

The State and the Citizen-as-Migrant. How Free Movement Changes the Social Contract

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1. Introduction

In the first three months of 2021, while new waves of the Covid-19 pandemic kept highways and airports unusually empty, 3,589 EU citizens obtained a visa to work in the UK, 290 EU citizens were granted a visa to study and another 3,294 were turned back at UK borders.¹ In the same quarter of 2020, just before the pandemic started to spur border closures and travel bans, the relevant numbers would have been, respectively, 0, 0 and 493. The end of free movement explains the sharp difference in these figures, and the counter trend in the context of the pandemic. With the UK withdrawal from the EU taking full effect on 1st January 2021, European citizens were no longer free to enter the UK under the terms of the EU Treaties and needed a visa to work or study there.²

There is nothing on the surface surprising about this. As the Privy Council had noted already in 1891, an alien may not claim a legal right to enter British territory, or any other territory where he is an alien for that matter.³ The revival of this old rule of immigration law in the relation between the UK and the EU was well expected. Harder to imagine was the rapid change that the reinstatement of this rule produced in the action of EU states on behalf of their own citizens. In the years leading to Brexit, both the UK and the EU governments had actively engaged to secure the status and rights of their citizens in the exercise of free movement. A frenzy of meetings between diplomatic representations in London and the UK Home Office had taken place behind the scenes of the official negotiations.⁴ After 31st December 2020, EU governments, partly, sat back. They entrusted their citizens in the UK to host state protection through the UK ‘Settlement Status’; they voiced disdain for the detention of some of their nationals at British ports, but also accepted that those nationals, as unauthorized migrants rather than free moving citizens, had breached the new rules;⁵ and they turned to staffing new consular offices throughout the UK to

¹ See Home Office, *Immigration statistics, year ending March 2021*, GOV.UK (May 27, 2021) <https://www.gov.uk/government/statistics/immigration-statistics-year-ending-march-2021>; also see Michaela Benson, *Which EU citizens are being turned away at Britain's borders?*, UK IN A CHANGING EUROPE (May 28, 2021) https://ukandeu.ac.uk/which-eu-citizens-are-being-turned-away-at-britains-borders/?mc_cid=ba167d5bdf&mc_eid=a017a6b366; also see Home Office, *Managed migration datasets* GOV.UK (Nov.28, 2019) <https://www.gov.uk/government/statistical-data-sets/managed-migration-datasets#passengers-initially-refused-entry-at-port>.

² See Treaty on the Functioning of the European Union, art.21 (OJ C 202/47).

³ *Musgrove v Chung Teeong Toy* [1891] AC 272 (UKPC) 282 (appeal taken from Victoria).

⁴ The Author was part of the advisory group to one of the Member States’ diplomatic missions in the context of those meetings.

⁵ See e.g. Cristina Gallardo, *Italy warns UK against detention of EU citizens over border mistakes*, POLITICO (Jun.1, 2021 6:27 PM) <https://www.politico.eu/article/italy-uk-eu-citizens-border-benedetto-della-vedova/>.

process newly needed visas and to assist, in the old fashioned diplomatic script of international relations, their nationals in the UK.⁶ Along similar lines, the UK government provided guidance to its nationals on how to obtain host state protection in Europe and otherwise turned to enact lockdowns and travel bans in response to the pandemic.⁷ While Covid-19 forced the attention of citizens and governments elsewhere, the social contract between the state and its own supranational citizens had been rescinded in the UK.

This prompts a question in retrospect: what went into that contract in the first place?⁸ How has the recognition of a right to free movement for the national citizen turned supranational altered the terms of the relation between each Member State and its own citizens? What happens in other words when migration is offered to the citizens of a sovereign state as a freedom? The rich literature that European citizenship, in its 30 years of association with the right to free movement,⁹ has inspired has mostly focused on the foundations and implications of the relation between the supranational citizen migrants and their host Member States. Much less attention has been paid to the latter question.¹⁰ The objective of this article is to begin to fill this gap.

In exploring the way free movement alters the relation between the state and its own citizens, the article relies on two starting points. First, that free movement operates in a system in which the nation states are the center of the European project, and national citizenship is the main category mediating the relation between individual and public authority. In this system, the nation state remains the main repository of affection, allegiance, cultural diversities and traditions. In respect to these, citizenship is not only a mantle of rights but also a beacon of responsibility. Second, free movement is part of the toolset through which, in the European Union, the relation between individual and public authority opens up to novel influences and is re-articulated in a space that projects the rights and responsibilities of both states and individuals beyond national boundaries.¹¹ Taken together, these two assumptions situate the article's quest into a vision of Europe that is simultaneously statist and cosmopolitan: the state community remains the main associative unit, but it embraces responsibilities towards citizens of different states whom it recognizes as having the same moral worth, and the same legal claims as its own. In this sense the article sits in a long tradition of legal and philosophical thought that dates back to Kant's attempt

⁶ Between 2018 and 2021, Ireland, Italy, Romania, Hungary and Spain, among others opened new consular seats in the UK outside of London.

⁷ See Guidance - Foreign & Commonwealth Office and Foreign, Commonwealth & Development Office, *Living in Europe: citizens' rights if you moved before 1 January 2021*, GOV.UK (Jan.30, 2020) <https://www.gov.uk/guidance/living-in-europe>.

⁸ In referring to the 'social contract' the article refers to the idea of an hypothetical compact between individual and public authority setting the terms of their reciprocal relation. It tracks in this sense a loose understanding of the notion as the "actual or hypothetical compact, or agreement, between the ruled and their rulers, defining the rights and duties of each" (The Editors of Encyclopaedia Britannica, *Social Contract*, BRITANNICA (Jul. 27, 2021) <https://www.britannica.com/topic/social-contract>). It does not imply a deliberative process as to the social ordering of that relation along the lines of social contract theories of justice and of political relations. See in this sense JOHN RAWLS, *A THEORY OF JUSTICE* (1971); DAVID GAUTHIER, *MORALS BY AGREEMENT* (1987).

⁹ For an overview of that debate and its ramifications, see e.g. Dimitry Kochenov, *The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and The Moon?* 62 INT.COMP.LAW Q. 97 (2013).

¹⁰ See Francesca Strumia, *Supranational Citizenship's Enablers: Free Movement from the Perspective of Home Member States*, 4 EUR. LAW REV. 507 (2020).

¹¹ See Loïc Azoulay, *Transfiguring European Citizenship: From Member State Territory to Union Territory*, in EU CITIZENSHIP AND FEDERALISM: THE ROLE OF RIGHTS (D. KOCHENOV ED., 2017).

to reconcile the state's institutional role with the moral aspiration to cosmopolitanism.¹² In the EU integration context, it sits alongside the accounts of integration that have sought to reconcile integration's statist mandate and its cosmopolitan reach.¹³ Alongside democratic and cosmopolitan statist accounts, it sees the EU as an association of states that in pursuing their shared purposes preserve institutional and political autonomy, but work together in accordance with norms of mutual recognition and concern.¹⁴

The article's vision diverges from the democratic and cosmopolitan statist ones in an important respect. In those visions the state's cosmopolitan turn lies in its internalizing the perspective of others through the norms of mutual recognition and concern.¹⁵ This article rather focuses on how the nesting of free movement within a transnational version of the social contract calls for externalizing the perspective of the citizens. It questions how the key norms in a cosmopolitan statist vision of free movement, mutual recognition and non-domination, operate in the context of the relation between the state and its own citizens. It advances two observations in this respect. First, in a system of states committed to mutual concern and recognition towards one another and their respective citizens, the citizen becomes a transnational stakeholder and the citizen-state relation becomes non-exclusive. Second, in the context of this non-exclusive relation, mobility becomes a protected part of the citizen's experience, so that the citizen-as-migrant becomes a party to the social contract.

The relation with the citizen-as-migrant commits the state to two newly shaped obligations. A reflexive set of obligations towards the migrants-as-citizens coming from other Member States; and an obligation to mediate the position of the citizen-as-migrant and the citizen-as-sedentary so that neither group becomes dominating of the other. Exploring these sets of obligations advances the understanding of the rights of the sedentary in the context of EU free movement law as well as the understanding of the implications of free movement for the condition of third country nationals. More broadly, it yields a novel paradigm of international movement distinct from the migration paradigm, whose categories have predominantly been deployed to date in the literature on EU free movement.¹⁶ While migration forces a relation between the state and the non-citizen, free movement problematizes that relation between the state and its own citizens.

