Originally reserved to market actors, freedom of movement has in time, and through the jurisprudence of the European

[11] Treaty on the Functioning of the European Union, art. 21.

Court of Justice, evolved into a fundamental attribute of the status of European supranational citizenship. The legal, political and social implications of the citizens' right to free movement have occupied academic writing for the best part of the last three decades.[12] But what does free movement of persons say about the role of the sovereign state in the context of European integration?

In legal and political science literature, the reverse of this question has rather attracted attention. What does the changing role of the state say about the source and justification of the rights of free movers? Three distinct visions of the role of the state in the integration project offer a potential answer. In a first vision, the state is recreated at a new federal or supranational level, at which novel rights of federal supranational citizenship, *in primis* free movement, find their source;[13] in a second vision,

[12] At least since the adoption of some of the landmark rulings in this area. See e.g. case C-184/99, *Grzelczyck* ECLI:EU:C:2001:458; case C- 85/96, *Martínez Sala*, ECLI:EU:C:1998:217.

[13] See e.g. C Schönberger, 'European Citizenship as Federal Citizenship – Some Citizenship Lessons of Comparative Federalism' 19 (2007) European Review of Public Law 63; D Kostakopoulou, 'European Union Citizenship: Writing the Future' 13 (2007) European Law Journal 623; K Lenaerts, 'Federalism and the Rule of Law' 33 (2010) Fordham International Law Journal 1338; L Friedman Goldstein, *Constituting Federal Sovereignty: The European Union in Comparative Perspective* (John Hopkins University Press, 2001); also see D Kochenov, 'On Tiles and Pillars: EU Citizenship as a

the state is superseded in favor of a form of 'cosmopolitan federalism', where supranational citizenship, and its annex rights such as free movement, can act as human rights enhancers;[14] and in a third vision, the state is preserved, but repurposed so as to protect transnational rights of citizens that descend from the state's participation in a horizontal community of accountability and recognition.[15] Free movement is, in this latter version, the first and foremost of these transnational rights. In all of these visions, free movement is treated as a signal of the changing role of the sovereign state.

This article rather looks at free movement as a prompt of that changing role. In pursuing this line of inquiry the article adopts as a starting point the same position as the third vision presented above: the state is not superseded in the context of European integration. It is preserved and repurposed.

Federal Denominator' in D Kochenov (ed) *EU Citizenship and Federalism: the Role of Rights* (CUP 2017), 3-82.

[14] See S Benhabib, *The Rights of Others* (CUP 2012) 213-21.

[15] As in the liberal intergovernmental account, A Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmental Approach' 31 (1993) 31 Journal of Common Market Studies 473; also see P Magnette, 'How Can One Be European? Reflections on the Pillars of European Civic Identity' 13 (2007) European Law Journal 664.

This third vision emerges clearly from accounts that interpret the process of European integration from a perspective that combines a simultaneous commitment to cosmopolitan values and to the preservation of the sovereign state and its functions. Richard Bellamy refers to this perspective as 'cosmopolitan statism'. In his words, cosmopolitan statism sees the 'system of states as intrinsically linked to the promotion of cosmopolitan norms'.[16] While liberal intergovernmentalism in the context of European integration already embodies a thin version of this conception, Bellamy advocates a thicker version, to which he refers as 'republican intergovernmentalism'.[17] The EU is best seen, and should be seen, as a republican intergovernmental association of states, in which organization at the supranational level remains under the shared control of the constituent polities – hence the state is preserved as the basis organization -but a principle of mutual concern comes to inform both interstate relations and relations between each state and the citizens of other states – whence the repurposing.[18] Kalypso Nicolaïdis, echoing the same confederal approach to EU interstate relations and the emphasis on mutual concern, sees in the EU the prototype of a demoicracy, a 'union of peoples, understood both as states and as citizens, who govern together but not as

[16] Bellamy, *A Republican Europe of State* (n 6), 49-56.

[17] Ibid., 49-55.

[18] Ibid., 91-92.

one'.[19] While this union is committed to preserve the separate existence of its peoples in plural and to resist the trap of 'oneness', a principle of no-othering of cosmopolitan flare informs its ethos.[20] It is this principle that calls for each of the participating peoples to think beyond the boundaries of their respective national places.

Demoicracy and republican intergovernmentalism trace a *via media* between the intergovernmental, the federal, and the supranational account of the integration process. In bringing forward the attempt to tame and model the exercise of sovereignty that represented one of the first prompts of European integration,[21] they echo a broader effort confronting political theory in the global era. This is the effort to propose a model of political organization that accommodates the claims of state sovereignty, democratic closure, self-determination, and bounded self-distributive justice; and at the same time advances those of moral and legal cosmopolitanism: the equal moral worth of individuals, their deservingness of equal concern, and the equal weight of their rights' claims regardless of citizenship.[22] Hence the preservation of the sovereign state as the

[19] Nicolaïdis, 'European Demoicracy' (n 6) 353.

[20] Nicolaïdis, 'The Idea of European Demoicracy' (n 6), 253-6.

[21] J Weiler, 'The Transformation of Europe' 100 (1990) Yale Law Journal 2403, 2480-3.

[22] In this effort, cosmopolitan statism and demoicracy continue to advance the work of liberal nationalism. For an overview see D Miller and G Gustavsson, *Liberal Nationalism and its Critics: Normative and Empirical Questions* (OUP 2020); Y Tamir,

fundamental unit for organization of governance and democratic participation, along with its repurposing to embrace cosmopolitan duties.

In spelling out these cosmopolitan duties of the state, both republican intergovernmentalism and demoicracy focus on duties of mutual concern and non-domination.

The imperative of recognition forms the basis of the demoi-cratic ideal, and in a broader perspective, of a cosmopolitan statist vision of Europe.[23] As a mode of governance and a political principle, it constrains and redirects sovereignty in the EU, through forcing the sovereign state to acknowledge and internalize interests external to its immediate jurisdiction.[24] The germane idea of non-domination guards against two

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Liberal Nationalism (1993). In the effort to uphold state sovereignty, while endeavouring to repurpose it in a cosmopolitan direction, they share the perspective of statist cosmopolitanism, pluralist sovereigntism and democracy-conscious transnationalism. See, respectively, L Ypi, *Global Justice and Avant-Garde Political Agency* (OUP 2011); J L Cohen, *Globalization and Sovereignty, Rethinking Legality, Legitimacy and Constitutionalism* (CUP 2012); S Benhabib, 'The New Sovereigntism and Transnational Law: Legal Utopianism, Democratic Scepticism and Statist Realism' 5 (2016) Global Constitutionalism 109.

[23] See K Nicolaïdis, 'Mutual Recognition: Promise and Denial, from Sapiens to Brexit' 70 (2017) Current Legal Problems 227, 239-240; Bellamy (n 6) 92.

[24] Nicolaïdis (n 17) 241; also see K Nicolaïdis, 'Trusting the Poles?: Mark 2—Towards a Regulatory Peace Theory in a World of Mutual Recognition' in I Lianos and O Odudu (eds) *Regulating Trade in Services in the EU and the WTO: Trust, Distrust and*

equally threatening perils, the union itself engaging in domination, and the Member States exploiting integration as a cover for their own dominating agendas.[25]

Duties of mutual recognition and non-domination create a horizontal link between the governance structures and democratic accountability mechanisms of different nation states.[26] Governance has to be exercised in each Member State taking into account the interests of the other ones; and institutions of government must account to their electors not only for the discharge of their internal duties, but also for the discharge of external duties that are owed to other Member States and their peoples.[27]

The right to free movement represents, in the republican intergovernmental as in the demoicratic visions of the EU, the very fulfilment of these horizontal links.[28] In Bellamy's account, supranational citizenship attaches to national citizenship a series of 'international rights' that can be claimed in a 'horizontal' fashion as against any of the states participating in the association. The right to free movement is at the same time the most prominent of these international rights, as well as a vehicle

Economic Integration (2012), 265. Also see Nicolaïdis, *European Demoicracy* (n 6), 359-360.

