

EU Law, Politics, and the Social Question

By Floris de Witte*

A. Introduction

This contribution analyzes how the process of European integration has affected the capacity of citizens to collectively decide on the “social question,” that is, on the distribution of resources and life chances between individuals in a society. It starts by highlighting the pivotal role of “the political” in any answer to such question (B); generally traces the demise of this role under the pressures of globalization, legal integration, and the sovereign debt crisis (C); and suggests that law has been an important instrument for the lifting of the social question outside the scope of political contestation. This contribution then briefly catalogues different alternatives that can serve to reappropriate the social question within the realm of politics, argues that our priority should lie in the formation of a transnational public sphere, and suggests that EU law can, in several ways, contribute towards, if not fully deliver, a return of authorship and ownership about how societies function to the citizen (D).

Regeneration Europe argues, among other things, that the Union no longer represents what Europe is and means to its citizens.¹ One of the most politically salient and obvious ways in which this phenomenon is visible lies in the capacity of citizens to decide on how their own society is structured, which moral norms guide it, and how scarce resources are distributed. While citizens can still decide such issues, the capacity of their Member State to implement the answer has progressively decreased. To be sure, the loss of the citizen’s voice in answering this social question is neither a new phenomenon, nor exclusive to the European Union.² Yet, in light of the Union’s recent eagerness to engage in distributive politics, in the historical context of the European tradition of social welfarism, in light of the Union’s commitment (at least rhetorical) to both democracy and social justice,³ and in light of the precarious contingency of the Union’s legitimacy on its capacity to generate

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¹ See Moritz Hartmann & Floris de Witte, *Ending the Honeymoon* (in this issue), and also regenerationeurope.eu

² See MICHEL FOUCAULT, *THE BIRTH OF BIO-POLITICS: LECTURES AT THE COLLEGE OF FRANCE (2010)* (discussing the inversion in the relationship between economy and politics).

³ See Consolidated Version of the Treaty on European Union art. 2–3, Mar. 3, 2010, 2010 O.J. (C 83) 17 [hereinafter TEU post-Lisbon].

citizen well-being, this disjunction between the citizens' wants and desires and the actual answers to the social question is particularly troublesome. At the same time, the European Union offers the most sophisticated institutional framework for the reappropriation of the social question beyond the nation state. In an interconnected world where nation state sovereignty is but a fiction, transnational structures such as the Union must be crafted so as to ensure that citizens remain at the center of the normative development of society, in particular, by ensuring ownership and authorship over the answering of the social question.

B. The Social Question and Democratic Capitalism

The social question essentially is: What does a good society presuppose? It is a question that asks what individuals, collectively constituted as a society, owe each other. Since the period of industrialization, this has increasingly been perceived to relate to the division of resources and opportunities between the individuals that make up society.⁴ As such, the welfare state, democratic institutions or fundamental rights, but also labor regulations, consumer protection, environmental policies, and public goods such as parks, universities, and hospitals, can be seen as traditional answers to the social question. The capacity to answer the social question, at a bare minimum, presupposes a system that generates sanctioned rules of obligatory behavior,⁵ and creates "a sense of normative obligation that helps to ensure voluntary compliance with undesired rules or decisions of governing authority."⁶ In other words, it presupposes both the presence of a thick political settlement that can collect and mediate between the different ideas of "the good" that exist in society—allowing for the articulation of one communal answer to the social question—and the presence of a minimal amount of administrative or legal control over the resources available and actors present within a territory—so as to tie them to the rights and obligations that the answer may entail. Or, as Somek puts it: "[G]iven that political self-determination has its ultimate focus on individual self-realization within a form of life one shares with others, it presupposes a unit that is capable of affecting and acting upon a relatively autonomous totality."⁷

The fundamental premise when discussing the social question is thus that it is a deeply political and politicized question. It is not only the most fundamental expression of

⁴ ALEXANDER SOMEK, *The Social Question in a Transnational Context*, in LSE 'EUROPE IN QUESTION' DISCUSSION PAPER SERIES 5 (2011).

⁵ Wolfgang Streeck, *Taking Capitalism Seriously: Towards an Institutional Approach to Contemporary Political Economy*, 9 SOCIO-ECON. REV. 137 (2011).

⁶ Fritz Scharpf, *Legitimacy in the Multi-Level European Polity*, in THE TWILIGHT OF CONSTITUTIONALISM? 89 (Martin Loughlin & Petra Dobner eds., 2010).

⁷ SOMEK, *supra* note 4, at 26.

individual self-determination, in the sense that it reflects how an individual sees himself in relation to others within the same community, and at the same time constitutes a communal expression of what a good society ought to look like, but it also provides the compliance structure necessary for its effective implementation. It is the people, on this view, who, albeit implicitly and indirectly, decide on the form of life that they prefer;⁸ on the relationship between the public and the private, choose to accept or reject capitalist structures, and trade off equality (or, these days, security) against freedom.⁹ And it is politics, in turn, that governs other social processes, including the market, and makes such processes sensitive (by forced compliance) to the electorate's needs and desires.

Politics as we know it, in fact, was born out of the immediacy with which the social question manifested itself during the late nineteenth century, when the rapid industrialization of processes of production, and the simultaneous demise of agrarian societies and their corporatist regulatory mechanisms based mainly on kinship and voluntary obligations drastically changed societal structures, creating a functionally differentiated society in which the efficient exploitation of resources, including labor, became increasingly important.¹⁰ The resultant imposition of harsh working conditions and exclusion of less efficient societal groups—the young, the old, the weak—led to a general dissatisfaction with the market and mobilized the citizens with demands for a better life.

During the period of industrialization, the concepts of democracy and capitalism—or politics and the market—contained each other. While for the workers, democracy and the emergence of political parties offered a site for collective struggle towards better conditions of life, and as a way to tame capital's raw economic power; for the employers it became a forum for the institutionalization and stabilization of social conflict, allowing it to more efficiently manage the workforce. In the aftermath of the Second World War, the marriage between capitalism and democracy became more explicit.¹¹ The emergence of a *democratic capitalism*, which to a large extent shaped the political and societal structures that have led the world into the 21st century,¹² was premised on an essential trade-off between these two seemingly contradictory concepts. As Streeck puts it, it "entailed the organized working classes accepting capitalist markets and property rights in exchange for political democracy, which enabled them to achieve social security and a steadily rising standard of living."¹³ Democratic capitalism, as such, presupposed a political system that

⁸ See also Alexander Somek, *What Is Political Union?* (in this issue).

⁹ Mark Mazower, *What Remains: On the European Union*, 147 *THE NATION* 2 (2012).

¹⁰ KARL POLANYI, *THE GREAT TRANSFORMATION* 136–140 (2002).

¹¹ Streeck, *supra* note 5, at 138.

¹² SASKIA SASSEN, *TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES* (2006).

¹³ Wolfgang Streeck, *The Crisis of Democratic Capitalism*, 71 *NEW LEFT REV.* 5, 10 (2011).

could form a social contract, tie the electorate to its outcome, protect the citizens that are unable to support themselves through market structures, and that could legitimately redistribute resources generated by market forces.¹⁴ It was explicitly geared to allow the electorate to answer the social question, but was, at the same time, bounded. Politicians that failed to cater for the social desires of the electorate would be booted out as fast as those who failed to create the market conditions necessary for the generation of the resources upon which those social desires depended.¹⁵

This marriage between the political and the economic,—happy during the *trentes glorieuses*, less so in recent times—has obscured the social question, but did not challenge its basic premise: Capitalist structures and neo-liberal policies exist by implicit consent of the electorate.¹⁶ The trade-off between capitalism and democracy, even if institutionalized, remains contingent on the masses buying into it—the social desires of the electorate needed to be met for capitalism to survive, whether in the form of increased living standards, social stability, or, more recently, a stream of iPads.¹⁷ The assumption is that within a radically alternative society, with a different balance between equity and efficiency, different policy outlooks and distributive agenda are theoretically possible, but are simply not appealing to the electorate.

This fundamental, basic autonomy for citizens to decide on the shape and borders of capitalist structures is what has been lost in recent times. While distributive justice remains the bread and butter of political conflict, the capacity of the political to implement the answer to the social question has increasingly vanished.¹⁸ The next section will argue that the pressures of globalization, asymmetrical European integration, and the sovereign debt crisis, have increasingly turned the relationship between democracy and capitalism on its head: Rather than the political disciplining the market, it is the market that disciplines the political, making certain policy choices simply unattainable and even forcing democratically elected leaders out of office.¹⁹ The social question, in consequence, is answered by the constraints imposed by the market, not as a reflection of the needs,

¹⁴ ROBERTO UNGER, *THE LEFT ALTERNATIVE* 31 (2009).

¹⁵ STREECK, *supra* note 13, at 7.

¹⁶ JÜRGEN HABERMAS, *THE CRISIS OF THE EUROPEAN UNION* 103 (2012).

¹⁷ See SOMEK, *supra* note 4, at 17. (noting, somewhat more cynically, stable access to “games, porn and drugs” which the underclass may use in order to numb their misery).

¹⁸ See also Andrew Moravcsik & Andrea Sangiovanni, *On Democracy and “Public Interest” in the European Union*, in *DIE REFORMIERBARKEIT DER DEMOKRATIE: INNOVATIONEN UND BLOCKADEN* 122, 130 (Wolfgang Streeck & Renate Mayntz eds., 2003).

