LUND UNIVERSITY

EU Law, Migration and Racial Capitalism: Encounters at the neoliberal EU (b)order

Loxa, Alezini

Published in:
Retfærd: Nordisk juridisk tidsskrift

2025

Document Version:
Peer reviewed version (aka post-print)

Link to publication

Citation for published version (APA):
Loxa, A. (2025). EU Law, Migration and Racial Capitalism: Encounters at the neoliberal EU (b)order. *Retfærd: Nordisk juridisk tidsskrift*, *24*(4), 11.

Total number of authors:
1

General rights
Unless other specific re-use rights are stated the following general rights apply:
Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.
• Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
• You may not further distribute the material or use it for any profit-making activity or commercial gain
• You may freely distribute the URL identifying the publication in the public portal

Read more about Creative commons licenses: https://creativecommons.org/licenses/

Take down policy
If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

LUND UNIVERSITY

PO Box 117
221 00 Lund
+46 46-222 00 00

Download date: 20. Apr. 2025

EU Law, Migration and Racial Capitalism

Encounters at the neoliberal EU (b)order

Alezini Loxa*

Abstract

EU law has developed with close ties to economic growth, and relatedly, various scholars have historically expressed critiques which would today be considered part of the Law and Political Economy approach. What is starkly absent from the relevant critiques is the way in which EU law regulates the migration phenomenon and its relation to the market. Migration law scholarship has been focusing on the exclusion produced for non-EU migrants due to security considerations or colonial legacies, but it has not related such exclusion to the parallel economic exclusion of EU migrants. Thereby a foundational myth has driven the development of EU scholarship and institutional practice, which emphasises the dichotomy between privileged EU citizens and excluded non-EU migrants.

The article revisits this myth by bringing insights from racial capitalism to bear on EU law and the ways in which it regulates migration. By an analysis of primary and secondary law in the area of free movement and migration, the article maps how EU migration law is constitutive of profit-making processes in parallel to and on top of the race-making ones, which have already been explored in literature. The parallel and mutually reinforcing race-making and profit-making features of EU migration law frame it as a legal system which creates stratified rights and shapes hierarchies among non-citizens in Member States' domestic laws. These features are then situated in a theoretical analysis on the position of migration in EU constitutional theories. Eventually the article suggests that EU migration law and the intersecting racial and economic exclusions it produces can be better understood as being part of the neoliberal bias of the EU constitution.

Keywords: EU law, migration, free movement, racial capitalism, civic stratification

* Post-Doctoral Research Fellow in EU Law, Faculty of Law, Lund University. This article is the outcome of a long intellectual process. I would like to thank the participants in the Law and Political Economy in Europe, Summer Academy, Rotterdam 2023, as well as in the Critical Europe Conference, LSE, February 2024 for reflecting to me what my work really was about. I would also like to thank Sabrina Axster and Moé Suzuki for their helpful reading suggestions. Finally, many thanks are due to Emiliya Bratanova, Serde Atalay, Mahesh Menon, Anastasiya Kotova, Daria Davitti, Sarah Ganty, as well as the two anonymous reviewers for engaging with previous drafts of the text, for pushing me on things I have missed and for prompting to better qualify and articulate my argument. This is a pre-copyedited, author-produced version of the article accepted for publication following peer review. The final version will be available in Issue 4 of 2024, Retfærd: Nordisk juridisk tidsskrift.

1. Introduction

EU law has developed with close ties to economic growth, and relatedly, various scholars have historically expressed critiques which would today be considered part of the Law and Political Economy (LPE) approach (Kampourakis, 2021). What is starkly absent from the relevant LPE critiques is the way in which EU law regulates the migration phenomenon and its relation to the market. In parallel, critical legal scholarship has been pointing to the various exclusions EU law produces for non-EU migrants due to security considerations or colonial legacies (Bigo et al., 2010; Eklund, 2023; Kochenov and Ganty, 2023; Spijkerboer, 2018). However, the relevant work has not related the alleged racial exclusion to the parallel economic exclusion which EU law furnishes for both EU and non-EU migrants who could pose a threat to the EU project of economic growth. While authors in other disciplines have challenged the divide between EU and non-EU migrants as regards the lived experience of vulnerability of migrant populations in EU Member States (Könönen, 2024; Persdotter, 2019; Riedner and Hess, 2024), EU law scholarship develops on the premise of an 'us' vs 'them' differentiation. Thereby a foundational myth has been driving the development of EU law scholarship and institutional practice, which emphasises and entrenches the dichotomy between privileged EU citizens and excluded non-EU migrants.

At this point a disclaimer is due. EU citizenship as a status prescribed in Article 20(1) TFEU is the basis for a series of rights which EU nationals enjoy in their country of origin even if they have never moved away and, most importantly, of rights which they can claim against their country of origin after having returned from migration to another Member State.[1] Such rights are undoubtedly of relevance when examining the nature of EU citizenship against the broader legal and political architecture of the EU, and are already examined in depth in scholarship (Bauböck, 2014; Choudhry, 2001; Kostakopoulou, 2008; Shaw, 2019, 2010). What is more, such rights undoubtedly create a more privileged treatment for EU compared to non-EU migrants. However, these rights stemming from EU citizenship, as well as the very discourse of a shared citizenship fails to capture the more complicated landscape of the exclusions EU nationals experience when they migrate to another Member State (Lafleur and Mescoli, 2018; Parker and Catalán, 2014). I suggest that these exclusions are closely related to how EU law regulates the migration phenomenon in total. Relating the migration of EU nationals to that of non-EU ones allows us to better capture the more complicated reality produced and regulated by EU law. Hence by analysing EU nationals as migrants, the purpose is not to undermine the status of EU citizenship. Rather, I suggest that for the purposes of any examination in EU law

[1] See rights enumerated in Article 20(2)(b), (d) and Articles 22- 24 TFEU, See the special Chapter on Citizens' rights in the Charter of Fundamental Rights of the European Union [2012] OJ C 326/39. On EU nationals and the protection drawn from EU law without moving away from the state of origin see Judgment of 8 March 2011, *Ruiz Zambrano*, C-34/09, ECLI:EU:C:2011:124; Judgment of 13 September 2016, *Rendón Marín*, C-165/14, ECLI:EU:C:2016:675; Judgment of 10 May 2017, *Chavez-Vilchez and others*, C-133/15, ECLI:EU:C:2017:354; Judgment of 14 November 2017, *Lounes*, C-165/16, ECLI:EU:C:2017:862. In such cases, the CJEU applies by analogy the rules on EU migrants to national law and nationals that have not left their state of origin. On the strength of EU citizenship for EU nationals that are returning to their state of origin see Judgment of the Court of 5 June 2018, *Coman*, C-673/16, ECLI:EU:C:2018:385; Judgment of the Court of 14 December 2021, *V.M.A. v Stolichna obshtina, rayon „Pancharevo"*, ECLI:EU:C:2021:1008; Judgment of the Court of 4 October 2024, *Mirin*, C-4/23 ECLI:EU:C:2024:845 on cross border recognition of gender identity change.

and migration, it would be intellectually dishonest to suggest that free movement does not regulate the act of migration of EU nationals.[2]

Against this background, the purpose of this article is to revisit the foundational myth of privileged EU citizens vs excluded non-EU migrants by using racial capitalism as an analytical tool, which better captures the effects produced by EU law in the regulation of migration. While racial capitalism has provided a useful lens to make sense of international and national legal developments, the relevant theoretical framework has not yet gained traction in EU law in general or in EU migration law specifically (Attar and Smith, 2024; Gonzalez, 2021; Hammoudi, 2022; Miller and Nicola, 2023). This article provides a first exploration on the value of this framework as a lens that can capture various orderings produced by EU law and hopes to inspire further research in the historical and contemporary relation of racial capitalism to various aspects of EU law.

1.1. Delimitations and Outline

To show how racial capitalism can help us understand and articulate the multiple intersecting exclusions produced by EU migration law, the article situates the doctrinal analysis of EU law in the theoretical framework of racial capitalism. Specifically, the article maps the ways in which EU law attributes and limits the rights of both EU and non-EU migrants. It presents and analyses the legal framework applicable to free movement of workers and free movement of persons which apply to EU migrants and the regulation of migration from third countries which apply to non-EU migrants.[3] There is a longer history of how these frameworks have developed and how economic considerations have guided the attribution of migrants' rights therein, but this history is not addressed in the present article (see Loxa, 2025). Still the analysis of the currently applicable framework captures the intimate connection of migrants' rights to the protection of public finances, and it emphasizes that economically active migrants (even those without an EU nationality) are the subjects whose interests are deemed worthy of protection under EU law. In so doing, the analysis highlights the constitutive role of EU migration law for profit-making processes.

As with every academic endeavour, this article comes with its own limitations. These relate to areas of EU migration law that are not part of the analysis as well as elements of critique that are missed. Specifically aspects of EU migration law related to border management, irregular migration and asylum are excluded as they have already been subject to extensive scrutiny by both EU law and migration studies scholars in relation to both racialised exclusion and economic concerns (Balibar, 2001; Bigo et al., 2010; Cross, 2021, p. 88 on borders; Se

[2] See International Migration Organization, Key Migration terms at https://www.iom.int/key-migration-terms defining international migration as the movement of individuals across borders to a country of which they are not nationals.

[3] Article 21(1) TFEU given expression in Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77; and Article 45 TFEU in Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L 141/1. Entry rights in the Students and Researchers Directive 2016/801; Blue Card Directive 2009/50 and recast 2021/1883, Intra-corporate Transfers Directive 2014/66/EU; Seasonal Workers Directive 2014/36; Rights for all legally resident non-EU migrants in the Single Permit Directive 2011/98 and recast Directive 2024/1233; Family Reunification Directive 2003/86; Long Term Residents Directive 2003/109.

FitzGerald, 2020 on the techniques used in the west more broadly; Hocquet, 2024; See more recently Kochenov and Ganty, 2023 for an attempt to cover all the violent forms of racialized exclusion; Kostakopoulou, 2009; Mayblin, 2017 while focused on the case of Britain, she provides important insights on the race-making discourses in asylum law; Moreno-Lax, 2017; Novak, 2019; Spijkerboer, 2018). Moreover, an important lens of critique this analysis misses is gender, which has a central position in the inequalities produced by EU law. In this regard, free movement law and the gendered exclusion it reproduces have been analysed in EU law scholarship already since the 90s (Hervey, 1995; Moebius and Szyszczak, 1998; O'Brien, 2009; Repo, 2016; Ganty, 2020). In the area of migration the relevant analysis has focused on residence rights for migrant women victims of domestic violence in the context of EU migration and asylum law with a human rights orientation (Briddick, 2020; Loxa, 2024; Loxa and Stoyanova, 2022; Mullally, 2011), while significant queer critiques have been developed on the processes and mechanisms of credibility assessment as regards LGBTQI+ asylum claims (Ferreira, 2022; Zisakou, 2024). While it is important to investigate how gender, race and class appear in EU migration law, all works come with limitations, and the limitation of this one is the emphasis on the intersection of class and race. It should also be noted that there is significant literature on the race-making processes traced in various policies of EU migration law, and for this reason the article develops by taking them as a given (Hocquet, 2024; Morris, 2002; Myslinska, 2024; Spijkerboer, 2022, 2018).

