

Freedom of movement and non-discrimination on grounds of **nationality** comprise two of the most distinctive and controversial upshots of European integration. Both elements form central aspects of Union **citizenship**. Yet, despite citizenship of the Union being formally established so as to be ‘**additional to and not replace national citizenship**’ (TFEU Art. 20; TEU Art. 9), these core elements of Union citizenship have been regarded as being in tension with national citizenship. Indeed, in 2001, the **European Court of Justice (ECJ)** famously declared in *Grzelczyk* how ‘Union Citizenship is destined to be the fundamental status of nationals of the member states’ rather than merely supplementing their status as national citizens. This view has been routinely repeated in subsequent Court of Justice rulings involving Union **citizenship rights**.

From a **normative perspective**, how should we conceive of the relationship between European citizenship and national citizenship? Is the Treaty provision concerning the primacy of national citizenship defensible, or should we think of the *Grzelczyk* and subsequent rulings concerning the eventual primacy of Union over national citizenship as a positive development? The answer to these questions can have very significant consequences pertaining to the proper place of nation-states in granting rights to citizens within the context of a **supranational polity**. Perhaps most contentiously, it determines who decides what **welfare rights** EU citizens should have access to when they move to another country. If EU citizenship takes priority over national citizenship, then member states cede the right to treat EU non-nationals differently to nationals in terms of **welfare access**.

We believe that **ambitions** to make EU citizenship the fundamental status of member state nationals goes too far in a supranational direction. EU cooperation between states should be seen as a supplement to **cooperation** between citizens at the national level. The former should not replace or take priority over the latter. In this regard, member states ought to retain at least some rights to discriminate between nationals and non-nationals in terms of welfare access. But they should do so on a **principled** basis rooted in the **normative foundations** of the scheme of cooperation constituted at the national level.

Social Contracts

Along with many **political philosophers**, we think of the legitimacy of political systems in terms of principles that all members of the system can be reasonably expected to accept. These principles constitute a “**social contract**” between members of a political community

in terms of how power, rights and resources are distributed.

Historically, the national social contract is most familiar. By virtue of their common **participation** in a scheme of socioeconomic and political cooperation, national citizens are thought to have special duties to one another. This involves ensuring that they each have the rights and resources required to secure their status as free and equal citizens within the **society**.

In a **globalising world**, however, the national social contract has a number of shortcomings. When it comes to sustainability, nation-states are much less able to reap the benefits of their respective schemes of cooperation, and **protect** themselves from the negative **externalities** of globalisation, unless they engage in dense forms of cooperation with one another. In terms of **legitimacy**, the increasing **mobility** of citizens raises questions of justifiability concerning the **exclusion** of non-nationals from the scheme of cooperation constituted by any given nation-state.

In principle, therefore, an institution like the EU is to be welcomed. Through **common law**, it has the potential to offer an **international social contract** within which member states can pursue their internal schemes of cooperation, while preventing forms of arbitrary exclusion based on nationality.

The key questions then become, **what sort of social contract should the EU be based upon, and what counts as an arbitrary exclusion of non-national citizens on this scheme of cooperation?**

Competing Visions of the EU

One set of **visions** for the EU believe that this political system, much like the nation-state, should be built upon a social contract between individuals.

On accounts of this kind, often called transnational or supranational, restrictions of **free movement** and other protectionist regulations that stymie the development of transnational **networks** (which may rely upon and seek to promote the flow of goods, information, people, etc.) are inconsistent with the idea of individuals as subjects of equal **moral worth**. As such, EU citizens’ rights should not be affected by or secondary to national citizenship. Rather, they should attach to all individuals who may claim them simply through exercising a basic right to move and live with others and participate in supporting and re-constructing the

community to which they have associated themselves.

These transformative accounts welcome large parts of the ECJ case law on citizenship, which has sought to expand the circumstances in which EU citizens can **access social and economic rights across the Union**, regardless of their willingness and ability to contribute to the national scheme of cooperation. In our view, this extension of EU citizenship puts it in **tension** with the national social contract, which is premised upon the socioeconomic contributions of its residents. Put differently, the transnational perspective and the case law that it supports has been overly focused on attempting to prevent arbitrary exclusions by giving full priority to EU citizenship. This focus, however, fails to consider the possibility of arbitrary inclusions in the national scheme of cooperation.

In place of a social contract between individuals, we believe that the EU is better conceived as a social contract between states and citizens. This social contract is referred to as a “demoicracy” (i.e. a democracy of multiple demoi or peoples). On this account, EU citizens should be entitled to the benefits of free movement and the **legal protections** of transnational citizenship. However, these **benefits** run up against a limit: they should be consistent with the normative basis of the national social contract.

Stakeholders, Free Movement and Welfare Rights

To borrow a concept from the political theorist, **Rainer Bauböck**, we believe that **stakeholdership** is the appropriate criterion for navigating between arbitrary exclusions and arbitrary inclusions on a demoicratic conception of the EU. The claim to being a stakeholder in a given political community belongs to those whose freedom and rights are inherently linked to the collective self-government and flourishing of this polity over time. While the stakeholder status will typically apply to citizens, it also allows for resident non-citizens to eventually become stakeholders by joining the national citizenship regime.

A state may be justified in **withholding** certain rights from non-citizen residents, such as the right to vote in national elections, until they have fulfilled the stakeholder conditions of citizenship. However, one should not require full stakeholdership to be **entitled** to welfare rights and thereby protected from the worst consequences of unemployment. Such a restriction would make freedom of movement a highly unattractive prospect, except perhaps for those with the most **secure** and well-paying jobs.

Instead, mobile EU citizens should be entitled to access welfare rights on equal terms with

nationals when they have taken on what we call a “**perspective on stakeholder**ship”. Having a perspective on stakeholder ship does not mean that that a non-citizen resident will ultimately commit themselves to the community long-term, but that they have **demonstrated a willingness and capacity to contribute** to the socioeconomic fabric of the receiving state. The ability of non-citizen residents to maintain a relatively **consistent employment status** over a certain period will frequently be the best means of determining whether or not they have adopted an appropriate perspective on stakeholder ship.

What it **costs** to run the **social welfare regime** in question would seem to be the most relevant, and non-arbitrary, **metric** for determining what should be the length of this minimum. That is to say, since different member states will have more or less generous welfare regimes that are more or less expensive to run, member states should have a significant **degree of flexibility** within the context of EU law to determine how deep a non-citizen residents’ perspective on stakeholder ship must be if they are to be granted equivalent access to social welfare provisions as citizens. Although this period should certainly not be too long, member states may be justified in not making it too short either. Not only does it take some time for a second country national to make significant socioeconomic contributions, and thereby offset his potential **burden on the state** in the event of unemployment, it also takes time for such individuals to demonstrate their willingness and ability to be consistent and active contributors to the labour force.

There is evidence that arguments of this kind are holding increasing sway with the ECJ. The much discussed **Dano case**, where the Court ruled that second-country nationals who are not working or pursuing work in their country of residence may be excluded from **non-contributory social benefits**, is the clearest example of a turn-around in the ECJ’s rather consistent attempt to hitherto expand the scope of European citizenship and place it in tension with national citizenship regimes.

Our account does not preclude the possibility that shifting some kind of welfare competences to the EU-level, such as instituting an **unconditional European-wide basic income**, would be desirable to ensure a minimum standard of living for all Europeans regardless of residence. However, even in this scenario, any further welfare rights must be subject to the stakeholder criterion that we have outlined.

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The case for welfare restrictions in an EU “demoicracy”
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