¹⁹ E.g., *Greece and the Euro: Papandreou’s People*, *ECONOMIST*, Nov. 5, 2011, <http://www.economist.com/node/21536667>.

desires, and conceptions of the good of the citizen. This is problematic because it challenges the basic social and political assumption that the citizen is at the center of the normative construction of society,²⁰ and instead structurally favors one of the many different assessments of the interaction between the market and politics (*grosso modo*, the neo-liberal one). Moreover, it risks undermining the stability of our current mode of governance by not providing a forum for the institutional settlement of social conflicts, ultimately at the risk of political rupture, whether in the form of Member States leaving the European Union, or national actors no longer accepting the legitimacy of their own governments, which are no longer able to produce the desired political goods.

C. The Erosion of the Role of the Political in Answering the Social Question

The last few decades has seen the gradual erosion of the role of the political in answering the social question—partially due to the constraints imposed by globally mobile capital, and partially due to the asymmetries implicit in the project of European integration, and in particular in monetary and economic governance. In very blunt terms, these processes have decreased the control of “the political” over the resources available and actors present within a territory, and have thereby increasingly lifted the social question outside the scope of political contestation. The citizens are no longer fully in control in answering the social question—but can only avail themselves, if at all, of a limited number of policy choices. This has repercussions not only for the normative development of society—favoring, in general terms, the (neo-)liberal agenda—but also for its stability, as it decreases the capacity of the political system of institutionalizing and mediating social conflicts. To be sure, this is no new development. More than a decade ago, Pierson already highlighted that “the welfare state now faces a context of essentially permanent austerity. Changes in the global economy, the sharp slowdown in economic growth, the maturation of governmental commitments, and population ageing all generate considerable fiscal stress.”²¹ The argument made here is not, to be precise, that certain endogenous constraints may limit the range of answers available for the electorate, but rather that the processes of globalization, European integration, and the sovereign debt crisis have elevated the question outside the realm of the political altogether. This is a more serious challenge to legitimate government in both qualitative and quantitative terms, and precludes any meaningful authorship or ownership of the electorate over the solutions reached.

The depoliticizing effect of globalization has often been discussed.²² In the most simple terms, and at the risk of oversimplification, it postulates that the increased mobility of

²⁰ MICHAEL HALBERSTAM, *TOTALITARIANISM AND THE MODERN CONCEPTION OF POLITICS* 17 (1999).

²¹ Paul Pierson, *Coping with Permanent Austerity*, 43 *REVUE FRANÇAISE DE SOCIOLOGIE* 369, 370 (2002).

²² See, e.g., ANDREW GLYN, *CAPITALISM UNLEASHED: FINANCE, GLOBALIZATION AND WELFARE* (2007).

capital, that is, its capacity to, even virtually, skip between jurisdictions—which has been drastically increased both by the global program of trade liberalization and technological progress—has a direct effect on the willingness of nation states to act on their capacity to enforce legislation or regulations that restrict or temper the power and potential of capital. To use a recent example, the threat by the UK government to impose a banking tax was met by the City of London with a simple counter threat: “Fine, we’ll move to Zurich or Singapore.”²³ It is, properly understood, not the actual mobility of actors that causes this effect, but its internalization by policy makers.²⁴

This internalization has a cause, and it has an effect. The cause is, again in very general terms, that capital has become a “fugitive power,” which manages to elude the administrative and legal reach of the authority and enforcement capacity of nation states to bind them to a certain territory. This relates both the intangible nature of many capital transactions, think of tax havens, mailbox cooperations, which, even though they may in reality take place within the territory of one particular state, manage to avoid the jurisdiction of that state; and to the global system of free trade, which to a large extent attributes effective control to the place of production over the place of consumption. The effect of this “golden rule” of the global market, which disperses regulatory and administrative control out of reach of individual states, is that, given the inherent attraction that direct capital investment has on national governments—perennially worried about attaining an as-high-as possible employment rate—direct investment becomes top priority for many governments.²⁵ In a mobile world, however, governments enter into competition with each other in attracting capital; a process that is often suggested to put pressure on wage and labor standards that are, in turn, considered to add to the costs of production.²⁶ Both the incapacity to bind capital to its physical location, and the inter-state competition in the pursuit of direct investment, has limited the capacity and willingness of nation states to answer the social question in ways that strongly contain the market.²⁷ Globalization, the argument runs, systemically lifts the social question out of the

²³ E.g., James Fontanella-Khan & Chris Giles, *Britain challenges EU over Tobin-tax*, FIN. TIMES, Apr. 19, 2013, <http://www.ft.com/intl/cms/s/0/08322fa0-a913-11e2-a096-00144feabdc0.html#axzz2T7fr8Hxr>.

²⁴ Consider, alternatively, the case of Bernard Arnault. Arnault, France’s richest man, who, upon the announcement of the Hollande government that citizens earning more than €1 million/year would be (temporarily) taxed up to 75%, decided to apply for Belgian citizenship, which would exempt him from the tax and bring millions to the Belgian treasury. The ease of regulatory mobility, including tax regimes and company structures, allows individuals to pick a regime most favorable, not only withdrawing their resources from their home state, but also creating a strong regulatory pull in favor of capital in both France and Belgium. The more “anti-capital” a social answer, the stronger this pull becomes.

²⁵ Francesco Parisi, Norbert Schulz & Jonathan Klick, *Two Dimensions of Regulatory Competition*, 26 INT’L REV. L. & ECON. 55, 56 (2006).

²⁶ *Id.*

²⁷ Jürgen Habermas, *The Crisis of the European Union in the Light of a Constitutionalization of International Law*, 23 EUR. J. OF INT’L L. 335, 338 (2012); DAVID HELD & ANTHONY MCGREW, *THE GLOBAL TRANSFORMATION READER* (2000).

confines of political contestation and redistributive trade-offs, and instead allocates it to the global marketplace—where the political is all but unrepresented.²⁸ The economic and political structure of world trade, simply put, favors the lowest common denominator in terms of market-corrective devices, and globalization, as such, has become “the generic alibi for surrender: [E]very progressive alternative is derided on the ground that the constraints of globalization make it impractical.”²⁹

These two ways in which capital mobility has depoliticized the social question—in the sense that only a range of answers have remained available to the electorate—are even more blatant in the European Union, where the legally enforceable right to free movement of capital, establishment, and companies has institutionalized the practices described above. The capacity of electorates to answer the social question in a way that involves, for example, high taxation on capital investments or on mobile industries, high social security obligations on (multinational) employers has been further decreased by way of the notion of mutual recognition, through which economic actors can “export” home legislation into Member States that may have more stringent domestic standards, and the idea of regulatory competition, which suggests that this legally condoned mobility further decreases the willingness of Member States to impose high social costs to the production process.³⁰ This has particularly salient repercussions on the possible answer to the social question, as it affects tax legislation, company legislation, and the transnational posting of workers; all of which play a fundamental role in the capacity of Member States to enforce its answer to the social question to all actors present on their territory.

Again, the fundamental premise is that of all the available ways in which the social question can be answered, EU integration makes a number of them (to be precise, those that run against the interests of mobile actors—which is by far and large capital and not labor) unavailable. At the core, this boils down to the opportunity for “exit” provided by free movement (which, oddly enough, does not even presuppose physical movement),³¹ and can be traced back to the ordoliberal origins of the integration project, which, for example, deliberately insulated the free movement provisions from political interference by their transnational codification, while the social question remained on the national level, and the subsequent constitutionalization of the free movement provisions by the European Court of Justice. This has led, as identified by Scharpf, to a double asymmetry on

²⁸ See DANNY NICOL, *THE CONSTITUTIONAL PROTECTION OF CAPITALISM* 47–127 (2010).

²⁹ UNGER, *supra* note 14, at 133.

³⁰ MIGUEL POIARES MADURO, *A NEW GOVERNANCE FOR THE EUROPEAN UNION AND THE EURO: DEMOCRACY AND JUSTICE* 14 (2012); DANI RODRIK, *THE GLOBALISATION PARADOX—DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY* (2011).

³¹ Alexandre Saydé, *One Law, Two Competitions: An Enquiry into the Contradictions of Free Movement Law*, 13 *CAMBRIDGE Y.B. EUR. LEGAL STUD.* 365, 370 (2011).

the European level.³² On the one hand, negative integration (declaring illegal national regulations that restrict or make less attractive the mobility of capital) was more easily attained than positive integration (negotiating market correcting mechanisms on the political level); and, even more crucially, the lack of competences of the European Union in the more salient areas of social policy has led to a complete depoliticization. In the simplest terms, the national answer to the social question is precluded by EU free movement law, and a European answer is precluded by lack of competences, and, of course, a sufficiently thick political sphere.³³ Even within the sphere of its competences, the ideological, institutional, and economic preferences of the different Member States make imposing market-correcting mechanisms increasingly difficult.³⁴ The forum for the articulation and answering of the social question has, as such, shifted from the national political arena to the transnational judiciary. It is the European Court of Justice, these days, that answers the question to what extent trade unions may strike against the transnational movement of companies, and that decides whether domestic trade-offs in healthcare or education are legitimate.³⁵ The critique, of course, is the Court is hardly legitimate or capable to answer the social question—which is the most political question of all.

Globalization and European integration have thus triggered a process whereby standard setting is only possible within sectors that can be legally captured—consumables, for example, as opposed to financial services; that can be controlled by the administrative authorities of the state—whether an iPad does not explode, as opposed to the labor conditions of the workers in third states who made the iPad; and where the European Union has regulatory competences—typically, regulatory sectors as opposed to those with distributive effects.³⁶ Answers to the social question that presuppose different, or more stringent regulatory or redistributive commitments, are structurally less likely to be implemented successfully in Europe.