The main contribution of this article is, thus, the demonstration of the economic injustices that are constituted by EU migration law. It is argued that the parallel and mutually reinforcing race-making and profit-making features of EU migration law frame it as a system which structures stratified rights and creates hierarchies among non-citizens in domestic law with due regard to the interests of neoliberalism. To develop this argument, the analysis is structured as follows.

Section 2 presents the basic foundations of the LPE movement and discusses how traces of LPE critique have been an integral part of EU law scholarship due to the close ties of this supranational project with economic ordering, without however ever examining the regulation of migration and its relation to the market. The section further presents racial capitalism as the main historical account put forward by LPE scholars when relating migration and the global economy.

Following, Section 3 maps the EU legal framework on free movement and migration by examining how both these frameworks regulate the attribution and limitation of rights with due regard to the economic risks that could be posed by migrant movement. The analysis shows that EU law grants the maximum level of protection to EU migrants who do not negatively impact growth (economically active or self-sufficient), and to non-EU migrants who actively contribute to growth. A system of stratified rights is created with due regard to economic considerations, which assigns variable rights to different groups of migrants and in turn, it produces hierarchies among non-citizens in domestic law. Specifically, migration studies scholars have since long examined how EU migration law reproduces and naturalizes racial hierarchies (Morris, 2002; Riedner and Hess, 2024). The contribution of the present analysis lies in showing that EU law simultaneously ensures the exclusion of the destitute who can make no market contribution, be they EU nationals or not.

With this legal framework in mind, in Section 4 the article asks how we should make sense of the simultaneous racial and economic exclusion produced by EU migration law, which does not

neatly fit in the various constitutional theories proposed as a way of understanding EU law and the position of EU and non-EU migrants in it. Specifically, while racial exclusion could be justified through an understanding of the EU as a bounded community with EU citizens at its centre, the parallel economic exclusion of these citizens and inclusion of non-EU migrants who contribute simply does not make sense. The article situates the relevant legal framework in scholarly accounts on the EU and its neoliberal bias. While such accounts usually focus on the relationship between the market and social policy, the paper ultimately suggests that they could also fit the way in which the EU regulates migration. Acknowledging the complicated relation of migrants' rights and the economy in times of threat to the neoliberal growth paradigm, the article concludes in Section 5 by suggesting further avenues for research and by emphasising the need to re-politicize the economic ordering demanded by EU law and to reimagine the underlying basis of migrants' rights with due regard of the injustices produced by racial capitalism.

2. Law, Political Economy and the Inconspicuous Nature of Migration

The LPE movement is a network of scholars and a scholarly approach which builds on the proposition that politics and the economy cannot be separated and that law has a constitutive place in their structuring (Britton-Purdy et al., 2020). The purpose of the relevant scholarly approach is to study the 'distributive and power-structuring effects' of the law (Kampourakis, 2021). The approach builds on the work of American legal realists, who as Kampourakis has pointed out, had been inspired by European social thought (Kampourakis, 2021 with reference to Marx and Weber.). Kampourakis has further suggested that an LPE approach could enrich the study of law in Europe by allowing for a methodological focus on the role of legal structures in generating power and consolidating racial, class and gender hierarchies (Kampourakis, 2021; see also Kjaer, 2020).

While LPE is often presented as a novel approach to the study of law, in the EU field scholars have historically studied law with due regard to the structuring of the economy, as well as with due regard to the effects that such ordering has had for the EU political sphere (Joerges, 2004; Kampourakis, 2021; Peebles, 1997; Scharpf, 1999, 2010; Somek, 2016). While there has been no such approach as regards migration from third countries to the EU, significant literature has been produced on the distributive effects of free movement and on the racial hierarchies produced by EU law (Everson, 1995; Myslinska, 2024; O'Brien, 2016, 2021; Somek, 2012; Spijkerboer, 2022, 2018). Specifically, EU law scholarship is guided by a foundational myth which acknowledges and reinforces the differences between 'us' and 'them', the EU citizens and the EU's others (Cf Bonjour et al., 2011; Jesse, 2020). Guided by the adoption of EU citizenship in EU primary law after the Maastricht Treaty, various interpretations by the Court of Justice of the EU on the special status of EU citizenship, as well as by the historical past of free movement of workers which has only included EU migrant workers, literature has a presumed higher normative weight in the attribution of rights to EU migrants.[4] Even the wording used to describe the reality of migration by EU citizens naturalizes the difference

[4] Article 20 TFEU; See also case law of the Court on 18 TFEU only applying only to EU nationals. See EU citizenship as fundamental status in Judgment of 20 September 2001, *Grzelczyk*, C-184/99, ECLI:EU:C:2001:458 and more recently on EU citizens having rights and status of different kind in Judgment of 2 September 2021, *Belgian State (Droit de séjour en cas de violence domestique*), C-930/19, ECLI:EU:C:2021.

between the insiders and outsiders by suggesting that their migration is mobility so as to emphasize its domestic character (Guild, 2004; Maas, 2013; Mantu et al., 2020; Nic Shuibhne, 2023; Thym, 2017a). EU migrants are referred to as citizens and they enjoy specific (privileged) mobility rights and certain political rights. The history of EU citizens' rights tells a story of gradual attribution of rights as a means to the realization of the internal market. As economic integration progressed, the status of EU citizenship was established, and nationals of Member States were attributed rights as members of a supranational community that developed with the purpose of closer political integration.

The relevant developments have been understood and criticized for the racialized exclusion of 'the other' (Balibar, 2001; Spijkerboer, 2018). Migration law scholars accept the EU institutional rhetoric of special status for EU citizens and limited rights for third country nationals (Thym, 2016a, 2016b, 2013). The relevant literature explains how the abolition of border controls between the Member States and the facilitation of movement for EU migrants created the need for the creation of common borders with the outside world and for the harmonization of the categories of third-country nationals who were to have access to this common area (Costello, 2016; Cf Hailbronner, 2000). The central presumption on the regulation of migration from third countries is that it was introduced to ensure that a true Area of Freedom, Security and Justice would be available to EU citizens on the move. In making this presumption, the literature does not differentiate between the very different frameworks of regular migration, asylum, border management and irregular migration. This can be explained by the simultaneous development of all these policies in the various intergovernmental fora and their common institutional evolution in the Treaties. The presumption has been theoretically developed and perfected in the work of Daniel Thym who has engaged with the relation of free movement and migration from third countries in various works in order to develop an argument around the different constitutional rationale of these two areas (Thym, 2017b, 2016b, 2013). According to him free movement is guided by the normative surplus of the internal market while whereas migration is understood to express the cosmopolitan aspirations of the legal order (Thym, 2016b, p. 301).

Critical scholars have provided valuable research in this field by identifying different reasons behind migrant exclusion (Balibar, 2001; Bigo et al., 2010; Kostakopoulou, 2009). More recently legal scholars have started connecting the racial hierarchies produced by EU law to the colonial past of EU Member States thereby complementing the work of political scientists which had identified colonialism behind the EU a lot earlier (Eklund, 2023; Hansen and Jonsson, 2015; Hocquet, 2024; Lentin, 2008). Nevertheless, what these accounts have failed to capture and what this analysis brings to the fore is that EU law and the way in which it regulates migration not only reproduces racial hierarchies which privilege the rights of EU nationals. Rather, simultaneously and in parallel to these processes, EU law is also used as a tool to exclude those who do not have an active economic role in the EU market (this is well established in sociology, see Riedner and Hess, 2024). And that process takes place in parallel for both EU and non-EU migrants, as will be shown in the next section, in a way which challenges the central position of the EU citizen in EU law.

In this regard, the analysis of EU law can benefit from the historical account of racial capitalism which provides us with the tools to understand how law can simultaneously constitute and

naturalize both race-making and profit-making processes which mutually reinforce one another. Racial capitalism has been first put forward as a concept by South African scholars examining the relation of capitalism and racism during apartheid in South Africa. Building on the work of various scholars from the Black Radical tradition, Cedrik Robinson developed the concept by arguing that racism and capitalism have been historically connected and can be traced well beyond South Africa (A. Kundnani, 2023; Robinson, 2000 drawing on W.E.B. Du Bois, C.L.R: James, Richard Wright among others). In his work, Robinson has showed that ordering based on race is not restricted to the relations of European and non-European people. Rather, European capitalism has historically initiated 'myths of egalitarianism' while at the same time turning regional, cultural and dialectical differences into racial ones in order to rationalize the domination over and exploitation of other Europeans (Robinson, 2000 with reference among others to the English Poor Laws, and the construction of *Herrenvolk*).

Scholarship on racial capitalism continues to develop with more recent contributions examining the relation of neoliberalism and racial capitalism (Bhattacharyya, 2018, 2018; Kundnani, 2021). According to Gonzalez and Mutua, the concept of racial capitalism 'provides a structural and historical account of the ways in which race and class are linked in the global economy'(Gonzalez and Mutua, 2022, p. 128). Gonzalez and Mutua have mapped the key structural features of racial capitalism, which they suggest are profit making and race making (Gonzalez and Mutua, 2022). They define profit-making as 'capturing, as well as securing and expanding, surplus value, economic profits or wealth, and political power through processes of exploitation, expropriation, and expulsion' and race-making as the process by which 'racial hierarchies are created and perpetuated, including through practices of differential dispossession, discrimination, segregation' (Gonzalez and Mutua, 2022, p. 128). In their analysis, race is not referred to as a biological signifier, but rather as a social construction which serves as 'an organizing principle of social stratification'(Gonzalez and Mutua, 2022, p. 128). According to Mutua and Gonzalez, race-making and profit making are mutually reinforcing and support the central goal of racial capitalism which is the accumulation of wealth and power (Gonzalez and Mutua, 2022, p. 128). Important from a legal perspective is their suggestion that law plays a constitutive role in structuring and naturalizing social and economic hierarchies by determining which interest should enjoy special protection and which should remain unprotected (by analogy Gonzalez and Mutua, 2022, p. 140). In their work, they have mapped the central processes of racial capitalism and have set a broader background against which legal scholars can explore the way in which law structures and reinforces problems of inequality, oppression and injustice (Gonzalez and Mutua, 2022).

Racial capitalism has so far been used by legal scholars to provide critical analyses of international economic law, international labour law as well as analyses on the relation between migration, climate and race (Attar and Smith, 2024; Gonzalez, 2020, 2021; Hammoudi, 2022). However, there has been no engagement with the concept as a tool to understand the way in which EU law in general, and EU migration law specifically, relate to both politics and the economy. Developing on Mutua and Gonzalez's work, the analysis that follows explores how EU law structures, facilitates and naturalizes the injustices caused not only by race-making which has been explored in scholarship, but also by profit-making processes in the context of migration. For the purposes of the present analysis, profit-making is narrower than the

definition Gonzalez and Mutua follow, and it should be understood as the processes of capturing and securing economic profits or wealth through migrant labour in the internal market. Overall, by grounding the distributive effects of EU migration law in racial capitalism, the paper also attempts to open a research agenda on the matter and to address the failure of EU constitutional thought to engage with racial capitalism (Miller and Nicola, 2023).

