Post-National Citizenship in a Post-Brexit European Union: The Case for Treaty Reform and Alternative Routes to Union Citizenship Admission

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Abstract

This thesis argues that citizenship of the European Union has not reached its full potential. Article 1 TEU proclaims that the goal of the European Union is to establish an ever closer union among the peoples of Europe. However, the EU is willing to derogate from this obligation where a Member State has expressed its intention to withdraw from the Union under Article 50 TEU. This work questions how seriously the EU takes its own Treaty obligations when pitted against a Member State withdrawal and asks how the EU defines its peoples under Article 3(1) TEU. Citizenship of the Union continues to limit its personal scope to only include EU Member State nationals. Brexit has appeared to confirm such given that the Union citizenship of UK nationals has been stripped from them. However, many UK nationals and long-term and lawfully resident third-country nationals do share in the European Union identity after acting in accordance with its values and principles as stated within Article 2 TEU. It is claimed that such peoples maintain a genuine link with the EU due to their European Union identities and should therefore be admitted to Union citizenship through routes other than the holding of a Member State nationality. The contribution made here is to recognise and accept this identity as the core of Union citizenship and to use such to justify alternative routes to Union citizenship admission. The work proposes further amendments to Articles 2, 3, 9 and 50 TEU, and Article 20(1) TFEU. Ultimately, the work finds that if Union citizenship is to become the fundamental status for those who rely upon it, then it must first be established as a properly post-national status of citizenship that cannot be automatically revoked following a Member State withdrawal from the EU.

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Introduction

This work originated out of a growing curiosity over the United Kingdom's relationship with the European Union. The Brexit referendum and the triggering of Article 50 TEU certainly enlivened debate and what I found most striking was that there were many UK nationals who sought to retain their European Union citizenship after Brexit.[1] It became clear that many had developed an identity that surpassed the borders of their nationality, and the removal of their Union citizenship would not alter this position.

This project began in January 2019 with the broad aim of whether it was possible to secure Union citizenship for the nationals of a withdrawing EU Member State. Since then, the UK has formally withdrawn from the EU; the Brexit Withdrawal Agreement has been ratified to confirm that UK nationals have indeed lost their Union citizenship; and the future EU-UK relationship has been set in motion through the Trade and Cooperation Agreement. Additionally, the Court of Justice has since confirmed that it cannot restore the Union citizenship of UK nationals regardless of whether they had exercised their previously held right to freedom of movement under EU law.[2]

[1] See European Union, 'Permanent European Union Citizenship' (*Europa.eu*, 23 July 2018) <https://citizens-initiative.europa.eu/initiatives/details/2018/000003_en> accessed 18 September 2024.

[2] Case C-673/20 *EP v Préfet du Gers and Institut national de la statistique et des études économiques (INSEE)* EU:C:2022:449, paras 46-52 ; Case C-499/21 P *Joshua David Silver and Others v Council of the European Union* EU:C:2023:479. See also Case C-501/21 P *Harry Shindler and Others v Council of the European Union* EU:C:2023:480; Case C-502/21 P *David Price v Council of the European Union* EU:C:2023:482.

It is not entirely clear whether another Member State will trigger Article 50 TEU and begin a formal withdrawal from the EU.[3] However likely or unlikely another Member State withdrawal may be, the EU should nevertheless recognise this as a possibility. It is perhaps advisable that the EU begins to work towards securing the continuity of Union citizenship through avenues other than the holding of a Member State nationality. Such could be achieved if the EU and its Member States also recognises and has due regard for the links or allegiances that its peoples, lawfully resident third-country nationals and former European Union citizens have towards the EU and uses such as a basis for allowing for alternative criteria for being admitted to Union citizenship. On this basis, it is contended that UK nationals ought to be able to continue their Union citizenship given that they continue to identify with the values and principles that have underpinned the EU and Union citizenship.

This work considers how such an identity to the EU can be qualified and whether the acceptance of such could provide a theoretical justification for acquiring Union citizenship upon criteria other than the holding of a Member State nationality. This work holds that the European identity is defined through acceptance towards the values of the EU as stated in Article 2 TEU. That being respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. This work also holds that the problem with Union citizenship is not so much the UK's withdrawal but is instead found within the current conceptualisation of the status as expressed within the EU Treaties. It is argued here that a broader interpretation of the personal scope of the status ought to be considered to allow for all those who

[3] See Marlene Wind, 'Brexit and Euroskepticism: Will "Leaving Europe" be Emulated Elsewhere?' in Federico Fabbrini (ed), *The Law & Politics of Brexit* (OUP 2017) 221-45.

share in the European Union identity to be able to contribute to and participate in it as Union citizens regardless of their nationality.

Brexit has demonstrated that Union citizenship is a contradictory concept. On the one hand, the Treaties state that every national of a Member State shall be a citizen of the Union and that Union citizenship is to be additional to and not replace national citizenship. On the other, the Court of Justice has appeared to expand its scope by declaring it as being destined to become the fundamental status of Member State nationals to seemingly raise its significance above that of their national citizenship.[4] It is difficult to fully grasp what the intended meaning of Union citizenship is given the differences between the legislative and judicial interpretations of the status. Was the status intended to establish a post-national status of citizenship, or was it always intended that the Member States should retain control over its access and continuity? In attempting to provide clarity, it should be asked whether the intended, or perhaps true, meaning of Union citizenship has become lost in the wake of the numerous crises and rising Euroscepticism in the contemporary EU.

What is proposed here is that the EU political institutions and the EU Member States ought to establish something more concrete within the Treaties through the Article 48 TEU ordinary revision procedure. Here it is argued that Union citizenship's admission criteria should be redefined to allow for admission upon criteria other than the holding of a Member State nationality. To achieve this, it is proposed that a rewriting of Article 2 TEU, Article 3 TEU, Article 9 TEU, Article 50 TEU, Article 20(1) TFEU, and Article 2 of Directive 2004/38 is required. This would recognise and legally cement the fact that a withdrawal from the EU does not detach an individual's

[4] Case C-184/99 *Rudy Grzelczyk v Centre Public d'Aidec Sociale d'Ottignies-Louvain-La-Neuve* EU:C:2001:458, para 31.

identity to it. In other words, the acceptance of an EU identity in the Treaties would offer a form of Union citizenship that is genuinely post-national. Such a proposal would also take a step towards properly establishing Union citizenship as the fundamental status, one that is so fundamental that it cannot be revoked upon a Member State withdrawal from the EU.

If Union citizenship is to become a truly post-national and fundamental status of citizenship, then it is necessary to reconsider its admission criteria. The research questions this work aims to address are as follows:

- Can it be said that the European Union identity provides a link to the EU to allow for the admission of UK nationals and other lawfully resident third-country nationals to Union citizenship? And;
- How could the EU Treaties be amended to incorporate additional routes to Union citizenship admission?

The core structure of the work is based upon three parts consisting of seven chapters and subsequent concluding remarks. Part I seeks to provide historical background and context to both national and European Union citizenship. Part II considers Union citizenship's legal and theoretical shortcomings that were already in place prior to Brexit. Part III considers the post-Brexit landscape and its impact upon the idea of a post-national Union citizenship.

Chapter One explores the historical relationship between citizenship and belonging in a politically defined territory. The unpacking of historical sources seeks to highlight the changing nature of citizenship from its traditional association with duty and active participation towards becoming defined liberally to provide for a passive status conferring rights upon individuals. The chapter ultimately finds a

definition of citizenship from the writings of Thomas H Marshall claiming that citizenship ought to provide for civil, political and social rights.[5] Marshall's definition of citizenship will be used as a template for considering the status of European Union citizenship and to assess whether the status has been successful in facilitating the civil, political and social rights of Union citizens.

Chapter Two explores how the European Union has been the catalyst for debate in respect to cross-border rights protection for the nationals of the participating European nation-states. The devastation of World War II meant that the nation-states of Europe needed to realign themselves politically, culturally and socially. The European nation-states began to achieve this through integrating certain aspects of their economies. The integration of economic sectors perhaps naturally entailed some measure of political integration as a system of supranational institutions were established to facilitate the rights of migrant workers who crossed national borders to work in a territory other than the one of their nationalities. It became obvious that the rights of these peoples needed to include not only economic rights but also the full suite of civil, political and social rights. The chapter analyses the Copenhagen Declaration on European Identity adopted on 14 December 1973 to uncover initial attempts to clarify the meaning of a European identity as the shared adherence to the value of life, representative democracy, the rule of law, social justice and human rights.[6] This definition of European identity shall be accounted for throughout this work and it is argued that the Member States have indeed accepted these values as the core of a European identity. Such recognition arguably led to the establishment of a European Union citizenship within the Treaty of Maastricht. To

[5] See Thomas H Marshall, *Citizenship and Social Class: And Other Essays* (CUP 1950).
[6] European Council, 'Declaration on European Identity' (Copenhagen European Council, Bull EC No 12, 14 December 1973) pt 2.

unpack how the transition from economic migrant to European Union citizen occurred, it is necessary to consider the historical and institutional developments that led towards its formal establishment.

Chapter Three considers the scope and content of Union citizenship and how Union citizenship has taken a contested jurisprudential journey regarding how fundamental the status ought to be. In respect to scope and content, the chapter considers the suite of rights that are available to the EU Member State nationals. Such rights including the right to freedom of movement and residence; voting in the country of residence in municipal and European Parliament elections; entitlement to diplomatic protection in another Member State; the right of petition and the right to appeal to the European Ombudsman. In respect to Union citizenship jurisprudence, this chapter considers whether the jurisprudence of the CJEU has adequately accounted for the EU identity.[7] This chapter demonstrates how the interpretive character of the Court of Justice became side-lined after a period of doctrinally motivated judgments that imposed additional criteria to residence contained within Directive 2004/38 in place of applying the primary law right to freedom of movement free from discrimination on the basis of their nationality.[8] The chapter finds that Union citizenship is legally insufficient as the status has not met the Marshallian citizenship standard given the status has remained entrenched in the values ascribed to a type of European market citizenship in the place of guaranteeing genuine and enforceable social rights.[9] Examining such judgments uncovers the

[7] See Case C-168/91 *Christos Konstantinidis v Stadt Altensteig* EU:C:1993:115, Opinion of AG Jacobs, para 46. See also Case C-135/09 *Janko Rottman v Freistaat Bayern* EU:C:2010:104, Opinion of AG Poiares Maduro, para 23.
[8] See Case C-85/96 *María Martínez Sala v Freistaat Bayern* EU:C:1998:217, paras 61-65. See also Case C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* EU:C:2014:2358, paras 93-131.
[9] See Charlotte O'Brien, 'I Trade, Therefore I Am: Legal Personhood in the European Union' (2013) 50 Common Market Law Review 1684, 1646; Moritz Jesse and Daniel Carter, 'The "Market Insider"'

Court's ambiguous nature and its ability to make any future judgments on Union citizenship somewhat unforeseeable.[10]

Chapter Four shall consider how European integration has led to a multinational and constructivist identity towards the EU. This chapter responds primarily to the work of Joseph Weiler and his account of identity building in the EU.[11] It is considered whether the values and principles that have underpinned belonging in the EU could theoretically replace Member State nationality as the prerequisite requirement to be admitted to Union citizenship. The chapter considers whether such accounts could legitimise the potential for a post-national Union citizenship that is no longer solely dependent upon the holding of a Member State nationality. The works of Yasemin Soysal and Dora Kostakopoulou are accounted for to determine what criteria could be met to admit people to a post-national form of Union citizenship.[12] The chapter asks what the EU identity is and whether it can create a strong enough sense of solidarity to provide a justification for Union citizenship admission and recognises that identity and citizenship are sociological concepts that are often in conflict with one another. It is proposed that if a citizenship is to function effectively as a legal concept, then it must closely mirror the identity that it seeks to legally formalise. However, the chapter finds that Union citizenship in its current form is only a post-national status of citizenship in so far as a Member State willingly remains within the EU's political structure.

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in Moritz Jesse (ed), *European Societies, Migration, and the Law: The 'Others' Amongst 'Us'* (CUP 2022) 282-300.

[10] See Daniel Thym, 'Towards "Real" Citizenship? The Judicial Construction of Union Citizenship and Its Limits' in Maurice Adams and others (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013) 164.

[11] JHH Weiler, 'Introduction: European Citizenship, Identity and Differentity' in Massimo La Torre (ed), *European Citizenship: An Institutional Challenge* (Kluwer Law International 1998) 16.

[12] Yasemin Nuhoğlu Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (The University of Chicago Press 1994) 148; Theodora Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (Manchester UP 2001) 103-04.

Chapter Five considers the political processes and positive law that has underpinned Brexit and the loss of Union citizenship for UK nationals. The Withdrawal Agreement is taken into consideration to assess how the residence rights of free-moving UK nationals in the EU, and free-moving Union citizens in the UK, are secured. Following this, an account is provided of the political tension surrounding the Withdrawal Agreement and more particularly the Northern Ireland Protocol. Ultimately, the chapter concludes that it is difficult to maintain the idea that Brexit is done.

Chapter Six considers the jurisprudence of the Court of Justice following the Brexit referendum and then following the UK's formal withdrawal from the EU. It is said here that the Court could have protected the Union citizenship of UK nationals through an adherence to the general principles upon which the EU was founded and continues to operate upon to allow for an extension of the United Kingdom's past political decision to ratify the Treaty on European Union in order to retain the Union citizenship of UK nationals.[13] However, the Court did not consider Union citizenship as being fundamental enough to prevent its erasure upon the withdrawal of the UK from the EU.[14] It is now clear that if UK nationals are to be re-admitted to Union citizenship, then this must become a political issue rather than a judicial one.

Chapter Seven considers the rationale for Union citizenship reforms and offers a proposal arguing for Treaty amendment through the ordinary revision procedure. The chapter considers the ideas of numerous scholars and policy practitioners regarding the retention of Union citizenship following a Member State withdrawal from the EU. If Union citizenship is destined to be the fundamental status of Member

[13] See Ronald Dworkin, *Law's Empire* (first published 1986, Hart Publishing 2019) 134.
[14] Case C-673/20 (n 2).

State nationals, then it must be capable of being retained in the event of a Member State withdrawal from the EU. The chapter provides a proposal that argues for alternative routes to Union citizenship admission. The chapter considers how such routes could be qualified, how such could be written into the EU legal framework and how such could be applied in practice. It is argued that Member State nationality, periods of lawful residence exceeding five years and pecuniary measures could theoretically justify alternative routes to Union citizenship admission. The chapter shall also consider the values, rights and duties individuals must undertake to establish their commitment to this EU identity. The chapter shall also consider possible objections to this proposal.

Concluding remarks shall follow. This work ultimately concludes that citizenship, whether that be national or supranational, is a constructed institution that can become subject to change where the status no longer reflects the lived realities of those who live under it. It is also contended that Union citizenship as currently expressed by the EU Treaties and by the Court of Justice has left both legal and theoretical limitations to the expense of both static and free moving Union citizens, former Union citizens and lawfully resident third-country nationals. Additionally, the chapter argues that the retention of, and readmission to, Union citizenship for UK nationals, as well as the admission of all other lawfully resident TCNs to Union citizenship, must become a political issue requiring Treaty change to cement the post-national character of Union citizenship into a legally binding text. It is said that the personal scope of Union citizenship ought to be widened to include UK nationals and that if the EU and its Member States accept that such peoples belong to the EU and their host territories on the basis of their genuinely held identities then their admission to Union citizenship could be qualified through means other than the

holding of a Member States nationality. The work ultimately finds that Union citizenship can become the fundamental status for Union citizens if the EU and its Member States establish a truly post-national status of Union citizenship that could be acquired independently of a Member State nationality. To allow for such would guarantee the continuity of Union citizenship given that it would no longer be solely dependent upon the holding of a Member State nationality. It is argued here that Union citizenship cannot become a fundamental status until it is first realised as a properly post-national status. In other words, it would be incorrect to call a citizenship that can be revoked upon a Member State withdrawal a fundamental status of citizenship.

It is worth briefly outlining certain assumptions that have been brought into this work. First, it is argued here that an identity precedes the establishment of a legally binding status of citizenship and that this is especially the case in the European Union. In other words, an identity represents the core of any citizenship. It is said here that for a citizenship to be legitimate and for its continuity to be ensured, then an identity towards the community in which a citizenship is given is necessary. Without such it can be argued that any citizenship would lack the ‘social glue’ that is perhaps required to hold a community together. It is identity that makes a citizenship a malleable construct: people’s identities change and as they do, they also seek to alter what their citizenship encapsulates. Citizenship should reflect the identity of the community and legally cement what peoples perceive to be their collective identity in their political community. Citizenship must be malleable as the people it represents can come to view the status as being outdated if it is not reflective of

their identities and lived experiences. Therefore, citizenship is viewed as the legal instrument that provides for the official and legal recognition of an identity.

Second, this work contends that the nature of citizenship and nationality are fundamentally separate concepts to argue that post-national models of citizenship remain a theoretical possibility. The work holds that theories of identity formation can act as an alternative underpinning for Union citizenship admission to substitute the nationality component that has underpinned the status since its inception. The work also accepts that Union citizenship can become the fundamental status of all who hold it in that the status can provide the bundle of rights traditionally associated with citizenship. However, it is said that such a post-national paradigm shift is yet to occur, and this work contends that any reform ought to be established through Treaty revision at the EU level.[15]

Third, the work considers the positive law of the United Kingdom and of the European Union as currently formulated to accept Brexit and the loss of Union citizenship for UK nationals.[16] In Parliament enacting the European Union (Withdrawal Agreement) Act 2020 Brexit and the loss of Union citizenship for UK nationals became law.[17] It is contended here that the authority of the UK Parliament is recognised through the UK electorate as a matter of social fact,[18] and that Parliamentary sovereignty operates as the basic norm of the UK legal system which

[15] See Thomas S Kuhn, *The Structure of Scientific Revolutions* (4th edn, University of Chicago Press 2012) 92-110.
[16] See European Union (Withdrawal Agreement) Act 2020, s.1; Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ L29/07.
[17] Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (first published 1885, Forgotten Books 1982) 37-38; HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harvard Law Review 593, 601; HLA Hart, *The Concept of Law* (first published 1961, 3rd edn, OUP 2012) 107 and 116. See also Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 401-02.
[18] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, OUP 2009) 37, 40 and 151-53.

provides validity to the legal norms of the UK.[19] It is also contended that such legal norms regulate the behaviour and status of the UK citizenry.[20] Equally, it is said that the ordinary legislative procedure operates as the basic norm of the EU. Through the adoption of Council Decision 2020/135, the EU accepted Brexit and the loss of Union citizenship for UK nationals as a matter of positive law.[21] Article 9 TEU and Article 20 TFEU maintain that the holding of a Member State nationality is required if one is to also hold Union citizenship. Given that the UK is no longer an EU Member State, UK nationals can no longer be Union citizens under the current EU Treaty framework. The work does not agree with this decision, but it nevertheless accepts it as valid given the current framework of EU law. However, the benefit of accepting Brexit is that it provides a platform for innovative discussions regarding Union citizenship admission and highlights the increased urgency for the EU and its Member States to act in the interests of those who have relied upon it and those who seek to do so in the future.[22]

In respect to broader research assumptions, citizenship is to be seen as one of the many legal concepts that are used to make sense of our position within the world. In other words, it is argued that there is no absolute truth when determining the scope of citizenship given its dynamic nature. This widens the scope of citizenship through including concepts such as identity expression to consider if and how such identities are formalised in legislation. Therefore, the EU shall be viewed

[19] Hans Kelsen, *Pure Theory of Law* (Max Knight trs, first published 1934, The Lawbook Exchange Ltd 2009) 46-47 and 105-06. See also Hans Kelsen, 'On the Basic Norm' (1959) 47 California Law Review 107, 109-10.
[20] ibid 31 and 198.
[21] Council Decision (EU) 2020/135 of 30 January 2020 on the Conclusion of the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Economic Community [2020] OJ L29/1.
[22] See Liav Orgad, 'A Citizenship Maze: How to Cure a Chronic Disease?' (2019) EUI Working Paper RSCAS 2019/24 <https://cadmus.eui.eu/handle/1814/62229> accessed 14 July 2020.

as a socially constructed entity that is best studied as an evolving and multi-levelled process that is related to but is also incomparable to nation-states.

In respect to methodology, Brexit was used as an interpretive case study to test post-national theories of citizenship.[23] The work adopts a doctrinal or 'black letter' methodological approach to legal scholarship to determine the legal norm for interpreting the legal consequences of Brexit and to determine what the legislation and the case law claim the law is.[24] Such analysis shall allow for recommendations and suggestions as to how the law could be reformed.[25] However, although a doctrinal approach will be a necessary precursor to demonstrate this, it is essential to reject the notion that the reality of European law can be found exclusively in legal sources. Given that this work argues for the reinterpretation of Union citizenship and legislative reform through Treaty revision, it is argued that a strictly doctrinal reading of the EU Treaties, EU secondary legislation and the CJEU case law is insufficient. Therefore, an interpretive, interdisciplinary and even socio-legal approach ought to be considered as it is necessary to understand how and why the decision to remove Union citizenship for UK nationals has impacted the lives of those who have previously relied upon it. To concur with Kostakopoulou, 'legal norms should reflect social practices and citizens lived realities.'[26]

The work shall consider the socio-legal scholarship conducted by numerous scholars to provide a more holistic view of the EU legal order and to determine the

[23] Robert K Yin, *Case Study Research: Design and Methods* (5th edn, Sage 2014) 155. See also Sonia Morano-Foadi, 'EU Citizenship and Religious Liberty in an Enlarged Europe' (2010) 16 European Law Journal 417, 436-38.
[24] See Ronald Dworkin, *Law's Empire* (first published 1986, Hart Publishing 2019) 116.
[25] Mike McConville and Wing Hong Chui, 'Introduction and Overview' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edn, Edinburgh University Press 2017) 4; Ian Dobinson and Francis Johns, 'Legal Research as Qualitative Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edn, Edinburgh University Press 2017) 24.
[26] Dora Kostakopoulou, *European Union Citizenship Law and Policy: Beyond Brexit* (Edward Elgar Publishing Ltd 2020) 145.

effect of the law on wider society and the process of European integration.[27] If EU law is to be viewed as a *sui generis* legal order that genuinely decouples its laws from the nation-state in a manner that makes it neither national nor international,[28] then interdisciplinary collaboration with literature concerning philosophy, political science, sociology and the humanities must intervene to interpret the translation problem between the nation-state and the supranational EU.[29] The often tacit touches of 'stateness' in EU legal research have tended to ignore the fact that the Union citizenship provisions are beyond the nation-state in a way that can be empirically observed.[30]

In respect to method, documentary data was collected and analysed to justify the claims made. The adoption of this method can be justified upon numerous grounds. Two such reasons are the limitations of access and the lack of control over the research subject. Brexit as a political process has been in constant motion and upon embarking on this project in January 2019, the UK was yet to formally withdraw from the EU. In responding to the problem of control over the research subject, the use of documentary analysis as a research method attempted to match such pace given its primary benefit is in the ease of access to such data.[31] However, although

[27] See Jo Shaw, 'Socio-legal Studies and the European Union' in Philip A Thomas (ed), *Socio-Legal Studies* (Dartmouth Publishing Company 1997) 313; See also See also Jo Hunt and Jo Shaw, 'Fairy Tale of Luxembourg? Reflections on Law and Legal Scholarship in European Integration' in Alex Warleigh-Lack and David Phinnemore (eds), *Reflections on European Integration: 50 Years of the Treaty of Rome* (Palgrave MacMillan 2009) 4.
[28] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* EU:C:1963:1, para 3.
[29] Gary Marks, Liesbet Hooghe and Kermit Blank, 'European Integration from the 1980s: State-centric v. Multi-level Governance' (1996) 34 JCMS 341; Neil Walker, 'Legal Theory and the European Union: A 25th Anniversary Essay' (2005) 25 OJLS 581. See also Paul Roberts, 'Interdisciplinarity in Legal Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (2nd edn, Edinburgh University Press 2017) 92-99.
[30] Jo Shaw and Antje Wiener, 'The Paradox of the European Polity' in Maria Green Cowles and Michael Smith (eds), *State of the European Union Volume 5: Risks, Reforms, Resistance and Revival* (OUP 2001) 64-90.
[31] Michael D Myers, *Qualitative Research in Business and Management* (2nd edn, Sage 2013) 120.

documentary evidence can be said to be used to avoid personal bias, this is not the case as the bias occurs in the selection of the texts. To alleviate this, all documentary evidence underwent an interpretive process to assess the quality of certain documentation to consider its authenticity, credibility, representativeness and meaning to determine if and how far the data is to be believed.[32] In selecting the texts for investigation these criteria shall be applied but inevitably, and regrettably, it was not possible to include all theories and argumentation.