As if all of this was not enough, the recent euro-crisis has further constricted the role of the political on the national level in the answering of the social question.³⁷ Institutional,

³² Fritz Scharpf, *The Asymmetry of European Integration, or why the EU cannot be a 'Social Market Economy,'* 8 SOCIO-ECON. REV. 211, 217 (2010).

³³ See Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvE 2/08, June 30, 2009 [hereinafter *Lisbon* ruling] (noting all the different ways in which it does not).

³⁴ FRITZ SCHARPF, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC 43–83 (1999).

³⁵ See Case C-438/05, Int'l Transp. Workers' Fed'n v. Viking Line ABP, 2007 E.C.R. I-10779; Case C-173/09, *Elchinov* Georgi Ivanov Elchinov v. Natsionalna zdravnoosiguritelna kasa, 2010 E.C.R. I-08889; Case C-73/08, *Bressol et al v. Gouvernement de la Communauté française*, 2010 E.C.R. I-2735.

³⁶ See Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1 (2012).

³⁷ Mark Dawson & Floris de Witte, *Constitutional Balance in the EU after the Euro-crisis*, 76 MOD. L. REV. (forthcoming 2013).

economic, and monetary constraints make it all but impossible for Member States to deviate from the demands of the market, while the recent Fiscal Compact and ESM even manage to constitutionalize austerity, which has led to the somewhat perverse situation that the “Greek social question” is currently answered by a troika composed of the ECB, Commission, and IMF.³⁸ Where politics once meant to tame the market, it is now the market that tames the political. The process of monetary integration has, from its very inception, imposed certain limitations on the socio-economic policies of the Member States, not just by way of the Stability and Growth Pact, which imposed fiscal discipline on the Member States, not permitting a government deficit above 3% of GDP, or a debt higher than 60% of GDP, but more importantly by making currency deflation unavailable as a policy instrument. The single currency, as such, robbed Member States of one of their main instruments for fiscal and macro-economic policy. Brian Barry put it as follows: “The worst thing about the EU has been that it banned most of the increasingly sophisticated policy instruments by which states had controlled their economies since 1918, but left their replacement to a decision process that was [and is] heavily stacked against equivalent EU-wide intervention.”³⁹ In consequence, Barry continues, “this automatically inhibited politics from challenging markets successfully.”⁴⁰

The euro-crisis has further entrenched the answer to the social question into the hands of the global economy, by making any policy choice but austerity both economically and politically impossible.⁴¹ The few safeguards that the EU Treaties had enacted to ensure that it was citizens in charge of the social question—for example by insulating the autonomy of smaller Member States and by curtailing the capacity of the EU to directly engage in policies such as trade union rights, education, healthcare, pensions and social security all went overboard in the responses to the crisis.⁴² The explicit rejection of these structures, by way of the Fiscal Compact and the ESM, have led to a sort of executive federalism,⁴³ in which raw economic power and market imperatives dictate the answer of the social question—not just to debtor states, even in states with solid economic prospects.⁴⁴ The

³⁸ Memorandum of Understanding between the European Commission and Greece on Specific Economic Policy Conditionality (Mar. 14, 2012), available at http://ec.europa.eu/europe2020/europe-2020-in-your-country/ellada/index_en.htm.

³⁹ Brian Barry, *What did we learn?*, in CULTURAL DIVERSITY VERSUS ECONOMIC SOLIDARITY 357, 361 (Van Parijs ed., 2004).

⁴⁰ *Id.*

⁴¹ See also HABERMAS, *supra* note 16, at 4.

⁴² Dawson & de Witte, *supra* note 37.

⁴³ *Id.*

⁴⁴ Currently, 23/27 Member States are under supervision under the excessive deficit procedure and 12/17 Eurozone states under the macro-economic imbalance procedure. See EUROPEAN COMMISSION, Economic and Financial Affairs, *Excessive Deficit Procedure*, http://ec.europa.eu/economy_finance/economic_governance/sgp/deficit/index_en.htm (last visited May 12,

austerity drive has been pushed through in explicit conditionality agreements and memoranda of understanding that debtor states are forced to sign, and which, even apply to those states, such as the Netherlands, that are, economically speaking, not in need to retrenchment and austerity.⁴⁵ For debtor states, in a sense, democracy is suspended in the name of conforming to market pressures⁴⁶—painfully visible in Papandreou’s call for a referendum in Greece on the acceptance of bailout conditions, and his retraction under pressure of Merkel and Sarkozy.⁴⁷ Greek citizens, for example, have no meaningful control over the nature, scope, or direction of the distributive criteria that govern their lives. A recent Goldman Sachs Report even went as far as to logically presume that democracy is inimical to economic stabilization: “[T]he more the Spanish administration indulges domestic political interests . . . the more explicit conditionality is likely to be demanded [when Spain is forced to ask for a bailout].”⁴⁸ These “domestic political interests,” however, are exactly what the social question asks—who owes what to whom. The Goldman Sachs report nicely shows, however, the inevitability at which we have arrived: The markets will dictate an austerity drive, with specific required neo-liberal reforms to labor standards and the welfare state—either implicitly under threat of no longer lending money at a sustainable rate, or, as a result of their raising the interest rates, by the imposition of harsh conditionality criteria once Member States are forced to turn to their fellow Member States and IMF for loans.⁴⁹

It lies beyond the scope and ambition of this contribution to analyze how the three processes discussed above—globalization, asymmetrical European integration, and the sovereign debt crisis—relate to each other, and to what extent they are more or less the foundation of the different positions in which the different Member States find themselves.⁵⁰ Suffice to say that whatever the recent economic crisis and its social and

2013); see also EUROPEAN COMMISSION, Economic and Financial Affairs, *Macroeconomic Imbalance Procedure*, http://ec.europa.eu/economy_finance/economic_governance/macroeconomic_imbalance_procedure/index_en.htm (last visited May 12, 2013).

⁴⁵ *Focus on Growth*, ECONOMIST, Mar. 23, 2013, <http://www.economist.com/news/europe/21574028-imf-delivers-unexpected-message-dutch-focus-growth>.

⁴⁶ STREECK, *supra* note 13, at 26.

⁴⁷ Stefon Simons, *Tough Words: Merkel and Sarkozy halt payments to Athens*, DER SPIEGEL, Nov. 3, 2011, <http://www.spiegel.de/international/europe/tough-words-merkel-and-sarkozy-halt-payments-to-athens-a-795638.html>.

⁴⁸ Katharine Ainger, *The Spanish public won't accept a financial coup d'etat*, GUARDIAN, Sept. 25, 2012, <http://www.guardian.co.uk/commentisfree/2012/sep/25/spain-public-financial-coup>.

⁴⁹ Dawson & de Witte, *supra* note 37.

⁵⁰ Clearly, Member States with a more solid economic surplus (e.g. Norway) may more easily withstand the economic pressures of globalization and the sovereign debt crisis. See UNGER, *supra* note 14, at 37. Such economic buffers, however, appear to require the mobilization of national resources, including both savings and financial surpluses; mobilization which has become increasingly difficult since the crisis. *Id.*

political fall-out may have emphasized, they have not, properly understood, suggested a new answer to the social question. Rather, they have emphasized the need to bring the political back in in order to be able to actually give any answer to that question. The processes of globalization and transnational cooperation, amplified by the economic crisis, have created a systemic black hole that absorbs the social question, lifting it outside the confines of political contestation that is essential to its very answer.⁵¹ The global Occupy movement, for example, has often been criticized for its lack of a single voice or claim. These global protest movements, as much as the *Indignados* movement, raise the exact point made above: We no longer possess a political voice. Even if, say, the government of the United Kingdom would wish to meet all the demands of the protesters involved in the Occupy movement, they could not. The claims made by those protesters by and large attach to processes that are no longer controlled by the political on the national level. While Přibáň, for example, has argued that a process of politicization and depoliticization is cyclical in every polity,⁵² this current trend of depoliticization appears problematic specifically because of its tiered, transnational, or even global nature. Political control is not rescinded to be later reappropriated; it is structurally transferred to a level of governance where the basic institutional preconditions for its exercise are lacking. Whether couched in the name of justice,⁵³ freedom,⁵⁴ or democracy,⁵⁵ this renunciation to the idea of the political in answering the social question is deeply problematic.

As Hayek had already anticipated then, the dynamics of a globally and functionally integrated world have depoliticized the social question to a large extent, subjecting matters of labor standards and redistributive justice to the logic of the market. His work has proved to be nothing less than prophetic:

[C]ertain kinds of coercion require the joint and coordinated use of different powers or the employment of several means, and, if these means are in separate hands, nobody can exercise those kinds of coercion. The most familiar illustration is provided by many kinds of economic control which can be effective only if the authority exercising them can also control

⁵¹ HAUKE BRUNKHORST, *SOLIDARITY: FROM CIVIC FRIENDSHIP TO A GLOBAL LEGAL COMMUNITY* 3 (2005).

⁵² Jiri Přibáň, *The Self-Referential European Polity, its Legal Context and Systemic Differentiation: Theoretical Reflections on the Emergence of the EU's Political and Legal Autopoiesis*, 15 EUR. L.J. 442, 442–461 (2009).

⁵³ *Id.*; see also Andrea Sangiovanni, *Justice and the Priority of Politics over Morality*, 16 J. OF POL. PHIL. 137, 137–164 (2008).

⁵⁴ AMARTYA SEN, *THE IDEA OF JUSTICE* 227 (2009). See also JAMES GRIFFIN, *ON HUMAN RIGHTS* 167 (2008).