[25] Nicolaïdis, *European Demoicracy* (n 6) 359.

[26] See Nicolaïdis, 'Mutual Recognition: Promise and Denial' (n 23), 14.

[27] Nicolaïdis, *European Demoicracy* (n 6), 355-6.

[28] See Nicolaïdis, 'Mutual Recognition: Promise and Denial' (n 23), 26-33.

for many corollary ones.[29] In particular, through the right to non-discrimination on the basis of nationality to which it is closely linked, it brings the duties of mutual respect and concern that operate among the Member States to bear directly on their citizens.[30]

Republican intergovernmentalism and demoicracy thus treat free movement, once again, as a symptom of the changed role of the state; and as a symptom, in particular, of the way that role changes through the assumption of novel duties towards other states and their citizens. They partly avoid a different question, which is instead central to the inquiry in this article: how does free movement change not the relation between the state and the non-citizen, but the very relation between the state and its own citizens? How are duties of mutual concern and recognition of others sourced, justified, implemented in the context of the latter relation?

In this respect, republican intergovernmentalism and demoicracy suggest that the costs and benefits of being part of interconnected peoples must be somehow internalized. However the dynamics that could govern this internalization, leading for instance the citizens to hold to account their governors also on behalf of the citizens of other Member States, remain under-defined.[31] Formulating a clearer hypothesis about these dynamics

[29] Bellamy, *A Republican Europe of State* (n 6), 131.

[30] See Bellamy, *A Republican Europe of State* (n 6), 133.

[31] See Nicolaïdis, 'Mutual Recognition: Promise and Denial' (n 23), 14; Nicolaïdis, *European Demoicracy* (n 6), 356. Also see Bellamy (n 6), 90-93.

requires taking a step back to consider more closely how free movement alters the very status of citizenship, and the terms of the relation between the state and the citizen.

Free movement indeed is not only the expression of the duty of mutual concern among the Member States. It is an enhancement of the condition of the national citizen. The recognition to the citizen of a right to free movement implies that the citizen can choose to live his life, and his relation to the state of belonging, in a present and sedentary manner, or in a remote and migrant one. Citizenship thus assumes two possible configurations: that of the citizen-settler; and that of the citizen-migrant, who lives his condition of citizenship in a mobile way, interacting with the home Member State from the outside and from the perspective, in part, of a migrant.[32] The coexistence of these two citizenship configurations challenges the traditional association between sovereignty, citizenship,

[32] The status of the citizen-migrant may appear to overlap with the status of the 'external citizen'. There are two distinctions however. First, the notion of the citizen-migrant is a more nuanced one than that of external citizen. The citizen-migrant may live part of his citizen's experience as an external citizen, but his condition of migrant is a transient one and he may return to be an 'internal citizen'. Second, external citizenship already belongs in the realm of the anomalous experiences of citizenship. On the contrary, in the context of free movement, the citizen-migrant is a citizen 'in the ordinary course'. On external citizenship see R Bauböck, 'The Rights and Duties of External Citizenship' 13(5) (2009) Citizenship Studies 475.

territoriality and settlement. Migration is normalized as part of the experience of citizenship.[33]

This forces in turn to problematize the role of the state in the context of migration. This role cannot just be that of a border guard and arbiter of inclusion and exclusion. The state must cater to the citizen-migrant, without compromising however its duty to protect the citizen-settler and its interest. How does the role of the state change then in light of this dual commitment? The idea of the social contract may help frame and address this question.

3. The social contract with the citizen-as-migrant

[33] See e.g. D Miller, 'Bounded Citizenship' in K Hutchings and R Dannreuther (eds), *Cosmopolitan Citizenship* (Springer 1999), 60-80. To be sure, non-national conceptions have already challenged citizenship's territoriality and boundedness. Cosmopolitan and global citizenship accounts, for instance, in endeavouring to various extents to disentangle citizenship from national loyalties, question both the scope of relevant boundaries, and the nature of the collectivity of reference for citizenship. However, they do not challenge a settled understanding of citizenship. By contrast, from the perspective of the citizen-migrant mobility is an integral part of the citizen's condition. For a democratic theory perspective on global citizenship, see D Archibugi, *The Global Commonwealth of Citizens: Towards Cosmopolitan Democracy* (Princeton University Press 2008); for an overview of the notion of cosmopolitan citizenship, K Tan, 'Cosmopolitan Citizenship', in A Shachar et al (eds), *Oxford Handbook of Citizenship* (Oxford University Press 2017), 694-714.

The idea of the social contract has long provided a theoretical frame to explain, legitimize, and perhaps also romanticize the role of the sovereign state and the relation between state and citizen.[34] To be sure, no citizen has ever concretely signed a contract with their state of belonging.[35] In social contract theory indeed the idea of the contract refers to the rationale of the relation between the state and its citizens.[36] It is meant as a

[34] For an account of the romanticization of the relevant idea see J Scott, *Against the Grain – A Deep History of the Earliest States* (Yale University Press, 2017), 25-27 (the early state was largely a coercive enterprise inviting to reexamine that vision of the state 'dear to the heart of such social contract theorists as Hobbes and Locke, as a magnet of civil peace, social order, and freedom from fear, drawing people in by its charisma').

[35] If we exclude the integration agreements that some naturalized citizens will have signed when first entering their host country over the last two decades. France, Luxembourg, Austria and Italy have requirements in this sense. See e.g. for France, Office Français de l'Immigration et de l'Intégration, Le contrat d'intégration républicaine < Accueil & intégration - Ofii> accessed 21 June 2024; for Italy, Ministero dell'Interno 'Accordo di Integrazione per lo Straniero che Richiede il Permesso di Soggiorno, < Accordo di integrazione per lo straniero che richiede il permesso di soggiorno | Ministero dell'Interno> accessed 21 June 2024; for Austria, Federal Government Official Information Website on Migration to Austria, Integration Agreement, < http://www.migration.gv.at/en/living-and-working-in-austria/integration-and-citizenship/integration-agreement.html#c2563> accessed 21 June 2024.

[36] For the modern view on the social contract see among others J Rawls, *A Theory of Justice* (Harvard University Press 1971); D Gauthier, *Morals by Agreement* (OUP 1987). Also see F D'Agostino et al, 'Contemporary Approaches to the Social Contract', *The*

justification for the social arrangement that ties a citizen to their state, not as the concrete source or cause of that arrangement. [37]

In presenting his contractarian theory of justice, John Rawls for instance emphasizes that the social contract does not govern the decision to enter a given society or to adopt a particular form of government. The content of the original agreement are rather 'the principles of justice for the basic structure of society'.[38] In his view principles of justice that are justified as part of an original social contract are those that would be agreed to in a hypothetical initial situation of equality.[39] In this hypothetical initial situation no one would know yet their concrete place in society, whether rich or poor, ill or healthy, settler or migrant. Thus, the principles of justice constituting the foundation of society would be the ones that could be agreeable to everyone 'behind a veil of ignorance'.[40]

The idea of the social contract is thus deployed here as an aid to explore what principles of justice can be taken as foundational in a society

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Stanford Encyclopedia of Philosophy (Winter 2021 Edition) <https://plato.stanford.edu/archives/win2021/entries/contractarianism-contemporary/> accessed 21 June 2024.

[37] D Gauthier 'The Social Contract as Ideology' in D Gauthier, *Moral Dealing, Contract, Ethics and Reason* (Cornell University Press 1990), 325-354, 329; Rawls, n (36), 16.

[38] Rawls, n (36), 12-16.

[39] Rawls, n (36), 21.

[40] Rawls, n (36), 136-8.

in which mobility is a freedom for the citizens. Most conceptions of justice, whether formed behind this veil of ignorance in a social contract perspective or not, accept that society is premised on a measure of boundedness. In the famous words of Michael Walzer, 'distributive justice presupposes a bounded world'.[41] And so do the interests in preservation of cultures and demographic equilibria.[42] Even the most prominent supporter of the idea of open borders recognizes that the idea is a way to advance our thinking through challenging some of its established tenets rather than a feasible programme in contemporary political arenas.[43] It is well-accepted indeed that the sovereign state has the right to exclude. A world-wide system of border control implements this right. And through the tool of the passport the state detains the monopoly of its citizens' mobility options through those borders.[44] It is against this backdrop that our conceptions of justice are formed.

