European citizenship and the disillusion of the common man

MICHELLE EVERSON, BIRKBECK COLLEGE, UNIVERSITY OF LONDON

I. Introduction

Almost 20 years ago, the European Union was born, and with it, the European citizen.[1] Today, we may have grown used to the concept of a European citizen; but, in the heady days following the dedication of a, once, European (Economic) Community to a, forever, 'closer union of the peoples of Europe', the novel concept of supranational citizenship drew a host of excited comment. Where was it to be located amongst the sliding range of communitarian, republican and identity-based theories of citizenships, and could it be deployed to give voice to traditionally marginalised constituencies?[2] Alternatively, should it be dismissed as impossible on its own terms — after all, when have we ever seen a citizenship without a state? — and, accordingly, treated as a veiled, but usurping, threat to the sovereignty of the member states.[3] Or, was it a simple chimera, which, with its paltry catalogue of political rights, merely masked the essential character of the European as *homo economicus*; a pale modern echo of Bismark's *Wirtschaftsbürger*, and vehicle for the creation of an irredeemably neo-liberal European market as ill-conceived precursor to the forced creation of a European state *grand goût*?[4]

Today, both overly optimistic and menacingly apocalyptic visions of the European citizen might appear to have been misplaced. For all that we have not witnessed the emergence of a new, instantly recognisable, post-modern European citizen, armed with the necessary rights to forge his or her own identity against the once unyielding backdrops of 'imagined' (national) collectivities;[5] neither have we seen the creation of the State of Europe, neo-liberal or otherwise. Instead, and all grand but failed constitutional aspirations apart, the legal vehicle of citizenship would appear to share

[1] Treaty on European Union, Articles 17-21.
[2] Jo Shaw, 'The Many Pasts and Futures of Citizenship in the European Union' (1997) *Modern Law Review* 554. U.K.Preuß, 'Problems of a Concept of European Citizenship', (1995) 1:3 *European Law Journal*.
[3] Preuß (1995).
[4] M.Everson, 'The Legacy of the Market Citizen,' in J. Shaw & G. More (eds), *New Legal Dynamics of European Union* (Clarendon: Oxford 1995), pp. 73-89.
[5] M.Everson & J.Eisner, with reference to the pluralist tradition, The *Making of a European Constitution* (Routledge-Cavendish 2007).

this much with all European mechanisms of potential constitutional renewal: legal evolution is not so much a child of minutely planned conceptual revolution, but, rather, a matter of incremental pragmatism, whereby citizenship is unfolded by means of judicial response to instances of assertion of individual right. European citizenship has thus proceeded slowly to recognise the free-standing (non-economic) right of free movement (*Martinez Sala*[6]), to establish an essential link between acquisition of 'derivative' rights of citizenship and human rights (*Chen*[7]), and to concede a measure of transnational solidarity (*Grzelcyk*[8]).

Is that then the end of the story of European citizenship? Might we accordingly be satisfied that incremental legal evolution of Articles 17-21 of the European Treaty will provide us with an appropriate vehicle of self-recognition and self-projection for the individual European? The following pages argue that this question must be answered with a resounding 'no'. Things are now far from well in the world of European citizenship. The initial impetus for this negative assessment is drawn from a discipline foreign to legal science, and, above all, from Neil Fligstein's recent sociological-empirical finding that economically-driven processes of European integration only have the full support of a very small and financially very privileged group of Europeans (10-15% of the European population).[9] However, the lesson that the entire project of European integration is now threatened by its own fatal disregard for the historical core of citizenship — the binding together of disparate and *antagonistic* classes within a community of fate — is one that is drawn specifically for legal science; and, above all, in promotion of a form and rigorous method of legal scholarship that has, all Europeanised temptation apart, retained its primary respect for the achievements of the post-war national constitutional settlement, but which has, likewise, never failed to pay due note to its historically-conditioned failings.[10]

[6] Case C-85/96, *Maria Martinez Sala* v. *Freistaat Bayern* [1998] ECR I-2691.
[7] Case C-200/02 *Zhu and Chen* [2004] ECR I-9925.
[8] C-184/99 *Grzelcyk* v *Centre Public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193.
[9] N.Fligstein, *Euro-Clash: The EU, European Identity and the Future of Europe* (Oxford University Press 2008).
[10] In short, the legal science pursued by Christian Joerges (see, below, V).

II. Maastricht: the false promise of the homo economicus?

Making an initial and brief historical detour, it is worth recalling exactly why the original concept of European citizenship was subject to such suspicion when viewed through the lenses of an historical citizenship theory.[11] In this view, the European scheme whereby the existence of the European citizen was boldly declared, was linked with the nationality law of the member states, and was further elaborated with specific reference to a restricted set of (European) political rights and rights of consular representation, was not merely to be doubted with regard to its lack of an independent genesis for European citizenship. It was, instead, to be decried for its seeming failure to establish 'allegiance', or to ensure that European citizens would be 'bound to one another by the personal bond of fellow-membership of one body.'[12]

Thus, critique did not focus upon the lack of a pre-political, or communitarian, wellspring for European 'being' within a common European language, religion or race.[13] Neither, importantly, did it descend into a republican-liberal reverie to dream of a common illiberal European enemy and thus to bemoan the lack of concomitant citizenship duties (military service), whose exercise might accordingly unite the body of imagined Europeans through shared adversity.[14] Instead, the homily that nationality is merely 'the other side of the citizenship coin' to rights,[15] was placed within its historical-industrial context to breathe new comparative force into T.H.Marshall's seminal narrative of citizenship evolution.[16] The vital question then posed was one of whether European citizenship had been consciously developed in order to compensate for the inequalities of the emerging European market, thus to ensure the continuing loyalty of Europeans to the project of Europe, even should its market be experienced in a negative light.

