Solidarity Decomposed

Being and time in European citizenship

Alexander Somek

College of Law, University of Iowa

Alexander Somek

Solidarity decomposed

Being and time in European citizenship*

In this paper, argue that Union citizenship cannot be understood as the elevation of national solidarity, however thinly conceived, to the transnational level. On the contrary, Union citizenship acts on national solidarity, thereby altering its shape. It lends expression to an individualistic view of the political realm. I attempt to explain why owing to the preponderance of this view, national solidarity comes to be perceived as ungenerous and unkind, even in the eyes of its own beneficiaries.

I. The appropriation of an ideal

Solidarity is a nice word. Its use evokes aesthetically pleasing images of tears of compassion, the sharing of bread, a hand reaching out to the needy or of recalcitrant workers standing firmly together. Until up to the mid twentieth century, we used to associate solidarity also with revolutionary acts as a result of which something rotten is brought to a fall, be it a government or a whole social system, giving room for the creation of a kinder and gentler world. The aesthetically enchanted left still enjoys fancying such acts.[1]

---

* I would like to acknowledge gratefully how much I benefited from comments by Steven Legomsky and from discussions with Jonathan Carlson and Doris Witt. As always, my wife served as an indulgent reader. A much shorter German version of this article is to appear in a *Denkschrift,* published by the Austrian Chamber of Workers, commemorating the 50th anniversary of the Treaty of Rome. With regard to the title, I drew inspiration from Stanley Cavell's article "Music discomposed". I need to confess, though, that even after twenty years of repeated efforts at understanding, Cavell's musical aesthetics remains a book sealed with seven seals for me. I do not mind. The title is fabulous.

1. For reasons that I find difficult to understand, the left is now more comfortable to refer to such acts as „Lacanian Acts". See Slavoj Žižek, 'Taking on America', http://www.spiked-online.com/Printable/00000006DA75.htm.

But solidarity is more than a token with a lustrous aura. At least since the French revolution, it has attained the status of a cherished political ideal.[2] But it is also more than a ideal. Solidarity is a legal concept, at any rate, in the case of European Union law.[3]

European Union law's first encounter with solidarity was delicate, to be sure. In fact, it has occasioned in the ECJ repeatedly playing cat and mouse with national legal institutions, such as Member States' health insurance or supplementary pension insurance schemes.[4] Ever since *Poucet and Pistre*[5] the Court

---

2. Indeed, it has made its career originally as "fraternity". For obvious reasons it had to be stripped of its gender.

3. For a useful and more comprehensive overview of the uses of „solidarity" in European Union law (both primary and secondary), see Catherine Barnard, 'EU Citizenship and the Principle of Solidarity' In E. Spaventa & M. Dougan (eds.), *Social Welfare and EU Law* (Oxford: Hart Publishing, 2005) 157-180 at 157-160; 'Solidarity and New Governance in Social Policy' In G. de Búrca & J. Scott (eds.), *Law and New Governance in the EU and the US* (Oxford: Hart Publ., 2006) 153-178.

4. See the conclusion of the discussion of the Court's case law by Hatzopouolos: '[…] [I]t is almost impossible for an entity for an entity involved in the provision of healthcare services to know whether or not it should abide by the [criteria set out for solidarity] until before its case is actually judged by the ECJ." Vassilis Hatzopoulos, 'Health Law and Policy: The Impact of the EU' In G. de Búrca (ed.), *EU Law and the Welfare State. In Search of Solidarity* (Oxford: Oxford University Press, 2005) 111-168 at 157. For a useful introduction, see Tamara Hervey, ‚Social Solidarity: A Buttress Against Internal Market Law' In J. Shaw (ed.), *Social Law and Policy in an Evolving European Union* (Oxford: Hart Publishing, 2000) 31-48; see also Stefano Boni & Pietro Manzini, 'National Social Legislation and EC Antitrust Law' (2001) 24 *World Competition* 239-255; Alexander Winterstein, 'Nailing the Jellyfish: Social Security and Competition Law' (1999) 6 *European Community Law Review* 324-333. For the observation that "social solidarity" now has a "vital Community component" see Michael Dougan & Eleanor Spaventa, "Wish You Weren't Here…'. New Models of Social Solidarity in the European Union' In E. Spaventa & M. Dougan (eds.), *Social Welfare and EU Law* (Oxford: Hart Publ., 2005) 179-218 at 179.

5. See Joined Cases C-159/91 and C-160/91, Poucet and Pistre v AGF and Cancava [1993] ECR I-637.

recognised, in principle, that certain social arrangements, be they negotiated agreements between management and labour[6] or statutory occupational accident insurance schemes, reflect the principle of solidarity provided that they exhibit an appropriate combination of certain elements, such as compulsoriness of membership or wealth transfers across different categories of risk.[7] When and inasmuch as these arrangements are based on solidarity, they are exempted from the application of Article 81 and 82 EC Treaty. Which and how many of the several elements identified by the Court it takes for an arrangement to attain immunity from the application of competition rules is subject to highly contextual determinations.[8]

---

6. See Case C-67/96, Albany v. Stichting Bedrijfspensionenfonds Textielindustrie [1999] ECR I-05751.

7. For a more general observation that solidarity presupposes the foreclosure of exit from certain arrangements in order to attain redistributive objectives, see Maurizio Ferrera, 'Towards an 'Open' Social Citizenship? The New Boundaries of Welfare in the European Union' In G. de Búrca (ed.), *EU Law and the Welfare State. In Search of Solidarity* (Oxford: Oxford University Press, 2005) 11-38 at 20-21, 24.

8. For a case, in which the ECJ found the relevant elements wanting, see Albany, note 6 (a pension fund charged with the management of a supplementary pension scheme set up by a collective agreement concluded between organizations representing employers and workers in a given sector, to which affiliation has been made compulsory by the public authorities for all workers in that sector, is an undertaking within the meaning of Article 85 et seq. of the Treaty); Case C-244/94, Fédération Française des Sociétés d'Assurance, Société Paternelle-Vie, Union des Assurances de Paris-Vie and Caisse d'Assurance et de Prévoyance Mutuelle des Agriculteurs v Ministère de l'Agriculture et de la Pêche [1995] ECR I-4013 (a non-profit-making organization which manages an old-age insurance scheme intended to supplement a basic compulsory scheme, established by law as an optional scheme and operating according to the principle of capitalization in keeping with the rules laid down by the authorities in particular with regard to conditions for membership, contributions and benefits, is an undertaking within the meaning of Article 85 et seq. of the EC Treaty); Case C-309/99, Wouters and others [2002] ECR I-1577 (a regulation concerning partnerships between members of the Bar and other professionals, such as the Samenwerkingsverordening 1993 (1993 regulation on joint profes-

Complexity and niceties aside, in order to get a picture of what the Court appears to have in mind when referring to "solidarity" in this context, one can still look for guidance to the *Sodemare* case where the Court stated that a system of social welfare is based on social solidarity if it

> is designed as a matter of priority to assist those who are in a state of need owing to insufficient family income, total or partial lack of independence or the risk of being marginalized, and only then, within the limits imposed by the capacity of the establishments and resources available, to assist other persons who are, however, required to bear the costs thereof, to an extent commensurate with their financial means, in accordance with scales determined by reference to family income.[9]

Admittedly, this is not as handy and short a definition as the one that was given in the same case by the AG. Social solidarity, he posited, "envisages the inherently uncommercial act of involuntary subsidization of one group by another".[10]

In these said instances, and in others, the Community initially encountered in "solidarity", which was recognised as being "national" in kind,[11] an organising principle that was perceived not to

---

sional activity), adopted by a body such as the Nederlandse Orde van Advocaten (the Bar of the Netherlands), is to be treated as a decision adopted by an association of undertakings within the meaning of Article 85(1) of the Treaty (now Article 81 EC)). For an attempt at reconstructing a general theory from the case law for the conditions under which, for reasons of insufficient solidarity, a scheme is to be considered an undertaking, see Hervey, note 4 at 44-46. For a highly useful discussion of different elements with regard to health insurance funds, see in Hatzopoulos, note 4 at 153-155. But even where legal institutes do not live up to a shifting standard of solidarity they may still be sheltered from competition if exposure to the latter would threaten to obstruct the provisions of services of a general interest. See Albany para. 103-111.

9. See Case C- -70/95, Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v Regione Lombardia [1997] ECR I-3395 para 29.

10. Sodemare SA, Anni Azzurri Holding SpA and Anni Azzurri Rezzato Srl v Regione Lombardia [1997] ECR I-3395, AG's Opinion para. 29. This seems to be established and accepted wisdom. See Dougan & Spaventa, note 4 at 184.

11. See *Poucet and Pistre*, note 5 at para. 18: "Sickness funds, and the organizations involved in the management of the public social security system, fulfil

be its own. Using postmodernist jargon, it quickly became clear that solidarity was Community law's "Other". Upon encounter, Community law decided to yield, respectfully. This, at any rate, had been the initial approach with regard to education[12] and, arguably, this should have also been the approach to certain types of health-care provision.[13]

---

an exclusively social function. That activity is based on the principle of national solidarity and is entirely non-profit-making. The benefits paid are statutory benefits bearing no relation to the amount of the contributions."

12. See Case 263/86, Belgian State v René Humbel and Marie-Thérèse Edel [1988] ECR 5365, in which case the ECJ held that national systems of secondary education did not have to be classified as services for the purposes of the Treaty. The reason, again, was "nationality". See ibid at para. 18: "First of all, the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields . Secondly, the system in question is, as a general rule, funded from the public purse and not by pupils or their parents."

13. At any rate, this was the position of the AG in Geraets-Smits and Peerbooms, in which he argued, relying on the principle of national solidarity, that in-kind provision of health care benefits by the compulsory Dutch scheme is not to be considered a service within the meaning of article 50 of the EC Treaty. See Case C-157/99, B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringer [2001] ECR I-5473, AG's Opinion, paras. 31-32.

In the meantime, however, the overall approach has altered.[14] The change is a twofold one. First, the Community does no longer yield. Many arrangements in which non-nationals have been excluded from the embrace of solidarity are now submitted to one or the other version of a proportionality test.[15] Second, instead of yielding, it seems as though the Community has come to even absorb solidarity[16] and to appropriate it for itself.[17] This appropriation has been confirmed, not least, by the Draft Constitutional Treaty where "solidarity" is proudly presented as one of the Union's values.[18]

We encounter solidarity in its appropriated state, for example, where international humanitarian aid is concerned. The relevant Community's policy[19] suggests that Europe is not turning a blind eye on the victims of catastrophic events. In a similar vein, this

---

14. For education, the case where this happened for the first time is, arguably, Case C-293, Gravier v City of Liège [1985] ECR 593; see now, of course, Case C-147/03, Commission of the European Communities v Republic of Austria [2005] ECR I-5969. In the case of health care, yielding to solidarity has been overridden by the emphasis on free movement of services with *Decker* and its progeny. See Case C-120/95, Nicolas Decker v Caisse de maladie des employés privés [1998] ECR I-1831. For a useful discussion of this change, see Christopher Newdick, 'Citizenship, Free Movement and Health Care: Cementing Individual Rights by Corroding Social Solidarity' (2006) 43 *Common Market Law Review* 1645-1668 at 1654-1656, 1665; Maximilian Fuchs, 'Free Movement of Services and Social Security—Quo Vadis?' (2002) 8 *European Law Journal* 536-555; Vassilis Hatzopoulos, '*Killing* National Health and Insurance Systems But *Healing* Patients? The European Market for Health Care Services after the Judgements of the ECJ in *Vanbraekel* and *Peerbooms*' (2002) 39 *Common Market Law Review* 683-729.

15. See, for example, *Commission v. Austria*, note 14 at para. 48.

16. See Barnard, 'EU Citizenship' note 3 at 160, 166 ("transnational solidarity").

17. For the observation that the EU has come to play a role in „solidarity making", see Ferrera, note 7 at 32.

18. See Article I-2. In Article 2 EC Treaty the establishment of solidarity among the Member States is listed as one of the Community's tasks.