The EU system of free movement challenges some of these premises. It offers a model of social organization in which borders are open for the citizens of the Member States, movement is legally possible, and

[41] M Walzer, *Spheres of Justice* (Basic Books 1984), 31.

[42] See D Miller, 'Immigration. The Case for Limits' in A I Cohen & C Heath Wellman (eds), *Contemporary Debates in Applied Ethics* (Wiley-Blackwell 2005), 193-205.

[43] J H Carens, *The Ethics of Immigration* (Oxford University Press 2013), 229-230.

[44] J Torpey, *The Invention of the Passport – Surveillance, Citizenship and the State* (Cambridge University Press, 2000), 1-5.

thanks to transport means and communication technology entails low transaction costs. Admittedly mobility options are unequally distributed, and the free movers are but a small percentage of the EU population. Nonetheless, the free movement model forces to reconsider, from a social contract theory perspective, the original hypothetical position of equality. It invites to question what expectations would change, and what principles of justice would be agreed to in an original position in which movement were unconstrained for the citizens, and no one knew yet whether their position in society would be that of citizens or non-citizens, of migrants or non-migrants. One could object that the European system of free movement is not a real original position: other than Rawls' hypothetical initial situation of equality, it is not a situation of equilibrium or one in which people form their conception of justice behind a veil of ignorance.[45] The system of free movement descends from a covenant that the Member States, as pre-existing social organizations in the exercise of their international sovereignty, have agreed among themselves and from which they can always withdraw.[46] Nonetheless, the system created by that covenant is analogized here, as a thought experiment, to a Rawlsian original position. The assumption of free movement brings such a fundamental change to the system of international relations among the

[45] See Rawls, n (36), 118-122.

[46] The withdrawals of the UK from the Union is a fitting example of such a retreat and was arguably largely motivated precisely by the urge to end free movement.

European states and their citizens that it 'resets the clock' in those relations and requires a reassessment of the moral sentiments on whose basis the basic principles of justice would be agreed.[47]

A first expectation that changes then, in this reset original position in which the citizen has a protected right to reside, exercise economic rights and political voice in another Member State, pertains to the very role of the state vis-à-vis the citizen-migrant. The figure of the citizen-migrant compels the state to recognize that its own citizens, as supranational citizens, have a claim to belong in several communities beyond the national one and can concretely exercise that claim through the right to free movement. And each citizen of a Member State, whether a settled or a migrant one, has to recognize, conversely, that her own condition of membership reaches beyond the borders of an individual Member State.[48] Through this outward-looking mutual recognition, the promise of loyalty in exchange for protection that citizenship has embodied since medieval times is stretched in scope.[49] On the one hand movement and distance cannot be taken as a proxy for lack or loss of loyalty. And on the other hand, the citizen-settlers and the citizen-migrants must be thought of as two

[47] See Rawls, n (36), 120.

[48] See F Strumia, 'The Citizen as Other: The Case from Within for Cosmopolitan State Duties and Freedom to Migrate' 87(3) (2024) Modern Law Review 670, 681-3.

[49] On the evolution of this promise in the context of Medieval Italian cities see P Riesenberg, *Citizenship in the Western Political Tradition – Plato to Rousseau*, 151-3.

distinct, but co-existing and co-obligated classes of stakeholders in the polity that the social contract with the citizen-migrant produces.[50] And the state must be the agent of both groups of stakeholders.

At first sight agency for the citizen-migrant translates into a reinforced duty to protect the right to emigrate. The right to emigrate is well-recognized in international law.[51] However it requires little more of a state than refraining from imposing direct restrictions, such as denying a passport or requiring an exit visa.[52] By contrast the duty to protect the citizen-migrant invests the home Member State with a central responsibility in the system of free movement. The home Member State is the first in line to enable, protect, and guarantee the condition of the citizen-migrant.[53]

This heightened responsibility is well-reflected in the varied home Member States' obligations that descend from the Treaty rules on free movement. Overall, home Member States are under a duty not only not to

[50] On the notion of stakeholder citizenship, see R Bauböck, 'Democratic Inclusion: A Pluralist Theory of Citizenship', in R Bauböck (ed) *Democratic Inclusion - R. Bauböck in Dialogue* (Manchester University Press 2017).

[51] See International Covenant on Civil and Political Rights, art.12(2); European Convention on Human Rights and Fundamental Freedoms (ECHR), Protocol 4, art. 2(2).

[52] See e.g. ECtHR, *Vlasov and Benyash v Russia,* Appls. Nos. 51279/09 and 32098/13, judgments of 20 September 2016.

[53] See Strumia, n (4).

restrict, but also not to discourage their own citizens' free movement.[54] This duty not to discourage pushes much further than a duty to just 'let the citizens go'.[55] The variety of positive obligations in which it finds expression is well-illustrated in the case law of the Court of Justice of the European Union interpreting art. 21 of the TFEU. Home Member States have to continue providing social benefits and civic allowances to citizens residing in another Member State;[56] they have to issue them identity documents without imposing any domicile or residence requirements; in using these documents they have to adopt names as spelled in the Member State of residence. The duty to protect the citizen migrants continues when they return home. Upon their return, home Member States have to recognize the experiences and qualifications they have earned abroad;[57] they have to take into account periods of child-raising completed in other Member States for purposes of calculating the amount of social benefits they are entitled to;[58] they also have to grant rights of residence to family members, whether EU citizens or third country nationals, with whom the citizen migrant has established or strengthened family life while in the

[54] See e.g. case C-224/98 *D'Hoop* ECLI:EU:C:2002:432, paras 34-35.

[55] See Lazowski, (n 4).

[56] Case C-503/09 *Lucy Stewart v Secretary of State for Work and Pensions* ECLI:EU:C:2011:500; Case C-192/05 *Tas-Hagen v Raadskamer WUBO van de Pensioen- en Uitkeringsraad* ECLI:EU:C:2006:676.

[57] See e.g. case C-224/98 *D'Hoop* ECLI:EU:C:2002:432.

[58] VA v Deutsche Rentenversicherung Bund (n 2).

exercise of free movement.[59] Each of the above obligations is justified in the case law in view of not discouraging or penalizing the exercise of movement.

Not only does the home Member State need to not discourage the citizen migrant from leaving and to support him upon return. It also remains the guardian and guarantor of the citizen-migrant throughout his experience of free movement. The case law on protection of migrant Union citizens in the context of extradition from a host Member State to a third country illustrates this aspect clearly.[60] The European Court of Justice has found that a Member State that is requested to extradite a Union citizen residing in its territory to a third country has a duty to consult the home Member State of the relevant citizen before deciding on that request. Once informed, the home Member State can decide to bring the citizen home for prosecution via a European arrest warrant.[61] In the context of national legislation that protects nationals only from extradition, this duty of cooperation between host and home Member States ensures the equal treatment of Union citizens who are exercising free movement while

[59] See e.g. case C-456/12 *O. and B.* ECLI:EU:C:2014:135; case C-673/16 *Coman* EU:C:2018:385.

[60] See e.g. case C-182/15 *Petruhhin* ECLI:EU:C:2016:630; case C-191/16 *Pisciotti* ECLI:EU:C:2018:222; case C-398/19 *BY* ECLI:EU:C:2020:1032.