Outside the communitarian perspective, the acquisition of European citizenship by virtue of possession of the nationality of one of the member states does not preclude establishment of reciprocal loyalty between individual Europeans. Instead, with an

[11] I refer primarily to my own analysis, M.Everson (1995).
[12] J.W. Salmond, 'Citizenship and Allegiance' (Part II), (1902) 17 LQR, 49-63.
[13] See, for explanation of communitarian visions of acquisition of citizenship, Preuß (1995).
[14] For a disturbing example of this tendency, see, Ulrich Haltern, 'On Finality', in A.von Bogdandy & J.Bast (eds), *Principles of European Constitutional Law* (Hart:Oxford 2006) pp373-403.
[15] Preuß (1995).
[16] T.H Marshall, (1953) *Citizenship and Social Class*, (Pluto Press: London, 1992).

eye to contractual theories of the establishment of *res publica*, T.H.Marshall tells us the stirring concrete story of the evolution of industrial citizenship within the United Kingdom — and forms the basis for the abstract tale of creation of allegiance to the alienating state of modernity and the mass modern economy — with recourse to rights rather than nation. Citizenship is a historical and a violent happening, which both creates and tames the market and the state: civic rights — including, most importantly, the right to contract — are medieval artefacts whose post-black-death development shattered the feudal system and elevated the feudal subject to the status of a contractual party, who might then forge a new market-based economy; political rights are the child of the 17th century and the struggle by market burghers to assert their growing economic power by means of violent struggle for a share in the political powers of the sovereign; social rights are corrective, status-based, mechanisms, politically hard-fought-for by the industrial classes of the 19th and 20th centuries in response to the necessary functional differentiations of the mass economy, as well as the abject indifference of a bourgeois state to inequalities of class. From subjecthood, to contract, to status: the historical antagonisms captured within the concept of citizenship are then, in turn, seemingly reconciled, as — following the formula given by Ralph Dahrendorf[17] — civic, political and social rights are concentrically constitutionalised within the post-war national settlement, furnishing each such reborn nation, with a normative concept of citizenship, which both recognises its own historical class struggle, and holds it in permanent equilibrium; a concept of citizenship which guarantees, not only the market, with its myriad inequalities, but also the means of its social correction within a politically-inclusive state.

Citizen is brother to citizen, and all citizens have reason to be loyal to their state. What then of the rights of the European Union citizen? Herein, the critique of the Maastricht citizen is to be found: clearly, rights to vote and stand in European and local elections, together with the right to petition the European ombudsman, as well as the right to consular protection, were not born out of portentous European class struggle, nor less do they represent a genuine European effort to reproduce the normative, concentric scheme of Dahrendorf's 'allegiance-inducing' civic, political and social rights. More tellingly still, the core and unique right of the Union citizen,

[17] R. Dahrendorf, (1992): *Der moderne soziale Konflikt*, (Deutsche Verlagsanstalt: Stuttgart 1992).

the right to move and reside freely within the borders of the EU, appeared, in the Maastricht Treaty at least, to be qualified, exercisable only 'subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect' (now, Article 18(1) European Treaty). Alternatively, Article 18 explicitly related the new Union Citizenship to older provisions of European law, and more particularly to the existing right of free movement for European workers now laid down in Article 39 EC; one of the quartet of European rights of labour movement, establishment (Article 43), service provision (Article 49) and capital movement (56), commonly known as the 'four freedoms'.

With this irresistible reminder of the economic antecedents of European integration, the TEU's chapter on citizenship itself placed renewed emphasis upon an existing vision of the individual European as *homo economicus*; the economically active and pro-active European economic citizen, who, in the manner of Bismark's *Wirtschaftsbürger*, would be the primary instigator — *creatur ex nihilo* — of a European market, asserting European economic rationality and, where necessary, setting the obstructions of national regulatory provision aside. Was this then the true face of European citizenship, a face of naked entrepreneurial endeavour? Given the weak nature of political rights within the Maastricht Treaty, the absence of a normatively-stated social commitment to correction of market inequalities at European level, and the proven juridical strength of the four freedoms, the European *homo economicus* was surely still predominant. Further, lacking even the paternalistic (anti-democratic) framework of social provision and control within which Bismark sought to neutralise the individualism (inherent cosmopolitanism) of his *Witschaftsbürger*, the European economic citizen could surely not but be a selfish being; a contractual party dedicated by European right to personal profit, a cosmopolitan dismissive of the feudal confines of the nation state, a solipsist utterly without loyalty to fellow Europeans, and also — where no individual profit was to be made — without status within, or allegiance to, any common European project.

III. The end of nation and history within European citizenship

That was then, and now is now. The European Court of Justice has since pronounced repeatedly upon the notion of the European citizen. Further, responding to the pragmatic problems thrown up by integration processes, the ECJ has surprised and confounded traditional citizenship theory. The primary European bolt from the blue was to come in the seminal case of *Martinez Sala* in 1998,[18] which severed the existing link between free movement and economic activity. Thereafter, judicial inventiveness was fundamentally to refashion all accepted understandings of the nature of citizenship: on the hand, allowing for derivation of a right to citizenship, not from nationality, but from human rights; and, on the other, extending rights of solidarity across the once wholly impermeable borders of national solidarity collectivities — and that in disregard of Council wishes. With this, it might, accordingly, be argued that European citizenship is evolving, not as an unconscionable assault upon traditional citizens, but rather as a promising solution to the inherently exclusionary nature of the historical citizen.

Thus, the case of *Sala* — confirming that Article 18 EC Treaty was a free standing Treaty right, and was not qualified by Article 39 EC Treaty — was revolutionary in its effects, not simply since it expanded the *dramatis personae* of the European integration stage to include persons moving across frontiers for non-economic reasons, but also, since it laid the foundations for a series of subsequent cases,[19] which can be viewed as divorcing the legal vehicle of Union citizenship from notions of nationality, locating its *genus* within human rights instead. Citizenship, it should

[18] See, above, footnote 6. For details of the extraordinary and immediate resonance of this case, see, S.O'Leary, 'Putting Flesh on the Bones of European Citizenship' 24 (1999) *European Law Review* 68.
[19] There is very little room here to detail all cases and commentary on a complex area of European law. Interested readers should refer to: A.Tryfonidou, 'Jia or 'Carpenter II': the edge of reason', (2007) *European Law Review* 908; E.Drywood, 'Giving with one hand, taking with the other' (2007), *European law Review* 369; O.Golynker, 'Student loans: the concept of social justice according to Bidar', (2006) *European Law Review* 390; Ch.Hilson, 'What's in a right? The relationship between Community, fundamental and citizenship rights in EU law' (2004) *European law Review* 636; S.Peers, 'Implementing equality? The Directive on long term resident third country nationals', (2004) *European Law Review* 437; R.C.A.White, 'Conflicting competences: free movement rules and immigration laws', (2004) *European Law Review* 385.

never be forgotten,[20] matches its own inclusionary aspirations with its own exclusionary impacts: even in its republican/contractual variant, which rejects all pre-political notions of belonging, to include citizens within the state by means of rights, the legal vehicle of nationality — typically *ius soli* based — draws an exclusionary line in fact, if not in theory,[21] based solely upon the accident of birth. Nationality is the gateway to citizenship. An exclusionary feature of citizenship that has long haunted the enlightenment ideal of a universal brotherhood of man, the gate of nationality has, nonetheless, been prised open by an ECJ, which has collapsed the distinction between 'the rights of man and the rights of the citizen', extending derivative rights of European citizenship to individuals who are not nationals of a member state. The exemplary case here is that of *Chen*.[22] Master Chen, at the planned instigation of his Chinese parents, was born in Northern Ireland, becoming a citizen of the Irish Republic by virtue of *ius soli* and,[23] thus, a European citizen by virtue of Article 17(2) EC. Accordingly, Master Chen could exercise his Article 18 EC right of free movement to relocate to London. But, what of his Chinese mother? Surely, the UK Home Office could exercise its right to exclude a Chinese national? Not so, said the ECJ: human rights, particularly the right to enjoyment of family life, would determine that Mrs Chen, as the primary carer, could move with her son.

