ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES

EUI WORKING PAPERS

RSCAS 2020/33
Robert Schuman Centre for Advanced Studies
Global Governance Programme-396
GLOBALCIT

Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism

Jo Shaw

European University Institute

Robert Schuman Centre for Advanced Studies

Global Governance Programme

GLOBALCIT

Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism

Jo Shaw

EUI Working Paper **RSCAS** 2020/33

Terms of access and reuse for this work are governed by the Creative Commons Attribution 4.0 (CC-BY 4.0) International license. If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the working paper series and number, the year and the publisher.

ISSN 1028-3625

© Jo Shaw, 2020

This work is licensed under a Creative Commons Attribution 4.0 (CC-BY 4.0) International license.
https://creativecommons.org/licenses/by/4.0/

Published in May 2020 by the European University Institute.
Badia Fiesolana, via dei Roccettini 9
I – 50014 San Domenico di Fiesole (FI)
Italy

Views expressed in this publication reflect the opinion of individual author(s) and not those of the European University Institute.

This publication is available in Open Access in Cadmus, the EUI Research Repository:
https://cadmus.eui.eu

Robert Schuman Centre for Advanced Studies

The Robert Schuman Centre for Advanced Studies, created in 1992 and currently directed by Professor Brigid Laffan, aims to develop inter-disciplinary and comparative research on the major issues facing the process of European integration, European societies and Europe's place in 21st century global politics.

The Centre is home to a large post-doctoral programme and hosts major research programmes, projects and data sets, in addition to a range of working groups and *ad hoc* initiatives. The research agenda is organised around a set of core themes and is continuously evolving, reflecting the changing agenda of European integration, the expanding membership of the European Union, developments in Europe's neighbourhood and the wider world.

For more information: http://eui.eu/rscas

The EUI and the RSCAS are not responsible for the opinion expressed by the author(s).

The Global Governance Programme

The Global Governance Programme is one of the flagship programmes of the Robert Schuman Centre. It is made of a community of outstanding professors and scholars, produce high quality research and engage with the world of practice through policy dialogue. Established and early career scholars research write on and discuss issues of global governance within and beyond academia, focusing on four broad and interdisciplinary areas: Global Economics, Europe in the World, Cultural Pluralism and Global Citizenship.

The Programme also aims to contribute to the fostering of present and future generations of policy and decision makers through its executive training programme: the Academy of Global Governance, where theory and 'real world' experience meet and where leading academics, top-level officials, heads of international organisations and senior executives discuss on topical issues relating to global governance.

For more information: http://globalgovernanceprogramme.eui.eu

The European University Institute and the Robert Schuman Centre are not responsible for the opinions expressed by the author(s).

GLOBALCIT

GLOBALCIT, the successor of EUDO CITIZENSHIP, is an observatory within the EUI's Global Governance Programme. GLOBALCIT publishes two kinds of working papers: (1) peer reviewed and previously unpublished manuscripts on topics of citizenship laws and policies covered by the observatory and (2) collections of edited contributions to GLOBALCIT Forum Debates. For more information, visit our website at http://globalgovernanceprogramme.eui.eu/globalcit/

Series editors:

Rainer Bauböck (European University Institute, Political and Social Sciences)

Iseult Honohan (University College Dublin, School of Politics and International Relations)

Jo Shaw (University of Edinburgh, Law School)

Maarten Vink (University of Maastricht, Department of Political Science)

The views expressed in this publication cannot in any circumstance be regarded as the official position of the European Union.

Abstract

This paper explores the complex tapestry of citizenship in the European Union context, and examines how discourses of citizenship illuminate both the nature of European integration and the process of gradual constitutionalisation. The objective is to re-evaluate the role played by citizenship in the evolving processes of Union polity-formation, and the connection between citizenship and the various dynamics of constitution-making. The paper thus has three substantive sections. The first addresses the role of citizenship of the Union, examining the dynamic relationship between this concept, the role of the Court of Justice, and the free movement dynamic of EU law. The second turns to citizenship in the Union, looking at recent political developments under which concepts of citizenship, and democratic membership as a key dimension of citizenship, have been given greater prominence. The third section links together the conclusions of the previous sections, focusing in particular on the relationship between EU citizenship and national citizenship. One key finding of the paper is that there is a tension between citizenship of the Union, as part of the EU's 'old' incremental constitutionalism based on the constitutionalisation of the existing Treaties, and citizenship in the Union, where the possibilities of a 'new' constitutionalism based on renewed constitutional documents have yet to be fully realised

Keywords

Citizenship; European Union; Treaty of Lisbon; Free Movement; Constitution

> Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship (Article 20(1) of the Treaty on the Functioning of the European Union).

A. Introduction*

This Chapter[1] explores the complex tapestry of citizenship in the European Union context, and examines how discourses of citizenship illuminate both the nature of European integration and the process of gradual constitutionalisation. The objective is to re-evaluate the role played by citizenship in the evolving processes of Union polity-formation, and the connection between citizenship and the various dynamics of constitution-making. In this chapter, I take both an explanatory and evolutionary approach to investigating multi-level citizenship in a complex Union of states.[2]

Much scholarship on citizenship concentrates on the role of 'citizenship *of* the Union' as a legal status (Article 20(1) TFEU). This is citizenship viewed in relation to the functions of EU law as a framework for integration based on treaties agreed between the Member States, but endowed with institutions which operate autonomously – in particular a Court of Justice (CJEU). This framework for integration encapsulates the idea of the 'constitutionalised treaty'. Here, citizenship draws heavily on the integrative functions of the founding treaties. Studying this dimension of citizenship in the EU context has traditionally implied a primary focus on the transnational character of most Union citizenship rights as enumerated in the treaties and interpreted by the CJEU. This is the form of 'citizenship' which (prior to Brexit) directly benefited 17 million persons, resident outside their home state. This amounted to some 4% of the working age population of the then 28 Member States.[3] These are not small numbers. But those taking advantage of free movement, and thus the transnational aspect of their EU citizenship, in that form remain a very small proportion of the EU's overall population.

However, as we shall see, the CJEU has, over the years, periodically explored the terrain of citizenship beyond the immediate confines of the single market. From time to time, and with the enthusiastic support for further progress in this direction coming from most, but not all,[4] of the scholars

---

* I am very grateful to Niamh Nic Shuibhne for comments on earlier drafts of this version of the Chapter, demonstrating a level of collegiality in the midst of a pandemic that one can only wonder at. In order to accommodate substantial new material as well as a changed emphasis within the argument in order to reflect different circumstances, this chapter is less an update than a substantial rewrite. In particular, it omits a number of elements of the version of the Chapter that appeared in the second edition of *The Evolution of EU Law*, such as, for example, a brief literature review previously found at pp 581-582. All remaining infelicities are mine alone.

[1] This paper is the author pre-print of a chapter to be published in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 2020/2021, 3rd Edition, forthcoming). It is based on J Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism', in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 2011, 2nd Edition), which itself was published as an author pre-print by RSCAS: Working Paper, EUI RSCAS, 2010/60, [GLOBALCIT], EUDO Citizenship Observatory (https://cadmus.eui.eu/handle/1814/14396).

[2] For examples of other recent work in this register see O. Garner, 'The Existential Crisis of Citizenship of the European Union: The Argument for an Autonomous Status', (2018) 20 *Cambridge Yearbook of European Legal Studies* 116-146; D Kostakopoulou, 'European Union Citizenship Rights and Duties: Civil, Political and Social', in E Isin and P Neyers (eds), *Global Handbook of Citizenship Studies* (Routledge, 2014), 427-436.

[3] For details, see European Commission Press Release, New EU rules cut red tape for citizens living or working in another Member State as of tomorrow, IP/19/1148, 15 February 2019, https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1148 and 'EU citizens living in another Member State - statistical overview', Eurostat Statistics Explained, https://ec.europa.eu/eurostat/statistics-explained/index.php/EU_citizens_living_in_another_Member_State_-_statistical_overview (last visited 28 April 2020).

[4] For significant exceptions, see AJ Menendez and E Olsen, *Challenging European Citizenship. Ideas and Realities in Contrast* (Palgrave, 2020) and R Bellamy, *A Republican Europe of States: Cosmopolitanism, Intergovernmentalism and Democracy in the EU* (Cambridge University Press, 2019), especially ch 5.

operating within the field of EU legal studies and related disciplines, the CJEU has made use in its growing case law of the symbolic capital which stems from citizenship-related arguments in ways which have seemed more and more remote from the immediate practices of the single market. The most dramatic intervention on the part of the CJEU was its adoption of the so-called 'substance of rights' test in *Ruiz Zambrano*,[5] which seemed to set EU citizenship on the route to becoming an autonomous status, with a future federal potential.[6] However, as we shall see in Section C, this case opened some new avenues, but did not change the nature of EU citizenship as radically as some might have expected.

In addition to citizenship *of* the Union, we can see a complementary dimension of the concept which engages the actual and potential role of citizenship *in* the Union as a polity. Can citizenship in this context be about more than individual (market) rights? Can it acquire a distinct political or legal dimension appropriate to a polity evolving beyond the state, within a framework of multilevel governance, where political powers are shared both horizontally and vertically amongst diverse partners? How does it fit in to the institutionalised political dimensions of the existing EU treaties? This is the task of identifying the putative contribution of citizenship to processes of formal or institutionalised constitution-building within the European Union.

Whichever dimension of citizenship is under the microscope, it remains important to recognise the distinction between the study of citizenship in the context of a state and its study in the context of the European Union, but without separating the two domains. We should avoid thinking about Union citizenship and citizenship of the Member States as two unrelated phenomena, even though they are different in character. The two concepts are not linked just because one (national citizenship) gives access to the other (Union citizenship), or because the treaties have always reinforced their complementary character. On the contrary, the complex relationship between the two can only be effectively understood by deploying a composite concept of citizenship which links together the different levels and different spheres in which individuals claim citizenship rights, carry out citizenship duties and act out citizenship practices, and within which the governance of citizenship occurs.[7] In other words, by focusing on citizenship *in* the EU context as well as citizenship *of* the Union, we can see that the EU's citizenship regime is the expression of a framework for multi-level governance, in which many of the constitutional fundamentals[8] that we associate with citizenship are fragmented across different levels and nodes of authority. As the argument in this chapter will show, the complex character of the Union's constitutional form and nature and the tensions between socio-economic and political dynamics make it hard to develop a stable and secure understanding of how citizenship fits into the framework of an evolving European Union.[9] Specifically, in the sections which follow we will draw a distinction between the European Union's 'old' and 'new' constitutionalisms. 'Old' constitutionalism draws on the idea of the 'constitutionalised treaty', dating back to the first days of the 'Community legal order' in the 1950s and 1960s. The 'new' constitutionalism comes to the fore periodically, and did so especially in the first decade of the twenty-first century. It involves a more formalised top down institutionalisation of a constitutional Union. However, as these two spheres are no longer (if they ever were) totally

---

5 Case C-34/09 *Ruiz Zambrano v Office national de l'emploi* ECLI:EU:C:2011:124.

6 For a sustained exploration of the issues which this raises, see the contributions to D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017).

7 M van den Brink, 'A qualified defence of the primacy of nationality over European Union Citizenship', (2020) 69 *International and Comparative Law Quarterly* 177-202.

8 For details see J Shaw, *The People in Question. Citizens and Constitutions in Uncertain Times* (Bristol University Press, 2020).

9 See for example S Seubert, 'EU citizenship and the puzzle of a European *political* union', in S Seubert, O Eberl and F van Waarden (eds), *Reconsidering EU Citizenship* (Edward Elgar, 2018) 21-41. Compare also the distinction drawn by Stephen Coutts between transnational rights and a supranational status: S Coutts, 'The Shifting Geometry of Union Citizenship: A Supranational Status from Transnational Rights' (2019) 21 *Cambridge Yearbook of European Legal Studies* 318-341, partly based on drawing a distinction between supranational status in Article 20 TFEU (as cited at the head of this chapter) and transnational rights of free movement and residence enumerated in Article 21 TFEU.

separate, it is important to explore not only the two main discourses of citizenship *of* and *in* the European Union, but also the bridges between the two. In particular, I will do that through a focus on the ever more complex interactions between EU citizenship and national citizenship.

Section B explains in more detail the different concepts of citizenship on which this chapter focuses and highlights some of the most important features of the institutionalist approach adopted. Three substantive sections elaborate upon the various discourses of citizenship. Sections C and D explore how we got to where we are in relation to the first two dimensions with which we started (citizenship *of* and *in* the Union). Section E then draws out some of the implications of the increased complexity of the CJEU's case law in relation to Union citizenship, identifying an emerging middle ground which highlights the evolving relationship between EU citizenship and national citizenship. A brief conclusion draws together the main threads articulated in the previous sections.

B. The European Union and conceptions of citizenship

1. Citizenship of the Union: the transnational dimension

Citizenship *of* the Union, as first articulated by the Treaty of Maastricht in 1993, has often been mocked as a form of 'citizenship-lite', or as a purely symbolic status, redolent of rights without identity, and of access without belonging.[10] As I have argued elsewhere,

> the European Union began its journey towards recognising a uniform legal status for individuals at the supranational level not by acknowledging and supporting the political agency of individuals as citizens, but by giving them rights and freedoms.[11]

When the Court of Justice asserted in 2001 in *Grzelczyk* that citizenship of the Union was 'destined to be the fundamental status of the nationals of the Member States',[12] it was outlining an aspiration and not claiming that this was presently the case. It is also a rather confusing statement, given that – as a *status* – citizenship of the Union remains dependent upon the differing approaches to the acquisition and loss of nationality on the part of the Member States,[13] as only the nationals of the Member States are citizens of the Union (Article 20(1) TFEU). Whether it is gradually becoming the fundamental basis on which such persons hold *certain rights* has remained a matter of intense debate.[14] This could be said to follow from Article 20(2) which grandly states that 'Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties.' Presently the list of rights ascribed to *mobile* EU citizens under the treaties themselves is rather limited (Articles 20(2), 21(1), 22 and 23 TFEU). While it is possible to argue that one of the most important innovations of EU citizenship is its limited engagement with political rights,[15] in practical terms the framing of citizenship of the Union has been dominated by the right to move freely and to reside in the Member States.

---

[10] W Maas, 'Unrespected, unequal, hollow? Contingent citizenship and reversible rights in the European Union' (2009) 15 CJEL 265-280.

[11] J Shaw, 'EU citizenship: still a fundamental status?', in R Bauböck, (ed.) *Debating European Citizenship* (Springer, 2019) 1-17, 3.

[12] Case C-184/99 *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-La-Neuve* ECLI:EU:C:2001:458 [31].

[13] In international law, and sometimes in domestic law, the legal relationship between nationals and the state is termed 'nationality'. Citizenship is a broader term, encompassing not only the legal relationship and legal status, but also the political dimensions of membership. For further discussion see Shaw (n 8 above) 13-23.

[14] For discussion see Shaw (n 11 above).

[15] For extended discussion see J Shaw, *The Transformation of Citizenship in the European Union* (Cambridge University Press, 2007) and F Fabbrini, 'The Political Side of EU Citizenship in the Context of EU Federalism', in Kochenov (n 6 above), 271-293. Detailed discussion of political rights lies beyond the scope of this chapter.

The list of rights is also subject to various limitations (which are detailed in both the treaties and in legislative measures). This is especially important in respect of the right to move freely and reside in the Member States. The CJEU itself seemed to acknowledge that point because it went on in *Grzelczyk* to say that Union citizenship enables 'those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, *subject to such exceptions as are expressly provided for*'.[16] In other words, at that point the Court was arguing that the primary basis of Union citizenship in law was that it was an equal treatment law, but that equal treatment can never be unlimited.[17] This was evident in its initial case law on the interpretation of Union citizenship in the late 1990s and early 2000s. Since that time, much of the case law has been focused on finding the limits of the equal treatment principle, with the CJEU not always being entirely consistent in its approach throughout the first two decades of the twenty first century.[18]

One the most important developments arrived approximately one decade after the Treaty of Maastricht came into force, and that was the adoption of the 2004 Citizens' Rights or Free Movement Directive.[19] This important legislative measure was intended, as Niamh Nic Shuibhne explains, 'to have both simplifying or consolidating and rights-strengthening purposes'.[20] Not only did it create new 'citizenship rights', such as the possibility of gaining the right of permanent residence in the host state after five years, but it also impacted upon the residual space for treaty-based citizenship rights to be adjudicated by the CJEU. However, it did not remove that space altogether, and this has continued to be a theme within the case law.