Something should be said for the inclusion of 'grey literature' meaning literature that has not been subjected to academic peer review.[33] The inclusion of non-peer-reviewed data is justifiable in the field of legal studies given that court judgments and legislation are not always subject to immediate academic scrutiny, but they nevertheless provide authority. In any event, academic peer review has itself been subject to criticism given that the peer review process can involve reviewers being overly critical of research methodologies which they do not favour that can consequently result in overall journal or conference bias.[34] Much is said about the need to provide objective, systematic and 'post-ideological research' but it is contended here that while this should be borne in mind it is somewhat an

[32] John Scott, *A Matter of Record: Documentary Sources in Social Research* (Polity Press 1990) 19-35; Geoff Payne and Judy Payne, *Key Concepts in Social Research* (Sage 2004) 63.
[33] Joachim Schöpfel, 'Towards a Prague Definition of Grey Literature' (2011) 7 The Grey Journal 5; Richard J Adams, Palie Smart and Anne Sigismun Huff, 'Shades of Grey: Guidelines for Working with the Grey Literature in Systematic Reviews for Management and Organizational Studies' (2017) 19 International Journal of Management Reviews 432, 349. See also Len L Levin, 'Literature Search Strategy Week: Len Levin on Understanding and Finding Grey Literature' (*University of Massachusetts Medical School*, 5 November 2014) <https://escholarship.umassmed.edu/cgi/viewcontent.cgi?article=1175&context=lib_articles> accessed 22 October 2020; Sally Hopewell, Mike Clarke and Sue Mallet, 'Grey Literature and Systematic Reviews' in Hannah R Rothstein, Alexander J Sutton and Michael Borenstein (eds), *Publication Bias in Meta-Analysis: Prevention, Assessment and Adjustments* (Wiley 2005) 49-72.
[34] Jörgen Sandberg and Mats Alvesson, 'Ways of Constructing Research Questions: Gap-Spotting or Problematization' (2011) 18 Organization 23, 35; Daniel E Ho, 'Forward: Conference Bias' (2013) 10 Journal of Empirical Legal Studies 603, 604.

impossibility when carrying out research in a field such as Brexit given that it was ultimately a political decision before it became a legal one.[35]

In moving forward, it is perhaps worth stating that I had been a Union citizen for the entirety of my life prior to 31 January 2020. It may be worth acknowledging that the EU and its citizenship must have had some bearing upon the construction of my identity as a UK national who holds the view that the European political space is better placed when the European nation-states are cooperating with one another. Whether this makes any impact upon the overall findings of this work is for each individual reader to decide.

[35] See David Tranfield, David Denyer and Palminder Smart, 'Towards a Methodology for Developing Evidence-Informed Review' (2003) 14 British Journal of Management 207, 208.

PART I

Chapter I

Citizenship and Its Historical Context

I. Introduction

To provide an uncontested definition of citizenship presents a task of near impossibility. In attempting to define the status through dictionary definitions, one finds slight disparities. The Oxford Dictionary defines citizenship as: 'the position or status of being a citizen of a particular country.'[1] This definition would appear to be straightforward in both its interpretation and application, yet the Cambridge Dictionary expands upon this by stating that citizenship is: 'the state of being a member of a particular country *and having rights because of it*.'[2] The inclusion of rights to citizenship is one of the hallmarks of the doctrine, and the omission of rights within the Oxford definition arguably fails to give significant weight to its nature and scope. However, it is important to note that the nature of what is meant by the term 'rights' is subjective and is therefore fervently disputed. It is this dispute that ensues conflict as although many maintain that people do have rights they nevertheless disagree about their origin, substance and scope.[3] In addition, the dispute as to what

[1] Oxford English Dictionary, 'Definition of Citizenship in English by Oxford Dictionaries' (*Oxford Dictionaries*, 2018) <https://en.oxforddictionaries.com/definition/citizenship> accessed 27 November 2018.
[2] Cambridge Dictionary, 'Citizenship Meaning in The Cambridge English Dictionary' (*Dictionary.cambridge.org*, 2018) <https://dictionary.cambridge.org/dictionary/english/citizenship> accessed 27 November 2018 (emphasis added).
[3] Richard Bellamy, *Citizenship: A Very Short Introduction* (OUP 2008) 14; Richard Bellamy, 'Political Constitutionalism and the Human Rights Act' (2011) 9 International Journal of Constitutional Law 86, 90.

citizenship rights are and how they are to be enforced has the potential to challenge pre-existing ideological beliefs and institutional structures.

In analysing these definitions further, it becomes clear that two distinct players exist when addressing citizenship: the citizen and the territory in which they are entitled to this status. The two definitions provided above explain that citizenship acts as the vehicle for recognising a vertical connection, or a sense of belonging, to a territory. However, they omit any explanation of how best to connect citizens horizontally to each other. It can be argued that the extension of citizenship to incorporate a system of rights facilitates this horizontal connection as the inclusion of rights arguably achieves equal membership and social inclusion in a political community.[4]

This chapter takes one aim: to demonstrate that citizenship is a malleable construct. There are numerous pre-existing philosophical approaches available that could demonstrate this. For example, one approach would be to apply John Searle's distinction between 'brute' and 'institutional' facts. In this model, Searle presents his idea of institutional facts as facts that are only such by way of human agreement and require the continuance of human-made institutions to function.[5] Citizenship can easily sit within this narrative. However, this chapter contends that such analysis is not required as uncovering citizenship's historical context can demonstrate this point. The following sections will consider some of the prominent historical, philosophical and sociological accounts that can help explain citizenship's journey from Antiquity to the establishment of the British welfare state.

[4] See Judith N Shklar, *American Citizenship: The Quest for Inclusion* (Harvard UP 1991) ch 3.
[5] John R Searle, *The Construction of Social Reality* (Penguin 1996) 1-2.

Three main themes of citizenship development are of interest: first, the chapter will consider the origins of citizenship and establish the criteria to secure it; second, the chapter will consider the modern or enlightened citizenship ideal that encapsulates the citizen as a member of a nation-state; third, the shift to a more liberally defined citizenship ideal that places its emphasis upon the inclusion of rights within the title of citizenship shall be considered. The chapter concludes by finding that citizenship's definition is not only reliant upon the citizen and the political territory but may instead be made of constituent elements that each need to be met.

II. Citizenship in Antiquity

The Athenians and the Romans made the first notable contributions to citizenship as a method for instilling belonging to a geographical territory.[6] Athens is considered the starting point given the Greeks added the unhindered study of mathematics, science and philosophy to society which appeared to be lacking in ancient Egyptian and Mesopotamian societies.[7] Despite such achievements, Athenian democracy arguably left much to be desired given its tendency towards the unjust as demonstrable through the trial of Socrates.[8] However, Derek Heater regarded Aristotle's *The Politics* as the seminal text for citizenship studies as it sought to reconcile the relationship between the individual and the Greek city-state.[9] Aristotle

[6] Derek Heater, *What Is Citizenship?* (Polity Press 1999) 44-48; Virginia Leary, 'Citizenship, Human Rights, and Diversity' in Alan C Cairns and others (eds), *Citizenship, Diversity & Pluralism: Canadian and Comparative Perspectives* (McGill-Queen's UP 1999) 247; Bellamy (n 3) 28.
[7] Bertrand Russell, *History of Western Philosophy* (first published 1946, Routledge 2004) 15.
[8] Plato, *The Last Days of Socrates* (Penguin Classics 2003) pt.2, pt.3 and pt.4. See also Xenophon, *Conversations with Socrates* (Penguin Classics 1990) 27-49.
[9] Derek Heater, *Citizenship in Britain: A History* (Edinburgh UP 2006) 15.

conceded that the great variety of practices in different periods of history meant that he came no closer to finding an uncontested citizenship definition.[10]

Aristotle concerned himself with defining what he considered 'the citizen proper' to mean one 'without any defect needing to be amended.'[11] In Aristotle's mind, it is clear who is able to be admitted to the citizenly status: 'as soon as a man becomes entitled to participate in office, deliberative or judicial, we deem him to be a citizen of that state.'[12] The end goal is to promote active citizenship to produce a male citizen with the wisdom to make political judgments.[13] Aristotle concluded that claims to citizenship should not be justified through the *jus soli* principle (the place of one's birth) as 'mere residence in a place [does not] confer citizenship' although he conceded that resident foreigners and slaves do share domicile in the territory.[14] Aristotle also critiqued citizenship admission through the *jus sanguinis* principle (citizenship through blood ties) arguing that this principle is only used for pragmatic purposes and leaves unsolved how ancestral claims to citizenship can be justified.[15]

What concerned Aristotle was how can the individual justify their claim to citizenship once it has been attained. In asking what a good citizen is he concluded that the answer depends 'largely on the *politeia* and constitution in which citizenship is held.'[16] If the duty of all citizens is to stabilise the constitution and given that there are many kinds of constitution 'there cannot be one single *and perfect* virtue of the

[10] Aristotle, *The Politics* (Penguin Classics 1992) 168-70. See also Elizabeth Meehan, *Citizenship and the European Community* (Sage 1993) ch 1.
[11] ibid 169.
[12] ibid 169-71.
[13] Stephen Howe, 'Citizenship in the New Europe: A Last Chance for the Enlightenment?' in Geoff Andrews (ed), *Citizenship* (Lawrence & Wishart 1991) 125.
[14] Aristotle (n 10) 169. See also Kostas Vlassopoulos, 'Slavery, Freedom and Citizenship in Classical Athens: Beyond a Legalistic Approach (2009) 16 European Review of History 347, 359-60.
[15] ibid 172.
[16] ibid 176.

sound citizen.'[17] Aristotle's distinction here is to mean that the sound citizen can operate independently of the sound man. The reality is that any territory cannot 'consist of entirely sound men [but], still, each of them must do, and do well his proper work; and doing it well depends on his virtue.'[18] Aristotle argued that the criteria for possessing the virtue of the sound man and the sound citizen are for one to rule as ruling requires one to be both good and wise.[19] The criteria for one to become a ruler is to learn through first being ruled since it is said that it is impossible to be a competent ruler without having been subjugated to the authority of another. This allows for the understanding of the governing of free men from both points of view.[20] Therefore, in Aristotle's view, it is good to rule as this will produce a citizen who understands life from all points of view.[21]

It would be reasonable to suggest that the virtues of the good man and the good citizen are not synonymous. One example would be the citizens under the Nazi regime during the implementation of the Nuremberg Laws.[22] Where a constitution supports oppression the distinction between the virtue of the good man and the good citizen is tested. If one were to act as a good citizen under the Nazi regime then the question of whether the good citizen can be a good man is separated, and this separation is for reasons other than their capability to rule. In such circumstances, a good man must be simultaneously a bad citizen in their disregard to adhere to

[17] ibid 179.
[18] ibid 180.
[19] ibid 180-81. See also Robert Devlin, 'The Good Man and the Good Citizen in Aristotle's "Politics"' (1973) 18 Phronesis 71, 78.
[20] Aristotle (n 10) 182.
[21] JGA Pocock, 'The Ideal of Citizenship Since Classical Times' in Gershon Shafir (ed), *The Citizenship Debates* (University of Minnesota Press 1998) 32-33.
[22] William L Shirer, *The Rise and Fall of the Third Reich* (Random House 1998) 233; Kristen Rundle, 'The Impossibility of an Exterminatory Legality: Law and the Holocaust' (2009) 59 University of Toronto Law Journal 65, 69-76.

unjust laws.[23] To quote Sir Hartley Shawcross from the Nuremberg trials: 'There comes a point when a man must refuse to answer to his leader if he is also to answer to his own conscience.'

The qualifying nature of having first been ruled before becoming a ruler also appears to lack universality and arguably represents a major flaw in Aristotle's theory.[24] Historical studies remind us that Mao Zedong's peasant upbringing did not imbue him with optimism about improving the plight of Chinese peasants.[25] The quality of first being ruled led Mao no closer to defining the citizen in constitutional terms. The 'promise [that] his regime "protects all citizens safety and legal rights …" [was underlined by Mao who] wrote in the margin: "What exactly is a citizen?"'[26] Additionally, the peasant upbringing of Joseph Stalin did nothing to prevent the Great Terror.[27] The solution to such contradictions found in Aristotle's work is that the good man should gladly accept such honours and opportunities if they come but not to become dissatisfied if they do not, this appears to confirm that there is nothing intrinsically bad about not holding political office.[28] Instead, what should matter is the freedom to take part in public decision-making when defining who is a citizen.[29]

In designing the State, Aristotle advocated for a republican form through a constitution of mingled aristocratic and democratic governance as this creates a

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[23] Colleen Bell, 'Spooked by the Demos: Aristotle's Conception of the Good Citizenry Against the Mob' (2007) 11 Problematique 11, 11. See also Gustav Radbruch, 'Five Minutes of Legal Philosophy (1945)' (2006) 26 Oxford Journal of Legal Studies 13, 13; Gustav Radbruch, 'Statutory Lawlessness and Supra-Statutory Laws (1946)' (2006) 26 Oxford Journal of Legal Studies 1, 1-6; Lon L Fuller, 'Positivism and Fidelity to Law — A Reply to Professor Hart' (1957) 71 Harvard Law Review 630, 644-648; John Finnis, *Natural Law & Natural Rights* (2nd end, OUP 2011) 275 and 281-90; Martin Luther King, *Why We Can't Wait* (first published 1964, Penguin Classics 2018) 92-95.
[24] Donald Morrison, 'Aristotle's Definition of Citizenship: A Problem and Some Solutions' (1999) 16 History of Philosophy Quarterly 143, 145.
[25] Jung Chang and Jon Halliday, *Mao: The Unknown Story* (Vintage 2007) 11.
[26] ibid 476.
[27] Robert Service, *Stalin: A Biography* (Pan Books 2010) 13-22.
[28] Richard Mulgan, 'Aristotle and the Value of Political Participation' (1990) 18 Political Theory 195, 202-03.
[29] Pocock (n 21) 34.

society that is free from factions.[30] The citizens cannot hold the state in equilibrium if it is too unwieldy. The checks and balances proposed by Aristotle is one example of how his thinking has been translated into the modern world.[31] Above all, Aristotle believed in the primacy of the rule of law rather than the State being governed by a single individual.[32]

Aristotle expressed concern about the size of the State claiming that it can neither be too large nor too small. In respect to its citizens, it must be considered 'how many they ought to be and of what natural qualities' they must possess within the 'extent and character' of the territory.[33] Aristotle's justification for this reasoning is that there is 'no state with a reputation for a well-run constitution that does not restrict its numbers' into its territory.[34] The concern surrounded the identity of the populous and Aristotle argued that the body of citizens should be sufficiently compact as to enable them to know one another's character, and it is only through this type of intimacy where the communal bonds of true fraternal citizenship can be realised.[35] Aristotle claimed that for 'decisions to be made on matters of justice, and for the purpose of distributing offices on merit, it is necessary that the citizens should know one another and know what kind of people they are.'[36] For the State to determine whether the citizen can satisfy the communal bond required for good citizenship it must demand that all who seek its citizenship should integrate by identifying and acting upon the social and political behaviour of the pre-established community.

[30] Aristotle (n 10) 68.
[31] Heater (n 6) 54.
[32] Aristotle (n 10) 226.
[33] ibid 403.
[34] ibid 403-04.
[35] Heater (n 6) 45.
[36] Aristotle (n 10) 405.

Aristotle considered it essential to generate political friendship among the citizens as 'friendship seems to hold the state together' and defined such friendship as 'Concord'.[37] There is only Concord when citizens agree about their interests, adopt a policy unanimously and proceed to carry it out.[38] Therefore, citizenship must connect citizens horizontally to each other as well as vertically to the State. In this view of citizenship, assimilation is seen as a positive duty to benefit the citizen as they become a morally mature person who 'is by nature a *political animal*' intended to live in a Polis in communal concord.[39] It has since been debated whether we are a creature made by nature to live a political life, but it has nevertheless remained one of the great western definitions of what it is to be human. It is a formulation that we are still strongly disposed to accept, and some argue that to deny the individual the ability to shape their lives in a political sense is to deny them humane treatment.[40]

Aristotle considered the collective political judgment of citizens and defended mass political participation, claiming that 'the mass of the people ought to be sovereign, rather than the best few'.[41] Aristotle justifies this belief in the same vein to which 'a feast to which all contribute is better than one supplied at one man's expense,'[42] or in the judgment of poetry and music in how 'some judge some parts and some judge others, but their collective judgment is the verdict upon all the parts.'[43] Aristotle rejected the views of Socrates and Plato who argued that political activity is a skill

[37] Aristotle, *The Nicomachean Ethics* (OUP 2009) 142 and 171.
[38] ibid.
[39] Aristotle (n 10) 59 (emphasis added).
[40] Pocock (n 21) 35.
[41] Aristotle (n 10) 202.
[42] ibid.
[43] ibid 203.

not to be found among the populous at large. In one regard, Aristotle's *The Politics* can be considered an answer to Plato's *Republic* given that Plato was more concerned with defining the good community with a focus upon the provision of education and sound democracy rather than defining the good individual.[44] Perhaps the same could be said of Plato's *The Laws* given its focus upon defining the state proper with a sound balance between monarchy and democracy.[45] Aristotle argued that it is not at all certain that 'this superiority of the many over the sound few is possible.'[46] He acknowledged that although in his view some men are hardly better than 'wild animals' there is yet still no reason to deny the sovereignty of the many.[47] In every society the risk of the menace exists, but Aristotle claimed that it is an even greater risk to deny them their share as to do so will provoke them to act in hostility against the State.[48]

The real difficulty in this constitution presents itself in another manner. No reasonable person would deny that 'the proper person to judge … a piece of medical work … is the same sort of person as is actually engaged on such work … in other words the medical practitioner himself.'[49] Therefore, 'It would seem on this argument that the mass of the people should not be given the sovereign power in either the choosing of officials or for calling them into account.'[50] Here the individual will be a worse judge than the expert, but Aristotle argued that collectively they will be 'at any rate no worse.'[51] Aristotle recognises that in life there will be accomplishments in

[44] Plato, *Republic* (Christopher Rowe tr, Penguin Classics 2012) 56-121, 248-66 and 290-316; Russell (n 7) 546.
[45] Plato, *The Laws* (Penguin Classics 1975) 98-99.
[46] Aristotle (n 10) 203.
[47] ibid.
[48] ibid.
[49] ibid 204
[50] ibid.
[51] ibid 205.

which the professional will be ‘neither the best nor the only judge’ and ‘those who do not possess the skill will form an opinion on the finished product … it is the diner, not the cook, that pronounces upon the merits of a dinner.’[52]

Aristotle's citizenship model carries impracticalities given it consists of only the leisured and propertied elite while also excluding female franchise to citizenship.[53] However, Aristotle recognised that Good citizens are not born and contended that the good citizen is made as a product of education.[54] The purpose of citizenly education is to teach the citizen that they do not belong merely to themselves but also to the State.[55] This ideal is also rife with contradictions, as Aristotle’s insistence on active participation would leave the majority of the Polis excluded given the necessity to work.[56] The citizen would therefore be left with limited time to educate themselves on political matters, especially so given Aristotle's insistence that the young man is not to become the bearer of lectures in political science.[57]

The good man will conscientiously perform the duties of citizenship if they come his way, but there is no suggestion in the ethical treatises that the duties of citizenship are an essential part of his life.[58] However, the good man will require the company of others, and the political animal does not assert the social nature of an individual. The political community also has a specific political character that is necessary for the good life, the citizen is an animal whose reason allows him to

[52] ibid.
[53] Heater (n 6) 46. See also Max Weber, ‘Citizenship in Ancient and Medieval Cities’ in Gershon Shafir (ed), *The Citizenship Debates* (University of Minnesota Press 1998) 47.
[54] Ibid.
[55] Aristotle (n 10) 452.
[56] Susan D Collins, *Aristotle and the Rediscovery of Citizenship* (CUP 2006) 129.
[57] Aristotle (n 37) 5.
[58] Mulgan (n 28) 204.

perceive justice but who requires the activity of the Polis to enforce it.[59] Aristotle's argument that an individual is a political animal may not imply that they must participate in politics to become virtuous. It merely asserts that they must be a part of a Polis and live under its laws,[60] and that a true citizen, in his mind, is a man capable of governing rightly.[61]

* * *

The influence of Aristotle's citizenship philosophy and Athenian culture would later be reinterpreted by the Roman jurist Cicero as a method for organising the peoples of the Roman Republic.[62] Cicero noted how citizenship should not be a static status confined to a singular place given that the Romans extended their citizenship to the residents of those territories conquered by the Empire, including Britain.[63] Cicero's citizenship innovation was to allow the Roman citizen to decree '*civis romanus sum'* ('I am a Roman citizen') to be able to plea for his legal rights.[64] Thus, upon St. Paul's arrest in Jerusalem he could claim his Roman citizenship to demand his trial under Roman law rather than the local system of justice.[65] Cicero's ideal of citizenship is as a matter of status, rights and duties rather than ethnicity and social worth.[66]

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[59] ibid 205.
[60] ibid.
[61] Curtis Johnson, 'Who is Aristotle's Citizen?' (1984) 29 Phronesis 73, 84.
[62] Cicero, *The Republic* (Niall Rudd tr, OUP 2008) 5.
[63] Meehan (n 10) 7.
[64] Cicero, *Political Speeches* (DH Berry tr, OUP 2006) 93. See also Elizabeth Depalma Digeser, 'Citizenship and the Roman *res publica*: Cicero and a Christian Corollary' (2003) 6 Critical Review of International Social and Political Philosophy 5, 6.
[65] Derek Heater, *Citizenship: The Civic Ideal in World History, Politics and Education* (Longman 1990) 17-18; Leary (n 6) 247; Meehan (n 10) 7.
[66] Nicholas Buttle, 'Republican Constitutionalism: A Roman Ideal' (2001) 9 The Journal of Political Philosophy 331, 339-40.