3. Encountering the Economy in EU Migration Law

In the previous section, the dichotomized approach of literature to free movement and migration as regulated in the Area of Freedom, Security and Justice was discussed to highlight the already examined race-making features of EU law on migration. This section will proceed in a combined examination of the relevant frameworks to argue that -further to the racialized exclusion- EU migration law produces economic exclusion for both EU and non-EU migrants. The analysis examines the framework regulating the movement of EU migrants with an emphasis on individual choice and extensive social rights in Section 3.1, and the framework regulating the entry, mobility and rights for non-EU migrants in Section 3.2. After providing an overview of both these frameworks, Section 3.3 draws the connections between them and discusses how EU law structures a framework of stratified rights which naturalizes hierarchies among non-citizens within Member States with due regard to the protection of the economy.

3.1 EU Migrants and the Economy as Constitutive of Rights

Despite the great aspirations of EU institutions and scholarship alike for generalized free movement rights for EU citizens, the rights of EU migrants are to this day conditioned by their economic contribution to the internal market (Kostakopoulou, 2008; Kostakopoulou et al., 2009; Maas, 2005; Mantu et al., 2020). Unlike what the term citizenship suggests, both residence and social rights for EU migrants are conditioned by their economic activity, while more privileged treatment is granted to EU migrant workers.

First, residence rights for EU migrants are closely tied to economic activity or at least self-sufficiency. The primary law guarantee of movement and residence derived from the EU citizen status is conditioned by the legislature in Directive 2004/38 so as to align free movement with the primary law objective of economic growth under Article 3(3) TEU and to avoid the economic repercussions of EU migration. Even a limited right to reside to another Member State for up to three months is conditioned on the migrants not becoming an unreasonable burden on the social assistance system of the host state.[5] Residence over three months is guaranteed only for EU migrants who cannot pose a risk to the economy of Member States. Specifically, residence is guaranteed for workers, self-employed persons, and their family members. Where EU migrants are not engaged in economic activity, as is the case also for students, their security of residence is dependent on them having sufficient resources and comprehensive health insurance.[6] The Directive allows some leeway for temporary economic

[5] Articles 6 and 14(1), Directive 2004/38.

[6] Article 7, Directive 2004/38. Recital 9 of the Directive suggests that Member States may allow more favourable treatment to job-seekers; however, there are no more specific provisions on this in the text of the Directive.

inactivity, for example in case of illness or, temporary unemployment but with clear limitations.[7]

Economic activity or, at the very least, self-sufficiency, functions as a guarantee that EU migrants will positively contribute, or at least that they will not negatively affect the economies of the Member States. In case of negative effects, EU migrants can be removed since after all, their right to reside is conditioned on them and their families not becoming an unreasonable burden on the social assistance system of the host state (Lafleur and Mescoli, 2018; Parker and Catalán, 2014; Riedner and Hess, 2024).[8] This is not the case as regards workers, or first time job seekers. Specifically, Article 14(4) of Directive 2004/38 provides that expulsion may in no case be adopted against economically active migrants, or EU migrants who entered the territory to seek employment. Such an expulsion would go against the longstanding right of EU migrants to move to take up work. However, the claim of job-seeking is not without restrictions and the migrants need to be able to prove that they are indeed seeking employment, and that they have a genuine chance of being employed. Security of residence becomes decoupled from economic considerations only after five years of residence in a host state.[9]

In addition, equal treatment as regards access to social rights is reserved to economically active EU migrants. Under Article 24(2) of Directive 2004/38, Member States can restrict equal treatment as regards social assistance and maintenance aid for studies to economically active migrants and to only allow such aid to economically inactive migrants after the acquisition of a right of permanent residence. Such limitations were introduced in the Directive to avoid EU migrants becoming unreasonable burdens on the social assistance system of the host state.[10] Essentially it is only workers, self-employed migrants and their families that enjoy full equal treatment rights and do not fall under these limitations. The differentiation in this, and the broader attribution of rights under Directive 2004/38 lies in the presumption that workers, by virtue of their status, cannot become a burden, but will rather be net contributors to the system. What is more, even if workers were entitled to equal treatment under Article 24 of Directive 2004/38, there is limited potential that they would overburden the national welfare systems, as they would be excluded from it for other reasons. Social assistance is usually aimed at supporting persons through mechanisms of solidarity so that they can have a decent livelihood. Workers and self-employed individuals would most probably be excluded on the basis of their finances, as they would have sufficient resources to ensure their livelihood without the need of

[7] Article 7(3), Directive 2004/38. EU migrants can retain the status of worker or self-employed, and hence security of residence, if they are temporarily unable to work due to illness or accident, and if they are in duly recorded involuntary unemployment after having been employed for more than one year and have registered as job-seekers. See Judgment of 19 June 2014, *Saint Prix*, C-507/12, ECLI:EU:C:2014:2007; Judgment of 20 December 2017, *Gusa*, C-442/16, ECLI:EU:C:2017:1004; Judgment of 19 September 2019, *Dakneviciute*, C-544/18, ECLI:EU:C:2019:761.

[8] See Article 14, Directive 2004/38. A potential removal needs to be proportional. Among the considerations to be taken into account in accordance with recital 6 are the following: whether the migrant is facing temporary difficulties, the duration of their residence, their personal circumstances, and the aid granted to them. The expulsion should not come as an automatic consequence of recourse to social assistance in line with the case law incorporated in Article 14(3), Directive 2004/38. Judgment of 20 September 2001, *Grzelczyk*, C-184/99, ECLI:EU:C:2001:458; Judgment of 7 September 2004, *Trojani*, C-456/02, ECLI:EU:C:2004:488. them.

[9] That is when EU migrants can access permanent residence under Article 16, Directive 2004/38. See also Article 18, Directive 2004/38 for family members.

[10] See Recitals 10, 16, Article 14(1), Directive 2004/38 on the retention of the right to reside.

state support. Overall, Directive 2004/38 operationalizes free movement rights for EU migrants under specific limitations and conditions as provided by Article 21(1) TFEU. The limitations regarding economically inactive and not self-sufficient EU migrants condition both the right to reside and access to social rights.[11] This is not a surprise. Secondary law has always imposed such conditions on the rights of EU migrants.[12]

Before concluding this section, it should be noted that workers still enjoy more privileged treatment under the relevant framework. There are exceptions in Directive 2004/38 which allow more privileged access to permanent residence to workers, self-employed persons and their family members.[13] In parallel, an additional regulation, Regulation 492/2011, applies to free movement of workers and provides for a broader application of equal treatment in line with the broad interpretation of the concept of social and tax advantages in the Court's case law.[14] And while family reunification for workers is in principle regulated for all categories of EU migrants under Directive 2004/38, Regulation 492/2011 still provides for differentiated treatment not only to workers themselves, but, most importantly, to former workers and their family members.[15] The more extensive protection of migrants who are (or have been) economically active under free movement of workers, and their families as compared to those who are not, has by now been established in the relevant case law.[16] In this regard, the economic function of the migrant is the source of more extensive social rights, as has been the case from the early years of EU law (for a detailed analysis of the case law see Loxa, 2023). Overall free movement protects the interests of all EU migrants who have had any connection to the market, to the exclusion of those who pursue migration in the EU while being vulnerable, poor, and incapable of or unable to provide with their work (Cf Davies, 2018).

[11] Judgment of 11 November 2014, *Dano*, C-333/13, ECLI:EU:C:2014:2358; Judgment of 15 September 2015, *Alimanovic*, C-67/14, ECLI:EU:C:2015:597; Judgment of 25 February 2016, *García-Nieto and others*, C-299/14, ECLI:EU:C:2016:114; Judgment of 14 June 2016, *Commission/United Kingdom*, C-308/14, ECLI:EU:C:2016:436

[12] Free movement has been guaranteed for workers under the EEC and EC Treaties and for self-employed persons and students through case law evolutions and secondary law. Before the adoption of Directive 2004/38 which unified the regulation of residence rights across all categories, Council Directive 90/364/EEC of 28 June 1990 on the right of residence [1990] OJ L 180/0026 provided for general residence rights to all those having sufficient resources and sickness insurance.

[13] Article 17, Directive 2004/38. Under Recital 19, Directive 2004/38, the differentiated rights of economically active migrants are based on Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State [1970] OJ L 142/24 and Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity [1975] OJ L 14/10 and have been maintained as acquired rights.

[14] Articles 7-9, Regulation 492/2011, which also include equality in trade union membership and rights, and equality as regards access to housing. See Judgment of 29 September 2022, *Chief Appeals Officer and others*, C-3/21, ECLI:EU:C:2022:737.

[15] Article 12, Regulation 1612/68 on derived rights of residence for children of migrant workers. See also Article 38(1), of the Directive 2004/38.

[16] Judgment of 17 September 2002, *Baumbast and R*, C-413/99, ECLI:EU:C:2002:493; Judgment of 23 February 2010, *Teixeira*, C-480/08, ECLI:EU:C:2010:83 where the Court held that where a child enjoys a residence right to access education under Regulation 1612/68, this right can create residence rights for their primary carer. See also Judgment of 23 February 2010, *Ibrahim and Secretary of State for the Home Department*, C-310/08, ECLI:EU:C:2010:80, para 59 where the Court held that EU migrants parents of children who had a residence right based on Regulation 492/2011 could enjoy a derived right of residence from their children without the need to satisfy the conditions of Directive 2004/38, that is, without the need to have sufficient resources and health insurance. See also Judgment of 6 October 2020, *Jobcenter Krefeld*, C-181/19 ECLI:EU:C:2020:794.

3.2 Non-EU Migrants and the Economy as a Ground for Differentiated Rights

The regulation of the rights of non-EU migrants is more complicated and fragmented. Admission is regulated under a sectoral regime which provides entry and residence to specific categories of migrants: researchers and students, intra-corporate transferees, highly skilled workers, and seasonal workers.[17] In parallel, the Single Permit Directive and the Family Reunification Directive regulate horizontally the rights of all migrants legally resident in the EU regardless of whether they enjoy residence rights under national or EU law.[18] Finally, the Long-term Residents Directive extends the protection and the rights afforded to migrants due to their long presence and integration in the Member States.[19]

All the sectoral directives that regulate admission have been put in place to contribute to the economic objectives of the EU. The harmonization of admission aimed at ensuring that the necessary human capital would be available to drive the desired growth.[20] This becomes clear if we look at the recitals of the different Directives, all of which are aligned with the economic targets set by EU during the years they were adopted.[21] At the same time, national contestation and fear about the effects of the attribution of such rights for national economies have limited both the extent of rights migrants are entitled to under the different instruments, as well as the instruments' contribution to achieving the economic objectives of the EU (Farcy, 2020; Groenendijk, 2015). In any case, considering this shared objective, the instruments present crucial similarities as regards both the limitation of rights to avoid repercussions for public

[17] Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects, and au pairing (recast) [2016] OJ L 132/21; Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer [2014] OJ L 157/1; Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L 155/ 17 (Blue Card Directive 2009) and Directive (EU) 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC [2021] OJ L 382/1 (Blue Card Directive 2021); Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L 94/375.

[18] Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [2011] OJ L 343/1; Directive (EU) 2024/1233 of the European Parliament and of the Council of 24 April 2024 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (recast) [2024] OJ L 2024/1233; Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12.