19. See http://ec.europa.eu/echo/presentation/background_en.htm.

idea reappears in the Draft constitution in the context of a "solidarity clause" (Article I-43). Its first section states that "the Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster".[20]

Much more remarkable than these legal gestures of compassion, however, is the recent development of European citizenship.[21] It is in this context that the Union clearly appears to appropriate the idea of solidarity for itself, turning it inward, that is, towards its core. No longer does the Community merely yield and let solidarity created by nation states have its way; rather, it seems to absorb the spirit of national solidarity and to make it its own.[22] In the well-known *Grzelczyk* case, the ECJ introduced an interpretation of European Citizenship, presenting it as giving rise to "a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters

---

20. A Solidarity Fund had been created already in 2002 in order to have funds available for assisting Member States when they are struck by a major natural disaster. See Council Regulation (EC) No 2012/2002 of 11 November 2002 establishing the European Union Solidarity Fund. As I would like to explain below this is a highly elementary sense, reminiscent of what Rousseau only called pité, that is, the impossibility to see others suffer.

21. It should go without saying that European citizenship is a variety of transnational citizenship. See Linda Bosniak, *The Citizen and the Alien. Dilemmas of Contemporary Membership* (Princeton: Princeton University Press, 2006) at 25; 'Citizenship Denationalised' (2000) 7 *Indiana Journal of Globale Legal Studies* 447-509 at 457-459. According to Soysal, European citizenship embodies postnational membership structures in a most elaborate legal form. See Yasemin Nuhoğlu Soysal, *Limits of Citizenship. Migrants and Postnational Membership in Europe* (Chicago: University of Chicago Press, 1994) at 148

22. The method of—borrowing Borgian parlance—"assimilation" is indeed called by Dougan & Spaventa, note 4 at 189 the "assimilation model", by which they mean the assimilation of the rights of migrant European citizens to the rights of nationals on the ground of an equal treatment obligation.

are temporary."[23] No longer, it seems, are Member States free to remove immediately from their territory an indigent national of another Member State.[24] They have to take care of a stranger, at any rate for a little while.[25]

II. Types of citizenship

The case law giving rise to appropriation was as "inventive" as usual. As is well know, the ideas introduced by the Court have entered into a "codification" of free movement related matters in Directive 2004/38/EC.[26] On the basis of this Directive, it is tempting to distinguish, following Barnard,[27] between degrees of solidarity to which Union citizenship gives rise.

Three categories of European migrant status can be distinguished:[28]

(1) *Long-term residents (Article-16-citizens)*. Not only do they have a right of permanent residence, which can be forfeited

---

23. See Case C-184/99, Rudy Grzelczyk v Centre Public d'Aide Social d'Ottignes-Louvain-la-Neuve (CPAS) [2001] ECR I-6193 para. 44.

24. See ibid. at para. 42-43 (recourse to the social assistance system by a citizen may not automatically entail removal from the territory).

25. Many questions are still left open at this point. See Dougan & Spaventa, note 4 at 204, 214.

26. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, 77. The verb "codify" is used in recital 3 of the preamble.

27. This graduated approach is called by Barnard an „incremental approach" and contrasted with a „full assimilationist approach" which does not admit of gradations. See Barnard, 'EU Citizenship' note 3 at 166. By the incremental approach she means "that the longer the migrant's period of residence and the deeper his or her integration into the community of the host state, the greater the rights he or she enjoys in the host state" (ibid. at 160).

28. On the following, see also Barnard, 'EU Citizenship' note 3 at 166-175.

only subject to restrictive conditions,[29] they are also fully protected against any discrimination on the ground of nationality "within the scope of the Treaty" (Article 24[1]). The status of an Article 16 citizen is attained automatically after five years of residence (Article 16).[30]

(2) *Mid-term residents (Article-7-citizens).*[31] The right of residence for this category of Union citizens can be derivative of self-employment or employment (Article 7[1][a]), former self-employment or employment (Article 7 [3][a-d]), enrolment as a student (including vocational training), provided one has sickness insurance and given a "declaration" to avail of enough resources (Article 7 [1][c]);[32] the status can also be attained without economic activity as long as the migrant Union citizen has sickness insurance and indeed enough resources (Article 7 [1][b]).[33] The availability of enough resources is linked to the

---

29. Recital 18 of *leg. cit.* states that the right of permanent residence, once obtained, should not be subject to any conditions "in order to be a genuine vehicle for integration into the society of the host Member States". Article 28 [2 & 3] make it clear that Union citizens or their family members who have acquired the right of permanent residence may not be expelled "except on serious grounds of public policy and public security". An expulsion decision needs to be based on "imperative grounds of public security" once the citizen has resided in the Member State for the previous ten years. The right of permanent residence is lost "only through absence from the host Member State for a period exceeding two consecutive years" (Article 16[4] leg. cit.).

30. Member States have to issue a certificate certifying permanent residence if the citizen desires to have one (Article 19[1]).

31. In the following brief sketch I shall leave aside the rights of family members, registered partners and not discuss the consequences of a divorce.

32. As is well known, this was an important issue in Grzelzcyk, note 23 para. 41-44, where the Court recognised a declaration as sufficient for a student to become eligible for social assistance when the student encounters temporary difficulties.

33. For periods of residence longer than three months, the Member State may require Union citizens to register. Non-compliance may be subject to sanctions, however, they do not result in the loss of permanent residence (Article 8 [1-2]).

proviso that European citizens not become "a burden" on the social assistance system of the Member State "during their period of residence" (Article 7 [1][b-c]). According to Article 8(4) Member States may not lay down a fixed amount which they regard as "sufficient resources". The amount, in any event, shall not be higher than the threshold below which nationals are eligible to receive social assistance. The personal situation of the citizen is to be taken into account. Apparently, this rule has been designed to protect from deportation those Union citizens who are used to get by with very little. Article 24[2] exempts Member States from the application of the equal treatment obligation to study grants. They are not obligated to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families. *E contrario* it follows that such grants need to be made available to permanent residents (Article-16-citizens) and their dependents. This is consonant with the objective stated in recital 17, according to which long term residence is to promote "social cohesion".

(3) *Short-term residents (Article-6-citizens).* They (and their third country family members) have a right of residence for three month, provided that they hold a valid identity card or passport. This right of residence is, however, subject to the condition that they "do not become an unreasonable burden on the social assistance system of the host Member State" (Article 14[1]). Host Member States are also under no obligation to confer entitlements to social assistance during the first three months of residence (Article 24[2] *leg. cit.*).

Intriguingly, Barnard goes on to ascribe to these different categories different types of solidarity.[34] Long-term residents (Article-16-citizens) partake fully of the blessings of *national*

34. See Barnard note 3at 166, 174.

solidarity. In a sense, permanent residence is just like *national solidarity with a discount* (there is still a remote possibility of deportation). Mid-term residents (Article-7-citizens) become the limited beneficiaries of transnational solidarity, that is, solidarity in the relation between nationals and migrants. The limited enjoyment of benefits by migrants depends on a degree of integration into the host Member State. Finally, short-term residents (Article-6-citizens) enjoy only "very limited equal treatment" owing to the "virtual absence" of solidarity.[35]

Such a reconstruction rests on two presuppositions. According to the first, there is only one type of solidarity.[36] National and transnational solidarity differ only with regard to the groups affected, but with regard to the underlying principle they basically amount to the same. Solidarity is always, as pointed out by the AG in *Sodemare*,[37] about one group unconditionally supporting another. Interestingly, Barnard ascribes to long-term residents a status akin to national citizenship because it is, in her opinion, national solidarity that they benefit from. The second presupposition suggests that transnational solidarity essentially plays the role of a transmitter of national solidarity by either extending it in limited form or by preparing recent incumbents for its full enjoyment as Article-16-citizens. Transnational solidarity, thus understood, is solidarity in a transitional state, that is, the extension of concern to migrants in anticipation of their potential integration into the national domain. As to its effect, it is not different from national solidarity proper.

In what follows I would like to challenge the transmitter model of transnational solidarity. I would like to formulate this challenge by taking three steps.

---

35. See ibid. at 166.

36. But see Dougan & Spaventa, note 4 at 316, who divine hat "the concept of social solidarity is not a constant of given, but dynamic and up for renegotiation".

37. See above note 10.

First, after recounting briefly the basic principles of Union citizenship in part III I would like to point out, in part IV, that the categories of citizens are not as neatly separable as the transmitter model seems to suggest. Alas, even after the adoption of the new "codifying" Directive, Community law defies watertight classification. Instead, as I would like to argue in part V, as to its operation, European citizenship exhibits the characteristics of what Roberto Mangabeira Unger has indeed called a "solidarity right".[38]

Second, in part VI, I would like to explore the tension between European citizenship and national solidarity by examining the Court's case law. Upon closer inspection it turns out that the grounds for restricting the scope of application of citizenship, understood as a comparative right, reintroduces national solidarity through the backdoor even though they allege not to take the nationality of the persons concerned into account. This indicates that, contrary to what is suggested by the transmitter model, there is not merely a tension between national and transnational solidarity, but that both differ in kind. Paradoxically, even though one would expect the contours of transnational solidarity to emerge clearly vis-à-vis its national counterpart, the type of solidarity underpinning Union citizenship remains in a strangely indeterminate state.

Third, since the case law proper is of little avail, I resort to a few conceptual distinctions in order to elucidate the meaning of solidarity in parts VI-VIII. In part IX, it will be seen that transnational solidarity, if it can be classified as an instance of solidarity at all, is an (inconsistent) extrapolation of the type of solidarity that has long been assumed to prevail in transnational market societies by public international law enthusiasts since the 19th century. With an eye to its original source in sociological theory, I am going to refer to this type as "Durkheimian solidarity" or "solidarity as interpenetration". Insight into this type of solidarity will help us to catch a glimpse of the European social model, which emerges ever more clearly, in parts X and XI, in its individualistic orientation.

---

38. See below note 85.

III. Citizenship principles

Before I shall return to explaining why it is difficult, indeed, to draw boundaries around different categories of citizens I should like to recall to mind briefly the basic principles of European citizenship as they have been developed by the ECJ over the last few years.

Citizenship not only protects the national from one Member State against discrimination by another[39] but also the Member States own national against being worse off than fellow nationals who do not avail themselves of the opportunities offered by Article 18. The national plays the role of a "honorary foreigner" inasmuch as he or she shares with foreigners the essential characteristic of being mobile or having moved.[40] This is, in the eyes of Community law, what makes nationals equal to non-nationals. Denying those who are equal in *an essential respect* equal treatment would be contrary to the equality principle.[41] In *d'Hoop* this is formulated quite clearly by the Court:[42]

> In that a citizen of the Union must be granted in all Member States the same treatment in law as that accorded to the nationals of those Member States who find themselves in the same situation, it would be incompatible with the right to freedom of movement were a citizen, in the Member State of which he is a national, to receive treatment less favourable than he

---

39. As always, this covers equally cases of indirect discrimination. See Case C-209/03, The Queen (on the application of Dany Bidar) v. London Borough of Ealing and Secretary of State for Education and Skills [2005] ECR I-2119 at para. 51.

40. The paradigmatic instance of the "honorary foreigner" is Romano Angonese. See Case 281/98, Roman Angonese v. Cassa di Pisparmio di Bolzano [2000] ECR I-4139.

41. I would agree with Dougan & Spaventa, note 4 at 205, in this one respect that a "comparability" approach does make sense where nationals ought to be treated as though they were non-nationals because of obstacles that they confront regarding their economic mobility.

42. Marie-Nathalie D'Hoop v. Office national de l'employ, ECR I-6191 para. 30. See also Case 520/04, Pirkko Marjatta Turpeinen, 6 November 6 2006 at para 20.

> would enjoy if he had not availed himself of the opportunities offered by the Treaty in relation of freedom of movement.

Hence, *in addition* to being a right to be in the same overall situation as nationals unless an inequality is proportionate with regard to a legitimate aim[43] citizenship has ascended to the level of the right to enjoy mobility and to establish residence subject to certain conditions.[44] The right to mobility gives rise to two claims: first, the right to non-discrimination on the ground of mobility[45] and, second, the right to have potential obstacles to mobility

---

43. It is a novel development that the principle of non-discrimination comes to be read as a principle of reasonableness. According to such a reading that ought to be equally treated which is equal while unequally that which is unequal. The authority that has been recently invoked for this principle is Case C-354/95, The Queen v Minister for Agriculture, Fisheries and Food, ex parte, National Farmers' Union and Others [1997] ECR I-4559 para. 61. See Case C-148/02, Carlos Garcia Avello v. État belge [2003] I-11613 at para 31, 32-34; *Schempp,* note at para. 28. This is a novel development. Thus far, this (mis)-interpretation of equality has been restricted to agricultural cases. I, for one, believe that this is indeed an indefensible interpretation of the equality principle. See Alexander Somek, 'Equality as Reasonableness. Constitutional Normativity in Demise', In A. Sajó (ed.), *The Dark Side of Fundamental Rights* (Utrecht: eleven international publishing, 2006) 191-215.