The purpose of this brief and oversimplified point is to consider how citizenship has been subject to redefinition to become a status that emphasises rights. Under Cicero's logic, the right to travel contained within the status can extend beyond borders. In addition to the above, it is also worth noting that the Romans were famed for their social virtues, 'in particular, those which enabled cooperation, mutual support, and solidarity among themselves, qualities like honesty, fairness, dependability, and trustworthiness' were held in high esteem.[67] These virtues further add to the argument that the individual is not only a political animal but also a social one with varying allegiances and identities.

* * *

The Roman Republic's influence was carried into Renaissance Italy and thus began the shift from medieval to modern philosophy.[68] It is worth noting here that the chapter omits any real discussion about medieval philosophy, feudal society or the emergence of Christianity and how it came to dominate State practice in Europe. Instead, the revived interest in the ancient practices of citizenship through the study of certain historical sources will be considered.

Livy's *History of Rome from its Foundations* was used as a platform by Machiavelli to produce *The Discourses*. Machiavelli took a sceptical view on Rome's social virtues believing: 'that men never do good unless necessity drives them to

[67] Michelle T Clarke, 'The Virtues of Republican Citizenship in Machiavelli's Discourses on Livy' (2013) 75 The Journal of Politics 317. See also Martha C Nussbaum, 'Duties of Justice, Duties of Material Aid: Cicero's Problematic Legacy (2001) 54 American Academy of Arts & Science 38, 40-42.
[68] Russell (n 7) 461.

it';[69] and 'that men are more prone to evil than to good';[70] 'that violence and war are more common than peace; that despotic government is more common than republican; and that corrupt and self-seeking behaviour is more common than good citizenship.'[71] Machiavelli agreed with Aristotle concluding that Concord was necessary but argued that political friendship would not occur spontaneously and instead depends on the moral force of good law and religion.

Machiavelli rejected the view that the successes of Rome were driven by consensus and argued that it was not Concord but discord that really kept Rome free.[72] In his view, the social virtues of Rome were used by elites to amass extra-legal powers and urged people to condemn them as political vices that undermined liberty.[73] In order to gain the respect of their fellow citizens, they practised social virtues, and this respect was used to justify moral authority in their advice. People placed themselves as a benefactor to whom reciprocation was owed, not legally but morally, and Machiavelli believed the Roman social virtues created a society that was distinctively hierarchical with social virtues acting only as the bond between superior and inferior.[74] In attaining social capital, the citizen attempts to extricate themselves from the rule of law by acquiring friendships that challenged the authority of law and neutralised the institutions entrusted with defending legal authority. Machiavelli argued that friendly gestures should be subject to state regulation, making it illegal to solicit personal loyalty through the exchange of

[69] Niccolò Machiavelli, *The Discourses* (Penguin Classics 1983) 112.
[70] ibid 132.
[71] Heater (n 6) 48.
[72] Clarke (n 67) 318-23.
[73] ibid 317-18.
[74] ibid 320-22.

virtuous deeds and to watch that citizens do no wrong under the pretence of doing right.[75]

Machiavelli developed a new definition of good citizenship in which unsociable traits took a central place.[76] He concluded that good citizenship had to be of a hardened and tougher moral fabric and that 'power is for those who have the skill to seize it in a free competition.'[77] Heater noted how Machiavelli emphasised the role of the citizen-soldier, claiming that military service provides the discipline to convert the naturally wicked man into a virtuous and patriotic citizen.[78] He believed that only by aggressively deploying its citizens as soldiers can the republic ensure that citizens as civilians enjoy the benefits of a stable polity.[79]

In respect to defining the territory, Machiavelli believed that the best constitution is one that incorporates shared forms of governance, for if there is 'a principality, aristocracy and democracy each would keep watch over the other.'[80] Each needs to be checked by the other or to be disciplined by religion and military codes.[81] Machiavelli citied Sparta as the ideal city-state in that it was the lawgiver that assigned to the kings, the aristocracy and the populace each its function, creating a system of governance with a lineage lasting over eight hundred years without disturbance.[82]

Religion was to be a necessary instrument above all others for the maintenance of a civilised State.[83] The Roman era produced so many centuries with such a fear

[75] Machiavelli (n 69) 224-25.
[76] Clarke (n 67) 317.
[77] Russell (n 7) 469.
[78] Heater (n 6) 49.
[79] ibid.
[80] Machiavelli (n 69) 109.
[81] Adrian Oldfield, *Citizenship and Community: Civic Republicanism and the Modern World* (Routledge 1990) 49.
[82] Machiavelli (n 69) 110-11.
[83] ibid 139.

of God that resulted in its citizens being more afraid of breaking an oath to God than breaking the law. They held higher the power of God than the power of men.[84] Religion aided in the management of armies, the cultivation of good citizens and the punishing of the wicked. There was never a legislator who in introducing extraordinary laws to the people did not have recourse in God for otherwise they would have been unlikely to have been accepted. To neglect religion would cause ruin, where the fear of God is left wanting the kingdom survives through fear of the prince. However, princes are short-lived and when the kingdom loses its prince it loses the virtue of its prince. Kingdoms that depend on the virtue of one man do not last long given it is seldom the case where the successor revives the same virtues of the deceased prince.[85]

Although the shift from medieval to modern philosophy began in Renaissance Italy, Russell nevertheless considered it a weak period in philosophy in that it was neither medieval nor modern.[86] The significance of this period is in the ground laid for further developments in citizenship studies through its revival of the ancient philosophers in the west after they, as Christopher Hitchens claimed, became:

> "lost" because the Christian authorities had burned some, suppressed others, and closed the schools of philosophy, on the grounds that there could have been no useful reflections on morality before the preaching of Jesus.[87]

[84] ibid 139.
[85] ibid 141.
[86] Russell (n 7) 484.
[87] Christopher Hitchens, *God Is Not Great: How Religion Poisons Everything* (Allen & Unwin 2007) 25. See also Heater (n 9) 26.

III. Citizenship and the Nation-State

This section introduces three figures in Western philosophy who each provide varying definitions of the relationship between the individual and a politically defined territory. The significance of these philosophers is the move further into the modern period of philosophy that is often associated with numerous historical developments that are generally termed together as the Enlightenment. The modernist enlightenment philosophy is often associated with Descartes's ontological idea '*Cogito, ergo sum*' (I think, therefore I am) which began a tendency toward subjectivism that took individual experience into account.[88]

Modern political philosophy has been associated with secularism to question and replace theocratic governance and the divine right of kings with the authority of science, individual sovereignty and the rule of law. Perhaps this was first symbolised with the Peace of Westphalia in 1648, which arguably made the sovereign state the legitimate political unit.[89] England also played a significant role with the Magna Carta in 1215, the execution of Charles I during the English Civil War, the Glorious Revolution of 1688 and the English Bill of Rights 1689 arguably ending the divine right of kings.[90] The practice of citizenship in any full sense was consequently impossible without the crippling of this doctrine.[91] Instead, human achievements were to be found in the names of science and rationality as the likes of Copernicus,

[88] René Descartes, *Discourse on Method and Meditation on First Philosophy* (Donald A Cress tr, Hackett Publishing Company 1993) 19; Russell (n 7) 484, 511, 516 and 546.
[89] Daniel Philpott, 'Sovereignty: An Introduction and Brief History' (1995) 48 Journal of International Affairs 353, 364.
[90] Diane Purkiss, *The English Civil War: A People's History* (Harper Perennial 2007) 555-60; Steven C A Pincus, *England's Glorious Revolution, 1688-1689: A Brief History with Documents* (Bedford/St. Martins 2006).
[91] Heater (n 9) 22.

Galileo, Huygens, Newton, Darwin etc. began to discover that answers may be found in the natural world without recourse to God.

The most important development for the purposes of this work is the change in requirements to be admitted to citizenship. Where in Athenian culture it was required that the citizens were to be free men with the ability to make political judgments, modern political philosophy concluded that the individual is to become a part of the nation operating within a State to be admitted to citizenship. The recognition of individual sovereignty consequently established a democratic and state-wide legal system decided by the nation acting collectively as its citizens. Subsequently, this saw the end of the 'sovereign's vengeance'[92] and in the place of the sovereign monarch it was perceived that the law 'ought to be king.'[93] Consequently, a more human face was given to the individual to hold that ideas of justice and capital punishment should no longer remain a public spectacle[94] and that these ideals should be equally distributed among all, regardless of their societal rank.[95] This system of legal rules as decided by the nation of citizens may be considered the closest thing conceivable to a universal and secular religion.[96] Essentially, the religious justification that the citizen is to be the property of the monarch began to be contested.[97] The 'death of God' in this sense provided citizenship with an alternative ontological grounding where rights and duties are no longer grounded in

[92] Michel Foucault, *Discipline and Punish: The Birth of the Prison* (first published 1975, Penguin Classics 2020) 74.
[93] Thomas Paine, *Common Sense* (first published 1776, OUP 1995) 34; Thomas Paine, *The Rights of Man* (first published 1791, Henry Collins ed, Penguin 1969) 165. See also Dora Kostakopoulou, 'Legal and Political Concepts as Contextures' (2020) 49 Netherlands Journal of Legal Philosophy 22, 24.
[94] Foucault (n 92) 7ff.
[95] Ian Davidson, *The French Revolution: From Enlightenment to Tyranny* (Profile Books 2017) 106. See also Foucault (n 92) 12-13.
[96] Tom Bingham, *The Rule of Law* (Penguin Books 2011) 174.
[97] Hannah Arendt, *The Origins of Totalitarianism* (first published 1951, Penguin Classics 2017) 13.

religious scripture but were instead justified by the rational and collective decisions of the nation of citizens who act as the authors of the law.[98]

Political revolutions had broken down the old feudal order to therefore give rise to a new conception of equality in which a nation within a nation could no longer be tolerated. Modernity constituted the citizen as a member of a nation-state, and it was their nationality that would ultimately constitute their collective and individual identities.[99] The disparities between peoples under feudalism were remedied by the introduction of state simplifications. Things such as maps, units of measurement, surnames, languages etc. became standardised to allow for better State control over matters such as the collection of taxes and conscription.[100] In other words, the rise of the modern nation-state made it easier for all citizens to be equally categorised with corresponding rights and duties. The collapse of the feudal system affected the individual's right to movement within the State as movement was traditionally controlled by their masters.[101]

This period of philosophy also begins to question Aristotle's 'political animal' to contend that this no longer reflects the citizen virtue. Instead, it introduces the idea that the individual leaves the State of Nature and enters civil government upon a social contract to live under its laws and consequently becomes a citizen. In other

[98] See Friedrich Nietzsche, *The Gay Science* (first published 1882, Walter Kaufmann tr, Vintage Books 1974) 181 and 279; Friedrich Nietzsche, *Beyond Good and Evil* (first published 1886, Marion Faber tr, OUP 2008) 44, 49 and 55-57.

[99] Ulrich Preuß, 'Citizenship and Identity: Aspects of a Political Theory of Citizenship' in Richard Bellamy, Vittorio Buffachi and Dario Castiglione (eds), *Democracy and Constitutional Culture in the Union of Europe* (Lothian Foundation Press 1995); Engin F Isin and Patricia K Wood, *Citizenship & Identity* (SAGE Publications 1999) 156. See also David Held, 'Democracy: From City-States to a Cosmopolitan Order?' in David Held (ed), *Prospects for Democracy: North, South, East, West* (Polity Press 1993) 29.

[100] James C Scott, *Seeing Like a State* (first published 1998, Yale University Press 2020) ch 1.

[101] Dora Kostakopoulou and Robert Thomas, 'Unweaving the Threads: Territoriality, National Ownership of Land and Asylum Policy' (2004) 6 EJML 5; Elspeth Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law* (Kluwer Law International 2004) 27.

words, priority is given to becoming a part of the political community over participation within it.

The first of these figures is Thomas Hobbes who has been regarded as the first modern writer on political theory.[102] Hobbes expressed his Royalist beliefs in *Leviathan* (1651) to contend that the individual must subject themselves to the sovereign and join a political society if a perpetual State of War is to be avoided.[103] It was argued that this was necessary as living in the State of Nature bred only self-interested men who would lead a 'solitary, poor, nasty, brutish, and short' life.[104] This conception of the State of Nature is to explain the human condition since time immemorial, to therefore cast off the religious or creationist yoke, and if the individual is to remain within the State of Nature then, in Hobbes's view, it would inevitably result in a perpetual war where force and fraud remain the two cardinal virtues.[105] Fukuyama has contended that the State of Nature represents a metaphor for human nature that characterises a human being independent of the political society in which they belong to.[106]

Hobbes considered why men cannot cooperate naturally and require an artificial yet binding covenant to avoid conflict.[107] Hobbes's theory argued that once the ruling power is chosen, the citizens then enter a social contract with each other to obey the ruling power. The citizens lose their right to rebellion, private property and

[102] Russell (n 7) 509.
[103] Thomas Hobbes, *Leviathan* (first published 1651, OUP 1998) xliii.
[104] ibid 84. See also Thomas Hobbes, *On the Citizen* (first published 1642, Richard Tuck and Michael Silverthorne eds, CUP 2003) 11-12.
[105] ibid 85.
[106] Francis Fukuyama, *Identity: Contemporary Identity Politics and the Struggle for Recognition* (Profile Books 2019) 15.
[107] Russell (n 7) 505.

all other rights except those granted to them by the ruler.[108] The citizen must surrender their liberty to the ruler and even where the ruler may be despotic it is still better than anarchy.[109] Hobbes rejected the views of Aristotle, Cicero and Machiavelli for a shared form of governance and believed his doctrine of sovereign dictatorship would remedy the causes of the English Civil War, arguing that its outbreak was caused by the distribution of power between King, Lords and Commons.[110] Ultimately, in Hobbes's view, the ruler must have total control to enforce the agreements made by individuals towards each other and towards the State as 'covenants, without the sword, are but words, and of no strength to secure a man at all.'[111] This poses a practical problem, in attempting to avoid civil war Hobbes promoted a virtual sovereign dictatorship to secure the safety of the citizen, but in doing so his doctrine undermines the citizen's ability to retain their freedom.[112]

The second of these figures is John Locke and his *Second Treatise of Government* (1689). Locke agreed with Hobbes and argued that all people emerged from the State of Nature to create a civil government. Locke defined the State of Nature as 'men living together according to reason, without a common superior on earth, with authority to judge between them, [that] is properly the State of Nature.'[113] Locke further agreed with Hobbes 'That all Men are naturally in that state, and remain so, till by their own Consents they make themselves Members of some politick (sic) Society'.[114]

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[108] ibid.
[109] ibid.
[110] ibid.
[111] Hobbes (n 103) 111.
[112] ibid xxxvi. See also Heater (n 6) 50.
[113] John Locke, *Second Treatise of Government* (first published 1689, OUP 2016) 11.
[114] ibid 10.

It is the right to private property that represents one of the differences in Locke's political philosophy: 'The great and *chief End* therefore, of Mens uniting into commonwealths, and putting themselves under government, *is the preservation of their property*. To which in that State of Nature there are many things wanting.'[115] Locke defined citizenship liberally and rejected Hobbes in the sense that the citizen must give up all their rights to the ruling power upon entering civil government arguing that 'The *supream Power cannot take* from any Man any part of his *Property* without his own Consent.'[116] Locke argued that it is an individual's labour that vests in them private property, 'That *labour* put a Distinction between them and common: That added something to them more than Nature, the common Mother of all, had done; and so they became his private right.'[117] Where the Hobbesian doctrine in *Leviathan* held that the social contract imposed upon the citizens a requirement to collectively relinquish their rights and status to the sovereign without the sovereign being party to the social contract, in Locke's political writing the ruling power is also subject to the contract and can be resisted.[118] Locke believed in equality before the law under Habeas Corpus, *toleration*[119] and natural rights theory to claim that every man should have the free, equal and universal right 'to preserve his Property, that is, his Life, Liberty and Estate.'[120]

In respect to collective judgment, Locke preferred the rule of the majority: 'Every Man, by consenting with others to make one Body Politick under one Government, puts himself under an Obligation, to every one of that Society, to submit to the

[115] ibid 63.
[116] ibid 70.
[117] ibid 16.
[118] Russell (n 7) 573.
[119] See John Locke, *A Letter Concerning Toleration* (first published 1689, OUP 2016) 153.
[120] Locke (n 113) 43.

determination of the *Majority*'.[121] If the majority rule is not followed Locke claimed that 'it is impossible [for the political community to] act or continue as one Body, *one Communit*y, which the consent of every individual that united into it, agreed that this should; and so everyone is bound by that consent to be concluded by the *Majority*.'[122]

The third of these figures is Jean-Jacques Rousseau and his work *The Social Contract* (1762). Rousseau criticised the divine right of kings and believed the State was the outcome of an agreement among men operating under a social contract to the benefit of all. Rousseau set about solving the Hobbesian question and believed it possible for men to be both free and enjoy the security of political society and asserts that it is only through living in a civil society that men can experience their fullest freedom. Rousseau clarifies:

> Although in civil society man surrenders some of the advantages that belong to the state of nature, he gains in return far greater ones; … his mind so enlarged … he should constantly bless the happy hour that lifted him for ever from the state of nature and from a stupid, limited animal made a creature of intelligence and a man.[123]

In answering the Hobbesian question Rousseau proposed that people can be both ruled and free if they rule themselves.[124] Rousseau's solution was the formulation of the *general will* where 'each one of us puts into the community his person and all his powers under the supreme direction of the general will; and as a body, we incorporate every member as an indivisible part of the whole.'[125] Under

[121] ibid 49.
[122] ibid.
[123] Jean-Jacques Rousseau, *The Social Contract* (first published 1762, Penguin Classics 1968) 65.
[124] ibid 29.
[125] ibid 61.

the general will, the sovereign people become the authors of political decisions: they make judgements to benefit the community and agree to abide by those outcomes.[126] In behaving obediently individuals live as subjects of the State; in contributing to the formulation of the general will they live as citizens.[127] It is claimed that the modern concept of citizenship developed out of the consequences of Rousseau's notion of self-determination.[128]

Rousseau agreed with Locke in respect to majority rule arguing that the social contract is something to which '*everyone* subscribes and pledges … everyone agrees to accept the decision of the majority in the formulation of the law.'[129] The argument put forth is that 'the general will is always rightful, but the judgment which guides it is not always enlightened.'[130] Rousseau reasons that the individual cannot be trusted to devise laws, therefore, a lawgiver is necessary. Individuals 'left alone will be led by their passions and folly into disaster; they need someone to save them from themselves.'[131] Rousseau wrestles with the tension between his democratic instincts and his lack of trust in the general populace:

> How can a blind multitude, which often does not know what it wants, because it seldom knows what is good for it, undertake by itself an enterprise as vast and difficult as a system of legislation? By themselves, the people always will what is good, but by themselves, they do not always discern it.[132]

In answering this question, Rousseau speaks of forcing man to be free to claim that those who 'refuse to obey the general will shall be constrained to do so by the

[126] Ronald Dworkin, *Law's Empire* (first published 1986, Hart Publishing 2019) 189.
[127] Heater (n 6) 50.
[128] Jürgen Habermas, 'Citizenship and National Identity: Some Reflections on the Future of Europe' in Ronald Beiner (ed), *Theorizing Citizenship* (State University of New York Press 1995) 259.
[129] Rousseau (n 123) 37-38
[130] ibid 83.
[131] ibid 43.
[132] ibid 83.

whole body'.[133] The general will is something each man has within him and Rousseau argued that legal penalties are a device for helping the individual in his struggle against his passions, as well as a device for protecting society against the anti-social depredations of lawbreakers.[134] In Rousseau's view, the individual should show gratitude for such correction. In sum, Rousseau argues that the General Will and the assemblies of the people act as the shield of the body politic and as the brake on the government.[135]

In considering what makes citizens obedient and to abide by judgments to which they do not agree Rousseau argued that Concord is provided by a sense of nationhood and national character 'with which it is the duty of the ruler to endow his people.'[136] This symbolic construction of 'a people' would consequently transform the modern state into the nation-state where 'the people' provided a basis of solidarity and trust among one another.[137] Rousseau opposed Machiavelli here to claim that nationalism would take the place of religion arguing that Christians know better how to die than to conquer.[138] The replacement of religion with the nation meant that the State was forced to recognise only nationals as its citizens. It would only be nationals who would carry civil and political rights as the consequence of the circumstances of their birth or through their family origin. The State thus became an instrument of the nation.[139]

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[133] ibid 64.
[134] ibid 35.
[135] ibid 139.
[136] Alfred Cobban, *Rousseau and the Modern State* (2nd edn, Allen & Unwin 1964) 109.
[137] Jürgen Habermas, *The Postnational Constellation: Political Essays* (Max Pensky tr and ed, MIT Press 2001) 64.
[138] Rousseau (n 123) 183.
[139] Arendt (n 97) 300-02.