⁵⁵ See JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION II* 178 (1987); see also HALBERSTAM, *supra* note 20, at 17.

the movement of men and goods across the frontiers of its territory. If it lack that power, though it has the power to control internal events, it cannot pursue policies which require the joint use of both.⁵⁶

Redistributive policies, clearly, do require both control over movement and political authority. Transnational processes have made these two drift apart—the former left to the European or global level, while the latter has remained on the national level.

Hayek had also anticipated that transnationalization would have normative repercussions. His intuition, that an international regime could not harness the popular support, or solidarity required to redistribute resources beyond the borders of the nation state (or, in our language, could not answer the social question in a transnational fashion) has become painfully evident in recent times.⁵⁷ Thick political constituencies, such as those on the national level, possess the capacity to answer the social question not simply by virtue of their capacity to collect their citizen's views on "the good," mediate between the citizen's views, and tie everyone to the outcome; but also by being made sensitive to those concerns by way of sophisticated channels of communication, such as media, grassroots movements, integrated interest groups, and a culture of political contestation. These channels of communication, vital to the capacity of an electorate to be able to answer the social question, are missing outside the confines of the nation state, and cannot be replicated in forums such as the WTO and the EU.⁵⁸ The neo-liberal project, in other words, has found, or created, a structural flaw in our mode of governance, which structurally makes social policies significantly less attractive than liberal policies; which structurally protects capital investment and returns, and socializes their costs—as the roll-backs of welfare states in the Member States that used public funds to bail out their banks show. Whether intended or not, it seems that the neo-liberal project is one of class domination through depoliticization.⁵⁹

The systemic elevation of the social question beyond the state, combined with the unavailability on the transnational level of political structures thick and sophisticated enough to allow citizens to re-appropriate it, has led not just to an increased incapacity of the political to tame the market, but even led to the market disciplining politics. The replacement of democratically elected leaders by technocrats like Monti and Papademos—former advisor to Goldman Sachs, and head of the Greek central bank during the hasty and

⁵⁶ FRIEDRICH VON HAYEK, *THE CONSTITUTION OF LIBERTY* 184–85 (1978).

⁵⁷ See SOMEK, *supra* note 4, 10–12.

⁵⁸ NICOL, *supra* note 28.

⁵⁹ See also Gareth Dale & Nadine El-Enany, *The Limits of Social Europe: EU Law and the Ordoliberal Agenda* (in this issue).

falsified accession of Greece to the EMU, respectively⁶⁰—or the fall of the Dutch, Slovenian, Spanish, and Portuguese governments over the imposition of fiscal constraints, are anecdotal examples of this trend. More worryingly, it appears that the fear of the markets control the main policy decisions made on the European level. As Streeck nicely put it: “Investor confidence is more important now than voter confidence.”⁶¹ Headlines recounting the euro-drama often justify both the need to act, “the market demands that . . .,” as well as the success of its intervention, “the market reacted positively . . .,” on the basis of market structures. Systemically, of course, this catering to the market is the main catalyst for its supremacy over the political. What is more, internal political pressures within the EU make the ultimate exit strategy for states—declaring sovereign bankruptcy—unavailable.⁶² Counter-intuitively, it appears that making political choices in opposition of market pressures and expectations is exactly what is needed to recalibrate the balance and reappropriate the social question within the realm of the political—even if this would only solve structural problems, not those of the real economy.

The process of depoliticization—whatever its sources and its extent—is problematic for two main reasons: It not only challenges the social and political criteria of self-determination, in the sense that it removes political agency, authorship, and ownership over the conditions of life away from the citizens; but it also destabilizes the legitimacy of the institutional structure that imposes those norms. This tension, which essentially follows from the incapacity of the political process to implement the answer to the social question, at the same time entails that it no longer serves to institutionalize and mediate social conflicts. The process of political rupture, through which open-ended social conflict moves from the institutional sphere onto the streets, and through which political institutions and the norms that they propagate quickly lose legitimacy, is increasingly visible on the national and European level alike.

The first signs of rupture are not just visible in the mass protests throughout the continent, in the decreasing trust in political institutions, in increased anti-European rhetoric in debtor and creditor states alike—a sure sign of the incapacity of the European political settlement to mediate in transnational social conflicts—but also in decreased voter turnouts,⁶³ or the rise of what have been called “anti-political political parties.”⁶⁴ Within the European context, this places us in a very vicious circle. On the one hand, national

⁶⁰ See Wolfgang Streeck, *Markets and Peoples*, 73 *NEW LEFT REV.* 63, 64 (2012).

⁶¹ STREECK, *supra* note 60, at 65.

⁶² See STREECK, *supra* note 13, at 22.

⁶³ See Damian Chalmers, *The European Redistributive State and a European Law of Struggle*, 18 *EUR. L.J.* 667, 667 (2012).

⁶⁴ Consider the German Pirate Party, the Italian Party led by comedian Beppe Grillo, or the participation of Vladimir Franz in the Czech presidential election.

politicians and the national political settlement are much better placed and much more institutionally sensitive to the needs and desires of its citizens. The lack of mechanisms available for national politicians to enforce their answer to the social question, however, in either legal or administrative ways, have led to a political culture of complaint across the continent—alternatively blaming German neo-colonialism, Greek laziness, or the market's greed. This has already led to increased anti-European sentiments, often expressed by referring to the loss of the citizens' voice in the process that forms and structures societies—as the Union precluding desired political change,⁶⁵ or even acting as agents of the market.⁶⁶ This moralization of national political discourse has severe consequences for the likelihood of the European Union being used as an alternative strategy. The nation state, after all, cannot possibly serve as a solution to reappropriate the social question. Any answer beyond “austerity” faces significant economic, legal, and administrative constraints, leading to a situation, as Unger puts it, whereby “in European social democracy—with a well-developed social contract, [the citizens] have good reason to fear that the contract will be broken—not once, but over and over again in the name of economic necessity, described as competition and globalization.”⁶⁷ National political rhetoric thus delegitimizes itself by promising what it cannot possibly deliver—a national answer to the social question—while simultaneously delegitimizing the one forum, the European Union, that has many characteristics that would allow for the reappropriation of the social question. Only by political action on the transnational level, after all, can “the social forces of nature that have been unleashed at the transnational level—the systemic constraints that operate without hindrance across national borders, today especially those of the global banking sector—also be tamed.”⁶⁸

Together, these two trends feed the beast of rupture. National politicians delegitimize the Union as much by their rhetoric as they delegitimize their own role by their actions. Cumulatively, this has led to a loss of even the illusion of political control and political agency from the individual's perspective, which in turn might lead to ever further depoliticization and delegitimation of the political space on the national and transnational level. In the longer run, however, taking away money from people in order to give it to others (or to the banks) cannot be tolerated without a minimal return in terms of well-being or procedural ownership by the people.⁶⁹ As Scharpf has put it: “When highly salient interests and normative preferences are violated, positive legitimating arguments are

⁶⁵ On the importance of the illusion of change in political agency, see LEA YPI, *GLOBAL JUSTICE AND AVANT-GARDE POLITICAL AGENCY* 131 (2011).

⁶⁶ STREECK, *supra* note 13, at 26.

⁶⁷ UNGER, *supra* note 14, at 39.

⁶⁸ HABERMAS, *supra* note 16, at 10. See also STREECK, *supra* note 13, at 26.

⁶⁹ YPI, *supra* note 65, at 131.

needed to stabilize the routines of voluntary compliance.”⁷⁰ The only other solutions left in the absence of such arguments, history tells us, are political rupture or a repressive state. Radical as this may sound, any response quickly becomes so once an institutional system can no longer accommodate the citizen’s voices.⁷¹

The above diagnosis of the dissolution of the social question should not be taken as an ideological argument, as a call for a new left alternative. Rather, it is one that defends, on procedural and normative grounds, the need for the social question to be answered by the people. It is simply one that argues that if we are to have austerity, it should at least be a reflection of the desires of the electorate, and not as a by-product of raw economic power and institutional asymmetries in transnational governance.

D. Three Ways to Reappropriate the Social Question?

How do we reappropriate the social question within the realm of politics? In order for us to answer this question, we need to clearly understand that globalization, European legal integration, and the euro-crisis pose similar, but also different challenges. Any fix will need to take these different dynamics into account. As discussed in the first section, answering the social question presupposes two institutional capabilities. On the one hand, it requires a system that can collect and mediate between the different views that citizens have on the social question; while on the other hand it requires the administrative or legal capacity to bind all resources and actors present in the territory to the outcome. These presuppositions, presumably, underlie the arguments brought forward by the politicians and academics who would value a return to state sovereignty, wherein resources and actors can be locked in. Such proposals, however, fail to grasp the mechanics of, and power asymmetries implicit in, transnational economic reality. Any commitment to the social question beyond a strictly procedural one, in which citizens get to vote; but one in which the answer to the social question can actually be implemented, presupposes transnational mechanisms that control the mobility of actors and capital across borders. At the same time, cosmopolitans, with their objection to the artifice of the nation state that distorts the moral reach of the social question,⁷² and their view that increased mobility improves people’s capacity to live a “good life,” must accept that the answering and implementation of the social questions presupposes certain structures, of a political, institutional, and administrative kind, that are currently nonexistent beyond the level of the nation state, and are unlikely to be formed in the absence of a thick, global transnational public sphere and political culture.

⁷⁰ SCHARPF, *supra* note 6, at 105.

⁷¹ See also Michael Wilkinson, *The Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union* (in this issue).

⁷² YPI, *supra* note 65, at 107.