The derivative exercise of a European right of free movement by a Chinese national, may not initially appear to be such a momentous evolution, being qualified as it is by the need to establish a relational connection between non-EU mother and EU child. However, the core sociological-empirical element within the judgement — the ECJ's recognition of a need to deal pragmatically with a simple human happening, the birth of a child[24] — and its use of human rights to imbue the particularist/exclusionary vehicle of citizenship with a measure of universal humanity, further gains in

[20] See, U.K.Preuß & M.Everson 'Concepts, Foundations and Limits of European Citizenship,' ZERP-Diskussionspapier 2/95, ZERP an der Universität Bremen (1995); P. Tuitt, *Race, Law, Resistance,* (Glasshouse Press 2004); D.Heater, *Citizenship: The Civic Ideal in World History and Politics* (Longmann: London 1990).
[21] In its original revolutionary form, the French Constitution offered French citizenship to all who professed to share in the ideals of the Republic; French-speaking slaves within the Caribbean foolishly relied upon this sentiment, only to be bloodily suppressed by the young Republic, see, Heater (1990).
[22] See, above, footnote 7.
[23] The Republic extends its *ius soli* rule to include all persons born within the island of Ireland.
[24] Even in the face of suggestions that the situation had been contrived by the parents. See, however, an opposite finding in *Akrich* (Case C-109/01 ECR I-9607), where the 'misconduct' of the applicant defeats the claim to derivative citizenship.

significance if read in the light of the ECJ's recent and notable efforts to expand the addressees of national solidarity collectives to include the figure of the impecunious, but needy, stranger. Article 18 EC and the free-standing (non-economic) European right of movement, thus sets its own limits on its exercise by European citizens, reserving to the Council a right to determine the conditions under which it will be exercised (Article 18(2) EC). Predictably, Council action to implement the right of free movement within the Union has seen the re-emergence of economic qualifications within the concept of European citizenship, this time, with regard to the assertion of the primacy of the national solidarity collective. Most recently, then, Directive 2004/38[25] on free movement re-emphasises the closed nature of the national solidarity collective — or the exclusionary notion that the redistributive social benefits of citizenship are reserved for members of the nation alone — by granting EU citizens and their family members a right of residence throughout Europe 'as long as they do not become an unreasonable burden on the social assistance system of the host member state' (Article 6).

The operative word here, the measure of the willingness of the member states to open up national solidarity to afford real succour to the indigent Union citizen, is to be found in the word 'unreasonable';[26] and is it is here, too, that the determination of the ECJ to pry open that door further is demonstrated. Prior to the implementation of Directive 2004/38, the Court had already firmly signalled its universalist welfare aspirations in cases such as *Grzelczyk*, accordingly stating that the fact that Directive 93/96[27] regulating movement of students did not provide for benefits for students, similarly did not preclude extension of national benefits to EU students where such students found themselves in the same needy circumstances as national students. In *Baumbast*, where a German national had not satisfied UK requirements that he maintain sufficient sickness insurance for himself and his family, the Court accordingly declared that national legislation implementing Directive 2004/38 must be 'proportionate'. As has been cleverly noted,[28] the imposition of the community principle of proportionality to national implementing legislation thus also amounted to

[25] [2004] O.J. L158/77.
[26] M.Dougan, 'The constitutional dimension to the case law on Union citizenship', (2006) *European Law Review* 613.
[27] [1993] OJ L317/59.
[28] M.Dougan (2006).

a ‘constitutional review’ of the efforts of the Council to set the legislative limits to national solidarity through the judicial frontline assessment of the impacts of a notion of ‘unreasonable burden’ in the light of every-day-cases in individual member states.

Naturally, this constitutionally-oriented aspiration to review the actions of the Council in setting limits to national solidarity collectives, has also inexorably implicated the ECJ in a series of intricate judgments, concerning the intimate tax, benefits and financial dealings of a host of EU citizens from students to pensioners.[29] Nonetheless, such painstaking judicial labour has also bought with it immense benefits in terms of the pursuit of the Court’s dedicated campaign to re-orient Union citizenship in line with common understandings of the simple humanity that is due from man to man under circumstances of real human want. Abstracting to the level of political theory: the Court’s very real materiality, its willingness to engage with an ‘other’ within the immediacy of needy circumstances, is reborn as a pragmatic, empathetic and reflex-driven reproach to Hannah Arendt’s eternally sorrowful observation of the human condition and the imperative need to ‘locate’ humanity — the recognition of the human by humans as a human — within time and within ‘space’.[30] Temporality and spaciality are the measure of the traditional concept of citizenship: Mrs Chen’s maternal preoccupations are wholly irrelevant to a republican nation which demands individual philosophical concordance with revolutionary principles born out of and reified within bloody history; contractual citizenship and solidarity, invigorated by a shared geographical experience of class struggle and redistributive resolution, is utterly blind to Mr Baumbast’s, or the geographical stranger’s need for immediate medical care for his family.

This need not be so intones the ECJ: the measure of recognition and solidarity within Europe is certainly not to be negated by spacially-bounded history; still less, is it to be found within a simple reciprocal display of solidarity between and beyond actuarial

[29] Here, it suffices to note only Case C-258/04 *Ioannidis* [2005] ECR I-8275, where the Court continued to struggle to identify ‘an effective and genuine link’ between applicant and host state.
[30] H.Lindahl, ‘Finding a place for freedom, security and justice: The European Union’s claim to territorial unity’, (2004) *European Law Review* 461; A.Somek. ‘Solidarity decomposed: being and time in European citizenship’, (2007) *European Law Review* 787. I am immensely grateful to each of these authors for their insights.

national calculations of cost and benefit in social provision.[31] Instead, a 'wonder' of extra-European recognition is invoked into being as the Court's very post-modern act of observing and responding to the personalised need situation of a non-European subject is conjoined with the modern legal instrument of human rights, in order to recall and, importantly, juridify the pre-modern emotions of universal empathy and brotherhood. By the same token, a once technical yardstick of procedural legal review, 'proportionality', is transformed into a far more indistinct realm of substantive adjudication, open to an emotionally-founded *interposito auctoritas*, within which a 'miracle' of European solidarity is born — a miracle of unbounded love[32] — as the ECJ forensically interrogates the wants of individual citizens, requiring the national solidarity collective to be prised open in response to and in sympathy with the facts of individualised situational context.