[61] See *BY (*n 60) para 43.

avoiding the risk that a criminal offence may remain unpunished.[62] Exposure of migrant Union citizens to extradition from a host Member State amounts indeed to discrimination in comparison to nationals of that state that are protected from extradition given similar circumstances. The threat of such discrimination may inhibit free movement.[63] While the potential discrimination depends in these cases on the host Member State and its legislation, the Court has entrusted the task to work around it and ensure that free movement remains unhindered to the home Member State. This vindicates the role of home Member States in the context of free movement. The literature that has looked at the role of home Member States has framed this role mostly in emancipatory or remedial terms. Free movement emancipates the citizen from the home Member State.[64] However the home Member State remains responsible for its citizens in the 'pathology' of free movement. It has to foot the social bill for its citizen-migrants who do not meet the financial conditions to reside in a host Member State. And when the 'genuine substance' of supranational

[62] Ibid., paras 39-43.

[63] *Petruhhin* (n 60) para 33; *Pisciotti* (n 60) para 45; *BY* (n 60) para 40.

[64] See e.g. F De Witte, 'Integrating the Subject: Narratives of Emancipation in Regionalism', 30 (2019) European Journal of International Law 257; L Azoulai, 'Transfiguring European Citizenship: From Member State Territory to Union Territory', in Kochenov (ed) (n 13); E Spaventa, 'Citizenship: Reallocating Responsibilities to the Member State of Origin', in P Koutrakos et al (eds), *Exceptions from EU Free Movement Law – Derogation, Justification, Proportionality* (Bloomsbury, 2019), 32-52.

citizenship is in question, it is the first in line to protect that of its own nationals.[65] Part of the literature links this role of the home Member State to the re-emerging primacy of national belonging over national citizenship.[66] The insufficiency of that status as a fundamental one, and its inability to fully equalize the condition of the migrant to that of the citizen in a host Member State, forces, from this perspective, a remedial role on the home Member State. Unravelling the social contract with the citizen-migrant yields a different perspective. Within the frame of that contract the role of the sovereign state shines as that of enabler of mobility and protector of its citizens abroad.

This role of the state as protector of mobility may appear less novel than it sounds. The active creation of opportunities for citizens across borders is not new state practice, it is a well-tested one that dates back to the age of empire. Already in 16th century England, emissaries of the crown were busy negotiating privileges for the nation's merchant

[65] For the notion of 'genuine substance' of Union citizenship see case C-34/09 *Ruiz Zambrano* ECLI:EU:C:2011:124; also see case C-86/12 *Alokpa* ECLI:EU:C:2013:645.

[66] See E Spaventa, 'Earned Citizenship – Understanding Union Citizenship through its Scope', in Kochenov (ed) (n 13), 214-216. Also see N Nic Shuibne, *Recasting EU Citizenship as Federal Citizenship: What are the Implications for the Citizen when the Polity Bargain is Privileged?,* in Kochenov (ed) (n 13), 158-9.

companies in the lands of the Ottoman Empire.[67] And between the 17th and 18th century the ranks of the East India Company provided a reliable route to wealth for adventurous British nationals.[68]

What is more, part of the literature on citizenship and migration emphasizes how citizenship in the 21st century has become precisely a ticket to mobility.[69] In a global world, a citizen's options for international mobility are correlated to the heft of the passport that the state issues to him.[70] The strongest passports in the global ranking of mobility options allow visa free travel to hundreds of countries.[71] The passport of a EU Member State does not only allow travel, it entitles the holder to reside and work in any of the 27 Member States in the Union. Particularly in countries outside the western world, people who have the option to acquire a second citizenship do so as an 'insurance policy' and as a guarantee of a future

[67] J Brotton, *This Orient Isle, Elizabethan England and the Islamic World* (Penguin 2017), 107. Also, see P Frankopan, *The Silk Roads: a New History of the World* (Bloomsbury Publishing 2015) 245-9.

[68] Frankopan (n 67) 267-9.

[69] Harpaz n 72; Marloes de Hoon et al., 'A Ticket to Mobility? Naturalisation and Subsequent Migration of Refugees after Obtaining Asylum in the Netherlands', 46 (2020) Journal of Ethnic and Migration Studies 1185.

[70] See S Mau et al, 'The Global Mobility Divide: How Visa Policies Have Evolved Over Time' 41 (2015) Journal of Ethnic and Migration Studies 1213.

[71] See Global Passport Power Rank 2024, https://www.passportindex.org/byRank.php, last visited 21 June 2024.

mobility option.[72] It may thus appear that, albeit in different guises, the role of the state has always been that of dispenser and protector of mobility options.

However, in this traditional version, exercised first through the sponsoring of its nationals' ventures abroad, and then through the monopoly of the issuance of passports, that role is sensibly different from the role of the state as enabler of mobility in the European social contract with the citizen-migrant. Protection of movers and movement is, in each of the above examples, the expression of a state-controlled privilege, not the expression of a freedom of the citizen. For the 17th and 18th century state nationals abroad were a proxy for national interests. Merchants and explorers were the ambassadors of the state in a burgeoning system of world trade. For the 21st century state the issuance of passports is the expression of a state monopoly, that on the citizen's mobility options.[73] And the very holding of such monopoly speaks to the nature of national citizenship as a marker of settlement. Only citizenship, and the passport that is its tangible manifestation, guarantee security of status in a state and the unhindered possibility to return to it from every corner of the globe. The use of citizenship as an 'insurance policy' for future mobility options

[72] See e.g. C Joppke, 'The Instrumental Turn of Citizenship' 45 (2018) Journal of Ethnic and Migration Studies 858; Y Harpaz, *Citizenship 2.0 – Dual Nationality As A Global Asset* (2019).

[73] See Torpey, (n 44).

does nothing but confirm this role of citizenship, and of the state. Citizenship is used as a stepping stone to establish a relation with a new state, a relation that can be useful in the case of a shortfall in the relation with the original state of belonging. In establishing the second relation the traditional sequence of migration is reversed: citizenship of the destination state comes first, migration to that state comes next. But the substance is unaltered: migration requires a destination state's authorization to settle, and citizenship represents that authorization. What some of the literature has described as a 'ticket to mobility' is thus best described as a pre-authorization to resettlement.[74] It confirms a conception where mobility is a state-controlled privilege.

By contrast, in the European social contract with the citizen-migrant citizenship is a veritable ticket to mobility. The right to move and reside in any of the Member States becomes an inherent right of national citizenship, whose safeguarding and protection is entrusted, in the first instance, to the home Member State. The citizen's ability to move elsewhere does not depend on the authorization, whether ex ante or ex post, of another state. It depends on the very nature of the state-citizen relation, and on the framing of mobility as a citizen's freedom. It is this latter aspect that truly transforms the role of the EU sovereign state in respect to

[74] See de Hoon et al. (n 69).

mobility from that of border guard and monopolist to that of agent for the citizen's freedom.

This state's agency however is not only targeted to the citizen-migrants. The social contract with the citizen-migrant has, to maintain contract terminology, a further party in the citizen-settler, and a third-party beneficiary in the non-citizen migrant. What expectations and duties in respect to these latter two categories would be agreed to then in an initial situation of equality in which movement is a protected freedom but no one knows yet whether their place in the state will be that of citizen-migrants, citizen-settlers, or non-citizen migrants?

4. The citizen-settler and non-dominating free movement

The literature that has looked at free movement from the perspective of those this article calls the citizen-settlers tends to highlight a contrast of interests between the migrant and the non-migrant among the citizens. In accommodating the interests of intra-EU migrants, the argument from the relevant perspective goes, free movement diminishes those of citizen-settlers. This is an argument that has different facets and several possible ramifications. From a first legal facet, the argument has led to treating the settlers as 'outsiders' to EU free movement law: reversely discriminated in their own states in comparison to the migrants, and falling out, bar for exceptional circumstances, of the protective

umbrella of supranational citizenship.[75] From a second critical facet, the argument frames the migrant as the 'atomized individual' par excellence, a self-centered citizen that in the twists and turns of EU integration has lost the sense of commitment to a community of belonging.[76] This facet of the argument echoes a negative conception of cosmopolitanism in the EU arena, whereby the cosmopolitan citizen is an unattached and indifferent one. At the extreme, he is a 'citizen of nowhere' who does not recognize any community as his own and does not feel a sense of obligation to any.[77] This self-centered citizen-migrant, turning to yet another facet of the argument, threatens the citizen-settler by eroding the cohesiveness of their communities and by forcing open the logics of boundedness that govern redistribution within those communities.[78] Here the argument echoes the

[75] See S Iglesias Sánchez, 'A Citizenship Right to Stay? The Right Not to Move in a Union Based on Free Movement' in Kochenov (ed) (n 13), 371; A Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe' 35 (2008) Legal Issues of Economic Integration 43; M van den Brink, 'A Typology of Reverse Discrimination in EU Citizenship Law 2 (2023) European Law Open 57.