The European Union, as a big integrated economic bloc with external borders, internal economic regulation, robust institutions, and incipient political culture, may prove to be a good experiment in trying to re-appropriate the social question. If we look at the Union in greater detail, it appears that while the EU is an economic bloc that is big and powerful enough to control market forces, and while it can control the access to, and exit by economic actors from, its territory,⁷³ it seems to lack a political system sophisticated and “thick” enough to be able to answer the social question in a way that reflects the wishes of its electorate(s). Even if constitutionally and ideologically committed to the social question, any answer given by the EU is doomed from its utterance. This is not to say that the EU should not be considered an appropriate forum for the re-appropriation of the social question. Its nature as a transnational experiment in the articulation and institutionalization of the irreducible plurality of conceptions of the “good” beyond the nation state offers a new and exciting structure through which to counterbalance the economic power of the global market, and bring the social question back into the realm of political contestation.⁷⁴

This contribution suggests three possible avenues for the re-appropriation of the social question within the European context. The first (I) is the creation of a transnational public sphere and political system sophisticated enough to answer the social question on the transnational level. This appears to be an absolute necessity, without which no solution is likely to work. It is also, however, the most challenging, with only a limited role for law, the likely resistance of the Member States, afraid of losing the little legitimacy that they have retained, and will require a much more proactive approach by the European citizenry. The second avenue (II) is the further integration of the Union, as recently proposed (in different forms) by the “Future of Europe” working group, led by the German Minister of Foreign Affairs, Guido Westerwelle, by prominent MEP’s Verhofstadt and Cohn-Bendit, and by Barroso and Van Rompuy. It will be argued that without a transnational public sphere, deeper integration is likely to destabilize the Union further, leading it towards ever more *executive federalism*, and further decreasing its legitimacy, stability, and capacity to answer the social question. While the first two suggestions seek to create institutional structures that allows a European answer to the social question, the third (III) and final suggestion seeks to devise a system of coordination that allows citizens to answer the social question on the national level while preventing EU law, and in particular its free movement provisions, from creating distributive asymmetries that may prevent its actual implementation. Given the central role of the legal system in the increased incapacity of the political to control the resources and actors on its territory within the European Union, this third suggestion is decisively legal, could be implemented in as little time as it takes

⁷³ BRADFORD, *supra* note 36.

⁷⁴ See Floris de Witte, *Transnational Solidarity and the Mediation of Conflicts of Justice in Europe*, 18 EUR. L.J. 694, 694 (2012).

the Court to make a judgment, but does, notably, not solve the issue of redistribution between Member States.

I. The Creation of a Transnational Public Sphere

The first solution, which seems to be absolutely indispensable in the transnationalization of the social question, is the creation of a genuine transnational public sphere, the cultivation of a political culture of contestation, and the strengthening of the democratic credentials of the Union—even if the latter two appear to result from the former. Ultimately, as understood by Monet, Haas, and Habermas, the trajectory of the Union generally, and the direction in which it is going now specifically, is fundamentally and precariously premised on its capacity to attract the loyalty of citizens, whether understood as civic solidarity or as the projection of political claims.⁷⁵ A transnational public sphere would serve to connect the Europeans above and beyond their own polity, and make the Union sensitive and responsive to the needs and desires of its citizens.

As *regeneration Europe* claims, Europe is and means more to its citizens than is currently articulated. Very bluntly put, the European Union is not Europe. We, Europeans, are all connected to each other and each other's cultural points of reference. This is not a reference to the quite tedious euro-elitism, of eurostars and eurocities,⁷⁶ but a recognition of the people in the four corners of Europe that eat pasta, watch Manchester United, shop at IKEA, drink Czech beer, and use Easyjet. For better or worse, our daily lives are increasingly—if maybe subconsciously—becoming more and more European. To translate this into political engagement or political identity, however, we require a forum that allows for the articulation of such claims, that channels communication between citizens horizontally, and towards the political elites vertically, that disseminates relevant information to all citizens, that defends the interests of minorities, engages and internalizes social conflict, makes government responsive and sensitive to the electorates' needs, strengthens center-periphery relations, and crucially, cultivates an understanding of loyalty, community, and civic solidarity—a feeling of interdependence that is crucial to solve communal questions of normative salience such as the social one.⁷⁷ Such a transnational public sphere and political culture would not only prevent the distortive effects of the asymmetries implicit in the integration process, by strengthening the political on the European level, but would also legitimize the monetary and economic redistributive choices made and conditionality principles imposed.

⁷⁵ ERNST HAAS, *THE UNITING OF EUROPE* 16 (1958).

⁷⁶ ADRIAN FAVELL, *EUROSTARS AND EUROCITIES* (2008).

⁷⁷ HABERMAS, *supra* note 16.

The conceptual framework for such a leap is offered by Habermas. His view that sovereignty in Europe is shared between the *peoples* of Europe, that is, the individuals within their national political context, and the *citizens* of Europe, directly constituted on the European level, offers an interesting context within which to think through the reappropriation of the social question.⁷⁸ In this scenario, the depoliticizing effects of globalization, European integration, and the euro-crisis can be nicely framed: the national peoples would answer the social question as they wish, while the European citizens would answer the social question on the transnational level in a way that mitigates the externalities that emerge due to lack of coordination and that redistributes resources on the transnational plane in accordance with the nature and strength of the incipient forms of transnational solidarity.⁷⁹ For such a conceptual framework to function, and for the individual to, at least partially, detach himself from the national political unit, however, we need a medium that structures and stabilizes political interaction beyond the nation state. This, as many people have intuited, is a transnational public sphere.

A transnational public sphere presupposes, among other things, a transnational media that covers the whole territory of the Union—both in content and dissemination—citizens that engage in transnational cooperative projects, not to discuss the merit of transnationalization as such, but to contest its content; to discuss and engage with what Europe ought to look like. It has been argued that this could take place either through the creation of a *supranational* structure, that transcends the whole territory of the Union, through *vertical Europeanization*, in which national elites and media address and discuss European issues, and, conversely, the European political elite engages in domestic discussion, or through *horizontal Europeanization*, which consists of communicative linkages across state borders, or, in practical terms, Hollande joining the debate on the future of Europe in Germany during the upcoming German elections.⁸⁰

But what role can law play in this development? As Habermas has recently stressed, “the expansion of communication networks and horizons of perception, the liberalization of values and attitudes, an increase in the willingness to include strangers, the strengthening of civil society initiatives and a corresponding transformation of strong identities can at best be stimulated through legal-administrative means.”⁸¹ Beyond the facilitation of cultural exchange programs, Erasmus student exchanges, or broadcasting networks such as

⁷⁸ *Id.*

⁷⁹ DE WITTE, *supra* note 74, at 702.

⁸⁰ THE MAKING OF A EUROPEAN PUBLIC SPHERE: MEDIA DISCOURSE AND POLITICAL CONTENTION 38 (Ruud Koopmans & Paul Statham eds., 2010).

⁸¹ HABERMAS, *supra* note 16, at 46.

ARTE, the Union seems relatively powerless to induce the public sphere required.⁸² At the same time, recent innovations in the legislative process, such as the introduction of the citizenship initiative and the strengthening of the role of national parliaments, which are the fulcrum of politics of contestation, may, marginal as it may seem, be a good starting point to raise the political engagement of the citizen on the transnational sphere. Depending on the reception of such initiatives by the Commission and Parliament, they could become a catalyst for an ever-growing engagement of the citizen with the Union and its policies, and could significantly lower the threshold for citizen participation and increased the perceived ownership of European citizens over (certain) EU laws.⁸³

A transnational public sphere, important as it is, however, is nothing but a first step for the development of a democratic system on the Union level that is robust and sophisticated enough to be able to generate answers to the social question that reflects what its citizens want. It equally presupposes making the European political settlement receptive and sensitive to such claims, by creating a legal system that can accommodate such pressures,⁸⁴ and by tying the executive closer to the citizen. While the mentality and engagement of the European citizen must definitely be changed and provoked, we currently do not possess an institutional framework sophisticated enough to contain it or to ensure collective will-formation while tying all citizens to its outcome. As the German Constitutional Court has highlighted, the Union does not possess the democratic pedigree required to legitimately answer the social question.⁸⁵ Any answer coming from that structure, if the Union were to have competences to implement redistributive policies, can—on procedural grounds alone—never be considered “just.”⁸⁶ It is relatively evident that the Union lacks the political capital to solve this problem head-on. This would require the vast re-enfranchisement of the European citizen on the transnational level directly, transferring much of the legitimizing capacity of collective self-determination to the European level. It would require at the very basic the strengthening of the political space on the transnational level and include closer ties between the European Parliament and Commission, a stronger commitment to deliberation, transparency, more direct elections, and transnational political parties, and, crucially, a drastic decrease in the role of the European Council and Council in the decision-making process—something that the Member States, as the Masters of the Treaty, are not likely to promote, out of the fear of losing whatever legitimacy they have retained. It might in the end be up to the citizens,

⁸² See EUROPEAN COMMISSION, *Culture, Our Programmes and Actions*, <http://ec.europa.eu/culture/our-programmes-and-actions/> (detailing a list of current EU cultural programs) (last visited May 12, 2013).

⁸³ Michael Dougan, *What Are We to Make of the Citizens' Initiative?*, 48 COMMON MKT L. REV. 1807, 1807–1848 (2011).

⁸⁴ Chalmers makes a convincing case for the need to create a public law of struggle. See CHALMERS, *supra* note 63.

⁸⁵ *Lisbon ruling*, *supra* note 33, ¶ 251.

⁸⁶ See also JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 218 (2010).

alone and collectively, to start articulating their concerns and desires on the transnational forum directly.