The notable degree of comment, controversy and puzzlement about the ECJ's jurisprudence on Union citizenship is thus explained:[33] a post- and pre-modern process whereby the identity of European citizens and, thus, Europe itself, is negotiated in reflexive confrontation (or emotional reflex) with a concrete other, is not easily explained in formal legal categories; still less is it easily recognised within a proceduralist legal paradigm — how can a collective national expression of shared love ever be 'proportionally' balanced against the 'miracle' of universal and unbounded solidarity? Instead, European legal evolution is lead by the emotions of European judges. Nonetheless, the pre-/post-modern stripping away of the history and geography of Europe, the pragmatic juridicial preparedness to consider each individual in his or her situational context, not only seems to echo and embody the political/constitutional aspirations of the Union to give normative voice to identity-oriented concepts of citizenship, particularly in the sphere of non-discrimination;[34] instead, it might also be argued to furnish Union citizenship with an inspirational

[31] Both Dougan (2006) and Somek (2007) confirm — each in their own way — that the ECJ has moved beyond simple notions of reciprocity to justify its creation of European solidarity. In Somek, this idea is to be found in the notion that European solidarity is a 'miracle' drawn forth by virtue of empathetic empirical observation; within Dougan, the constitutional review of the actions of the Council, a European figure, provides us with a distinct European (i.e., not nationally reciprocal) form of solidarity.
[32] Somek (2007) recalling Unger's description of social solidarity as an irrational act of collective love: *Law in Modern Society* (New York-London: Free Press 1975).
[33] See, in particular, Somek's musings on the complex differences in the treatment of students, pensioners and what-have-you (2007).
[34] And here, the reference is to Articles 141 & 13 EC Treaty and the Union's seeming desire to extend its highly successful sex equality provisions to cover fields of race, religion, age, disability and gender.

quality to match the antagonistically reconciling history of industrial citizenship. Following the judicial execution of nation and history in Europe, has European citizenship, finally and remarkably overcome destructive problems of spatiality, temporality and exclusion?

III. Union citizenship fallito (1): nation and history bite back

Hans Lindahl has reminded us of just how powerful Ahrendt's concept of spatiality is.[35] The notion of space is:

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

Writing against the post-war backdrop of Europe's proven moral turpitude, its utter failure to secure the most basic of rights of the millions of murdered dead, who had seen their citizenship and concomitant protection negated, its continuing complicity in the mass displacement of the millions of individuals who had found themselves on the wrong side of re-drawn borders, Arendt's sorrowful observation that '[F]reedom, where it existed as tangible reality, has always been spatially limited',[36] her assertion that human security can only be found within time and place, was no intentionalist statement of sovereign exclusion. Instead it was a highly ambivalent recognition that freedom is only ever secured within a substantive realm of collective nation and history — which contemporaneously and inexorably imperils freedom — and it is this ambivalence which has likewise led Hans Lindahl to conclude that, with its constitution of a legal space of European values, the EU has also re-asserted, with all its negative connotations, a *place* of European nation and history, a European *place* of exclusion.

In other words, and for all the brave efforts of the ECJ, a curiously differentiated European regime, whereby Union citizens are afforded rights, third country nationals

[35] Hannah Arendt (1963), *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin: London 1994), p.262. See, also, Hannah Arendt, *The Human Condition* (Chicago University Press: Chicago, 1958), p.52. Cited by Lindahl (2007).
[36] *On Revolution* (Penguin Classics 1990)

are afforded limited recognition,[37] and asylum seekers are subject to a common framework of control,[38] does not end exclusion in Europe, but rather reinforces it within a binary legal code, whereby the 'legally-resident' take their stratified place within a European space, which protects individual Europeans, one from the other, and Europeans from *the* other, such that 'the illegal', both within Europe and without, are left bereft, knocking at the firmly closed doors of recognition and solidarity. The European other dies daily in the waters of the Mediterranean just as the draft European Constitution promises its citizens 'an area of freedom, security and justice without internal frontiers' (Article 3(2)). Spatiality and temporality inexorably return to haunt Europe and, with them, the pressing questions of which are the narratives of history and which are the narratives of nation, which are unfolding within our common realm of legal place? We have already observed the ECJ's liberating 'blindness' to history and to nation within its jurisprudence, but we must now ask, by means of disruptive eversion (*Umstülpung*), whether blindness is itself only a mask for construction of a sanitised narrative of European history, for assertion of a European nation, which ignores the antagonisms that exist between individual Europeans and between Europeans and their other; antagonisms that must nevertheless be revealed and reconciled (also within European citizenship) if Europe is to endure and not merely to founder within the empty promises of the *ius publicum europaeum*, and its simple veneer of occidental rationalism.[39]

The deconstructive quest for the narrative of history and nation focuses on two cases that may, initially, seem quirkily distanced from one another: the case of *Lechourito* on the one hand, where the ECJ held that a 1943 retaliatory massacre committed by German armed forces within Greece did not fall within the *ratione materiae* of the 1968 Brussels Convention, since the massacre concerned the exercise of public rather than civil powers;[40] and the case of *Commission* v *Austria*, on the other, where the 'open-door' policy of university entry within Austria, guaranteeing university

[37] As family members under Directive 2004/38 and long term residents under the Long Term Residents Directive 2003/109EC.
[38] See, C.Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford University Press 2004), for comprehensive details on the disturbing differentiated categorisation of individuals in Europe.
[39] The echo of Carl Schmitt is wholly intentional, see, C.Schmitt (1932), *Der Begriff des Politischen* (Dunker & Humblodt: Berlin 2001).
[40] Case C-292/05 *Lechouritou* v *Germany* [2007] OJ C82/85.

admission to all Austrians holding a high school diploma, regardless of grade, was held to be indirectly discriminatory against non-Austrian EU-nationals who were required to qualify themselves for admission in-line with their own national practices.[41] What then unites these utterly disparate cases? The answer is the potential for the recognition of emotion and irrationality within European law, for the acknowledgment of uncomfortable history and acts of social love within the *ius europaeum.* As Carol Lyon notes, above all in her treatment of Advocate General Ruiz-Jarabo Colomner's sensitive efforts to address 'the other country of [Europe's] past,'[42] *Lechouritou* concerned memories of European trauma that will not die, and, further, implicates the European Court in an act of 'listening rather than answering,'[43] of responding empathetically to enduring human emotion rather than immediate legal right. By the same token, as Alex Somek asserts,[44] the facts of *Austria* v *Commission* also encompass a measure of irrationality, or social love, a diffuse but collective decision that 'everyone who has made it through school [should be] rewarded with a fresh start';[45] a measure of national empathy, with very real socially redistributive consequences, that closes the space of Austrian education to non-Austrians, just as it makes inclusive reparation for jointly-experienced memories of adolescent self-discovery and academic underachievement.