44. For a brief overview, see Norbert Streinz, *Europarecht* (7th ed., Heidelberg: C.F. Müller, 2005) para. 955-956 (pp. 374-375). Dougan & Spaventa, note 4 at 198, point out correctly that Art. 18 (and, subject to certain conditions, also Article 17) now also applies to lawfully visiting European citizens. Even though pursuant to Regulation 1408/71 the Member States are no longer free to discriminate against third-country nationals where social rights are concerned, third-country nationals are still not in a position to move freely in order to take up employment. See Ferrera, note 7 at 32-33.

45. Hence, the relevant comparison is not between nationals and non-nationals, but between those who move and others who do not. See Case C.224/02, Heikki Antero Pusa v Osuuspankkien Keskinäinen Vakuutusyhtiö [2004] ECR I-5763 at para. 20; *D'Hoop*, note 42 at para. 30: "[…] [I]t would be incompatible with the right of freedom of movement were a citizen, in the Member State of which he is a national, to receive treatment less favourable than he would enjoy if he had not availed himself of the opportunities offered by the Treaty in relation to freedom of movement."

removed, regardless of whether they are discriminatory or not.[46] Consequently, in the spirit of *Gebhard*[47] and *Bosman*,[48] Article 18(1) has been interpreted to mean that impediments are relevant even when they arise from *differences* between national regulations as soon as the domestic rule makes access to the foreign territory more onerous for a country's own national.[49]

In three respects, the ECJ also successfully "fundamentalised" citizenship, in the sense of transforming it into the most fundamental of all fundamental freedoms.

---

46. I take this to be the upshot of *Garcia Avello*, note 43 at paras. 36, 43-44, where the Court held that a surname rule for children which discriminated neither on the ground of nationality nor on the ground of mobility nonetheless created a "serious inconvenience" for children of a foreign national with regard to the translation of official documents. This "inconvenience" was taken to be serious enough to constitute an illicit interference with the mobility guaranteed by citizenship. – It is questionable, though, whether the Belgian rule in question, which required children to bear the surname of their father, really constituted an obstacle (see ibid. at para. 40) because the children could have benefited from the Spanish rule in all other Member States of the European Union, according to which their surname would have been composed of the surname of both the father and the mother. In the words of Advocate General Kokott, a European citizen must not be worse off as a result of exercising the right to mobility. See opinion by Advocate General Juliane Kokott, Case C-192/05, K. Tas-Hagen R. A. Tas, at para. 49.

47. See Case C-55/94, Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano [1995] ECR I-04165 at para. 33.

48. See Case C-415/93, Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman [1995] ECR I-04921.

49. See, again, *Garcia Avello*, note 43 at 36. See also the opinion by Advocate General Geelhoed at para. 14: "Discrimination need not be established for Article 18 EC to apply"; para. 15: "That provision confers on a citizen of the Union the right to move and reside freely within the territory of the Member States, subject to any limitations or conditions laid down in the Treaty and its implementing measures. None of those terms imply that they apply only where discrimination is found to exist."

First, citizenship is now presented as defining the core of which other freedoms merely give more specific expression. No longer are the rights of the economically active regarded as primary and the provisions on citizenship regarded as secondary;[50] rather, both are seen as flowing from one organising core, namely, the elementary right of European citizens and their family members to move freely and to reside in the territory of another Member State.[51] Most recently, this has been affirmed by the ECJ in the *Turpeinen* case where it was stated that Article 39, guaranteeing the free movement of workers, is now to be read as a special expression of the principles of Article 18 with regard to workers.[52]

Second, a fundamentalisation of citizenship is also to be observed with regard to the restrictions that may be legitimately established for that right by Community legislation itself. This is definitely true for Community legislation that is designed to implement free movement of workers. Collins,[53] for example, would not in the least have been eligible for the jobseekers allowance on the basis of Regulation 1612/68 since the right to equal treatment guaranteed in its Article 7(2) does not extend to this type of benefit;[54] his situation was, nonetheless, relevant for this type of allowance (even though it was left open whether he was also entitled)[55] on the basis of equal treatment that is derivative of citizenship (Ar-

---

50. This is a quite momentous shift from the perspective of transnational citizenship. See Dougan & Spaventa, note 4 at 191.

51. See Article 3 and recital 3 of the preamble.

52. See *Turpeinen* note 42 para. 13,

53. His was the case of an Irishman trying to find employment in the United Kingdom. See Case C-138/02, Brian Francis Collins v. Secretary of State for Work and Pensions [2004] ECR I-2703.

54. See Case C-316/85, Centre public d'aide sociale de Courcelles v. Lebon [1987] ECR 2811 at para. 26; *Collins*, note 53 at 31.

55. The conclusion that the Court arrived at was that it the Member State may legitimately require, in this type of case, "a connection between persons who claim the entitlement to such an allowance and its employment market". *Collins*, note 53 at para. 71.

ticle 17 EC Treaty).[56] Article 17(2) says that citizens of the Union "shall enjoy the rights conferred by this Treaty". The right to be free from discrimination on the ground of nationality laid down in Article 12 EC Treaty is among those rights. Never mind that the relation between Article 17(2) and 12 EC Treaty is circular as regards their scope of application. Its existence does in no way alter the fact that, in tandem, Article 17(2) and Article 12 add up to the most fundamental freedom granted by Community law. Wherever existing Community legislation leaves a gap of protection or threatens to circumscribe the rights of citizens too narrowly, Article 17(2) and Article 12 can now serve as a fallback position for the creative introduction of a more comprehensive regime.

Third, and not surprisingly, fundamentalisation is also to be observed with regard to implementing Community legislation itself.[57] It affects the way in which the proviso is construed according to which citizens of the Union have the right to move and to reside freely "subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect".[58] Ordinarily, one would have assumed that secondary legislation is thereby granted full authority to qualify and to limit this right in certain respects. The reason is simple. Article 18(1), which guarantees the right to move and to reside freely, no longer applies directly to cases for which its scope of application has been regulated and limited by Community law on the basis of Article 18(2) or any another legal base.[59] Hence, in the event that Union citizens do not have

---

56. See *Collins*, note 53 at para. 61.

57. For a similar observation, see Dougan & Spaventa, note 4 at 214-215.

58. Choosing the parlance of constitutional discourse, one might say that the proviso has been given a "material" interpretation. See Karl Korinek, 'Gedanken zur Lehre vom Gesetzesvorbehalt bei Grundrechten' In M. Imboden et al. (ed.), *Festschrift für Adolf J. Merkl zum 80. Geburtstag* (Munich: Europa Verlag, 1970) 171-186.

59. This interpretation has been suggested by the governments of Member States in *Bidar*, note 39 at para. 44. It should be noted that no such limitation applies to Article 12, as envisaged from the perspective of Article 17(2), for the

sufficient resources to support themselves and their family members and hence threatened to become a burden on the social assistance system of the host Member State, those citizens cannot benefit from Articles 18(1) because Community law, as laid down in prior legislation and repeated in Article 7(1)(b) Directive 04/38/EC, explicitly conferred on the Member States the right to rid themselves of unwelcome freeloaders. Such an interpretation of Article 18 avoids reading into the proviso of Article 18(1) the proportionality principle. As long as Member States stay within the limits established by Community legislation, their own implementing measures are not subject to the application of a proportionality test. A fortiori, this exemption would apply to Community legislation itself. However, the ECJ clearly rejected this reading of Article 18 EC Treaty in the cases of *Grzelzcyk*,[60] *Trojani*[61]and *Bidar*[62]. In *Grzelzcyk,*[63] even though recognising that pursuant to secondary Community law Member States retain a right to rid themselves of non-working citizens who do not fulfil the requirements of residence, the Court "softened" this right by appeal to the relevant Directives' preamble, saying that the right of removal is of avail to the state only when the right of residence becomes an unreasonable burden on the Member State. The Court added, and repeated in *Trojani*,[64] that recourse to the host state's social assistance system

---

proviso of Article 18(1) only extends to legislation adopted pursuant to Article 18(2) or other legal bases. See Case C-456/02, Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS) [2004].I-7573 at para. 40: "[W]hile the Member States may make residence of a citizen of the Union who is not economically active conditional on his having sufficient resources, that does not mean that such a person cannot, during his lawful residence in the host Member State, benefit from the fundamental principle of equal treatment as laid down in Article 12 EC."

60. See *Grzelczyk*, note 23 at para. 42-44.

61. See *Trojani*, note 59 at para. 46.

62. See *Bidar*, note 39 at para. 42-48.

63. See *Grzelczyk*, note 23 at para. 44.

64. See *Trojani*, note 59 at para. 46.

must not trigger expulsion as its automatic consequence. The ECJ thus submitted the interpretative construction of Community law to a proportionality test.

IV. Line-drawing conundra

Against this background, it can be seen why it is difficult to draw accurate boundaries between categories of citizens with regard to what such boundaries *mean* in terms of citizen solidarity. Whereas Article-16-citizenship appears to present a relatively unproblematic case, the complexity increases when examining the differential treatment of short-term (Article-6-citizens) and medium term residents (Article-7-citizens). Upon closer inspection, it turns out to be less significant than it may have appeared at the outset.

Pursuant to Article 24(2), Article-6-citizens do not have to be entitled to social assistance.[65] According to Article 14(1) their right of residence may be terminated as soon as they become an "unreasonable burden" on the social assistance system of the host Member State. Article 14(3) states that "an expulsion measure shall not be the automatic consequence of a Union citizen's recourse to the social assistance system of the Member State". These provisions, if read in conjunction, can amount to at least two different things.[66] The significance of the difference is also not all that clear.

---

65. It should be noted that more and more non-contributory benefits were introduced in European social welfare states in the 1960s and 1970s. The aim was to fill coverage gaps at the margins and to establish a safety net of last resort. See Ferrera, note 7 at 25. Ferrara also points out (at 32) that social assistance is viewed by the Member States as the holy of all holies ("*sanctum sanctorum*") of national welfare systems.

66. The concept of "social assistance" might be construed more narrowly in light of the Courts construction of the term in Regulation 1407/71. It would thus cover only benefits that are offered on a discretionary basis and pursuant to a means test. There are good reasons to assume the ECJ might construe the term as referring to any non-contributory welfare benefit that affects the national budget. For a discussion of this issue, see Dougan & Spaventa, note 4 at 213-215.

First, should the Member State decide to withhold social assistance from short-term residents, those residents could still be removed—reasons of public policy, public security and public health, notwithstanding (Article 27)—only if they were to become, owing to their presence on the territory, "an unreasonable burden". Since recourse to the social assistance system, in and of itself, does not warrant expulsion and since even non-entitled citizens need to become a burden before they maybe legitimately deported one is inclined to conclude that the Directive confers even on short-term residents a minimal non-comparative right[67] to social assistance. In fact, reading Directive 38/2004 against the backdrop of Article 17 EC Treaty might indeed warrant this conclusion, for it is least restrictive with regard to citizens rights.[68]

This is not, however, the only possible conclusion. Even indigent Union citizens, who have to live off what they solicit on the streets, may not be deported because, by definition, they *cannot* become an unreasonable burden on the social assistance system of the host Member State. If a Member State, "in order to get these people off the streets", decides to provide social assistance on a purely discretionary basis even when it is under no obligation to do so it may become estopped from raising an unreasonable burden claim, since the burden would be of its own making. The policy of a more tight-fisted Member State would raise the even more interesting question whether indigent Union citizens may be deported on the basis of applicable anti-begging regulations. Owing to its differential impact in more affluent European societies, an anti-begging regulation would be caught by Article 24 qua discriminating *indirectly* on the ground of nationality. The exemption made for social assistance would not apply. Expulsion measures, however, would

---

67. "Non-comparative" in the sense that it is not derivative of the treatment of nationals. For a comprehensive defence of understanding equality as a "comparative right", see Kenneth W. Simons, 1985: 'Equality as a Comparative Right' (1985) 65 *Boston University Law Review* 387-481.

68. See Dougan & Spaventa, note 4 at 214.

have to be supported by public policy reasons with a certain weight. Article 27(2) requires that the personal conduct of the individual concerned must present "a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society". It is profoundly unclear, to say the least, that begging in the streets amounts to such a threat. Moreover, it is difficult to imagine what the deportation of beggars would imply in terms of European solidarity.