II. Further and Deeper Integration

A second type of solution, which seems to be in fashion among Europe's political elite, is to use the current instability to push for further fiscal and political integration. Among these proposals, the most eye-catching are those by the "Future of Europe" workgroup, composed of the ministers of foreign affairs of eleven Member States, which calls for immediate fiscal and banking integration;⁸⁷ the manifesto for "A Post-National and Federal Europe," by MEPs Cohn-Bendit and Verhofstadt;⁸⁸ and the Van Rompuy/Barroso proposal towards a "Genuine Economic and Monetary Union."⁸⁹ All of these proposals, however, either fail to link such desires for further integration to the desires of the citizenry, or fail to appreciate that the capacity to answer the social question not only presupposes political control over resources and actors, but also the articulation of the needs and desires by those actors, that is, requires a transnational political sphere. None of these proposals suggest how to create this space, beyond the fact that it should be there. None, in consequence, make a very convincing case that deeper integration will help re-appropriate the capacity of citizens to decide on the social question. If anything, it further entrenches its dissipation, by depriving citizens within the national setting of the last remnants of fiscal and budgetary control. Deeper integration, in other words, might re-appropriate the social question on the European level, by providing for a centralized taxation regulation, company law and labor regulations, but cannot possibly answer it—as, in fact, the Court's rulings in *Viking*⁹⁰ and *Laval*⁹¹ make clear, where the Court appropriated the capacity to answer the question how trade union rights should be balanced against rights to cross-border trading, but then went on to utterly misinterpret the meaning of the former, leaving twenty-seven Member States without the possibility of coming to a different conclusion.⁹² An increased capacity to answer the social question without an increased

⁸⁷ *Final Report of the Future of Europe Group* (Sept. 17, 2012) [hereinafter *Final Report*], available at <http://www.auswaertiges-amt.de/cae/servlet/contentblob/626338/publicationFile/171843/120918-Abschlussbericht-Zukunftsgruppe.pdf>.

⁸⁸ GUY VERHOFSTADT & DANIEL COHN-BENDIT, FOR EUROPE!: MANIFESTO FOR A POST-NATIONAL REVOLUTION IN EUROPE (2012).

⁸⁹ Herman Van Rompuy, *Towards a Genuine Economic and Monetary Union: Report by President of the European Council* Herman Van Rompuy (Dec. 5, 2012), available at http://ec.europa.eu/economy_finance/focuson/crisis/documents/131201_en.pdf.

⁹⁰ Case C-438/05, Int'l Transp. Workers' Fed'n v. Viking Line ABP, 2007 E.C.R. I-10779.

⁹¹ Case C-341/05, Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, 2007 E.C.R. I-11767.

⁹² See, e.g., Rebecca Zahn, *The Viking and Laval cases in the Context of European Enlargement*, 3 WEB J. OF CURRENT LEGAL ISSUES (2008), available at <http://webjcli.ncl.ac.uk/2008/issue3/zahn3.html>.

capacity to understand what citizens actually want might well be the nail in the Union's coffin; an exercise of blind technocracy at best and hegemony at worst.

It is interesting to see this choice for further integration through depoliticization in a historical light. Müller has recently suggested that this process of depoliticization, through governmental agencies, constitutional courts, and the European integration process, was very deliberate (at least at its origin).⁹³ In the aftermath of the Second World War, the elite's distrust of popular sovereignty led to the ring-fencing of certain policy areas and institutional actors from democratic pressures, exactly to protect the liberal-democratic values that are constitutive of democracy. This idea of constrained democracy, however, fails to be normatively persuasive, as Müller himself emphasizes, when the action of depoliticized institutions, such as the EU, move to salient and normatively contested areas such as fiscal redistribution. Assessing budgetary competences—to tax and spend—as something to be “managed” causes serious problems from the perspective of democracy; it is no longer “contained” but altogether replaced by something best typified as *executive federalism*, where raw economic power dictates whether misbehaving Member States are to renegotiate the core values that inform their societies.⁹⁴

The proposals by the Future of Europe working group, which consisted of the Ministers of Foreign Affairs of eleven Member States, led by their German member, Guido Westerwelle, are striking mostly because of their neo-liberal assumptions⁹⁵ and their chronology. It calls for immediate deeper integration, including “effective oversight powers at European level with concrete competences for European institutions to oversee the budgets and implementation of fiscal policies of member states,” the possible “mutualization of sovereign risk,” and making the “euro-plus pact,” which touches on many traditional Member State competences, binding.⁹⁶ At the same time, this further integration, the paper continues, “must go hand in hand with deeper democratic legitimacy,” a lofty claim substantiated, rather underwhelmingly, by the need to consult the European Parliament about the measures mentioned above.⁹⁷ “[O]nce the euro crisis has been overcome, we must also improve the overall functioning of the European Union,”⁹⁸ including the democratic legitimacy of the European Parliament, the “nomination of a European top candidate for the next EP elections by each European political group,” “a greater distinction between majority and minority in the Parliament,” the creation of a

⁹³ Jan-Werner Müller, *Beyond Militant Democracy?*, 73 NEW LEFT REV. 44 (2012).

⁹⁴ *Id.*

⁹⁵ See also Somek, *supra* note 8.

⁹⁶ *Final Report*, *supra* note 87, at 3–4.

⁹⁷ *Id.* at 4.

⁹⁸ *Id.* at 5.

requirement of super-majority for Treaty revisions, and the building of “a truly European political space, which would draw European citizens’ attention to key political issues concerning their common future.”⁹⁹ All to be done, of course, once the biggest redistributive decisions and executive coup in the history of European integration has taken place. Müller has highlighted the problem with this chronology of events—which appears to hold the strong preference of, at least, Berlin. As he argues, “ignoring legitimacy—or thinking that the right strategy will automatically create it,” puts the horse before the cart; it presumes normative validation without source.¹⁰⁰

Van Rompuy, Barroso, Juncker and Draghi have come up with a similar proposal, which is to lead the EU “towards a genuine economic and monetary union,” which, in reality, is a thinly veiled compromise between the French and German positions on the euro-crisis.¹⁰¹ This proposal also calls for an “integrated financial framework” that “elevates responsibility for supervision to the European Union;”¹⁰² “an integrated budgetary framework to ensure sound fiscal policy . . . encompassing coordination, joint decision-making, greater enforcement and commensurate steps towards common debt issuance;”¹⁰³ “an integrated economic policy framework . . . that promotes sustainable growth, employment[,] and competitiveness;”¹⁰⁴ and for mechanisms “ensuring the necessary democratic legitimacy and accountability”¹⁰⁵ given that “building support for European-wide decisions with a far-reaching impact on the everyday life of citizens is essential.”¹⁰⁶ The authors continue to elaborate this to mean only that “close involvement of the European parliament and national parliaments will be central.”¹⁰⁷ The proposal, as well as its interim report released in October 2012,¹⁰⁸ indicate that the Union’s current leaders are well aware of the problem that deeper integration without further

⁹⁹ *Id.* at 7.

¹⁰⁰ Müller, *supra* note 93, at 47.

¹⁰¹ See Charlemagne, *The Euro Crisis: A Delicate Proposal*, ECONOMIST, June 26, 2012, <http://www.economist.com/blogs/charlemagne/2012/06/euro-crisis> (last visited May 7, 2013).

¹⁰² Van Rompuy, *supra* note 89, at 3.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ EUROPEAN COUNCIL: THE PRESIDENT, *Interim Report: Towards a Genuine Economic and Monetary Union*, (Oct. 12, 2012), available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/132809.pdf.

democratization entails for the stability of the Union, but seem caught between the German preference for executive federalism, the immediacy of the crisis, and their incapacity to construct a transnational public sphere from the top-down. The recently released Commission blueprint for the future of the EMU sets out clear objectives, including the adoption of the single rulebook, budgetary supervision, banking union and—in the longer term—fiscal harmonization and a political union while referring, in the part on the democratic nature of such changes, exclusively to the relative power that the Commission and EP should have, without realizing, at any stage, that such power, wherever it may lie, will be structurally insensitive to the citizen's desires for lack of a thick transnational political sphere.¹⁰⁹ The proposal by Miguel Poiares Maduro, written for the Constitutional Affairs committee of the EP, suffers from similar problems.¹¹⁰ While it offers a democratic rather than economic justification for the Europeanization of fiscal policies, his proposal, which mentions the creation of a European public as an inevitable by-product or result of fiscal and redistributive majoritarianism at the Union level, suggest that widely divisive criteria of redistribution or justice—Maduro suggests a harmonized corporate tax, or the requirement of internationalization for universities before subsidies are granted—can be decided *for* the citizens, rather than *by* the citizens.¹¹¹ It is very difficult to see how such proposals would function in the absence of a transnational public sphere that is thick enough to accommodate such divisive choices. Difficult as it may be, deeper integration, in particular in fiscal and distributive matters, is not likely to be sustainable without such a public sphere, and, to the extent that it might well *result* in the creation of a transnational public movement, the dismantlement of the Union might well be the single objective of such a transnational movement.¹¹² The proposals discussed above are excellent from the perspective of re-appropriating the social question within the realm of politics, but offer little in a way of answering such question correctly (that is, in accordance with the citizens' desires),¹¹³ or offer the safeguards required for that answer to provide a stable and legitimate basis for the structuring of society.

Verhofstadt and Cohn-Bendit also call for a quite radical forward step in the integration process, if not as a fig leaf for executive federalism this time, for a more messianistic and

¹⁰⁹ *Communication from the Commission: A Blueprint for a Deep and Genuine Economic and Monetary Union: Launching a European Debate*, COM (2012) 777 final (Nov. 28, 2012), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0777:FIN:EN:PDF>.