To summarise, this period intended to create a homogenous and well-defined political space based upon a sense of shared solidarity that was formalised with the establishment of the nation-state with all nationals being afforded the same rights under the umbrella of citizenship. Citizenship became dependent upon nationality and without such the individual would be denied equality of status. The result is a population who knows one another's character as Aristotle envisaged, but, it also created the foreign Other who is to be excluded from citizenship.[140] This period of modern constitutionalism creates, on the one hand, the right to self-determination, yet, on the other, citizenship remained an exclusive club that continued to deny women, minorities and those without property from it, therefore making it unjust.[141]

IV. Citizenship as the Right to Have Rights

In the late eighteenth century, citizenship underwent a paradigm shift towards a liberal ideal of citizenship that no longer defined the citizen as the representative of active participation, but instead as a passive rights-holder.[142] The transition from a monarch-subject to a state-citizen relationship is of importance and appears to set the scene for further developments in the area of individual rights.[143] The political writings of Rousseau and the upheaval of the French Revolution first established

[140] Moritz Jesse, 'European Societies, Migration, and the Law' in Moritz Jesse (ed), *European Societies, Migration, and the Law* (CUP 2022) 1-7; Moritz Jesse, 'The Immigrant As the "Other"' in Moritz Jesse (ed), *European Societies, Migration, and the Law* (CUP 2022) 20-25.
[141] James Tully, 'Cultural Demands for Constitutional Recognition' (1995) 3 The Journal of Political Philosophy 111, 114-15. See also Mary Wollstonecraft, *A Vindication of the Rights of Women* (Penguin 2004) 263.
[142] Sanja Ivic, *EU Citizenship: Towards a Postmodern Conception of Citizenship?* (Vernon Press 2019) 3.
[143] Heater (n 6) 4.

the practice and equality of citizenship as the central feature of the modern socio-political structure using the Declaration of the Rights of Man and the Citizen as its basis.[144] The Declaration was a turning point in citizenship's history as from then on Man was supposedly no longer constrained by God's command as he himself became the source of the law.[145]

Such ideas were instilled into the citizen for some time prior with Adam Smith claiming in 1759 that: 'every man is, no doubt, by nature, first and principally recommended to his own care; and as he is fitter to take care of himself than of any other person, it is fit and right that it should be so.'[146] Therefore, the idea of rights being a natural consequence of human existence took hold and a legally binding citizenship was to confirm the 'right to have rights'[147] or to cement a 'bundle of rights'.[148] The French Declaration and the idea of inherent rights was critiqued as being 'nonsense upon stilts' by Jeremy Bentham who argued that such rights do not have an independent existence and must instead be posited into law.[149] However, the natural rights thesis has supplied the nation with a set of rights to be guaranteed by the State as the consequence of being a citizen of that state. Consequently, it is said by many that rights naturally involve duties[150] and thus a tense relationship between the two emerged.[151]

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[144] ibid.
[145] Arendt (n 97) 380.
[146] Adam Smith, *The Theory of Moral Sentiments* (first published 1759, Knud Haakonssen ed, CUP 2002) 96.
[147] Arendt (n 97) 388.
[148] Leary (n 6) 247.
[149] See Ilias Bantekas and Lutz Oette, *International Human Rights: Law and Practice* (3rd edn, CUP 2022) 9. See also Edmund Burke, *Reflections on the Revolution in France* (first published 1790, Penguin 1968).
[150] Bellamy, *Citizenship: A Very Short Introduction* (n 3) 17.
[151] Guild (n 101) 30-31.

Although the idea of a rights-based citizenship promotes individualism it nevertheless has ulterior consequences. Karl Marx recognised this claiming that the Rights of Man are negative as they allow the citizen to pursue, or retreat into, his personal life to no longer commit themselves as a member of a community.[152] Marx cited Article Four of the Declaration of the Rights of Man and the Citizen which defines liberty as 'the freedom to do everything which injures no one else….'[153] Marx continues:

> The freedom in question is that of a man treated as an isolated monad and withdrawn into himself.… Thus none of the so-called rights of man goes beyond the egoistic man… namely an individual withdrawn behind his private interests and whims and separated from the community…., finally that is not man as a citizen but man as a bourgeois who is called the real and true man.[154]

Given its prior emphasis on duty and active engagement, it is challenging to conceptualise a rights-based citizenship with the core aim of maximising individual liberty while simultaneously minimising State intrusion.[155] Under the liberal model, the citizen remains an individual and the admission to citizenship does not necessitate the abandonment of their private self-interests. The public and private spheres are kept distinct with citizens being under no obligation to participate in the public arena and with no defined responsibilities to their fellow citizens. All citizens are autonomous beings albeit they are still required to perform certain duties to the State such as the payment of taxes and the following of the law.[156]

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[152] Heater (n 6) 5.
[153] See also John Stuart Mill, 'On Liberty' in *On Liberty, Utilitarianism and Other Essays* (OUP 2015) 13 and 73-74.
[154] Karl Marx, 'On the Jewish Question' in David McLellan (ed), *Karl Marx: Selected Writings* (2nd edn, OUP 2000) 60-61.
[155] Peter H Schuck, 'Liberal Citizenship' in Engin F Isin and Bryan S Turner (eds), *Handbook of Citizenship Studies* (SAGE 2002) 132-37.
[156] Dora Kostakopoulou, *The Future Governance of Citizenship* (CUP 2008) 26.

It can be said that one consequence of a citizenship that is grounded in rights is that it allows for a thinner sense of identity. Further, there is the problem of reciprocity. It can be said to be unfair for a citizen to legally pursue their self-interests only to owe only minor duties to the rights-granting body. Some argue that the enjoyment of such benefits requires 'the payment of the dues of membership' and that individuals who renege on their civic duties are simply 'free riders'.[157] These criticisms are raised given that if the government oversteps its limited powers and interferes with the rights of the citizen, or if it fails in its protective function, the citizenry has the right to rouse itself from the quiet pursuit of private affairs and rebel.[158]

The ability to pursue private interests is in some respects a capitalist ideal and perhaps culminated in the Industrial Revolution in Europe coupled with its exploitative treatment of workers.[159] Marx recognised that profitable private pursuits undermined the sense of commitment that made civil society a cooperative network and 'the shaking off of the [feudal] political yoke entailed the shaking off of those bonds that had kept the egotistic spirit of civil society fettered.'[160] Liberal citizenship appears to shift a traditionally hierarchical society to an increasingly egalitarian society, yet in doing so it created economic inequality and exploitation induced by unfettered capitalism.[161] It is argued that such progress in the 'growth of modernity is simply the movement from *de jure* inequalities in terms of legitimate status

[157] Oldfield (n 81) 160.
[158] Heater (n 6) 7.
[159] See Friedrich Engels, *The Condition of the Working Class in England* (first published 1845, Oxford World's Classics 2009) 59.
[160] Marx (n 154) 63. See also Karl Marx, *Capital* (first published 1867, Penguin Classics 1990) 168-69.
[161] Heater (n 6) 9.

hierarchies to *de facto* inequalities as a consequence of naked market forces where the labourer is defined as a "free" person.'[162]

It cannot be ignored that becoming a successful citizen in capitalistic terms is judged upon successes in a pecuniary, competitive and free market and not upon civic participation or loyalty.[163] The ethic is therefore 'a duty of the individual towards the increase of his capital, which is assumed as an end in itself.'[164] Hannah Arendt's comments are of use here:

> According to bourgeois standards, those who are completely unlucky and unsuccessful are automatically barred from competition, which is the life of society. By assigning his political rights to the state the individual also delegates his social responsibilities to it: he asks the state to relieve him of the burden of caring for the poor precisely as he asks for protection against criminals. The difference between pauper and criminal disappears - both stand outside society. The unsuccessful are robbed of the virtue that classical civilization left them….[165]

When the determinant for success relies solely upon the accumulation of capital the unsuccessful find only small comfort in their reliance upon the classical citizenly virtues. If capital is a necessity to fulfil basic human functions, then without it the classical virtues of citizenship are essentially meaningless as they will not provide for a standard of living that their legal rights allow for. This establishes classes of citizens, particularly the successful and the unsuccessful. These two groups hold equal legal rights, as ensured by the legislatures of their State, but, in practice, they have become more unequal as the consequences of liberal citizenship's guarantee to pursue private interests and wealth. Marx's interpretation was that the modern State is a bourgeois State that cannot resolve this conflict as it is a disinterested

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[162] Bryan S Turner, *Citizenship and Capitalism: The Debate Over Reformism* (Allen & Unwin 1986) 136.
[163] Heater (n 6) 10.
[164] Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (first published 1930, Routledge 1992) 16-17
[165] Arendt (n 97) 184.

party: citizenship is therefore nothing more than a cloak for the citizen's impotence claiming that the 'political man is only the abstract fictional man.'[166] It can be concluded that the ethics of capitalism and the ethics of citizenship are incompatible,[167] that liberal economics cannot cohabit with liberal politics[168] and that citizenship and capitalism are ultimately opposing concepts.

V. Thomas H Marshall: Citizenship and Social Class

The paradoxical nature of the liberal conceptions of citizenship is that while, on the one hand, it has allowed for untrammelled capitalism it has nevertheless, on the other, posed a threat to it. Thomas H. Marshall's essay 'Citizenship and Social Class' remains a significant contribution in this regard.[169] His work provides the framework for the universalist theory of citizenship that became the dominant model in the aftermath of World War II and is perhaps best encapsulated by the Universal Declaration of Human Rights.[170] Universal citizenship is inspired by the ideals of the Enlightenment to proclaim that freedom and equality can only be secured through the use of human rationality and enforces a set of rights that claim that all people are equals.[171] It is an account to protect citizens from unfettered capitalism and to instil a deeper sense of belonging to the national community. Marshall's citizenship ideal shall be discussed at some length in this section as to do so provides a

[166] Marx (n 154) 64.
[167] Heater (n 6) 11.
[168] Turner (n 162) 12.
[169] Thomas H Marshall, *Citizenship and Social Class: And Other Essays* (CUP 1950) 29. See also Martin Bulmer and Anthony M Rees, *Citizenship Today: The Contemporary Relevance of T.H. Marshall* (University College London Press 1996) 35.
[170] Sanja Ivic, *European Identity and Citizenship: Between Modernity and Postmodernity* (Palgrave Macmillan 2016) 17.
[171] ibid 19.

definition of citizenship that can be used as a framework to compare European Union citizenship in subsequent chapters.

In the aftermath of World War II, the ordinary citizen demanded to see the benefits of their sacrifices.[172] In the United Kingdom, this led to the fall of Churchill's Conservative Government and the election of Atlee's Labour Government and with it came its social democratic program based upon the Beveridge Report to establish a welfare state in Britain. Social inequalities remained rife throughout Britain, and it was contended that such social reforms were required to alleviate such.[173] Arguably, the post-war mentality of the State may have been primarily concerned about civil unrest among a militarily trained population. However, Marshall concluded that although economic inequalities will be forever present within a capitalist society, they can nevertheless be justified provided that the equality of citizenship is recognised.[174]

Marshall categorised citizenship into three constituent elements: the civil, the political and the social. Civil rights finding their incorporation into citizenship in the eighteenth century, the political in the nineteenth and the social in the twentieth century.[175] Marshall held that the civil element is composed of the rights necessary for individual freedom: liberty of the person; freedom of speech; freedom of thought and faith; the right to own property; to conclude contracts; and the right to justice.'[176] 'The political element is the right to participate in the exercise of political power.'[177]

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[172] Kevin O'Rourke*, A Short History of Brexit* (Pelican Books 2018) 12.
[173] See George Orwell, *The Road to Wigan Pier* (first published 1937, Penguin Classics 2001) Part I. See also Robert Roberts, *The Classic Slum: Salford Life in the First Quarter of the Century* (Penguin 1990); Robert Roberts, *A Ragged Schooling: Growing Up in the Classic Slum* (Manchester University Press 1997).
[174] Marshall (n 169) 8.
[175] ibid 10.
[176] ibid.
[177] ibid 11.

And the social element confers: 'the right to a modicum of social welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society.'[178]

Marshall consolidated this finding to define citizenship as:

> [A] kind of basic human equality associated with the concept of full membership of a community - or, as I should say, of citizenship. … [A] status bestowed on all those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which that status is endowed. … Citizenship [accompanies] a … community … of free men endowed with rights and protected by common law.[179]

Marshall argued that citizens had equal civil and political rights but was concerned with social rights and what impact their inclusion could achieve. He credits the modern development of these rights to the provision of elementary education in the nineteenth century, yet he identified an apparent paradox from a much earlier period. This is the emergence of the egalitarian principle of citizenship in its civil guise from the late seventeenth century with the development of socially inegalitarian capitalism.[180] Marshall clarifies the problem by distinguishing between legally entrenched feudal class divisions and modern economically differentiated classes. With the former citizenship is incompatible; with the latter it is compatible.[181] The idea is that civil rights are of limited value without the social rights to substantiate them: 'a property right is not a right to possess property, but a right to acquire it, if you can, and to protect it, if you can get it.'[182] 'Similarly, the right to freedom of speech has real little substance if, from a lack of education, you have nothing to say

[178] ibid. See also Habermas (n 128) 267.
[179] Marshall (n 169) 8, 28-29 and 40-41.
[180] Heater (n 6) 13-14.
[181] ibid 14.
[182] Marshall (n 169) 35.

that is worth saying, and no means of making yourself heard if you say it.'[183] Marshall claimed that these discrepancies are the result of a lack of social rights rather than flaws existing in civil rights.[184]

Civil and political rights were only equal in principle for reasons mostly associated with class prejudice and economic influence.[185] Therefore, a system of social rights appeared to be necessary for the effective exercise of civil and political rights.[186] In both its political and civil forms, citizenship became a threat to capitalism and through trade unions civil rights were used to extract social rights through the method of collective bargaining: 'Trade unionism has, therefore, created a secondary system of industrial citizenship parallel with and supplementary to the system of political citizenship.'[187] A wage allowing for sustainability is a social right but this has not been recognised directly through citizenship and trade unions have had to bargain for this.[188] However, as Heater notes: 'If trade unions base their claim upon the principle of citizenship, they should balance their demand for rights by a sense of duty: unofficial strikes are incompatible with this position.'[189] Citizenship and the accumulation of capital must therefore be a balancing act where neither concept tilts too far. The issue in legislating social rights is how best to combine the principles of social equality and the market.

The twentieth century saw the advancement of social rights within an egalitarian principle of citizenship. The shift from a feudal to an industrial society spurred economic changes that began to erode the class distinctions to gradually produce

[183] ibid.
[184] ibid.
[185] Heater (n 6) 14.
[186] Meehan (n 10) 83.
[187] Marshall (n 169) 44.
[188] ibid 69.
[189] Heater (n 6) 16.

an emerging middle class who sought a more egalitarian society. Marshall noted the difficulty for the State to temper the qualitative expectation of the citizenry for such services given the inability to foresee their true monetary costs and as expectations rise, 'the obligations automatically get heavier.'[190] 'The extension of the social services to be able to provide the guaranteed minimum is not primarily a means of equalising incomes,'[191] what matters is that there is a general enrichment of the concrete substance of civilised life. It is not so much about reducing the gaps between different incomes between the classes. Marshall concluded that the 'equality of status is more important than equality of income,'[192] and the establishment of a system of social rights is designed 'to reveal hidden inequalities to show that the poor boy is as capable as the rich boy.'[193]

Innovation aside, Marshall's work has not been spared criticism. One claim is that Marshall's work was short-sighted due to his enthusiasm for the achievements of the welfare state.[194] The claim to universalism within Marshall's framework long served as a means of inhibiting the inclusion and participation of all citizens.[195] However, women,[196] ethnic minorities, the poverty-stricken underclass and those who are incapable of self-determination have been unable to participate on equal terms with the rest of the community.[197] Universalism understands equality as

[190] Marshall (n 169) 59.
[191] ibid 56.
[192] ibid.
[193] ibid 66.
[194] Heater (n 6) 19. See also Heater (n 9) 202-03; Meehan (n 10) 84.
[195] Iris M Young, *Justice and the Politics of Difference* (Princeton UP 1990) 105.
[196] Yvonne Summers, 'Women and Citizenship: The Insane, the Insolvent and the Inanimate?' in Pamela Abbott and Claire Wallace (eds), *Gender, Power and Sexuality* (Palgrave Macmillan 1991) 24; Meehan (n 10) 22-24 and ch 6. See also Dimitry Kochenov, *Citizenship* (MIT Press 2019) 23.
[197] Will Kymlicka, 'Multicultural Citizenship' in Gershon Shafir (ed), *The Citizenship Debates* (University of Minnesota Press 1998) 172-73. See also Kochenov (n 196) 123.

uniformity to therefore deny the differences in each citizen and making legislation blind to these group differences.[198] Marshall failed to recognise that historically, in England, there were those who believed that rights were to be found in the nation as opposed to being natural; their distrust of the natural came from their realisation that natural rights are granted even to 'savages'.[199] Conservatives believed that social inequality was the basis of English society and, as Arendt notes, opinions widely held by nineteenth-century Tories assumed that 'inequality belonged to the English national character.'[200] Therefore, the Rights of Man became the 'rights of Englishmen' and due to British colonialism they believed that England and the rights found within the nation were the supreme guarantee for humanity.[201]

Marshall's optimism led him to conclude that social rights would continue naturally in a society that has not yet become fully homogenous in terms of socio-economic status. The educational system is still in the process of providing equal opportunities for all in respect to entering the marketplace and capitalism has put up more resistance to social citizenship than Marshall had allowed for.[202] In addition, the nation-state has failed to remain a neutral observer when distributing resources. In Britain, this was perhaps most prevalent in the 1980s during the Thatcher government with its politics of neo-liberalism as a philosophical opposition to the liberalism of the 1960s that only widened the distinction between the rich and the poor.[203]

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[198] Iris M Young, 'Polity and Group Difference: A Critique of the Ideal of Universal Citizenship' (1989) 99 Ethics 250, 250; Young (n 195) 60. See also Meehan (n 10) 79.
[199] Arendt (n 97) 391-92. See also Mill (n 153) 13.
[200] ibid 229.
[201] ibid 237; Leary (n 6) 249. See also Edward Said, *Orientalism* (first published 1978, Penguin Classics 2003) 172, 289, 299, 308-309 and 311.
[202] Heater (n 6) 20.
[203] ibid 21. See also Aihwa Ong, 'Ecologies of Expertise: Assembling Flows, Managing Citizenship' in Aihwa Ong and Stephen J Collier (eds), *Global Assemblages: Technology, Politics, and Ethics as Anthropological Problems* (Blackwell Publishing 2007) 339.

Critics argue that Marshall's tripod citizenship design is overly simple arguing that citizens do not fall neatly into three compartments.[204] The most cogent criticism is that the category of civil rights contains two quite distinct sets of rights. One of these is the right for the individual to pursue his own interests; the other, the right to achieve collective aims.[205] One notable critique of Marshall is his failure to recognise that social citizenship differs from that of the civil and political elements. Civil citizenship establishes the rights against the state; social citizenship establishes the rights provided by the state.[206] Marshall merely defined what entitlements, in theory, a citizen should have and ignored how this would play out. David Held argued this claiming that 'the very meaning of particular rights cannot be adequately understood if the range of concerns and pressures which have given rise to them is not properly grasped.'[207]

In sum, the arguments contending that Marshall's vision was short-sighted is to claim that his thesis was an attempt to create a universally valid typology; but this is by no means evident within his work.[208] The criticism that Marshall was too simplistic has also been considered unfair as the Marshallian tripod of rights is still firmly established as one of the most useful tools for comprehending the complexities of the citizenly nature. No one now, however many critics, can ignore the element of social rights within citizenship, it is this that gave Marshall his indelible mark in the citizenship debate.[209]

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[204] ibid.
[205] ibid.
[206] ibid.
[207] David Held, *Political Theory and the Modern State* (Polity Press 1989) 200.
[208] Heater (n 6) 23.
[209] ibid 24. See also Bryan S Turner, "T.H. Marshall, Social Rights and English National Identity' (2009) 13 Citizenship Studies 65, 72.

The contemporary relevance of Marshall's analysis is that it appears to set the foundations for a citizenship design that could extend 'beyond the nation-state' given that his analysis omits any discussion regarding the national dimension of citizenship.[210] However, it is equally argued that such is taken for granted in his analysis.[211] This aside, it is nevertheless possible to construe Marshall's analysis as allowing for post-national models of citizenship given that the equality of rights enables the recognition of a common belonging, but it is argued that such a common belonging must be found in shared institutions and practices if that belonging is to act as the theoretical underpinning for a post-national model of citizenship.[212]

VI. Citizenship and Social Responsibility

The granting of social rights has raised the question of social responsibility as social liberalism has cohabitated with neo-liberalism. This established something of an ideological war between rights and responsibilities. The political right often advocating responsibilities without distributing the power, nor the monies, to bear them. The political left advocating for the distribution of power while tacitly assuming that the State bears final responsibility.[213] As Heater noted, those belonging to Marshall's school of thought hold the view that any indigence impedes the citizen's full use of the civil and political elements of citizenship; the welfare state is therefore required to raise the relatively poor to a condition in which they can fully enjoy full

[210] John Crowley, 'The National Dimension of Citizenship in T.H. Marshall' (1998) 2 Citizenship Studies 165, 168
[211] ibid.
[212] ibid 176.
[213] Geoff Mulgan, 'Citizens and Responsibilities' in Geoff Andrews (ed), *Citizenship* (Lawrence & Wishart 1991) 41.

autonomy, freedom and participation.[214] Neo-liberals argue the contrary believing that freedom and autonomy are limited due to the individual's dependency upon the welfare state, thus creating a nanny or Santa Clause state.[215] The writings of John Stuart Mill perhaps provide an explanation for this tension:

> In countries of more advanced civilization … the public accustomed to expect everything to be done for them by the State … naturally hold the state responsible for all evil which befalls them, and when the evil exceeds their amount of patience, they rise against the government and make what is called a revolution.[216]

The works of Friedrich Hayek and Robert Nozick heavily influenced the neo-liberal vision.[217] Hayek argued that the warning from nineteenth-century political thinkers, such as Tocqueville who argued that socialism leads to slavery, had been ignored.[218] Hayek's central claim was that Fascism is the by-product of Socialism and the separatist policies of the socialist, to ensure that the good proletarian could be produced by omitting any outsider influence, which provided the framework for Fascist imitation.[219] This is how Hayek viewed socialism as being the vehicle that directed state populations towards serfdom. This in turn influenced the neo-liberal policies of the Thatcher and Reagan administrations. Neoliberals found their justification in the disillusionment towards the political system where an increasing number of people no longer saw the value of their vote. The argument is that this only led to a thin democracy that 'yields neither the pleasures of participation nor the fellowship of the civic association, neither the autonomy and self-governance of

[214] Heater (n 6) 25.
[215] Mulgan (n 213) 40.
[216] Mill (n 153) 108.
[217] Friedrich A Hayek, *The Road to Serfdom* (first published 1944, Routledge 2006); Robert Nozick, *Anarchy, State, and Utopia* (Basic Books 1974).
[218] Hayek (n 217) 13.
[219] ibid 118.

continuous political activity nor the enlarging mutuality of shared public goods.'[220] The emphasis was thus placed back upon the individual rather than the community.

Individual responsibility underpins the moral superiority of the political right as they claim that the left could be seen as spending without earning and blaming every ill upon society.[221] The neoliberal dismisses the concept of egalitarianism claiming that the promise of a better lifestyle for the poor is grubby and unpleasant while being impossible to achieve.[222] Upon this realisation, there will only be feelings of resentment among a disappointed citizenry. It is argued that the welfare state only further damages the weak-willed individual as the poor simply accept their inferiority due to the welfare provisions of the State keeping them afloat. These citizens lose all self-esteem and consequently any interest in genuine self-improvement (i.e., the ability to accrue wealth), and results in an increase in poverty due to a lack of incentive to work.[223] Those able-bodied citizens receiving social security benefits will not see themselves as independent citizens claiming what is theirs but as the mere recipient of charity.[224] In other words, neo-liberals hold the view that these citizens need something to aim for and only through their working efforts will they be able to attain their desires.