The article's quest proceeds in four steps. Part I articulates the role of free movement in the context of a cosmopolitan statist vision of European integration. Part II analyzes more specifically the relation that free movement institutes between each Member State and its own citizen-as-

¹² IMMANUEL KANT, *KANT'S PERPETUAL PEACE: A PHILOSOPHICAL PROPOSAL* (Helen O'Brien & Jessie H Buckland trans., Sweet & Maxwell 1927). Also see LEA YPI, *GLOBAL JUSTICE AND AVANT-GARDE POLITICAL AGENCY* 12-34 (2012); for an overview, also see Miriam Ronzoni and Laura Valentini, *Global Justice and the Role of the State: a Critical Survey*, in *OXFORD HANDBOOK OF GLOBAL JUSTICE* (T. Brooks ed., 2020); *VARIETIES OF SOVEREIGNTY AND CITIZENSHIP* (Sigal R. Ben-Porath and Rogers M. Smith eds., 2012).

¹³ See e.g. RICHARD BELLAMY, *A REPUBLICAN EUROPE OF STATES-COSMOPOLITANISM, INTERGOVERNMENTALISM AND DEMOCRACY IN THE EU* (2019); Kalypso Nicolaïdis, *The Idea of European Democracy*, in *PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW* 247 (Julie Dickinson & Pavlos Eleftheriadis eds., 2012); Kalypso Nicolaïdis, *European Democracy and its Crisis*, 51 *J. COMMON MKT. STUD.* 351 (2013).

¹⁴ See Kalypso Nicolaïdis, *Mutual Recognition, Promise and Denial, From Sapiens to Brexit*, 70 *CURRENT LEGAL PROBLEMS* 1, 15-18 (2017); BELLAMY, *supra* note 13 at 90-93.

¹⁵ Nicolaïdis, *supra* note 14, at 15; BELLAMY, *supra* note 13, at 90.

¹⁶ For a sample of these categories in use see Charlotte O'Brien, *Civis Capitalist Sum: Class as the New Guiding Principle of Free Movement Rights*, 53 *COMMON MARK. LAW REV.* 937 (2016); Daniel Thym, *The Elusive Limits of Solidarity. Residence Rights of and Social Benefits for Economically Inactive Union Citizens*, 52 *COMMON MARK. LAW REV.* 17 (2015).

migrants. Part III articulates the implications of this relation in terms of duties of Member States towards others. Part IV explores the implications for the duty of Member States to mediate between the citizen as migrant and the citizen as sedentary. The conclusion weighs the cosmopolitan potential of a model of international movement based on mobility as an element of the citizen's experience.

2. Free movement in a cosmopolitan statist vision of European integration

The citizen's right to free movement has been mostly understood on the backdrop of one of three distinct visions of the role of the state in the European integration project: (1) shifted and recreated at a new federal or supranational level, from which novel rights of federal supranational citizenship flow;¹⁷ (2) superseded in favor of a form of 'cosmopolitan federalism', where supranational citizenship, and its annex rights such as free movement, can act as human rights enhancers;¹⁸ or (3) preserved but repurposed so as to protect transnational rights of citizens that descend from the state's participation in a horizontal community of accountability and recognition.¹⁹ This article's approach starts from this third perspective and further develops it in a cosmopolitan direction.

In Richard Bellamy's words, cosmopolitan statism sees the 'system of states as intrinsically linked to the promotion of cosmopolitan norms'.²⁰ While liberal intergovernmentalism in the context of European integration already embodies a thin version of this conception, Bellamy advocates a thicker version, to which he refers to as 'republican intergovernmentalism'.²¹ A republican intergovernmentalist association of states – which the EU represents an instance of in Bellamy's vision – has to respect four criteria. First, all associated peoples have to commit to representative democracy, in order to avoid domination of one people over another; second, organization at the supranational level must remain under the shared and equal control of the constituent polities, acting as representatives of their peoples; third, the same mutual concern that binds together the participating polities must be extended to their respective citizens through a norm of non-discrimination on the basis of nationality; and fourth, the membership of this international system must remain entirely voluntary and allow for opt-outs.²² The confederal approach to interstate relations, and the duty of mutual concern among different peoples that inspire republican

¹⁷ See e.g. Christoph Schönberger, *European Citizenship as Federal Citizenship – Some Citizenship Lessons of Comparative Federalism*, 19 EUR. REV. PUB. LAW 63 (2007); Dora Kostakopoulou, *European Union Citizenship: Writing the Future*, 13 EUR. LAW J. 623 (2007); Koen Lenaerts, *Federalism and the Rule of Law*, 33 FORDH. INT. LAW J. 1338 (2010); LESLIE FRIEDMAN GOLDSTEIN, *CONSTITUTING FEDERAL SOVEREIGNTY: THE EUROPEAN UNION IN COMPARATIVE PERSPECTIVE* (2001); also see Dimitry Kochenov, *On Tiles and Pillars: EU Citizenship as a Federal Denominator*, in *EU CITIZENSHIP AND FEDERALISM: THE ROLE OF RIGHTS* (D. Kochenov ed., 2017).

¹⁸ See SEYLA BENHABIB, *THE RIGHTS OF OTHERS* 213-221 (2012).

¹⁹ As in the liberal intergovernmental account, Andrew Moravcsik, *Preferences and Power in the European Community: A Liberal Intergovernmental Approach*, 31 J. COMMON MARK. STUD. 473 (1993); also see Paul Magnette, *How Can One Be European? Reflections on the Pillars of European Civic Identity* 13 EUR. LAW J. 664 (2007).

²⁰ BELLAMY, *supra* note 13, at 49-56.

²¹ *Id.*, at 49-55.

²² BELLAMY, *supra* note 13, at 91-92.

intergovernmentalism resonate with Kalypso Nicolaidis' vision of the EU as a democracy: a 'union of peoples, understood both as states and as citizens, who govern together but not as one'.²³

Democracy and republican intergovernmentalism view the EU as the realization of a neo-kantian project. They bring forward in this sense the commitment to taming and modelling the exercise of sovereignty that represented, according to Joseph Weiler, the original ethos of European integration.²⁴ The *via media* that they trace between the intergovernmental, the federal, and the supranational account of the integration process echoes a broader effort confronting political theory in the global era. This is the effort to propose a model of political organization that accommodates the claims of state sovereignty, democratic closure, self-determination, and bounded self-distributive justice. And at the same time advances those of moral and legal cosmopolitanism: the equal moral worth of individuals, their deservingness of equal concern, and the equal weight of their rights' claims regardless of citizenship. In this effort, cosmopolitanism and democracy continue to advance the work of liberal nationalism.²⁵ In the effort to uphold state sovereignty, while endeavouring to repurpose it in a cosmopolitan direction, they share the perspective of statist cosmopolitanism, pluralist sovereigntism and democracy-conscious transnationalism.²⁶

Two norms are key to the democratic and republican intergovernmentalist agenda in this sense, mutual recognition and non-domination. The imperative of recognition forms the basis of the democratic ideal, and in a broader perspective, of a cosmopolitan statist vision of Europe.²⁷ As a mode of governance and a political principle, it constrains and redirects sovereignty in the EU, through forcing the sovereign state to acknowledge and internalize interests external to its immediate jurisdiction.²⁸ At a normative level, mutual recognition governs the relation among the Member States in several fields, from trade to cooperation in matters of justice and enforcement. At an analytical level it helps unravel several dynamics of integration. The germane idea of non-domination provides a further normative benchmark for a civic association of sovereign states. It guards against two equally threatening perils, the union itself engaging in domination, and the Member States exploiting integration as a cover for their own dominating agendas.²⁹ Mutual recognition and non-domination both focus the attention, in the democratic and republican intergovernmental accounts of European integration, on the horizontal link between the governance structures and democratic accountability mechanisms of different nation states. It is the strength of these links, that lends legitimacy to an integrated Europe.³⁰

²³ Nicolaidis, *European Democracy*, *supra* note 13, at 353.

²⁴ Joseph Weiler, *The Transformation of Europe*, 100 YALE LAW J. 2403, 2480-83 (1990).

²⁵ For an overview see DAVID MILLER & GINA GUSTAVSSON, LIBERAL NATIONALISM AND ITS CRITICS: NORMATIVE AND EMPIRICAL QUESTIONS (OUP 2020); YAEL TAMIR, LIBERAL NATIONALISM (1993).