If leaving non-assisted Article-6-citizens on the territory is the preferred interpretation in the case where the Member State decided to deny, as a matter of law, to grant any social assistance during the first three months, it becomes all the more paradoxical that only expulsion, and not ceasing assistance, seems to be the option for the Member State on whose system the foreign Article-6 or Article-7-citizen has become an "unreasonable burden". Why should not ceasing all assistance without deportation be a less restrictive means, in particular when the Union citizen affected would like to stay? It may be suggested that the choice between two conflicting options, since they implicate the Member State as agent of the Community, would have to be informed by the Union's fundamental rights standard.[69] I do not see, however, a conclusive resolution of the issue, since the problem does not seem to be addressed by Community fundamental rights law.

Second, should a Member State decide to extend social assistance also to short term residents, the benefits could still be denied to such a resident—and the resident subsequently be deported—once it had been determined that the Union citizen in question has become an "unreasonable burden". It would be possible, thus, to reintroduce unequal treatment by using the "unreasonable burden" standard as a vehicle, that is, as soon as equal treatment threatens to become too expensive. This would be consonant with

---

69. See Article 51 Section 2 of the Charter of Fundamental Rights of the European Union, 2000/C 364/01); See also J.H.H. Weiler, *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999) at 120-121.

the context of emergence of the "unreasonable burden standard" from *Grzelzcyk* and *Trojani* where it was introduced to delimit the reasonableness of short term assistance against the backdrop of the citizens overall situation. Recital 16 of the Directive explains what is at stake in a determination of whether the Union citizen has become an unreasonable burden:

> The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on the social assistance system and to proceed to his expulsion.

The choice is, thus, really between letting indigent Union citizens fend for themselves[70] or feeding them until they can be sent home (if they can be sent home at all, see the question posed above).

Turning to Article-7-citizens, matters seem to be even more muddled, even though it is clear that the exceptions to the equal treatment principle are more narrowly circumscribed. Basically, Member States are not required to pay out educational grants and loans to foreign Union citizens, unless they are workers (Article 24[2]). Even in this context, citizens who, without being economically active, fully benefit from equal treatment in the social sphere may be expelled at a point at which supporting them may become too onerous.

Interestingly, the ground explaining why a termination of residence is permissible is not at all clear. If one were to follow recital 16 of the preamble,[71] beneficiaries of the right of residence (and this would include *both* Article-6-citizens and Article-7-citizens)

---

70. The intriguing question is, of course, whether Union citizens living of donations that they collect on the streets might be expelled for reasons of public policy. I suggested above that they may not.

71. As does, without further discussion, Christoph Schönberger, ‚Die Unionsbürgerschaft als Sozialbürgerschaft. Aufenthaltsrecht und soziale Gleichbehandlung von Unionsbürgern im Regelungssystem der Unionsbürgerrichtlinie' (2006) 7 *Zeitschrift für Ausländerrecht und Ausländerpolitik* 226-231 at 228.

would have a right to stay for as long as they do not become an "unreasonable burden". The balancing standard, mentioned above, would then apply to both categories of citizens. Such a construction, however, is hard to square with a distinction made in Article 14. Whereas section 1 of this Article says that short term residents (Article-6-citizens) have the right of residence as long as they do not become an "unreasonable burden", section 2 says that medium term residents whose status is derivative of Article 7 shall enjoy their right of residence subject to "the conditions set out therein". One of these conditions demands that the citizens, unless they are economically active, have sufficient resources for themselves and their family members in order not to become a "burden" on the social assistance system of the host Member state (Article 7[1][b]). Article 8[4] fleshes out what it takes to have sufficient resources. Paradoxically, it enjoins Member States from laying down a fixed amount and requires them to take into account the personal situation of the person concerned. Generally, however, the amount, which is apparently to be determined on a case-by-case basis, is not to be higher than the minimum social security pension paid out by the host Member State or not to go beyond the threshold at which nationals become eligible for social assistance.

It is possible to account for the divergence between recital 16 and Article 8[4] in at least two different ways.

First, one can simply ignore the recital and attribute relevant normative force to the Articles of the Directive only. From this would follow that owing to the systematic correlation between "having enough resources" and the likelihood of becoming a "burden", Article-7-citizens may be expelled only if they become a "burden". Whether or not this is the case depends on their not having sufficient resources but not, in addition, on their having become *also* an "unreasonable burden on the social assistance scheme" of the host Member State. From this would follow that, regardless of whether Union citizens have recourse to the social assistance system, their residence may legitimately be terminated as

soon as their financial wherewithal is so low that they would have to ask for support in order to sustain themselves (or their family). Interestingly, thus understood, Article-7-citizens would be worse off than Article-6-citizens, since the latter still would have a right to stay as long as they do not take recourse to the social assistance system. Such a strict construction would be congruent with the wording of the Directive. It could be argued that Article-7-citizens without sufficient resources become a "burden", even if the burden is not an *unreasonable* one. The determination of "burden" would thus be governed exclusively by Article 8(4), that is, basically, by the *needs* of the person affected, not pursuant to the flexible approach envisaged in recital 16. Consequently, Member States could easily rid themselves of Article-7-citizens as soon as they begin having recourse to the social assistance system.[72] Thus understood, the difference between Article-6-citizens and Article-7-citizens would be far less impressive than one would have originally assumed, at any rate, on the basis of the transmitter model of transnational solidarity.

Second, according to an alternative interpretation, which would be congruent with recital 16's ignoring of the difference between Article-6-citizens and Article-7-citizens, the standard established in Article 8(4) affects only the proof of sufficient resources *ex ante* for purposes of registration, but does not govern the termination of residence in the host state. The termination of residence of Article-7-citizens would thus be subject to more stringent conditions. The approach invites the weighing of several different factors, such as whether the citizens are confronted with "temporary difficulties". The Member States should also take into account factors, such as duration of residence, personal circumstances or the amount of aid granted. Arguably, Article-7-citizens might be, owing to the lengths of residence, in a slightly better position than Article-6-citizens,

72. For a critique of the discrepancy between what seems to be a generous promise of social assistance and the consequence of looming expulsion, see ibid. at 230.

however, in principle a general rule is unavailable here, as recital 16 appears to suggest that determinations ought to be made on a case-by-case basis.[73]

Regardless of how the difference between both types of case are going to be developed in the future, the loss of existential means and recourse to the social assistance scheme is in no case the equivalent of a termination clause ("*auflösende Bedingung*")[74] of residence. Arguably, for both Article-6-citizens and Article-7-citizens, Article 14(3) guarantees that "an expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State". The open question is what this guarantee entails in the context of the balancing test associated with the "unreasonable burden" standard. How long do benefits have to be paid out? It is not at all easy to make out under which conditions a burden on the social system would indeed be deemed "unreasonable".[75] Again, with an eye to the existing jurisprudence, at least two interpretations appear to be conceivable.

First, the Court may follow the path taken already in the case of cross-border health care services. In these cases, the Court has repeatedly stated that reimbursement for services obtained abroad needs to be granted unless there is reason to fear that the financial balance of the domestic system will collapse.[76] Since the matter to

---

73. The clarification that was meant to be brought about by Directive 38/2004 becomes thus abandoned to casuistry. For a similar observations, see Dougan & Spaventa, note 4 at 215.

74. Schönberger, note 71 at 228.

75. See Oxana Golynker, 'Student loans: the European concept of social justice according to Bidar' (2006) 31 *European Law Review* 390-401 at 398-399.

76. See, for example, Case C-158/96, Raymond Kohll v. Union des caisses de maladie [1998] ECR I-1931, para. 42; Case C-385/99, V.G. Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA and E.E.M. van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen, [2003] ECR I-4509 at para. 66, 72, 91. I mention in passing that his type of countervailing concern was put on the table by the Austrian government in defence of restric-

be adjudicated is a matter of right and, hence, any argument regarding the potential aggregate effect of an individual's exercise of that right is likely to be treated as either inapposite or more or less speculative,[77] the Member States are systematically in a weak position to prove that either an expected mass exodus of clients or the satisfaction of numerous reimbursement requests would affect the viability of established systems in the long run.[78] Consequently, in isolated instances of service provision, it is next to impossible for them to establish that a burden is "unreasonable", in particular, where the matter is not one of empirical forecast alone but involves an evaluation of the priorities that a system ought to attend to.[79] The proportionality principle, thus, would be of very little avail or even of no bite with regard to the financial interest of the Member State, at any rate, as long as the ECJ insisted on an individual case-by-case evaluation of the merits of each case. Aggregate budgetary effects would always run up against the personal situation of the applicant.

---

tions on access to the public university system. See *Commission v. Austria*, note 14 at para 50.

77. The Court, however, is ready to grant speculative arguments a certain weight where the maintenance of hospital services is concerned. See Case C-157/99, B.S.M. Geraets-Smits and Stichting Ziekenfonds VGZ and between H.T.M. Peerbooms and Stichting CZ Groep Zorgverzekeringen, [2001] ECR I-5473 para. 106. For an analysis, see Hatzopoulos, note 4 at 138-140. On the Court's propensity to adjudicate on the basis of its own intuition where non-hospital services are concerned *(i.e.*, no collapse is to be feared from patients going to see physicians outside their country of insurance), see Dougan & Spaventa, note 4 at 204.

78. For perceptive observations in this regard, see Gareth Davies, 'The Process and Side-Effects of Harmonisation of European Welfare States' (2006) 02/06 *Jean Monnet Working Paper*, http://www.jeanmonnetprogram.org/papers/06/060201.rtf at 30-31.

79. For comments, see Hatzopoulos, note 4 at 139; Newdick, note 14 at 1658-1660.

Second, in *Bidar*[80] the ECJ indeed hinted at a factor that would make it unreasonably onerous for a Member State to cover the maintenance costs of students. The Court said that it is legitimate to grant such assistance only to students "who have demonstrated a certain degree of integration into the society of that State".[81] It is not easy to make out, of course, what this "genuine link"[82] criterion requires. The only other hint that was given by the ECJ says that residence "for a certain length of time"[83] may establish the existence of a "certain degree of integration".

	equal treatment	**termination of residence if**	**recourse to social assistance scheme**
Article-6-citizens	not for social assistance	unreasonable burden	expulsion no automatic consequence
Article-7-citizens	not for student grants and loans	burden or unreasonable burden?	expulsion no automatic consequence
Article-16-citizens	full	not even if unreasonable burden	expulsion never an option

This brief sketch of interpretative problems should suffice to explain why the lines between categories of resident citizens are indeed difficult to draw from the perspective of solidarity. Article-6-citizens may have better protection than one might have guessed at a first glance. For economically inactive Article-7-citizens the situation may not be any better. Above all, many decisive questions are still left open by the Directive,[84] which seems to suggest that there

80. See note 39

81. Ibid. at para. 57.

82. See Golynker, note 75 at 400.

83. Ibid. at para 59.

84. In particular, as the conditions of the Directive are susceptible to „softening" on the ground of the proportionality principle and Articles 17 and 18 EC Treaty. See Dougan & Spaventa, note 4 at 215.

is far more unresolved antagonism between national solidarity and European citizenship than the transmitter model suggests.

It is this tension that I shall explore below.

V. The indeterminate core

The essential dependence of the rights of Union citizens on concrete situations is reason to classify citizenship in terms of what Roberto Unger once introduced, indeed, under the name of "solidarity rights". According to Unger, such rights "give[s] legal form to social relations of reliance and trust".[85] They are appealed to in order to articulate the obligations that are implicit in, and accrue from, relations of belonging to, and dealing with, others.[86] Not only is their articulation highly context-sensitive, it is even essential for such rights to eschew classification along a bright line dividing instances of protection from those where the right has no bite. In the words of Unger:

> Instead of contrasting a zone of unquestioned discretion to an area of no protection, this class of entitlements favours a nuanced grading of degrees of legal support for the rightholder.[87]

In a similar vein, it can be claimed that the concrete entitlements afforded by citizenship with regard to equal treatment vis-à-vis nationals or those who do not move ought to reflect reliance on the European polity. They extend only so far, of course, as this reliance is reasonable, that is, as long as it can be plausibly assumed that solidarity, in some inchoate manner, obtains. Entitlements arise only if there is solidarity. In the case of European citizenship, the normative basis of such reliance, which does not give rise to

---

85. Roberto Mangabeira Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (Cambridge: Cambridge University Press, 1987) at 537.

86. For a description of how personal relations can be "pregnant of obligation", see Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986) at 206.

87. Unger, note 85 at 538.

context-independent claims, remains strangely mysterious. Why should the mere *presence* on a territory, for example, be indicative of a "degree of integration", even where participation in the economy or in vocational training are absent?