¹¹⁰ Maduro, *supra* note 30.

¹¹¹ *Id.* at 18.

¹¹² Cf. Graeme Wearden, Europe's Day of Anti-Austerity Strikes and Protests Turn Violent: As It Happened, THE GUARDIAN, Nov. 14, 2012, <http://www.guardian.co.uk/business/2012/nov/14/eurozone-crisis-general-strikes-protest-day-of-action> (describing the European day of Action and Solidarity against Austerity, held on 14th November 2012, where workers were on strike in most EU Member States).

¹¹³ Maduro, *supra* note 30. (appearing to assume that such choices are self-evident).

technocratic view of the Union.¹¹⁴ In their view, we require a federal Union which is led by a “European government which determines economic, budgetary and fiscal policy and is able to impose rules on all Eurozone Member States.”¹¹⁵ Their admirable *cri de coeur* for federalization is informed both by the need to reappropriate the place of “the political”¹¹⁶ and prevent the rise of nationalism,¹¹⁷ but, despite numerous references to a European democratic space, without which “no solution can survive,”¹¹⁸ and despite the recurring theme that suggests that this is to be accomplished by transferring power from the European Council to the European Parliament and European Commission, their solutions remain opaque—either because too thinly conceptualized, “democracy as a right to vote,”¹¹⁹ or too tokenistic, “possibility to choose a EU passport.”¹²⁰ As with the other proposals for further integration, if the objective is to justify redistributive criteria and fiscal transfers, the conception of democracy used needs to be much thicker. While these proposals may serve to reappropriate the social question within the realm of the political, they create a political which is structurally insensitive to what citizens want from it. Rather than remedying the problem then, such proposals perpetuate the problem, and obscure its relevance and inevitable neo-liberal answer behind a façade of transnational democracy.

III. Expanding National Answers of the Social Question

If the above suppositions are true—that the creation of a transnational public sphere will require time, while further integration cannot possibly serve to strengthen the capacity of the European citizens to actually answer the social question—it may be useful to look at how EU law can help the political on the national level to re-attain that capacity. Or, in simple terms, how to frame a European solution to re-appropriate the social question on the national level. Law, here, plays an important role.

EU law in general, and EU free movement law in particular, has long been the lever through which the social question has been lifted outside the scope of political

¹¹⁴ VERHOFSTADT & COHN-BENDIT, *supra* note 88.

¹¹⁵ *Id.* at 17.

¹¹⁶ *Id.* at ch. 1.

¹¹⁷ *Id.* at ch. 3; *but see* Anthony Beevor, *Europe’s Long Shadow: Will a Continent Turn its Back on Democracy?*, PROSPECT, Nov. 3, 2012, <http://www.prospectmagazine.co.uk/magazine/eurozone-democracy-antony-beevor/>.

¹¹⁸ VERHOFSTADT & COHN-BENDIT, *supra* note 88, at 17.

¹¹⁹ *Id.* at 69.

¹²⁰ *Id.* at 60.

contestation on the national level,¹²¹ and has been the instrument through which actors and their resources have been able to escape the legal and administrative control of Member States that is vital for the implementation of the answer to the social question.¹²² A reinterpretation of the scope of EU free movement law, then, if carefully done, could remedy some of the significant problems identified above,¹²³ while not renouncing on the justice enhancing quality of free movement, in so far as it offers citizens both a wider choice of alternative lifestyles and engenders claims to solidarity and basic social rights, which individual European citizens can assert against whichever state they reside in.¹²⁴ Such a reinterpretation of the free movement provisions with a view to repoliticize the social question presupposes that the EU-wide rules that control and regulate the movement of resources and individuals are made sensitive to the collective self-expression of the electorate in the different Member States. There are at least four ways in which the free movement provisions can serve this function. All the solutions discussed below essentially purport to find a European solution to allow national political systems to answer the social question in a *transnational* fashion.

The first approach is to rethink the free movement rights in light of the need to limit the depoliticizing effect of mutual recognition and regulatory competition. As Saydé has argued convincingly, the free movement case law of the Court contains two fundamentally opposed conceptions of the European economic constitution.¹²⁵ One he calls *regulatory neutrality*, which aims to foster competition between companies within the different Member States, and which presupposes the insulation of the Member State's control over actors and resources present on the territory.¹²⁶ It requires, simply put, that all companies and actors can enter and exit the different Member States but, when they are present, must abide fully to the rules decided upon by the government of that state, provided that they do not discriminate.¹²⁷ A preference for this second paradigm was visible in, for example, the development of the doctrine of abuse of law, which aims to prevent gratuitous mobility for the sake of circumventing capture by national regulatory standards. On the other hand of the spectrum we have a regulatory paradigm that Saydé calls

¹²¹ Richard Bellamy, *The Liberty of the Post-Moderns? Market and Civic Freedom Within the EU* 17–18 (LSE 'Europe in Question' Discussion Paper Series No. 1/2009, 2009), available at <http://www2.lse.ac.uk/europeaninstitute/leqs/leqspaper1.pdf>.

¹²² Fritz Scharpf, *Legitimacy in the Multilevel European Polity*, 1 EUR. POL. SCI. REV. 173, 173–204 (2009).

¹²³ See *id.* § B; see also Agustín José Menéndez, *The Existential Crisis of the European Union* (in this issue).

¹²⁴ MAURIZIO FERRERA, *THE BOUNDARIES OF WELFARE* (2005); Floris de Witte, *National Welfare as Transnational Justice?*, in *EUROPEAN CONTRACT LAW AND THE WELFARE STATE* 15 (Rutgers ed., 2012).

¹²⁵ Saydé, *supra* note 31.

¹²⁶ *Id.* at 374.

¹²⁷ *Id.* at 375.

regulatory competition, which structurally aims to allow for free competition between actors on the *common* European market, and as such has stimulated the development of the ideas of mutual recognition.¹²⁸ It creates a strong regulatory pull on the capacity of Member States to answer the social question, as it presupposes relinquishing control over the mobility of actors and resources. This paradigm has been criticized in company law, tax law, and within the context of the cross-border provision of services as stimulating legally fictitious arrangements that asymmetrically favor mobile interests, read: Capital, and undercut the capacity of Member States to constrain those powers in favor of more social or more communal objectives. Saydé's work neatly shows how the free movement provisions are to be reconceptualized if it is to lead to the insulation of the capacity of the political on the national level to autonomously determine and implement the normative decisions reached: It presupposes an understanding of EU free movement law to allow for more regulatory diversity and thereby prevent distributive asymmetries and normative distortions on the national level; an emphasis on actual, physical manifestation of resources instead of its legal form in company law, tax law, and the cross-border provision of services; a test of market access and not one of restriction as a trigger for the application of EU free movement law; and, at the same time, it presupposes the systematic entrenchment of minimum standards on the transnational level to prevent a regulatory race, whereby national normative standards are affected by standards set by other states.¹²⁹ Such a shift in the Court's case law would allow for the reappropriation of the social question on the national level, while still allowing for free movement.

A second approach that might serve to re-appropriate the social question within the political context is by the incorporation of ideas of transnational solidarity within the functioning of the free movement provisions. Elsewhere I have argued that the tiered nature of the Union, and the Union's incapacity to sustain directly redistributive arrangements or positive welfare rights such as education or healthcare, implies a normative commitment to insulate the capacity of Member States to redistribute resources internally.¹³⁰ This commitment suggests both respect for the institutional framework (the national political process) through which the social question is answered, and the insulation of the capacity of the Member States to actually implement the answer. Transnational solidarity, I argued, can serve as an interpretative tool to confine the scope of the free movement provisions and the obligations of equal treatment so as at the same time incorporate the transnational rights and obligations that are implicit in the integration process, while preserving the capacity, both structural and substantive, of Member States to individually devise and execute redistributive policies. A reconceptualization of the free movement provisions in light of the moral commitments of transnational solidarity

¹²⁸ *Id.* at 377.

¹²⁹ Simon Deakin, *Reflexive Harmonisation and European Company Law*, 15 EUR. L.J. 224 (2009).

¹³⁰ De Witte, *supra* note 74.

explicitly requires, for example, that mobile actors can only make use of regulatory benefits, most crucially, of course, welfare benefits, in different Member States as soon as they have met the conditions of reciprocity that are implicit in those benefits. This way, it was argued, the *internal* capacity of electorates to decide on the social question is to a large extent insulated from *external* pressures, while at the same time preventing discriminatory assessments, by including those migrants who “deserve” access, by virtue of meeting the preconditions of reciprocity. A more contextualized interpretation of the free movement provisions, taking account of the commitments of reciprocity that underlie the national rule to which it attaches, can, as such, serve to repoliticize the social question.¹³¹

A third way in which the free movement provisions can be tweaked so as to protect the Member State’s capacity to answer the social question is by employing a new test of proportionality. The current test of proportionality, as several authors have observed, plays an important role in the depoliticization of national policies, in particular in those areas explicitly excluded from Union competences.¹³² This results from the way in which it transfers the asymmetrical bias that exists in the Union—simply put, capital extracts a bias by virtue of its greater mobility—into the national political process. The principle of proportionality entails that Member States may only restrict the free movement of economic actors when it is suitable and necessary to protect a vital public interests.¹³³ While this test has often been employed to serve majoritarian politics, bringing policy outliers in line with national (economic) arrangements in the majority of Member States, this process has recently become much more problematic; first, by reason of the increased inroads that free movement is making within national distributive policies, and second, because the test has shifted into one that only allows Member States to uphold policies when they are least restrictive of the exercise of free movement as possible.¹³⁴ This approach has a great de-politicizing effect, as—, in particular in cases where the interests of capital are explicitly and even deliberately restricted by a Member States’ answer to the social question, it simply narrows down that answer to the option that is the least possible restriction of the interest of mobile capital. In *Viking*, for example, this led to the absurd situation where trade unions had to not only take account of the interests of mobile capital, but also restrict their exercise of the right to strike so as to cause as little harm to the company making use of free movement rights as possible, which, needless to say, is

¹³¹ *Id.*

¹³² Loïc Azoulay, *The European Court of Justice and the Duty to Respect Sensitive National Interests*, in *JUDICIAL ACTIVISM AT THE EUROPEAN COURT OF JUSTICE* 167 (Mark Dawson, Bruno de Witte & Elise Muir eds., 2013).