²⁶ See, respectively, Ypi, *supra* note 12; JEAN L. COHEN, GLOBALIZATION AND SOVEREIGNTY, RETHINKING LEGALITY, LEGITIMACY AND CONSTITUTIONALISM (2012); Seyla Benhabib, *The New Sovereigntism and Transnational Law: Legal Utopianism, Democratic Scepticism and Statist Realism*, 5 GLOB. CONST. 109 (2016).

²⁷ Nicolaidis, *supra* note 17; BELLAMY, *supra* note 13, at 92.

²⁸ Nicolaidis, *supra* note 17; Kalypso Nicolaidis, *Trusting the Poles?: Mark 2—Towards a Regulatory Peace Theory in a World of Mutual Recognition*, in REGULATING TRADE IN SERVICES IN THE EU AND THE WTO: TRUST, DISTRUST AND ECONOMIC INTEGRATION 263, 265 (Ioannis Lianos & Okeoghene Odudu eds., 2012). Also see Nicolaidis, *European Democracy*, *supra* note 13, at 359-360.

²⁹ Nicolaidis, *European Democracy*, *supra* note 13, at 359.

³⁰ Nicolaidis, *European Democracy*, *supra* note 13, at 355-356.

Seen through the cosmopolitan statist lens, free movement is an expression of this architecture of horizontal accountability links. On the backdrop of a concept of supranational citizenship that compels each Member State to recognize citizens of other Member States as part of its own,³¹ free movement is the first of the ‘international rights’ that come to characterize citizenship in cosmopolitan statism.³² As a right of Union citizens, it brings the duties of mutual respect and concern that operate among the Member States to bear directly on their citizens. Through transposing recognition duties from the interstate to the individual level through the norm of non-discrimination on the basis of nationality, it fulfils Bellamy’s third criterion for a republican intergovernmentalist association of states.³³

There is however an important gap in the democratic and republican intergovernmentalist reading of free movement and of citizenship in the EU. Both accounts stop short of addressing the changing relation between the state and its own citizens. Bellamy suggests that Union citizenship offers ‘a normative and practical defence of the fundamental status of national citizenship in an interconnected world’.³⁴ Neither republican intergovernmentalism nor democracy fully account for what national citizenship in an interconnected world entails. They suggest that the costs and benefits of being part of an ‘interconnected peoples’ must be internalized. That is, the citizens of a democracy are called to hold their states accountable for the obligations those states owe to others. But no exhaustive answer is formulated to what Kalypso Nicolaidis calls the ‘vertical Kantian question’ of recognition: what is the relation between the mandate of interstate recognition and that of recognition between each state and its own citizens.³⁵

Addressing this question requires a closer look to the norm of non-discrimination on the basis of nationality that is the core of the EU system of free movement, and to its implications in terms of mutual recognition. How does the norm of mutual recognition and non-discrimination operate in the relation between each citizen and its own state? The next section turns to this.

3. Going non-exclusive: the relation between the state and the citizen-as-migrant

It has been argued that non-discrimination on the basis of nationality grounds supranational citizenship in mutual recognition of belonging.³⁶ It points in this sense to an inward-looking component of mutual recognition: it compels EU Member States to recognize the citizens of one another as part of their own community.

But how does mutual recognition operate in the relation between each state and its own citizens? This is the first question that our inquiry needs to disentangle. This inward-looking component implies, in turn, an outward-looking one. Each participating state also has to recognize that its own citizens belong to some extent in other polities. The mutual recognition relation between state and citizen becomes, through this outward-looking component, non-exclusive. From the perspective of the citizen: ‘I recognize you as my state of belonging, together with other states within the supranational association’, from the perspective of the state: ‘I recognize you as my citizen, belonging to my polity, but not only to mine’.

³¹ See in this sense Francesca Strumia, *Supranational Citizenship*, in OXFORD HANDBOOK OF CITIZENSHIP 671 (Ayelet Shachar et al eds., 2017).

³² BELLAMY, *supra* note 13, at 131.

³³ BELLAMY, *supra* note 13, at 133.

³⁴ *Id.*

³⁵ Nicolaidis, *supra* note 14, at 10-11.

³⁶ See Strumia, *supra* note 32.

Through the combination of the outward- and inward- looking components of mutual recognition the citizen is constituted as a transnational stakeholder. Each state recognizes that citizens of other states have stakes within its national borders. And thus, each state must also recognize that its own citizens belong and have stakes beyond their national borders. Rainer Bauböck has developed the notion of ‘stakeholder citizenship’.³⁷ In deploying the notion as a principle of democratic inclusion, Bauböck points to the alignment between “individuals’ interests in autonomy and well-being and the collective interests of all citizens in their polity’s self-government and flourishing”.³⁸ The notion of the citizen transnational stakeholder echoes this attention to the alignment of individual and collective interests. However it takes stock of the decoupling, in a democratic association of sovereign states, between the scope of the citizens’ individual interests that cuts across national borders, and the scope of citizens’ redistributive duties and participation opportunities that mostly articulate within the nation state. The conflicting responsibilities that this decoupling apparently generates can be reconciled through the nesting of the state-national-citizen relation within the supranational relation and its mutual recognition dynamics. In this sense the idea of the national citizen as a transnational stakeholder develops and complements the definition of supranational citizenship as mutual recognition of belonging.³⁹ It advances it through clarifying how this definition bears on the relation between national citizenship and mobility, pointing to the figure of the citizen-as-migrant.

The figure of the citizen-as-migrant follows from the status of the national citizen as a transnational stakeholder. To embrace this status of the national citizen, the relation between a state and its own citizens in the EU has to transform to embrace mobility as a legitimate way to live the citizen’s condition. The citizen-as-migrant is the citizen who lives his condition of citizenship in this mobile way, interacting with his home Member State from the outside and from the perspective, in part, of a migrant. The counterpart of the citizen-as-migrant in the context of the state-own-citizen relation is the citizen-as-sedentary who lives his citizen’s condition, and his relation to his home Member State, in a sedentary fashion. From a different angle, the citizen-as-migrant within the frame of the relation between citizen and home Member State, corresponds to that of the migrant-as-citizen in the relation between migrant and host Member State.

The figure of the citizen-as-migrant thus clarifies the place of freedom of movement in a cosmopolitan statist understanding of the state-citizen relation. Free movement is not only the expression of the duty of mutual concern among the Member States, it is the very entitlement that fulfils what Bellamy calls the fundamental status of the national citizen in an interconnected world.⁴⁰ The state-citizen relation, in its national version, evokes an idea of settlement and boundedness.⁴¹ Whether national citizenship is intended as a status, as a bundle of rights, as a way to channel political participation, or as a repository of identity, it points to a bounded and territorial community.⁴² The status of citizenship entails formal recognition as members of the national community and has been traditionally framed around categories of subjecthood, allegiance and

³⁷ See Rainer Bauböck, *Democratic Inclusion: A Pluralist Theory of Citizenship*, in DEMOCRATIC INCLUSION - R. BAUBÖCK IN DIALOGUE 3 (Rainer Bauböck ed., 2017).

³⁸ *Id.*, at 41.

³⁹ See Strumia, *supra* note 32.

⁴⁰ BELLAMY, *supra* note 13, at 160-164.

⁴¹ See e.g. David Miller, *Bounded Citizenship*, in COSMOPOLITAN CITIZENSHIP 105 (Kimberley Hutchings & Roland Dannreuther eds., 1999).

⁴² For this classification, see Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOB. LEGAL STUD. 447 (2000).

loyalty that presuppose bounded belonging.⁴³ The rights that it confers are claimed against a state, whose jurisdiction is primarily territorial. As to political participation, ‘sedentariness creates the conditions under which citizens can collectively authorize and hold accountable a territorial government’.⁴⁴ And identity within an ingroup of citizens goes hand in hand with distinction from an outgroup. To be sure, non-national conceptions challenge citizenship’s territoriality and boundedness. Cosmopolitan and global citizenship accounts, for instance, in endeavouring to various extents to disentangle citizenship from national loyalties, question both the scope of relevant boundaries, and the nature of the collectivity of reference for citizenship.⁴⁵ However, they do not challenge a settled understanding of citizenship. By contrast, from the perspective of the citizen-as-migrant mobility is an integral part of the citizen’s condition. The ability to move elsewhere does not depend on the authorization, whether *ex ante* or *ex post*, of another state. It depends on the very nature of the state-citizen relation, and on the framing of mobility as a citizen’s freedom.