In what follows, I would like to uncover the mysterious root of transnational solidarity by distinguishing it from its national counterpart. The case law, which has led others to assume that transnational solidarity is essentially very much like national solidarity, merely in a more tentative or even diluted form, can serve as a guide here. On the surface—their appearance, as it were—the cases suggest that national solidarity must not influence the unequal treatment of mobile Europeans. The case-law, if it can be addressed as such,[88] states clearly enough that interferences with the status created by European citizenship need to abide by a principle that promises to filter out certain legislative interests and to submit whatever remains to a proportionality test. The principle, which is invoked equally in the cases of unequal treatment and of obstacles, says that restrictions need to be based on objective considerations of public interest independent of the nationality of the persons concerned and proportionate to the legitimate objectives of the national provisions.[89] Consequently, one might expect, as is suggested by the transmitter model, that the application of this principle filters out public interest with a national bias until trans-

---

88. There is increasing awareness among commentators that with the interpretative liberties taken by the ECJ it is not at all clear that what we are dealing with here is indeed "case law". See, for example, Newdick, note 14 at 1655-1656 (discussing the nonchalance with which the ECJ is ready to overturn pre-established doctrine without addressing the change).

89. See Case C-274/96, Criminal proceedings against Horst Otto Bickel and Ulrich Franz [1998] ECR I-7637 at para. 27; *d'Hoop*, note 42 at 36; *Pusa*, note 45 at para. 20; *Commission v. Austria* note 14 at para.48; Case C-258/04, Office national de l'emploi v Ioannis Ioannidis [2005] ECR I-8275 at para. 29; Case C-406/04, Gérald De Cuyper v Office national de'emploi [2006] ECR I-6947 at para 40; Case C-192/05, K. Tas-Hagen, R.A. Tas v Raadskamer WUBO van de Pensioen- en Uitkeringsraad, 26. October 2006 at para. 33.

national solidarity has done its work of transmission and expanded the sphere where one group pays and another receives until there is established full overlap between national and transnational social citizenship.

Intriguingly, this is not the case simply because the proportionality test does not eliminate all interests associated with national solidarity. If national solidarity is hence left in place vis-à-vis its transnational counterpart—which is pushing against, rather than merely transmitting the former—it makes sense to assume that "transnational solidarity" may also be different from it.

This is what I would like to establish by taking a quick tour through the case law. Since, for that purpose, I do not see a relevant difference between cases affecting either unequal treatment or obstacles I shall refer to both types of case indiscriminately throughout. I shall also focus, more or less exclusively, on the "objective considerations of public interest independent of the nationality of the persons concerned" even though it should not be forgotten that for a state measure to pass muster it also needs to fast the regulatory means chosen tightly enough to their objective. Otherwise it would fail on proportionality grounds.

VI. Admitted reasons

In what follows, I would like to highlight a number of these reasons capable of justifying the adverse treatment of foreign European citizens or mobile nationals beginning with those where no association with nationality is to be suspected and then turn to others where matters are more complex.

Some of the reasons are of a mere *administrative kind*. They affect the administrability of either tax collection or the monitoring of transfer payments. At least in principle, the admission is made in *Pusa*[90] and *Turpeinen*[91] that the facilitation of tax collection

90. See *Pusa*, note 45 para. 21.

91. See *Turpeinen*, note 42 para. 34.

does not per se reveal bias against the interest of mobile European citizens. Their pursuit is, in principle, not incompatible with citizenship.[92]

Closely associated with administrative convenience are reasons to deny benefits where the situation, owing to its entanglement with moving to or from another country, may give rise to *abuse*. When receiving benefits by the own national abroad makes it next to impossible to monitor the employment or family situation of the recipients they may be treated differently than those receiving the same benefits at home.[93] The same rationale is also at work where a period of residence requirement becomes conflated with the interest on the part of the government to ascertain that the benefit is applied for also for the right reason.

The reasoning of the Court wavers, remarkably, in *Collins*. The paying out of a job-seeker's allowance was limited to persons habitually resident in the country and to those who were to be considered "workers" pursuant to Community law.[94] This was quite in line with the interpretation of Regulation 1612/68 that had been first introduced in *Lebon*.[95] As is well known, the Court went beyond the limitation of such benefits to "workers", strictly construed, by saying that "in view of the establishment of citizenship of the Union and the interpretation in the case-law of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of Article 48(2) of the Treaty – which expresses the fundamental principle of equal treatment, guaranteed by Article 6 of the Treaty – a benefit of a financial nature intended to facilitate access to employment in the labour mar-

---

92. The case becomes more tricky, to be sure, where the matter is intermingled with the penniless European citizen who wishes to have his or her share of social resources, to which I shall turn below.

93. See *De Cuyper*, note 89 para. 41; *Turpeinen*, note 42 at para. 26.

94. See *Collins*, note 53 at para. 17.

95. See Lebon, note 54.

ket of a Member State".[96] Nevertheless, the Court recognised that restricting the job-seeker's allowance to certain groups—in spite of all its indirectly discriminatory effect on non-nationals—was permissible if the connecting factor between the benefit and the claimant was the existence of some "genuine link" between the latter and the geographic employment market in question.[97] The Court, alas, made no great advances in clarifying the conditions under which such a "genuine link" obtains.[98] The only matter that was made clear by the Court was that a Member State may make the entitlement conditional on its existence.[99] The Court came up with a set of suggestions for determining the *connection* between the Union citizen and the employment market in question, as a result of which matters became unclear. While in para. 70-71 the observance of "a connection" may be the objective of the regulation and the residence requirement is presented as means to attain it, in the discussion of proportionality in para. 72 the objective changes. The residence requirement is now presented as a means to ascertain that the job-applicant is seriously seeking work. The required period must not be excessively long in light of that end. The difference should not go unnoticed. Whereas in the latter case residence is a proxy for "seeking work" and thus for the existence, however tenuous, of a connection to the labour market, in the former case residence is a proxy for a not further determined type of connection. Whereas residence as a proxy for engaging in a job-search assimilates the Union citizen to a worker, residence as a proxy for a not further determined connection might indicate the sought-after core of transnational solidarity, which is supposed to work as a transmitter.

---

96. *Collins*, note 53 at para. 63.

97. See ibid. at para. 67.

98. It would come to be invoked in subsequent cases. See *Bidar*, note 39 para. 62; *d'Hoop*, note 42 at para. 38.

99. See *Collins,* note 53 at para. 60.

As the case may be, a residence requirement is too narrow a proxy for the sincere determination to find work. The intent to get a job may well be shown also in frequent visits made to a country in order to check out available options. The matter would be different had the Court said that residence is indicative of the determination to find work *in this and no other* country. Limiting the jobseeker's allowance to a certain group for the reason of the Union citizen's *self-association* to a certain society would lend support to the transmitter theory. It would require Member States to treat those who *want* to live among their nationals as if they were already one of them. Transnational solidarity would work, indeed, as *anticipated national solidarity*. The choice of belonging would be a choice by Union citizens. They would be protected in their liberty to align themselves with a society of their liking.

The indeterminate nature of the "connection" ("genuine link"), which to maintain is recognised as a legitimate objective of restrictive national legislation, is patent even in another case affecting the employment market. The *d'Hoop* case affected the so-called "tide-over allowance" which was to be granted according to national legislation to young people who had just completed their higher education programs and were seeking their first employment. The entitlement was limited—special arrangements for dependents of migrant EU citizens aside—to graduates from secondary education institutions established in the Member State.[100] On its face, the regulation did not discriminate against non-nationals, however, it affected adversely the Member States' own nationals if they had obtained their school degree outside the state.[101] The ECJ concedes in *d'Hoop* that it is "legitimate" for the Member State to ensure that there is a "real link" between the beneficiary and the employment market concerned. *D'Hoop* was decided before the Court ex-

100. See *d'Hoop*, note 42 at para. 3-7.

101. The Court made clear that when first employment is concerned the Union citizen does not benefit from the provisions governing free movement of workers. See *d'Hoop*, note 42 at para. 18.

plored in *Collins* the issue of whether a genuine and sincere job-search suffices to establish what would later come to be called a "genuine" link. The Court did not actually specify what such a "connection" might come to. It merely determined negatively, thereby creating what Hegel would have derided as "bad infinity",[102] the legislative means which is overbroad and too exclusionary with regard to attaining the unspecified objective. The Court stated that the means chosen, namely, the requirement to have a degree obtained in the country of the employment market "unduly favours an element which is not necessarily representative of the real and effective degree of connection between the applicant for the tideover allowance and the geographic employment market, to the exclusion of all other representative elements."[103] The Court did not confide to us, though, what these were. What one can take from this case, nonetheless, is the lesson that Member States are apparently *not free* to determine for themselves what they deem such a connecting factor to be. Even more disturbingly, the Court seems to insinuate that the connecting factor might vary according to the benefit concerned, again by leaving open what it would actually amount to. In *Bidar*, the Court made clear that where student maintenance payments are concerned establishing a link with the employment market would be unreasonable to ask.[104]

The nihilistic aura surrounding the "genuine link"—and this link would actually point us, as the transmitter model suggests, to the substance of transnational solidarity acting on its national counterpart—does not really disappear when taking into account for what the Court has apparently settled in the meanwhile, namely, *duration of residence* or even only the *issuance of a residence*

---

102. See G.W.F. Hegel, Wissenschaft der Logik I, *Werke in zwanzig Bänden* (Frankfurt aM.: Suhrkamp, 1969–71) vol. 5 at 155.

103. *D'Hoop* note 42 para. 39. The same reasoning is applied later in the relation of resident nationals and incoming European citizens. See *Ioannidis*, note 89 at para. 31.

104. Bidar, note 39 para. 58.

permit.[105] Indeed, this seems to have been the major import of *Trojani* and *Bidar*. As soon as a benefit is sufficiently like the benefits eligible to be received by workers[106] even though for some reason Union citizens do not qualify for them, they cannot be excluded from the receipt of a non-contributory benefit when they have demonstrated "a certain degree of integration"[107], that is, have been resident for a "certain time".[108] The length of time required appears to be more or less open to determination by the Member State.[109] But even after merely resident or even more long-term resident Union citizens have become first eligible to receive social assistance the Member State may also, albeit not automatically,[110] determine that citizens must consequently be removed from the territory because they no longer fulfil the conditions of their right of residence.[111] *Grzelzcyk*[112] added the condition that this rule applies only if supplicants become an unreasonable burden, which they do not when their difficulties are of a temporary nature.

Nevertheless, from the cases cited follows conclusively that the adverse overall effect of having to take care of non-national Union citizens on programs that articulate national solidarity, however difficult to establish, is a legitimate ground of restriction. *National*

---

105. The later alternative was explicitly mentioned by the Court in *Trojani*, note 59 at para. 43.

106. For an approach to Union citizenship which highlights that the type of benefit accounts for the legally relevant comparability of the situations of nationals and Union citizens, see Dougan & Spaventa, note 4 at 208-210.

107. *Bidar*, note 39 para. 57.

108. *Trojani*, note 59 at para. 43; see also *Bidar*, note 39 para. 59.

109. The Court did not object in *Bidar*, note 39 para. 17-18, 59-61, to the three year requirement with regard to counting as "settled" and, when settled, becoming eligible for the maintenance grants, but to the rule that precluded resident students from becoming settled unless they had been employed during three years of residence.

110. See *Grzelczyk*, note 23 at para. 42-43; *Trojani*, note 59 at para. 45.

111. See *Trojani*, note 59 at para. 45; *Grzelczyk*, note 23 at para. 42.

112. See ibid. at para. 44.

solidarity legitimately establishes a limit for the pursuit of its transnational counterpart.[113] Far from being an extension of national solidarity and serving as its transmitter, transnational solidarity is clearly *in opposition* to it.

A related "consideration of public interest" was at stake in the case affecting the Austrian (and earlier the Belgian)[114] system of university admission.[115] The Court recognised that, in principle, it was a legitimate objective to avoid the overburdening of a public University system with too many incoming students from other Member States. The objective, introduced by the Austrian government under the highly unfortunate name of the "homogeneity" of the Austrian education system,[116] in fact was to maintain a uniquely liberal admission system for students with an Austrian highschool diploma. Had it been extended to non-nationals the system would have collapsed, in particular, in medical schools. The Court respected the objective, remaining, however, unconvinced that the Austrian government had chosen the least restrictive means to attain it.[117]

The Court concluded that Austria should have chosen less restrictive means—less restrictive for European citizens wishing to be admitted to an Austrian University, at any rate.[118] Thereby, it covertly changes the nature of the system that may be legitimately established. The application of the proportionality principle identified as disproportionate a liberal admission policy that had worked

---

113. From a different angle but in a similar vein, see also Dougan & Spaventa, note 4 at 210.

114. See Case C-65/03, Commission v. Belgium [2004] ECR I-6427; both cases marked a departure from the prior jurisprudence established in Case C-263/86, Belgium v. Rene Humbel and Marie-Therese Edel [1988] ECR 5365, pursuant to which case one would have assumed state education systems to be outside the scope of application of the Treaty.