The reality is that a system of social rights must be funded, and it is in taxation where the nation-state has found its method. Conservative types argue that it is unethical to expect the hard-working citizen to meet their obligations only to provide for others whom they deem as being unwilling to meet their responsibilities to still

[220] Benjamin R Barber, *Strong Democracy: Participatory Politics for a New Age* (first published 1984, University of California Press 2003) 24.
[221] Mulgan (n 213) 39.
[222] Keith Joseph and Jonathan Sumption, *Equality* (John Murray Publishers Ltd 1979) 121.
[223] Heater (n 6) 25.
[224] Raymond Plant, 'Social Rights and the Reconstruction of Welfare' in Geoff Andrews (ed), *Citizenship* (Lawrence & Wishart 1991) 62.

be guaranteed their rights to state welfare.[225] The belief is that these rights are conditional, not automatic.[226] Therefore, the slimming down of social rights has been the methodological approach. To the neo-liberal, work must be treated as a social obligation akin to paying taxes and obeying the law.[227]

This is not to say that liberal citizenship is without its virtues. Macedo attributed 'tolerance and respect for the rights of others, self-control, reflectiveness, self-criticism, moderation, and a reasonable degree of engagement' as some of the ethics of liberal conceptions of citizenship.[228] In addition, the good citizen may justifiably inspire activities of protest if they believe the actions of the government are misguided.[229] Macedo also defines what fails to constitute as liberal virtues claiming that 'quiet obedience, deference, unquestioned devotion, and humility could not be counted among the liberal virtues.'[230] Adding to this, it is permissible to claim that any fanaticism or extremism, in any sense, cannot qualify as a liberal virtue, for such qualities only breed intolerance. The liberal citizen understands and tolerates plurality and understands that citizenly virtue must incorporate an attitude of empathy.[231]

Unsurprisingly, neo-liberal policies have been subject to scrutiny in moral terms and in respect to their supposed practical benefits.[232] If social rights are linked to work, then the state must be their employer at the last resort. In this instance, there must be an enforceable right to work, and it is unclear as to whether state-provided

[225] Heater (n 6) 26-27.
[226] ibid 27.
[227] Lawrence Mead, *Beyond Entitlement: The Social Obligation of Citizenship* (Free Press 1986) 82.
[228] Stephen Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism* (OUP 1990) 2.
[229] Heater (n 6) 32.
[230] Macedo (n 228) 278.
[231] Heater (n 6) 33.
[232] ibid 28.

work would instil a sense of self-esteem and self-improvement in the same sense as the securing of paid employment.[233] Neo-liberalism has failed to convince that its policies for increased responsibilities are anything more than a weak apology for cuts to public services.[234]

No one can reasonably deny that we live in class-ridden societies. Marshall had hoped to remedy class divisions in asserting that the inequality of the social class system may be tolerated provided the equality of citizenship is guaranteed. However, what Marshall failed to recognise is that class differences yield different civil, political and social interests.[235] Nevertheless, what Marshall meant was not that these rights would be individually enforceable, but rather that the State has a general duty to provide for collective services in the fields such as health, education, and welfare.[236] It is in this regard where liberal conceptions of citizenship have found their significance. This contribution demonstrates is that citizenships development from the active to the passive confirms the malleable nature of citizenship and its content of rights.

VII. Conclusion

Citizenship remains a politically, theoretically and legally disputed concept. The status remains squarely in two ideological camps with those on one side arguing for the preservation of the community through wilful participation in its structure, and the other arguing for the right to be treated as equals regardless of contribution.

[233] Plant (n 224) 62.
[234] Mulgan (n 214) 39.
[235] Plant (n 224) 51.
[236] ibid 57.

However, for the purpose of this work, the definition adopted by Thomas H Marshall shall be implemented. Irrespective of its flaws, his categorisation of citizenship into the civil, the political and the social provides a foundation that is both accessible and easily understood. Additionally, Marshall's analysis opens the possibility of construing a citizenship design that is independent of nationality.

It is worth explaining what the point of trawling through this selection of historical literature was. It explains how the transformation of citizenship from the active to the passive confirms its malleable nature in respect to its admission criteria and content. Citizenship has been subject to redevelopment where the requirements of the citizenry demand it, whether through the ballot box or protest, or even through revolution or indeed war. It demonstrates that the concept of citizenship has come to mean different things to different individuals across different time periods as was necessary for the inclusion of women, minorities and those without property.

Chapter II

An Emerging European Identity and Citizenship

I. Introduction

The fundamental philosophy guiding the European Union is to ensure the equality of status throughout its Member States.[1] The EU encapsulates this effort in its slogan ('United in Diversity') that seeks to remove and eliminate any discrimination against individuals upon the basis of their nationality.[2] It can be said that the culmination of this effort came in 2012 when the EU was awarded the Nobel Peace Prize for its contribution to the advancement of peace, reconciliation, democracy and human rights in Europe. This achievement should not be understated given that the European nation-states throughout different historical periods have adopted numerous organisational forms to elicit allegiance by way of radically opposing ideological structures — ranging from the direct democracy of the Greek city-state to the reprehensible regime of totalitarian Nazi Germany and its atrocities culminating in the Holocaust.[3]

[1] Dora Kostakopoulou, 'Had Coudenhove-Kalergi's *Pan-Europa* Foreseen the United Kingdom's Nationalist Hour (Brexit)?' (2020) 5 European Papers 691, 693.
[2] Andrew T Williams, 'Taking Values Seriously: Towards a Philosophy of EU law' (2009) 29 Oxford Journal of Legal Studies 549, 554.
[3] John Erik Fossum, 'Citizenship, Diversity, and Pluralism: The Case of the European Union' in Alan C Cairns and others (eds), *Citizenship, Diversity & Pluralism: Canadian and Comparative Perspectives* (McGill-Queen's UP 1999) 202. See also Elie Wiesel, *Night* (first published 1960, Penguin Classics 2006); Viktor E Frankl, *Man's Search for Meaning* (first published 1946, Random House 2004); Sybille Steinbacher, *Auschwitz: A History* (Penguin 2005); Francizek Piper, 'Role of Manpower of Prisoners of Nazi Concentration Camps in the Third Reich Economy' (1979) 14 Studia Historiae Oeconomicae 263, 263-66.

This chapter seeks to uncover how European unity became a reality and shall focus specifically on the institutional developments that led to the emergence of a supranational European identity and citizenship. The purpose of this chapter is two-fold: first, is to summarise the European integration process and to explain how the Member States began to weave together their economic and political relationships; second, is to uncover the efforts made by the EU institutions and its associated political actors to advance the concept of supranational belonging and identity through a European Union citizenship.

II. Towards European Unity

The aftermath of World War II inspired ideas of belonging that were no longer restricted to the confines of national boundaries and identities. The consequences of excessive nationalism and the declining maritime empires during the twentieth century arguably created a need for a supranational system of politics among the nation-states of Europe.[4] The original advocates of European unity were federally minded and arrived at this position due to their antipathy towards the dictators of the twentieth century.[5] The establishment of a multinational European federal order was thought to serve as the antidote to the negative and exclusionary features of the nation-state that had exposed the worst side of humanity.[6] However, the establishment of a multinational federal Europe would have been challenging given

[4] JHH Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration* (CUP 1999) 342; Signe Rehling Larsen, *The Constitutional Theory of the Federation and the European Union* (OUP 2021) 8.
[5] Derek Heater, *The Idea of European Unity* (Leicester UP 1992) 148.
[6] JHH Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403, 2479; JHH Weiler, 'Does Europe Need a Constitution Demos, Telos and the German Maastricht Decision' (1995) 1 ELJ 219, 248-49.

the deep cultural histories, traditions and sovereign authorities of the European nation-states. However, this aside, both Robert Schuman and Jean Monnet sought to weaken the aggressive ethno-nationalisms that they believed to be the root of the two world wars and to replace them with a more post-national European consciousness.[7]

British attitudes helped fuel European unity with Clement Atlee in 1939, then leader of the Labour opposition, stating that 'Europe must federate or perish.'[8] However, in 1943, Winston Churchill opposed this stating that we are with Europe, but not of it. Churchill argued the contrary in 1946 during his Zurich speech and advocated for a 'united states of Europe' and for 'a European group that could give a sense of enlarged patriotism and common citizenship to the distracted peoples of this turbulent and mighty continent.'[9]

This attitude disseminated throughout Europe and continued through the work of the European Action Group in the Netherlands which called for a wider model of European citizenship. In 1943, the Italian European Federalist Movement foresaw the creation of a European continental citizenship.[10] Similar plans were introduced by Giovanni Gronchi, later president of Italy, for the option to take out a European form of citizenship in addition to national citizenship.[11] The expression 'to take out' would suggest that in its embryonic stages, the idea was that the individual would make a conscious decision to supplement their national citizenship and have the

[7] Ghia Nodia, 'The End of the Postnational Illusion' (2017) 28 Journal of Democracy 5, 7; Francis Fukuyama, *Identity: Contemporary Identity Politics and the Struggle for Recognition* (Profile Books 2019) 143. See also Jürgen Habermas, *The Postnational Constellation: Political Essays* (Max Pensky tr and ed, MIT Press 2001).
[8] RWG Mackay, *Peace Aims and the New Order* (Michael Joseph 1940) 36.
[9] Winston Churchill, *The Sinews of Peace: Post-War Speeches* (Houghton Mifflin 1949) 200. See also George Orwell, 'Toward European Unity' *Partisan Review* (London, July-August 1947).
[10] Willem Maas, *Creating European Citizens* (Rowman & Littlefield 2007) 12.
[11] Piero Malvestiti, 'There is Hope in Europe: Addresses Delivered on the Occasion of the Inauguration of the High Authority of the European Coal and Steel Community' (Publications Department of the European Communities 16-23 September 1959) 58.

ability to rely upon either status. The 1948 Congress of Europe resolved that the direct access for citizens to redress before a European court of any violation of their rights was to be an essential ingredient of the European political and economic union they advocated.[12] The conference concluded that it was the 'urgent duty of the nations of Europe to create an economic and political union.'[13] This resulted in the Schuman Declaration, a proposal to integrate the coal and steel sectors of France and West Germany.

The Americans came to support European unity upon the onset of the Cold War, believing that Europe could transform itself into a consolidated bastion against Communist expansionism.[14] Interestingly, Paul-Henri Spaak when writing his memoirs claimed that, 'in the last twenty years a number of Western statesmen have been dubbed the "fathers of European unity" not one of them deserves this title: it belongs to Stalin.'[15] Whether American homogeny or the threat of Soviet expansionism played a part in the unification of Europe is beside the fact: Europe was in turmoil and it needed to redesign its economic, civil, political and social character.

The development of a supranational economic and political community began to take shape throughout the 1950s. This period saw the implementation of two notable pieces of legislation that have been said to provide what is now the European Union with its constitutional character.[16] The European Coal and Steel Community (ECSC)

[12] Maas (n 10) 12.
[13] Gary T Miller, 'Citizenship and European Union: A Federalist Approach' in C Lloyd Brown-John (ed), *Federal-Type Solutions and European Integration* (UP of America 1995) 371-72.
[14] Heater (n 5) 150.
[15] Paul-Henri Spaak, *The Continuing Battle: Memoirs of a European 1936-1966* (Henry Fox tr, Weidenfeld & Nicholson 1971) 141. See also Basil Karp, 'The Draft Constitution for a European Political Community' (1954) 8 International Organization 181, 182.
[16] Case 294/83 *Parti écologiste "Les Verts" v European Parliament* EU:C:1986:166, para 23; Opinion 1/91 Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty - Draft

was formally established by the Treaty of Paris, in which the six founding Member States signed on 18 April 1951 and entering into force on 23 July 1952.[17] Arguably, the Treaty had two primary objectives: first, and foremost, was the prevention of German rearmament; second, was to rectify Franco-German relations. The Treaty gave effect to the European Court of Justice to allow the nationals of the participating Member States to seek redress before it if their rights granted under the Treaty were infringed.[18] On 10 August 1952, the Member States began working towards merging sovereignty and allowed for the free movement of workers in the coal and steel sectors. This freedom was secured under Article 69(1) of the Paris Treaty stating that the Member States ought to:

> [R]emove any restriction based on nationality upon the employment in the coal and steel industries of workers who are nationals of Member States and have recognised qualifications in a coal mining or steelmaking occupation, subject to the limitations imposed by the basic requirement of health and public policy.

The free movement of foreign nationals in the coal and steel sectors aroused suspicions over national sovereignty and national border control. Concerns over sovereignty was the primary reason for Britain's failure to participate in the ECSC negotiations.[19] The Treaty did not receive universal acclaim throughout the initial six Member States. Many of the European-based Communist parties argued that the free mobilisation of workers would lead to them being considered simple

agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area EU:C:1991:490, para 21 (emphasis added).

[17] That being France, Germany, Luxembourg, Italy, the Netherlands and Belgium.

[18] See Case C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* EU:C:1990:257; Joined Cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* EU:C:1991:428, para 35; Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* EU:C:1996:79.

[19] Paul-Henri Spaak, 'The Integration of Europe: Dreams and Realities' (1950) 29 Council on Foreign Affairs 94, 100.

merchandise in an expanding economic market to consequently result in further worker exploitation as their value rises and falls like a commodity.[20] German socialists asked whether those who resided in the host state to work in coal and steel industries would be authorised to seek career alternatives if their employment ended or became disrupted by strikes.[21] The Treaty also raised moral qualms from religious groups who claimed that the family unit could be uprooted.

Despite these concerns, the Treaty was ratified in all six Member States. However, the limitation of the Paris Treaty was that it did not foresee economic expansion beyond the coal and steel industries. For instance, the Member States' transportation sectors would need to be homogenised in order for coal and steel to cross borders efficiently. Upon realising such, the Social Affairs Committee began to work with national employment ministers to secure a common labour market.[22] Jean Monnet, President of the then ECSC High Authority, saw the free movement of all workers as one of the ways that would harmonise living standards.[23] Monnet's position regarding free movement was to necessitate the uniting of Europeans claiming, 'that we unite Europeans and that we do not keep them separated, we are not joining states, we are unifying men.'[24]

In July 1953 the ministers of Belgium, the Netherlands and Luxembourg met in the Hague to sign a protocol on coordinating their economic and social policies to ensure the free movement of goods, capital, services and people.[25] It was

[20] See Friedrich Engels, *The Condition of the Working Class in England* (first published 1845, Oxford World's Classics 2009) 91 and 226-27; Karl Marx and Friedrich Engels, *The Communist Manifesto* (first published 1888, Penguin Classics 2015) 5-6 and 11-12. See also Liesbet Hooghe and Gary Marks, 'A Postfuntionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus' (2008) 39 British Journal of Political Science 1, 17.
[21] Maas (n 10) 15.
[22] ibid 15-16.
[23] ibid 17.
[24] Jean Monnet, *Les États-Unis d'Europe ont commencé: La Communauté européenne du charbon et de l'acier. Discours et allocutions, 1952-1954* (Robert Laffont 1955) 132.
[25] Maas (n 10) 23.

considered that movement by migrants was not a burden but rather a necessity for the economic recovery of Europe following labour shortages.[26] The idea was to expand the ECSC through the inclusion of the transport and energy sectors. This signals Haas's idea of neofunctionalism that argues that the integration of one economic sector naturally pushes States into integrating others, thus creating an irreversible spillover effect that the participating states become locked into.[27]

A joint proposal combining the sectoral and common market approach was considered at a special meeting of the Council of Ministers at Messina, 2-3 June 1955. The Messina conference has been considered the turning point in European integration and was set up to examine the integration of transport, conventional energy, nuclear energy and to consider the creation of a European common market.[28] The ministers of the then six Member States agreed to examine the feasibility of expanding European integration to all sectors of the economy despite their differences. An agreement was reached 3 June 1955 with the Six adopting a resolution to further progress towards the setting up of a united Europe through the creation of common institutions, the gradual merging of national economies, the creation of a common market and the harmonisation of social policies in the pursuit of higher living standards.

The Messina conference established a committee headed by Paul-Henri Spaak to prepare a report on the feasibility of a common customs union and a common atomic energy agency. The result was the Spaak report which laid down the impetus for extending the right to free movement and non-discrimination to workers of all

[26] ibid 24-25.
[27] Ernst B Haas, *The Uniting of Europe: Political, Social and Economic Forces* (Stanford UP 1958) 311 and 383. See also Paul Pierson, 'The Path to European Integration: A Historical Institutionalist Analysis' (1996) 29 Comparative Political Studies 123, 144-47.
[28] Federico Fabbrini, *Brexit and the Future of the European Union: The Case for Constitutional Reform* (OUP 2020) 119.

economic sectors.[29] The recommendations of the Spaak report would ultimately birth what is now known as the market citizen: a libertarian citizen who bears rights as an economic actor with their relationship to the host community being regarded as a purely contractual one.[30] Market citizenship represents a right-leaning cosmopolitan approach to citizenship with a simple tenet: as long as you are participating in the economic market and contributing toward national resources, then national borders become diluted. In this environment, there is the risk of the self-interested citizen who in their dealings with Europe establishes no allegiance nor identity towards its supranational structure.[31]

The acceptance of the Spaak report consequently established the Treaty of Rome (signed 25 March 1957; entering into force 1 January 1958) thus formalising the European Economic Community (EEC).[32] The Messina conference was therefore transformed into a clear commitment to create a unified market, with the goal of achieving an ever closer union among the peoples of Europe.[33] In contrast to the restrictiveness of the ECSC Treaty, the Treaty of Rome extended free movement rights to all workers except for those employed in the public service.[34] What separates Rome from Paris is that the Rome Treaty empowered a European Commission to make the proposals necessary to achieve the free movement of workers in contrast to the Paris Treaty where it was left to the Member States to

[29] Paul-Henri Spaak, 'The Brussels Report on the General Common Market' (Spaak Report, Information Service High Authority of The European Community for Coal and Steel 1956); Maas (n 10) 18-19.
[30] See Michelle Everson, 'The Legacy of the Market Citizen' in Jo Shaw and Gillian More (eds), *New Legal Dynamics of European Union* (OUP 1995) 73-89.
[31] ibid 85-88.
[32] Also, the Euratom treaty.
[33] See Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, 49.
[34] Elspeth Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law* (Kluwer Law International 2004) 91-92.

draft and implement free movement provisions.[35] The hope driving these legislative changes was that the equal treatment of all EEC workers would result in deeper integration with mobile Europeans not seeing themselves as 'emigrants' but rather as a 'European worker.'[36]

The freedom of movement for workers was fully implemented by 1968 with the implementation of Regulation 1612/68. The purpose of the regulation as stated in its preamble was to ensure that all beneficiaries could exercise their fundamental right to improve their standard of living which must be exercised in freedom and dignity. The regulation states:

> Any national of a Member State shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that state… [and] with the same priority as nationals of that state.[37]

The accompanying Directive sought to 'abolish restrictions on the movement and residence of nationals [of other Member States] … and of members of their families'.[38] The right to move and reside for the then EEC workers was accomplished meaning that these peoples were no longer labelled 'foreigners' or 'guest workers' but as fellow Europeans. However, it ought to be noted that the initial Treaties made no mention to a supranational European identity nor to a European citizenship. The purpose was economic and freedom of movement for workers was considered only to achieve that end.

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[35] Maas (n 10) 18.
[36] Lionello Levi Sandri, 'The Free Movement of Workers in the Countries of the European Economic Community' (Bull EC 6/61, 1961) 5-6.
[37] Council Regulation (EEC) 1612/68 of 15 October 1968 on the freedom of movement within the Community [1968] OJ L257/2, art 1.
[38] Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on the movement and residence of workers from Member States and of their families within the Community [1968] OJ L257/13, art 1.

III. An Economic or Peoples Community?

The EEC Treaty and the four fundamental freedoms established by it were initially thought to be interpreted as the reciprocal obligations of the Member States rather than the granting of new rights to private individuals. Through the EEC Treaty and Regulation 1612/68 the free movement of European workers became a legally entrenched right.[39] Therefore, questions arose regarding the nature of this legal order and whether freedom of movement was to be viewed purely in economic terms, or whether it began a process towards achieving an ever closer union among the peoples of Europe.

The 1960s saw alternatives to supranationalism as the reductionist theory of intergovernmentalism was offered to explain European integration. The theory views European integration in terms of State cooperation and choice as opposed to it being an automatic process of functional spillover that could result in subsequent identity building.[40] In other words, European integration is at most to assume pooled or shared sovereignty as opposed to any transfer to the supranational level.[41] The Member States act as the masters of the Treaties rather than there existing a

[39] Everson (n 30) 79; Massimo La Torre, 'Citizenship: A European Wager' (1995) 8 Ratio Juris 113, 120; Jo Shaw, 'Citizenship of the Union: Towards Post-National Membership?' (*The Jean Monnet Center for International and Regional Economic Law & Justice*, 1998) <https://jeanmonnetprogram.org/archive/papers/97/97-06-.html> accessed 16 June 2020; Dora Kostakopoulou, 'Co-creating European Citizenship: Policy Review' (Publications Office of the European Union 2013) 19.

[40] Stanley Hoffmann, *The European Sisyphus: Essays on Europe, 1964-1994* (Westfield Press 1995) 96; Michelle Cini, 'Intergovernmentalism' in Michelle Cini and Nieves Pérez-Solórzano Borragán (eds), *European Union Politics* (5th edn, OUP 2016) 66-67; Hans Vollaard, *European Disintegration: A Search for Explanations* (Palgrave Macmillan 2018) 32.

[41] Robert O Keohane and Stanley Hoffmann, *The New European Community: Decision Making and Institutional Change* (Westview Press 1991) 46 and 227.

centralised supranational authority enforcing political decisions upon them.[42] Additionally, certain Member State actors argued that the EEC Treaty should resemble that of other international treaties in which the participating States are the only recognised legal entities. However, the theory does accept that the traditional notions of state sovereignty were being tamed in the post-1945 era but that they nevertheless remained legitimate given that they were democratically elected institutions.[43]

The interpretation of the Treaty fell to the jurisdiction of the Court of Justice following the inevitable clashes between the EEC Treaty and the domestic legislation of the Member States. The scope of the Court was to define and articulate the obligations and meaning behind the wording of the Treaties. In its early development, the Court was politically feeble as the Member States were primarily concerned with the material outcome of cases rather than establishing grounded supranational legal principles.[44] This meant that the Court could build legal doctrine based upon unconventional legal interpretations to expand its own territory without provoking much of a political response at the Member State level.[45]

The matter of whether the Treaties also concerned the interests of individuals was settled in 1963 with the *Van Gend & Loos* judgment. The case concerned conflicting national legislation in respect to the charging of import duties on goods moving from West Germany to the Netherlands and *Van Gend en Loos* argued that

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[42] Andrew Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach' (1993) 31 JCMS 473, 480; Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Cornell UP 1998) 22; Andrew Moravcsik and Frank Schimmelfennig, 'Liberal Intergovernmentalism' in Antje Wiener and Thomas Diez (eds), *European Integration Theory* (2nd edn, OUP 2009) 68.