The high point of a more expansive approach to EU citizenship as a creature of the treaties came at the beginning of the 2010s with the cases of *Rottmann*[21] and *Ruiz Zambrano*,[22] which will be discussed in more detail in the following sections. While the cases have not generated a revolutionary shift into a truly autonomous conception of 'European citizenship', more akin to national citizenship, they have pushed at the boundaries of the treaty-based conception.[23] This has involved a focus on the limitations which EU law places upon national laws which regulate the lives of citizens if these touch upon some area of Union competence, a concern on the part of the CJEU with protecting the 'genuine substance of the rights' of EU citizenship against evisceration by Member States, and an emphasis on an evolving connection between Union citizens and the 'territory of the Union'.[24]

---

16 Grzelczyk (n 12 above) [31]. Emphasis added.

17 The first case dealing with the implications of a general principle of EU law (in that case the general principle of equal treatment) for EU citizenship was Case C-300/04 *Eman and Sevinger v College van burgemeester en wethouders van Den Haag (Aruba)* ECLI:EU:C:2006:545.

18 See for example S O'Leary, 'Equal treatment and EU citizens: a new chapter on cross border educational mobility and access to student financial assistance' (2009) 34 *European Law Review* 612 and N Nic Shuibhne, 'The Developing Legal Dimensions of Union Citizenship', in A Arnull and D Chalmers (eds), *The Oxford Handbook of European Union Law* (Oxford University Press, 2015) 477-507.

19 European Parliament and Council Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, as amended, [2004] OJ L158/77.

20 Nic Shuibhne (n 18 above), 486. Although the Directive is not the only important piece of legislation in this field, space precludes discussion of the other measures.

21 Case C-135/08 *Rottmann v Freistaat Bayern* ECLI: EU:C:2010:104, discussed in Section D.

22 *Ruiz Zambrano* (n 5 above). The same point is also made by D Sarmiento and E Sharpston, 'European Citizenship and Its New Union: Time to Move On?' in Kochenov (n 6 above) 226-242.

23 Van den Brink (n 7 above).

24 For articulations of the importance of territory, see N Nic Shuibhne, 'The 'Territory of the Union' in EU Citizenship Law: Charting a Route from Parallel to Integrated Narratives', (2019) *Yearbook of European Law* 267–319; L Azoulai, 'Transfiguring European Citizenship: From Member State Territory to Union Territory' in Kochenov (n 6 above) 178-203; Coutts (n 9 above).

2. Citizenship in the Union: multi-level citizenship in a complex Union of states

Notwithstanding the developments noted in the previous subsection, the concept of *national* citizenship remains a much more expansive creature than this relative newcomer 'citizenship of the Union'. Understanding national citizenship is therefore one of the most important components of a structured approach to citizenship *in* the Union. Subject to the limited strictures of international law[25] and EU law (discussed below),[26] states still act as their own gatekeepers in terms of determining the body of the citizenry. Most importantly, at the national level, citizenship is invested with an intensity of political significance and substance, and a connection to the body politic in the broadest sense.[27] The same cannot yet be said of the case of the EU, which is a polity whose 'own' elections (i.e. elections of members of the European Parliament) tend to be fought on the basis of national political platforms by national political parties fielding national candidates, despite the existence of electoral rights for EU citizens under Articles 22(2)(b) and 23 TFEU. In practice, most of the legal regulations governing European Parliament elections are national, not European in character,[28] and the idea of an express right to vote in European Parliament elections has been a belated judicially engineered addition to the roster of citizenship rights.[29] Yet notwithstanding these limitations, it is still quite common, politically speaking, for the collective name of 'citizens' to be invoked, as the basis for a claim to be constructing 'a Europe for its citizens', which is 'close to its citizens'.[30]

This is not just rhetoric. To adopt a phrase coined by Niamh Nic Shuibhne some years ago, the EU appears to be a 'citizenship-capable polity', from a normative perspective.[31] That is, it is a polity which displays the types of constitutional features where one might also expect to find some sort of concept of membership in operation as a means of distinguishing between groups of included and excluded persons, and rules setting out the boundaries and contents of rights and duties. Thus, it is a polity based on a constitutional framework underpinned by the rule of law, respect for fundamental rights and principles of accountability, including (limited) electoral accountability, but also accountability through judicial review[32] and a variety of other mechanisms, such as the right to complain to the Ombudsman, to petition the European Parliament, to seek access to documents and most recently to campaign directly for changes in EU law through the mechanism of the European Citizens' Initiative.

We should expect therefore to find plenty of evidence of citizenship-related practices in the *context* of the EU's development as a polity and 'citizenship-capability' is a reasonable intuition with which to begin the discussion. Yet no one could deny that there are many challenges to such a proposition, not least because both the processes and structures of European integration remain highly contested and because the idea of the EU undertaking 'citizenship-type' tasks and activities still struggles to attain a

---

[25] *Liechtenstein v Guatemala (Nottebohm)* 1955 ICJ 4.

[26] Case C-369/90 *Micheletti v Delegacion del Gobierno en Cantabria* ECLI:EU:C:1992:295; *Rottmann* (n 21 above); *Tjebbes v Minister van Buitenlandse Zaken*, C-221/17, EU:C:2019:189.

[27] Shaw (n 8 above).

[28] This point was recognised by the Court of Justice in Case C-145/04 *Spain v United Kingdom (Gibraltar)* ECLI:EU:C:2006:543, and remains the case more than fifteen years later.

[29] See Case C-650/13 *Delvigne v Commune de Lesparre Médoc* ECLI:EU:C:2015:648, which built on the earlier case of *Eman and Sevinger* (n 17 above).

[30] A good example of such rhetoric is offered by the Laeken Declaration, Presidency Conclusions of the European Council meeting of 14 and 15 December 2001, available at https://www.cvce.eu/content/publication/2002/9/26/a76801d5-4bf0-4483-9000-e6df94b07a55/publishable_en.pdf. This rhetoric eventually led to the 'democracy' provisions of the Treaty of Lisbon. The terminology remains live, as is shown by the 'Europe for Citizens' funding programme (2014-2020) based on Council Regulation (EU) 390/2014 [2014] OJ L 115/3.

[31] N Nic Shuibhne, 'The Outer Limits of EU Citizenship; Displacing Economic Free Movement Rights?' in C Barnard and O Odudu (eds), *The Outer Limits of European Union Law* (Hart, 2009) 167-195, 168; the idea is discussed in more detail in N Nic Shuibhne, 'The resilience of EU market citizenship' (2010) 47 *Common Market Law Review* 1597-1628.

[32] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* ECLI:EU:C:2018:117.

legitimate status in the eyes of many citizens of the Member States. It is hard, for example, to imagine the EU in its present stage of development acquiring the 'obligations' dimension of the citizenship concept, given the limitations upon its legal competences as well as limited recognition of its political capacity, although this is an issue that has been discussed by scholars.[33] Hence even with such soft intuitions, caution should be exercised. All in all, if a good working definition of citizenship combines elements of rights, access (to legal status) and belonging,[34] then the value-added of citizenship at the EU level is strongest by far in relation to the rights to which it gives rise, but much weaker in relation to questions of access and belonging. This set of attributes has remained a durable feature over several decades.

For those who live in complex polities like the EU, which exhibit shifting and evolving vertical and horizontal relationships between different levels and spheres of political authority, citizenship itself is best understood multi-perspectively and relationally.[35] The concept of citizenship operating in Europe today is both multilevel and composite in character. It comprises a range of different legal statuses at the international, supranational, national and subnational level – as well as at the level of individual and group identity – with various normative systems cutting across each other and, from time to time, coming into conflict. In important respects, however, these different elements are mutually constitutive and often contested. Samantha Besson and André Utzinger[36] have explained the evolution of a composite 'European' citizenship in an interesting way. They argue that changes have not occurred by supplanting national citizenships and replacing them with an overarching supranational citizenship of the Union. On the contrary,

> citizenship remains strongly anchored at the national level in Europe albeit in a different way. The change is both quantitative and qualitative. First, citizenship in Europe has become multi-levelled as European citizens are members of different polities both horizontally across Europe (other Member States) and vertically (European transnational, international and supranational institutions). Second, national citizenship in and of itself has changed in quality and has been made more inclusive in its scope and mode of functioning. Union citizenship adds a European dimension to each national *demos* and, to a certain extent, alters national citizenship in reconceiving it in a complementary relation to other Member States' citizenships.

Their argument reinforces the point that engaging in citizenship practices in the context of the Euro-polity – i.e. in relation to the EU and its Member States viewed as a composite and conjoined polity – does not involve a zero-sum game. Indeed, as has been articulated in the EU Treaties since the Treaty of Amsterdam, Union citizenship and national citizenship are complementary in character and the former, in particular, is not supposed to supplant or replace the latter, but rather to be additional to it (Article 20(1) TFEU). A similar approach is suggested by Christoph Schönberger, who argues in favour of thinking about citizenship in the Union from a federal perspective, which means that we must 'free ourselves from the unitary state-centred categories and consider the possibility of *tiered, nested*

---

[33] The main arguments around the relationship between EU citizenship and duties are canvassed in a debate about strengthening EU citizenship in 'Part III: Should EU Citizenship Be Duty-Free?', of Bauböck (n 11 above), 180-313.

[34] See A Wiener, From *Special* to *Specialized* Rights: The Politics of Citizenship and Identity in the European Union' in M Hanagan and C Tilly (eds), *Extending Citizenship, Reconfiguring States*, (Rowman and Littlefield, 1999) 195-227, 200-201.

[35] C Wiesner et al, 'Introduction: Shaping Citizenship as a Political Concept' in C Wiesner (eds), *Shaping Citizenship* (Routledge, 2018) 1-16.

[36] S Besson and A Utzinger, 'Towards European Citizenship' (2008) *J of Social Philosophy* 185-208, 196; see also L Besselink, Case Notes on *Gibraltar*, *Aruba*, *and Sevinger and Eman v The Netherlands*, (2008) 45 *Common Market Law Review* 787 –813, 801 arguing that the composite constitutional arrangement underpinning the Euro-polity is not a 'monolithic European concept of citizenship'.

citizenships in federal systems.'[37] Coming at the issue from the point of view of international law, the approach here shares much in common with the dual track approach to democratic legitimation within the context of the constitutionalisation of international law, adopted by Anne Peters in her joint work with Jan Klabbers and Geir Ulfstein.[38] As Peters argues, a democratised world order depends for its legitimacy both upon democracy *within* states and within *international institutions and processes*. One could equally argue that the evolution of the multi-level governance of citizenship within the EU is fully anchored within, or indeed at the leading edge of, the emerging phenomenon of global constitutionalism.[39]

3. Constitutional discourses of European citizenship

Building on these two dimensions, we can argue that there are two primary competing and overlapping discourses which shape our understanding of EU citizenship. In relation to the principles of free movement and non-discrimination, which represent the central pillars of the EU's single market and legal integration project, Citizenship *of* the Union has become – since the late 1990s – an important factor in legal and policy development. In many respects, it has been the activism of the Court of Justice which has contributed to this. It has been argued that in recent years the Court of Justice has rowed back on its more 'welfarist' case law, in such a way as to contribute to a resurgence of the 'market' figure.[40] Issues of social integration, 'genuine residence' and the nature of the 'good citizen' have come to the fore. These are developments and variants on the EU's well-established traditions of 'old constitutionalism'. These issues, and more, will be the focus of Section C.

The second discourse is that of citizenship *in* the Union. It concerns the limited extent to which there has been treaty-based reform since the heady days of the early 1990s, when the Member States first appeared to subscribe to the Commission's much vaunted manifesto of creating 'special rights' for Union citizens.[41] Since that time, despite numerous treaty changes up to and including the Treaty of Lisbon (several of which have led to the renumbering as well as the tweaking of the citizenship provisions), there have been relatively few significant changes and a general failure to harness the resonance of citizenship as a political and legal concept. It is none the less important to relate the story of these limited changes, which can be termed a form of 'new' constitutionalism, and these issues will be explored more fully in Section D.

However, the two discourses can and do merge in some cases, as the CJEU has continued to develop a more political concept of concept of EU citizenship. There is an enhanced linkage in more recent case law between human rights and citizenship arguments, sometimes drawing inspiration from the Treaty of Amsterdam's innovation of an Area of Freedom, Security and Justice. This has become a more influential vector of policy-making in the EU from the second decade of the twenty-first century onwards, and has influenced CJEU case law. Consequently, Section E will explore some the ways in which it is no longer useful to draw a bright line distinction between Citizenship *of* and *in* the Union. It does this principally by looking in more detail at how the concepts and practices of EU law and national

---

[37] Emphasis in the original. C Schönberger, 'European Citizenship as Federal Citizenship: Some Citizenship Lessons of Comparative Federalism' (2007) 19 *Revue Européenne de Droit Public* 61-81, 61. See also the contributions to Kochenov (n 6 above).

[38] See J Klabbers, A Peters and G Ulfstein, *The Constitutionalization of International Law* (Oxford University Press, 2009) ch 6.

[39] See J Shaw, 'The European Union and global constitutionalism', in A Lang and A Wiener (eds), *The Handbook of Global Constitutionalism* (Edward Elgar, 2017) 368-382.

[40] For an example of such a critique see S Reynolds, 'Union citizenship: Placing limitations on a human-centred approach?' in N Ferreira and D Kostakopoulou (eds) *The Human Face of the European Union. Are EU Law and Policy Humane Enough?* (Cambridge University Press, 2016) 154-186.

[41] A Wiener, '*European' Citizenship Practice. Building Institutions of a Non-State*, (Westview Press, 1998), especially chs 5 and 8.

citizenship regimes relate to each other, as this permits us to explore some of the most important tensions within the evolution of the EU's composite multi-level citizenship regime.

One final question concerns how best to explore these discourses and practices. Where are they to be found, institutionally speaking? There is, of course, a well-established argument that the CJEU has been and remains the main engine of European integration. This argument retains some traction even today, not least for the purposes of offsetting the continuing widespread ignorance about what the Court actually does, which is still to be found amongst many scholars of European integration; but it is an argument that must in truth be treated with caution as it may tend to 'overstate the integrative capacity of law and posit a view of the case law as progressing ineluctably to a particular constitutional *finalité*.'[42] The focus on the CJEU remains important, however, as it is evident that since the grandiose 'establishment' of Union citizenship in the Treaty structure through the Treaty of Maastricht, there have been relatively few institutional developments of note aimed at reconstructing the position of the individual citizen as a political subject or identifying a coherent set of common political interests among citizens. There has been, with all due respect to policy-makers and legislators, mere tinkering at the margins in terms of treaty amendments which might affect the meaning of political citizenship. What is interesting here is to draw attention to the contrast between how the powerful notion of citizenship is regularly used in a symbolic manner by the CJEU, sometimes in conjunction with human rights arguments,[43] in order to justify some of its most daring judgments from the end of the 1990s onwards, and the more sporadic and less effective invocation of citizenship questions in political debates about EU constitutionalism. This finding will be reflected in the sections which follow, as I attempt to capture both two distinct discourses of citizenship as well some of the respects in which the two discourses have moved much closer together.

Whilst investigating these questions, we need to pay attention not only to the relevant legal framework, but also to the political and geo-political backdrop that has consistently influenced the evolution of concepts of citizenship both in the EU and in its Member States. Notably, since the last edition of this volume, there have been endless challenges to the stability and effectiveness of the EU as a framework for supranational cooperation and governance. Thus we must take note of the continued impact of post-transition/post-enlargement pressures in relation to migration and development questions, the longer term effects of the financial crisis of 2008 and its impact not only upon the eurozone but also on changed patterns of east/west and south/north migration, of the so-called migrant crisis of 2015 onwards, which has impacted upon the borders of the EU in the east and along the Mediterranean, and of the assaults on democracy and citizenship which have come from a number of Member State governments which have abandoned the liberal democratic register of governing (notably Hungary and Poland). From March 2020 onwards, as this version of the chapter was being prepared, the EU and its Member States fell under the shadow of the pandemic generated by the spread of the novel coronavirus, leading to unprecedented lockdown conditions worldwide. This impacts significantly not only on issues of mobility but also upon the question of who we are as 'citizens' and how we can act as citizens in the context of a social and economic crisis.

Furthermore, throughout the chapter, we will pick up on some of the implications of one of the most significant changes to the scope of EU citizenship that has occurred since the publication of the first version of this chapter, namely the UK's departure from the European Union on 31 January 2020,

---

[42] See J Hunt and J Shaw, 'Fairy Tale of Luxembourg? Reflections on law and Legal Scholarship in European Integration' in D Phinnemore and A Warleigh-Lack (eds), *Reflections on European Integration. 50 Years of the Treaty of Rome* (Palgrave Macmillan, 2009) 93-108, 101.