That freedom has been the subject of sustained attention in both aspirational and critical accounts in EU literature.⁴⁶ However those accounts have mostly focused on the perspective of the migrant as a citizen in a destination state, rather than that of the citizen-as-migrant out of a home state; and on the relation between the migrant and the state of destination, rather than that between the home state and the citizen turned migrant. Where this latter relation has been considered, this has been from an emancipatory or remedial perspective. Free movement emancipates the citizen from the home state.⁴⁷ However the home state remains responsible for its citizens in the ‘pathology’ of free movement. It has to foot the social bill for its citizen-migrants who do not meet the financial conditions to reside in a host Member State. And when the ‘genuine substance’ of supranational citizenship is in question, it is the first in line to protect that of its own nationals.⁴⁸ Part of the literature links this role of the home state to the re-emerging primacy of national belonging over national citizenship.⁴⁹ The insufficiency of that status as a fundamental one, and its inability to fully equalize the condition of the migrant to that of the citizen in a host state, forces, from this perspective, a remedial role on the home Member State.

⁴³ The notion of subjecthood drove the determination of the scope of rights of citizens in the foundational common law Calvin’s Case. See the Calvin’s Case (1608) 77 Eng. Rep. 377.

⁴⁴ Bauböck, *supra* note 37.

⁴⁵ For a democratic theory perspective on global citizenship, see DANIELE ARCHIBUGI, *THE GLOBAL COMMONWEALTH OF CITIZENS: TOWARDS COSMOPOLITAN DEMOCRACY* (Princeton University Press 2008); for an overview of the notion of cosmopolitan citizenship, Kok-Chor Tan, *Cosmopolitan Citizenship*, in *OXFORD HANDBOOK OF CITIZENSHIP*, *supra* note 31, 694.

⁴⁶ For an example in the former sense see Niamh Nic Shuibne, *The Resilience of EU Market Citizenship*, 47 *COMMON MKT. L. REV.* 1597 (2010); for an example in the latter sense see Michelle Everson, *A Citizenship in Movement*, 15 *GERM. LAW J.* 965 (2014).

⁴⁷ See e.g. Floris De Witte, *Integrating the Subject: Narratives of Emancipation in Regionalism*, 30 *EUR. J. INT’L. LAW* 257 (2019); Loïc Azoulay, *Transfiguring European Citizenship: From Member State Territory to Union Territory*, in *EU CITIZENSHIP AND FEDERALISM - THE ROLE OF RIGHTS*, *supra* note 17; Eleanor Spaventa, *Citizenship: Reallocating Responsibilities to the Member State of Origin*, in *EXCEPTIONS FROM EU FREE MOVEMENT LAW* (Panos Koutrakos et al. eds., 2016).

⁴⁸ For the notion of ‘genuine substance’ of Union citizenship see case C-34/09, *Ruiz Zambrano*, *ECLI:EU:C:2011:124*; also see case C-86/12, *Alokpa*, *ECLI:EU:C:2013:645*.

⁴⁹ See Eleanor Spaventa, *Earned Citizenship – Understanding Union Citizenship through its Scope*, in *EU CITIZENSHIP AND FEDERALISM: THE ROLE OF RIGHTS*, *supra* note 47, 214-216. Also see Niamh Nic Shuibne, *Recasting EU Citizenship as Federal Citizenship: What are the Implications for the Citizen when the Polity Bargain is Privileged?*, in *id.*, at 158-159.

Reconceiving mobility as an aspect of the citizen's condition however invests the home Member State with a more rounded responsibility. The home Member State must then enable, protect, and guarantee that condition, not just remedy its shortcomings.⁵⁰ This heightened responsibility helps justify, as a first step, the varied home Member States' obligations that the case law has carved out of the Treaty rules on free movement. Overall, home Member States are under a duty not to restrict or discourage their own citizens' free movement.⁵¹ This is not simply a duty to 'let the citizens go'.⁵² As the case law illustrates, the non-restriction duty yields obligations to let the citizens 'export' social benefits and civic allowances;⁵³ obligations to recognize the experiences and qualifications earned abroad by returning migrant citizens;⁵⁴ as well as obligations towards the family members that return with them.⁵⁵ The home Member State has to accompany the citizen in her experience of free movement while also remaining the guardian of the citizen. The case law on protection of migrant Union citizens in the context of extradition from a host Member State to a third country illustrates this aspect clearly.⁵⁶ The European Court of Justice has found that a Member State that is requested to extradite a Union citizen residing in its territory to a third country has a duty to consult the home Member State of the relevant citizen before deciding on that request. Once informed, the home Member State can decide to bring the citizen home for prosecution via a European arrest warrant.⁵⁷ In the context of national legislation that protects nationals only from extradition, this duty of cooperation between host and home Member States ensures the equal treatment of Union citizens who are exercising free movement while avoiding the risk that a criminal offence may remain unpunished.⁵⁸ Exposure of migrant Union citizens to extradition from a host Member State amounts indeed to discrimination of nationals of that state that are protected from extradition given similar circumstances. The threat of such discrimination may inhibit free movement.⁵⁹ While the potential discrimination depends in these cases on the host Member State and its legislation, the Court has entrusted the task to work around it and ensure that free movement remains unhindered to the home Member State. This confirms the latter Member State's primary role as the enabler and guardian of free movement. It also shows how the right to equal treatment regardless of nationality, that is arguably the centre of the right to free movement in the EU, depends on that guardianship. And relatedly that the status of the migrant-as-citizen in a host Member State is inextricably linked to that of the citizen-as-migrant out of a home state.

⁵⁰ See Francesca Strumia, *Supranational Citizenship's Enablers: Free Movement from the Perspective of Home Member States*, 4 EUR. LAW REV. 507 (2020)

⁵¹ See e.g. case C-224/98, *D'Hoop* ECLI:EU:C:2002:432, paras 34-35.

⁵² See Adam Lazowski, "*Darling You Are Not Going Anywhere*": *The Right to Exit in EU Law*, 40 EUR. LAW REV. 887 (2015).

⁵³ Case C-503/09, *Lucy Stewart v Secretary of State for Work and Pensions*, ECLI:EU:C:2011:500; Case C-192/05, *Tas-Hagen v Raadskamer WUBO van de Pensioen- en Uitkeringsraad*, ECLI:EU:C:2006:676.

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

⁵⁵ See e.g. case C-456/12, *O. and B.*, ECLI:EU:C:2014:135; case C-673/16, *Coman*, EU:C:2018:385; also see in general Strumia *supra* note 50 at 522.

⁵⁶ See e.g. case C-182/15, *Petruhhin*, ECLI:EU:C:2016:630; case C-191/16, *Pisciotti*, ECLI:EU:C:2018:222; case C-398/19, *BY*, ECLI:EU:C:2020:1032.

⁵⁷ See case C-398/19, *BY*, *supra* note 56, at para 43.

⁵⁸ *Id.*, at paras 39-43.

⁵⁹ Case C-182/15, *Petruhhin*, *supra* note 56, at para 33; case C-191/16, *Pisciotti*, *supra* note 56, at para 45; case C-398/19, *BY*, *supra* note 56, at para 40.

The first question that this forces to reconsider is the cosmopolitan question of free movement. Taking stock of this link prompts to reframing the cosmopolitan question of free movement in novel terms: the question is not just what is owed to the migrant other; it is rather what is owed to that migrant other *when the citizen is a migrant*. Can she be conceived as a third party beneficiary of the social contract between the citizen-as-migrant and her own state, and if so how? The next section turns to consider this question.

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

The fundamental norm that governs the position of the second country national ‘other’ in EU law is nondiscrimination on the basis of nationality. This imperative of equal treatment regardless of the Member State of belonging is a general principle of EU law and governs all its areas of application.⁶⁰ In the context of the right to free movement, it grounds the entitlements of migrants in a host Member State. For migrant workers, it protects the right to pursue opportunities of employment in a host Member State on the same terms as nationals and to benefit from the same work conditions.⁶¹ To migrant citizens more broadly who lawfully reside in a Member State other than their own it guarantees equal treatment in respect to a wide range of benefits and services.⁶² Non-discrimination on the basis of nationality has inspired an early residence-focused account of the rights of migrant others in the EU. In the words of Gareth Davies, residence was to be the ‘new nationality in the EU’.⁶³ The intra-EU migrant is entitled to live in a citizen-like fashion ‘anywhere he hangs his hat’ within the Union, accessing the same benefits and services that are available to citizens, and also continuing to receive the benefits and to practice the identity of a Member State of belonging. Over the years, this residence model has gradually ceded ground to an integration one. Citizen-like treatment for the migrant other in a host Member State presupposes the establishment of a genuine relation of belonging within that state, proven through length of residence, family life and overall social integration. The European Court of Justice has been looking for genuine links to a host Member State as a prerequisite for the equal treatment of migrant others for a long time.⁶⁴ But in its most recent case law, the loose search for those links has ripened into a strictly conditional reading of the very right to reside in a host Member State.⁶⁵ Widely read as a ‘regressive phase’ in the Court’s treatment of Union citizenship, this has strengthened an integration-based understanding of the position of the migrant other in the host

⁶⁰ Art 18 TFEU; for a recent take on its scope see case C-581/18, *RB*, ECLI:EU:C:2020:453. For a reflection on the role of the principle of equal treatment in the context of free movement see Niamh Nic Shuibne, *Reconnecting Free Movement of Workers and Equal Treatment in an Unequal Europe*, 43 *EUR. LAW REV.* 477 (2018).