[43] Stanley Hoffmann, 'Obstinate or Obsolete? The Fate of the Nation-State and the Case of Western Europe' (1966) 95 Daedalus 862, 867-89 and 908-11; Ian Bache and others, *Politics in the European Union* (4th edn, OUP 2014) 14.

[44] Maas (n 10) 26-27.

[45] Karen J Alter, 'Who are the "Masters of the Treaties"?: European Governments and the European Court of Justice' (1998) 52 International Organization 121, 130.

this breached Article 12 of the EEC Treaty (now Article 30 TFEU). The Court rejected the intergovernmental position by stating that the EEC Treaty established '*a new legal order of international law*' in which States have limited their sovereignty, albeit in limited fields, and the subjects of which are not only the Member States but also their nationals.[46] The Treaty was not only to impose obligations upon individuals but was also intended to confer upon them rights which became part of their '*legal heritage*'.[47] Therefore, the EEC Treaty itself produces direct effects and creates individual rights that national courts must protect. The Treaty granted individuals with rights that needed to be respected vertically by the Member State governments and horizontally between Member State nationals.[48] In other words, the Court reversed the international law norm that assumes international legal obligations apply only to nation-states as opposed to private individuals.[49]

It can be said that the language of the Court gave a human dimension to the Treaty by introducing the idea of a European legal heritage while also referring to the *spirit* of the Treaty. Arguably, this interpretation allowed for both a broader and deeper connection to the EU legal order to which the concepts of an ever closer union and European identity could emerge. Unsurprisingly, this judgement, the EEC Treaty and Regulation 1612/68 have been considered to represent an incipient form of European citizenship.[50] However, considering recent events, such as Brexit, it

[46] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* EU:C:1963:1, 12 (emphasis added).
[47] ibid (emphasis added).
[48] See Case 93/71 *Orsolina Leonesio v Ministero dell'agricoltura e foreste* EU:C:1972:39; Case 43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* EU:C:1976:56; Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* EU:C:1984:153.
[49] Weiler, 'The Transformation of Europe' (n 6) 2413.
[50] Richard Plender, 'An Incipient Form of European Citizenship' in Francis Geoffrey Jacobs (ed), *European Law and the Individual* (North Holland 1976); AC Evans, 'European Citizenship' (1982) 45 MLR 497, 501; Theodora Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (Manchester UP 2001) 41-53.

ought to be asked if the foundations for a European legal heritage have remained underspecified.[51]

Despite the Court's judgment in *Van Gend en Loos*, conflicts between the EEC Treaty and the national legislation of the Member States continued to emerge. To overcome this, it became clear that Community law required supremacy over the conflicting national laws of the Member States if it was to achieve the common market. In 1964, the Court of Justice held in its *Costa v E.N.E.L* judgment that the Treaty of Rome had created its '*own legal system* which became an integral part of the legal systems of the Member States *and which their courts are bound to apply'*.[52] Therefore, the Court held that it would be impossible for the Member States to adopt a unilateral and subsequent measure that conflicted with the objectives of the EEC Treaty, that being the establishment of a common market.[53] Additionally, in the same year the meaning of 'worker' was held to be governed by the Community to further ensure uniform application of the EEC Treaty throughout the Member States.[54]

The effect of the EEC Treaty expanded the rights of movement granted in the Treaty of Paris, charged the Commission with enforcing these rights and the Court with the duty of interpreting them. It can be argued that the *van Gend & Loos* and the *Costa v ENEL* judgments elevated the then Community, Union, legal order from an ordinary intergovernmental organisation to the status of a 'new legal order'

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[51] Francesca Strumia, 'European Citizenship and Transnational Rights: Chronicles of a Troubled Narrative' in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing 2017) 166. See also Williams (n 2) 558.
[52] Case 6/64 *Flaminio Costa v E.N.E.L.* [1964] EU:C:1964:66, 593 (emphasis added).
[53] ibid, 593-95.
[54] Case 75/63 *Mrs M.K.H. Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten (Administration of the Industrial Board for Retail Trades and Businesses)* EU:C:1964:19, 184. See also Case 53/81 *D.M. Levin v Staatssecretaris van Justitie* EU:C:1982:105; Case 66/85 *Deborah Lawrie-Blum v Land Baden-Württemberg* EU:C:1986:284, para 17; Case 139/85 *R. H. Kempf v Staatssecretaris van Justitie* EU:C:1986:223, paras 12-16; Case 196/87 *Udo Steymann v Staatssecretaris van Justitie* EU:C:1988:475.

comparable in some respects to a federal state.[55] The ECSC Treaty, the EEC Treaty and subsequent secondary legislation and case law provided a genuine area for the free movement of European workers who could enforce certain fundamental rights against their host state to which the national courts had a duty to uphold.[56] However, the Court's expansive interpretation of the EEC Treaty established the principles of direct effect and supremacy without any explicit reference to such within the Treaty. Such an expansive interpretation remains a point of controversy to this day.

IV. Emerging Ideas for a European Identity

Throughout the 1970s, many started to question whether the democratic nation-state still offered a comprehensive and self-sufficient context within which citizenship could operate.[57] The debate for introducing a common status of European citizenship had already begun but with the first Community enlargement to include the UK,[58] Ireland and Denmark in 1973 (making the Six the Nine) the idea became temporarily stagnant.[59] It was clear that the European workers who made use of their free movement rights were there to stay and a decision was required to determine whether the EEC should guarantee a right of residence and related social

[55] Josephine Shaw, *European Community Law* (Macmillan 1993) 7; Phoebus L Athanassiou and Stéphanie Laullhé Shaelou, 'EU Citizenship and Its Relevance for EU Exit and Secession' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017) 737-38.
[56] See Case 29/69 *Erich Stauder v City of Ulm* EU:C:1969:57; Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* EU:C:1970:114, 1134; Case C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* EU:C:1978:49, para 24; Case C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* EU:C:1990:257, para 23.
[57] Richard Bellamy, Dario Castiglione and Jo Shaw, 'Introduction: From National to Transnational Citizenship' in Richard Bellamy, Dario Castiglione and Jo Shaw (eds), *Making European Citizens: Civic Inclusion in a Transnational Context* (Palgrave Macmillan 2006) 7.
[58] European Communities Act 1972, s.2.
[59] Weiler, 'The Transformation of Europe' (n 6) 2431; Willem Mass, 'European Citizenship in the Ongoing Brexit Process' (2021) 58 International Studies 168, 169.

rights to these workers, or to go further and include the political right to vote and stand as a candidate in municipal elections.[60]

The 1970s signalled a mutual consensus that there was a lack of European identity throughout the Member States and that its omission had stagnated further European integration. Therefore, the idea for a 'people's Europe' emerged to replace the previously held concept of a 'traders Europe' attached to the Common Market. The 1972 Paris Summit recognised the need for the then nine Member States to define the unity of their interests, the extent of their capacities and the magnitude of their duties.[61] It has been said that the formation of a European identity is an impossible task because Europe has become too diverse and lacks the necessary emotional reverence.[62] Raymond Aron claimed that 'there are no such animals as "European citizens." There are only French, German, or Italian citizens.'[63] This can be taken to mean that the European political space lacks a *demos*, or a people, who collectively make up a body of Europeans who could share a common citizenship.[64] However, others would argue that the construction of a European identity does not require ethnic bonds nor a cultural history that is tied to an ethnic identity.[65] Alternatively, a European identity can establish itself through the belief that Others are of the same community.[66]

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[60] Maas (n 10) 30.
[61] European Council, First Summit Conference of the Enlarged Community, 19-21 October [1972] Bull. EC 30.
[62] Anthony D Smith, 'National Identity and the Idea of European Unity' (1992) 68 International Affairs 55, 65 and 70-74.
[63] Raymond Aron, 'Is Multinational Citizenship Possible?' (1974) 41 Social Research 638, 653.
[64] Weiler, 'Does Europe Need a Constitution Demos, Telos and the German Maastricht Decision' (n 6) 229-31 and 254; JHH Weiler, 'To Be a European Citizen - Eros and Civilization' (1997) 4 Journal of European Public Policy 495. See also Percy Lehning, 'European Citizenship: A Mirage?' in Percy Lehning and Albert Weale (eds), *Citizenship, Democracy and Justice in the New Europe* (Routledge 1997) 182; Massimo La Torre, 'Citizenship, Constitution, and the European Union' in Massimo La Torre (ed), *European Citizenship: An Institutional Challenge* (Kluwer Law International 1998) 451.
[65] Paul Howe, 'A Community of Europeans: The Requisite Underpinnings' (1995) 33 JCMS 27, 32-33.
[66] ibid 44.

It was envisaged that a European citizenship would not be confined to socioeconomics but would instead facilitate all the rights enjoyed in the typical liberal democratic State.[67] Both Belgium and Italy proposed granting all EEC nationals, regardless of their place of residence, the right to vote and run for office in the municipal elections of the Member States.[68] The German Chancellor suggested putting social policy into a European perspective to provide EEC nationals with a supranational identity in which they could attach themselves.[69] Giulio Andreotti, then Prime Minister of Italy, advocated for the establishment of a European citizenship which would be in addition to the citizenship that the inhabitants of the Member States already possessed.[70] These proposals were welcomed by the European Commission with then President Sicco Mansholt declaring that the then EEC must open the frontiers that keep citizens apart from one another and to integrate the social, administrative and political fabric of their host countries to confer upon them European civic rights.[71]

The Copenhagen Declaration on European Identity, 14 December 1973, aimed to introduce a common European identity. The Nine EEC members decided to draw up a document placing its emphasis on their cultural heritage. Defining European identity involved reviewing the common heritage, interests and obligations and to assess the extent to which the Nine were already acting together with the rest of the world. National culture would not be encroached but positively affirmed by ensuring that the cherished values of the legal, political and moral order are respected, yet their shared values towards life, the principle of representative democracy, the rule

[67] Evans (n 50) 505-06.
[68] Maas (n 10) 30.
[69] European Council (n 61) 30.
[70] ibid 39-46.
[71] ibid 58-59.

of law, social justice, and respect for human rights are to be recognised unanimously as the fundamental elements of a European identity.[72]

The goal was to establish a recognised identity to represent the reunification of Europe. Upon achieving its construction its parameters are then open to other European nations who share the desire for unity and the ideals and objectives of a united Europe. European countries faced a new international dilemma and where previously they were able to play a major role on the international stage, the 1970s further demonstrated the complexity of international relations and it was concluded that any of the Nine acting unitarily would be unable to provide solutions.[73] Europe's new position was that it must speak with one voice if it is to be heard and the Nine were convinced that building upon this policy would enable them to tackle further stages in the construction of European unity with both confidence and realism.[74]

With a view to progress towards European unity, the Paris Summit, 9-10 December 1974, prioritised three goals: first, was the instruction of a working party to study the possibility of establishing a uniform European passport aiming to provide stage-by-stage harmonisation of legislation affecting aliens and for the abolition of passport controls within the Community;[75] second, was the instruction of a working party to study the conditions and the timings under which the citizens of the Nine could be provided special rights as members of the Community;[76] and third, was the invitation to Mr Leo Tindemans to submit a comprehensive report on the conceptualisation of a common European identity and a new European

[72] European Council, 'Declaration on European Identity' (Copenhagen European Council, Bull EC No 12, 14 December 1973) pt 2.
[73] ibid 3.
[74] ibid 4.
[75] European Council, 'Final communiqué of the Paris Summit' (Bull E.C. No 12, 9 and 10 December 1974) 10.
[76] European Council, 'Document on the European Identity Published by the Nine Foreign Ministers' (Copenhagen European Council, 14 December 1973) pt 1104.

citizenship. Further to these objectives, the principle of direct elections to the European Parliament was also endorsed in the effort to increase democratic participation among the citizens of Europe.[77]

In 1975, the Commission presented a report titled 'Towards European Citizenship' that covered proposals for a passport union and the conditions under which the Member States could grant the right to vote and provide eligibility for public office to citizens of other Member States. The Commission presented these goals as 'the logical goal of the principle of national treatment and integration into the host country.'[78] The report also examined the political rights of Community nationals concluding that equal treatment for citizens in terms of social and economic rights was politically acceptable because it had long been a subject of frequent negotiation between the Member States. It was accepted that public opinion might not support the equal treatment of foreigners in the political field, but the Commission contended that the public would simply have to be given the opportunity to get used to it.[79] The conclusion was that a European citizenship implies that citizens of one Member State should be treated equally to the nationals of their host state.

The Tindemans report, submitted 29 December 1975, and the European Commission began to address the question of special rights due to the chapter within the report dedicated wholly to 'a citizens Europe'.[80] The report asked why Europe was losing its initial force after acknowledging that in 1975 the peoples of Europe did not regard European unity with the same enthusiasm as they did in 1950. Through the Tindemans report came the realisation that political union does not

[77] European Council, 'Final communiqué of the meeting of heads of Government of the Community' (Office for Official Publications of the European Communities 9 and 10 December 1974) 3.
[78] Commission, 'Towards European Citizenship' (Bull EC 7/75) COM (75) 322 final.
[79] Maas (n 10) 31-32; COM (75) 322 final.
[80] Commission, 'Report on European Union' (Tindemans Report, Bull E.C. suppl. 1/76, 29 December 1975) ch 4.

automatically follow from economic integration, and it was recognised that there existed a need to restore a common vision for a united Europe.[81]

Tindemans claimed that the ideal for closer relations between the peoples of Europe remained due to the regret in not having more evidence of the 'ever closer union' in their daily lives.[82] For Tindemans the European project must be experienced personally by the citizen and to achieve this then it ought to make itself felt in education, culture, news and communication as this would best cement itself in the youth cultures of the Member States.[83] It was recommended that the nationals of the Member States should be attributed certain rights including the right to vote and stand in elections to the European Parliament supplemented by the establishment of a European passport. He agreed that there should be a more post-national sense of belonging in the European political space. Tindemans did not claim that these rights were to be of European citizens but that they were necessary to establish a 'Europe of citizens.'[84]

Tindemans rejected the intergovernmental nature of the then EC and contended that Europe must become closer to its citizens and not merely a form of political collaboration between its Member States. Two courses of action were outlined: to protect the rights of Europeans where protection can no longer be guaranteed by individual States; and to secure European solidarity by utilising external signs to be discernible in everyday life.[85] The gradual increase of powers in the supranational European institutions was to ensure that the rights of Community nationals are recognised and protected through the individual having the right of direct appeal to

[81] ibid ch 1 pt A.
[82] ibid ch 1 pt A 3.
[83] ibid.
[84] COM (75) 322 final.
[85] ibid ch 4.

the Court of Justice where a violation of such rights occur.[86] To ensure external signs of solidarity among the European peoples Tindemans proposed that the Community should aim to gradually remove frontier controls on persons claiming that the day Europeans can freely move within the territory of the Member States is the day when the European project will be transformed into a discernible reality for its citizens.[87]

Proposals to bring Europe nearer to its citizens are directly in line with the deep-seated motivations behind the European construction. These proposals were, in Tindemans's view, to allow for its social and human dimension.[88] Intergovernmental cooperation would not be able to solve the problems faced by the nation-states of Europe given that such cooperation tends to underline differences. There was political tension in establishing these rights that subsequently aroused a legal problem in that mobile European citizens would enjoy rights in both their state of origin and in their state of residence while no longer being subject to the process of naturalisation.[89] This would ultimately become the downfall of the Tindemans report as the Commission claimed that reverse discrimination would occur resulting in mobile Community nationals being afforded more rights than the immobile citizens. Therefore, the special rights policy as proposed by Tindemans made a limited impact.[90]

However, the year 1979 brought some of these ideas to fruition. First, the 1979 election to the European Parliament through universal suffrage helped to revive the debate regarding a common European citizenship with some arguing that this

[86] ibid ch 4 pt A 1.
[87] ibid ch 4.
[88] ibid ch 4 pt B.
[89] Patricia Mindus, *European Citizenship After Brexit: Freedom of Movement and Rights of Residence* (Palgrave Macmillan 2017) 9.
[90] ibid.

represented an embryonic form of citizenship in Europe.[91] The use of direct elections was intended to increase the democratic legitimacy of the European institutions and to foster a more legitimate European demos, thus turning an economic community into a community of citizens. Second, the Commission produced a draft directive on a right of residence for Community nationals who could present proof of sufficient resources to provide for their own needs and those of their dependent family members while resident in the host state.[92] The reasoning for this introduction was to discourage large population movements based upon accessing the most favourable social benefits.[93] Although the Commission favoured these suggestions, support in the Council waned due to a rise in the number of third-country nationals entering the Community. Further, the election of Margaret Thatcher as UK Prime Minister would only harden European integration policies. Third, the Commission, in its thirteenth General Report, produced a draft to state that rights would be granted to Community nationals 'no longer as persons engaged in economic activity but in their capacity as Community citizens.'[94] The European Parliament described the draft as 'the first step towards the creation of a European citizenship'.[95]

[91] ibid.
[92] Commission, 'Proposal for a Council Directive on a Right of Residence for Nationals of Member States in the Territory of Another Member State' COM (79) 215 final, 14.
[93] Commission, 'Amended Proposal for a Council Directive on a Right of Residence for Nationals of Member States in the Territory of Another Member State' COM (80) 358 final, 3.
[94] See Evans (n 50) 510.
[95] European Parliament, Minutes of the Sitting of Thursday, 17 April 1980 [1980] OJ C117/1, 48; Evans (n 50) 510.

V. Furthering a Conception of European Identity

The desire for further integration continued throughout the 1980s. Where previously European integration was used to characterise the development of the European project, theories of governance emerged to better explain its development. Governance theories assume that the European project is best studied as a separate entity without the presence of a traditional government at the helm. It represents a post-ontological approach to the European project as it is less interested in understanding what the euro-polity represents but is instead interested in what its impact has been.[96]

Such an approach allows political actors to discuss decision-making without invoking the idea that Europe is in the process of becoming a State.[97] The Community, and now Union, is perhaps best described as a system of multi-levelled governance incorporating subnational, national and supranational communities and interests.[98] Its innovation is the recognition of the subnational level after it was found that communication and action between the regional and the supranational levels often bypassed the national level where previously their interests were ignored.[99] This allowed for multiple identities to become embedded in each level. The European identity has therefore become somewhat post-national as it has been

[96] James A Caporaso, 'The European Union and Forms of State: Westphalian, Regulatory or Post-Modern?' (1996) 34 JCMS 29, 30; Markus Jachtenfuchs, 'The Governance Approach to European Integration' (2001) 39 JCMS 245, 250.
[97] Thomas Christiansen, 'Governance in the European Union' in Michelle Cini and Nieves Pérez-Solórzano Borragán (eds), *European Union Politics* (5th edn, OUP 2016) 98.
[98] Gary Marks, 'Structural Policy and Multilevel Governance in the EC' in Alan Cafruny and Glenda Rosenthal (eds), *The State of the European Community Volume 2: The Maastricht Debates and Beyond* (Lynne Rienner 1993) 392; Gary Marks, Liesbet Hooghe and Kermit Blank, 'European Integration from the 1980s: State-centric v. Multi-level Governance' (1996) 34 JCMS 341.
[99] Gary Marks and Liesbet Hooghe, 'Optimality and Authority: A Critique of Neo-classical Theory' (2000) 38 JCMS 795; Hooghe and Marks (n 20) 4-5 and 13.

spurred through experiences of mobility and transnational social interaction with decision making consequently shifting from an insulated elite to the mass public.[100]

Integration deepened with the Member States' agreeing in 1981 to introduce the uniform European passport.[101] Integration also widened with Greece's accession to the Community in 1981 (expanding the Nine to the Ten). Efforts were furthered in 1983 when the European Parliament produced a report to extend to Community nationals the right to vote and stand as a candidate in local elections.[102] However, it was not until the 1984 European Council meeting at Fontainebleau where the European Parliament presented the Draft Treaty Establishing the European Union (DTEU) that saw the re-emergence of a European citizenship explicitly mentioned. The draft treaty stated that citizens of the Member States shall *ipso facto* be citizens of the Union, that European Union citizenship is to be dependent upon the holding of a Member State nationality, and that it may not be independently acquired or forfeited.[103]

As a result of the Fontainebleau European Council, two committees were established: the *ad hoc* committee on 'The Europe of Citizens' directed by Pietro Adonnino and the committee on 'institutional affairs' directed by James Dooge.[104] These committees were instructed given that the Community considered that it should respond to the expectations of the peoples of Europe and promote its identity for its citizens.[105] The Fontainebleau conference confirmed the European Council's

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[100] Gary Marks, 'Structural Policy in the European Community' in Alberta Sbragia (ed), *Europolitics: Institutions and Policymaking in the 'New' European Community* (Brookings Institution Press 1992) 191-224; Hooghe and Marks (n 20) 13. See also Neil Fligstein, *Euroclash: The EU, European Identity, and the Future of Europe* (OUP 2008) 123.
[101] Maas (n 10) 35.
[102] European Parliament, Resolution on the Right of Citizens of a Member State Residing in a Member State Other Than Their Own to Stand for and Vote in Local Elections [1983] OJ C184/28.
[103] European Council, 'Draft Treaty Establishing the European Union' (14 February 1984) 5.
[104] Mindus (n 89) 9.
[105] European Council, 'European Council Meeting at Fontainebleau' (Presidency Conclusions 25 and 26 June 1984) 8.

approval for the creation of a European passport by 1 January 1985.[106] In response, the Council was required to produce a report before the middle of 1985 that would produce a single document on the abolition of all police and customs formalities for people crossing intra-community frontiers. On 12 December 1984, the newly elected European Parliament passed a resolution on the DTEU.[107] What arguably aided this process was the appointment of Jacques Delors to the presidency of the European Commission who sought to reignite European integration in a way that was compared by some to Jean Monnet.[108]

The Peoples of Europe Committee produced its first short-term objectives report that examined the strengthening of the special rights of citizens, voting rights, improvement of citizens' complaints procedures and called for the simplification of Community legislation.[109] By March 1985, the Institutional Affairs report called for a homogenous internal market that replaced unanimity with Qualified Majority Voting (QMV) in the European Council and called for greater powers for the Commission and the Parliament.[110] Despite the reluctance of some Member States, progress towards integration continued on other fronts.[111] The 1986 accession Treaties of Spain and Portugal (making the Ten the Twelve) saw the Commission issuing a White Paper on completing the internal market arguing that it was crucial that any remaining obstacles to freedom of movement for workers and the self-employed be removed by 1992.[112] The White Paper cited the preliminary findings of the Peoples

[106] Saskia Sassen, 'Towards Post-national and Denationalized Citizenship' in Engin F Isin and Bryan S Turner (eds), *Handbook of Citizenship Studies* (Sage Publications 2002) 277-78.
[107] European Parliament, Resolution on the Draft Treaty Establishing the European Union [1984] OJ C77/27.
[108] Stanley Hoffmann, 'The European Community and 1992' (1989) 68 Foreign Affairs 27, 32.
[109] Commission, 'Report from the ad hoc Committee on a People's Europe' (Adonnino report, 29 and 30 March 1985) 3.
[110] European Council, 'Report of the Ad Hoc Committee for Institutional Affairs to the European Council' (Dooge Report, 29 and 30 March 1985) 27.
[111] Maas (n 10) 37.
[112] Commission, 'Completing the Internal Market' (White Paper) COM (85) 310 final, 25.

of Europe report continuing that measures to ensure the free movement of individuals must not be restricted to the workforce only.[113]

The Peoples of Europe committee submitted its second report 20 June 1985. The report recommended that the right to vote and stand as a candidate in local elections ought to be established, but the matter was to be held within the competence of the Member States and not the Community.[114] The report emphasised the importance of symbolic legitimacy to bind the citizens of the Member State to the Community and called for the introduction of Beethoven's *Ode to Joy* as the official anthem of Europe. The report also proposed a general right of residence for all Community nationals, the creation of a European ombudsman, consular assistance, and the recognition of voting rights in local elections. However, the report stressed that the impetus for the implementation of these changes had to come from national political leaders.[115]

The Adonnino report left no great marks on the Single European Act (SEA), (signed 17 February 1986; entering into force 1 July 1987) as its preamble only makes a vague reference to a European citizenship.[116] The SEA set a specific deadline of 31 December 1992 for the implementation of the European single market to allow for goods, services, capital and people to move freely within its territories.[117] The SEA turned much of the Commission's White Paper into law, yet any proposals for a European citizenship were considered too radical for some Member States. The SEA to some was a disappointment in that it failed to progress

[113] COM (85) 310 final, 26.
[114] European Council, 'Report by the Committee on a People's Europe Submitted to the Milan European Council' (Bull E.C. 7/85, 28 and 29 June 1985); Kostakopoulou (n 39) 21.
[115] Maas (n 10) 38.
[116] Mindus (n 89) 9.
[117] Maas (n 10) 38.

ideas for a common status of citizenship in Europe.[118] State hesitance and the use of their veto powers over Treaty change appeared to confirm the intergovernmental character of the European project.[119] Qualified Majority Voting would only be extended to EU secondary legislation.[120] Ultimately, there were no new rights within the SEA and only a mere enhancement was included to further cover workers and self-employed persons to social security benefits.