[43] This has been particularly visible in cases where there is a family reunion element involved, where the Court has often been ready to invoke Art 8 ECHR to support its arguments. See for example Case C-200/02 *Chen v Secretary of State for the Home Department* ECLI:EU:C:2004:639 , Case C-127/08 *Metock and Others v Minister for Justice, Equality and Law Reform* ECLI:EU:C:2008:449 and more recently Case C-673/16 *Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* ECLI:EU:C:2018:385.

following its referendum in June 2016.[44] While Brexit has not changed the legal nature of EU citizenship, it has posed unprecedented legal and political challenges for those losing the status of EU citizen in the state in which they reside, and it has raised questions about the extent to which any aspect of EU citizenship could survive the effects of the UK's departure.[45] It is arguable, however, that had Brexit not actually occurred it could have had a significant impact on EU citizenship. This would have occurred if the EU and the Member States had chosen to implement the terms of an agreement reached in the shadow of the UK's referendum campaign to make some changes to free movement rights in order to respond to the UK's putative concerns about the burdens it felt it was taking.[46] As Nic Shuibhne has argued,[47] when analysing these provisions, they would have challenged a much more fundamental tenet of the free movement regime than the hypothetical barriers to future free movement which have dominated some parts of the case law in recent years, namely the protection of the non-discrimination rights of those who have *already* moved to another Member State. One clear insight comes from reviewing the actual and hypothetical citizenship consequences of Brexit, which is that it forces us to focus more closely upon the relationship between EU citizenship and national citizenship, including the extent to which the former bears similarities to and differences from the latter, as well as the more well-established question of autonomy.[48] It is arguable that both offer a (constitutional) promise of equality, while offering up a reality of difference and inequality.[49] Indeed, like all of those 'crises' listed above, which have raised questions about the survival of the European Union in the form in which we know it presently, Brexit remains an instance where citizenship is important because it 'can be seen as a microcosm of some of the key variables at play within the story of EU integration more generally'.[50]

C. Citizenship and the 'Old' Constitutionalism of the European Union

1. The possibilities and limits of 'Old' Constitutionalism

Both the narrative and the practices of citizenship in the context of European integration have a long history. From the 1970s onwards, drawing on what one might call the 'proto-citizenship' case law of the Court of Justice,[51] some lawyers were talking of an 'incipient form' of European citizenship.[52]

[44] For more details (placed in a wider citizenship context), see Shaw (n 8 above) chs 6 and 7.

[45] For an argument for the special status of 'former EU citizens' see E Spaventa, 'Mice or Horses? British Citizens in the EU 27 after Brexit as "Former EU Citizens"', (2019) 44 *European Law Review* 589-604. Space precludes discussion of the special case of Northern Ireland in relation to EU citizenship, but on this see S de Mars et al, *Continuing EU Citizenship "Rights, Opportunities and Benefits" in Northern Ireland after Brexit*, Report for the Irish Human Rights and Equality Commission and the Northern Ireland Human Rights Commission, March 2020.

[46] Section D, Decision of the Heads of State or Government, meeting within the European Council, concerning a new settlement for the United Kingdom within the European Union [2016] OJ C691/1.

[47] N Nic Shuibhne, 'Reconnecting Free Movement of Workers and Equal Treatment in an Unequal Europe', (2018) 43 *European Law Review* 477-510.

[48] See Garner (n 2 above); Van den Brink (n 7 above).

[49] J Shaw, '"Shunning" and "seeking" membership: Rethinking citizenship regimes in the European constitutional space', (2019) 8 *Global Constitutionalism* 425-469.

[50] Shaw (n 15 above) 93.

[51] See, eg, Case 293/87 *Gravier v City of Liège* ECLI:EU:C:1985:69; Case 186/87 *Cowan v Le Trésor public* ECLI:EU:C:1989:47.

[52] See W Böhning, *The Migration of Workers in the United Kingdom and the European Community*, (Oxford University Press, 1972), cited in B Wilkinson, 'Towards European Citizenship? Nationality, Discrimination and Free Movement of Workers in the European Union' (1995) 1 *European Public Law* 417-437, 418; R Plender, 'An Incipient Form of European Citizenship' in F Jacobs (ed), *European Law and the Individual* (North Holland, 1976) 39-52; A Evans, 'European Citizenship: A Novel Concept in EEC Law' (1984) *American Journal of Comparative Law* 679-715; G Ress, 'Free

'Citizenship', in this sense, has long been linked to the manner in which the CJEU has interpreted the provisions of the Treaty governing the free movement and non-discrimination rights of individuals, and in particular its willingness – even in advance of legislative[53] and later Treaty developments[54] – to extend the categories of persons beyond the traditional groups of economically active persons directly protected by the EEC Treaties (workers, self-employed, service-providers). Acting on this impulse, the Court took steps to institute strict scrutiny of national restrictions on free movement and practices discriminating against EU citizens, subject to the application of a proportionality test. One of the main beneficiary groups comprised students, some of whom have gone on to comment positively upon the interface between free movement, non-discrimination and citizenship in an academic capacity or to publish work highlighting the benefits of student study abroad.[55]

Citizenship, in this sense, is an important element of the 'old' constitutionalism of the European Union.[56] This is a form of constitutionalism which, whilst 'old' in the sense of being rooted in the early days of the evolution of the EU legal order, remains as central as ever to understanding whether, how and why we can regard the EU today as a constitutionalised polity, not least since the Member States – in formulating the negotiating brief for what became the Treaty of Lisbon – self-consciously disavowed the 'constitutional' mandate of the 2001 Laeken Declaration that led to the Convention on the Future of Europe and the symbols and mottos of the failed Constitutional Treaty of the mid 2000s.[57] Thus 'old' constitutionalism persists today, but alongside the reforms brought about the Treaty of Lisbon, which in turn have a paradoxical relationship with the 'new' constitutionalism of the failed Constitutional Treaty. Much of the text of the Treaty of Lisbon is the same as that of the Constitutional Treaty – but the constitutional vocation and mandate was stripped out and 'abandoned'.[58]

'Old' constitutionalism comprises not only the rules governing the relationship between the EU and the national legal orders (supremacy, direct effect, etc.), the parallel principles of respect for limited competences and of implied powers, and the rule of law and judicial protection, combined with respect for fundamental rights, but also the core animating principles of the single market without which the EU legal order would, from the outset, have lacked a *raison d'être*. 'Old' constitutionalism thus brings (transnational) citizenship into the legal framework as a quasi-single market practice through the connection to free movement law, but the idea of citizenship in turn brings human development and political angles which add resonance to the effects of the legal order and in particular to the historic focus on *economic* integration from the neo-functionalist perspective on integration, which many scholars have argued underpinned the original European Economic Community treaty.

The connection between citizenship and 'old' constitutionalism in this sense was actually reinforced both at the moment when citizenship was included in the EU Treaties and later when the Free Movement

Movement of persons, services and capital' in Commission of the European Communities (ed), *Thirty years of Community law*, Luxembourg: OOPEC, 1981, 302, has a section entitled 'Are we on the way towards creating European citizenship?'.

[53] Referring here to the three Council Directives introduced in 1990 and 1993 (now repealed and replaced by the Free Movement Directive n 19 above) which provided for the free movement of students, those of independent means, and retired persons.

[54] What was Art 8A EC, immediately after the entry into force of the Treaty of Maastricht, now Art 20(2)(a) TFEU, guaranteeing the right of citizens to move and reside freely within the territory of the Member States.

[55] PJ Cardwell, 'Does studying abroad help academic achievement?' (2019) *European Journal of Higher Education*. https://doi.org/10.1080/21568235.2019.1573695 (online in advance of publication). If a note of personal 'evolution' may be permitted, I would observe that I belong to the pre-*Gravier* era of students moving within Europe, having studied at the Institut des Etudes Européennes of the Université Libre de Bruxelles at a time when the *minerval* (or fee) imposed on foreign students and outlawed by *Gravier* (n 51 above) was still collected and when I had to obtain a residence card from the local commune where they took my fingerprints in the old fashioned way.

[56] See generally J Shaw, 'One or Many Constitutions? The Constitutional Future of the European Union in the 2000s from a Legal Perspective' (2007) 52 Scandinavian Studies, available at https://www.scandinavianlaw.se/pdf/52-21.pdf.

[57] Presidency Conclusions, Council Document 11177/1/07, Rev 1, Concl 2, 20 July 2007, Annex 1, IGC Mandate.

[58] ibid point 1 of the Mandate.

Directive of 2004 was adopted, bringing across many principles from earlier pre-Maastricht legislation such as limitations on the residence rights of non-economically active citizens. The main rights which were formally attached to the concept were precisely those transnational rights which are triggered when an individual exercises his or her free movement rights, and is resident in a Member State other than the one of which he or she is a national or, less commonly, when he or she returns to the home state after exercising free movement rights and faces obstacles to accessing, for example, welfare or educational benefits, as a result of having exercised free movement rights.[59] The right to move and reside freely in the territory of the Member States is the centrepiece of the Treaty rights (Articles 20(2)(a) and 21 TFEU), along with the right to vote and stand in local and European Parliament elections on the basis of residence, not citizenship, and under the same conditions as nationals (Articles 20(2)(b) and 22 TFEU). While free movement-related rights are dominant, they are not alone. EU law also provides rights to consular protection for EU citizens when outside the territory of the Union (i.e. premised on a different sort of movement),[60] and rights concerned with transparency and access to the institutions. However, these latter rights are not exclusive to citizens but are also given to legal and natural persons *resident* in the Member States.

The link between the main citizenship rights and the right to non-discrimination on grounds of nationality (now Article 18 TFEU) has become, over time, more evident than ever. These two cornerstones of the EU legal order have been included in the same part of the post-Lisbon Treaty on the Functioning of the Union, which combines, in its heading, 'Non-Discrimination and Citizenship'. Moreover, the CJEU has linked them together in its case law, focusing on what was previously Article 17(2) EC, a freestanding statement that 'Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby', and emphasising that the right to non-discrimination is central to the 'rights enjoyed' (now replicated in Article 20(2) TFEU). It did this first in the ground-breaking case of *Martínez Sala*.[61] The CJEU adopted an approach to protecting the rights of a longstanding and apparently well-integrated member of German society, who none the less retained Spanish citizenship, which cut across its earlier case law on migrant workers and work-seekers. It did this in the following terms:

> Article [20(2)] [TFEU] attaches to the status of citizen of the Union the rights and duties laid down by the Treaty, including the right, laid down in Article [18 TFEU], not to suffer discrimination on grounds of nationality within the scope of application *ratione materiae* of the Treaty.

This became the baseline for its subsequent case law, although its approach to the status and rights of non-economically active migrant EU citizens has evolved in recent years in ways which appear less encompassing of their protections under EU law than the earlier post-*Martínez Sala* case law. The most readily identifiable quality of citizenship *of* the Union was thus its *transnational*, not its *postnational* character, an argument which fitted well with much scholarship which has addressed the increasingly porous boundaries of *national* citizenships in the context of globalisation and Europeanisation.[62] This is precisely what led Paul Magnette, to use the term 'isopolity', drawn from the Greek traditions of city states, to describe the current basis of EU citizenship, and to deduce certain political conclusions from the choices made by the 'masters' of the Treaty:

---

[59] This issue is not dealt with in the treaties. It is described as 'passporting' rights back to the home state by AG Sharpston in C-456/12 *O. v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B* ECLI:EU:C:2014:135; the first case which established the principle was C-370/90 *The Queen v Surinder Singh* ECLI:EU:C:1992:296. For further discussion as to how these rights fit into the scheme of EU citizenship, see Coutts n 9 above.

[60] The right to consular protection has been elaborated in the form of a Directive: see M Moraru, 'An Analysis of the Consular Protection Directive: Are EU Citizens now better protected in the world?', (2019) 56 *Common Market Law Review* 417–462.

[61] Case C-85/96 *Martínez Sala v Freistadt Berlin* ECLI:EU:C:1998:217.

[62] See, eg, J Fox, 'Unpacking "Transnational Citizenship"' (2005) 8 *Annual Review of Political Science* 171-201.

> The fact that the authors of the treaty have developed this horizontal dimension of citizenship, rather than the vertical bonds between the citizens and the Union, confirms that they intended to build a 'federation of states' rather than a 'European state'. In the EU, as in the ancient leagues of Greek cities, the *isopoliteia* is more developed than the *sympoliteia*.[63]

Because of the weakness of the vertical bonds, the 'static' European citizen, in contrast to the mobile transnational one, does not appear to derive as many immediate benefits from the institution of citizenship as a fundamental building block of the European Union. We shall explore some of the questions raised by this idea of citizenship as polity-building in later parts of this section and the subsequent sections.

2. The complex interactions between citizenship, free movement and non-discrimination

This subsection explores in more detail the iterative relationship between the formalisation of a concept of Union citizenship and the evolution of free movement and non-discrimination law. There are two reasons for doing this. The first is in order to identify the continuing significance of the citizenship/'old' constitutionalism interaction, and to look at how it has evolved. The second is to identify the limits of any approach based on the potential of 'free movement', as the baseline for understanding the nature of the EU's citizenship regime, in particular so far as concerns situations which seem to occur *within* Member States and not across their boundaries. This subsection is deeply engaged with the case law of the CJEU across a wide variety of fields, but it does not lay claim either to offering a comprehensive assessment or to identifying a single line of argument that could link all of the Court's interventions in this field.

We will see, in due course, that the concept of 'free movement', as it plays out in EU citizenship, continues to evolve in ways that show it to be richer and thicker than it was in earlier times, and moving in directions which should not be seen unambiguously as either restrictive or rights-enhancing. It is possible to discern substantial variations in approach across different areas of law, especially now that the more precise legislative considerations enacted in the Free Movement Directive have come increasingly into play, so that it is easier to see what might be regarded as the intentions of the Member States. To understand these developments, it is important first to assess the implications of *Ruiz Zambrano*, which is arguably the leading case on treaty-based conceptions of citizenship of the Union.

In *Ruiz Zambrano*, the CJEU considered the relevance of EU law to the case of EU citizen children who had never exercised their free movement rights, as they were Belgian citizens resident in Belgium. These children faced the risk of leaving the EU and thus being deprived of what the CJEU came to call the 'genuine enjoyment of the substance of their rights' as EU citizens.[64] This was because their third country national parents were threatened with deportation from Belgium, almost inevitably to a third country, as they did not have a valid right to reside under national law. The position of such EU citizens was not covered by any of the relevant legislation and could only brought within the scope of EU law by an expansive interpretation of the relationship between their residence in the state of which they were citizens and their future exercise of free movement rights. In an extraordinarily brief ruling, the Court offered little 'authority' to support its arguments.[65] It referred to Article 20 TFEU, and then proceeded to ascribe to one paragraph in the *Rottmann* judgment[66] a meaning that it cannot bear. However, this 'reasoning' enabled the CJEU to ascribe to the parents, on whom the children remained, for the time being, dependent, a derived right of residence under EU law. This and other related cases were generally welcomed by scholars of EU citizenship as installing a new sense of the autonomy into this legal

---

[63] P Magnette, *Citizenship: The History of an Idea* (ECPR, 2005) 177.

[64] *Ruiz Zambrano* (n 5 above) [42].

[65] N Nic Shuibhne, 'Seven Questions for Seven Paragraphs', (2011) 36 *European Law Review* 161-162.

[66] See n 21 above.

concept, such that it should be recognised as having an freestanding constitutional status under EU law.[67] Analytically, what these cases relied upon was an individualised proportionality assessment to determine whether a restriction on EU citizenship rights (i.e. an assumption of hypothetical future free movement) engineered under national law could be justified by reference to reasons of public policy or related matters. The free movement argument was enriched by reference to the emergent legal properties of fundamental rights and the rights of the child within the EU, drawing on the emergence of the Charter of Rights as a binding source of law after the Treaty of Lisbon.[68] However, the case law since that time has not seen a unilinear trend, as there are also quite a few examples where the Court has highlighted the limits of supranational citizenship and illuminated the autonomy of the Member States to determine for themselves, for example, the boundaries of solidarity in relation to certain welfare benefits for those just arriving in the territory.[69] It has also emphasised the responsibilities of individual Union citizens in relation to their integration in the host state and the limits to their autonomy as rights-holders.