[19] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L 16/ 44.

[20] Also confirmed in the European Council, The Stockholm programme, An open and secure Europe serving and protecting citizens [2010] OJ C 115/1. See for example Researchers and Students Directive Recital 3; Intra-Corporate Transfers Directive Recital 4; Blue Card Directive 2021 Recital 1; Seasonal Workers Directive Recital 6.

[21] See Researchers Directive Recital 2; Blue Card Directive 2009 Recital 3 mentioning the Lisbon European Council objective of making the Community the most competitive and dynamic knowledge-based economy in the world by 2010; See also Blue Card Directive 2009 Recital 4; Seasonal Workers Directive Recital 4 and Researchers and Students Directive Recital 3; Intra-Corporate Transfers Directive Recital 3; Blue Card Directive 2021 Recital 1 on the Europe 2020 strategy for Smart, sustainable and inclusive growth.

finances, but also the differentiation of rights based on how much different workers are needed for the EU development project. These similarities are examined in the remainder of this section.

As a rule, admission is based on the fulfilment of certain conditions and the absence of grounds for limitation of admission (negative conditions).[22] Provided that an applicant meets the conditions of admission, they are entitled to a residence permit for a period of time, the minimum and maximum duration of which are defined in the relevant Directives. Looking more closely into the Directives, we find many similarities on the substantive conditions that need to be met for entry to the EU to ensure the admission of individuals who will actively contribute to EU growth, while minimizing the potential economic risks, thus aligning migration to economic sustainability. Such similarities are framed differently in the relevant texts, which is due to their sectoral nature as explained below.[23] Despite the different framing, all the Directives require sufficient resources on the part of the migrant who applies for admission and an appropriate health insurance. At the same time, the legislative texts emphasize the need to ensure that in all cases the migrant does not become a burden on the social security system of Member States.[24] In the case of highly skilled workers, sufficient resources are proven by the contract the applicants need to provide and by the requirement that their employment meets a certain salary threshold.[25] When it comes to researchers, the Directive specifies that the applicants need to have sufficient means of subsistence.[26] As for seasonal workers, the work agreement required for admission has to specify remuneration.[27] Overall, admission conditions are framed so as to ensure that migrant admission will not pose the slightest risk to economic growth (this is the case also for conditions that do not appear economic at first sight, see Ganty, 2021).

Economic considerations also appear as a blanket ground to limit entry. In general, the right to entry of non-EU migrants is without prejudice to the right of Member States to regulate the volumes of admission of migrants under Article 79(5) TFEU. This right was given expression via specific clauses in all the relevant Directives. Essentially, Member States can refuse admission, even if a migrant meets all requirements, in order to protect their labour markets. What is more, the relevant framework is shaped under the umbrella principle of Union preference. This principle formed part of the past attempts of the Commission to horizontally regulate entry and residence of non-EU migrants and was articulated in a 1994 Council

[22] See also Judgment of 4 April 2017, *Fahimian*, C-544/15, ECLI:EU:C:2017:255 which refers to public security exceptions as negative conditions to the right to entry.
[23] Commission Staff Working Document, Executive Summary of the Fitness Check on EU Legislation on legal migration SWD(2019)1055 PART 2/2, Annex 5 page 52.
[24] Fitness Check on EU Legislation on legal migration SWD(2019)1055 PART 2/2, Annex 5.
[25] Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment COM(2007)0637 final, explanatory memorandum, Article 5; Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment COM(2016)0378 final, Explanatory memorandum, Article 5.
[26] Researchers and Students Directive, Article 7(1)(e) which can be provided either in the form of employment by the research institution or through any other grant, while for students this entails proving sufficiency of resources.
[27] Seasonal Workers Directive, Article 5(3) and 6(3).

Resolution.[28] The principle of Union preference demands that non-EU migrants may enter the EU labour market provided a post cannot be filled by a worker who is already part of the labour market. This so-called labour market test means that Member States maintain discretion to reject admission where a vacancy can be filled by an EU national, a non-EU migrant already resident in a Member State and part of its labour market, or a long-term resident in any Member State.

As regards equal treatment rights, the Legal Fitness Check, an assessment carried by the Commission on the relevant instruments, suggested that relevant directives 'could be characterized as a fine-tuning of legitimate differentiated treatment'.[29] If we look closely at the relevant texts, it appears that limitations appear in areas of equal treatment which could come with costs for public finances, like in access to social security and education grants.[30] In cases where equal treatment comes with no cost for national economies, then there is no reason to differentiate. At the same time, migrants who are most needed for the EU economy are granted more extensive rights. To put it simply, minimum rights are attributed horizontally by the Single Permit Directive, the Family Reunification Directive and the Long-Term Residence Directive to all legally resident migrants. However, the Blue Card Directive and the Researchers and Students Directive go beyond the Single Permit Directive in the rights they grant to these highly skilled migrants. Not only do these two Directives grant more rights to highly skilled migrants, but they also introduce exceptions to the Family Reunification Directive and the Long-Term Residence Directive. These exceptions lead to more extensive rights for the family members of these workers, mobility rights for the holders of the permit and their family members across the EU and easier access to permanent residence for both them and their families under an explicit understanding that these types of workers need to be attracted to the EU in the global race for talent.[31] In practice, the economic fears of Member States and the possibility to attract highly skilled workers through parallel national schemes mean that requirements for cross-border movement under both the Blue Card Directive and the Researchers and Students Directive are very close to requirements for entry, thereby making mobility rights close to ineffective (de Lange and Vankova, 2022; Della Torre and de Lange, 2018). Still, however, the legal system in place attributes more rights to those who are seen as crucial for the development of the EU. In view of attracting specific types of migration, the fragmented evolution of the legal migration *acquis* has led to the uneven attribution of rights to non-EU migrants.

3.3.EU Migration Law Ordering a System of Stratified Rights

The analysis of the free movement and regular migration frameworks point to the limitations introduced by EU law to shield national economies from the potential effects of migrant movement and to ensure that any type of migration will always be to the benefit of economic development. In essence, EU law creates a system with variable degrees of rights that should

[28] Council Resolution of 20 June 1994 on limitation on admission of third-country nationals to the territory of the Member states for employment [1996] OJ C 274/31.
[29] Fitness Check on EU Legislation on legal migration SWD(2019)1055 PART 2/2, Annex 5.
[30] See for example Article 12 Single Permit Directive, Article 12 recast Single Permit Directive, Article 11 Long Term Residents Directive.
[31] See Proposal for a Blue Card Directive, COM(2007)0637 final; Blue Card Directive 2009 Recital 20, Blue Card Directive 2021, Recitals 51 and 52. See also Researchers Directive Recital 18; Council Recommendation of 12 October 2005 [2005] OJ L 289/26 Recital 9 and point 3; Researchers and Students Directive Recital 11; Blue Card Directive 2009 Recital 23, Blue Card Directive 2021 Recital 50, Intra-Corporate Transfers Directive Recital 40.

be delivered at the domestic level for economically active or self-sufficient EU migrants, economically active non-EU migrants, and economically inactive EU migrants.

The system which is constituted by EU law can be better conceived through the sociological lens of civic stratification employed by Morris (Morris, 2002). At the turn of the century and before the adoption of the *acquis* on regular migration, Morris compared national migration regimes in Germany, the UK and Italy in light of the various interests protected by domestic, European and international law. Morris's work developed against the background of two opposing ways of conceptualizing the rights of migrants in democratic nation-states: the presumption of a clear migrant vs citizen division with a full set of rights reserved for the latter and the imaginary of a post-national membership to capture the broader set of rights EU law created (Hammar, 1990 on the distinction between citizens, denizens and aliens; Soysal, 1994 on post-national citizenship). Morris rejected these accounts as too simplistic to capture the very diverse set of rights which different migrants (EU and non-EU) enjoy in a host state (Morris, 2002). Building on Lockwood, Morris suggested that the concept of civic stratification can adequately capture the stratified rights migrants enjoy in the Member States she examined (Lockwood, 1996). Her contribution to a sociology of rights presented a hierarchy of statuses with varied rights that nuance the distinction between citizens, denizens and aliens, as well as between EU citizens and non-EU migrants (Morris, 2002). Morris's use of civic stratification adequately captures the way in which EU law simultaneously produces the exclusion of non-EU migrants from the free movement framework, as well as the partial inclusion of some economically active migrants in (an ineffective) free movement. The system put in place by EU law produces and institutionalizes hierarchies among non-citizens which are then implemented in domestic law (Chung, 2020; Lewicki, 2024; Morris, 2002).

The discourse of EU law and EU institutions perpetuates a distinction between 'us', EU citizens who have a status and rights of different kind, and 'them', non-EU migrants. However, in parallel, and perhaps behind this language, the politics of exclusion are also economic as represented by the complicated legal reality put in place in secondary law. That is a reality where the 'us' vs 'them' is *not* the central dividing line as regards access to social rights. Rather the central dividing line is whether any migrant can make an economic contribution or not. In sum, the way in which EU law regulates free movement and migration comes close to Sivandan's and Fekete concept of xeno-racism which uses the discourse of racial othering while producing economic exclusion, 'a racism that is meted out to impoverished strangers even if they are white'(Fekete, 2001; Sivanandan, 2001). Similarly Riedner and Hess have more recently suggested that the internal border reconstructed for the EU migrant poor 'reconnects meritocratic logics with classical articulations of racism, thus contributing to the finely tuned reinvention of a racial order in Europe' (Riedner and Hess, 2024, p. 2707). EU migration law plays an important function in racializing and othering EU migrants as well (see Lafleur and Mescoli, 2018; Myslinska, 2024; Parker and Catalán, 2014).

4. EU Migration Law through the Lens of Racial Capitalism

The analysis above pointed to EU migration law as a legal system that structures civic stratification and produces exclusion by relating migrant movement to the protection of the economy. This finding does not fit well with constitutional accounts on EU law and its relation

to migration. In the following section I first present the limitations of the way in which EU migration law is captured by prevalent and mainstream constitutional accounts. Following, in section 4.2 I demonstrate that EU migration law should be perceived instead as part of the EU neoliberal constitution. This would better capture the way in which EU migration law is used as a tool to exclude those who do not have an active economic role in the EU market.

4.1 The prevalent constitutional approach to EU migration law

The most comprehensive account of the constitutional underpinnings of EU migration law has been put forward by Thym in a series of contributions, and it has been widely accepted as the central account explaining (and sustaining) the differences between free movement and migration (Thym, 2023, 2016b, 2016a, 2013). The starting point of his analysis is that EU law distinguishes between the legal categories of EU citizens and third-country nationals, whose condition from a sociological point of view is no different, as both are in a state of migration. The two different statuses develop by reference to different frameworks, free movement for EU migrants and migration in the Area of Freedom, Security and Justice for non-EU migrants. However, the differentiation does not fit the state-centred understanding of citizenship and alienage, of citizens with equal rights and aliens who are excluded from the protection of the law (Thym, 2016b, p. 316, 2013, p. 735). Nor does the difference in rights enjoyed by EU citizens and foreigners fit with accounts of universalism or with attempts of scholars to present the EU as a prototype of transnational governance with new forms of membership (Soysal, 1994; Thym, 2016a, p. 128). According to Thym, the separate categories of EU citizens and foreigners, and the rights the latter can claim, cannot be explained by a binary juxtaposition of sovereign statehood and universalism (Thym, 2016b, p. 316, 2016a, p. 129). What could explain them is that the respective frameworks have different constitutional rationales. As regards free moment, the protection afforded to EU migrants can be justified by the special status of EU citizenship which expresses a supranational Union in the making (Thym, 2013). In contrast to that, the regulation of migration under the Area of Freedom, Security and Justice has a cosmopolitan outlook as constitutional frame of reference (Thym, 2016a, p. 316, 2013, p. 726). This cosmopolitan outlook describes a migration governance that can 'combine migratory opportunities for the economically motivated with the pursuit of legitimate concerns of democratic self-government' of the Member States (Thym, 2013, p. 732).