⁶¹ Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ L141/1), art.7.

⁶² 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 (OJ L158/77), art. 24.

⁶³ Gareth T. Davies, *Any Place I Hang my Hat or Residence is the New Nationality*, 11 *EUR. LAW J.* 43 (2005).

⁶⁴ See e.g. case C-138/02 *Collins* ECLI:EU:C:2004:172; case C-209/03, *Bidar*, ECLI:EU:C:2005:169.

⁶⁵ The relevant right is conditional in light of art.7 of Directive 2004/38. See e.g. case C-333/13 *Dano*, ECLI:EU:C:2014:2358.

Member State.⁶⁶ In line with a reading of art. 21 TFEU on the right of citizens to move and reside as a norm intended to ‘promote the gradual integration of the Union citizen concerned in the society of the host Member State’,⁶⁷ the migrant other can claim citizen-like treatment where not only he hangs his hat but where he organises his wardrobe.

Whether read through the lens of the residence or integration model, there is a dark side to the position of the other in EU law as construed in the context of free movement. ‘Come be one of us’, in the words of Joseph Weiler.⁶⁸ But, as the experience of the EU has shown, only if you were one of us in the first place. The condition of the citizen-as-migrant differs profoundly from that of third country nationals.⁶⁹ In spite of the stated intent to assimilate their condition to that of Union citizens, third country nationals remain a category apart, subject to the rules of EU and national immigration law, and extraneous to the benefits of free movement.⁷⁰ This is the equivocal cosmopolitanism of EU law. In turning to the citizen other, it amplifies the otherness of the non-citizen.

What does a cosmopolitan reading of the role of the state in the EU suggest in this respect? The democratic and republican intergovernmental accounts of the EU point to a duty of other-regardingness that should inform deliberation within the state. Recognition in a democracy, according to Nicolaïdis’ ‘implies that when a country takes its decision democratically, enough people remind everyone else of the obligation to ensure that ‘foreign’ identities and their interests are taken into account’.⁷¹ Bellamy suggests that in an association of sovereign states the associational duties of states translate into duties of mutual concern and respect towards each other’s citizens.⁷² This duty of concern for others, in the relevant accounts, points to the citizens of other states within the democratic association. But the moral norm underpinning it stretches beyond the boundaries of citizenship. It responds to Kantian cosmopolitan morality and to the duty of universal hospitality that descends from it.⁷³ It has been suggested that the narrative that emerges from the exercise of this duty in respect to citizens can spill over into the treatment of third country nationals.⁷⁴ However the dynamics that drive that duty in the first place, even in its citizen-other addressed version, remain underdefined. Neither democracy nor republican intergovernmentalism explain what drives the internalization of foreign interests and the translation of associational duties into obligations of mutual concern. The perspective of the citizen-as-migrant helps fill this gap. It points to the externalization of the rights of the citizens as a source of duties to ‘others’.

⁶⁶ See e.g. Stephen Coutts, *The Absence of Integration and the Responsabilisation of the Union Citizen*, 3 EUROPEAN PAPERS 763 (2018); Eleanor Spaventa, *What is Left of Union Citizenship?*, in INCLUSION AND EXCLUSION IN THE EUROPEAN UNION, 24 (34 University of Amsterdam Collected Papers 2016).

⁶⁷ On the ‘integration’ rationale of art. 21 TFEU see case C-165/16, *Lounes*, ECLI:EU:C:2017:862, paras 56 and 58.

⁶⁸ J.H.H Weiler, *In Defence of the Status Quo: Europe’s Constitutional Sonderweg*, in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 7, 19-20 (J.H.H. Weiler & Marlene Wind eds., 2009).

⁶⁹ The discrepancy of status between the two groups gave rise to the discourse of ‘fortress Europe’ at the turn of the millennium. See ANDREW GEDDES, IMMIGRATION AND EUROPEAN INTEGRATION – TOWARDS FORTRESS EUROPE (2000).

⁷⁰ See TFEU, art. 79. Also see Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ L16/44).

⁷¹ Nicolaïdis, *supra* note 14, at 36.

⁷² BELLAMY, *supra* note 13, at 163.

⁷³ See KANT’S PERPETUAL PEACE, *supra* note 12, at 33.

⁷⁴ Francesca Strumia, *European Citizenship and EU Immigration: A Democratic Bridge Between the Third Country Nationals’ Right to Belong and the Member States Power to Exclude* 22 EUR. LAW J. 417 (2016).

In a multilateral system where mobility is a way to live the citizen's condition, the rationale for these duties lies not just in hospitality but in a form of reinforced mutual recognition. This reinforced recognition operates between the citizen-as-migrant and the migrant other. At the crossroads between the citizen's outward-looking self-recognition as a potential migrant, and her inward-looking recognition of the migrant other as a potential fellow citizen, the 'gap between the idea of the one and that of the other' is suddenly narrowed.⁷⁵ An 'existential simultaneity' comes to bind the citizen-as-migrant to the migrant other.⁷⁶ In the eye of the citizen, the migrant other becomes another version of the citizen's self, the version who chooses mobility as the way to live the citizen's condition. This reflexive understanding of the migrant other provides a renewed reason to relate to him as to a fellow citizen. First, in protecting the interests of the migrant other the citizen of a host state protects the transnational possibilities of his own citizenship. He also protects indirectly the interests of his fellow citizens who have chosen to live their citizenship in a mobile way. In accepting to share welfare resources, the labor market, and more broadly their state's institutions with the incoming migrants, citizens of a host Member State act in part on behalf of the citizens of all other Member States who are host to citizen migrants. Their actions ground the expectation that citizens of those other Member States will act accordingly, that they will embrace foreign interests in their deliberative processes, that they will treat incoming migrants according to the norms of recognition and mutual concern, and that they will hold their respective states to account in this sense. In quality, the duties that this reinforced recognition calls for resemble those identified in the republican intergovernmental and democratic accounts. But the perspective of the citizen-as-migrant brings adds strength to the normative drive underpinning relevant duties. In authentic reflexive fashion, they are owed to the 'other' in order to uphold the citizen's very condition.

This reflexive call is addressed not only to the citizen, but also to the state. Host Member States to migrant citizens are but home ones to citizen-as-migrants. Their obligations as host to inbound migrant citizens can be seen as the flip side of their obligations as home to outbound ones. In accommodating nationals of other Member States within its borders, the state acts in part out of an expectation that other Member States will do the same and accommodate its citizens as migrants. If replicated by all the state participants in the multilateral system of citizens' mobility, this unilateral accommodation of others driven by an expectation of reciprocity is one of the strongest possible guarantees of the implementation of the duties of mutual recognition and concern. Thus, in discharging its obligations as host, a Member State fulfils its duties as home. This reflexive perspective strengthens the rationale for the panoply of duties that EU Member States owe to migrant others, from the duty to grant a right of residence to the duty of non discrimination on the basis of nationality and all its ramifications. Relevant duties that have come to be seen as a burden for the state in the mainstream narrative of free movement are recast in a partly self-serving perspective.

What emerges piece by piece is a puzzle of reciprocal duties that articulate on the backdrop of an architecture of reinforced and reflexive recognition. The puzzle includes duties from host states towards migrant others in order to fulfil their roles as home states; as well as duties owed by the citizens to the migrant others in order to uphold their own freedom to choose between a sedentary and a migrant condition. Relevant duties are owed by their holders as surrogate for other parties. Host states owe these as surrogate for the home states of incoming migrants. Citizens of

⁷⁵ PAUL RICOEUR, *THE COURSE OF RECOGNITION*, 152 (David Pellauer trans., 2005).