However, the Court of Justice began to take Community rights seriously.[121] The Court strengthened the 'market citizen' by recognising that economic transactions do not take place in a vacuum but co-exist in a political and social space.[122] The *Gravier* judgment demonstrates this shift as it was held that a French national studying in Belgium was entitled to access to higher education upon the same basis as the nationals of the host state.[123] This entitlement began to demonstrate the existence of rights that extended beyond rights for workers and into one that recognised the legal bond between the then Community nationals and the social fabric of their host territories.

Irrespective of state hesitance it became clear that a common status for Community nationals was required. It was thus concluded at the 1986 Hague European Council and at the 1988 Hanover European Council that a general right of residence throughout the Member States should be extended to all Community

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[118] Caporaso (n 96) 47.
[119] Percy B Lehning, 'European Citizenship: Towards a European Identity?' (2001) 20 Law and Philosophy 239, 271.
[120] Kalypso Nicolaïdis, 'The Political Mantra: Brexit, Control and the Transformation of the European Order' in Federico Fabbrini (ed), *The Law & Politics of Brexit* (OUP 2017) 34.
[121] Neill Nugent, *The Government and Politics of the European Community* (2nd edn, Palgrave Macmillan 1989) 150; Elizabeth Meehan, *Citizenship and the European Community* (Sage 1993) 54; Guild (n 34) 131-32.
[122] Dora Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change' (2005) 68 MLR 233, 238.
[123] Case 293/83 *Françoise Gravier v City of Liège* EU:C:1985:69. See also Case 24/86 *Vincent Blaizot v University of Liège and others* EU:C:1988:43; Case 263/86 *Belgian State v René Humbel and Marie-Thérèse Edel* EU:C:1988:451.

nationals.[124] The UK and Denmark were reluctant to agree due to concerns that the extension of residence rights would become a burden to Member States with more generous social welfare systems.[125] They argued that to extend these rights to students, pensioners, and the self-supporting required treaty change and even if successful, any changes should guarantee that these persons shall not become a burden to the social security or the public health of the host state.[126] As a result of the June 1988 Hanover European Council, the Commission asked the Economic and Social Committee to consider a Community charter of fundamental social rights for workers.[127] The Rhodes European Council in December 1988 confirmed that the completion of the single market was not to be an end in securing rights for Europeans and aimed to ensure the well-being of all. The European tradition of social progress should guarantee that citizens, regardless of their economic standing, would be able to access the direct benefits of the single market.[128] After three weeks of deliberation, the European Parliament stated that the presence of competition should not jeopardise the adoption of European social rights.[129]

The 1989 Madrid European Council saw the political will to introduce a European citizenship become tangible.[130] The Member States agreed that the same importance should be given to the social aspects of the Community as was being given to its economic aspects.[131] The Commission presented the December 1989

[124] European Council, 'London European Council' (Presidency Conclusions, 5 and 6 December 1986) (emphasis added).
[125] Maas (n 10) 41.
[126] Commission, 'Proposal for a Council Directive on the Right of Residence' COM (1989) 275.
[127] Maas (n 10) 42.
[128] European Council, 'Rhodes European Council' (Presidency Conclusions, 2 and 3 December 1988) 5.
[129] European Parliament, Resolution on the Social Dimension of the Single Market (Doc. A 2-399/88) [1989] OJ C96/61.
[130] Mindus (n 89) 9-10.
[131] European Council, 'Madrid European Council' (Presidency Conclusions, 26 and 27 June 1989) 14.

Strasbourg European Council with a Community charter of fundamental social rights for workers with only the UK refusing to sign.[132] Margaret Thatcher termed Europe's economic policy as socialism by the back door and her reluctance forced the hands of the Member States to settle for limited progress.[133] Thatcher, in 1988, during her speech at the College of Europe, stated that 'we have not successfully rolled back the frontiers of the State in Britain only to see them reimposed at a European level with a European super-state exercising a new dominance from Brussels.'[134]

Notwithstanding intergovernmental resistance, the Court of Justice continued in its protective jurisprudence to further the rights and status of the then EEC Member State nationals. The *Cowan* Judgment held that a British visitor to Paris who was mugged while riding the Metro could acquire criminal injuries compensation on the same basis as French nationals.[135] Mr Cowan was merely a consumer of services and the Court recognised that although a service provider may not be required to move across national borders the consumers of such services still require protection, and thus interpreted the Treaty as allowing for the free movement of consumers.[136] This appeared to create something of a common right for all Community nationals given that the mere fact that someone had crossed national borders would in itself satisfy the minimum threshold to fall within the scope of the Treaty.[137] In any case, it is somewhat ironic that the UK remained hesitant towards

[132] Maas (n 10) 42-43.
[133] David Morgan, 'Is EU Media Coverage Biased?' (2005) 6 European Affairs 14, 15.
[134] Margaret Thatcher, 'Speech to the College of Europe ("The Bruges Speech")' (*Margaret Thatcher Foundation*, 20 September 1988) <https://www.margaretthatcher.org/document/107332> accessed 7 January 2023.
[135] Case C-186/87 *Ian William Cowan v Trésor Public* EU:C:1989:47.
[136] Joined Cases 286/82 and 26/83 *Graziana Luisi and Giuseppe Carbone v Ministero del Tesoro* EU:C:1984:35.
[137] Tony Downes, 'Market Citizenship: Functionalism and Fig-leaves' in Richard Bellamy and Alex Warleigh (eds), *Citizenship and Governance in the European Union* (Continuum 2001) 93-106; Guild (n 34) 82.

furthering European integration in this period given that the Community institutions were already protecting UK nationals.

VI. Towards European Union Citizenship

With the unsuccessful attempt to introduce a European citizenship in the Draft Treaty on European Union and the Single European Act, the project of building a supranational citizenship was to be revived as the single market program further developed. In 1990, the European Parliament called for a specific formulation of rights to be granted under a European citizenship to be included in the future Maastricht Treaty.[138] The 1990 Dublin European Council decided that in order to shape the political union effectively then the concept of European citizenship rights had to be introduced within the Treaty. A draft resolution asked the Member States to hold an intergovernmental conference not simply on economic and monetary union but also to resolve the issue of incorporating fundamental rights into the Treaties.[139] In the parliamentary debates Jacques Delors was strongly in favour of including fundamental rights citing the purpose of the reform was to remedy the democratic deficit and engender a constitutional patriotism as the Community should strengthen its citizens' feelings of belonging.[140] The Dublin European Council was to define the eventual European Union as including a common citizenship.[141]

What followed at the Rome European Council of 27-28 October 1990 was a document that described European citizenship as complementing national

[138] Mindus (n 89) 10.
[139] European Parliament, Resolution on the Intergovernmental Conference in the Context of the Parliaments Strategy for European Union (Doc. A 3-47/90) [1990] OJ C96/114.
[140] Mass (n 11) 47.
[141] ibid.

citizenship that could only be derived through the holding of a Member State nationality.[142] The Rome European Council was to introduce four sets of citizenship rights into the future treaty: first, the right to participate in elections to the European Parliament; second, the right to provide for free movement and residence irrespective of economic activity; third, the right to diplomatic and consular protection; and fourth, was the right to appeal to a European ombudsman.[143] Margaret Thatcher continued to oppose deeper integration in the House of Commons, stating a hard 'No. No. No.' to the proposals of Jacques Delors,[144] and that such proposals were to introduce 'a federal Europe by the back door'.[145] Thatcher's intransigence towards furthering European integration would ultimately result in her being ousted as the leader of the Conservative Party, and therefore as UK Prime Minister.

The 1991 IGC institutionalised European citizenship as established by the Rome European Council and pronounced that 'every person holding the nationality of a Member State shall be a citizen of the Union.'[146] This definition sparked tension from both Denmark and the UK resulting in the European Parliament passing a resolution to confirm that European citizenship is merely additional to national citizenship.[147] The Spanish proposal of 21 February 1991 stated that the definition of European citizenship ought to be achieved through inserting a new title into the future Maastricht Treaty. This proposal came to fruition and the Maastricht Treaty was

[142] European Council, 'Rome European Council' (Presidency Conclusions, 27 and 28 October 1990) 3.
[143] European Council, 'Rome European Council' (Presidency Conclusions, 14 15 December 1990).
[144] HC Deb 30 October 1990, vol 178, col 873.
[145] HC Deb 22 November 1990, vol 181, col 451.
[146] Commission, 'Union Citizenship' (Bull EC) COM (91); Dora Kostakopoulou, 'When EU Citizens Become Foreigners' (2014) 20 ELJ 447, 451.
[147] European Parliament, Resolution on Union Citizenship (A 3-0139/91) [1991] OJ C183/473.

signed 7 February 1992 and, for the first time, European Union citizenship was expressed in text that would become legally binding.[148]

Although signed, the Maastricht Treaty would require the Member States to ratify the new Treaty in accordance with their own constitutional requirements before entering into force. Ratifying the Treaty became burdensome due to the opposition of Denmark following a slim majority 'No' in its referendum of 2 June 1992.[149] The Danes required clarification as to how the Treaty on European Union would impact their domestic nationality laws.[150] The Birmingham European Council, 16 October 1992, confirmed that in the eyes of national executives Union citizenship is not intended to replace national citizenship.[151] The Edinburgh European Council, 11-12 December 1992, further clarified that Union citizenship is to give nationals additional rights but does not replace national citizenship, and whether an individual is a national of a Member State will be determined solely by the national law of the State concerned.[152] The Edinburgh European Council stressed further that Union citizenship is a political and legal concept which is entirely different from the concept of national citizenship within the constitution of Denmark and nothing in the Treaty implies that Union citizenship will provide an equal status, and that any change to this would require unanimity in the European Council.[153] Following a second

[148] Mindus (n 89) 10.
[149] Maas (n 10) 53.
[150] David Howarth, 'The Compromise on Denmark and the Treaty on European Union' (1994) 18 Journal of European Integration 57, 78-79; Daniel Thym, 'The Evolution of Citizens' Rights in Light of the European Union's Constitutional Development' in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing 2017) 123.
[151] See Dora Kostakopoulou, *European Union Citizenship Law and Policy: Beyond Brexit* (Edward Elgar Publishing Ltd 2020) 14.
[152] European Council, 'Denmark and the Treaty on European Union' [1992] OJ C348/1, 2. See also La Torre (n 39) 113; Willem Maas, 'European Union Citizenship in Retrospect and Prospect' in Engin F Isin and Peter Nyers (eds), *Routledge Handbook of Global Citizenship Studies* (Routledge 2014) 415; Mass (n 59) 177.
[153] European Council (n 152) 4; Elspeth Guild, 'EU Citizenship' in Dennis Patterson and Anna Södersten (eds), *A Companion to European Law and International Law* (John Wiley & Sons 2016) 492.

referendum, the Danish people accepted the Treaty by 56.7% and it was subsequently ratified by Denmark 18 May 1993.[154]

The UK also expressed initial opposition to the TEU and only recanted after securing an opt out from the Economic and Monetary Union.[155] Margaret Thatcher continually opposed Europe's integration ideology and in 1993 when speaking in the House of Lords she claimed that the amalgamation of the then twelve countries under a common umbrella of citizenship would lead to the owing of duties towards the new EU stating, 'what else is citizenship about?'[156] Despite such concerns, the House of Commons approved the European Communities (Amendment) Act 1993 20 May 1993, the House of Lords approving it 20 July 1993 and it received Royal Assent the same day. This subsequently amended the European Communities Act 1972 to incorporate the Maastricht Treaty amendments into domestic UK law.[157] The TEU subsequently entered into force 1 November 1993 and as a result the European Union as we now know it became a reality, and the nationals of the EU Member States simultaneously became European Union citizens.[158]

VII. Conclusion

Europe was once a continent in dispute, yet it now finds itself in a relatively stable state of peace and unity. The Maastricht Treaty can be seen to symbolise this achievement and the transformation of the Member States nationals into European

[154] Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis* (CUP 2010) 8.
[155] See John Major, *The Autobiography* (Harper Collins 2000) 264-86.
[156] HL Deb 7 June 1993, vol 546, cols 564-65. See also *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Rees-Mogg* [1994] EWHC Admin 4, All ER 457.
[157] European Communities (Amendment) Act 1993; European Economic Area Act 1993.
[158] See Sonia Morano-Foadi and Stelios Andreadakis, *Protection of Fundamental Rights in Europe: The Challenge of Integration* (Springer 2020) 85-106.

Union citizens can be taken as the recognition of their shared identity towards a united European continent. The question is how this unity is to be justified given the EU's deviation from the traditional ideals of statehood and citizenship?[159] It can be debated whether the creation of Union citizenship was the intention of the founding fathers, but it cannot be denied that European integration has created a genuine and multi-layered political space where feelings of belonging and identity have become fluid to stretch beyond the confines of national borders.[160] It is said here that the establishment of Union citizenship legally formalised this identity that had been growing throughout Europe as its peoples exercised their rights derived from the Community, and now Union. However, although the status became legally established it appeared to lack the Marshallian qualities of citizenship to allow for the civil, political and social rights of Union citizens. Bridget Laffan argued that the Treaty did not directly engage citizens and all the status initially achieved was to confirm their right to vote in the European Parliament elections every five years and to cement the Union citizen's role as a consumer.[161]

The opinion of AG Jacobs from the *Konstantinidis* case perhaps best explains what Union citizenship sought to accomplish:

> In my opinion, a Community national who goes to another Member State as a worker or self-employed person … is entitled not just to pursue his trade or profession and to enjoy the same living and working conditions as nationals of the host state; he is in addition entitled to assume that, wherever he goes to earn his living … he will be treated in accordance with a common code of fundamental values, in particular those laid down in the European Convention on Human Rights. In other words, he is entitled to say 'civis europeus sum' and to invoke that status in order to oppose any violation of his fundamental rights.[162]

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[159] See Dimitry Kochenov, 'EU Citizenship Without Duties' (2014) 20 European Law Journal 482, 483; Richard Bellamy, 'A Duty-Free Europe? What's Wrong with Kochenov's Account of EU Citizenship Rights' (2015) 21 European Law Journal 558, 560.
[160] Meehan (n 121) 152.
[161] Brigid Laffan, 'The Politics of Identity and Political Order in Europe' (1996) 34 JCMS 81, 94
[162] Case C-168/91 *Christos Konstantinidis v Stadt Altensteig* EU:C:1993:115, Opinion of AG Jacobs, para 46.

Jacob's opinion was not followed by the Court, so this should not be taken as an authoritative statement of EU law.[163] Nevertheless, it provides a basis upon which to view the Union citizen simply as a Union citizen as opposed to being a purely economic actor. It is said here that this is the intended meaning of Union citizenship.

[163] Jo Shaw, *The Transformation of Citizenship in the European Union: Electoral Rights and the Restructuring of Political Space* (CUP 2007) 46; Allan Rosas and Lorna Armati, *EU Constitutional Law: An Introduction* (3rd edn, Hart Publishing 2018) 145.

PART II

Chapter III

Union Citizenship and Its Legal Limitations

I. Introduction

The Maastricht Treaty proclaimed that citizenship of the European Union is hereby established — but what exactly does this amount to? In taking a Marshallian approach, it ought to be asked whether Union citizenship is a status that confers the nationals of the Member States with the civil, political and social rights of citizenship on the supranational level. Chapter II highlighted the institutional efforts to move towards this goal, but it was noted how the roots of Union citizenship became grounded upon economic principles.[1] Consequently, this cemented the status in a troublesome commercial legacy encapsulated in the concept of the European market citizen.[2] Union citizenship was supposed to transform the free movement of workers and persons into the free movement of free European citizens,[3] but some argued that upon its establishment it represented a merely symbolic status.[4] The

[1] Dora Kostakopoulou, 'Co-creating European Citizenship: Policy Review' (Publications Office of the European Union 2013) 19.
[2] Michelle Everson, 'The Legacy of the Market Citizen' in Jo Shaw and Gillian More (eds), *New Legal Dynamics of European Union* (OUP 1995) 89.
[3] Case C-228/07 *Jörn Petersen v Landesgeschäftsstelle des Arbeitsmarktservice Niederösterreich* EU:C:2008:494, Opinion of AG Colomer, paras 15 and 28.
[4] Dora Kostakopoulou, 'European Citizenship: Writing the Future' (2007) 13 ELJ 623, 624. See also Everson (n 2) 73-89; Hans Ulrich Jessurun d'Oliveira, 'Union Citizenship: Pie in the Sky?' in Allan Rosas and Esko Antola (eds), *A Citizens' Europe: In Search of a New Order* (Sage 1995) 82; Percy Lehning, 'European Citizenship: A Mirage?' in Percy Lehning and Albert Weale (eds), *Citizenship, Democracy and Justice in the New Europe* (Routledge 1997) 188; Tony Downes, 'Market Citizenship: Functionalism and Fig-leaves' in Richard Bellamy and Alex Warleigh (eds), *Citizenship and Governance in the European Union* (Continuum 2001) 93; Elspeth Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law* (Kluwer Law International 2004) 238; Daniel Thym, 'Introduction: The Judicial Deconstruction of Union Citizenship' in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing 2017) 4.

Treaties lacked substance and it ultimately fell to the Court of Justice to determine the meaning and intent of the status.[5]

This chapter has five aims: first, it shall consider the Treaty rights and how access to them remains limited to Member State nationals to the exclusion of lawfully resident third-country nationals (TCNs); second, a doctrinal account of the pre-Brexit referendum jurisprudence of the Court of Justice in respect to Union citizenship shall be provided; third, ideas of Union citizenship becoming an independent status of citizenship will be introduced; fourth, the chapter shall demonstrate the Court's doctrinal and restrictive turn;[6] finally, the chapter concludes finding that Union citizenship in its current form is too ambiguous to be relied upon consistently and that it has failed to live up to its potential given that it has not met the Marshallian standard of citizenship.[7]

II. The Initial Impact of Union Citizenship: Rights, Nationality and Third-Country Nationals

The EU as we know it today and its citizenship received formal legitimacy with the ratification of the Maastricht Treaty. Article 8(1) EC proclaimed that 'every person holding the nationality of a Member State shall be a citizen of the Union.'[8] The status was initially defined by several rights: freedom of movement and residence; voting

[5] Elizabeth Meehan, *Citizenship and the European Community* (Sage 1993) 78.
[6] Dora Kostakopoulou and Daniel Thym, 'Conclusion: The Non-Simultaneous Evolution of Citizens' Rights' in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing 2017) 316; Dora Kostakopoulou, *European Union Citizenship Law and Policy: Beyond Brexit* (Edward Elgar Publishing Ltd 2020) 148. See also Armin von Bogdandy, 'Founding Principles of EU Law' (2010) 16 ELJ 95, 98-100.
[7] See Daniel Thym, 'Towards "Real" Citizenship? The Judicial Construction of Union Citizenship and Its Limits' in Maurice Adams and others (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013) 164.
[8] Now Article 9 TEU. See also Article 20(1) TFEU.

rights in the country of residence in municipal and European Parliament elections; entitlement to diplomatic protection in another Member State; the right of petition and the right to appeal to the European Ombudsman.[9] It appeared that the right to EU freedom of movement had at last been legally decoupled from participation in the economic market.[10] This appeared to end the market citizen concept to usher in the 'first age' of Union citizenship.[11]

Despite the advancement of individual rights, their only point of access remains buried within the nationality laws of the now twenty-seven Member States. Quite simply, the Member States continue to serve as the gatekeepers to the European demos.[12] Kostakopoulou has argued that the exclusion of long-term and lawfully resident TCNs from Union citizenship reveals how the preservation of state sovereignty has underpinned the scope of Union citizenship.[13] The requirement to hold a Member State nationality ought to have been recognised as Union citizenship's canary in the coal mine given that the exclusion of TCNs relegates them to the peripheries of the emerging European civil society even though they are

[9] TEU Article 8. See also Carlos Closa, 'Citizenship of the Union and Nationality of Member States' in David O'Keeffe and Patrick M Twomey (eds), *Legal Issues of the Maastricht Treaty* (John Wiley & Sons 1994) 109; Jo Shaw, 'European Union Citizenship: The IGC and Beyond' (1997) 3 EPL 413, 414.

[10] Willem Mass, 'European Citizenship in the Ongoing Brexit Process' (2021) 58 International Studies 168, 169.

[11] Niamh Nic Shuibhne, 'The Third Age of EU Citizenship: Directive 2004/38 in the Case Law of the Court of Justice' in Philip Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (CUP 2012) 333. See also Dimitry Kochenov, 'The Oxymoron of "Market Citizenship" and the Future Union' in Fabian Amtenbrink and others (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (CUP 2019) 222.

[12] JHH Weiler, 'To Be a European Citizen - Eros and Civilization' (1997) 4 Journal of European Public Policy 495, 497; Maciej Szpunar and María Esther Blas López, 'Some Reflections on Member State Nationality: A Prerequisite of EU Citizenship and an Obstacle to Its Enjoyment' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017); Kostakopoulou, *European Union Citizenship Law and Policy: Beyond Brexit* (n 6) 14.