This account of the supranational impetus of EU free movement and the cosmopolitan outlook of EU migration law resonates if we approach EU migration law from a national lens. It allows us to understand how EU law has affected the sovereign nation state as the central actor of migration control, without however, overcoming it. At the same time, it fits with constitutional pluralism theories on the relation of EU law with the Member States, as it allows the combination of 'pan-European values and rules with particularistic self-government and identity-construction at national level'(Maduro, 2008; Thym, 2016b, p. 314). Nevertheless, this approach comes up against paradoxes if we look at EU law from an internal constitutional perspective related to the structure of the EU legal order and the rights individuals draw from it. Thym has suggested that '[i]n the field of migration, human rights assume the function of fundamental freedoms'(Thym, 2013, p. 736). In the distinction between EU citizens and foreigners, he juxtaposes EU citizenship with the Area of Freedom, Security and Justice and the Charter. However, especially after the Lisbon Treaty, the Charter plays a specific role in the

construction of the EU as a constitutional legal order in its own right (Groussot and Petursson, 2015).

A common constitutional framework would demand full and equal protection of fundamental rights for all citizens, with rights attributed to aliens to different extents depending on the aspirations of different societies. However, in EU law, the claim to fundamental rights protection is dependent on whether a situation falls within the scope of EU law under Article 51 of the Charter. This means that EU migrants cannot claim protection under the Charter just for being EU citizens, because this would upset the conferral of powers under EU law (Lenaerts and Gutiérrez-Fons, 2017). Rather to do so, they would have to fall either under Directive 2004/38 or Directive 492/2011 as regards residence and social rights. And despite earlier case-law, it is now crystal clear that to fall under these Directives, an EU migrant would have to be economically active or at least self-sufficient (Nic Shuibhne, 2016). In contrast, all non-EU migrants who draw residence rights from EU law automatically come within its scope, as already their entry to European territory is regulated by EU secondary law. As a result, the way in which fundamental rights application has developed in the case law as regards EU and non-EU migrants challenges 'common wisdom about the way in which a political entity engages with the fundamental rights of citizens and foreigners'(Iglesias Sánchez, 2017).

Specifically, the secondary law presented in Section 3.2 together with interpretations of the Court as regards the rights of non-EU migrants under the Charter have brought as a result the more extensive protection of the social rights of non-EU migrants as compared to economically inactive EU migrants in a way that does not neatly fit with the perception of the EU as a constitutional order with EU citizens as the primary subject.[32] After a period of extensive interpretation of rights for EU migrants celebrated in EU law literature for showing the potential of the EU citizen status, the Court is no longer invoking primary law provisions or the Charter to review the protection of the rights of EU migrants (Jesse and Carter, 2020; Kostakopoulou, 2005; Muir, 2019; Nic Shuibhne, 2016). Even in cases where Directive 2004/38 sets less favorable conditions for the rights of EU migrants compared to the rights of non-EU migrants, the Court highlights the political goals of the EU for its nationals, and does not examine whether secondary law can stand review under the Charter.[33] Contrary to the approach for EU migrants, as regards non-EU migrants, because all the relevant rights are drawn from Directives and, thus, fall squarely within the scope of EU law, the Court has proceeded in extensive interpretations drawing on Charter.[34] While the Court repeatedly refuses to relate the protection of non-EU migrants to EU ones, it never misses an opportunity to use the Charter as a lens through which secondary law on non-EU migrants should be examined and as a reason why national restrictions should be reviewed.[35]

[32] On EU citizenship as fundamental status see Judgment of 20 September 2001, *Grzelczyk*, C-184/99, ECLI:EU:C:2001:458, para 34 and on EU citizens having rights and status of different kind in Judgment of 2 September 2021, *Belgian State (Droit de séjour en cas de violence domestique*), C-930/19, ECLI:EU:C:2021:657

[33] Judgment of 2 September 2021, *Belgian State (Droit de séjour en cas de violence domestique),* C-930/19, ECLI:EU:C:2021:657.

[34] Indicative Judgment of 4 March 2010, *Chakroun*, C-578/08, ECLI:EU:C:2010:117; Judgment of 24 April 2012, *Kamberaj*, C-571/10, ECLI:EU:C:2012:233.

[35] See Judgment of 29 July 2024, *CU (Assistance sociale - Discrimination indirecte),* C-112/22 and C-223/22, ECLI:EU:C:2024:636; Judgment of 25 November 2020 *INPS (Prestations familiales pour les titulaires d'un*

This creates paradoxes for the interaction of EU citizenship and migration law with the EU constitutional framework, which have been examined in different contributions by Iglesias Sánchez (Iglesias Sánchez, 2017, 2014). In her work, she has shown that the specificity of the EU fundamental rights protection regime, combined with the EU competence on citizenship and migration does not correspond to expectations based on how the categories of 'citizen' and 'foreigner' would normally shape fundamental rights protection (Iglesias Sánchez, 2017). As she mentions,

> [I]n a rather paradoxical fashion, the progressive development of EU law has led to a situation in which EU law on free movement of persons is still reminiscent of an internationalist approach, whereas the EU migration policy seems to have adopted a constitutional approach.(Iglesias Sánchez, 2017, p. 262)

While Iglesias Sánchez does not contest the different normative background identified by Thym, she shows that, in some respects, EU migration policy goes further than free movement law as regards the application of EU fundamental rights. If we were to follow the foundational myth of EU law and EU law scholarship that EU and non-EU migrants are differentiated by the nature of their rights, we cannot easily make sense of this uneven protection. By this I do not suggest that the Court is equating the protection of EU and non-EU migrants, nor that there are no differences between the two legal statuses as long as someone is economically useful. What I do claim though is that the differentiation between the two statuses is a lot more nuanced than what EU law scholarship and CJEU decisions suggest, and that there are points of connection in relation to both the inclusion of economically active migrants and the racialized exclusion of the destitute. The dynamics of EU migration law and the intersected exclusions it produces are better captured if we use racial capitalism as a tool to relate them to the functional orientation of the EU constitution.

4.2 EU Migration Law as part of the Neoliberal Constitution

The previous section pointed to the shortcomings of conceptualizing the relationship between free movement and migration against the broader background of EU law as an order with constitutional characteristics. However, if we take a step back and place EU migration in the broader functional orientation of the EU in light of its growth driven parameters and profit-making features a different constitutional reading arises.

It is true that, so far, accounts of the EU as a functionally oriented order geared towards the imperative of economic growth have not adequately captured the matter, as they tend to exclude the regulation of migration from their purview. For example Tuori's suggestion on the various sectoral constitutions places EU nationals under the economic constitution and non-EU ones as part of the security one (Tuori, 2019, 2015). Similarly Isiksel has suggested that '[w]hile supranational free movement law mitigates the exclusionary framing of national political communities, it has helped to fashion a new, equally bounded legal space by excluding third-country nationals from its scope'(Isiksel, 2016). Contrary to her suggestion, the analysis carried

permis unique), C-302/19 ECLI:EU:C:2020:957; Judgment of 25 November 2020, *INPS (Prestations familiales pour les résidents de longue durée)*, C-303/19, ECLI:EU:C:2020:958; Judgment of 2 September 2021, *INPS (Allocations de naissance and de maternité pour les titulaires de permis unique)*,C-350/20, ECLI:EU:C:2021:659; Judgment of 28 October 2021, *ASGI and others*, C-462/20, ECLI:EU:C:2021:894

out in this article demonstrates that the supranational framework has some room for inclusion of non-EU migrants. Even though non-EU migrants do not benefit from effective free movement rights, there is convergence as regards both the inclusion of economically active migrants within the scope of EU law and the racialization of the destitute within and outside EU borders.

The argument I put forward is that EU migration law and the racial and economic exclusions it produces actually fit well against a neoliberal understanding of EU law. Scholarly accounts on the neoliberal bias of the EU constitution usually focus on the relationship between the market and social policy with no focus on the migrant and their relation to the EU (Bugarič, 2023; Scharpf, 2010). Indeed after the adoption of the Single European Act and later with the Economic and Monetary Union scholars pointed to the difficulty of combining a common market together with redistributive social policies (Moravcsik, 1991; Pollack, 2013). The central approach of the relevant scholarship as summarized by Bugarič suggests that 'the EU constitutional order embodies a neoliberal bias effectively ruling out a progressive agenda by structurally privileging the interests of capital against the socio-economic rights and interests of the working class' (Bugarič, 2023). This approach draws on American legal realism and the suggestion that markets are not pre-political but rather constituted by law (Bugarič, 2023; Kalman, 2010; Singer, 1988). Such neoliberal bias is understood as an integral part of the EU constitutional architecture which precludes any political renegotiation of the fundamental internal market imperative (Scharpf, 2010).

Accounts on the neoliberal bias of the EU legal order rarely engage with migration, unless when discussing the EU migrant worker whose social protection diminishes (Somek, 2012). A reason for this could be attributed to the fact that the neoliberal bias of the EU constitution is thought to be a 'testament to the inclusive potential of capitalism'(Somek, 2012, p. 725). In this context, various scholars who critically engage with neoliberalism miss the intersection of race, class and profit in the contemporary regulation of migration (Kundnani, 2021 for a critique of Harvey, Streeck and Brown). In a recent attempt to explain the implications of neoliberalism for national migration and social policies, Joppke has coined the term neoliberal nationalism. According to the him, neoliberal nationalism captures the idea of a non-ethnic community which is inclusive of migrants and which demands of the individual to become ''responsibilized'' and rendered ''self-sufficient'', detached from society so as not to become a burden on it' (Joppke, 2024 with reference to Mounk, 2017). In this transactional identity of the individual, which hints to the relevant language of burdens used in Directive 2004/38, the central concern is the contribution one has made to the market in order to claim rights. Relatedly, the distinction between citizen and migrant is blurred and this is particularly the case in the way in which EU law imposes obligations on Member States to include resident migrants in their social policy and to exclude all those who can be considered a burden (Thym, 2015; Devetzi, 2019; Mantu and Minderhoud, 2019; Joppke, 2024). Joppke's neoliberal nationalism could offer an account of the inclusiveness of EU migration law for non-EU migrants, as well as the exclusion for destitute EU migrants(the latter already being well documented in research Hervey, 1995; Persdotter, 2019; Riedner and Hess, 2024), but that account would necessarily be partial. For it would miss the intersecting racial aspects of exclusion. Neoliberal nationalism does not explain the parallel racialization of the EU poor within the EU borders in addition to

the existing racialization of those outside the EU borders (on the implications of the racialization for those outside the EU borders see Kochenov and Ganty, 2023).