¹³³ Tor-Inge Harbo, *The Function of the Proportionality Principle in EU Law*, 16 *EUR. L.J.* 158 (2010).

¹³⁴ See Case C-370/05, *Festersen*, 2007 E.C.R. I-1135; see also Case C-438/05, *Int’l Transp. Workers’ Fed’n v. Viking Line ABP*, 2007 E.C.R. I-10779; see also Harbo, *supra* note 133.

the exact opposite of the social function of the right to strike.¹³⁵ Especially in areas that fall outside the competences of the Union itself, then, this type of proportionality approach not only depoliticizes the social question, but answers it in a manner that directly contradicts the electorate's voice, in case it had not, after all, the question of a restriction to free movement would never have arisen. A suggested new approach to proportionality should take this effect into account, and give more leeway to the national articulation of the social question, especially in areas that fall outside the scope of competences of the Union, such as trade union rights, education, and healthcare, which are crucial for any answer to the social question.¹³⁶ This could be done by reversing the burden of proof for those specific areas, demanding that the actors making use of the exercise of free movement rights make the case that the restriction is particularly disproportionate; or, alternatively, by making proportionality more procedural, such as by a demand of a deliberative process, wherein external interests were represented in the national political process but simply outvoted, coupled with a demand of non-discriminatory market access.¹³⁷

The fourth way in which the free movement provisions can be reconceptualized with a view of reinstating the capacity of the Member States to answer the social question is by giving clout to the newly inserted horizontal clauses, including the "national constitutional identity clause,"¹³⁸ the "social clause,"¹³⁹ and the "social market clause."¹⁴⁰ All of these—albeit arguably political declarations rather than legal mechanisms—could be employed by the Court as an excuse to overturn its previous case law, to give more leeway for the implementation of national answers to the social question, either by restricting the scope of the free movement provisions, by accepting redistributive arrangements *per se* as grounds that can justify infringements of the free movement rights, or by relaxing its

¹³⁵ Wolfgang Streeck, *Citizenship Under Regime Competition: The Case of the "European Works Councils,"* 1 EUR. INTEGRATION ONLINE PAPERS 3, 5 (1997), available at <http://eiop.or.at/eiop/pdf/1997-005.pdf>.

¹³⁶ Harbo, *supra* note 133, at 166 (noting the distinction between proportionality as understood by Alexy and Habermas).

¹³⁷ See Simon Deakin & Catherine Barnard, *Market Access and Regulatory Competition, in* THE LAW OF THE SINGLE EUROPEAN MARKET: UNPACKING THE PREMISES 197 (Catherine Barnard & Joanne Scott eds., 2002).

¹³⁸ See Consolidated Version of the Treaty on European Union art. 4(2), May 9, 2008, 2008 O.J. (C 83) 18 [hereinafter TEU] ("the Union shall respect the equality of Member States . . . as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.").

¹³⁹ See Consolidated Version of the Treaty on the Functioning of the European Union art. 9, Sep. 5, 2008, 2008 O.J. (C 83) 53 ("the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.").

¹⁴⁰ The TEU refers to the objective of creating a "social market economy." See TEU, *supra* note 138, at art 3(3).

standard of proportionality where a national answer to the social question has an effect on the transboundary mobility of economic actors. Since the entry into force of the Treaty of Lisbon, the different clauses have been discussed in several cases. In *Sayn-Wittgenstein*,¹⁴¹ for example, the Court used the constitutional identity clause to define the margin of appreciation that should be awarded to Member States under the proportionality test.¹⁴² The German Constitutional Court has also explicitly used the constitutional identity clause to bracket the scope of application of EU law, arguing that the “principle of the welfare state” could not be affected by EU law,¹⁴³ and that “sufficient space is left to the Member States for the political formation of economic, cultural[,] and social living conditions.”¹⁴⁴ This, in addition the GCC’s general defense of the principle of self-determination, through which citizens must be able to decide on the social and redistributive norms that structure their lives,¹⁴⁵ comes very close to a principled defense of the electorate’s capacity to answer the social question itself, and actually implement it. One can only speculate what the implications would have been if it had been pronounced by one of the constitutional courts in debtor Member States.

The social clauses have been discussed by AG Villalon in *Santos Palhota*,¹⁴⁶ where he argues that their inclusion in the Treaty of Lisbon should lead the Court to grant a wider margin of appreciation within the context of the principle of proportionality when Member States restrict the free movement provisions in their answer to the social question, that is, in the protection of social interests.¹⁴⁷ The Court, however, declined the invitation of the AG and decided the case without reference to Article 9 TFEU or Article 3 (3) TEU.¹⁴⁸ Be that as it may, the horizontal clauses could provide an elegant mechanism through which the

¹⁴¹ See Case C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, 2010 E.C.R. I-13693, ¶ 83, 92; for a general discussion of the case law and the use of the constitutional identity clause see Armin Van Bogdandy & Stephan Schill, *Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty*, 48 COMMON MKT. L. REV. 1417, 1427–1430 (2011). Von Bogdandy and Schill indeed accept that the role of the constitutional identity clause is to strengthen the capacity of Member States to come up with diverse policy outcomes, even if they limit its scope of application in a formalistic and procedural fashion. *Id.*

¹⁴² See Case C-165/08, *Comm’n v. Poland*, 2009 E.C.R. I-6843, ¶ 52.

¹⁴³ *Lisbon ruling*, *supra* note 33, ¶ 343; See also 14 GERMAN L.J. 1–190 (2013) (elaborating upon, in a special issue of the GERMAN LAW JOURNAL, the ESM decision).

¹⁴⁴ *Lisbon ruling*, *supra* note 33, ¶ 358.

¹⁴⁵ *Id.* ¶ 248–58.

¹⁴⁶ Case C-515/08, *Opinion of AG Villalon in Santos Palhota*, 2010 E.C.R. I-9133, ¶ 52–53.

¹⁴⁷ See also Case C-282/10, *Maribel Dominguez v. Centre Informatique du Centre Ouest Atlantique and Préfet de la Région Centre*, 2012 E.C.R. (forthcoming), ¶ 159 (Sept. 8, 2011), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=109267&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1674620>.

¹⁴⁸ Case C-515/08, *Santos Palhota*, 2010 E.C.R. I-9133.

Court can reconceptualize the free movement provisions in a way that insulates the social question on the national level from the distributive asymmetries that free movement law engenders without having to explicitly go back on its established case law.

The four above proposals may go some way towards solving the regulatory pull exercised by globalization and the asymmetrical integration process, by insulating domestic answers to the social question from such pressures; but cannot deal with the problems generated by the euro-crisis. It might suggest how the social question is to be re-appropriated within Member States, but is silent about its effect between Member States (such as the normative validity of fiscal transfers, or of the exact nature of the conditionality criteria to be attached to bail-outs). What is required, fundamentally, is a thick transnational political space—one that not only politicizes such questions but is able to collect and mediate between the different preferences that citizens may have and that can come to a legitimate redistributive and normative agenda. All that law can do, while we patiently wait for such a political space to emerge, is to devise mechanisms on the transnational level that allow Member States to control the actors and resources present on their territory and at least partially implement the domestic answer to the social question.

E. Conclusion

This contribution has discussed the effect of globalization, European integration, and the sovereign debt crisis on the capacity of citizens to be in control over the most important conditions under which they live their lives. It has suggested that while these transnational processes are loosening the grip of “the political” on the social question, the European Union, with its robust institutional transnational political settlement, offers the fascinating potential to experiment whether the social question can be reiterated and answered on the transnational level. This presupposes, however, as clearly reflected in *regeneration Europe*, not only a commitment to bring the European Union closer to what Europe is and means to the citizen, but also a commitment towards the re-enfranchisement of the citizen on the European level. It was argued that the creation of a thick transnational public sphere and political culture, to which *regeneration Europe* tries to contribute, is absolutely vital in this process. Our commitment to the ideals of political self-determination and to the role of redistributive welfare in liberating us from the brutality of mere survival requires the regeneration of the preconditions for their effective implementation. Ever further and deeper integration is not an alternative, and risks entrenching the depoliticization of the social question more than anything else, with the delegitimation of politics and the European process as natural consequences. Even the legal solutions proposed above, which attempt to reconceptualize the free movement provisions and which are at the core of both the promise and potential downfall of the integration project, can only buy time for the construction of a transnational public sphere. For all the arguments made then, the solution lies in the objective: Self-determination. It will have to be the European citizens, individually and collectively, to step-by-step reappropriate the social question and the preconditions for its implementation. The EU could do itself a favor

by accommodating such a process, or, alternatively, continuing to obey the demands of the market, bracketing the questions of democracy, equality and freedom, and watching the whole enterprise *implode* (if it is lucky) sooner or later. The proposed solutions may not be attractive or efficient, but perhaps an inefficient solution is exactly what is necessary to remind the EU and market structures that they exist but by the grace of the citizen.