The *Ruiz Zambrano* ruling did not come out of the blue. Even prior to the Treaty of Maastricht, the CJEU was deploying a teleological interpretation which pushed at the limits of the law. It did this in the context of dealing with cases where the putative beneficiaries of free movement and non-discrimination rights fell into marginal categories, such as students, children, other persons not in the labour market such as carers and retired persons, and tourists, who were not covered by either the primary free movement provisions of the treaties or the secondary legislation then in force. We can see an early example of this approach in *Gravier*,[70] where the Court combined the principle of non-discrimination on grounds of nationality with an outline competence granted to the (then) European Economic Community in the field of vocational training (what was then Article 128 EEC) in order to conclude that 'migrant' students had free movement rights across the Member States and must be granted equal treatment with domestic students.[71] In the era of a more formalised concept of citizenship, the Court was able to add extra weight to its conclusions precisely by invoking this concept when it has to deal with the 'marginal' categories, who fall outside the group of core economic actors. In so doing, the Court has simply been making use of the extra tools put at its disposal.[72] Thus, after the entry into force of the Treaty of Maastricht, the Court overruled some of the conclusions which it reached in the era of 'mere' free movement, reaching conclusions which often placed greater weight on the intrinsic value of free movement than on states' choices about the distribution of educational benefits or other public goods.[73]

---

[67] For a thorough review of the case law and literature until 2019, see H Kroeze, 'The substance of rights: new pieces of the Ruiz Zambrano puzzle', (2019) 44 *European Law Review* 238-256.

[68] This is well illustrated in some of the later case law 'clarifying' *Ruiz Zambrano* such as Case C-133/15 *Chavez-Vilchez and Others* ECLI: EU:C:2017:354 and *K.A. and Others (Family reunification in Belgium)*, C 82/16, EU:C:2018:308.

[69] For a defence of the CJEU, see K Lenaerts and J Gutiérrez-Fons, 'Epilogue on EU Citizenship: Hopes and Fears', in Kochenov (n 6 above), 751-781. Lenaerts, who has been the President of the CJEU since 2015, is writing in this context extrajudicially.

[70] See n 51 above.

[71] J Shaw, 'From the Margins to the Centre: Education and Training Law and Policy', in P Craig and G de Búrca (eds.), *European Union Law: Evolutionary Perspectives* (Oxford University Press, 1999) 555-595.

[72] J Shaw, 'Citizenship of the Union: Towards Post-national Membership?' in Academy of European Law (ed), *Collected Courses of the Academy of European Law*, Vol VI, Book 1, (Kluwer Law International, 1998) 237-347; J Shaw, 'The Interpretation of European Union Citizenship' (1998) 61 *Modern Law Review* 293-317.

[73] A Menéndez, 'European Citizenship after *Martínez Sala* and *Baumbast*: Has European Law Become More Human but Less Social' in M Maduro and L Azoulai (eds), *The Past and Future of EU Law; The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart, 2010) 363-393, and M Dougan, 'Expanding the Frontiers of Union Citizenship by Dismantling the Territorial Boundaries of the National Welfare States?' in Barnard and Odudo (n 31 above) 119-165.

Moreover, it has developed its approach, notwithstanding the precept that matters related to so-called 'internal situations' fall outside the scope of EU law.[74] This was one of the first principles that the CJEU (re-)established in its post-Maastricht citizenship case law,[75] rejecting the contention that the creation of Union citizenship meant that there need no longer be any connection with, for example, the internal market in order for EU law to apply. The application of this principle has often been said to lead to a scenario of *reverse* discrimination, with Member States able to apply stricter rules, eg on family reunion relating to third country nationals, to its own nationals than it can to resident non-national EU citizens. Many have observed that this situation seems unjust, and it seems even more challenging in circumstances, such as those at issue in the early case of *Carpenter*,[76] where the connection between the EU citizen seeking to assert a right to family reunification (in order to remove a threat to deport his third country national spouse) and free movement rights (sometimes acting as a service provider in another Member State) seemed tenuous at the best. However, this case perhaps belongs to an earlier era of EU citizenship development which has been superseded both by concrete legislative developments, and by a subtler and more responsive body of case law, reviewed in this chapter. The discourse of citizenship has become both broader and more rounded and, in some ways, more exclusive over the years. A range of examples will help to make this point.

As regards the right of residence, which is specifically articulated within the citizenship provisions as well as in legislation, it has been illuminating to see the CJEU mustering the creative judicial interpretation required to render it directly effective.[77] In *Bidar*,[78] a case on educational benefits for students which addressed the closeness of the connection to the host state which students needed to show before they could be entitled to subsidised loans and grants, the CJEU reversed its earlier ruling in *Brown*[79] on the grounds of the value-added provided by the introduction of the citizenship provisions. Its treatment of the scope and effects of what was then Article 7(2) of Regulation 1612/68 in *Martínez Sala*[80] is hard to square with earlier case law on the extent to which persons not active in labour market could receive the benefit of the non-discrimination principle such as *Lebon*.[81]

The CJEU's approach to the differing rules on the formulation of surnames which exist in the Member States has seen a significant change of emphasis over the years. In the era of *Konstantinidis*,[82] the Court preferred to ground its judgment on the existence of an economic link (however tenuous) between the rule under challenge (German rules on the transliteration of Greek names) and the presence of the applicant on the territory of the host Member States (as a self-employed *masseur* resident and working in Germany). Thus, it opted for an approach based entirely on the risk of confusion in the marketplace faced by a person exercising their freedom of establishment under what is now Article 49

---

[74] For the standard recitation of the 'no factor linking the case to any of the situations envisaged by Community (sic) law' formula, see Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* ECLI:EU:C:2008:178 [33].

[75] C-64 and C-65/96 *Uecker and Jacquet* ECLI:EU:C:1997:285.

[76] Case C-60/00 *Carpenter v Secretary of State for the Home Department* ECLI:EU:C:2002:434.

[77] The early case law is instructive. In Case C-413/99 *Baumbast and R* ECLI:EU:C:2002:493, the CJEU concluded that the right of residence as expressed in the EC Treaty was directly effective, thus allowing the Court to scrutinise the reasonableness and proportionality of the restrictions placed upon the right of free movement, in accordance with the text of the Treaty: Art 18 EC and now Art 21 TFEU; see also *Chen* (n 43 above). This has remained especially important for those groups *not covered* by the 2004 Free Movement Directive.

[78] Case C-209/03 *R v London Borough of Ealing, ex p Bidar* ECLI:EU:C:2005:169. On workseekers see Case C-138/02 *Collins v Secretary of State for Work and Pensions* ECLI:EU:C:2004:172, as discussed in S O'Leary, 'Developing an Ever Closer Union between the Peoples of Europe? A Reappraisal of the Case Law of the Court of Justice on the Free Movement of Persons and EU Citizenship', (2008) 27 *Yearbook of European Law* 167–193.

[79] Case 197/86 *Brown v Secretary of State for Scotland* ECLI:EU:C:1988:323.

[80] See n 61 above.

[81] Case 316/85 *Lebon* ECLI:EU:C:1987:302.

[82] Case C-168/91 *Konstantinides v Stadt Altensteig* ECLI:EU:*C*:1993:115.

TFEU, rather than choosing the broad-based citizenship and fundamental rights approaches advocated by AG Jacobs who urged the Court to allow nationals of the Member States to assert their rights by stating that '*civis europeus sum*'. Later on, however, there was a significant step away from this approach. In *Garcia Avello*[83] the focus was on the 'right to a name', placed in the context of transnational lives. This concerned the right of dual Belgian-Spanish national children to register, when in Belgium, the Spanish version of their surnames, incorporating elements of the mother's and the father's name, notwithstanding Belgian rules on the 'unity' of the family surname. In this case, the applicants themselves were born and had resided throughout their lives in Belgium, raising the question as to the true transnational character of this case. In approach, if not in outcome, *Garcia Avello* effectively reversed *Konstantinidis*.[84]

The principle in play here is that Member States must exercise *their* competences, eg in the civil law sphere, in accordance with their duties under EU law, even if this impacts negatively on another aspect of national law, relating to the recognition of dual nationality. When combined with the Court's willingness to impose a low threshold for triggering the applicability of EU law, by requiring the Member States to take care not to place obstacles in the way of exercising (future) free movement rights, this generates a huge potential for the Court to intrude substantially into areas which are matters for national law (into the realms of private law and immigration law as well as into distributional matters related to public goods). Furthermore, in its approach to surnames, it could be said that the Court has ridden roughshod over some Member States' hesitancy about dual nationality and especially the recognition of nationality. In similar terms, in *Micheletti*[85] the CJEU held that while Member States remain competent to define the scope of their citizenship laws in order to determine who are their citizens, when the host state is faced with a person who has the nationality of a Member State and also the nationality of a third state, it is obliged to recognise that part of a person's dual (or multiple) nationality which gives them access to free movement and non-discrimination rights.

This is just one of the areas where we can see problematic interactions between national citizenship regimes and EU free movement law, as regards the issue of dual citizenship.[86] What happens, for example, when Member States claim that after naturalisation a person is *only* a national of the host state (as Belgium did in *Garcia Avello* in respect of children who were dual citizens by birth)? The *Lounes* case[87] deals with this tricky question. In this case, the CJEU concluded that an EU citizen who has made use of her free movement rights and then naturalises on the basis of residence and integration within a host Member State can no longer benefit from the provisions of Directive 2004/38. However, she can *still* benefit from her status as an EU citizen protected by the scope of Articles 20 and 21 TFEU. That is, the host Member State must continue to recognise her subsisting nationality of the state of origin, and give her the benefit of provisions which are no less favourable than those which apply under the Directive.

This approach to dual citizenship in relation to issues of free movement raises some difficult questions. Perhaps the greatest challenge is that it threatens inconsistency, given the diverse rules applied by the Member States regarding both naturalisation and recognition and acceptance of dual nationality. The *Lounes* approach, while superficially attractive in terms of special protection of the interests of those who go so far as to naturalise in the host state, has an unhelpful aura of arbitrariness about its scope of application. If the facts were reversed, the position would be different. *Lounes* involved a Spanish woman acquiring UK citizenship while keeping her Spanish citizenship (as permitted under UK law),

---

[83] Case C-148/02 *Garcia Avello v Belgian State* ECLI:EU:*C*:2003:539; see also Case C-353/06 *Grunkin and Paul v Grunkin-Paul and Standesamt Stadt Niebüll* ECLI:EU:C:2008:559.

[84] For a more general discussion of the citizenship case law see J Shaw, 'A View of the Citizenship Classics: *Martínez Sala* and Subsequent Cases on Citizenship of the Union' in Maduro and Azoulai (n 73 above) 356-362.

[85] See n 26 above.

[86] DAJG de Groot, 'Free Movement of Dual EU Citizens', (2018) 3 *European Papers* 1075-1113.

[87] Case C-165/16 *Lounes v SSHD* ECLI:EU:C:2017:862.

and yet still benefiting from family reunion with her Algerian partner in the UK under EU citizenship law. Suppose that a British woman resident in Spain were to acquire Spanish citizenship by naturalisation. The stricter requirements in relation to dual citizenship in Spain would mean that she would not be able to continue benefiting from her UK citizenship under Articles 20 and 21 TFEU because, at least as far as the Spanish authorities would be concerned, she would have renounced that nationality.[88] It would therefore not be recognised and presumably she could then be denied the protection of EU law.

In a different domain, as Agustin Menéndez noted at an early stage, the Court's activism in the field of social, welfare and educational benefits inevitably raised doubts, because of its capacity to disturb solidaristic bargains *within* (welfare) states, in the interests of promoting the development of human capital *between* them.[89] The intrusiveness of the Court was particularly striking where the case law allowed citizens to export benefits which could only previously be enjoyed within the territory of the state, as it did in cases such as *Tas Hagen*[90] and *Morgan*.[91] In those cases, the national restrictions on export have failed the test of proportionality imposed by the Court of Justice. However, many of the judgments in question do not find ready acceptance at national level on the part of institutional actors[92] and could be said to have the effect of hollowing out national citizenship regimes without replacing them with equivalent protection. The justification given in cases such as *Grzelczyk*[93] to the effect that it is reasonable to expect a certain degree of solidarity *between* states, when it comes to balancing out the consequences of the mobility of students can simply ring hollow, especially in an era of straitened public finances or post-financial crisis 'austerity'. Perhaps the CJEU has picked up on these concerns when it has made use of an integration test as the basis for determining the proportionality of national rules which, for example, apply a residence test in order to substitute for traditional tests based on nationality.[94] Here the Court has indicated that a certain length of residence as an indication of a genuine link with the host state is a reasonable restriction for Member States to impose.[95]

Elsewhere, the CJEU has given a broad interpretation of the rights of mobile EU citizens to be joined by their third country national family members,[96] including on return to the country of origin when seeking to 'passport' their rights, subject to the main condition that the residence in the host state must be 'genuine'.[97] In such cases, the CJEU has continued to draw on citizenship rights in primary law as well as upon fundamental rights sources. Furthermore, it insisted that the UK – while still a Member State – must accept a valid residence card issued under the Free Movement Directive to a third country national in another Member State as a sufficient document for them to enter the UK, along with their UK citizen/free moving spouse.[98]

---

[88] R Rubio-Marín et al, *Country report on citizenship law: Spain* (GLOBALCIT/EUI, 2015) https://cadmus.eui.eu/handle/1814/34480. It is sometimes argued that Spain is *de facto* tolerant of dual citizenship, but this point would not assist a person in these circumstances as the *de jure* situation would still mean that the Spanish authorities could legitimately assume that such a person is *only* a Spanish citizen after naturalisation, on the grounds that the requested renunciation of the original nationality could be assumed to have taken place.

[89] See Menéndez (n 73 above) and Menéndez and Olsen (n 4 above).

[90] Case C-192/05 *Tas-Hagen* ECLI:EU:C:2006:676.

[91] Case C-11/06 *Morgan v Bezirksregierung Köln* ECLI:EU:C:2007:626.

[92] Reactions to *Metock* (n 43 above) offer a good example: see A Lansbergen, 'Metock, implementation of the Citizens' Rights Directive and lessons for EU citizenship' (2009) 31 *Journal of Social Welfare and Family Law* 285-297.

[93] See n 10 above.

[94] For an extended discussion of the use and transformation of the concept of social integration in EU citizenship law, see Coutts (n 9 above).

[95] See *Bidar* and *Collins* (n 78 above).

[96] See *Metock* (n 43 above).

[97] See *Coman* (n 43 above).

[98] Case C-202/13 *McCarthy v SSHD* ECLI:EU:C:2014:2450.

Furthermore, the second decade of the twenty first century has seen more shifts in judicial approach, which have tweaked the evolving conception of Union citizenship. The CJEU has increasingly accentuated a notion of the 'good citizen' and highlighted the importance of 'social integration' on the part of the migrant EU citizen in the host state.[99] In particular, the Court ruled in the *Dano* case[100] that the 'citizenship protection' of equal treatment does not extend as far as requiring a Member State to grant welfare benefits to a national of another Member State who does not have a right to reside under the Free Movement Directive (because of being economically inactive). The focus in *Dano* is on the limits of the Directive, not the empowering possibilities of EU citizenship under the treaties. The rule applied is a blanket one, and pays no regard to the individual situation of the EU citizen in question, and does not demand an individualised proportionality assessment. This approach, repeated in subsequent case law,[101] has been criticised by some scholars as needlessly positioning citizenship rights as being economic only in focus and raising spectres of a fear of what is sometimes dismissively termed 'poverty mobility' or 'benefit tourism', even though there is scant evidence of this occurring on a substantial scale.[102] This could be seen as the resurgence of the 'legacy of market citizenship',[103] explored by Michele Everson in the early 1990s and proving to be even more durable than might have been expected. Others have suggested that it shows that the CJEU is intensely aware that it should not be introducing what might be thought of 'stealth treaty amendment' by the back door.[104]

The CJEU has also adopted a restrictive approach to the scope of the protections offered by EU citizenship in relation to the capacity of Member States to deport certain migrant EU citizens who have committed serious crimes (and/or who are not strongly integrated in the host state).[105] These limitations can be seen as pointing to the limits of a free movement-based approach to understanding the overall scope and character of EU citizenship.[106] In relation to the right of permanent residence under Article 16 of the Free Movement Directive and the accumulation of the necessary periods of residence relevant to the acquisition of that status, especially in relation to those non-national EU citizens or their family members who have served periods of imprisonment, the Court has emphasised the issue of integration in the host society as an element of the calculation. Articulating a strict approach, the Court has stated that 'the imposition of a prison sentence by the national court is such as to show the non-compliance by the person concerned with the values expressed by the society of the host Member State in its criminal law'.[107] It is logical, therefore, for the Court to suggest that it is right that national courts should disregard periods of imprisonment for the purposes of calculating periods of residence necessary for permanent residence, subject only to considerations of rehabilitation.[108] As Nic Shuibhne suggests, 'permanent

---

99 See Coutts (n 9 above).

100 C-333/13 *Dano* v *Jobcenter Leipzig* ECLI:EU:C:2014:2358.

101 Case C-67/14 *Jobcenter Berlin Neukölln v Alimanovic* ECLI:EU:C:2015:597; Case C-299/14 *Vestische Arbeit Jobcenter Kreis Recklinghausen v García-Nieto* ECLI:EU:C:2016:114.