I argue that instead, racial capitalism provides us with a theoretical frame than can capture the nuances of the intersecting exclusions produced by EU law as a legal system, a system that is characterised by its neoliberal bias. On a general note on the intersections of nation, race and class, Wallerstein has suggested that while in principle capitalism seems to require the free flow of labour, capital and commodities, in fact it requires a market that can 'both be utilized and circumvented' and where the flow of these factors is partially free (Wallerstein, 2011). Relatedly to that, but on neoliberalism, Kundnani has suggested that 'neoliberalism, in its theory and its practice, conceives of the market order as a universal that transcends racial and ethnic differences but also as needed to be embedded culturally in racial systems of spatial order'(Kundnani, 2021, p. 58). Bhattacharyya captures the value of racial capitalism as a framework which, rather than showing that capitalism differentiates between different racial groups, in reality it reveals that 'the world made through racism shapes patterns of capital development' (Bhattacharyya, 2018, p. 103). To her this includes both the manners in which actors invoke race to protect their economic interests and the way 'in which the differentiating tendencies of capitalism become racializing processes'(Bhattacharyya, 2018, p. 103). And this is particularly what happens in EU migration law and the way in which it produces rights on the divide between 'us' the European citizens, and the 'others' non-EU migrants.

Access to rights for EU and non-EU migrants takes place in a European market that is both racially open and deeply embedded in racial systems of spatial order (by analogy Kundnani, 2021). The racial openness is identified in the way in which EU law shapes access to social rights for non-EU migrants, while excluding the poor and vulnerable EU migrants. The racial closure on the other hand is identified in the EU border regime, the fact that non-EU migrants do not have a right to enter the labour market and move between the EU Member States in the way in which EU migrants do (Della Torre and de Lange, 2018), but also in the racialization of the EU migrant poor.[36] This closure is aligned with the Hayekian proposition that limitations to free movement of people across borders can be justified as 'liberal principles can be consistently applied only to those who themselves obey liberal principles, and cannot always be extended to those who do not'(Hayek, 1979, p. 56). Kundnani links this excerpt with the mainstream argument put forward to justify immigration policies in Europe based on western values that need to be defended (Kundnani, 2021). Naturally this also finds perfect application in the strategic priorities of the EU Commission to protect and promote 'our European way of life'.[37]

5. The Politics of Growth and the Impossibility of Moving Forward

The analysis carried in the article demonstrated how EU migration law does more than constituting a divide between 'us', the EU nationals, and the 'others', non-EU migrants, which

[36] There is Judgment of 10 September 2014, *Ben Alaya*, C-491/13, ECLI:EU:C:2014:2187 and C-578/08, *Chakroun* on the right to entry if one fulfills the requirements of secondary law, but the discretion which the instruments allow do make this right ineffective. Free movement rights for non-EU migrants, even though possible under Article 45(2) of the Charter and provided for in the Long-Term Residence Directive, the Blue Card Directive and in the Researchers and Students Directive are nowhere close to effective.

[37] European Commission website, priorities 2019-2024, at https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life_en

has been documented in literature. In parallel to and on top of the racial hierarchies produced by EU law, the legal system also has important distributional effects. Specifically, EU law is aligned with an ideal of promoting economic growth and avoiding the economic risks that come with migrant movement. As a result, while it does see the interest of economically active non-EU migrants as worthy of protection, it demonises the interests of the vulnerable, the poor, the economically inactive EU migrants (Barnard et al., 2024; Lafleur and Mescoli, 2018; Parker and Catalán, 2014; Persdotter, 2019; Riedner and Hess, 2024).

This parallel inclusion of the economically active and exclusion of the destitute within and outside EU borders can be better understood by using the theoretical frame of racial capitalism. By demonstrating the profit-making features of EU migration law which have been overlooked to this day, I suggested that EU migration law is an integral part of the EU neoliberal constitution. Such a neoliberal constitution can be racially inclusive, but it is not racially blind. The value that racial capitalism brings to the analysis is that it allows us to conceive of the racial and economic features of the system as mutually reinforcing rather than mutually exclusive.

A central feature which appears in the way EU migration law is structured is the undue emphasis on economic growth as the reason behind the attribution, extension and limitation of rights (see also Loxa, 2025). In this regard, one is left wondering how the system can evolve since, as Bhattacharyya has also pointed out, '[w]e are learning, painfully that there is a limit to economic growth in a time of finite resources. In such a time, disposability becomes a more, not less, likely experience' (Bhattacharyya, 2018, p. 123). For this reason, it is important to be able to renegotiate the position of economic ordering in EU law, and to discuss fundamental rights not in view of our European values that need to be protected by the threat of foreign civilisations (H. Kundnani, 2023). Rather, such a renegotiation should occur against a broader discussion on the place of migrant workers, their human rights and the place of social policy at times of an untenable aspiration of growth.

Without providing a conclusive historical analysis of EU migration law and all the different ways in which it has been producing and reinforcing racial and economic hierarchies, this article set the basis for closer engagement with racial capitalism in EU law. A closer investigation of the historical development of EU migration law, which took place in parallel with decolonisation, carries an even stronger potential of understanding the normative imprint of racial capitalism and European imperialism on EU migration law. The past years have brought about a turn in the EU law scholarship towards more critical self-reflection on the discipline and the role of law in European societies (Azoulai, 2020). In this context, research has been produced on the relation of colonialism and EU law, as well as on the exclusion of non-EU migrants and its colonial-imperial characteristics (Eklund, 2023; Erpelding, 2022; Hocquet, 2024; Spijkerboer, 2022).

Using racial capitalism as a new lens to approach these matters carries the potential of opening new possibilities to examine not only contemporary models of economic cooperation and migration, but also past trade and cooperation agreements negotiated during the crucial period of decolonisation. Moreover, this framework can provide a novel lens of investigation of previously overlooked categories of migration under EU law (for example posted workers, migrants falling under the Intra-Corporate Transfers Directive, frontier workers, for an analysis

of the distributive effects of these instruments see Bogoeski and Costamagna, 2022; Menz, 2014; Somek, 2012). A horizon of more in-depth critical reflection can be opened by further engagement with racial capitalism in EU law and this article has offered a first moderate beginning.

Bibliography

Attar, M. al, Smith, C., 2024. Racial Capitalism and the Dialectics of Development: Exposing the Limits and Lies of International Economic Law. Law Critique 35, 149–171. https://doi.org/10.1007/s10978-022-09336-z

Azoulai, L., 2020. The Madness of Europe, Being Attached to It. German Law Journal 21, 100–103. https://doi.org/10.1017/glj.2019.104

Balibar, É., 2001. Nous, citoyens d'Europe ? La Découverte. https://doi.org/10.3917/dec.balib.2001.02

Barnard, C., Costello, F., Fraser Butlin, S., 2024. Low-Paid EU Migrant Workers: The House, the Street, the Town. Bristol University Press. https://doi.org/10.47674/9781529229592

Bauböck, R., 2014. The Three Levels of Citizenship within the European Union. German Law Journal 15, 751–763. https://doi.org/10.1017/S207183220001912X

Bhattacharyya, G., 2018. Rethinking racial capitalism: questions of reproduction and survival, Cultural studies and Marxism. Rowman & Littlefield Publishers, Lanham.

Bigo, D., Walker, R.B.J., Carrera, S., 2010. Europe's 21st Century Challenge : Delivering Liberty. Routledge, Farnham, Surrey, England.

Bogoeski, V., Costamagna, F., 2022. Law and the production of precarious work in Europe: an introduction. European Law Open 1, 660–668. https://doi.org/10.1017/elo.2022.44

Bonjour, S., Rea, A., Jacobs, D. (Eds.), 2011. The others in Europe, Études européennes. Institut d'Études Europeennes : Editions de l'Université de Bruxelles, Brussels.

Briddick, C., 2020. Combatting or Enabling Domestic Violence? Evaluating the Residence Rights of Migrant Victims of Domestic Violence in Europe Short Articles. Int'l & Comp. L.Q. 69, 1013–1034.

Britton-Purdy, J., Grewal, D., Kapczynski, A., Rahman, K.S., 2020. Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis. Yale Law Journal 129, 1784.

Bugarič, B., 2023. The neo-liberal bias of the EU constitutional order: a critical analysis, in: Research Handbook on the Politics of Constitutional Law. Edward Elgar Publishing, pp. 386–409.

Choudhry, S., 2001. Citizenship and Federations: Some Preliminary Reflections, in: Nicolaidis, K., Howse, R. (Eds.), The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union. Oxford University Press.

Chung, E.A., 2020. Creating hierarchies of noncitizens: race, gender, and visa categories in South Korea. Journal of Ethnic and Migration Studies 46, 2497–2514. https://doi.org/10.1080/1369183X.2018.1561061

Costello, C., 2016. The human rights of migrants and refugees in European law, Oxford studies in European law. Oxford University Press, Oxford, United Kingdom.

Cross, H., 2021. Migration beyond capitalism. Polity, Cambridge, UK ; Medford, MA.

Davies, G., 2018. Has the Court changed, or have the cases? The deservingness of litigants as an element in Court of Justice citizenship adjudication. Journal of European Public Policy 25, 1442–1460. https://doi.org/10.1080/13501763.2018.1488881

de Lange, T., Vankova, Z., 2022. The Recast EU Blue Card Directive: Towards a Level Playing Field to Attract Highly Qualified Migrant Talent to Work in the EU? European Journal of Migration and Law 24, 489–515. https://doi.org/10.1163/15718166-12340138

Della Torre, L., de Lange, T., 2018. The 'importance of staying put': third country nationals' limited intra-EU mobility rights. Journal of Ethnic and Migration Studies 44, 1409–1424. https://doi.org/10.1080/1369183X.2017.1401920