As noted, within the legal technical term of proportionality — at least as it applies to reciprocity between schemes of social assistance — the ECJ has opened up potential for itself to respond to the facts of European integration within an emotionally-founded *interposito auctoritas.* The robed, if not be-wigged, European Justice is undoubtedly, and perhaps sometimes usefully so, judge-king[46] within Europe, with the freedom to adapt the normative framework of European law to the factual demands thrown up by integration processes, in line with his or her own emotional processes of recognition and empathy. But what of the European judge-king's

[41] Case C-147/03 *Commission of the European Communities* v *Republic of Austria* [2005] ECR I-5969.
[42] Carol Lyons, 'The persistence of memory: the *Lechouritou* case and history before the European Court of Justice' [2007] European Law Review 563, p. XX.
[43] Carol Lyons (2007:XX).
[44] Somek (2007:XX)
[45] Somek also notes the potentially regressive social impacts of the decision: are those failing to obtain a grammar school education (typically, from the less-advantaged Austrian classes) to be excluded from Austrian educational life?
[46] Ehrlich, E (reprint from 1903), *Freie Rechtsfindung und freie Rechtswissenschaft* (Aalen: Scientia 1987).

preparedness to respond to the emotions and irrationalities of European publics? Here, however, a façade of occidental rationalism is decisively re-established within the law as: 1) in *Lechouritou,* the Court perhaps takes the Advocate General's exhortation to exercise its judicial role in a 'restrained' manner — that is, 'without sentiment' — too much to heart, dismissing the AG's opinion in its entirety and treating the matter before it solely within the rationality language of the self-referential jurisdiction of civil matters;[47] and 2) all issues of emotional solidarity with the underachieving teenager of our pasts are simply swept aside as the Court 'gives Austria the unsolicited [but brutally rational] advice to establish "entry examinations or the requirement of a minimal qualification to avoid the system's collapse".'[48]

History and nation are indeed dead within the minds of the ECJ as reparation in its historical and cultural contexts is not even addressed within the language of the Court, much less allowed to contaminate the implementation of European law. Or is it? Certainly, in terms of Arendt's eternally ambivalent notion of spatiality, *Lechouritou's* utter failure to refocus European minds — however symbolically — on the other of our own bloody past, must be decried as an instance of historical blindness, which inevitably contributes to the process whereby the modern European mind is stripped of empathy for, and inured to the sufferings of, the European other that languishes nightly in Mediterranean death-traps, or daily in the asylum detention-centres that ∗border∗ our 'area of freedom, security and justice without internal frontiers.' At the same time, however, the language of legal rationality must also be recognised to be a re-assertion and affirmation of the emotionally-denuded narrative of occidental rationalism that has, ever since the enlightenment, presented and justified European expansion and self-profligation upon the world stage within an argument of evolutionary superiority and logical inevitability: a history of logical rationalism, which swamps and displaces a bloody history of slavery and European colonial expansion —as well as, continuing post-colonial dominance — relieving us of our enduring historical responsibility for the European other; and — once again in Arendt's terms — which disguises and neuters the antagonistic class relations that lie behind our constitutional frameworks of civic, social and political rights, voiding our memories of feudal, bourgeois and industrial conflagration and laying us open to the

[47] Lyons (2007).
[48] Somek (2007:XX).

rational colonisation and perversion of a *ius publicum europaeum*, which, through its self-referential placement in a sphere beyond politics (and emotional history), undermines its own socially-reconciling promise.[49]

IV. Union citizenship fallito (II): class bites back

1) The empirical traces of class exclusion

Returning then to our notion of industrial citizenship, the case of *Commission* v *Austria* may also be treated in explicitly class-oriented terms. For all of Somek's doubts about the socially-regressive impacts of the legislation in question — which rewards a *per se* middle class failure to achieve outstanding results within the Austrian system of grammar schools with a university education — the refusal to establish an exclusionary *numerus clausus* within continental universities has generally been motivated by corrective concern about the stubborn persistence of structural class inequalities within the education system. Seen in this light, ECJ's jurisprudence might accordingly be regarded as rewarding the middle class success of Polish, Portuguese and Greek students at the price of the working class failure of their Austrian counterparts. This, in its turn, raises the highly uncomfortable question of whether processes of European integration have — in fact rather than in the esoteric terms of allocational economic theory — been detrimental to the interests of a European working class.

Arendt herself was highly pessimistic:[50] the predominantly economic nature of the founding European Treaties would only aggravate the inherent failings of the European, rather than American, republican revolution — that is: its tendency to subdue the confrontational class politics that was deemed to have to have explosively expressed and, thus, ended itself within the revolutionary moment; its promotion of a

[49] The initial congruence between Arendt's (that is, our heroine's) negative evaluation of European republicanism and Schmitt's (our universal fiend's) dismissal of plural constitutional settlement is one that disturbs many a political theorist. However, Schmitt's binary friend-enemy distinction, which justifies sovereign colonisation of political power must be starkly contrasted, in its theoretical-political impacts, with Arendt's spatial ambivalence and consequential recognition of the normative primacy of enduring antagonism.

[50] Her general concerns about the European constitutional settlement are explicitly related to the European Communities in M.Walzer, *Exodus und Revolution* (Fischer Taschenbücher 1995).

history-denying, history-displacing and history-creating rationality; as well as its assertion of a self-deluding, normative narrative of evolutionary progress.[51] A European working class might only forge a Europe responsive to its needs were it to end the constitutionally-conditioned bourgeois monopoly over European (non) politics. However, that was then, and now is now, and, further, the past thirty years of European integration has been wholly dominated by a normative-descriptive narrative of the *telos* of European integration, which has no room for class analyses or, indeed, for any empirical analysis at all.[52] Is it now at all possible properly to ascertain the differentiated class impacts of processes of European integration?