102 C O'Brien, '*Civis Capitalist Sum*: Class as the new guiding principle of EU free movement rights', (2016) 53 *Common Market Law Review* 937–978.

103 M Everson, 'The Legacy of the Market Citizen' in J Shaw and G More (eds), *New Legal Dynamics of European Union* (Oxford University Press, 1995) 73-90.

104 This is evident from Lenaerts' (and co-author's) invocation of this risk in Lenaerts and Gutiérrez-Fons (n 69 above) 751. For the more general 'democratic' argument against the CJEU's 'excessive' constitutionalisation of the treaties, see FW Scharpf, 'Towards a More Democratic Europe: De-Constitutionalization and Majority Rule', (2017) 15 *Zeitschrift für Staats- und Europawissenschaften* 84-118.

105 Case C-165/14 *Rendón Martin* ECLI:EU:C:2016:675; C-304/14 *CS* ECLI:EU:C:2016:674, although compare Joined Cases C-316/16 and C-424/16 *B v Land Baden-Württemberg*; *SSHD v Vomero* ECLI:EU:C:2018:256 on the possibilities of rehabilitation.

106 Sarmiento and Sharpston (n 22 above).

107 Case C-378/12 *Onuekwere* ECLI:EU:C:2014:13. See also *B and Vomero* (n 105 above).

108 *B and Vomero* (n 105 above).

residence is … conceived as a reward and certain citizens are excluded from attaining it.'[109] Alternatively, as Stephen Coutts puts it, Union citizenship remains an 'ever-evolving status',[110] and what we have seen in recent years has been a transformation of the 'social integration paradigm' that has long been recognised as lying at the heart of the idea of free movement within a single market. In sum, as Nic Shuibhne observes,[111] while the 'exercise of free movement does generate a sustained shield of protection in these situations….it is not obligation free'. Coutts takes this point further by exploring in detail the reworking of the 'social integration paradigm', 'to emphasise the role of the individual and the responsibility he has for his integration in the society of the host Member State'.[112]

Yet at the same time, an emerging body of case law is concerned with the legal treatment of persons protected under EU citizenship law (migrant EU citizens and their family members), who are threatened with extradition from the *host* state to a third country. These cases engage the complex relationship between EU citizenship law and the law relating to the Area of Freedom, Security and Justice, which includes measures such as the European Arrest Warrant, as well as an external dimension incorporating international engagements such as the Treaty between the EU and the USA on extradition. In such cases, the CJEU has instituted a preference for communication between the Member States as regards the position of the person requested, in order to protect the principles upon which EU citizenship is based. In these cases, it has installed a primary concern with the interests of the EU citizen in having access to, or remaining within, the territory of the European Union, drawing out one of the main implications of the *Ruiz Zambrano* case.[113]

At the same time there have been critics who have suggested that, in a judgment such as *Ruiz Zambrano*, the CJEU may have overstepped the limits of the established vertical distribution of powers within the Treaties by effectively limiting the immigration sovereignty of the Member States.[114] Perhaps in response to these critics (and in recognition of the reaction within some Member States), the CJEU subsequently closed off some avenues for exploiting the opening it created in *Ruiz Zambrano*, by declaring that it had articulated legal remedies which were an option only for exceptional situations.[115] However, it eventually returned to a slightly more expansive approach by probing further the possibilities that *Ruiz Zambrano* opened up for protecting the essence of Union citizenship, exploring in more detail both the concept of dependency that lies at the heart of relationship between the Union citizen and the third country national (which provides particular protection for children) as well as the obligations that lie on Member States to undertake individualised assessments of the situation of those potentially covered by a *Zambrano*-like situation.[116]

It remains to reflect how far might this line of thinking about protecting the substance of rights could potentially go. What is, for example, the position in relation to rights to vote in *national* elections, which are not covered as part of the package of the EU electoral rights, and which may be lost as a consequence of free movement? Across the world, very few countries give the right to vote in national elections to resident non-nationals.[117] Within the EU (post-Brexit), there are no longer any arrangements in place for

---

[109] Nic Shuibhne (n 20 above) 497.

[110] Coutts (n 9 above) 339.

[111] Nic Shuibhne (n 20 above) 503.

[112] Coutts (n 9 above) 339.

[113] Nic Shuibhne (n 24 above).

[114] Menéndez and Olsen and Bellamy (n 4 above).

[115] C-40/11 *Iida v Stadt Ulm* ECLI:EU:C:2012:691 [71]; see also Case C-256/11 *Dereci v Bundesministerium für Inneres* ECLI:EU:C:2011:734.

[116] See Coutts n 9 above. The point is illustrated by cases such as *Chavez Vilchez* and *K.A. and Others* (n 68 above).

[117] JT Arrighi and R Bauböck, 'A multilevel puzzle: Migrants' voting rights in national and local elections', (2017) 56 *European Journal of Political Research* 619-639; SD Schmid et al, 'Non-universal suffrage: measuring electoral inclusion in contemporary democracies', (2019) 18 *European Political Science* 695–713.

voting by nationals of other Member States.[118] There are also gaps in the coverage of *external* voting rights, which is another mechanism covering the interests of non-resident citizens via the right to vote in the home state. This point was recognised by the European Commission in a 2014 recommendation to Member States encouraging them to address the disenfranchisement consequences of free movement.[119] Does the absence of effective coverage discourage free movement, thus rendering this an issue that potentially falls within the scope of EU law and a matter on which the CJEU could adjudicate (for example, by imposing a proportionality test for judging the legitimacy of the national restriction)?[120] The argument in favour of viewing voting in national elections as part of the 'substance' of EU citizenship (i.e. following the idea trailed in *Ruiz Zambrano*) is captured in the Commission Communication accompanying the 2014 recommendation on disenfranchisement, which refers to the 'founding premise of EU citizenship'.[121] On that view, measures restricting national voting rights to citizens or resident citizens alone could be seen as being within the scope of EU law and thus requiring justification on public interest grounds. Against that argument, it may be claimed that the fear of losing voting rights in the future is relatively 'remote' from any decision about exercising free movement rights and that any judicial decision effectively extending national voting rights to non-national EU citizens would be a case of the CJEU overstepping the mark as a court and bringing about 'stealth treaty amendment'. If this gap in political representation continues to be regarded as a barrier to free movement, then a number of possible routes exist to eliminating what might be regarded as an anomaly, via universal expatriate voting, proposals for automatic naturalisation, or perhaps some form of mutual recognition of electoral rights amongst the Member States.[122] And indeed *if* it is a barrier to free movement, then that might imply that the EU legislature *ought* to have some power to regulate in order to harmonise national laws or to remove the barrier. However, while it is arguable that an amendment to the treaties via Article 25 TFEU may be legally conceivable, to suggest that a treaty change comparable to the introduction of the local and European Parliamentary electoral rights now found in Article 22 TFEU is politically conceivable at present seems to depart radically from reality.[123]

Having started with the premise of the classic postulate of 'old constitutionalism' as a creature of judge-made law, via an extended reflection on the complex highways and byways of the CJEU's interpretations of the relevant material, we arrive now at a meeting point between case law development of citizenship *of* the Union and the arrested development of a formal constitutional concept of citizenship *in* the Union. This is therefore an appropriate point at which to turn our attention away from the case law of the CJEU on citizenship *of* the Union in order to look more closely at the role of treaty provisions in relation to citizenship *in* the European Union.

D. Citizenship: Lost in Transition from 'Old' to 'New' Constitutionalism

This section will endeavour to show how citizenship – which developed as a creature of the basic transnational character of the EU, where it has generally operated in a positive relation with the EU's

---

[118] Previously, all such arrangements involved the UK in some way or another: votes in UK elections for Irish and Commonwealth citizens (i.e. Maltese and Cypriot citizens); votes in Ireland for UK citizens.

[119] 2014/53/EU: Commission Recommendation of 29 January 2014 addressing the consequences of disenfranchisement of Union citizens exercising their rights to free movement [2014] OJ L32/34.

[120] D Kochenov, 'Free Movement and Participation in the Parliamentary Elections in the Member State of Nationality: An Ignored Link?' (2009) 16 *Maastricht Journal of European and Comparative Law* 197-233.

[121] European Commission, 'Communication addressing the consequences of disenfranchisement of Union citizens exercising their right to free movement', COM(2014) 33, final, 7.

[122] See Shaw (n 50 above) 189-208. J Blatter and R Bauböck (eds) *Let me vote in your country, and I'll let you vote in mine : a proposal for transnational democracy*, Forum Debate, Working Paper, EUI RSCAS, 2019/25, Global Governance Programme-340, GLOBALCIT, [Global Citizenship], https://cadmus.eui.eu/handle/1814/62225.

[123] See the views and ideas canvassed in Part I: Should EU Citizens Living in Other Member States Vote There in National Elections? in Bauböck (n 11 above) 20-90.

'old' legal constitutionalism – has not yet found a secure and comfortable position in continuing debates about a 'new' constitutionalism for Union. This is perhaps unsurprising, as a continental scale polity can hardly garner the necessary legitimacy based on a focus on the transnational citizen alone. The key reference point in what follows is provided by the last set of major changes to the overall treaty framework introduced by the Treaty of Lisbon, but the evidence can be drawn from throughout the uneasy period that followed the conclusion of the Treaty of Nice in 2000.[124] While an effective – albeit generally non-political – concept of citizenship seems to be strongly anchored in the EU's 'old' constitutionalism of the single market and the supranational legal order, in particular through the connection to transnational market and quasi-market practices, there has not been a similar breakthrough to find a comfortable understanding of what it means, in political terms, to be a citizen of a euro-polity founded on a formal constitutional framework. This is in part, of course, because EU citizenship does not mean the same as being a citizen of a 'national' polity. On the contrary, what we probably need is some sort of new vocabulary (as well as perhaps even new institutions) with which to address such questions of belonging which breaks the bonds of citizenship's binary divides of inclusion and exclusion.[125] This Section explores these questions in more detail, by reference to some examples drawn from recent institutional practice.

1. Citizenship and democracy

It remains an open question how concepts of democracy and democratic legitimation, as key citizenship practices, can be translated in the context of the plural and multi-level character of euro-polity, with its demand for multiple and linked approaches to questions of accountability to stakeholders, including citizens, at the supranational, national and indeed the subnational levels.

Much of the early academic debate on the centrality of concepts of citizenship in the context of polity-building focused on the *demos*/no *demos* debate. For some,[126] debating European citizenship is a futile exercise, as there cannot be a European people for whom there is something like a European state. Thus, in the absence of a common identity based on a 'story of peoplehood',[127] there cannot be a 'European' citizenship. Such a notion could only ever be artifice. For others, the *telos* of European integration demands a strong concept of citizenship and although it is acknowledged that at present it is in a state of becoming, rather than the finished article, its construction none the less remains the central normative challenge for the Union, the Member States and political elites.[128]

In recent years, the concept of *demoi*-cracy as opposed to *demo*-cracy has received particular attention, including from the President of the CJEU, writing in a scholarly extrajudicial capacity.[129] The widely used definition of *demoi*-cracy is the one offered by Kalypso Nicolaïdes: it is 'a Union of peoples,

[124] For the texts of the treaties currently in force, see https://eur-lex.europa.eu/collection/eu-law/treaties/treaties-force.html.

[125] See, eg N Walker, 'Denizenship and Deterritorialisation in the European Union', in H Lindahl (ed), *A Right to Inclusion and Exclusion* (Hart, 2009) 261-272.

[126] See, for example, a return to the *demos*/no *demos* arguments under the shadow of the German Federal Constitutional Court's decision on the constitutionality of the Treaty of Lisbon: D Grimm, 'Comments on the German Constitutional Court's Decision on the Lisbon Treaty. Defending Sovereign Statehood against Transforming the European Union into a State' (2010) 5 *European Constitutional Law Review* 353-373.

[127] R Smith, *Stories of Peoplehood. The Politics and Morals of Political Membership* (Cambridge University Press, 2003).

[128] M Aziz, 'Implementation as the Test Case of Union Citizenship' (2009) 15 CJEL 281-298; see Kostakopoulou (n 2 above) on the need for Union citizenship to remain experimental in character.

[129] Lenaerts and Gutiérrez-Fons (n 69 above).

understood both as States and as citizens, who govern together but not as one'.[130] As I have argued elsewhere,[131] *demoi*-cracy

> offers a useful basis for understanding how democratic legitimacy operates in polities comprising more than a single *demos* both in descriptive terms and as an ideal-type setting a normative standard of non-domination amongst the respective *demoi*. Normatively, when the EU is understood as a *demoi*-cracy, this means that democratically legitimate outcomes ought to emerge from the interplay of states, states peoples and citizens of the EU, not just from any single authority or constituent power.

In this chapter, it is not possible to delve deeply into these rich academic debates. All we can do, within these confines, is identify and analyse relevant institutional practices which incrementally constitute the Union's emergence as a polity which is more than simply an international organisation grounded on treaties between sovereign states. The focus here is on how citizenship concepts have been used in legal and constitutional contexts and on the contestations and debates which have occurred around such use. The aim is to draw out some of the patterns and exchanges between key actors, with a view to understanding how these key ideas have developed. If there is a political conclusion to be drawn, then it is this: citizenship still has an uncertain 'constitutional' role in the European Union and this can be attributed not just to uncertainties about the place of 'democracy' in the EU but also, at least in part, to the uneasy shift which has occurred between 'old' and 'incremental' versions of European constitutionalism based on the classic law/integration interface and the 'newer' more formalised ones, epitomised by the grand and ultimately misplaced 'dreams' of a 'Constitution for Europe's citizens' trailed in the Laeken Declaration of December 2001. This was a dream which went on to dominate the Convention on the Future of Europe and even the intergovernmental conference which finalised the draft produced by the Convention into a formal treaty text, until it turned to nightmare with the negative referendums on the Treaty establishing a Constitution for Europe in France and the Netherlands in spring 2005. At that moment, it became clear that whatever Europe's citizens expected of the Union, it was not reasonable for elites to expect citizens to deliver an easy acceptance of a ready-made 'European constitution', perceived as having been imposed with minimum consultation and little democratic legitimacy.

After a brief discussion of what might be thought of as a semantic change in how the EU Treaties express the relationship between national citizenship and citizenship of the Union, the main part of the discussion proceeds by looking more closely at political citizenship in the Union. Here we can consider the case law in which the CJEU has so far had an opportunity to engage with the right to vote in European Parliament elections. A related question concerns the significance of the fact that the Treaty of Lisbon, in contrast to the proposals contained in the Constitutional Treaty, does not refer to the 'will' of the citizens in relation to the establishment of the Union. Finally, we turn to some important reforms in the area of democratic procedures introduced by the Treaty of Lisbon.

2. The position of citizens within Europe's evolving political union

Citizenship of the Union makes it first appearance in the EU Treaties in the form of Article 9 TEU. This provides:

> In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a

---

[130] See K Nicolaïdis, 'The Idea of European Demoicracy', in J Dickson and P Eleftheriadis (eds.), *The Philosophical Foundations of European Union Law* (Oxford University Press, 2012) 247-274. See also S Besson, 'Deliberative demoi-cracy in the European Union: Towards the Deterritorialization of Democracy' in S Besson and JL Marti (eds), *Deliberative Democracy and its Discontents: National and Post-National Challenges* (Ashgate, 2006) 181-214; K Nicolaïdes, 'We, the Peoples of Europe ...' (2004) 83 Foreign Affairs 97-110.

[131] J Shaw, 'The quintessentially democratic act? Democracy, political community and citizenship in and after the UK's EU referendum of June 2016', (2017) 39 *Journal of European Integration* 559-574.

> Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it.

The final two sentences, drawn from the text of Article 20(1) TFEU, were included in the Treaty of Lisbon at the behest of the European Parliament representatives in the IGC who were worried that earlier versions of the text omitted citizenship altogether from the TEU.[132] The parliamentarians had adopted citizenship of the Union as a political priority because of its symbolic importance.[133] It is obviously clumsy to have such textual repetition between the TEU and the TFEU, but it was unavoidable in this particular context given what the parliamentarians saw as a serious threat to the status of citizenship if it was not mentioned in terms in the TEU itself.