[76] See in this sense A Somek, 'Europe: Political not Cosmopolitan' 20 (2014) European Law Journal 142; J.H.H. Weiler, 'Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy' 12 (2014) International Journal of Constitutional Law 94.

[77] For an overview of the argument in this sense, see Ypi (n 22) 13-14.

[78] In this sense, Agustín José Menéndez, 'Which Citizenship? Whose Europe? - The Many Paradoxes of European Citizenship' 15 (2014) German Law Journal 907; M Everson, 'A Citizenship in Movement' 15 (2014) German Law Journal 965.

communitarian and liberal nationalist perspective in the debate across philosophy and political theory on whether borders should be open or closed: whether from a redistributive or democratic perspective, free movement, in loosening the bonds of national belonging, ultimately threatens national communities in their efforts at self-determination.[79]

The republican intergovernmental and the demoicratic accounts of the EU share in the concerns expressed from this latter perspective. Borrowing Rainer Bauböck's terminology, Bellamy warns of the need to ensure that free movement respects the 'circumstances of citizenship', that is 'the existing world of bounded polities within which issues of political membership arise'.[80] Nicolaïdis refers to the difficulty of getting mutual recognition right in a space of free movement that is 'fundamentally

[79] For the communitarian position in that debate, M Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (Basic Books 1983); for the liberal nationalist position, D Miller, 'Immigration: the Case for Limits', in A I Cohen and C H Wellman (eds) *Contemporary Debates in Applied Ethics* (Wiley, 2004), 363-375. This is an argument that echoes also in the republican intergovernmental and demoicratic account. Nicolaïdis, 'European Demoicracy' (n 6) 356. Bellamy, *A Republican Europe of State* (n 6), 152.

[80] Bellamy, *A Republican Europe of State* (n 6), 153. Also see R Bauböck, 'Morphing the Demos into the Right Shape. Normative Principles for Enfranchising Resident Aliens and Expatriate Citizens' 22/5 (2015) Democratization 820, 823. Also see Rawls (n 36), 126-7 (on the circumstances of justice).

defined by juxtaposed places, places with boundaries which are altogether political, jurisdictional, or regulatory, as well as redistributive'.[81]

Even if empirical studies contradict the idea that intra-EU migrants pose a threat to recipient societies,[82] the perception of the citizen-settler as left-behind, and the growing suspicion towards the citizen-migrant, have fuelled a backlash against free movement.[83] Politically, this has had a central outlet in the Brexit process, but can also be related to the nationalist and populist turn of the liberal state in Europe.[84] In the scholarly response, this has prompted the justification of a conditional vision of free movement, whereby the latter must be subject to clear limits and

[81] Nicolaïdis, 'Mutual Recognition: Promise and Denial' (n 23), 6-7.

[82] See C Dustmann and T Frattini, 'The Fiscal Effects of Immigration to the UK' 124 (2014) Economic Journal 593; E Recchi and A Favell, *Pioneers of European Integration-Citizenship and Mobility in the EU* (Edward Elgar 2009).

[83] See S Danaj and I Wagner, 'Beware of the "Poverty Migrant": Media Discourses on EU Labour Migration and the Welfare State in Germany and the UK' (2021) 67 Zeitschrift für Sozial Reform 1; S Vasilopoulou and L Talving, 'Opportunity or Threat? Public Attitudes towards EU Freedom of Movement' 26 (2019) Journal of European Public Policy 805.

[84] On this see, B Bugaric, 'The Two Faces of Populism: Between Authoritarian and Democratic Populism' 20 (2019) German Law Journal 390; M Wilkinson, 'Authoritarian Liberalism and the Transformation of Modern Europe' (OUP 2021).

requirements, and it has encouraged a certain disenchanted view of the role of free movement in the context of the project of Union citizenship.[85]

The republican intergovernmental and demoicratic accounts recognize and endorse the need to subject free movement to limits in the interest of the citizen-settlers and their bounded communities.[86] These limits are mostly conceived as limits to the duties of mutual recognition of host Member States, and as limits that descend from agreements reached among the representatives of the Member States at the supranational level.[87] Neither account interrogates in depth the duties of home Member States to the citizen-settlers or the terms of the relation between citizen-migrants and citizen-settlers. Nicolaïdis clearly acknowledges the issue – she sees the EU as 'a contingent, fluid, and contested contract between nomads and settlers, between the logic of space and the logic of place'.[88]

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[85] See Nic Shuibne (n 66); C Barnard & S Fraser Butlin, 'Free movement v. Fair Movement: Brexit and Managed Migration' 55 (2018) Common Market Law Review 203; G Davies, 'European Union Citizenship and the Sorting of Europe' 43 (2021) Journal of European Integration 49. Also see S Seubert, 'Shifting Boundaries of Membership: The Politicisation of Free Movement as a Challenge for EU citizenship' 26 (2019) European Law Journal 48.

[86] Bellamy, *A Republican Europe of State* (n 6), 163-168; also see Nicolaïdis 'European Demoicracy' (n 6), 357 (in the sense that the project of integration relies not on pursuing an ideal, such as free movement, to its extreme, but on an 'ethic of fanatic moderation).

[87] Bellamy, *A Republican Europe of State* (n 6), 156.

[88] Nicolaïdis, 'Mutual Recognition: Promise and Denial' (n 23), 6.

However she does not elaborate on what this contract requires within the domestic polity of each Member State. Bellamy goes one step further in referring to the duty of the Member States to secure a condition of non-domination both within and between their peoples.[89]

This idea of non-domination resonates also from the social contract perspective. In an initial position where movement is free and no one knew whether their place of citizenship would be that of settlers or that of migrants, everyone would agree that each class ought to be free from domination on the part of the other. But what does non-domination concretely require on the part of the state, and on the part of the citizens?

Seen through the republican lens of non-domination, freedom requires non-subjection to arbitrary alien control.[90] This is a more demanding conception of freedom than the liberal one based on non-interference. If freedom of movement from a non-interference perspective requires both a positive right to move and a negative right not to move,[91] from a non-dominating perspective it must go beyond this positive and

[89] Bellamy, *A Republican Europe of State* (n 6), 21.

[90] Phillip Pettit, *Republicanism: A Theory of Freedom and Government* (OUP 1999), 26-27.

[91] On the relation between freedom and rights see L Wenar, 'Rights', *The Stanford Encyclopedia of Philosophy* (Spring 2023 Edition), https://plato.stanford.edu/archives/spr2023/entries/rights/ accessed 5 August 2023. For an earlier conceptualization of the right not to move, see Iglesias Sánchez (n 75).

negative aspect.[92] One can be free to enjoy his rights and interests without interference, but still be subject to domination if the availability of those interests depends on the arbitrary will of another.[93] Being free, from a non-dominating perspective, means indeed not 'being subject to the potentially capricious will or the potentially idiosyncratic judgement of another'.[94] This may appear too demanding of a conception to inform the relation between the citizen-settlers and the citizen-migrants. The typical relation of domination is that binding the master and the slave.[95] The concept thus requires some adaptation. It is intended here in the sense that neither group ought to be able to acquire a position of legal or political dominance enabling it, through abuse of that dominance, to displace the interests of the other side. Thus intended non-domination places obligations both on the home Member State that is the agent for both classes of citizens, and on the citizens themselves. Home Member States have to ensure that free

[92] See Pettit (n 90) 17-19; I Berlin, 'Two Concepts of Liberty' in I Berlin, *Liberty* (Henry Hardy ed, 2nd ed, OUP 2002) 166; I Carter, 'Positive and Negative Liberty', *The Stanford Encyclopedia of Philosophy* (Spring 2022 Edition) https://plato.stanford.edu/archives/spr2022/entries/liberty-positive-negative/ accessed 5 August 2023.