Certainly, the traces of a differentiated class impact can be identified within the very dissimilar self-perceptions of European identity maintained by different social classes within Europe and, more particularly, have recently been so identified by the American sociologist, Neil Fligstein, in his timely book, *Euro-clash*.[53] For *Euro-clash* read 'a clash of European social classes' and an embarrassment for European politicians and academics alike: why has it taken an American to reveal to the obvious to us, that, as a simple matter of course, an integration process, which is primarily economically-driven, is perceived to be of great benefit to a small elite of Europeans (10-15%), who will accordingly give it their full support at all times, is thought to be of occasional benefit to a middle group (40-50%), whose 'European-ness' is, by the same token, necessarily contingent; but is, likewise perceived as a very real threat to a final set of Europeans (40-50%) who remain inexorably trapped within national paradigms of consciousness and self-protection.[54]

Fligstein accordingly presents us with the shocking, but surely not too surprising fact that socio-economic variables furnish us with an exact prediction of degrees of European identity formation amongst European individuals.[55] Persons will identify

[51] *On Revolution*: the European republic was beholden to European rationalism rather than pragmatic politics.
[52] See, M.Everson & J.Esiner (2007), Chapter Two; G.Majone, Dilemmas of European Integration (Oxford University Press: Oxford 2006): the point being that, in its efforts simultaneously to describe and legitimate European processes of integration, European scholarship has often failed to take proper empirical note of what is happening in a real world of European integration, fatally pre-empting any systematic empirical analysis as facts are viewed through normative lenses.
[53] *Euro-clash: the EU, European identity and the future of Europe* (OUP: Oxford 2008).
[54] Fligstein (2008) Chapter 8.
[55] Fligstein (2008:140).

themselves as more or less European in direct correlation to their mobility, levels of civic association (business, professional, NGO-related, tourism-related etc.), levels of education and levels of (higher) cultural interaction. At one level, this seems a self-obvious conclusion, dictated to us by common sense, but does Fligstein, the empirical sociologist, tell us more: does he tell us whether this brave new European world of reinvigorated class and differentiated identities is merely a matter of perception or, by stark contrast, is one of brutal fact?

Fligstein's orienting thesis is taken from Karl Deutsch and is, thus, also flavoured by centuries of European history (of class struggle and nation formation). Reviewing the wide range of sociological theories, historically centred on the nation state, which help to explain why groups of individuals with very divergent life experiences, as well as interests, are prepared to give their undivided loyalty to one political-legal entity, Fligstein plumps for Deutsch's exhortation that: 'the historical "trick" to the rise of a nation state will be to find a horizontal solidarity for the existing [class] stratification and a rationale that using a state apparatus to protect the nation makes sense'.[56] In Arendt's politically-centred view, both Deutsch and Fligstein may initially appear to be a mite cynical within a Bismarkian semmantic: identity, loyalty and the feeling that the search for a common fate is the best bet for self-protection (against forces internal and external to the nation), are not to be won through the final overcoming of 'stratification', but are, rather, to be bought through the establishment of a common culture (through shared national institutions such as church, army and educational establishments), which, continuing stratification notwithstanding, give a diffuse sense of common purpose and protection. Nonetheless, to the degree that the various joint institutions of national life are themselves centres for the reproduction and reconciliation of the antagonistic class politics that at once undermine and build the nation, which are the institutions of European life that might permit the reproduction and reconciliation of a purging European class conflict?

And it is here that Fligstein begins to sketch out a reality — not a perception — of European life that segregates European classes and denies them access to antagonistically-reconciling politics. European integration is now and has always been

[56] Fligstein (2008:130).

a response to economic realities; in a first integrationist wave, with an eye to the need to rebuild the shattered economies of European nation states (and empires); and, in a second stage, as an answer to the pressures of globalisation and the need to reform (protect) European economies, in order to meet the competitive pressures of a global market. In turn, however, economic processes of integration within the European market are themselves, and also give rise to specific 'fields of interaction' between individual Europeans,[57] which then determine the make-up of a European society, and also create opportunities for, and place constraints upon, European politics.

This process of economically-bounded interaction should never be mistaken for integrative 'spill-over'. Quite to the contrary: taking care empirically to dissect the exact nature of economic integration, globalisation, social interaction and political constraints/opportunities, Fligstein demonstrates that integration has not evenly and smoothly spread its impacts across the whole of a European society. Instead, the initial process of integration, though often blocked by nationally-oriented member states, nevertheless gave birth to powerful economic elites, with lobbying capacities at European level. By the same token, globalisation pressures and economic reforms have likewise enabled Europeanised elites to strengthen their presence within the higher — ownership — strata of the increasingly integrated European market. In socio-economic terms, the elite or ownership class now experiences a daily reality of Europeanisation within the workplace and within social life. Equally, the European elite has long found its political voice in Brussels, perceives Europeanisation to be in its interests (i.e., to act as a bulwark against globalisation), and will, therefore, place political pressure upon member state governments to deepen the integration process at both national and European levels, no matter how resistant such governments may be. By contrast, at national level, political pressures — the need constantly to re-assert the core measure of national life — have also determined that national frameworks of property and labour law have been maintained and that market integration, in wide-scale industrial sectors, such as defence and telecommunications, has been effected, not through establishment of conspicuously European firms, but through mergers, joint ventures and jointly owned subsidiaries; an integration model that leaves the concrete impression that economic life is still national and not European in nature

[57] Fligstein (2008:9-10).

(ironically, even where ownership is American).[58] This, in turn, determines that the mass of industrial workers experience their daily lives wholly within the national context. In contrast to a middle class, which may have a more diffuse understanding of Europeanisation processes, and which, at the very least, experiences Europeanisation — and, importantly, interacts with other Europeans — through the benefits of culturally-oriented tourism (i.e., *not* mass package tourism), a working class is never socialised within joint institutions of European life.

The site of politics for the European working class is a primarily national one. Further, at national level, the European working class confronts a national political leadership, which is itself beholden to the Europeanised interests of an ownership elite, and which is also uncertain of the degree of nationalised support that it will receive from a mass of middle class workers, whose political sentiments often prove to be as unpredictable as their partially-Europeanised daily life. In political terms, then, the European working class is doubly excluded from reconciling process of antagonistic European class expression; on the one hand, as they neither experience a site or institution of joint European political interaction; and, on the other hand, since they might never claim the undivided (national) attentions of their own political leaders.

2) The legal consolidation of class exclusion

To the degree that economic processes of European integration have isolated the working classes of Europe within national paradigms of protective politics, where they cannot but fight, the one against the other, rather than join together to contest bourgeois economic might, recent non-votes against the draft European constitution or draft Lisbon treaty are even less to be dismissed as the result of the European populace's unfortunate ignorance about and lacking understanding of the workings of European institutions. Instead, hostility is a highly rational phenomenon, both amongst the social class to whom integration is most threatening and amongst the better placed group of 'occasional' Europeans whose support is given either to the nation state, or to the EU, in line with a considered calculation as to which body is better placed to provide social cohesion at any one time. Indeed, the 'no' vote was

[58] The one exception being the UK, where ownership passes easily to non-UK companies. Equally, a UK labour market is heavily Europeanised.

potentially the only site of European politics within which class antagonisms might, at least, be jointly aired.