It is interesting to note that the provisions governing the nature of the European Parliament in the amended Treaty on European Union refer post-Lisbon to 'citizens', where previously the analogous provisions in the EC Treaty referred to the 'people'. Article 14(2) TEU provides that: 'The European Parliament shall be composed of representatives of the Union's citizens…'; Article 10(2) TEU states that 'citizens are directly represented at the Union level in the European Parliament'; and Article 10(3) TEU states that 'Every citizen shall have the right to participate in the democratic life of the Union.' Article 14(3) provides for Members of the European Parliament to be elected 'for a term of five years by direct universal suffrage in a free and secret ballot', although it omits a reference to the role of citizens here which appeared in the predecessor Article I-19(2) of the Constitutional Treaty.[134] There is also a reference to universal suffrage in connection with the European Parliament in Article 39 of the Charter of Fundamental Rights.[135] The Charter is now recognised under Article 6(1) TEU as a legal source of equal standing to the Treaties and the Member States in particular are bound by Article 3 of Protocol No. 1 of the ECHR.

These are staging points in a gradual process of recognition of the principle of universal suffrage under EU law, which had already began in the mid 2000s with two important judgments of the Court of Justice in the *Gibraltar* and *Aruba* cases.[136] It is already implicit in the Court's judgments in these politically sensitive cases about the scope of voting rights in European Parliament elections that European citizens have a right, as a matter of democratic principle, to vote for 'their' parliament. This emerged especially clearly from the *Aruba* case concerned with the right of EU citizens resident in Aruba (a dependent territory of the Kingdom of the Netherlands which is not part of the European Union) to vote in European Parliament elections. What is now Article 22 TFEU only provides explicitly for an *equal treatment* right, whereby nationals of the Member States resident in *other* Member States have the right to vote in European Parliament under the *same conditions* as nationals. There has, hitherto, never been a text in the EU Treaties which states, in terms, that 'the citizens of the Union shall elect the members of the European Parliament.' However, the conclusion can be drawn from the *Aruba* case, that citizens of Union cannot be deprived of their right to vote in European Parliament elections, if the national legislation which excludes them from the franchise fails a basic rationality test because, as in this case, the Arubans could gain a right to vote in European Parliament elections not only by moving to the Netherlands proper, but also by moving to a third country and taking advantage of Netherlands

---

[132] See the interviews with two of the European Parliament representatives at the 2007 IGC (Enrique Baron Crespo, Elmar Brok) for the webzine of the Young European Federalists, available at http://www.taurillon.org/IGC-on-the-Reform-Treaty-Interview-with-MEPs.

[133] See also the emphasis placed on citizenship by A Duff, the third of the 2007 European Parliament IGC representatives, in A Duff, *The Struggle for Europe's Constitution* (Federal Trust, 2005).

[134] See [2004] OJ C310/1.

[135] See the Charter as adapted post-Lisbon: [2007] OJ C303/1.

[136] Case C-145/04 *Spain v United Kingdom (Gibraltar)* [2006] ECR I-7917; *Eman and Sevinger* (n 17 above). For an extended discussion of these cases see J Shaw, 'The political representation of Europe's citizens: Developments' (2008) 4 *European Constitutional Law Review* 162-186. See also Besselink (n 34 above).

external voting rights.[137] This amounts to recognising the right to vote in European Parliament elections as a normal incident of EU citizenship, even if this is not explicitly stated in the Treaties. In fact, the Advocate General explicitly made this point in his joint Opinion on the two cases of *Gibraltar* and *Aruba* and he argued that the right to vote in European Parliament elections is *the most important* EU citizenship right.[138]

It was only later in the case of *Delvigne* that the CJEU explicitly stated that citizens did have the right to vote in European Parliament elections, and it did this by reference to Article 39(2) of the Charter of Fundamental Rights and Article 14(3) TEU, and thus not by reference to the provisions on citizenship in the TFEU. Since both provisions note that the European Parliament shall be elected by direct and universal suffrage, it is easy to accept the correlate of a right on the part of EU citizens to elect the Parliament even though it is not stated explicitly.[139] However, this case also made clear that like so many other citizens' rights, the right to vote in European Parliament elections is subject to a proportionality test, so that Member States may impose, for example, probity tests for electoral rights, so as to exclude some, if not all, prisoners from voting.[140]

The shift from the language of 'people' to that of 'citizens' in relation to the European Parliament raises important questions about the allocation of seats. The principle of 'degressive proportionality' was enshrined in Article 14(2) TEU, and its application caused some difficulty with respect to the allocation of seats to Italy during the 2007 IGC. This led to establishment of a 'fudge' whereby the European Parliament would constitute 750 members, plus one – the President – in order to accommodate one extra MEP for Italy. Hitherto the calculation base for Member State populations, both for EP purposes and for purposes of QMV in the Council of Ministers has been that of the number of residents rather than the number of nationals. This avoided difficult questions about the divergences in national laws on citizenship acquisition. For example, if a Member State has national rules which make acquisition of national citizenship so hard that this artificially deflates the number of national citizens, should this be taken into account when assessing the relevant numbers for purposes of calculating MEPs or QMV weightings?[141] There are also more advanced statistical methods available for estimating the number of residents present on the territory between the dates of comprehensive national censuses than there are for calculating the number of national citizens. Even so, Italy was successful in raising a specific issue about numbers of citizens abroad as part of the array of arguments it used to lay claim to the same number of MEPs in the 2009-2014 Parliament as the UK, where the principle of degressive proportionality seemed to demand that it should have one less. Nothing significant does seem to have

---

[137] A different scenario is presented, since the UK's withdrawal from the European Union, by the case of Irish citizens resident in Northern Ireland. Like all other Irish citizens resident outside Ireland, they have no external voting rights in European Parliament, but if they were resident in another EU Member State they could vote on the basis of residence in those countries. The argument exists that this group, given the special status given to Northern Ireland under EU law, the Withdrawal Agreement, and UK and Irish constitutional law (especially in relation to matters of citizenship) ought (by the standards of rationality and proportionality applied in the case law) to be included within the Irish electorate, perhaps by analogy with the inclusion of Gibraltarians in the UK electorate after the case of *Matthews v UK* (Application 24833/94 [1999] 28 EHHR 361) in the European Court of Human Rights. I am grateful to Niamh Nic Shuibhne for reminding me of this important issue.

[138] See Joint Opinion of AG Tizzano to the *Gibraltar* and *Aruba* of 6 April 2006 ECLI:EU:C:2006:231 [67]: 'it can be directly inferred from Community principles and legislation as a whole, thus overriding any indications to the contrary within national legislation, that there is an obligation to grant the voting rights [in European elections] to citizens of the Member States and, consequently, to citizens of the Union.'

[139] *Delvigne* (n 29 above).

[140] S Coutts, 'Delvigne: a multi-levelled political citizenship', (2017) 42 *European Law Review* 867-881. See also K Lenaerts, 'EU Citizenship and Democracy', (2016) 7 *New Journal of European Criminal Law* 164-174, warning against an overwide fundamental rights 'incorporation' doctrine for the EU as a result of *Delvigne*.

[141] See the discussion by A Duff in a Working Document for the European Parliament Committee on Constitutional Affairs on the Election of the European Parliament (III), PE400.478v01-00, 18 January 2008 at 2-3.

changed as a result of this shift from 'people' to 'citizens', although in a presentation to the European Parliament's the Committee on Constitutional Affairs, Andrew Duff laid out some interesting ideas:

> [D]o we follow James Madison's belief that, in the republic, parliamentary representation is more of a birthright than a civic privilege? The Madisonian approach suggests that the European Parliament represents not only *de jure* EU citizens (as formally established by the EU Treaty), but that it also represents, and has a duty of care towards, anyone else who abides in the territory of the Union […]. That being the case, the traditional method of distributing seats in the Parliament on the basis of total population […] is the right one and should not be amended.[142]

Finally, the question arises as to whether the rewording in the Treaty of Lisbon would make any difference if the issues such as those which arose in the *Gibraltar* case came before the CJEU once again. In that case, the Court of Justice was faced with a challenge by Spain to the UK's policy of including Commonwealth Citizens in its normal franchise for European Parliament elections. The particular scenario at issue concerned Gibraltar, which was only first included in European Parliament elections in 2004, following a case brought by Gibraltarians before the European Court of Human Rights contesting their prior exclusion from the framework of European Parliament elections in the United Kingdom.[143] The proceedings before the Court of Justice encompassed an interesting discussion by Advocate General Tizzano of the provisions of the EC Treaty on the European Parliament. He concluded that the reference to 'peoples' of the Member States in Articles 189 and 190 EC should be treated as largely coterminous with the citizens or nationals of the Member States (thus avoiding alternative 'ethnic' rather than 'civic' connotations of the term 'peoples'), which would suggest that it makes little difference that the TEU post-Lisbon now explicitly refers to citizens. The Court concluded that there was nothing in the text of the treaties at they were at the time, to suggest that it was not reasonable for Member States, which had such a constitutional tradition, as the UK does in relation to Commonwealth citizens, to extend the right to vote in such elections to persons with a close connection to the territory, recognised in national law. The Court noted that other EU 'citizenship' rights are non-exclusive in character, such as the right to apply to the Ombudsman, or to petition the European Parliament, which can be exercised by natural and legal persons resident in the Union.[144] Such an argument, which focuses on the civic connotations of 'people' as used in the present version of the EC Treaty, pre-empts rather effectively the possibility of relying upon the shift, in Article 10 TEU, from 'people' to 'citizens' as a significant change in terminology, since the non-exclusivity of these key participatory citizenship rights is also maintained in the Treaty of Lisbon. The Advocate General doubted, in any event, whether the expression 'peoples of the States brought together in the Community' in Article 190(1) EC was intended to have a 'precise legal meaning'.[145]

3. The 'Will' of Citizens

Article I-1 of the Constitutional Treaty, which sought to 'establish' the refounded European Union, sought to reflect 'the will of the citizens and the States of Europe to build a common future'. One of the most prominent dimensions of the passage from the Constitutional Treaty to the Treaty of Lisbon was the explicit 'abandonment' of the constitutional idea, formalised in the detailed mandate for reform rather than refoundation, agreed at the June 2007 European Council.[146] Unsurprisingly, the Madisonian ideal of constitutive self-government expressed in Article I-1 CT was excised from the more modest provisions of the Treaty of Lisbon as part of that 'abandonment'. On this journey, it accompanied other

[142] Duff (n 141 above) 3.

[143] *Matthews v UK* (n 137 above).

[144] See Arts 227 and 228 TFEU.

[145] Opinion AG Tizzano (n 138 above) [80].

[146] Presidency Conclusions, Council Document 11177/1/07, Rev 1, Conclusion 2, 20 July 2007.

elements of formal constitutionalisation such as the reference to the primacy of Union law, the flag, the symbols and the motto.

The Treaty of Lisbon, not least in the manner in which it was negotiated via the detailed mandate negotiated under the German Presidency and the perfunctory IGC held under the Portuguese Presidency, not to mention the marked preference for parliamentary ratification insisted upon in every Member State apart from Ireland, seemed to offer the authoritative reassertion of the principle that the Member States are the ultimate masters of the Treaties. At the same time, those elites thought that by dropping the blatant state-like symbols they were appeasing some of the anxieties expressed in the 2005 Dutch and French referendums. The need for two referendums in Ireland seems, at least in part, to suggest that matters are not as simple as that. While this chapter has already reflected upon two different sources of constitutional evolution in the Union, namely treaty amendments and judicial activism, the Irish Referendum saga reminds us that there is still the issue of popular consent to be taken into consideration. It is clear that one strand of argument which objects, on democratic and participatory grounds rather than eurosceptic grounds, to the denial of referendums in other states played at least a minor theme in the first Irish referendum campaign. Whatever the political elites of the European Union and at least some of its Member States might wish, it is clear that the question of the proper role of popular consent in relation to the further development of European integration is not an issue which is simply going to dissipate on the back of a set of assurances to national parliaments that treaty amendments are a good thing.[147] It may be the case that the concerns that citizens have too little influence over the direction and content may gradually ebb away if and when European Parliament elections come to be perceived as significant moments of 'European' democracy (as opposed to being second-order national elections with ever lower participation rates as is generally the case at present),[148] and it is ironic that had the Irish referendum not been controversially repeated with a different result, after assurances to the Irish government, the failure of the Treaty of Lisbon to enter into force would have retarded that very trend.

So we can now look back on the long and winding story of the Laeken Declaration, the Convention, the Constitutional Treaty, the reflection period, the negotiation and signature of the Treaty of Lisbon and then the laborious process whereby the Lisbon Treaty was eventually ratified, including grandstanding by the Czech President and interventions from two constitutional courts (German and Czech). It is tempting to say that this story has shown how the political elites which have most influence over the content of both EU treaties and the focus of EU policies failed to break out of a vicious circle in which the more they thought they were doing to increase the democratic legitimacy of the EU polity and its treaty basis, the more they have been perceived within the confines of national politics as illegitimately meddling in the arena of national (popular and parliamentary) sovereignty, not least because of deep misunderstandings about the scope of EU competences. Through the subsequent crises that the EU has faced, notably concerned with the sovereign debt crisis in the eurozone, the migration/refugee crisis of the mid and late 2010s, the challenge of Brexit and the ongoing 2020 novel coronavirus pandemic, these calculations have not fundamentally shifted.

This bleak assessment tends to be upheld by opinion surveys on citizenship issues, which have been undertaken by the EU for many years. For example, a Eurobarometer survey published in February 2008[149] highlighted widespread ignorance about the details of citizens' rights under EU law, especially in the new Member States, even though a substantial 78 per cent of those questioned across the Member

---

[147] See J Habermas, 'The search for Europe's future', *Spiegel Online International*, 18 June 2008, http://www.spiegel.de/international/europe/0,1518,560549,00.html.

[148] Two further European Parliament elections (2014 and 2019) since I first wrote that sentence have not in fact profoundly changed the nature of European Parliament elections, notwithstanding the experiment with the so-called *Spitzenkandidaten* or lead candidates. The increased levels of *European* politicisation, with consequent impacts upon citizens' engagement, are only modest: see S Fotopoulos, 'What sort of changes did the Spitzenkandidat process bring to the quality of the EU's democracy?', (2019) 18 *European View* 194–202.

[149] Flash Eurobarometer, 213.

States did claim some familiarity with the term. In practice, they were often unable to identify correctly which rights attach specifically to Union citizens and/or did not know that they automatically were Union citizenship by virtue of their national citizenship. The 2010s were a problematic period for the 'sense' of European citizenship, but by 2019, Eurobarometer were recording the highest level of positive answers to the question whether Europeans 'feel' like European citizens since 2010.[150] 73% gave a positive answer to this question, with 34% responding that they definitely felt like European citizens. A higher level of awareness of European citizenship (and approval for its benefits) stems, it has been argued, from reactions to the UK referendum on EU membership in 2016, as well as more general 'socialisation' effects which evidently somehow took less hold in the UK than elsewhere.[151]

Indeed, an earlier Eurobarometer survey published in May 2006 on the topic of the Future of Europe,[152] which contained some questions on citizenship, revealed an interesting trend. When respondents were asked what would be the best ways to strengthen European citizenship, rather large numbers of them *spontaneously* replied that they did not wish to be European citizens. The figure stood at 8 per cent across the EU as a whole, but was a daunting 25 per cent in the United Kingdom. It is arguable that many years later these were the sensitivities that resolved themselves into the 2016 vote to leave the EU. But even beyond the UK, citizenship of the Union has retained – for most people – a Cinderella status. This point needs to be borne in mind as the analysis in this paper proceeds. While it is often said that citizenship of the Union, in its current treaty form, is a vapid and impoverished version of the membership concept which has been central to liberal democratic and constitutionally based (national) polities, there does not seem to be any obvious popular legitimacy driving the argument that EU citizenship *should* be developed in more substantial ways than it is at present. It is to the specific challenge of the Union citizen as an actor in the context of structures for democratic participation that we therefore now turn to see whether there is anything in the Treaty of Lisbon that can overcome the doubts expressed here.

4. The Democratic Life of the Union

Where the Constitutional Treaty grandiosely referred to 'the democratic life of the Union', the TEU post-Lisbon contains merely a title on 'democratic principles', although the basic provisions are the same. This title fleshes out somewhat the notion of the citizen as a political actor within the EU, without fully embracing a concept of democratic citizenship. Speaking to the provisions of the Constitutional Treaty on democratic engagement, but with clear resonance for the Lisbon Treaty provisions also, Carlos Closa warned that:

> The conception of citizenship that emanates from these provisions privileges a vision of citizens as bearers of rights that provide them protection from public authorities, grant them some reduced scope of participation in the policy process but, by and large, it does not establish a solid connection between the citizens and the exercise of their political rights and the "democratic life of the Union".[153]

The provisions on democracy, which could be criticised for lacking a central focus, address consecutively concepts of representative, direct and participatory democracy, without giving the

[150] Standard Eurobarometer 91.

[151] R Shorrocks and R de Geus, 'Citizen support for European Union membership: the role of socialisation experiences', (2019) 42 *West European Politics* 873-894.

[152] Special Eurobarometer, 251.