[93] See Q Skinner, 'Rethinking Political Liberty' 61 (2006) History Workshop Journal 156, 157; also P Pettit, 'Keeping Republican Freedom Simple: On a Difference with Quentin Skinner' 30 (2002) Political Theory 339, 341-2.

[94] Pettit (n 90), 5.

[95] Bellamy, *A Republican Europe of State* (n 6), 62.

movement is for all citizens a free choice. Free movement must be on the one hand unimpeded and untaxed, in line with the Treaty-based obligations that have been discussed earlier. But on the other hand the home Member State must be a hospitable place where the citizen can find fulfilment of his or her educational, personal and professional aspirations. Only in this way the choice to inhabit the settler or the migrant side of the citizen divide can be a genuinely free one. In concrete terms, this requires three types of duties on the part of home Member States. First, it must mitigate the factors that can prompt movement as a forced choice. For instance, it must correct shortfalls in the social assistance and healthcare systems. To be clear, this does not mean eliminating all incentives to move on grounds of living in a Member State with a different social security or healthcare provision system. Citizens may genuinely have preferences for different recipes of state and service organization and may legitimately wish to contribute to a differently organized welfare system. This is an inherent consequence of open borders among Member States who retain autonomy in their fiscal and organizational choices. But home Member States ought to fix the faults in their systems of social and healthcare provision that rather than prompting movement out of choice, force it out of concern for not being able to access the services one needs at home. Second, home Member States must support the active exercise of free movement resulting of the un-interfered choice to pursue personal or professional opportunities in other Member States. This is in good part through the discharge of the

various enabling obligations identifies in the case law and examined earlier in this article. Third, where movement is prompted by disagreement on divisive ethical issues, for instance access to abortion, euthanasia, surrogacy, home Member States must support the choice of the movers but also promote democratic confrontation on relevant issues so that they be addressed not only through the exit of the citizen-migrants, but also through the voice of both the citizen-settlers and the citizen-migrants.[96]

This very last aspect links the duties of the state and those of the citizens. Non-domination between citizen-settlers and citizen-migrants requires that both groups treat free movement as a collective good and exercise their rights of participation with a view to protecting both its negative and positive side. Where the choices of citizen-migrants reflect societal divisions on ethical or economic choices, free movement creates an opportunity for debate that both citizen-settlers and citizen-migrants ought to embrace.[97]

On the part of the citizen-migrants, the non-dominating coexistence of citizen-migrants and citizen-settlers requires in addition that they embrace their duties to the citizen-settlers of the Member State in which they live as non-migrant citizens. The idea that a non-dominating conception of free movement requires duties on the part of the migrants is

[96] On the different relative value of voice and exit for citizens, as opposed to consumers, see A Somek, *The Cosmopolitan Constitution* (Oxford University Press, 2014), 281.

[97] See in this sense, Nicolaïdis, 'Mutual Recognition: Promise and Denial' (n 23), 32.

not new, and is in part intuitive.[98] Relevant duties, from a non-domination perspective, include not only the duty to pay taxes and respect the laws, but also a softer duty to respect the boundedness of the host community, through for instance approaching its language and culture with curiosity, and the interests of its citizen-settlers with consideration and respect. This latter duty has no firm legal source. It is rather an expectation inherent in the nature of European free movement as a right that enables citizens to articulate their lives across different bounded 'places',[99] on the understanding however that they remain committed to preserve these places' distinct identities, and political and social systems.

Exploring the terms of the social contract between citizen-settlers and citizen-migrants ultimately advances the republican intergovernmental and demoicratic accounts in three respects. First, it shifts the focus of attention from duties of host Member States to those of home Member States and their citizens, and from limits to free movement implemented at the supranational level to protections and safeguards for citizen-migrants and citizen-settlers negotiated and enacted at the domestic level. Second, it adds clarity to the demands of non-domination within the domestic frame of each Member State. Third, it begins to shed light on a peculiar dynamic for the internalization of the costs and benefits of being part of interconnected peoples. This dynamic relies on the indirect effects of

[98] Bellamy, *A Republican Europe of State* (n 6), 154.

[99] Nicolaïdis, 'Mutual Recognition: Promise and Denial' (n 23), 6.

advancing one's own interests: in ensuring that movement remains an authentic choice for its own citizens, each Member State also acts indirectly for the benefit of other Member States. Maintaining free movement as a non-compelled choice entails indeed removing the incentives for benefit-driven or otherwise mass movement of the type that could bring a burden to the polities of other Member States. These indirect effects of advancing the interests of one's own are even more prominent when one applies this logic to the duties of Member States as host to non-citizen migrants.

5. From the citizen-migrant to the migrant as citizen

The duties that host Member States owe to non-citizen migrants are an important test ground for the question of how free movement changes the role of the sovereign state. They are in particular an important test ground to understand to what extent free movement spins that role in a cosmopolitan direction. Non-citizen migrants are indeed 'others' to the sovereign state, and outsiders to the boundaries of the social contract.

Free movement splits this class of 'others' to whom a Member State may owe responsibilities as host into two: second-country nationals, that is nationals of another Member State who as Union citizens benefit from free movement rights; and third-country nationals, nationals of a country that is not a member of the EU.

The fundamental duty that host Member States owe to second country nationals in EU law is a duty of non-discrimination on the basis of

nationality. This imperative of equal treatment regardless of the Member State of belonging is a general principle of EU law and governs all its areas of application.[100] In the context of the right to free movement, it grounds the entitlements of migrants in a host Member State. For migrant workers, it protects the right to pursue opportunities of employment in a host Member State on the same terms as nationals and to benefit from the same work conditions.[101] To migrant citizens more broadly who lawfully reside in a Member State other than their own it guarantees equal treatment in respect to a wide range of benefits and services.[102]

Non-discrimination on the basis of nationality has inspired an early residence-focused account of the rights of second country nationals in the EU. In the words of Gareth Davies, residence was to be the 'new nationality

[100] Art 18 TFEU; for a recent take on its scope see case C-581/18 *RB* ECLI:EU:C:2020:453. For a reflection on the role of the principle of equal treatment in the context of free movement see N Nic Shuibne 'Reconnecting Free Movement of Workers and Equal Treatment in an Unequal Europe' 43 (2018) European Law Review 477.

[101] Parliament and Council Regulation (EU) 492/2011 on freedom of movement for workers within the Union [2011] OJ L141/1, art 7.

[102] Parliament and Council Directive (EC) 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77, art 24.

in the EU'.[103] The intra-EU migrant is entitled to live in a citizen-like fashion 'anywhere he hangs his hat' within the Union, accessing the same benefits and services that are available to citizens, and also continuing to receive the benefits and to practice the identity of a Member State of belonging. Over the years, this residence model has gradually ceded ground to an integration one. Citizen-like treatment for the second country national in a host Member State presupposes the establishment of a genuine relation of belonging within that state, proven through length of residence, family life and overall social integration. The European Court of Justice has been looking for genuine links to a host Member State as a prerequisite for the equal treatment of migrant Union citizens for a long time.[104] But in its most recent case law, the loose search for those links has ripened into a strictly conditional reading of the very right to reside in a host Member State.[105] Widely read as a 'regressive phase' in the Court's treatment of Union citizenship, this has strengthened an integration-based understanding of the

[103] G T Davies, 'Any Place I Hang my Hat or Residence is the New Nationality' 11 (2005) European Law Journal 43.

[104] See e.g. case C-138/02 *Collins* ECLI:EU:C:2004:172; case C-209/03 *Bidar* ECLI:EU:C:2005:169.