⁷⁶ *Id.*, at 153-154.

states that are home to the citizen-migrants owe these as surrogate for the citizens of the states that are host to those citizens. Taken together this puzzle of duties, directed to others for the benefit of the state's and citizen's self, answers the cosmopolitan question of free movement law from the internal perspective of the citizen, and of the citizen-state relation. Not in the sense that the state's political community is the agent of a broader cosmopolitan project.⁷⁷ Rather in the sense that the 'unfinished moral business of the sovereign state' comes to be finished from within.⁷⁸ It is finished through the ideal of reciprocity that is inherent to the normative conception of citizenship, even when pushed in a cosmopolitan direction.⁷⁹

Is this citizenship-driven cosmopolitanism capable of advancing the interests of the third country nationals in Europe? Does it bring the account further in this respect? At first sight it does not. It may seem that the implications of the citizen-as-migrant condition corroborate the Kantian moral duty of hospitality on which other accounts have relied on to answer the cosmopolitan question of free movement without necessarily altering the scope of this duty. However the reflexivity of that condition can also potentially embrace the perspective of the third country national other. This can happen along two distinct trajectories. First, in the logic of the reflexivity argument, the expanding of the sphere of the citizen broadens by reflection that of the other. In this latter sense, one can see the perspective of the citizen transnational stakeholder within the supranational sphere as a specific instance of a broader type of global transnational stakeholder. The protection of the condition of that global transnational stakeholder reflects the concern of an enlarged set of 'others'. Along a second trajectory, in the relation of mutual recognition between the citizen-as-migrant and the migrant as other the third country national other enters as an indirect beneficiary. Emmanuel Levinas has framed this triangulation of the I, the other and the third party in transcendental terms.⁸⁰ In the binary relation between the I and the other, the third party enters 'from a dimension of height, a dimension of transcendence whereby he can present himself as a stranger without opposing me as obstacle or enemy'.⁸¹ This transcendental other, with her cry for justice, summons the 'I' to her obligations. The position of the 'I' as 'I' in this immanent conception of the other consists of being able to respond to those obligations.⁸² Something similar happens in the social contract with the citizen-as-migrant. The position of the citizen as transnational stakeholder depends, from this perspective, on the citizen's ability to see her duties to the other, whether the second country or the third country other, as an aspect of the duties of her citizen-self. Consistent with the norm of cosmopolitanism-from-within, it is the reconfiguration of the rights and status of the citizen that generates duties to others, even beyond the boundary of the association of sovereign states. An important question remains as to the mechanisms that can drive the sociological and democratic appropriation of the relevant spheres of the self and of the other. These questions are beyond the scope of this article's inquiry.⁸³ However the idea of cosmopolitanism-from-within charts a direction to explore in this respect. It highlights both the

⁷⁷ For the argument in this sense see Lea Ypi, *Statist Cosmopolitanism*, 16 J. POL. PHIL. 48, 69-71 (2008); also see in general YPI, *supra* note 12.

⁷⁸ See Andrew Linklater, *Cosmopolitan Citizenship*, 2 CITIZENSHIP STUD. 23, 24 (1998).

⁷⁹ See Kok-Chor Tan, *supra* note 45, at 709. Also see David Miller, *The Idea of Global Citizenship*, in VARIETIES OF SOVEREIGNTY AND CITIZENSHIP, *supra* note 12, at 240-241.

⁸⁰ EMMANUEL LEVINAS, TOTALITY AND INFINITY- AN ESSAY ON EXTERIORITY, 212-214 (Alphonso Lingis transl., 1980); also see PAUL RICOEUR, *supra* note 75, at 159.

⁸¹ EMMANUEL LEVINAS, *supra* note 80, at 215.

⁸² *Id.*

⁸³ For an exploration of some of these mechanisms, see Francis Cheneval & Kalypso Nicolaïdis, *The Social Construction of Democracy in the European Union*, 16 EUR. J. POL. THEORY 1 (2016).

potential dynamics and the prompts that may facilitate the integration of the moral imperative of cosmopolitanism into the political agenda, and in the international relations of the sovereign state.

On the other hand, cosmopolitanism-from-within faces a further hurdle. Up to this point the perspective of the citizen-as-migrant has driven for the embracing of that of the migrant other. However, there is another other to the citizen-as-migrant: the citizen-as-sedentary. If mobility is to be one of two different ways to live the citizen's condition, certain demands of mutual concern and responsibility, must stretch, it seems, also to the relation between the citizen-as-migrant and the citizen-as-sedentary. This begs the question: to what extent can this relation be recast in terms of mutual recognition, and in particular within the frame of the reinforced and reflexive kind of recognition that has been found to underpin the relation between the citizen-as-migrant and the migrant as other.

5. The Citizen-as-sedentary and non-dominating free movement

As part of the predominant understanding of free movement, the relation between the migrant citizen and the sedentary one has hardly been set in terms of recognition. Reciprocal denial perhaps provides a more apt description of the relevant relation. The literature that has looked at free movement from the perspective of the sedentary citizen tends to highlight a contrast of interests between the migrant and the non-migrant. In accommodating the interests of migrant citizens, the argument from the relevant perspective goes, free movement diminishes those of sedentary citizens. This is an argument that has different facets and several possible ramifications. From a first legal facet, the argument has led to treating the sedentary as 'outsiders' to EU free movement law: reversely discriminated in their own states in comparison to the migrants, and falling out, bar for exceptional circumstances, of the protective umbrella of supranational citizenship.⁸⁴ From a second critical facet, the argument frames the migrant citizen as the 'atomized individual' par excellence, a self-centered citizen that in the twists and turns of EU integration has lost the sense of commitment to a community of belonging.⁸⁵ This facet of the argument echoes a negative conception of cosmopolitanism in the EU arena, whereby the cosmopolitan citizen is an unattached and indifferent one. At the extreme, he is a 'citizen of nowhere' who does not recognize any community as his own and does not feel a sense of obligation to any.⁸⁶ This self-centered migrant citizen, turning to yet another facet of the argument, threatens the sedentary by eroding the cohesiveness of their communities and by forcing open the logics of boundedness that govern redistribution within those communities.⁸⁷ Here the argument echoes the communitarian and liberal nationalist perspective in the debate across philosophy and political theory on whether borders should be open or closed: whether from a redistributive or democratic perspective, free

⁸⁴ See e.g. Sara Iglesias Sánchez, *A Citizenship Right to Stay? The Right Not to Move in a Union Based on Free Movement*, in EU CITIZENSHIP AND FEDERALISM: THE ROLE OF RIGHTS, *supra* note 17, at 371; Alina Tryfonidou, *Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe*, 35 LEGAL ISSUES OF ECONOMIC INTEGRATION 43 (2008).

⁸⁵ See in this sense Alexander Somek, *Europe: Political not Cosmopolitan*, 20 EUR LAW J. 142 (2014); J.H.H. Weiler, *Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy*, 12 INT'L J. OF CONST. LAW 94 (2014).

⁸⁶ For an overview of the argument in this sense, see YPI, *supra* note 12, at 13-14.

⁸⁷ In this sense, Agustín José Menéndez, *Which Citizenship? Whose Europe?—The Many Paradoxes of European Citizenship*, 15 GERM. LAW J. 907 (2014); Everson, *supra* note 46.

movement, in loosening the bonds of national belonging, ultimately threatens national communities in their efforts at self-determination.⁸⁸

Empirical studies on the profile, and impact of intra-EU migrants on recipient countries paint a picture that contradicts the above arguments at several junctures. Intra-EU migrants are a predominantly young and healthy minority that have tended to contribute more revenue than they have used in services in the countries of destination.⁸⁹ Nonetheless the perception of the sedentary as left-behind, and the growing suspicion towards the migrant, whether seen as the welfare-seeking free-rider or the unattached member of a distracted global elite, are at the heart of a backlash against free movement. Politically, this has had a central outlet in the Brexit process, but can also be related to the nationalist and populist turn of the liberal state in Europe.⁹⁰ In the scholarly response, the backlash has prompted the justification of a conditional vision of free movement, whereby the latter must be subject to clear limits and requirements.⁹¹

The republican intergovernmental account endorses the idea of conditional, or limited free movement, from a non-domination perspective.⁹² It points in this sense to the need to strike a balance between preserving ‘the circumstances of citizenship for each Member State’ while avoiding becoming a source of domination for either one’s own citizens or those of other Member States.⁹³ This requires on the one hand, ensuring that the citizen migrants retain duties to uphold the social and political system of both their home and host states.⁹⁴ And it frames the challenge for Union citizenship intended in Bellamy’s ‘international citizenship’ conception in terms of ‘getting the balance right and providing justifications based on the nature of citizenship for where the limits to free movement might lie’.⁹⁵ The limiting of free movement, in this optic, belongs to that ethos of ‘fanatic moderation’ that, in Nicolaidis’ words, informs European integration.⁹⁶

Through the proposed account of cosmopolitanism-from-within, this article aims to reconsider the problem of the relation between the sedentary and the migrant among the citizens from a further face of non-domination. What does a non-dominating conception of free movement require of that relation? And what duties does it call for on the part of states and citizens?