[153] C Closa, 'Constitutional Prospects of European Citizenship and new forms of democracy' in G Amato, H Bribosia and B De Witte (eds), *Genesis and destiny of the European Constitution* (Bruylant, 2007) 1037-1063, 1052.

impression of how these might be linked in a coherent way.[154] From the start,[155] it was recognised that the provision with the greatest capacity to capture headlines has been the one on citizens' initiatives, where an important link to citizenship of the Union is made through the location of the relevant legal basis within the TFEU citizenship provisions. Article 24 TFEU contains a legislative power, permitting the European Parliament and Council, acting by co-decision, to adopt the provisions necessary to implement the new 'citizens' initiatives' provided for by Article 11(4) TEU, which sets out in terms:

> Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties.

The opportunity for a European Citizens' Initiative (ECI) to direct the input of a minimum of one million signatures into the legislative process was intended to harness citizen power, especially via the internet, enabling it to be channelled towards seeking specific legislative initiatives to be put forward by the Commission. Citizens' initiatives, well known in other national and – especially – subnational contexts, were originally included in the Constitutional Treaty (allegedly at the behest of Valéry Giscard d'Estaing, the President of the Convention, himself), and they were retained in the TEU provisions on 'democratic principles' (Article 11(4) TEU). In a commentary on the Constitutional Treaty, Jean-Claude Piris described the ECI provision as 'very innovative and symbolic'.[156] He noted that while 'the Commission will not be legally obliged to follow up on any such initiative, the political weight of it will, in practice, force the Commission to engage in serious work following the result of an initiative.' The point that the Commission is not under a legal obligation to put forward a legislative proposal in response to a successful initiative was expressly confirmed by the CJEU in 2019.[157] In *Puppinck*, the Court, like its Advocate General, concluded that

> the particular added value of the ECI mechanism resides not in certainty of outcome, but in the possibilities and opportunities that it creates for Union citizens to initiate debate on policy within the EU institutions without having to wait for the commencement of a legislative procedure.[158]

The 2019 Regulation on the ECI speaks in similar terms of the ECI reaching 'its full potential as a tool to foster debate.'[159]

Under the TFEU, the European Parliament and the Council together had to define what constitutes a 'significant number of Member States', for the purposes of determining the minimum standard of cross-EU representativity for any citizens' initiative which has to be considered by the Commission, as well as setting other relevant conditions.[160] The fear has always that the effectiveness of the citizens' initiative may be stifled by excessive bureaucracy,[161] so the revised legislation in 2019 comprised a welcome, if tentative step towards making it somewhat easier for civil society groups to make use of the ECI. It also nudges the Member States towards lowering the age at which citizens may sign such initiatives from 18 to 16. Eventually, these initiatives could develop into interesting cases of *transnational* popular

---

[154] M Bevir and R Phillips, 'EU democracy and the Treaty of Lisbon', (2017) 15 *Comparative European Politics* 705–728.

[155] D Szeligowska and E Mincheva, 'The European Citizens' Initiative – Empowering European Citizens within the Institutional Triangle: A Political and Legal Analysis', (2012) 13 *Perspectives on European Politics and Society* 270-284.

[156] JC Piris, *The Constitution for Europe* (Cambridge University Press, 2006) 119.

[157] Case C-418/18 P *Puppinck and Others v European Commission* ECLI:EU:C:2019:1113.

[158] *Ibid* [70].

[159] A 2011 Regulation has been repealed and replaced as of 1 January 2020 by Regulation 2019/788 of the European Parliament and Council on the European citizens' initiative [2019] OJ L130/55, Recital 5.

[160] For detailed analysis of the original 2011 legislation, see M Dougan, 'What are we to make of the Citizens' Initiative?', (2011) 48 *Common Market Law Review* 1807.

[161] N Athanasiadou, 'The European citizens' initiative: Lost in admissibility?', (2019) 26 *Maastricht Journal of European and Comparative Law* 251–270.

democratic pressure, without as such detracting from the powers of national parliaments or the Commission's power to initiate legislation. However, it has been argued that without a more robust public sphere in the EU, their impact will remain limited.[162]

In sum, as with other topics canvassed in this Section, there is 'promise', but as yet little substantive achievement in relation to the realisation of a recognisable political actor: the European citizen.

E What future(s) for citizenship in the European Union?

1. Opening up the domain of citizenship

It is clear from the discussion in the previous two Sections that we have travelled some distance from the starting point of the transnational roots of citizenship within the EU's legal order. In that sense, there has been some degree of 'merger' between the ideas of citizenship *of* the Union and *in* the Union. Daniel Sarmiento and Eleanor Sharpston argue that

> citizenship is now a status possessed by, and affecting the legal position of, both 'moving' and 'non-moving' citizens, be that under the rules of free movement or under other equally relevant provisions of the Union's basic constitutional charter.[163]

They cite a number of 'areas traditionally distanced from the scope of European integration and European Union law… (such as) fundamental rights, democracy, the Rule of Law and solidarity (as) examples of the fields in which the notion of citizenship has begun to impregnate the European debate.'[164] For example, they refer to the argument developed by Armin von Bogdandy *et al* about the link between the 'substance of rights' test developed in *Ruiz Zambrano* and the Union's tools for the protection of the rule of law for the benefit of citizens and residents,[165] a task which has only become more urgent as illiberal regimes in several Member States have increasingly challenged those basic tenets of the EU legal and political order. Building on such insights, which demand ways of understanding EU citizenship which are more completely integrated into the overall 'system' of the EU's legal order, Niamh Nic Shuibhne has developed a model which uses the 'territory of the Union' as the analytical lens with which to reconstruct the different elements of the figure of the Union citizen.[166]

Particularly relevant to understanding how such a model might work have been the recent cases which have dealt with the interface between EU citizenship law and the law relating to the Area of Freedom, Security and Justice, especially in its external dimension. In cases concerned with whether an EU citizen should be extradited to a third country in circumstances where a citizen of the host state would not be, because of a constitutional prohibition, the CJEU has instituted a preference that these persons should more appropriately be surrendered to the *home* state to be prosecuted or to serve a sentence.[167] The conceptual basis for this shift concerns both equal treatment (for example, the benefit of a constitutional prohibition on the extradition of own citizens should be extended also to other EU

---

[162] E Longo, 'The European Citizens' initiative: Too much democracy for EU polity?', (2019) 20 *German Law Journal* 181-200; H de Waele and E Mastenbroek, 'Fulfilling High Hopes? The Legitimacy Potential of the European Citizens' Initiative', (2018) 1 *Open Political Science* 75-92.

[163] Sarmiento and Sharpston (n 22 above) 227.

[164] Sarmiento and Sharpston (n 22 above) 226.

[165] A von Bogdandy et al., 'Reverse Solange – Protecting the essence of fundamental rights against EU Member States' (2012) 49 *Common Market Law Review* 489-519.

[166] See the references to Nic Shuibhne and also to work by Loïc Azoulai and Stephen Coutts in n 24 above.

[167] Case C-182/15 *Petruhhin* EU:C:2016:630.

citizens)[168] and the principle that EU citizens must benefit from the fundamental rights protections embedded in EU law. This mandates the articulation, in a different form, of some of the constitutional protections associated with *national* citizenship to non-national resident EU citizens. This case law seems the inevitable consequence of the establishment of the Charter of Fundamental Rights as a source of law equal to the treaties as a result of the Treaty of Lisbon as well as the 'substance' turn taken in *Ruiz Zambrano*.

While the link between citizenship and the free movement and non-discrimination foundations of the EU has been a dynamic motor of legal development for many decades, it has been suggested that in the 2010 case of *Rottmann*[169] the CJEU opened the door to a new phase in its case law, or at least to a new discourse of citizenship based on a closer articulation of the relationship between EU citizenship and *national* citizenship. The specific relationship between citizenship of the Union and the citizenship laws of the Member States has been a common subject for close examination by scholars in recent years, with sharply differing conclusions amongst scholars as to the residual significance of national citizenship law in an era of Europeanisation and, indeed, globalisation.[170] Along with *Ruiz Zambrano*, *Rottmann* was arguably the logical conclusion of a line of case law in which the Court has countenanced ever more remote links with the putative exercise of free movement rights as justifying scrutiny and control of national laws and policies. But it was even more significant in the sense of opening the door to reflections on the character of Union citizenship as a legal status. *Rottmann*, along with the subsequent case of *Tjebbes*,[171] dealt directly with national rules on loss of citizenship within states, which have implications for the loss of EU citizenship, thereby telling us more about the nature of Union citizenship. In that sense, it has become apparent over the years that these cases do relate closely to the case of *Ruiz Zambrano* with its focus on the substance of EU citizenship for EU citizens, although in that case the 'loss' of EU citizenship was derived from a threatened departure from the territory of the Union (i.e. a factual change), not a loss of legal status under national law.

The discussion of this important case law on the loss of citizenship is framed by some reflections on how the relationship between EU citizenship and national citizenship is structured in legal terms.

2. The Difference which (Union) Citizenship Makes: Complementarity or Additionality?

In the EU treaty texts on citizenship, it has been made clear that EU citizenship does not *replace* national citizenship. This wording was introduced by the Treaty of Amsterdam, partly as a result of the Danish negative referendum on the Treaty of Maastricht which delayed its ratification, and in view of the European Council conclusions which followed at a summit in Edinburgh in December 1992.[172] However, since the Treaty of Lisbon, the Treaty now provides that Union citizenship is *additional* to national citizenship (Article 20(1) TFEU), replacing the earlier expression that it is *complementary* (Article 17(1) EC). Is this change purely semantic, or does it have some deeper meaning?

Expressing Union citizenship as *additional* to national citizenship was insisted upon by the Member States, in order to reinforce the point that EU citizenship can only *add* rights, and cannot *detract* from

---

[168] Case C-247/17 *Raugevicius* EU:C:2018:898. See also Case C-191/16 Pisciotti, EU:C:2018:222.

[169] See n 21 above.

[170] C Closa, 'Citizenship of the Union and Nationality of the Member States' (1995) 32 *Common Market Law Review* 487-518; GR de Groot, 'Towards a European Nationality Law', (2004) 8/3 *Electronic Journal of Comparative Law*, at http://www.ejcl.org/; G Davies, ''Any Place I Hang My Hat?' or: Residence is the New Nationality' (2005) 11 *European Law Journal* 43-56; M Szpunar and M Blas López, 'Some Reflections on Member State Nationality: A Prerequisite of EU Citizenship and an Obstacle to Its Enjoyment', in Kochenov n 6 above, 107-124.

[171] See n 26 above.

[172] Denmark and the Treaty on European Union, Official Journal C 348 , 31/12/1992 P. 0001 - 0001 https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41992X1231:EN:HTML.

national citizenship. It reflects the earlier Edinburgh Agreement. Andrew Duff suggested it was done 'cleverly, to mollify conservative eurosceptic opinion'.[173]

Legally speaking, additionality, reinforcing the duality between national and EU citizenship as legal statuses seems to be a more accurate delineation of the relationship between the two, and avoids any unfortunate implications that there is somehow a notion that one status should bend to the will of the other, in order to achieve the sought after 'complementarity'.[174] Conceptually speaking, it makes the point that the development of different layers of citizenship entitlements is not a zero sum game, in which rights given at one level must necessarily detract from those given at another level. In that sense, it is not so far from – but avoids the negative connotations of – the controversial wording contained in the first draft of Part One of the Constitutional Treaty prepared by the Praesidium to the Convention on the Future of Europe. This referred to citizens having 'dual' citizenship: EU and national, and being 'free to use either, as he or she chooses'.[175] Grainne De Búrca subjected this wording to some trenchant criticism back in 2003:[176]

> The notion of a dual citizenship is an unfortunate way of describing the co-existence of national and EU citizenship. If it is intended as a description of the currently existing relationship between EU and national citizenship it is misleading, and if it is intended to define these categories in a new way for the future, under the basic Constitutional Treaty, then it is a regrettable move. The concept of dual citizenship suggests full and competing loyalties/relationships to two different and entirely separate polities, each of which makes similar claims of allegiance on the individual.

Perhaps these criticisms were heard, because in subsequent versions of Part One of the Constitutional Treaty it was the additionality formula which prevailed. Annette Schrauwen took a positive view of this change, suggesting that this formula represents one step towards a 'more autonomous development of Union citizenship'.[177]

Despite these comments, the shift from complementarity to additionality certainly did not deliver an immediate change of emphasis with regard to the political trajectory of EU citizenship. It was not until the case of *Rottmann*, that the approach taken by the CJEU could in any way have been said truly to have detracted from the *status* and *legal boundaries* of national citizenship, except in terms of undermining its exclusivity by, for example, extending the territorial boundaries of the welfare state or in relation to the capacity of the national legislature to set rules on matters such surnames. But again, it should be reinforced that these have hitherto been cases involving migrant citizens. Despite the greater complexity of the post-*Rottmann* and post-*Ruiz Zambrano* case law, the shadow of the transnational character of Union citizenship continues to be the most important factor. According to Stephen Coutts, although 'there is an increasingly pronounced supranational dimension in the Union citizenship, this is not disassociated from the transnational dimension'.[178] Thus, it still remains unclear how additionality might play out as Union citizenship gradually becomes more significant within rather than solely across the boundaries of the Member States.

---

[173] Duff n 133 above at 56.

[174] For a strong normative defence of complementarity which – it can be assumed – would not be opposed to the principle of 'additionality' see R Bellamy, 'Evaluating Union citizenship: belonging, rights and participation within the EU' (2008) 12 *Citizenship Studies* 597-611.

[175] See Convention 360/02 of 28 October 2002, 9.

[176] G de Búrca, 'Fundamental Rights and Citizenship' in B De Witte (ed), *Ten Reflections of the Constitutional Treaty for Europe* (European University Institute, 2003) 11-44, 13.

[177] See A Schrauwen, 'European Union Citizenship in the Treaty of Lisbon: Any Change at all?' (2008) 15 *Maastricht Journal of European and Comparative Law*, 55-64, 59-60.

[178] See Coutts n 9 above, 341.

3. The regulation of national citizenship under EU law

One of the important meeting points of national citizenship and EU citizenship lies within the framework of the national rules governing the acquisition and loss of nationality, at the national level. We have earlier noted specific challenges are raised by dual citizenship in the context of a Union of states. In *Lounes*,[179] the CJEU held that, where a migrant EU citizen naturalises under national law, the host state must, if it recognises dual citizenship and thus allows such a person also to retain the nationality of origin, continue to treat the naturalised citizen as a non-national EU citizen, protected under the treaty provisions. Naturalisation, although for some the logical corollary of the integration of migrant EU citizens, is in fact never simple under current laws, although it is not always excessively complicated.[180] Furthermore it is not necessarily a solution for many non-national EU citizens. The exercise of EU free movement rights often differs from the classic migration scenario, where a person moves from country A to country B (perhaps with her family) and integrates in the latter state, acquiring along the way full membership of the polity through naturalisation. Regardless of whether such a scenario accurately reflects much contemporary international migration, it is certainly a poor fit with the ideology and many of the practices of free movement in the contemporary European Union. This would be much better expressed in terms of a series of moves involving lifestyle choices: for educational purposes; for love; for caring responsibilities; for economic reasons; for retirement; for leisure.

Those who move serially under the free movement rules as EU citizens may never stay long enough in one (new) country to be in a position to take citizenship (because of residence and other conditions), and many lose certain rights, including political rights, on exit from the home state. It could even be argued that the differing requirements that the Member States currently impose in respect of naturalisation represent obstacles to free movement. Only eight countries presently impose different – more lenient – rules in respect of nationals of other Member States compared to their general rules.[181] It seems unlikely, however, that it is the obstacles to acquiring national citizenship, combined with the rights which are denied to non-nationals such as voting rights in national elections discussed previously, which account for the persistently low level of intra-EU migration,[182] when compared to the United States, where a migrant American automatically takes on the citizenship of the state in which he or she is resident[183] and where cross-state mobility is generally thought to be a great deal more common.[184] Indeed, no one should disregard the cultural and language barriers which present disincentives to mobility, nor the risk of loss of professional status, as well as the persistent low level xenophobia which is prevalent in many Member States. On the other hand, the increased levels of naturalisation (both by UK citizens in the EU27 and EU27 citizens in the UK) after the Brexit referendum highlight that there

---

[179] See *Lounes* n 87 above.

[180] L Orgad, 'Naturalization' in A Shachar et al (eds), *The Oxford Handbook of Citizenship* (Oxford University Press, 2017) 337-357.