[105] The relevant right is conditional in light of art.7 of Directive 2004/38. See e.g. case C-333/13 *Dano* ECLI:EU:C:2014:2358.

position of second country nationals in the host Member State.[106] In line with a reading of art. 21 of the Treaty on the Functioning of the European Union (TFEU) on the right of citizens to move and reside as a norm intended to 'promote the gradual integration of the Union citizen concerned in the society of the host Member State',[107] the second country national can claim citizen-like treatment where not only he hangs his hat but where he also organises his wardrobe.

Duties that host Member States owe to third country nationals under free movement law are more limited. They are aimed at protecting rights that are not autonomously held by the third country national, but rather derive from the exercise of free movement on the part of a Union citizen family member.[108] The rationale for their protection is that the Union citizen would otherwise be discouraged from exercising his or her right to

[106] See e.g. S Coutts 'The Absence of Integration and the Responsabilisation of the Union Citizen' 3 (2018) European Papers 763; E Spaventa, 'What is Left of Union Citizenship?' in *Inclusion and Exclusion in the European Union – Collected Papers*, (Amsterdam Law School Research Paper 2016/34) <Inclusion and Exclusion in the European Union - Collected Papers by Annette Schrauwen, Christina Eckes, Maria Weimer, Jean-François Durieux, Sandra Mantu, Paul Minderhoud, Eleanor Spaventa, Bart Vanhercke, Jonathan Zeitlin :: SSRN> accessed 5 August 2023, 24.

[107] On the 'integration' rationale of art. 21 TFEU see case C-165/16 *Lounes* ECLI:EU:C:2017:862, paras 56 and 58.

[108] Case C-40/11, Yoshikazu Iida v Stadt Ulm, ECLI:EU:C:2012:691, para 67.

free movement.[109] Even when third country nationals, in some exceptional situations, are protected under EU law even in the absence of an exercise of free movement, this is justified in the case law by the intrinsic connection between the situation at hand and free movement.[110] Third country nationals are otherwise extraneous to the benefits of free movement and subject to a mixture of national and EU immigration law.[111] Through upgrading the condition of second country nationals in host Member States, free movement has thus the perverse effect of drawing an even larger wedge between the condition of the citizen and that of the third country national other. [112] If free movement is part of the toolset through which EU Member States ought to embrace cosmopolitan values of regard for others, it appears in this respect an imperfect tool at best. Its association to citizenship has rather highlighted the bounded character of the European imperative of no-othering, and thus the limited reach of European cosmopolitanism.

[109] Ibid., para 68.

[110] Ibid., paras 71-72.

[111] See TFEU, art. 79. Also see Council Directive (EC) 2003/109 concerning the status of third-country nationals who are long-term residents [2003] OJ L16/44.

[112] The discrepancy of status between the two groups gave rise to the discouse of 'fortress Europe' at the turn of the millennium. See Andrew Geddes, *Immigration and European Integration – Towards Fortress Europe* (Manchester University Press, 2008).

The demoicratic and intergovernmental accounts do little to clear the record of European cosmopolitanism in this respect. The norm of other-regardingness to which they point has undefined scope and uncertain dynamics. Bellamy explicitly limits the reach of other-regardingness to second country nationals, suggesting that in an association of sovereign states the associational duties of states translate into duties of mutual concern and respect towards each other's citizens.[113] Nicolaïdis broadens the lens. Recognition in a demoicracy 'implies that when a country takes its decision democratically, enough people remind everyone else of the obligation to ensure that 'foreign' identities and their interests are taken into account'.[114] Neither account however fully explains the source or operation of these obligations of mutual concern, whether towards second- or third-country national others.

Reconsidering these obligations from the perspective of the social contract with the citizen-migrant points once again to the indirect effect of self-interested behaviour. As a preliminary step, one has to question here how the non-citizen migrant, the second country national one for present purposes, enters this social contract in the first place. Why would anyone in the original position be concerned about what justice requires in respect to non-citizen migrants? The answer is that they enter the social contract, to some extent, as a lateral party. The citizen-migrant in a given Member

[113] Bellamy, *A Republican Europe of State* (n 6), 163.

[114] Nicolaïdis, 'Mutual Recognition: Promise and Denial' (n 23), 36.

State is necessarily a non-migrant citizen in another Member State. The non-citizen migrant is in other words the alter ego of the citizen-migrant. When a citizen-migrant looks at the incoming non-citizen migrants in his or her own Member State, he or she sees his or her own position in another Member State. In embracing a concern for their position, he or she is indirectly embracing a concern for his or her own position. The position of the non-citizen migrant in a host Member State is ground, from this perspective, in reflexivity. The term reflexivity captures, here, a situation where duties undertaken for the benefit of the other reflect back to advance the position of the one. This reflexivity operates both in respect to citizens, and in respect to Member States.

The citizens, in protecting the interests of the incoming non-citizen migrants, indirectly protect the transnational possibilities of their own citizenship. In treating incoming non-citizen migrants according to the norms of recognition and mutual concern, and in exercising political voice to hold their respective states to account for treating the non-citizen migrants in accordance with the same norms and for internalizing foreign interests in their deliberative processes, citizens act to insure their own possibilities as potential migrants. They act in conformity with the multilateral expectations of a system of open borders in which migration is protected as part of the citizen's experience.

As to the Member States, the reflexivity is between their role as home to citizen- migrants and their role as host to non-citizen migrants.

Their obligations as host to inbound non-citizen migrants can be seen as the flip side of their obligations as home to potential or actual outbound ones. In accommodating nationals of other Member States within its borders, the state protects the status of its own citizen- migrants. It acts in part out of an expectation that other Member States will do the same and accommodate its own nationals. If replicated by all the state participants in the multilateral system of citizens' mobility, this unilateral accommodation of others driven by the expectation of a reflexive benefit is one of the strongest possible guarantees of the implementation of the duties of mutual recognition and concern. In discharging its obligations as host, a Member State fulfils its duties as home. Reflexivity has thus some elements in common with reciprocity: as in the case of reciprocity, state and citizen duties to others are motivated in part by the expectation that another state or its citizens will accommodate the interests of the acting state and its citizens. This expectation is however of a non-binary nature, other than in reciprocity in its traditional meaning: the expectation of a benefit in return is not directly addressed to the state whose non-citizen migrants are being hosted or to its citizens. It is rather the shared nature of citizenship in a system of free movement as embracing both citizen-settlers and citizen-migrants, and the shared role of the state in this same system as agent of both groups that justifies this expectation.[115]

[115] See Strumia (n 48), 685.

The reflexivity argument faces the objection that it only captures the interests of the citizen-migrants, and of the Member States as agents for the citizen-migrants. However in the original position in which citizen-settlers and citizen-migrants would agree on the principles of justice governing a system of free movement, including the reflexivity principle, no one knows yet whether their destiny is that of citizen-settlers or citizen-migrants, and whether that of Member States that are primarily home to citizen-migrants, primarily home to citizen-settlers, or primarily host to non-migrant citizens. Not only, in the social contract described in these pages, and based on a conception of movement as free and non-dominating, freedom to move belongs to the citizen-settler as to the citizen-migrant. It is part of the citizenship heritage of both. The decision to exercise it in a negative or positive way is a contingent one, and one that can change along the course of a citizen's life. Hence all parties to the contract share an interest in preserving the system that it governs, and its functionality.

The reflexive perspective on the obligations of both citizens and Member States does not necessarily alter the quality of obligations owed to second country national non-citizen migrants. These remain state obligations to grant them entry, residence and equal treatment. And citizens' obligations to hold the state to account accordingly. Reflexivity however adds strength to the rationale for their discharge on the part of both states and citizens. The discharge of relevant duties that tends to be described as a burden on the shoulders of citizens and states in political

narratives is recast under a partly self-serving light. Reflexive protection of the citizen's status as a potential migrant comes to complement residence and integration as a rationale for the accommodation of second country nationals in a host Member State.