Devetzi, S., 2019. EU Citizens, Residence Rights and Solidarity in the Post-Dano/Alimanovic Era in Germany. European Journal of Migration and Law 21, 338–357. https://doi.org/10.1163/15718166-12340054
Eklund, H., 2023. Peoples, Inhabitants and Workers: Colonialism in the Treaty of Rome. European Journal of International Law 34, 831–854. https://doi.org/10.1093/ejil/chad060
Erpelding, M., 2022. Juristes internationalistes, juristes mixtes, Euro-Lawyers : l'apport de l'expérience semi-coloniale à l'émergence d'un droit supranational. Clio @ Themis 22.
Everson, M., 1995. The Legacy of the Market Citizen, in: Shaw, J., More, G. (Eds.), New Legal Dynamics of European Union. Clarendon Press, New York, pp. 73–90.
Farcy, J.-B., 2020. Labour Immigration Policy in the European Union: How to Overcome the Tension between Further Europeanisation and the Protection of National Interests? European Journal of Migration and Law 22, 198–223. https://doi.org/10.1163/15718166-12340074
Fekete, L., 2001. The emergence of xeno-racism. Race & Class 43, 23–40.
Ferreira, N., 2022. Utterly Unbelievable: The Discourse of 'Fake' SOGI Asylum Claims as a Form of Epistemic Injustice. International Journal of Refugee Law 34, 303–326. https://doi.org/10.1093/ijrl/eeac041
FitzGerald, D.S., 2020. Remote control of migration: theorising territoriality, shared coercion, and deterrence. Journal of Ethnic and Migration Studies 46, 4–22. https://doi.org/10.1080/1369183X.2020.1680115
Ganty, S., 2021. Integration duties in the European Union: Four models. Maastricht Journal of European and Comparative Law 28, 784–804. https://doi.org/10.1177/1023263X211048605
Ganty, S., 2020. Citoyenneté européenne et genre: approche critique de la directive 2004/38/CE, in: Bernard, D., Harmel, C. (Eds.), Code Commenté - Droits Des Femmes. Larcier.
Gonzalez, C., 2020. Climate Change, Race, and Migration. Journal of Law and Political Economy 1. https://doi.org/10.5070/LP61146501
Gonzalez, C., Mutua, A., 2022. Mapping Racial Capitalism: Implications for Law. Journal of Law and Political Economy 2, 127–201. https://doi.org/10.5070/LP62258224
Gonzalez, C.G., 2021. Racial capitalism, climate justice, and climate displacement. Oñati Socio-Legal Series 11, 108–147. https://doi.org/10.35295/osls.iisl/0000-0000-0000-1137
Groenendijk, K., 2015. Equal treatment of workers from third countries: the added value of the Single Permit Directive. ERA Forum 16, 547–561. https://doi.org/10.1007/s12027-015-0403-2
Groussot, X., Petursson, G.T., 2015. The EU Charter of Fundamental Rights Five Years on : The Emergence of a New Constitutional Framework?, in: Bernitz, U., de Vries, S., Weatherill, S. (Eds.), The EU Charter of Fundamental Rights as a Binding Instrument : Five Years Old and Growing. Hart Publishing, pp. 135–154. https://doi.org/10.5040/9781782258261
Guild, E., 2004. The legal elements of European identity: EU citizenship and migration law, Kluwer European law library. Kluwer Law International.
Hailbronner, K., 2000. Immigration and asylum law and policy of the European Union. Kluwer Law International.
Hammar, T., 1990. Democracy and the nation state: aliens, denizens, and citizens in a world of international migration, Research in ethnic relations series. Avebury ; Gower Pub. Co, Aldershot, Hants, England : Brookfield, Vt.
Hammoudi, A., 2022. International order and racial capitalism: The standardization of 'free labour' exploitation in international law. Leiden Journal of International Law 35, 779–799. https://doi.org/10.1017/S0922156522000218
Hansen, P., Jonsson, S., 2015. Eurafrica: the untold history of European integration and colonialism, Theory for a global age. Bloomsbury Academic, London Oxford New York New Delhi Sydney.
Hayek, F.A. von, 1979. Law, legislation and liberty : a new statement of the liberal principles of justice and political economy. Routledge.
Hervey, T., 1995. Migrant Workers and their Families in the European Union: the pervasive market ideology of Community law, in: Shaw, J., More, G. (Eds.), New Legal Dynamics of European Union. Clarendon Press, New York, pp. 91–110.

Hocquet, C., 2024. Tracking the civilising mission's continuities in externalised migration controls: a critical analysis of EU cooperation with third countries. London Review of International Law 12, 181–214. https://doi.org/10.1093/lril/lrae014
Iglesias Sánchez, S., 2017. The Constitutional Status of Foreigners and European Union Citizens: Loopholes and Interactions in the Scope of Application of Fundamental Rights, in: Thym, D. (Ed.), Questioning EU Citizenship : Judges and the Limits of Free Movement and Solidarity in the EU, Modern Studies in European Law. Hart Publishing, pp. 243–267.
Iglesias Sánchez, S., 2014. Nationality: The Missing Link between Citizenship of the European Union and European Migration Policy, in: Guild, E., Rotaeche, C.G., Kostakopoulou, D. (Eds.), The Reconceptualization of European Union Citizenship. Brill Nijhoff, pp. 65–88.
Isiksel, T., 2016. Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State. Oxford University Press.
Jesse, M. (Ed.), 2020. European Societies, Migration, and the Law: The 'Others' amongst 'Us'. Cambridge University Press, Cambridge. https://doi.org/10.1017/9781108767637
Jesse, M., Carter, D.W., 2020. Life after the 'Dano-Trilogy': Legal Certainty, Choices and Limitations in EU Citizenship Case Law, in: Cambien, N., Kochenov, D., Muir, E. (Eds.), European Citizenship under Stress, Social Justice, Brexit and Other Challenges, Nijhoff Studies in European Union Law. Brill Nijhoff, pp. 135–169.
Joerges, C., 2004. What is Left of the European Economic Constitution? (Working Paper). European University Institute.
Joppke, C., 2024. Neoliberal nationalism and immigration policy. Journal of Ethnic and Migration Studies 50, 1657–1676. https://doi.org/10.1080/1369183X.2024.2315349
Kalman, L., 2010. Legal realism at Yale, 1927-1960, Lawbook exchange edition. ed. Lawbook Exchange, Union, N.J.
Kampourakis, I., 2021. Bound by the Economic Constitution: Notes for "Law and Political Economy" in Europe. Journal of Law and Political Economy 1. https://doi.org/10.5070/LP61251589
Kjaer, P.F. (Ed.), 2020. The Law of Political Economy: Transformations in the Function of Law. Presented at the Law of Political Economy: Transformations in the Function of Law (Conference), Cambridge University Press, Cambridge, United Kingdom ; New York, NY, USA.
Kochenov, D., Ganty, S., 2023. EU Lawlessness Law: Europe's Passport Apartheid From Indifference To Torture and Killing, Jean Monnet Working Paper, NYU Law School. Rochester, NY.
Könönen, J., 2024. Removals of 'Dangerous' Mobile EU Citizens: Public Order and Security as a Police Paradigm. Social & Legal Studies 33, 601–619. https://doi.org/10.1177/09646639231207353
Kostakopoulou, D., 2009. The Area of Freedom, Security and Justice and the Political Morality of Migration and Integration, in: Lindahl, H. (Ed.), A Right to Inclusion and Exclusion? : Normative Fault Lines of the EU's Area of Freedom, Security and Justice. Hart Publishing. https://doi.org/10.5040/9781472564849
Kostakopoulou, D., 2008. The Evolution of European Union Citizenship. Eur Polit Sci 7, 285–295. https://doi.org/10.1057/eps.2008.24
Kostakopoulou, D., 2005. Ideas, Norms and European Citizenship: Explaining Institutional Change. The Modern Law Review 68, 233–267. https://doi.org/10.1111/j.1468-2230.2005.00536.x
Kostakopoulou, D., Carrera, S., Jesse, M., 2009. Doing and Deserving: Competing Frames of Intergration in the EU, in: Guild, E., Groenendijk, K., Carrera, S. (Eds.), Illiberal Liberal States : Immigration, Citizenship, and Integration in the EU. Ashgate.
Kundnani, A., 2023. What is antiracism? and why it means anticapitalism. Verso, London New York.
Kundnani, A., 2021. The racial constitution of neoliberalism. Race and Class 63, 51–69. https://doi.org/10.1177/0306396821992706
Kundnani, H., 2023. Eurowhiteness: culture, empire and race in the European project. Hurst & Company, London.
Lafleur, J.-M., Mescoli, E., 2018. Creating Undocumented EU Migrants through Welfare: A Conceptualization of Undeserving and Precarious Citizenship. Sociology 52, 480–496. https://doi.org/10.1177/0038038518764615

Lenaerts, K., Gutiérrez-Fons, J.A., 2017. Epilogue on EU Citizenship: Hopes and Fears, in: Kochenov, D. (Ed.), EU Citizenship and Federalism: The Role of Rights. Cambridge University Press, Cambridge, pp. 751–781. https://doi.org/10.1017/9781139680714.032
Lentin, A., 2008. Europe and the Silence about Race. European Journal of Social Theory 11, 487–503. https://doi.org/10.1177/1368431008097008
Lewicki, A., 2024. Coloniality, Race, and Europeanness: Britain's Borders after Brexit. International Political Sociology 18, olae025. https://doi.org/10.1093/ips/olae025
Lockwood, D., 1996. Civic Integration and Class Formation. The British Journal of Sociology 47, 531–550. https://doi.org/10.2307/591369
Loxa, A., 2025. Sustainability and EU Migration Law, Tracing the History of a Contemporary Concept, Accepted/In press. ed, European Law and Policy. Cambridge University Press.
Loxa, A., 2024. International human rights commitments to protect victims of domestic violence: Refugee recognition as the first step for an integrated approach under EU law in Case C-621/21, Intervyuirasht organ na DAB pri MS (women victims of domestic violence). Maastricht Journal of European and Comparative Law 1023263X241287403. https://doi.org/10.1177/1023263X241287403
Loxa, A., 2023. Sustainability and EU Migration Law: What Place for Migrants' Rights (Doctoral Thesis (monograph)). MediaTryck Lund, Lund.
Loxa, A., Stoyanova, V., 2022. Migration as a Constitutional Crisis for the European Union, in: Smet, S., Stoyanova, V. (Eds.), Migrants' Rights, Populism and Legal Resilience in Europe. Cambridge University Press, Cambridge, pp. 139–164. https://doi.org/10.1017/9781009040396.009
Maas, W. (Ed.), 2013. Democratic Citizenship and the Free Movement of People, Immigration and Asylum Law and Policy in Europe. Martinus Nijhoff Publishers.
Maas, W., 2005. The Genesis of European Rights. Journal of Common Market Studies 43, 1009–1025. https://doi.org/10.1111/j.1468-5965.2005.00606.x
Maduro, M.P., 2008. Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism. European Journal of Legal Studies 1, 137–152.
Mantu, S., Minderhoud, P., 2019. Exploring the Links between Residence and Social Rights for Economically Inactive EU Citizens. European Journal of Migration and Law 21, 313–337. https://doi.org/10.1163/15718166-12340053
Mantu, S., Minderhoud, P., Guild, E., Mantu, S. (Eds.), 2020. EU Citizenship and Free Movement Rights: Taking Supranational Citizenship Seriously. Brill Nijhoff.
Mayblin, L., 2017. Asylum after empire : colonial legacies in the politics of asylum seeking, Kilombo : international relations and colonial questions. Roman & Littlefield International.
Menz, G., 2014. Employers and Migrant Legality: Liberalization of Service Provision, Transnational Posting, and the Bifurcation of the European Labour Market, in: Costello, C., Freedland, M. (Eds.), Migrants at Work: Immigration and Vulnerability in Labour Law. Oxford University Press, p. 0. https://doi.org/10.1093/acprof:oso/9780198714101.003.0003
Miller, J., Nicola, F.G., 2023. The Failure to Grapple with Racial Capitalism in European Constitutionalism, in: Komárek, J. (Ed.), European Constitutional Imaginaries: Between Ideology and Utopia. Oxford University Press, p. 0. https://doi.org/10.1093/oso/9780192855480.003.0015
Moebius, I., Szyszczak, E., 1998. Of Raising Pigs and Children. Yearbook of European Law 18, 125–156. https://doi.org/10.1093/yel/18.1.125
Moravcsik, A., 1991. Negotiating the Single European Act: national interests and conventional statecraft in the European Community. International Organization 45, 19–56. https://doi.org/10.1017/S0020818300001387
Moreno-Lax, V., 2017. Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law, Oxford Studies in European Law. Oxford University Press, Oxford, New York.
Morris, L., 2002. Managing migration: civic stratification and migrants' rights, 1. publ. ed. Routledge, London.