[181] Austria, Bulgaria Czech Republic, Germany, Greece, Italy, Latvia and Romania; a further five (Cyprus, Denmark, Finland, Sweden and Spain) have provisions which facilitate naturalisation by citizens of some EU Member States: see GLOBALCIT, *Global Database on Modes of Acquisition of Citizenship* (GLOBALCIT/European University Institute, 2017), http://globalcit.eu/acquisition-citizenship/. The relevant information can be obtained under 'Mode A18, citizenship of a specific country'.

[182] As global migration has increased in recent years, so has intra-EU migration; it has also acquired a greater complexity: HJ Trenz and A Triandafyllidou, 'Complex and dynamic integration processes in Europe: intra EU mobility and international migration in times of recession', (2017) 43 *Journal of Ethnic and Migration Studies* 546-559.

[183] See the Citizenship Clause of the Fourteenth Amendment to the US Constitution.

[184] The situation, almost inevitably, is a good deal more complicated when a close comparison is made: see P Ester and H Krieger, 'Comparing labour mobility in Europe and the US: facts and pitfalls', (2008) *Tijdschrift van het Steunpunt WSE* 3-4/2008, 94-98.

is a discernible link between the protections provided by EU citizenship and the status change afforded by naturalisation.[185]

In *Rottmann*,[186] the CJEU explored in more detail than hitherto the potentially complex relationship between EU law and national citizenship laws. In what was a generally cautious Opinion,[187] Advocate General Maduro acknowledged that Member States are obliged to apply their nationality laws in ways which comply with the requirements of EU law and envisaged a number of scenarios where problems could arise. First, there could be actions which are in some way directly related to the free movement rules, such as arbitrary removal of nationality of a naturalised former citizen of another Member State on the grounds of political activities or membership of a trades union. Alternatively, there could be actions which breached the Article 4 TEU duty of sincere cooperation, such as collective naturalisations of third country nationals which would have impacts on other Member States through the effects of the free movement rules and which could be said to subvert their immigration policies. The specific issue in *Rottmann* was much narrower, and was concerned with the individual behaviour of the complainant, who was threatened with the withdrawal of the citizenship of Germany which he gained through naturalisation. This was on the grounds that he had committed a fraud during the application process when he failed to disclose criminal proceedings brought against him in Austria, his state of origin. On naturalisation in Germany, however, Rottmann had, by operation of law, lost his Austrian citizenship, and as things stood he would not automatically regain his Austrian citizenship just because he lost his German citizenship. He risked, therefore, the loss of his EU citizenship, because he would no longer hold any citizenship which gave him access to EU citizenship and its associated rights.

In its judgment the Court rejected the contention that this was a case with no factor connecting it to EU law, simply because it involved a decision of a German administrative authority about German citizenship. It noted that it is for each Member State to lay down the conditions for the acquisition and loss of nationality, but they must do so 'having due regard to Community law'[188] in 'situations covered by European Union law'.[189] While Advocate General Maduro premised his enquiries in relation national citizenship rules and EU law in his Opinion on the basis that this was a case with a clear cross border element, he then concluded that the loss of citizenship in this instance was not related to the exercise of free movement rights in such a way as to render it subject to scrutiny under EU law. In contrast, the Court made a very strong statement about the 'reach' of Union citizenship and consequently the capacity of Member States to withdraw national citizenship where that results in the loss of Union citizenship:

> It is clear that the situation of a citizen of the Union who, like the applicant in the main proceedings, is faced with a decision withdrawing his naturalisation, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article 17 EC [i.e. Union citizenship] and the rights attaching thereto falls, *by reason of its nature and its consequences*, within the ambit of European Union law.[190]

In *Rottmann* the connection which the Court draws between EU law and national law is the simple fact that by losing national citizenship a person will also lose EU citizenship rights. This seems to be a step beyond the approach in *Micheletti* where the Court formulated the issue thus:

---

[185] The latest cross-EU figures are for 2017, and they show an increase of EU citizens naturalising as a proportion of total naturalisations altogether in 2017. This was probably substantially influenced by Brexit. See https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Migration_and_migrant_population_statistics#Acquisitions_of_citizenship:_EU_Member_States_granted_citizenship_to_825_thousand_persons_in_2017.

[186] *Rottmann* (n 21 above).

[187] Opinion of AG Maduro, 30 September 2009, ECLI:EU:C:2009:588.

[188] ibid [39].

[189] ibid [41].

[190] Emphasis added; ibid [42].

> it is not permissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality *with a view to the exercise* of the fundamental freedoms provided for in the Treaty.[191]

The *Rottmann* formulation is justified by reference to the oft-repeated statement that 'citizenship of the Union is intended[192] to be the fundamental status of nationals of the Member States',[193] but significantly the Court omitted the second part of this quotation which refers to the equal treatment principle.[194] Later on, the Court emphasised again 'the importance which primary law attaches to the status of citizen of the Union'.[195] The second important dimension of the *Rottmann* case was the Court's conclusion that the appropriate standard of review is a test of proportionality based on an individualised assessment. However, the Court reached this conclusion even though it wanted to assure the Member States that taking action in such a case of false representations in the context of naturalisation does correspond 'to a reason relating to the public interest. In this regard, it is legitimate for a Member State to wish to protect the special relationship of solidarity and good faith between it and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality'.[196] Nonetheless, proportionality must be assessed. It is for the national court

> to ascertain whether the withdrawal decision at issue in the main proceedings observes the principle of proportionality so far as concerns the consequences it entails for the situation of the person concerned in the light of European Union law.[197]

This is an explicit invitation to national courts to weigh considerations relating to the national interest (ie the severity of the deception, for example) against the significance of losing EU citizenship (loss of free movement rights and other Union citizenship rights; possible impact upon family members, etc).

The principles in *Rottmann* have been applied once more in the 2019 case of *Tjebbes*.[198] This concerned Dutch rules on loss of citizenship by non-resident citizens. There are several important provisos before a person may lose their Dutch citizenship through non-residence: there must be habitual residence in another country involving an uninterrupted period of absence from the Netherlands and from the EU; the person in question must have the citizenship of the state of residence or other citizenship (so there is no risk of statelessness); and the lapsing of the citizenship can be halted by the person applying for a Dutch passport every ten years. The significance of the loss of Dutch citizenship in such a case is that the person will also lose EU citizenship and thus access to the various benefits which this supranational status provides, including in particular the right to reside and to work in any Member State. In *Tjebbes*, the CJEU repeated its *Rottmann* findings, and concluded that the Dutch provisions, including so far as they affected children, could be acceptable in principle, notwithstanding their falling within the scope of EU law, so long as there was scope for an individual examination of circumstances and compliance with the proportionality principle. In a balanced assessment of the judgment, Caia Vlieks concluded that the case reinforced the Court's willingness to take its incursions into national citizenship law so far, but not too far, but expressed disappointment that the judgment undermined the case, made by some academics, for saying that EU citizenship could be emerging not

---

[191] *Micheletti* (n 26 above) [10].

[192] Note the slight change of language from 'destined' to 'intended'.

[193] *Rottmann* (n 169 above) [43].

[194] See (n 13 above).

[195] *Rottmann* (n 169 above) [56].

[196] *Rottmann* (n 169 above) [51].

[197] *Rottmann* (n 169 above) [54].

[198] *Tjebbes* (n 171 above).

just as the 'fundamental status' of nationals of the Member States but also as an incipient autonomous and freestanding status in law.[199]

The question of the harmonisation of national citizenship laws within the EU as part of a package of measures which might have the effect of smoothing the sometimes tricky relationship between national citizenship law and EU citizenship law has never gained much traction amongst policy-makers. So far as the European Commission, for example, 'sponsors' research work on aspects of national citizenship, it does so either because of the connection between naturalisation of third country nationals and the emergent body of EU immigration law concerned with relations outside the EU's external borders and the integration of immigrants from beyond those borders[200] or because it wants to explore the potential scope of the *Rottmann* case law. In the latter context, it has questioned, for example, the willingness of Member States to create so-called investor citizenship programmes, that allow third country nationals not only to purchase citizenship in the target country (for example, Malta or Cyprus, which both have active programmes), but also to gain access to the benefits of EU citizenship which means that they will have a significant body of rights vis-à-vis every other Member State. In that context, the rigour of national investor citizenship rules will have an undoubted impact across the EU. The Commission has suggested that using the criterion of a 'genuine link' as the base for such programmes could enhance the legitimacy of the national measures, as well as offering protection to all Member States.[201] However, it has not seriously attempted to formulate proposals along these lines, since these would reach deep into the sphere of Member States' nationality laws as matters stand, on the basis of a dubious legislative competence and a likely weak political will. Most of the Commission's practical guidance has instead focused on encouraging states to be more precautionary when developing and applying investor citizenship programmes, exhorting them to take care to implement other existing provisions of EU law, for example on money laundering and financial probity, which may be undermined by investor citizenship schemes in which insufficient due diligence is applied in relation to the recipients.[202]

The idea of some form of harmonisation, the creation of common rules or even voluntary alignment on the part of states has, however, been supported from time to time by scholars.[203] Suggestions have included the proposal to use the criterion of genuine link as a reference point. It could be applied, Martijn van den Brink has argued, in order to strengthen a constructive rather than a solely 'derivative' relationship between national law and EU law.[204] Van den Brink's approach would recognise the primacy of national law when it comes to determining who are the citizens of the Union (as indeed it should, as per the Treaty), but it would also acknowledge that national decisions about, for example, who should be naturalised or acquire citizenship by birth, have spillover effects for other Member States, because of nature of the Union in which they are co-habiting.

There is a sense in which such an approach, albeit grounded in a principle that states do not consciously apply when developing their citizenship regimes at present, could represent an appropriate blending of the concerns about citizenship *of* the Union and *in* the Union, which have underpinned

---

[199] C Vlieks, '*Tjebbes and Others v Minister van Buitenlandse Zaken*: A Next Step in European Union Case Law on Nationality Matters?', (2019) 24 *Tilburg Law Review* 142–146. See also H Van Eijken, 'Tjebbes in Wonderland: On European Citizenship, Nationality and Fundamental Rights: ECJ 12 March 2019, Case C-221/17, M.G. Tjebbes and others v Minister van Buitenlandse Zaken, ECLI:EU:C:2019:189', (2019) 15 *European Constitutional Law Review* 714-730.

[200] See for example the Migrant Integration Policy Index, http://www.mipex.eu/.

[201] See Commission Report, *Investor Citizenship and Residence Schemes in the European Union*, COM/2019/12 final, 23 January 2019, based on research published in an accompanying Commission Staff Working Document, SWD(2019) 5 final, 23 January 2019. This work draws on, but substantially adapts, the idea in *Nottebohm* (n 25 above) that citizenship is the expression of a genuine link between citizen and state.

[202] See generally J Džankić, *The Global Market for Investor Citizenship* (Palgrave Macmillan, 2019).

[203] Eg, in the form of guiding principles for national courts: see GR de Groot and NC Luk, 'Twenty Years of CJEU Jurisprudence on Citizenship', (2014) 15 *German Law Journal* 821-834.

[204] Van den Brink (n 7 above).

previous discussions in this chapter. Citizenship *of* the Union recognises the significance of a supranational status recognised throughout the Union and its Member States. Citizenship *in* the Union notes the complex multi-level governance framework within which citizens participate as political actors, not least because they are what can be termed 'stakeholders' in the matter of government. In that sense, spillovers from national citizenship regimes have economic, social *and* political consequences, and taking cognisance of these matters may be one way in which the Union and the Member States can together bridge the gap between the discourses of old and new constitutionalism which we noted at the beginning of the chapter and which have now been shown to be less separate and more overlapping in nature.

F. Conclusions

The claims developed in the second edition of *The Evolution of EU Law* (which was the first version of this chapter) remain valid, so far as it remains possible to see distinct discourses of citizenship across the EU legal and political domains, which are influenced by multiple ideas about constitutionalism in the non-state context of the EU that compete within the same political space. The wealth of new evidence that has accrued since the previous version was completed have not fully undermined those claims, although what has emerged has been a narrowing of the gap between the two discourses, and the emergence of what might be regarded as a 'bridging discourse' as the CJEU in particular has continued to contribute to the emergence of a distinctive concept of EU citizenship *beyond* free movement in relation to the potential impact of EU law upon national citizenship laws. At the same time the role of citizenship within formal *institutional* polity-building remains ambivalent, despite innovative developments such as the European Citizens' Initiative. For many years, free movement has continued to cast a shadow over EU citizenship,[205] and yet the latest developments – in which national borders have been decisively closed at least for the duration of the novel coronavirus crisis in Spring 2020, with anticipated medium to long-term impacts expected thereafter – suggests that EU citizenship needs something more than free movement if it is to thrive in the long term.[206] To that end, while the reactions to the Brexit referendum seem to have strengthened some aspects of EU citizenship, not least by cementing the political agency of the residual EU27,[207] other contemporary developments including the ongoing question of what role the institutions of the eurozone should play in fighting crises such as the financial crisis of 2008 onwards, the subsequent sovereign debt crisis faced by states such as Greece, and the 2020-onwards COVID-19-triggered recession speak to a less clear sense of a distinctive agency for European citizens as political actors.

The objective of this chapter was, it should be recalled, not to plead for any specific model of citizenship, but rather to identify the conditions under which polity-building occurs and to highlight the diffuse and incremental changes which are occurring in the formal and informal arrangements which contribute to the construction of membership norms and membership practices. The chapter has thus attempted to explore the multiple dimensions of 'citizenship' as a membership status and set of practices, as it operates in the EU context. The conscious intention was to go beyond a focus on the legal institution of citizenship *of* the Union and to see how citizenship has contributed to wider constitutional debate *in* the EU context. It identified an initial bifurcation between the integrationist and constitutionalist dimensions in citizenship, but explored also the complexities within such a binary. While citizenship as a thin transnational concept sits comfortably within the 'old' constitutional norms of the

---

[205] S Seubert, 'Shifting Boundaries of Membership: The politicisation of free movement as a challenge for EU citizenship' (2019) *European Law Journal* 1– 13 https://doi.org/10.1111/eulj.12346 (online in advance of publication).

[206] R Barbulescu and A Favell, 'Commentary: A Citizenship without Social Rights? EU Freedom of Movement and Changing Access to Welfare Rights', (2020) 58 *International Migration* 151-165; J Shaw, 'Between Law and Political Truth? Member State Preferences, EU Free Movement Rules and National Immigration Law', (2015) 17 *Cambridge Yearbook of European Legal Studies* 247-286.

[207] B Laffan, 'How the EU27 Came to Be' (2019) 57 *JCMS: Journal of Common Market Studies* 13– 27.

constitutionalised legal order based on the Treaties as interpreted by the CJEU, it was not taken forward in a coherent manner in the context of the various processes of constitution-building (Charters, Conventions, Treaties and ratification processes) of the 2000s or in the subsequent years.[208] On the contrary, 'citizenship' has rather been invoked to contest rather than to confirm the legitimacy of the EU, through rejectionist referendums in particular. This became most clear in the UK's referendum on membership of the EU.

Inevitably – in declaring that Citizenship of the Union is destined to be the fundamental status of the nationals of the Member States – the CJEU has not paid equal attention to the construction of a defensible and legitimate concept of citizenship at the EU level as it has to hollowing out, sometimes at an alarming rate, national competences which ostensibly exist in relation to citizenship rights (e.g. welfare issues) and in matters of citizenship status definition. There has inevitably been a backlash at the national level, which some would argue has been appropriately mirrored within the CJEU. Thus, in most respects, citizenship has had limited integrative rather than constitutive effects, despite the symbolic power of the membership concept. But this is a dangerous and unsustainable status quo, not least because it demands, as the Court has recognised itself, a 'certain degree of solidarity between the Member States'. And while the Treaty of Lisbon did slowly begin to invest more political content into the citizenship provisions, the challenge of thinking through what kind of membership is appropriate for a polity emerging *beyond* but not *without* the state has yet to be taken up by any of the key actors (Member States, EU institutions, and indeed civil society) in a manner that suggests a sustainable future for citizenship.

---

[208] D Castiglione, 'We the Citizens? Representation and Participation in EU Constitutional Politics' in R Bellamy, D Castiglione and J Shaw (eds), *Making European Citizens. Civic Inclusion in a Transnational Context* (Palgrave Macmillan, 2006) 75-95.

Author contacts:

Jo Shaw

Salvesen Chair of European Institutions at the University of Edinburgh, UK

Part-Time Professor, New Social Research, Tampere University, Finland

Postal address: Edinburgh Law School, Old College, South Bridge, Edinburgh, EH8 9YL, UK

Email: jo.shaw@ed.ac.uk or jo.shaw@tuni.fi

With the support of the Erasmus+ Programme of the European Union

The European Commission supports the EUI through the European Union budget. This publication reflects the views only of the author(s), and the Commission cannot be held responsible for any use which may be made of the information contained therein.