But what about third country national migrants, who as seen above, are not party to this reframed social contract, if not in a marginal manner as family members of Union citizens. Can the reflexive perspective on the rights and status of non-citizens also benefit their condition? In this respect, the argument could at first sight cut both ways. From a first angle, reflexivity may appear to link the status of the other even more firmly to the condition of the citizen. The migrant other is owed duties to the extent that a correspondence can be drawn between his condition and that of the citizen. From this perspective the argument might appear to reinforce the wedge that already exists between the status of Union citizens and the status of third country nationals.[116] However reflexivity is distinct from reciprocity. Reciprocity justifies duties owed to second country national migrant others on the basis that they are also nationals of an EU Member State. Host Member States accommodate second country nationals out of a reciprocal expectation that their home Member State will offer the same treatment to their own citizens. As nationality is the commonality between first and second country nationals on which the reciprocity argument

[116] See Goldner Lang (n 9).

ultimately draws, it singles out third country nationals. Reflexivity instead justifies duties to migrant others on the basis that their experience of migration reflects a possible experience of the citizen. The status of migrants, actual or potential, is the commonality between citizens and others on which reflexivity draws. The reflexivity logic thus embraces third country nationals. The condition of the migrant, or more precisely the condition of being a citizen in the exercise of migration, is one in which third country nationals at the doors of Europe share.

Some have envisioned or auspicated a spill-over from the dynamics of free movement to those of migration.[117] That spill-over has however so far not occurred. On the contrary, a reverse spill-over of narratives of resistance and hostility to migration has rather occurred from the domain of immigration from third countries to that of intra-EU free movement.[118] The reflexivity argument lights a potential, disregarded, alternative path towards a positive spill-over. This path passes through the enlarging of the sphere of the citizen through the possibility of migration. Embracing the opportunities of the citizen- migrant requires indeed, by reflexion, adopting an aptitude of acceptance towards the claims of the migrant other.

[117] D. Thym, 'EU Migration Policy and its Constitutional Rationale: a Cosmopolitan Outlook' 50 (2013) Common Market Law Review 709.

[118] As is well known, those narratives played a leading role, for instance, in the debate surrounding Brexit.

This puzzle of duties that free movement engenders, directed to others for the benefit of the state and citizen's selves, ultimately frames the state cosmopolitan duties from the internal perspective of the citizen, and of the citizen-state relation.[119] Not in the sense, as the statist cosmopolitan position would have it, that the state's political community is the agent of a broader cosmopolitan project.[120] And not in the sense, as a certain vision of internal cosmopolitanism purports, that life is delinked from place and withdrawn from the public.[121] Rather in the sense that the 'unfinished moral business of the sovereign state' comes to be finished from within.[122] It is to advance the interests of the citizens in a reality of interconnected sovereigns that the state has to cater to the 'other'. And free movement is the very tool through which the state embraces this cosmopolitan role from within. The addition to the findings of the republican intergovernmental and demoicratic account is a simple but powerful one: the duties that implement the European imperative of no-othering, mutual recognition, mutual concern, and non-domination begin within the very relation between the state and the citizen. They are ground in the very duty of the former to protect the latter, in exchange for his loyalty, in concretely

[119] For a further take on this internal perspective see Strumia (n 48).
[120] For the argument in this sense see L Ypi, 'Statist Cosmopolitanism' 16 (2008) Journal of Political Philosophy 48, 69-71; also see in general Ypi (n 22).

[121] Somek (n 96), 271.

[122] See A Linklater 'Cosmopolitan Citizenship' 2 (1998) Citizenship Studies 23, 24.

benefiting from the canvas of options that he or she has available in a system of free movement.

6. Conclusion

The social contract with the citizen-migrant, as explored in these pages, ultimately adds but a simple qualification to the relation between state and citizen. The qualification reads more or less like this: 'the citizen is not necessarily settled within the state'. No good lawyer would be fooled. An apparently unremarkable edit can subvert an entire contractual relation. In this case, through that edit, citizenship that was the insignia of settlement becomes the beacon of mobility as freedom. This does not mean that only migrants have rights, or that they owe no duty to the settlers. And it does not mean that the rights of the settlers take precedence over those of the migrants. It means that citizenship can be lived as a sedentary, or as a migrant condition. Both conditions are legitimate and the choice between the two should remain open. This novel understanding of the relation between citizenship and mobility has two important implications. The first is in respect to the role of free movement in the context of the cosmopolitan turn of the European state. The second is in respect to the nature of this cosmopolitan turn.

In the first respect, free movement, in reshuffling the relation between citizenship and mobility, becomes the very prompt for the European state to embrace a cosmopolitan commitment. It stretches the state-citizen relation extraterritorially, bringing within its purview, by

reflection, several classes of 'others'. It gives a cosmopolitan spin to both the condition of the citizen and the role of the state. As to the citizen, it offers a lens on what it means for the citizen to be 'globally concerned'.[123] As to the state, free movement contributes to clarifying its cosmopolitan role by linking, through a norm of reflexive recognition, its obligations to the non-citizen migrant to those owed to the citizen-migrant.

In the second respect, free movement commits the European state to a kind of cosmopolitanism-from-within: the embracing of a cosmopolitan ethos of mutual concern and respect comes in part from the reconfiguration of the very internal relation between the state and the citizen. Duties to others are a corollary of the novel duties of agency that take shape in that relation.

This cosmopolitanism from within entails a promise and a risk. The promise is that cosmopolitanism, in this inside out version, starts from a premise similar to that of nationalism and statism: citizens first. A shared premise may not suffice to win the nationalist and statist to the cause of cosmopolitanism, but it may help engage them in dialogue. Grounding freedom of movement in that very premise inspires a reconsideration of the contrast between the condition of the settlers and the condition of the

[123] D Miller, 'The Idea of Global Citizenship' in S R Ben-Porath and R M. Smith (eds) Varieties of Sovereignty and Citizenship (University of Pennsylvania Press 2013), 27-243, 243.

migrants as historical, contingent, situational, bringing reflexivity in yet another direction.

The risk is that a vision of the other that starts from a reflection of the self could reframe the no-othering imperative in utilitarian terms, ultimately corrupting the moral norm of equal concern that lies at the basis of cosmopolitanism. That risk would concretize if reflexive recognition boiled down to a further endorsement of the self-centered citizen of Europe, whose autonomy is enhanced by the process of integration at the expense of the values of community and belonging, and whose political engagement is replaced by a 'radically private life' completely withdrawn from a logic of place.[124] But cosmopolitanism from within starts precisely from place. It is premised not only on the equal moral worth of individuals, but also on the equal worth of places. It follows that each national place is not only a point of station, but also potentially a point of transition, and what happens in one place is liable to have implications for what happens in the others. In the context of this fluidity and interdependence, the citizen turns to the other belonging to a different national 'place' not just because it is in his or her self-interest and not because he or she lives as a foreigner at home.[125] Rather, the citizen turns to the other as he understands that in order to fully live his citizen's condition he has to be able to empathize with the foreigner. In a society in which mobility is a way to live the citizen's

[124] Weiler (n 76); Somek (n 76); Somek (n 96), 262 and 271-4.

[125] See Somek (n 96), 244-6.

condition, the status of the other becomes a very aspect of the citizen's status.

Ultimately the social contract between the state and the citizen-migrant challenges the unholy alliance between negative cosmopolitanism and exalted statism. It shows a way to build a more fruitful collaboration between the cosmopolitan and the statist ideal. This collaboration endorses neither the populist story that depicts the state as the citizen's shield against the foreigner, nor the various strands of post- and supra-nationalism that would sever or weaken the national dimension of the state-citizen relation. It relies on a different vision of national citizenship and of the state. In this vision, citizenship, like the image of a passer-by in the hall of mirrors at Versailles palace, appears enmeshed with multiple other ones.[126] To each of those other citizenships it owes something, and from each of them it gains added strength and purpose. As to the state, its agency for one those citizenships ultimately mirrors into its agency for the other ones.

[126] For the idea that European citizenship enmeshes national ones see Nicolaïdis, 'European Demoicracy' (n 3) 364.