⁸⁸ For the communitarian position in that debate, MICHAEL WALZER, *SPHERES OF JUSTICE* (1983); for the liberal nationalist position, David Miller, *Immigration: the Case for Limits*, in *CONTEMPORARY DEBATES IN APPLIED ETHICS* 363 (Andrew I. Cohen & Christopher Heath Wellman eds., 2014). This is an argument that echoes also in the republican intergovernmental and democratic account. Nicolaidis, *European Democracy*, *supra* note 13, at 356. BELLAMY, *supra* note 13, at 152.

⁸⁹ See Christian Dustmann and Tommaso Frattini, *The Fiscal Effects of Immigration to the UK*, 124 *ECON. J.* 593 (2014); ETTORE RECCHI AND ADRIAN FAVELL, *PIONEERS OF EUROPEAN INTEGRATION-CITIZENSHIP AND MOBILITY IN THE EU* (2009).

⁹⁰ On this see, Bojan Bugarcic, *The Two Faces of Populism: Between Authoritarian and Democratic Populism*, 20 *GERM. LAW J.* 390 (2019); MICHAEL WILKINSON, *AUTHORITARIAN LIBERALISM AND THE TRANSFORMATION OF MODERN EUROPE* (2021).

⁹¹ See Shuibne, *supra* note 60; Catherine Barnard & Sarah Fraser Butlin, *Free movement v. Fair Movement: Brexit and Managed Migration*, 55 *COMM. MKT. LAW REV.* 203 (2018); Gareth Davies, *European Union Citizenship and the sorting of Europe*, 43 *J. OF EUR. INTEGR.* 49 (2021).

⁹² Nicolaidis, *European Democracy*, *supra* note 13, at 357.

⁹³ BELLAMY, *supra* note 13, at 147-155.

⁹⁴ BELLAMY, *supra* note 13, at 154.

⁹⁵ BELLAMY, *supra* note 13, at 163.

⁹⁶ Nicolaidis, *European Democracy*, *supra* note 13, at 357.

Seen through the republican lens of non-domination, freedom requires non-subjection to arbitrary alien control.⁹⁷ This is a more demanding conception of freedom than the liberal one based on non-interference. Being free, from a non-dominating perspective, means not ‘being subject to the potentially capricious will or the potentially idiosyncratic judgement of another’.⁹⁸ One can be free to enjoy his rights and interests without interference, but still be subject to domination if the availability of those interests depends on the arbitrary will of another.⁹⁹ In the context of freedom of movement, the sedentary citizen can be free to stay at home with no interference on the part of the migrant, and the migrant citizen can be equally free to leave the state without interference. But neither is free in a non-dominating perspective if the continuation of the liberty of either group depends to any extent on the whim of the other. If freedom of movement from a non-interference perspective requires both a positive right to move and a negative right not to move,¹⁰⁰ from a non-dominating perspective it must go beyond this positive and negative aspect.¹⁰¹ It requires, for both the sedentary and the migrant among the citizens, ‘the capacity to stand eye to eye with your fellow citizens, in a shared awareness that none of you has a power of arbitrary interference over another’.¹⁰² The very choice between the two aspects of freedom of movement, the positive one to live the citizen’s condition in a mobile way, and the negative one to live that condition in a sedentary way, must be non-dominated, uninterfered with and unlimited. Neither the presumption that the citizen’s life is a settled one or that the migrant is an anomalous citizen can stand. Nor the newly earned right of the citizen-as-migrant can condition the established freedom of the citizen-as-sedentary. To this end, the migrant and the sedentary must be thought of as two distinct, but co-existing and co-obligated classes of stakeholders in the polity that the social contract with the citizen-as-migrant produces.

Stakes held in that polity are of at least two types. First, there are active stakes. These are for the citizen-as-migrant to hold and exercise. They find expression in the right to enter a host Member State, to live, love and work there, and to benefit from equal treatment with the national citizens.¹⁰³ They form the familiar package of free movers’ entitlements that the literature, and the case law on EU citizenship and free movement have dissected in all directions. Then there are passive stakes. These are for the citizens-as-sedentary to claim. In a thinner sense, they point to an entitlement to have their stance taken into account in the management of free movement rights on the part of both home and host Member States, and in the context of the exercise of those rights on the part of migrant citizens. In a thicker version, they embrace the right for their claims to be

⁹⁷ PHILLIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 26-27 (1999).

⁹⁸ *Id.*, at 5.

⁹⁹ See Quentin Skinner, *Rethinking Political Liberty*, 61 *HISTORY WORKSHOP JOURNAL* 156, 157 (2006); also Phillip Pettit, *Keeping Republican Freedom Simple: On a Difference with Quentin Skinner*, 30 *POL. THEORY* 339, 341-342 (2002).

¹⁰⁰ On the relation between freedom and rights see Leif Wenar, *Rights*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY*, Part. 4 (Edward N. Zalta ed., 2020). For earlier conceptualizations of the right not to move, see Francesca Strumia, *Remedying the Inequalities of Economic Citizenship: Cohesion Policy and the Negative Right to Move*, 17 *EUR. LAW J.* 725 (2011); Iglesias Sánchez, *supra* note 84.

¹⁰¹ See PETTIT, *supra* note 97, at 17-19; Isaiah Berlin, *Two Concepts of Liberty*, in ISAIAH BERLIN, *LIBERTY* 166 (Henry Hardy ed., OUP 2nd ed. 2002); Ian Carter, *Positive and Negative Liberty*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2016).

¹⁰² PETTIT, *supra* note 97, at 5.

¹⁰³ See Floris de Witte, *Kick off contribution - Freedom of movement under attack: Is it worth defending as the core of EU citizenship?*, in *FREEDOM OF MOVEMENT UNDER ATTACK: IS IT WORTH DEFENDING AS THE CORE OF EU CITIZENSHIP?* (Floris de Witte et al. eds., EUI Working Papers 2016).

voiced, either directly through a degree of political participation, or indirectly, through their representatives at the national level, in the decision making processes of other Member States. The distinction between active and passive shares splits the citizenry into two classes of transnational stakeholders. The ‘migrants’ are the management stakeholders, the active class who run the day to day business of shifting lives, families, trades and services across national borders. They seek the freedom to leave home and reach out beyond national borders. The sedentary are the investor shareholders who contribute to funding the enterprise. They seek a return on their investment, in the form of assurance that home is a comfortable place, home is not flooded by migrants from other Member States, the migrants that come respect the local rules and key social practices, and possibly even that the citizens who migrate bring something back, whether in the form of fiscal contributions, of expanded economic opportunities, or of cultural enrichment.

The relation between the two classes of stakeholders has two normative implications. First it complicates the role of home Member States. Second, it grounds the duties of migrants in their host Member States in reflexive recognition.

In the first respect, a non-dominating conception of the relation between the two classes of citizen-stakeholders requires home Member States to enable the citizens to pick which side of the migrant/sedentary divide they want to live on, and to ensure that both sides of the divide are hospitable enough to make that choice a non-compelled one. This grounds specific obligations of home Member States towards their sedentary citizens. Some of these are the very inward-looking obligations states owe to their citizens and that citizens pay for through taxation— providing welfare, organizing a sustainable healthcare system, running an education system, guaranteeing public security and an effective justice administration system. Mobility as freedom vests those obligations in new garments that add a layer to the rationale for their discharge: outward movement has to be a free choice, and not a compelled one, hence home has to be not only a bearable place, but a hospitable and fulfilling one.¹⁰⁴ For the same purpose, home Member States also have outward-looking duties. These entail acting in concert with other Member States to keep a balance to free movement, ensuring the active rights of migrants are subject to appropriate conditions and safeguards so that the freedom of the migrants does not threaten that of the sedentary.¹⁰⁵ While some of these obligations may appear to echo populist promises, and they have been appropriated to the populist agenda. The values they respond to in a system of mobility as freedom are profoundly different from the nativist and anti-immigrant ones that the populist message advances. They are rather values of equality of opportunity and freedom of choice as to how citizens’ life is to be lived. The challenge free movement poses for home Member States, then, is embracing and protecting relevant values for the benefit of both the migrants and the sedentary among their citizens. In discharging those obligations, Member States act once again on behalf of one another. Each of them, in acting in the interest of its sedentary citizens to keep home a comfortable place also acts, in part, on behalf of other Member States and their sedentary citizens through reducing the incentives for mass outmigrations.