Mounk, Y., 2017. The age of responsibility: luck, choice, and the welfare state. Harvard University Press, Cambridge, Massachusetts London, England.
Muir, E., 2019. EU Citizenship, Access to "Social Benefits" and Third-Country National Family Members: Reflecting on the Relationship Between Primary and Secondary Rights in Times of Brexit. European Papers - A Journal on Law and Integration 2018, 1353–1378. https://doi.org/10.15166/2499-8249/274
Mullally, S., 2011. Domestic Violence Asylum Claims and Recent Developments in International Human Rights Law: A Progress Narrative? The International and Comparative Law Quarterly 60, 459–484.
Myslinska, D.R., 2024. Law, migration, and the construction of whiteness: mobility within the European Union. Routledge, Abingdon, Oxon [UK] ; New York, NY.
Nic Shuibhne, N., 2023. Introduction: Revisiting EU Law on the Free Movement of Persons, in: Nic Shuibhne, N. (Ed.), Revisiting the Fundamentals of the Free Movement of Persons in EU Law. Oxford University Press, p. 0. https://doi.org/10.1093/oso/9780198886273.003.0001
Nic Shuibhne, N., 2016. What I tell you three times is true: lawful residence and equal treatment after Dano. Maastricht Journal of European and Comparative Law 23, 908–936.
Novak, P., 2019. The neoliberal location of asylum. Political Geography 70, 1–13.
O'Brien, C., 2016. Civis capitalist sum: Class as the new guiding principle of EU free movement rights. Common Market Law Review 53, 937–978.
O'Brien, C., 2009. Social Blind Spots and Monocular Policy Making The ECJ's Migrant Worker Model. Common Market Law Review 46, 1107–1141.
O'Brien, C.R., 2021. The Great EU Citizenship Illusion Exposed : equal treatment rights evaporate for the vulnerable. European law review.
Parker, O., Catalán, Ó.L., 2014. Free Movement for Whom, Where, When? Roma EU Citizens in France and Spain. International Political Sociology 8, 379–395. https://doi.org/10.1111/ips.12069
Peebles, G., 1997. "A Very Eden of the Innate Rights of Man"? A Marxist Look at the European Union Treaties and Case Law. Law & Social Inquiry 22, 581–618.
Persdotter, M.E., 2019. Free to move along: On the urbanisation of Cross-Border Mobility Controls - A Case of Roma "EU migrants" in Malmö, Sweden, Dissertation series in Migration, Urbanisation, and Societal Change. Roskilde Universitet, Roskilde. https://doi.org/10.24834/isbn.9789178770328
Pollack, M., 2013. What's New, What's Missing. American University International Law Review 28, 1257–1310.
Repo, J., 2016. Gender Equality as Bioeconomic Governmentality in a Neoliberal EU, in: The Routledge Handbook of Biopolitics. Routledge.
Riedner, L., Hess, S., 2024. Mapping new colour lines – border studies within a workfare state. Journal of Ethnic and Migration Studies 50, 2707–2728. https://doi.org/10.1080/1369183X.2023.2298542
Robinson, C.J., 2000. Black marxism: the making of the Black radical tradition. University of North Carolina Press, Chapel Hill, N.C.
Scharpf, F., 1999. Governing in Europe: Effective and Democratic? Oxford University Press. https://doi.org/10.1093/acprof:oso/9780198295457.003.0003
Scharpf, F.W., 2010. The asymmetry of European integration, or why the EU cannot be a 'social market economy.' Socio-Economic Review 8, 211–250. https://doi.org/10.1093/ser/mwp031
Shaw, J., 2019. Towards a Political Europe?: Citizens, Elections and the European Parliament, in: Kochenov, D., Amtenbrink, F., Davies, G., Lindeboom, J. (Eds.), The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley. Cambridge University Press, Cambridge, pp. 231–245. https://doi.org/10.1017/9781108565417.017
Shaw, J., 2010. View of the Citizenship Classics: Martínez Sala and Subsequent Cases on Citizenship of the Union, in: Azoulai, L., Maduro, M.P. (Eds.), The Past and Future of EU Law : The Classics of

EU Law Revisited on the 50th Anniversary of the Rome Treaty. Hart Publishing, pp. 356–362. https://doi.org/10.5040/9781472564979
Singer, J.W., 1988. Legal Realism Now. California Law Review 76, 467. https://doi.org/10.2307/3480619
Sivanandan, A., 2001. Poverty is the new Black. Race & Class 43, 1–5.
Somek, A., 2016. Alienation, Despair and Social Freedom, in: Azoulai, L., Barbou des Places, S., Pataut, E. (Eds.), Constructing the Person in EU Law : Rights, Roles, Identities. Hart Publishing. https://doi.org/10.5040/9781782259367
Somek, A., 2012. From Workers to Migrants, from Distributive Justice to Inclusion: Exploring the Changing Social Democratic Imagination. European Law Journal 18, 711–726. https://doi.org/10.1111/j.1468-0386.2012.00625.x
Soysal, Y.N., 1994. Limits of citizenship: migrants and postnational membership in Europe. University of Chicago, Chicago.
Spijkerboer, T., 2022. Coloniality and Recent European Migration Case Law, in: Smet, S., Stoyanova, V. (Eds.), Migrants' Rights, Populism and Legal Resilience in Europe. Cambridge University Press, Cambridge, pp. 139–164. https://doi.org/10.1017/9781009040396.009
Spijkerboer, T., 2018. Bifurcation of people, bifurcation of law: externalization of migration policy before the EU Court of Justice. Journal of Refugee Studies 31, 216–239. https://doi.org/10.1093/jrs/fex038
Thym, D., 2023. European Migration Law. Oxford University Press, Oxford, New York.
Thym, D. (Ed.), 2017a. Questioning EU citizenship : judges and the limits of free movement and solidarity in the EU, Modern studies in European law. Hart Publishing.
Thym, D., 2017b. The Evolution of Citizen's Rights in Light of the European Union's Constitutional Development, in: Thym, D. (Ed.), Questioning EU Citizenship : Judges and the Limits of Free Movement and Solidarity in the EU, Modern Studies in European Law. Hart Publishing, pp. 111–134.
Thym, D., 2016a. Ambiguities of Personhood, Citizenship, Migration and Fundamental Rights in EU Law, in: Azoulai, L., Barbou des Places, S., Pataut, E. (Eds.), Constructing the Person in EU Law : Rights, Roles, Identities. Hart Publishing, pp. 111–132. https://doi.org/10.5040/9781782259367
Thym, D., 2016b. 'Citizens' and 'Foreigners' in EU Law. Migration Law and its Cosmopolitan Outlook. European Law Journal 22, 296–316.
Thym, D., 2015. The elusive limits of solidarity: Residence rights of and social benefits for economically inactive Union citizens. Common Market Law Review 52.
Thym, D., 2013. EU migration policy and its constitutional rationale: A cosmopolitan outlook. Common Market Law Review 50, 709–736.
Tuori, K., 2019. EU and Member State Constitutionalism: Complementing and Conflicting', in: Bakardjieva Engelbrekt, A., Groussot, X. (Eds.), The Future of Europe: Political and Legal Integration Beyond Brexit. Hart Publishing. https://doi.org/10.5040/9781509923335
Tuori, K., 2015. European constitutionalism, Cambridge studies in European law and policy. Cambridge University Press, Cambridge.
Wallerstein, I.M., 2011. The Bourgeois(ie) as Concept and Reality, in: Race, Nation, Class: Ambiguous Identities, Radical Thinkers. Verso Publ, London.
Zisakou, S., 2024. Feeling queer, feeling real: affective economies of truth in queer asylum politics. Ethnic and Racial Studies 1–22. https://doi.org/10.1080/01419870.2024.2374897

Primary legal sources

Charter of Fundamental Rights of the European Union [2012] OJ C 326/39

Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State [1970] OJ L 142/24
Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L 141/1
Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity [1975] OJ L 14/10.
Council Directive 90/364/EEC of 28 June 1990 on the right of residence [1990] OJ L 180/0026
Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L 16/ 44
Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12.
Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L 155/ 17 (Blue Card Directive 2009)
Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects, and au pairing (recast) [2016] OJ L 132/21
Directive (EU) 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC [2021] OJ L 382/1 (Blue Card Directive 2021)
Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L 158/77.
Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [2011] OJ L 343/1
Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L 94/375
Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer [2014] OJ L 157/1

List of cases

Judgment of 20 September 2001, *Grzelczyk*, C-184/99, ECLI:EU:C:2001:458
Judgment of 7 September 2004, *Trojani*, C-456/02, ECLI:EU:C:2004:488.
Judgment of 4 March 2010, *Chakroun*, C-578/08, ECLI:EU:C:2010:117
Judgment of 8 March 2011, *Ruiz Zambrano*, C-34/09, ECLI:EU:C:2011:124
Judgment of 24 April 2012, *Kamberaj*, C-571/10, ECLI:EU:C:2012:233.
Judgment of 19 June 2014, *Saint Prix*, C-507/12, ECLI:EU:C:2014:2007
Judgment of 10 September 2014, *Ben Alaya*, C-491/13, ECLI:EU:C:2014:2187

Judgment of 13 September 2016, *Rendón Marín*, C-165/14, ECLI:EU:C:2016:675
Judgment of 4 April 2017, *Fahimian*, C-544/15, ECLI:EU:C:2017:255
Judgment of 10 May 2017, *Chavez-Vilchez and others*, C-133/15, ECLI:EU:C:2017:354
Judgment of 14 November 2017, *Lounes*, C-165/16, ECLI:EU:C:2017:862.
Judgment of 20 December 2017, *Gusa*, C-442/16, ECLI:EU:C:2017:1004
Judgment of the Court of 5 June 2018, *Coman*, C-673/16, ECLI:EU:C:2018:385
Judgment of 19 September 2019, *Dakneviciute*, C-544/18, ECLI:EU:C:2019:761.
Judgment of 6 October 2020, *Jobcenter Krefeld*, C-181/19 ECLI:EU:C:2020:794 more recently.
Judgment of 2 September 2021, *Belgian State (Droit de séjour en cas de violence domestique*), C-930/19, ECLI:EU:C:2021:657
Judgment of the Court of 14 December 2021, *V.M.A. v Stolichna obshtina, rayon „Pancharevo“*, ECLI:EU:C:2021:1008
Judgment of 29 September 2022, *Chief Appeals Officer and others*, C-3/21, ECLI:EU:C:2022:737
Pending case Case C-4/23, *Mirin*.
C-310/08, *Ibrahim and Secretary of State for the Home Department*, EU:C:2010:80,
C-413/99, *Baumbast and R*, EU:C:2002:493
C-480/08, *Teixeira*, EU:C:2010:83