115. See *Commission v. Austria*, note 14.

116. See ibid. para. 50.

117. See ibid. para. 61.

118. See *Commission v. Austria,* note 14 para. 61, 66.

at the expense of outsiders. On the surface, the reasoning seems to accommodate national diversity, while it is in fact deeply opposed to it. I shall return to this consequence in the final section of my paper.

Finally, the public interest comes closest to the core of national affiliation where the limitation concerns allowances paid out only to nationals of peoples with whom the country shared a common fate or destiny, such as war-time alliance.[119] The Court cautiously, and hypothetically, assumed there to be valid consideration of public interest where a Member State appeals to a common historical alliance, however only to dismiss the concrete regulation as disproportionate with regard to the means chosen.[120] Even if only hypothetically, one is inclined to infer that a country may limit the "solidarity"[121] with civilian war victims to those who had links with the population of the relevant state during the war.

VII. Postmodernist interlude

This discussion of "considerations of public interest", brief as it may be, has shown that even though the Court purports to let pass muster only those considerations that are unrelated to nationality it is obvious that, where, in principle, the viability of a national welfare system or the "homogeneity" of a national system of secondary education is concerned, certain aspects of national solidarity are allowed to play a role as legitimate grounds of restriction. Moreover, it is also the case that there is a tension between national and transnational solidarity, which may cut against either one or the other. It is not at all clear that transnational solidarity merely plays the role of a more of less restrictive transmitter of national solidarity to resident Union citizens. In fact, we have seen

119. See Tas-Hagen, note 89 at para. 34.

120. See ibid. para. 32.

121. Ibid. para. 35.

that transnational solidarity seems to have its very own essence, which would find expression in its own connecting factor.

Intriguingly, the true connecting factor is left in an indeterminate state; so is its essence. Whereas national solidarity is, legally speaking, based upon birth in the country, descent from other nationals, acquisition as a consequence of residence and enculturation (see literacy tests), the ground for the enjoyment of transnational solidarity remains strangely indeterminate. Most importantly, the length of residence seems to be only an uneasy proxy for *other reasons* accounting for contiguity.

What these other reasons might come to is unclear. Maybe the existence of the proxy, therefore, is the essence of the essence. European citizenship would then come to be seen as surrounded with a postmodernist ring. It is tempting, I submit, to characterise it with the aid of one or the other stylish semantic icons whose use is mastered, not to our surprise, most imposingly by members of English departments. We could go on, thus, and claim that residence is the "supplement" of an absent connecting factor revealing that physical presence is what national solidarity, correctly understood, has always been about.[122] I could explain that transnational citizenship is a simulacrum of national citizenship, which pushes "belonging" to the level of hyperreality.[123] I may even want to signal, shrewdly, my commitment to radical democracy and rave about European citizenship's potential to serve as an "empty signifier"[124] that invites citizens to attribute to it forever elusive meanings.

---

122. See Jacques Derrida, *Of Grammatology* (trans. G. Spivak, Baltimore, John's Hopkins University Press, 1976).

123. See, for example, Jean Baudrillard, *Simulations* (trans. P. Foss, New York: semiotexte, 1983).

124. See Ernesto Laclau, "Ethics, Politics, and Radical Democracy: A Response to Simon Richley", http://culturemachine.tees.ac.uk/Cmach/Backissues/j004/Articles/laclau.htm : "For me, the notion of the ethical is linked with the notion of an empty signifier, whereby an empty signifier is that option to which no content would corre-

But the translation into a postmodernist idiom does not really shed much light on transnational citizenship, let alone make it convincing. Indeed, overdetermining matters with fancy designators would make one complicit with the aesthetically enchanted left, which has abandoned all practical ambition and conceals pervasive disempowerment behind a smokescreen of grandiose gestures.

What then is the condition explaining reasonable reliance and trust which is involved in Union citizenship, understood as a solidarity right? My surmise is that the connecting factor is, quite simply, being *and* time, that is, presence in a Member State. This is not much. It is, in a sense, even amazingly meagre. One may wonder, indeed, whether being and time, taken by themselves, do suffice to establish a connection with any meaningful conception of solidarity.

VII. Solidarity as identification and as transcendence

Solidarity comes in more than one form. In its most universal form it is animated by an agapistic impulse.[125] Someone falls into a pit and ends up being helplessly trapped therein. When a news story about such a mishap is done well, a whole nation may find itself emotionally overwhelmed with feelings of sympathy. But agapistic impulses are not limited to national borders.[126] The 2005 tsunami is a case in point. The tsunami also reveals, however, that the anxiety of compassion becomes quickly deflagrated if it fails to be permanently nurtured with attention-catching images. I guess that

---

spond. It is, to use Kant's term, a noumenon, an object which shows itself through the impossibility of its adequate representation."

125. See Charles S. Peirce, Evolutionary Love, reprinted in *The Essential Peirce*, vol. 1 (ed. N. Houser & C. Kloesel, Bloomington: Indiana University Press, 1992) 352-371 at 365, 362.

126. They do not necessarily arise when a part of the nation is struck by disaster. Hurricane Katrina and its aftermath is the case in point.

people living in crises-ridden areas know very well that once the cameras are gone so is fleeting compassion.

There are more stable forms of solidarity, of course. In this part and the following two, I would like to distinguish three of such forms. Solidarity as *identification*, as *transcendence* and as *interpenetration*.

Solidarity as *identification* refers to something positive, for it reflects the ability of persons to put themselves into someone else's shoes. This positive attitude is expressed, however, in *negative form*; that is, it is directed *against* the realisation in others of conditions that one would consider adverse for oneself. Essentially, it materialises in assistance to others who happen to be in dire straits. Identification is possible inasmuch as others endure what one abhors. Consequently, solidarity evanesces quickly when the wants of others do not appear to be urgent enough. In some instances, desires are then called "expensive tastes"[127] for whose satisfaction, as long as they arise in others, nobody feels to have any responsibility.

The very notion "expensive taste" reveals the *egocentrism* inherent in solidarity as identification. Tastes are considered inexpensive only inasmuch as I (or the great mass of others who are like me) experience a strong urgency of satisfaction myself.[128] The less a situation is intuitively deemed alarming the more likely is solidarity qua identification to switch into a *path-dependent* mode. Generous gestures become settled against choices made by the individual concerned. The greater the scope drawn for individual responsibility, the more narrowly circumscribed the scope solidarity.

Solidarity qua identification is therefore *systematically* vulnerable to being diminished through acts of *negative des-identification*. The latter may be triggered simply by parsimony or

---

127. See Will Kymlicka, *Contemporary Political Philosophy. An Introduction* (Oxford: Oxford University Press, 2002) at 72-75.

128. The observation applies also to Dworkin, via the market based solution of responsibility issues.

greed. The denial of assistance is notoriously rationalised with appeals to individual responsibility ("But thirty years ago they should have…"). It should not come as a surprise that the pursuit of neoliberal policies creates a high demand for morality. The lecturing of people about what they should have done in order to avert their misfortune is the shibboleth of negative des-identification. It is meant to fend off the claims made on those for whom life has gone well by those for whom it has not. Hence, the more sparse this type of solidarity becomes, the more clearly is revealed its ego-centric essence. The morality of liberal disaffection, at any rate, comes with the mantra "I was able to do it myself, so you should be able to do it yourself, too".[129]

Solidarity as *transcendence* goes beyond the bounds of the ego. Consequently, it involves *positive des-identification*. While negative identification reasserts the bounds of the ego in search of sufficient likeness in others—a likeness that is ultimately found wanting in "irresponsible people"—positive identification elevates the ego to a grander sphere in which it conceives of itself as one possibility among many others. The ego is seen, then, as a contingent realisation of alternate modes of being human and leading a life. The finitude of existence becomes aligned with the infinity of human potential. Des-identification is positive, in this case, since a dual negation of one's finite existence affirms community. Others with whom one identifies need not be sufficiently "like" you, as in the case of sympathy, hence you negate the relevance of your own life, a negation that is negated in reaffirming a social world to which one belongs. The core idea, expressed by Humboldt[130] and approv-

---

129. For a more sophisticated analysis of this problem, see Klaus Günther, ‚Zwischen Ermächtigung und Disziplinierung. Verantwortung im gegenwärtigen Kapitalismus' In A. Honneth (ed.), *Befreiung aus der Mündigkeit: Paradoxien des gegenwärtigen Kapitalismus* (Frankfurt aM: Campus Verlag, 2002) 117-140.

130. See Wilhelm von Humboldt, *Ideen zu einem Versuch die Grenzen der Wirksamkeit des Staats zu bestimmen* (Stuttgart: Reclam, 1995) at 22-23.

ingly, albeit somewhat mistakenly, referred to by Rawls,[131] is that one is dependent on others in order to realise *both* what one *is* oneself and what one *is not*. The relational dimension is not merely instrumentally valuable. Indeed, owing to interactions with others we are capable to discover and to assert who we are; what is more, however, through the individuation of others, which is mutually fostered, we *realise in others* what we ourselves are not able to accomplish ourselves. I make shoes and you make music. You could not compose the music that I enjoy if you had to make shoes. In community with others we partake of the wealth of experience created by others. Solidarity with others, thus, makes it possible to live with others without giving precedence to who one happens to be oneself.[132] Put in the terms accessible to the political idiom of modern liberalism, solidarity as transcendence treats *a whole social world as a public good*.

VIII. Solidarity as a miracle

Solidarity as transcendence does in no manner for its articulation implicate the use of the actuarial pocket calculator. This is an important point. The logic of insurance against risks is often invoked in order to explain what solidarity means. As we have seen above,[133] the ECJ has pointed out more than once that "social solidarity" is manifest in insurance arrangements marked by certain special features, such as compulsory membership, participation regardless of pre-existing conditions or redistribution among pre-

131. See John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) at 320-321. In a typical Anglo-American preoccupation with an ergon, Rawls simplifies the idea to that of a social union modelled on an orchestra.

132. See Roberto Mangabeira Unger, *Law in Modern Society. Toward a Criticism of Social Theory* (New York: Free Press, 1976) 206-207 (where solidarity is characterised as the "social face" of love).

133. See above pp. 1-8.

miums in the relation of more and less severe risks.[134] The point of social solidarity is seen to lie in the "identification" that the scheme effects in the relation between higher and lower risks or more or less premium-paying insurance takers.

Conceiving of solidarity in this manner presupposes, of course, that there is a pre-given division of persons into groups and that the pre-given division becomes suspended as a result of identification. This, at any rate, is insinuated by how solidarity has been conceived by the AG in *Sodemare* where it is explained as the "inherently uncommercial act of involuntary subsidisation of one group by another".[135] Such an explication presupposes that people pre-exist solidaristic arrangements according to some classificatory scheme. In fact, it takes for granted that the identity of groups is constituted by the actuarial sameness of the risk. This belief reflects the preponderance of *neo-liberal constructivism*, that is, the belief that social distinctions are drawn by an anonymous social mechanism, *i.e.* the (insurance) market.[136] Whoever, from the perspective of the insurance market, is less likely to suffer from something—be this an illness, an accident or any other disadvantaging social fact—belongs to a different group than those who are more likely. It would be, *ceteris paribus*, more *rational* for the less risk-burdened to have separate insurance schemes or to buy insurance at a comparatively lower rate. Conversely, the solidaristic identification with the potential plight of others lends itself to expression

134. See, generally, Ferrera, note 7 at 20.

135. See above note 10.

136. In contrast to old-fashioned liberalism, neoliberalism involves the belief that the market is not merely one social sphere among others but the only sphere of social life. All practical rationality is economic. All social activities ought to be analysed in economic terms. See Thomas Lemke, "The birth of bio-politics': Michel Foucault's lectures at The Collège de France on neoliberal governmentality' (2001) 30 *Economy and Society* 190-207.

in terms of transfer payments, such as equally high insurance rates for those belonging to different categories of risk.[137]

Evidently, neoliberal constructivism is deeply ingrained in the legal theory of the ECJ. The actuarial reconstruction of solidarity is the default position, social solidarity the exception. The social ontology of solidarity as transcendence does not even appear on the "internal monitor" of the ECJ's reasoning. But solidarity as transcendence is not concerned with insuring against risks via insurance arrangements. It does not perceive human life with a life-denying attitude, treating it as if it were principally burdened with a risk of social exclusion. Rather, solidarity as transcendence is concerned with realising the wealth of human potential. Societies as a "system of cooperation" are seen as serving this end.