Given this conclusion, the analysis now finally returns to its starting point in order to ask whether adjudicative European law — the confounding *Janus* that engages in acts of emotional irrationality, just as it draws a veil of rationalism over its activities — has made its own particular contribution to the exclusion of the common European man from sites of antagonistic European class conflict; whether it, too, and not just a diffuse process of economic differentiation, is actively engaged in the bourgeois colonisation of the normative framework of European law, a process of colonisation, which, by means of its negation of the European nation and its history of class struggle, has undermined the core of European citizenship? The response to this question, however, is relatively easily found and must now be a resounding 'yes'.

The recent European cases of *Viking*, *Laval* and *Rüffert* have thus become pivotal within this context,[59] not simply since they have, quite remarkably, rejected the warnings given by Marx and, more recently, by Polanyi,[60] about the dire consequences of forcing a working class into wage competition with itself — and that in the name of 'social justice'.[61] But rather, since they have also, with the aid of our old adjudicative friend of 'proportionality', once again excluded a European working class from any possible site of political contestation, within which its antagonistic interests might be presented and asserted. The adjudicative interplay between a Posted Workers Directive,[62] purportedly introduced by the Council in order to regulate potential social dumping within the European market, and European rights of establishment and service-provision, as well as the primary provisions of European state aid law have thus led in European law to: 1) the creation of an absolute judicial prohibition against an international seaman's strike (and *all* international solidarity strikes) called in solidaristic opposition to the re-flagging of a vessel, in order to allow

[59] Case C-438/05, *International Transport Workers' Federation, Finnish Seamen's Union* v. *Viking Line ABP, OÜ Viking Line Eesti* (Judgment of 11 December 2007; Case C-341/05); *Laval un Partneri Ltd* v. *Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet, avd. 1, Svenska Elektrikerförbundet* (Judgment of 18 December 2007); Case C-346/06, *Rechtsanwalt Dr. Dirk Rüffert* v. *Land Niedersachsen* (judgment of 3 April 2008).
[60] Karl Polanyi (1944), *The Great Transformation* (Beacon Press: New York 2001)
[61] See below.
[62] Directive 96/71/EC, OJ L 18/1996, 1.

for the hire of cheaper foreign labour (*Viking*); the imposition of a judicial value of 'proportionality' upon *all* national strikes called in defence of local bargaining agreements (*Viking* & *Laval*); and the establishment of a final prohibition on the democratically-legitimated enforcement of *all* local bargaining agreements, as local and national authorities are precluded by the provisions of state aids law from tailoring their tenders in line with such agreements, and Article 3(1) of the Posted Workers Directive is deemed to give European protection only to *universal* provisions of national labour law, such as minimum wage requirements, working hour legislation and health and safety regulation applying to *all* workers in a member state (*Laval* & *Rüffert*).

Not surprisingly, such judgements have drawn a host of outraged comment from commentators, not least since the European Court appears thus to have drawn a coach and horses through the social constitutional settlements of countries, such as Sweden, who, historically, have not maintained minimum wage legislation, but have, instead, reconciled antagonistic class struggle by means of governmental enforcement of union-employer negotiated bargaining agreements. At this one level, the ECJ would thus seem to have confirmed that the corporatist model of economic organisation within Europe is dead, and declared – the somewhat untimely – sovereignty of an Anglo-Saxon model of universal welfare provision.[63] However, the interventionist impact of the Court just as surely extends far beyond the misconceived negative constitutional juxtaposition of Anglo-Saxon with continental models of social organisation, in order to effect the bourgeois colonisation of the framework of European law instead.

The clear, but shocking, historical analogy is the case of *Lochner* v *New York*, decided by the US Supreme Court in 1905,[64] whereby the democratic right of the State of New York to set its own working conditions (including the rights of workers to strike) was overturned with reference to the US Constitution's absolute guarantee for property. Presented by the majority of the Court as a formalistic inevitability, driven simply by the hierarchical precedence of the Constitution over state legislation, the cracked

[63] See, relevant references in, Ch.Joerges & F.Rödl, 'Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval', (2009) 15:1 *European Law Journal* 1-19.
[64] *Lochner* v *New York*, 198 U.S. 45 (1905)

veneer of formalist rationality within the Court was nonetheless readily exposed, as the dissenting Judge, Justice Holmes, laconically observed that the democratic right of the states to legislate in this area was guaranteed also by the Constitution.[65] The bourgeois sentiments of the US Supreme Court are readily identified; and so, too, are the bourgeois sentiments of European judge-kings who once again engage in an ill-advised, emotionally-driven *auctoritas interposito*, giving voice to their own perceptions of the social justice due Eastern European workers, but at the same time denying the European working class as whole the opportunity to assert its antagonistic interests against a bourgeois European economy. The ECJ need not have decided as it did.

Eastern enlargement and the failure of Western Europe to afford a measure of democratically-legitimated redistributive justice to its recently-liberated eastern cousins is the backdrop against which the cases were decided, and it is also the backdrop against which the formalistically-flavoured *choice* of the Court to assert – under the veil of occidental rationalism – the hierarchical precedence of Articles 43, 49 and 87 EC Treaty above the constitutional traditions and democratic processes of the member states was taken. For all his talk of the creation of a European social constitution, the measure of AG Maduro's notion of social justice in modern Europe is to be found in his promotion of social constitutionalism within a dominant European economic model of 'allocative efficiency'; an ill-timed and emotional *auctoritas interposito*, which reacts to the clearly disadvantaged position of Eastern European workers with a notion of 'social justice' that will see them work for less than western workers, and western workers denied access to their own jobs. Worse still, this false individual sentiment affects the Court as a whole, as the useful precedents of a series of social insurance cases are rejected,[66] and the hands of national courts are tied, as proportionality becomes the impossible yardstick against which social antagonism must be measured.