In the second respect, the non-dominating coexistence of active and passive citizen stakeholders relies on the migrants taking up their duties towards their host communities. The idea

¹⁰⁴ The argument is not only that the citizens are free to ‘vote with their feet’, as Charles Tiebout would suggest, but that their vote has to be freely expressed and not the result of undue influences. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. OF POL. ECON. 416 (1956).

¹⁰⁵ See Gareth Davies, *Brexit and the Free Movement of Workers: A Plea for National Legal Assertiveness*, 41 EUR. LAW REV. 925 (2016); Barnard & Fraser Butlin, *supra* note 91.

that a non-dominating conception of free movement requires duties on the part of the migrants is not new, and is in part intuitive.¹⁰⁶ Non-domination applied to the cosmopolitan-from-within vision of free movement clarifies the rationale for these migrants' duties. In the context of free movement within an association of sovereign states committed to the mutual recognition of their citizens, those duties depend, once again, on reflexive recognition. The reflexivity this time links, in the eyes of the migrant, the sedentary other in the host Member State to the sedentary fellow citizen in the home one. In taking up the norms of living together in their host Member States, and in complying with those norms for the benefit of the sedentary citizens and their community, the migrants act in part directly. But in part they act on behalf of the outgoing migrant citizens in their host states, and for the benefit of the fellow sedentary citizens that they have left back home. In the reciprocity logic of citizenship that underpins cosmopolitanism-from-within and that has been examined in the previous section, in acting towards the sedentary citizens of their host states they uphold the expectation that migrant citizens in their home states will do the same.

In taking up responsibility to protect the citizens sitting on the opposite side of the migrant/sedentary divide, each citizen ultimately contributes to uphold a non-dominating conception of their freedom and of that of their fellow citizens. Under perfect conditions, this model would eliminate the need for the limits to free movement that both the EU legal literature and republican intergovernmentalism, from different perspectives, call for. The incentives for disruptive free movement, the type that draws down wages or promotes welfare races to the bottom, would be erased at the source through the Member States' discharge of their duties to their own sedentary citizens. And the disruption to the cohesion and boundedness of host communities would be managed through both the retention of the bond between the citizen-migrant and the home communities, and through the discharge of migrants' duties in host communities. Of course the perfect conditions exist only in an ideal world. Charting the way to concretely create those conditions is beyond the scope of this article. But the hope is certainly to inspire, and prepare, further research in that direction, possibly starting from the very reconceptualization of citizenship as a condition embracing, and balancing, both sedentary and migratory status.

6 Conclusion

Ultimately, what went into the social contract with the citizen-as-migrant is a rather simple qualification to the relation between state and citizen. The qualification reads more or less like this: "the citizen is not necessarily settled within the state". No good lawyer would be fooled. An apparently unremarkable edit can subvert an entire contractual relation. In this case, as a result of that edit, citizenship that was the insignia of settlement becomes the beacon of mobility as freedom. This does not mean that only migrants have rights, or that they owe no duty to the sedentary. And it does not mean that the rights of the sedentary take precedence over those of the migrants. It means that citizenship can be lived as a sedentary, or as a migrant condition. Either condition is legitimate and the choice between the two should remain open. Yet there are at least two conceptual implications, this article has argued, from a mobility perspective on citizenship.

First, with regard to the conception of international movement, a citizenship paradigm offers a novel frame to understand regional free movement as part of a global transformation in

¹⁰⁶ BELLAMY, *supra* note 13 at 154.

the constitutional relation between the state and the citizen. Rather than a genus of migration, as it has mostly been treated in the literature, free movement stretches the state-citizen relation extraterritorially, bringing within its purview, by reflection, several classes of ‘others’. In this way, free movement regimes give a cosmopolitan spin to both the condition of the citizen and the role of the state. As to the citizen, it highlights the correspondence between his becoming a transnational stakeholder and the call for him to be ‘globally concerned’.¹⁰⁷ As to the state, free movement contributes in clarifying its cosmopolitan role by linking, through a norm of reflexive recognition, its obligations to the migrant as other to those owed to the citizen-as-migrant.

Second, for the European nation states, free movement regimes advance a kind of cosmopolitanism-from-within through the early promise of integration as a process through which the Member States were to ‘improve their citizens’ living conditions, while keeping one another at bay’.¹⁰⁸ The norm of reflexive recognition renews the ‘come, be one of us while remaining yourself’ imperative of European integration.¹⁰⁹ Reflexivity reframes that imperative in Levinas’ transcendental terms: to remain her very self, the citizen has to become an ‘other’. In summoning the citizen to her obligations, the other fulfils the citizen’s condition. This entails a promise and a risk. The promise is that cosmopolitanism, in this inside out version, starts from a premise similar to that of nationalism and statism: citizens first. A shared premise may not suffice to win the nationalist and statist to the cause of cosmopolitanism, but it may help engage them in dialogue. Grounding freedom of movement in that very premise inspires a reconsideration of the contrast between the condition of the sedentary and the migrant population as historical, contingent, situational, bringing reflexivity in yet another direction. The risk is that a vision of the other that starts from a reflection of the self could reframe the no-othering imperative in utilitarian terms, ultimately corrupting the moral norm of equal concern that lies at the basis of cosmopolitanism. That risk would concretize if reflexive recognition boiled down to a further endorsement of the self-centered citizen of Europe, whose autonomy is enhanced by the process of integration at the expense of the values of community and belonging.¹¹⁰ But the norm of recognition underpinning cosmopolitanism from within posits the reflexivity between the self and the other in constitutive rather than utilitarian terms. The citizen turns to the other not just because it is in their self-interest. He turns to the other because the status of the other, in the context of a non-exclusive relation between the state and the citizen that embraces mobility as a way to live the citizen’s condition, becomes a very aspect of the citizen’s status. In this correspondence of statuses lies the potential link between the moral and the political understanding of cosmopolitanism. As a moral norm, cosmopolitanism has been accused of passivity. As a political norm, it has struggled to prompt agency.¹¹¹ When rooted within the state, and responding to the very call of citizenship, the cosmopolitan norm may find novel political ground.

Ultimately the social contract between the state and the citizen-as-migrant challenges the unholy alliance between negative cosmopolitanism and exalted statism. It shows a way to build a more fruitful collaboration between the cosmopolitan and the statist ideal. This collaboration endorses neither the populist story that depicts the state as the citizen’s shield against the foreigner,

¹⁰⁷ Miller, *supra* note 79, at 243.

¹⁰⁸ See *Schuman Declaration* of 9 May 1950, EUROPEAN UNION, https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950_en; also see Weiler, *supra* note 24, at 2480.

¹⁰⁹ Weiler, *supra* note 68, at 19-20.

¹¹⁰ Weiler, *supra* note 85; Somek, *supra* note 85.

¹¹¹ YPI, *supra* note 12, at 11-34.

nor the various strands of post- and supra-nationalism that would sever or weaken the national dimension of the state-citizen relation. It relies on a different vision of national citizenship and of the state. In this vision, citizenship, like the image of a passerby in the hall of mirrors at Versailles palace, appears enmeshed with multiple other ones.¹¹² To each of those other citizenships it owes something, and from each of them it gains added strength and purpose. The state, in order to serve the interests of one of those citizenships, cannot but serve the interests of all the intertwined ones as well. It can only do so through playing the collegial sovereign rather than retreating from international relations.

In unmaking the social contract with the citizen-as-migrant, the withdrawal of the UK from the European supranational union has laid bare its inner structure. In transnationally opening the state-citizen relation, this contract brings with it inward-looking and outward-looking obligations that make both the role of the sovereign state, and the status of the national citizen, cosmopolitan-from-within: concerned for the other out there, as a reflexion of being committed to the citizen here.

¹¹² For the idea that European citizenship enmeshes national ones see Nicolaïdis, *European Democracy*, supra note 16, at 364.