In fact, the existence of any type of solidarity is the *miracle* the occurrence of which neo-liberalism is in principle unable to explain. For certain arrangements, solidarity suspends the universal relevance of rationality. In the social universe of neoliberalism this can be accounted for only as an instance of an irrational subsidy. Indeed, the very characterisation of solidarity in terms of a willingness to pay without returns creates an incentive for negative desidentification. Does x really want to subsidise y? The debates are well-known. Why should non-smokers have to pay for the ailments smokers have prepared for themselves? Why should the employed pay into a welfare-system paying out benefits to the formerly self-employed? Why should the average guy, spending his spare time watching TV, pay for the accidents of those engaging in daring pursuits?

Solidarity qua identification is susceptible to sabotage by resentment. Societies infected with the virus of neoliberal constructivism are consequently inclined to be systematically biased in favour of the lifestyle of the median man. Embarking on pursuits and indulging in habits for which no sizable group is willing to pay in-

137. In fact, it has been suggested by Davis that the transfer component of solidarity can be severed from the insurance part. See Davis, note 78 at 35.

surance is costly for people. Solidarity in the state of negative desidentification becomes bashful, herdish and mean. It should not come as a surprise, then, that societies where solidarity has become weakened require "identity politics" in order to upgrade the value of difference whenever those marked by difference are exposed to the risk of social exclusion. Well-meaning people have to transfigure immigrants, no matter how simple and unsophisticated or even rearward their lifestyle may be, into an enchanting wellspring of the cultural enrichment in order to garner support for immigration-friendly policies. In a society sabotaged by resentment one is only allowed to be different if being different can be presented as a "good thing".

But the transfiguration of difference into something wonderful cannot alter the fact that in the eyes of neoliberal constructivism, according to which people are put by the market in their respective category of risk, solidarity remains eventually inexplicable. This explains way nationalism is an alien component of neoliberal societies.

What is more, neoliberal constructivism, when confronted with solidarity as transcendence, perceives only one of its dimensions, namely, the positive return to others. What neoliberal constructivism cannot observe, owing to its ontological commitment to a given self, is the negation of the finite self that is constitutive of solidarity as transcendence. Owing to this negation, working with actuarial schemes is of no avail. From the perspective of solidarity as transcendence, people do not come in groups, let alone classified along the lines of the risk that they are to themselves. People are not seen as encumbered with guarding themselves against their imperfection. What comes first is the social world to be realised and the self comes later, as a component of something more encompassing.[138]

---

138. See Max Adler, *Neue Menschen. Gedanken über sozialistische Erziehung* (2. ed., Berlin: E. Laubsche Verlagsbuchhandlung,1926).

Evidently, the world as a whole would be too indeterminate[139] to fulfil the role of such a world. But a national culture, evidently, can do the work. Belonging to such a culture allows individuals to grow. They can grow beyond themselves and say "this is mine" because what their fellows do is an expression of something that they grew into and that they continue and sustain (through taxes, transfers, emotional support, continuing a tradition or simply by being a co-operating member of society). Pride in athletic achievement or the greatness of art is relevant to such an experience of transcendence. But it is by no means limited to that. Some nations may have traditions of idleness and indolence that even industrious members of a nation would not like to see disappear. They think the lazybones have a right to exist. Why? Because they are part of a common world that encompasses the variety of human life. They would deem it horrible to live in a world where laziness existed only to be rooted out.[140] With the illusionary impression of naturalness a nation presents itself as a set of forms of life that people come to take for granted even though the lives they encounter may be fundamentally different from their own. The nation removes from alterity the taint of strangeness. Owing to national allegiances, for example, it may matter to people that small businesses, even though less efficient than economies of scale, stay around even when they may have no personal stake in them.

Admittedly, there is also a danger lurking underneath solidarity as transcendence. Appropriating the life and world of others as your own invites the mistake that what is essential about you is not who *you* are *in relation to others* but what you have in common

---

139. It would be, in a sense, the object of all predicates. For a discussion of this idea, see Wolfram Hogrebe, *Prädikation und Genesis. Metaphysik als Fundamentalheuristik im Ausgang von Schellings 'Die Weltalter'* (Frankfurt aM.: Suhrkamp, 1989) 63.

140. Needless to add that I am a devout follower of Paul Lafargue who advocated, against the right to work, the right to laziness. See his 1883 *The Right to be Lazy*, http://libcom.org/library/right-lazy-paul-lafargue.

with them, that is, your nationality. Your people would be everything and you would be nothing. But this is a mistake. What should matter are the relations that you have with others, that is, your rights.

IX. Solidarity as interpenetration

A third form of solidarity is relevant to our discussion. I would like to refer to it as solidarity as *interpenetration*. It has a different point. In fact, it has a functional orientation, that is, a concern with the cohesion of society. In its sociologically most elaborate form, it is to be found in the sociology of Emile Durkheim who distinguishes between "mechanical" solidarity, which is based on the impression of likeness, and "organic" solidarity, which arises as a result of the growing division of labour.[141] The latter occupies a strange middle position between solidarity as identification and solidarity as transcendence. Going beyond solidarity with those who are "like us" (or with whom we can identify), organic solidarity arises from interaction with those who are different from us. It arises from relations of exchange, but it is not limited to them. It comes to the fore in the interest to maintain the integrity of the whole to which one happens to belong.[142] Viewed from that angle, it looks like a relative of solidarity as transcendence.

Durkheim's ideas, as is well known,[143] have been appropriated for legal scholarship by Léon Duguit and, in particular, by George Scelle.[144] Interestingly, for Scelle, mechanical solidarity is associ-

---

141. See Emile Durkheim, *Über die soziale Arbeitsteilung. Studie über die Organisation höherer Gesellschaften* (German ed. Frankfurt aM: Suhrkamp: 1977) at 109, 283.

142. See ibid. at 285.

143. See Martti Koskenniemi, *The Gentle Civiliser of Nations. The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2002) at 266–352.

144. The following observations regarding Scelle are deeply indebted to Lars Peterson.

ated with nationality and likely to give rise to aggression towards those who are not like the members of the national community.[145] Organic solidarity, by contrast, *qua* solidarity associated with the division of labour, has the potential to create new transnational societies on the basis of international law. As Scelle observes:[146]

> The division of labour is the law of integration and progress, not only within a given social grouping, but also on the inter-societal level, because it functions between group and group, just as it does between individual and individual. [...] This organic solidarity, when it establishes itself in the conscience, leads to the utilitarian and sometimes affectionate respect for foreign groups and individuals.

I add in passing, that the expression "de facto solidarity", which was used by Robert Schuman in his famous declaration,[147] echoes dimly Scelle's belief that as soon as solidarity would have been created among nations on the basis of freedom of contract public international law would, in moments of crisis, follow suit with the creation of a European Union.[148] It is important, however, to observe the *casual spillover* that Scelle perceives in the relation between the "utilitarian" and "sometimes affectionate" respect for foreign groups and individuals. That such a transition from the regard for oneself to the regard for others would occur is an *article of faith* for solidarity as interpenetration. Drawing on Scelle, for the sake of the argument, it can be said that the law on the free movement of workers lends expression to precisely the type of "de facto solidarity" that arises from economic integration into the

---

145. See George Scelle, *Précis de Droit des Gens. Principes et Systématique* (2d ed. 1934), vol. 1 at 2.

146. See ibid. at 2-3 (translated by Lars Peterson).

147. Here are the famous words of his declaration of 9 May 1950: „L'Europe ne se fera pas d'un coup, ni dans une construction d'ensemble : elle se fera par des réalisations concrètes, créant d'abord une solidarité de fait." Which reads in English translation: "Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity." http://europa.eu/abc/symbols/9-may/decl_en.htm.

148. See Georg Scelle, ‚Essai Relatif à l'Union Européenne' (1931) *Revue Générale de Droit International Public* at 530.

economy of the host state. The utilitarian aspect is complemented nicely, in this case, with the more "affectionate" respect articulated in the broader understanding of social benefits pursuant to Article 7(2) of Regulation 1612/68. Solidarity as interpenetration—or "Durkheimian" solidarity—is solidarity among strangers which is mediated by the self-interested motives of co-operation for a mutual gain.

I assume that the reader can already guess why in my opinion we are already close to having found the key to understanding Union citizenship. It lies in the Scelleian article of faith that utilitarian respect is *somehow* capable of transforming itself into something more affectionate. It is precisely this *somehow* that is reflected in the adoption of *being and time* as connecting factors of transnational solidarity. Somehow being somewhere over time indicates that someone belongs.

X. Durkheim for autists

It would be premature, nevertheless, to conclude that Union citizenship represents an accurate reflection of the article of faith underlying solidarity as interpenetration. European citizenship is not co-extensive with solidarity as interpenetration, for it does not apply to the economically active. Of course, it is not a realisation of solidarity as transcendence either. From the sheer celebration and adjuration of diversity, however superficially conceived, does not flow the love of a common social world. The much belaboured Polish plumber does not care about the way of life of the Austrian mountain farmer. It is not part of his world.

One may wonder, however, whether Union citizenship is not expressive of solidarity as identification. Would not the "incremental approach" suggest that citizens identify, at an increasing level, with the plight of Union citizens from a different Member State? This conclusion seems to be supported by an approach to Union citizenship that draws on a wealth of historical materials and offers a model of concentric circles: more identification with nationals, less

with new entrants, but some identification nonetheless with those who belong to a state that is part of the same confederal system. I, for one, remain sceptical whether it is illuminating *enough* to explain Union citizenship against the backdrop of the requisite historical analogies. Schönberger, who has carried out the pertinent comparative research, deserves much credit for having uncovered various forms of extending privileges and immunities of citizens of one state to another in the context of federal and confederal structures, such as of the United States, Switzerland, the Second German Empire and even the modern German Republic.[149] The core of the (limited) rights associated with being a citizen of some type of federal and confederal structure is the right to stay on the territory of another participating country and possibly also some entitlement to receive social assistance.[150] From a structural perspective, it is instructive to learn that such structures are closely associated with confederations (or *Bünde* in Schönberger's parlance), that is, entities leaving notoriously open questions of sovereignty and the ultimate priority of federal law over state laws in core cases.[151] In leaving fundamental questions of law undecided, for example, the question whether the basis of the confederacy is an international agreement or a constitution,[152] the Union fits Schönberger's description of the *Bund*, however, it remains unclear why and how this *structural* undecidedness translates into the many gaps and uncertainties associated with Union citizenship. This would have been, indeed, a rewarding question to explore.

---

149. See Christoph Schönberger, *Unionsbürger. Europas föderales Bürgerrecht in vergleichender Sicht* (Tübingen: Mohr, 2006).

150. See ibid. 137, 350.

151. See Christoph Schönberger, ‚Die Europäische Union als Bund. Zugleich ein Beitrag zur Verabschiedung des Staatenbund-Bundestaat-Schemas' (2004) 129 *Archiv des öffentlichen Rechts* 81-120 at 105, 108. For a useful discussion, see already Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Vienna: Julius Springer, 1926) at 99-111.

152. See ibid. at 111-112.

More plausible than the association with identification is, still, Union citizenship's pedigree from solidarity as interpenetration. Schönberger's reconstruction of the *Indigenat* of the Second German Reich,[153] which he himself perceives to be the precursor of the Community's law on the free movement of persons,[154] is a legal manifestation of Durkheim's solidarity qua interpenetration. It can be argued that Union citizenship, at any rate from its design, mimics solidarity qua interpenetration simply by pushing—as the Court obviously did in seminal cases such as *Martínez Sala* and *Collins*—the material scope of social and tax advantages beyond the personal scope of workers. Hence, Union citizenship grew into what it is today merely by venturing *beyond de facto solidarity*. Union citizenship is, in essence, Durkheimian solidarity in an exaggerated form; or, putting the matter in more old-fashioned terms, it is Durkheimian solidarity in an *inconsistent from,* for it extends the principle of solidarity as interpenetration to a sphere where it cannot apply. By leaving out the "utilitarian" element it amends de facto solidarity's article of faith with the accumulation of presence over time. One does not, however, integrate into a society and begin to belong *simply* by being there.[155] There is something disturbingly autistic about Union citizenship.