Within the social insurance cases — primarily concerning professional 'trade agreements', rather than the industrial bargaining agreements commonly concluded

[65] *Lochner* v *New York*, 198 U.S. 45 (1905), pp.XX
[66] Joined Cases *Poucet and Pistre* C-180/98 to C-184/98 [2000] ECR I-6451; Joined Cases *Albany* C-115/97, C-117/97, C-210/97, [1999] ECR I-6025 and [1999] ECR I-6121; Joined Cases, *Pavel Pavlov*, C-180/98 to C-184/98 [2000].

by the mass trades union movement — the core decision was one that such restrictive practices were *per se* legitimate mechanisms of social policy, and might only be reviewed under the European competition regime (Article 81 EC), with an eye to a procedural principle of proportionality, whereby such private arrangements would be reviewed by national courts in order to ensure that they were fair and not abusive in their composition and rates.[67] Such a procedural resolution was also conceivable in the case of collective bargaining agreements; however, here the formula is reversed. Collective bargaining agreements are *per se* restrictions on European rights; strikes will be contested in national courts to ascertain whether they are proportionate with those rights, in their substance, and not in their conduct.

And thus false sentiment is unveiled as bourgeois might. A strike, withdrawal of labour, is never substantively proportionate. Certainly, it may be illegally conducted and, here, proportionality may have a real legal meaning, allowing courts to review whether strike votes were properly held. Beyond that, however, the strike is an irrational and disproportionate act, a concrete political expression of antagonistic class conflict, a modern continuation of the struggle that creates and undermines our market and our state, a necessary site of reconciling conflict between antagonistic European classes; and a necessary site of conflict that the European Court has decisively foreclosed.

V) The responsibilities of legal method in European law

The consequences of bourgeois colonisation of European law under current conditions of extreme economic decline are potentially catastrophic and may lead us blindly into a revolution, which ends in the destruction of Europe. Wildcat strikes within the UK against contracted labour from other European states, the prospect that continental unions will take legal action to ask their constitutional courts to set European law aside, are all the more shocking for the manner in which they have been represented within national and European media.[68] In a highly unfortunate clash between identity-

[67] See, M.Everson, 'Social Pluralism and the European Court of Justice. A Court between a Rock and a Hard Place', (2003) *The Journal of Legislative Studies* 98-116.
[68] *The Times* Comment (January 30, 2009): 'For many, complaints about foreign workers coming here and taking their jobs are disturbingly reminiscent of the atmosphere whipped up in Britain's cities during the 1960s and 1970s, when the backlash against Commonwealth immigration was reflected both

based notions of citizenship and industrial conceptions of the citizen, workers are dismissed as 'xenophobic' and 'racist'; are denied political voice as mere representatives of the dinosaur of industrial self-interest. Contracted workers are viewed as victims of the strikers, rather than the victims of a bourgeois European economy, which has no proper redistributive provision. Worker is set against worker as national governments, in thrall to the interests of the European ownership elite, are deaf to their protests; worker is set against worker as national courts are closed to them as sites of political contestation. The worker is eradicated from the stage of European politics and becomes easy prey for extremist organisers from the left and from the right.

The time then has surely come to end the complacency of a European scholarship, which has lauded processes of supposed deliberation within, say, the European convention and open method of co-ordination, has been blind to the real assertion of social interest within Europe, dismissing no-votes as being reflective of the ignorance of individual Europeans and has thus located itself within a European elite[69] that is inured to the social and political aspirations of the European people. Surely the time has now come to develop a European legal method, which is founded within history, sensitive to the dangers posed by a judge-king and which is never fooled or perverted by a lure of European elitism? Or has it: has it not, by stark contrast, been there all the time? We are fortunate to have experienced this legal scholarship from the very outset. In his time at the European University Institute, European Christian Joerges has not only reminded us constantly about the ambivalence of the judge-king,[70] however well-intentioned he or she may be, he has also written repeatedly on the need to celebrate lawyers who have fought against – at great personal cost – the very real dangers of occidental rationalism, and its collapse, within the *ius publicum europaeum*.[71] He has not only repeatedly stressed the vital importance of the

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in the ballot box — in support for extreme right-wing parties — and, in many cases, in street violence. As unemployment starts to edge up to levels last seen in the mid-1980s, the hunt is on for scapegoats'.

[69] Fligstein highlight the role of the European in the creation of the European elite (Fligstein 2008) Chapter six.

[70] In an excellent if very difficult seminar on legal theory.

[71] 'History as Non-History: Divergencies and Time Lags between Friedrich Kessler and German Jurisprudence', 42 (1994) *American Journal of Comparative Law* 163-193; 'Geschichte als Nicht-Geschichte: Unterschiede und Ungleichzeitigkeiten zwischen Friedrich Kessler und der deutschen Rechtswissenschaft,' in, Marcus Lutter, Ernst C. Stiefel & Michael H. Hoeflich (eds), *Der Einfluß deutschsprachiger Emigranten auf die*

maintenance – within a conflict of laws logic – of the core of the national social settlement,[72] he also powerfully intervened to oppose the forces of blind economic rationality that are now threatening the very future of Europe.[73] And finally, with his historical sensitivity for the failings of the classical European nation state within its myriad legal settlements, he has just as surely primed us to maintain, at all times, our core humanity and empathy for the European other.[74]

Rechtsentwicklung in den USA und in Deutschland (Tübingen: Mohr/Siebeck 1993), pp.221-253.

[72] What is left of the European Economic Constitution? A Melancholic Eulogy, (2005) 30 *European Law Review* 461-48; 'Rethinking European Law's Supremacy: A Plea for a Supranational Conflict of Laws,' in, Beate Kohler Koch & Berthold Rittberger (eds), *Debating the Democratic Legitimacy of the European Union* (Rowman & Littlefield: Lanham, MD, 2007) pp311-327; and Jürgen Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology', 3 (1997) *European Law Journal* 273-299.

[73] Ch.Joerges, 'The 'Social Market Economy' as Europe's Social Model?', in, Lars Magnusson and Bo Stråth (eds.), *A European Social Citizenship? Preconditions for Future Policies in Historical Light*, (Brussels: Lang 2005, 125-158); Christian Joerges & Florian Rödl, 'The 'Social Market Economy' as Europe's Social Model?', EUI Working Paper Law No. 2004/8; Ch.Joerges & F.Rödl, 'Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval', (2009) 15:1 *European Law Journal* 1-19.

[74] Erik Oddvar Eriksen, Christian Joerges and Florian Rödl (eds), Law, Democracy and Solidarity in a Post-national Union, London-New York: (Routledge 2008), especially, 'Working through "Bitter Experiences" towards Constitutionalisation: A Critique on the Disregard for History in European Constitutional Theory', at 175-192); Ch.Joerges & Navraj S. Ghaleigh (eds), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions* (Hart Publishing: Oxford 2003); Ch.Joerges, 'Continuities and Discontinuities in German Legal Thought', The Darker Side of a Pluralist Heritage: Anti-liberal Traditions in European Social Theory and Legal Thought, *Special Issue of Law and Critique* 14:3 (2003), pp297-308.