National solidarity does not remain unaffected by this turn.[156] In acting upon national solidarity, Union citizenship divests national

---

153. See Schönberger, note 149 at 113-117. *Indigenat* is the legal position that the national of a Member State of a federal structure has vis-à-vis other Member States (ibid. at 208).

154. See ibid. at 117.

155. Even Barnard appears to be puzzled by that. See her 'Solidarity and New Governance in Social Policy' note 3 at 172-173.

156. Dougan and Spaventa, note 4 at 205, describe quite accurately the effect of the Court's preferred "objective justification approach": "Union citizenship is being *elevated above*, and *superimposed upon*, the notion of national solidarity. Indeed, the very fact that a Member State must always justify restrictions on access to social benefits by visitors suggests that the Union citizen *as such* has been catapulted in the host welfare society."

solidarity of its core connecting factors, such as linage and integration into society (understood as a system of co-operation). Indeed, what might have seemed to amount to a transmission of national solidarity from the national community to residing European citizens may result in the transformation of national solidarity. The discussion above may have revealed that the considerations of public interest deemed in principle acceptable by the Court, such as "a certain degree of integration"[157] are not really unrelated to nationality. Indeed, they can be read as *explications* of what national solidarity *may legitimately mean* in a supranational context. National solidarity becomes reduced to something that accrues *somehow* owing to *presence* in the host state.

XI. Individualism

But if it is true that Union citizenship acts on national solidarity, thereby altering its meaning, what is it, then, if not the expression of some higher sense of belonging to some greater Community—an articulation Durkheimian solidarity in exaggerated (and inconsistent) form?

In conclusion, I would like to point out that Union citizenship itself is a consequence of what can be called, drawing on Tocqueville, individualism.[158]

Individualism is a political doctrine that combines the belief in the submission of all to one central authority with the experienced

---

157. See *Bidar*, note 39 at para 57. The only hint that was given by the ECJ as to what this really means was that residence "for a certain length of time" may indicate a "certain degree of integration". See ibid. 59.

158. See Alexis de Tocqueville, *Democracy in America* (trans. H. C. Mansfield & D. Winthrop, Chicago: University of Chicago Press, 2000) at 482-483, 640-641. It is one of the greatest mistakes of recent intellectual history to present Tocqueville as a defender of individualism. The culprit is, of course, Hayek. See Friedrich von Hayek, *Individualism and Economic Order* (Chicago: University of Chicago Press, 1948) at 5. Here is what Tocqueville had to say about individualism (ibid. at 482): "[…] individualism proceeds from an erroneous judgement […]".

absence of a corresponding political community. I cannot explain here why individualism, thus understood, represents *the* political worldview of neoliberalism; suffice it to say that classical liberals, by contrast, assumed that "common sympathies" would motivate individuals to stand up against their government if the latter threatens to become tyrannical.[159] Ironically, those left of the left now rest their hope on this emotional pool vis-à-vis encroachments by international bureaucracies.[160]

I extract from Tocqueville the observation that, regardless of regional allegiances, citizens of individualistic societies conceive of themselves as *prima facie* being subject to merely one regulatory authority. This is the case not because there is, in fact, merely one authority; the existence of merely *one* regulator is the vanishing point of the type of equality envisaged by individualism. As a result, the burden of justification shifts on regulatory differences.

To the subjection to one regulator does not correspond membership to a community. Individualists do not belong to a group. Consistently, they expect equal treatment without regard to existing associative obligations, that is, obligations that arise from relations of belonging.[161] Regulatory diversity or differences of opportunity cannot be explained to individualists by pointing out that "this is how we do things in Belgium" or "this is the way the world works in Cyprus" or "this is what Denmark does for the Danish" or "this is for Estonian citizens only". In the world of individualism, reasons

---

159. See John Stuart Mill, *Considerations on Representative Government* (orig. ed. 1861, Buffalo: Prometheus Books, 1991) at 308. As always, basic liberal ideas reappear in toned-down form in Rawls. See John Rawls, *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999) at 23 at footnote 17

160. See, for example, Jed Rubenfeld, 'Unilateralism and Constitutionalism' (2004) 79 *New York University Law Review* 1971-2028 at 2017-2018.

161. For an elementary phenomenology, see Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 2006) 195-196, 207.

of this kind cannot count as good, let alone sufficient, reasons.[162] How the Finnish people feel about certain things can be recast as a reason only if it becomes expressed substantively. Greece may prohibit x only if it does so because of y. A content-independent reason of the type that "this is done in Hungary because the Hungarian legislature said so" is of no avail. National regulations have no authority in the world of individualism. There is no *political* authority because there is no political community. In the world of individualism all reasons become substantive and the weighing of alternatives never comes to an end, for in the absence of political authority no final decision can be made either.[163] There are merely cases that have to be dealt with and whose normative import is up for grabs in the next case.

Individualism explains the substance of European citizenship. Its development in the jurisprudence of the ECJ is concomitant to the rise of a normativity of approximation which proportionalises difference. The exercise of bounded regulatory authority is deemed problematic and constantly submitted to tests. Nationality cannot be invoked as a justification. Consequently, residues of national solidarity become translated into grounds of legitimate difference, with the bizarre result that relations of belonging are recast as relations of time and presence in space.

The challenge posed by Union citizenship is, of course, whether with all its fixation upon moving in space it has indeed captured what we have *reason* to believe to be solidarity's *essence*. Has soli-

---

162. Consequently, in the world of individualism it becomes difficult to explain why a stranger who shows up at a birthday party should not also be given a piece of cake simply because he or she is here, in particular, if giving out one more piece does only slightly decrease the size of the pie. Transform this situation to a neoliberal perspective on social benefits in the EU. Handouts are always undeserved. It is not clear why some should be more undeserving than others.

163. For an exploration of this point, see Alexander Somek, 'Inexplicable Law: Legality's Adventure in Europe' (2006) 15 *Transnational Law and Contemporary Problems* 627-653.

darity already become so inexplicable to us that we take being and time to be its essence? Is this all that is left to say about attachments to places, people, and stages of one's own life?

Intriguingly, with the prevalence of individualism national solidarity begins to appear both ugly and unkind. This can be observed for developments in the field of free movement of services, in particular, in the well-known cases where manifestations of national solidarity have come to be *reduced* to questions of financial integrity or coherence of a health care system.[164] Determining who is to get treatment for what type of ailment and after how much of a waiting period are political questions.[165] Granting individuals, on the basis of Article 49 EC Treaty, the right to bypass national queues and to have services that were obtained abroad reimbursed at home gives rise to problems of opportunity cost. The ECJ's opens the door for a vocal minority. Lending them the hand of EC law may indirectly divert resources from clients who are more poorly represented on a transnational scale.[166] The choices made by the national political process become undercut by the ECJ which loves to posture as the sentinel of consumer interests.[167] The Union appears to be "brought closer to its citizens", but at the expense of democratic control. This is consistent with individualism. The relation between individuals and competing bureaucratic regulations is regulated by the proportionalisation of difference.

In the final result, the national state almost necessarily appears to be stingy and lacking in credibility when denying reimbursement for treatment that was obtained in another Member State. Why should a single treatment in another Member State trigger the mass exodus undermining all planning and rationalisation in order

164. See Hatzopoulos, note 4 at 138-139.

165. See Newdick, note 14 at 1663.

166. See Newdick, note 14 at 1646.

167. For perceptive observations, see ibid. at 1665.

to avoid overcapacity?[168] When Member States refuse to provide reimbursement for treatments by insisting that their own systems are based upon provision in kind they appear to be inflexible, to say the least.[169] Consequently, they are being told that as soon as there is a possibility to calculate the cost (for example in the case of pre-approved services), they cannot claim exemption from paying for the expenses at their own rate incurred by a patient who has obtained the treatment abroad.[170]

Hence, the public perception of national health care systems changes. Earlier, their existence nurtured a sense of national belonging.[171] Each citizen's life was experienced as being tied up with the life of all others. Now these systems come to be perceived as outdated and overly defensive. Repeatedly, they are forced to express their reluctance to assist those who obtained a service abroad (hence, they seem to be *not caring*) and constantly sounding the alarm about their financial viability (hence, they seem to be *potentially crumbling*). The perception of systems, which rest on enormous historical achievements, as uncaring, stingy and prone to financial crisis "erodes their credibility".[172] It begins to seem more promising to shift to privatisation and to allow for more flexible arrangements. Why not dismantle existing health care monopolies and preserve their "cross-subsidy element" (the good risks pay for the bad risks, the higher earners for the lower earners) by using the tax and transfer system to attain the redistributive effect in a priva-

---

168. For these questions, see *Peerbooms*, note 13 at 106. Never mind that reasons of the latter kind find mercy in the eyes of the ECJ only if they apply to hospital services. See Müller-Fauré, note 76 at para. 93-98.

169. What is more, cultural issues need to be considered when determining what services and treatments are considered to be normal by medical standards. See Newdick, note 14 at 1657-1658

170. See Müller-Fauré, note 76 at para. 106.

171. See Davies, note 78 at 34.

172. Newdick, note 14 at 1663.

tised system supplemented by subsidies?[173] Does not a competitive system hold out the promise of better and more flexible services owing to its superior efficiency?

An even more instructive example for the transformation of national solidarity into something ugly is the gestalt shift brought about by the application of Union citizenship-based equal treatment to the Austrian system of university admission. Prior to *Commission v. Austria*[174] the basic admission principle was fairly straightforward. It said, roughly, that all Austrians who have earned a high-school diploma had to be admitted. Non-Austrians from the EU were to be admitted only if they would have qualified for an equivalent program pursuant to their own national standards; otherwise, the system could have scarcely been sustained owing to the enormous influx of students from Germany (in particular, in the case of medical students). I do not want to dispute the point that the old Austrian "admit-all policy" had an overall regressive distributive effect. Its tendency was to benefit students from better-off families at the expense of taxpayers whose children did not even come close to obtaining a *gymnasium* degree. I would contend, however, that with regard to the graduating students a system of university admission which is based on test scores not only engenders a far more inegalitarian effect[175] but cannot accommodate a concern that may have lain at the heart of the Austrian system.

An admission policy that signals to students who graduated from a high school that they are welcome cuts deeply into the lives of adolescents since they are given leave to grow up and to enjoy their youth without having to worry too much about their scholastic per-

---

173. See Davies, note 78 at 35-36. Only who has experienced a fully private system can appreciate the absurdity of such a proposal.

174. See note 14.

175. The US American "merit based" system is the case in point. See Walter Benn Michaels, *The Trouble With Diversity. How We Learned to Love Identity and Ignore Inequality* (New York: Metropolitan Books, 2006) at 98-99.

formance. Everyone who has made it through school is rewarded with being given a fresh start. Young people can explore life without internalising the notorious nerdish obsession with how they perform in the eyes of their superiors. In fact, overcoming such a slavish concern is part of what it means to become an adult. Moreover, young people do not experience grades as determining their peer-group standing and, beyond that, their value as members of society. This type of egalitarianism makes people *more free* than a comparatively more "competitive" system because the educational system *forgets* (and hence *forgives*) what they have done in the past.

As is well known, the Court found Austria guilty of discriminating indirectly on the ground of nationality.[176] The Court even gave Austria the unsolicited advice to establish "entry examinations or the requirement of a minimal grade" in order to avoid the system's collapse.[177] The Court thus effectively forced upon Austria a "merit based" system of admission. Austria seems to be no longer free to pursue, as an outgrowth of its own national understanding of solidarity, a system where "merit" is something that is earned in the course of one's studies and not before one has engaged in them (with the attendant guarantee of graduation upon admission).

Austria now has to grant access to Austrian universities to more foreign students than before. The regressive effect in the relation of taxpayers and beneficiaries has not disappeared, it has merely been transnationalised. Now the less wealthy and less mobile taxpayers of Austria do in effect subsidise young members of the middle class from other Member States who are most likely to return to their home state after having completed their education.[178]

It is difficult to make out how in these instances catering to the desires of the mobile class helps to create an ever closer union

---

176. See *Commission v. Austria*, note 14 at para. 47, 60.

177. See ibid. at para. 61.

178. See Barnard, 'EU Citizenship' note 3 at 178.

among the peoples or Europe. Indeed, there is reason to suspect that the mere purport of it is utterly "unprincipled and cynical".[179]

179. Newdick, note 14 at 1666.