[13] Theodora Kostakopoulou, 'Long-Term Resident Third-Country Nationals in the European Union: Normative Expectations and Institutional Openings' (2002) 28 Journal of Ethnic and Migration Studies 443, 444-48.

an integral part of it.[14] Member State nationals have become the bearers of rights, yet TCNs are deprived of civic standing.[15] In other words, Union citizens are 'on the top of the ladder' in EU migration policy.[16]

This exclusion is difficult to justify given that in some cases their lifelong residence has resulted in TCNs making their host territory the centre of their socio-economic life.[17] Michael Walzer argued that people 'are either subject to the state's authority, or they are not; and if they are subject, they must be given a say, and ultimately an equal say, in what that authority does.'[18] In other words, this exclusion has created an Orwellian EU where some are more equal than others.[19] The intergovernmental approach to issues concerning migration has increased the vulnerability of TCNs and contradicted the EU's commitment to equal treatment.[20] It would be reasonable to assume that over time their voices shall become more audible as their taxation contributions are converted into policies to which they have no say.[21]

The nationality principle would remain pertinent to Union citizenship upon the first revision of the TEU. The Treaty of Amsterdam (signed 2 October 1997; entering into

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[14] Theodora Kostakopoulou, 'Invisible Citizens? Long-term Resident Third-country Nationals in the EU and their Struggle for Recognition' in Richard Bellamy and Alex Warleigh (eds), *Citizenship and Governance in the European Union* (Continuum 2001) 180.
[15] Theodora Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (Manchester UP 2001) 73.
[16] Sara Iglesias Sánchez, 'Fundamental Rights Protection for Third Country Nationals and Citizens of the Union: Principles for Enhancing Coherence' (2013) 15 European Journal of Migration and Law 137, 153.
[17] Theodora Kostakopoulou, 'Nested "Old' and "New" Citizenships in the European Union: Bringing Out the Complexity' (1999) 5 Columbia Journal of European Law 389, 406; Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (n 15) 73. See also Samantha Besson and André Utzinger, 'Introduction: Future Challenges of European Citizenship – Facing a Wide-Open Pandora's Box' (2007) 13 ELJ 573, 580.
[18] Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books 1983) 61; Martijn van den Brink, 'EU Citizenship and (Fundamental) Rights: Empirical, Normative, and Conceptual Problems' (2018) 25 ELJ 1, 9.
[19] Eleanor Spaventa, 'Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and Its Constitutional Effects' (2008) 45 CML Rev 13, 45.
[20] David O'Keeffe, 'The Emergence of a European Immigration Policy' (1995) 20 EL Rev 20; Kostakopoulou, 'Invisible Citizens? Long-term Resident Third-country Nationals in the EU and their Struggle for Recognition' (n 14) 188.
[21] Dora Kostakopoulou, 'One Cannot Promote Free Movement of EU Citizens and Restrict Their Political Participation' in Rainer Bauböck (ed), *Debating European Citizenship* (Springer 2019) 62.

force 1 May 1999) added a clause to the citizenship provisions with Article 2(9) EC stating that 'citizenship of the Union shall complement and not replace national citizenship.' If Union citizenship is to complement national citizenship, then there is no Union citizenship without national citizenship.[22] Ultimately, it was the intransigence of both Denmark and the UK that would block a wider conception of citizenship rights.[23] As a result, the Amsterdam Treaty resolved little in respect to Union citizenship and focused instead on the economic and monetary union and preparing the EU for enlargement.[24] The only expansion of citizenship rights under Amsterdam was the right for European citizens to communicate with the EU institutions in any Member State language. The Treaty did not extend the personal scope of Union citizenship to long-term TCNs at a time when barriers to free movement and residence were being removed for Union citizens.[25]

The pressure to codify Union citizenship rights for TCNs only increased following the Amsterdam amendments. The Cologne European Council in June 1999 identified the need to establish a Charter of Fundamental Rights of the European Union (CFR) and to make their importance and relevance more visible to the Union citizen.[26] It was agreed that the Charter should contain the rights and freedoms of the ECHR and the European Social Charter to affirm that all European residents have the right to obtain the citizenship of the State where they reside, and therefore Union citizenship.[27]

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[22] Annette Schrauwen, 'European Union Citizenship in the Treaty of Lisbon: Any Change at All?' (2007) 15 MJ 55, 60.
[23] Willem Maas, *Creating European Citizens* (Rowman & Littlefield 2007) 69.
[24] Percy B Lehning, 'European Citizenship: Towards a European Identity?' (2001) 20 Law and Philosophy 239, 276-77.
[25] Kostakopoulou, 'Invisible Citizens? Long-term Resident Third-country Nationals in the EU and their Struggle for Recognition' (n 15) 180.
[26] European Council, 'Cologne European Council' (Presidency Conclusions, 3 and 4 June 1999).
[27] European Council, 'Draft European Citizens Charter' (Charter 4104/00 Contrib 4, 7 January 2000).

The conclusions of the Tampere European Council in October 1999 highlighted the need for the nationality legislation of the Member States to be harmonised in order to guarantee comparable rights for TCNs and Union citizens. Harmonisation in this area would allow lawfully resident TCNs to access Union citizenship upon the same merits regardless of which Member State they resided in. However, the Member States have been unable to achieve this goal and subsequently a type of 'fortress Europe' emerged that appears to encourage a system of *apartheid européen* that shows TCNs an entirely different EU: 'a story of unity hidden from foreign eyes … while allowing them to work in your town and walk the same streets.'[28] Although it is now clear that the Tampere objective was overly ambitious,[29] it nevertheless made significant steps for securing the rights of TCNs in the EU to eventually pave the way for the Long-Term Residence Directive and the Family Reunification Directive.

However, if Union citizenship was to become truly effective, then it ought to guarantee social rights at the supranational level.[30] To use Marshall's tripod citizenship design, Union citizenship ought to incorporate genuine and enforceable social rights to counteract the alienating and disempowering forces of the economic market.[31] Therefore, the enjoyment of social rights represents a key to full

[28] Dimitry Kochenov, 'On Tiles and Pillars: EU Citizenship as a Federal Denominator' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017) 33-34. See also Kostakopoulou, 'Invisible Citizens? Long-term Resident Third-country Nationals in the EU and their Struggle for Recognition' (n 15) 180; Dimitry Kochenov, 'Rounding up the Circle: The Mutation of Member States' Nationalities Under Pressure from EU Citizenship' (2010) EUI Robert Schuman Centre for Advanced Studies Paper 2010/23 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1577984> accessed 14 July 2020; Dimitry Kochenov, 'Where is EU Citizenship Going? The Fraudulent Dr. Rottmann and the State of the Union in Europe' in Leila Simona Talani (ed), *Globalization, Migration, and the Future of Europe: Insiders and Outsiders* (Routledge 2012) 241.

[29] Guy Verhofstadt, *Europe's Last Chance: Why the European States Must Form a More Perfect Union* (Basic Books 2017) 97.

[30] Richard Bellamy, Dario Castiglione and Jo Shaw, 'Introduction: From National to Transnational Citizenship' in Richard Bellamy, Dario Castiglione and Jo Shaw (eds), *Making European Citizens: Civic Inclusion in a Transnational Context* (Palgrave Macmillan 2006) 6.

[31] Thomas H Marshall, *Citizenship and Social Class: And Other Essays* (CUP 1950).

citizenship and thus removes the concept of European market citizenship.[32] Willem Mass argued that the addition of social rights was in line with the original intent of the status by pointing out that the Spaak report called for thick social rights to align with thin free movement rights.[33]

Social welfare policy had traditionally been within the competence of the Member States and any merger of social welfare policy at the EU level could only become a reality after receiving unanimous support from the Member States. Tension arises for those who view European integration through the prism of economic cooperation, but if social rights are to become genuine then they must be addressed in terms of the individual and not in respect to the economies of the Member States. However, if Union citizenship is to carry any significant weight, then it must remove the fear that Union citizens carry when leaving their home country that they will be unable to access social welfare benefits in the host State. The political conflict regards how socially acceptable levels of income redistribution can be determined centrally in a community of sovereign nation-states where their economic development varies widely.[34] Nevertheless, belonging in the EU would arguably remain an economic relationship if genuine and enforceable social rights cannot be properly established. To define such belonging as citizenship could represent a grave misnomer.[35]

[32] Maas, *Creating European Citizens* (n 24) 63, See also Guild (n 4) 63.
[33] ibid 62.
[34] Giandomenico Majone, 'The European Community Between Social Policy and Social Regulation' (1993) 31 JCMS 153, 167-68.
[35] d'Oliveira, 'Union Citizenship: Pie in the Sky?' (n 4) 84; Lehning, 'European Citizenship: A Mirage?' (n 4) 175-77. See also Agustín José Menéndez, 'Which Citizenship? Whose Europe? The Many Paradoxes of European Citizenship' (2014) 15 German Law Journal 907; Charlotte O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights' (2016) 53 CML Rev 937, 974.

III. The Marshallian Rise: Recognising the Member State Nationals as Union Citizens

The Court of Justice was responsible for furnishing Union citizenship with social rights. However, in the 'first age' of Union citizenship (1993-98) the Court remained hesitant.[36] The *Uecker and Jacquet* case demonstrates this point. The case involved two TCNs employed in Germany on a temporary contract who were married to German nationals who had not exercised their free movement rights as Union citizens. The TCNs sought to remain in Germany with their wives upon the termination of their employment contract.[37] The Court held that Union citizenship:

> [I]s not intended to extend the scope *ratione materiae* of the Treaty also to internal situations which have no link with Community law … [and] a national of a non-member country married to a worker having the nationality of a Member State cannot rely on the rights conferred by Article 11 of Regulation No 1612/68 *when that worker has never exercised the right to freedom of movement within the Community*.[38]

This embedded the exercise of Union citizenship rights in free movement and the failure to exercise that right would create what is known as a purely internal situation. The Court in *Uecker and Jacquet* held that the failure to cross EU borders *will not trigger the rights of Union citizenship* and, therefore, the claimant could not be brought into the personal scope of the Treaty. In other words, to rely upon the rights of Union citizenship, a cross-border test must be satisfied. This created a system of reverse discrimination where the Member State's own nationals find themselves in

[36] Shuibhne, 'The Third Age of EU Citizenship: Directive 2004/38 in the Case Law of the Court of Justice' (n 11) 333. See also Niamh Nic Shuibhne, 'Free Movement of Persons and the Wholly Internal Rule: Time to Move On?' (2002) 39 CML Rev 731, 733-40.
[37] Joined Cases C-64/96 and C-65/96 *Land Nordrhein-Westfalen v Kari Uecker and Vera Jacquet v Land Nordrhein-Westfalen* EU:C:1997:285, para 18.
[38] ibid paras 23-24 (emphasis added). See also Case 175/78 *R v Vera Ann Saunders* EU:C:1979:88, para 11.

a less favourable position to free-moving Union citizens given that they are unable to enforce their Union citizenship rights against their own state.[39]

The judgment set the parameters of Union citizenship in order to prevent the EU from being deemed too federal.[40] The question is whether this rule should remain a part of Union citizenship given that it has been criticised as being the 'necessary evil' of Union citizenship.[41] Further, in conceptualising Union citizenship in this way it should be asked whether the status holds any value for those who never take advantage of their EU law free movement rights. In such situations, it can be said that the status adds little to their social status and their lived experience.[42] The rule has created an unnecessary binary between mobile and immobile Union citizens. The mobile making use of the status and benefitting from the rights contained within and who consequently votes for pro-European policies, and the immobile who begin to view the status as redundant and votes against pro-European policies.[43] In any event, Daniel Thym has highlighted how empirical studies have shown that even when Union citizens do exercise their rights they do not identify with the EU when doing so.[44] Maas has argued that high-net-worth individuals are more concerned

[39] Síofra O'Leary, 'The Past, Present and Future of the Purely Internal Rule in EU Law' (2009) 44 Irish Jurist 13, 14; Jo Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 576. See also Helen Toner, 'Judicial Interpretation of European Union Citizenship — Transformation or Consolidation?' (2000) 7 Maastricht Journal of European and Comparative Law 158, 169.

[40] Christoph Schönberger, 'European Citizenship as Federal Citizenship: Some Citizenship Lessons of Comparative Federalism' (2007) 19 European Review of Public Law 63, 67.

[41] Szpunar and López (n 12) 120-21.

[42] Majone (n 34) 167-68.

[43] Rainer Bauböck, 'The New Cleavage Between Mobile and Immobile Europeans' in Rainer Bauböck (ed), *Debating European Citizenship* (Springer 2019) 126. See also Mathieu Deflem and Fred C Pampel, 'The Myth of Postnational Identity: Popular Support for European Unification' (1996) 75 Social Forces 119, 122 and 138; Neil Fligstein, *Euroclash: The EU, European Identity, and the Future of Europe* (OUP 2008) 123; Ettore Recchi, 'The Engine of "Europeanness"? Free Movement, Social Transnationalism and European Identification' in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing 2017) 139-42.

[44] Adrian Favell, *Eurostars and Eurocities: Free Movement and Mobility in an Integrating Europe* (Blackwell 2008); Adrian Favell, 'European Citizenship in Three Eurocities' (2010) 30 Politique Eurpéenne 187, 191-202; Jonathan White, *Political Allegiance After European Integration* (Palgrave

about improving their social mobility than obtaining an improved immigration status.[45]

However, notwithstanding the limitations imposed by *Uecker and Jacquet,* the Court's judgment in *Sala* further untangled Union citizenship from its ties to the internal market. The Court held that to deprive a mobile, economically inactive but *lawfully resident* Union citizen of social welfare assistance when it was afforded to host State nationals was to suffer discrimination on the basis of nationality.[46] Given that *Sala* had come within the personal scope of the Treaty after exercising her free movement rights the Court could move beyond the ruling from *Uecker and Jacquet* and begin to ensure that the full scope of Union citizenship is attained.[47]

The important point here is the Court's willingness to interpret *Sala* as a Union citizen rather than an unemployed migrant.[48] However, this was not met without criticism as some regarded this judgment to be 'a political and economic dynamite' given the disparity among the social security systems of the Member States.[49] Irrespective of such critique, this change in direction by the Court ushered in the 'second age', or even perhaps 'the golden age,'[50] of Union citizenship.[51] This era

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Macmillan 2011); Richard Bellamy and Dario Castiglione, 'Three Models of Democracy, Political Community and Representation in the EU' (2013) 20 Journal of European Public Policy 206, 218; Daniel Thym, 'The Evolution of Citizens' Rights in Light of the European Union's Constitutional Development' in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing 2017) 127.

[45] Mass, 'European Citizenship in the Ongoing Brexit Process' (n 10) 176.

[46] Case C-85/96 *María Martínez Sala v Freistaat Bayern* EU:C:1998:217, paras 61-65.

[47] See Case C-214/94 *Ingrid Boukhalfa v Bundesrepublik Deutschland* EU:C:1996:174, Opinion of AG Léger, para 63.

[48] See Sybilla Fries and Jo Shaw, 'Citizenship of the Union: First Steps in the European Court of Justice' (1998) 4 European Public Law 533.

[49] See Síofra O'Leary, *European Union Citizenship: The Options for Reform* (Institute for Public Policy Research 1996) 92; Sybilla Fries and Jo Shaw, 'Citizenship of the Union: First Steps in the Court of Justice' (1998) 4 EPL 533, 559.

[50] Eglé Dagilyté, 'The Promised Land of Milk and Honey? From EU Citizens to Third Country Nationals After Brexit' in Sandra Mantu, Paul Minderhoud and Elspeth Guild (eds), *EU Citizenship and Free Movement Rights: Taking Supranational Citizenship Seriously* (Brill Nijhoff 2020) 353.

[51] Shuibhne, 'The Third Age of EU Citizenship: Directive 2004/38 in the Case Law of the Court of Justice' (n 11) 333; Henri de Waele, 'EU Citizenship: Revisiting Its Meaning, Place and Potential' (2010) 12 European Journal of Migration Law 319, 323.

was seen as a step towards shattering the market citizenship concept and replacing it with a genuine Marshallian styled citizenship of the Union.[52]

The principle of non-discrimination on the basis of nationality was applied further in *Grzelczyk*. In *Grzelczyk* the Court held that to deny a mobile, economically inactive but lawfully resident Union citizen to student grants when they were available to the host State's nationals was discriminatory. The Court reasoned '*that Union citizenship is destined to be the fundamental status of nationals of the Member States …*'[53] Here the Court further extended the material scope of Union citizenship to uphold the right to equal access to social welfare on the grounds of being a citizen of the Union.[54] What happened here is the re-energisation of the idea of Union citizenship being based on residence over economic participation, an idea which had largely stagnated by the beginning of the 1990s,[55] and thus further Marshallian flesh was put on the bones of Union citizenship.[56]

However, it can be argued that this 'fundamental status' is ill-defined given that the exercise of the rights contained within remains subject to crossing Member State borders. However, many considered the phrasing of the Court's judgment to transform the legal element of belonging in the EU.[57] A further problem is that the Court did so without any there being any explicit anchor from the Treaties given they make it clear that Union citizenship is to be an additional status of citizenship rather

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[52] Elspeth Guild, Cristina J Gortázar Rotaeche and Dora Kostakopoulou, 'Introduction: The Reconceptualization of European Union Citizenship' in Elspeth Guild, Cristina J Gortázar Rotaeche and Dora Kostakopoulou (eds), *The Reconceptualization of European Union Citizenship* (Brill Nijhoff 2014) 2.
[53] Case C-184/99 *Rudy Grzelczyk v Centre Public d'Aidec Sociale d'Ottignies-Louvain-La-Neuve* EU:C:2001:458, para 31 (emphasis added).
[54] Shuibhne, 'Free Movement of Persons and the Wholly Internal Rule: Time to Move On?' (n 36) 756.
[55] Bellamy, Castiglione and Shaw (n 30) 14.
[56] Síofra O'Leary, 'Putting Flesh on the Bones of European Union Citizenship' (1999) 24 EL Rev 68. See also Case C-411/05 *Félix Palacios de la Villa v Cortefiel Servicios SA* EU:C:2007:106, Opinion of AG Mazák, paras 85-86.
[57] Guild (n 4) 65.

than a fundamental one.[58] To concur with Jo Shaw, it should be recognised that the Court merely outlined an aspiration rather than seeking to re-write the Treaties.[59]

The expansion of social rights for Union citizens can be likened to neofunctionalism and the spillover concept in which economic and political integration naturally led to the expansion of social rights for Union citizens. This was consequently met with unease by the more intergovernmental Member State actors who sought to limit the application of Union citizenship rights to protect State provided welfare systems.[60] In response to such concerns, the Court of Justice reiterated the principle of proportionality as a mechanism to balance the interests of Union citizens against those of the Member States. The Court highlighted that there would be very few instances where this principle would not apply when ruling on issues regarding Union citizenship and EU law generally.[61] In response, the Court introduced the 'unreasonable burden' criteria to protect national welfare systems and it was the *Baumbast* case that first applied this methodology.

Mr Baumbast, a German national; his wife, a Colombian national; and their two children moved to the UK where Mr Baumbast had worked for three years. Mr Baumbast later left the UK to work outside EU territory meaning he was no longer a worker for the purposes of Article 45 TFEU. However, his wife and children remained in the UK as Mr Baumbast was able to provide for them. The UK Home Office refused to renew the residence permits for Mr Baumbast's family claiming that they did not have sufficient sickness insurance to cover emergency treatment

[58] Alexander Somek, 'Is Legality a Principle of EU Law?' in Stefan Vogenauer and Stephen Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Hart Publishing 2017) 53-76.
[59] Jo Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 576.
[60] Adrienne Yong, *The Rise and Decline of Fundamental Rights in EU Citizenship* (Hart Publishing 2019) 26.
[61] Case C-120/94 *Commission of the European Communities v Hellenic Republic* EU:C:1995:199, Opinion of AG Jacobs, para 70.

in the UK. The UK Immigration Appeal Tribunal sought a preliminary ruling to determine whether Mr Baumbast had an independent right of residence under Article 21 TFEU.

The Court of Justice upheld *Grzelczyk* in stating that Union citizenship is destined to be the fundamental status of Member State nationals to conclude that even in circumstances where employment came to an end, the Union citizen could still enjoy a right of residence in the host Member State given that Part II TEU does not require Union citizens to pursue a professional trade or activity.[62] As a result, the Court did not consider Mr Baumbast to be an unreasonable burden on the host state's finances, given the fact that Union citizenship rights are conferred on the basis of being a Union citizen and not as a worker.[63] Mr Baumbast and his family had never used the social assistance system of the UK,[64] and the fact that they were covered in Germany led the Court to determine that Article 21(1) TFEU was directly effective and the national courts must ensure that any limitations to this right are applied in compliance with the principle of proportionality.[65] In other words, the rights within the Treaty were to be 'autonomous' of any secondary legislation.[66]

The issues surrounding EU enlargement, voting in the Council and European social rights would hope to be resolved by amendments within the Treaty of Nice (signed 26 February 2001; entering into force 1 February 2003). In terms of free movement, the Nice Treaty extended Qualified Majority Voting (QMV) in the Council which prompted the Commission to draft a Directive on Union citizens' rights and

[62] Case C-184/99 *Baumbast and R v Secretary of State for the Home Department* EU:C:2002:493, paras 82-83.
[63] ibid para 84 and 90.
[64] ibid para 88.
[65] ibid, para 94.
[66] Oliver 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, 125.

the rights of their family members.[67] The negotiations resulted in the Citizens' Rights Directive (Directive 2004/38) which formalised the *Uecker and Jacquet* and the *Grzelczyk* judgments into secondary EU law to hold that 'Union citizenship should be the fundamental status of nationals of the Member States *when they exercise their right of free movement and residence*'.[68] However, Article 2(1) reiterated that this remains subject to the holding of a Member State nationality.[69]

Although the Directive formalised the 'fundamental status' it also created the necessary conditions to exercise Union citizenship rights.[70] The Directive makes a quantitative distinction between different periods of residence: up to three months, three months to five years and for periods exceeding five years. The rationale behind this system is that the longer Union citizens spend in the host Member State the more they become entangled with it, therefore making it increasingly difficult to justify their forced removal given the harm this will inevitably cause to the individual concerned.[71] Article 7(1) laid down the conditions for residence in the host Member State for a period exceeding three months stating that a Union citizen must be a worker or self-employed, have sufficient resources for themselves and their family members and have comprehensive sickness insurance in the host Member State to not become a burden on the social security system during their period of residence. After five years the Union citizen would be granted permanent residence in their host state under Article 16 of the Directive and the right to equal treatment under

[67] Commission, 'Proposal for a European Parliament and Council Directive on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely within the Territory of the Member States' COM (2001) 257 final.
[68] Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360 EEC, 72/194 EEC, 73/148/ EEC. 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77, 78 (emphasis added).
[69] ibid 87.
[70] Garner (n 66) 125.
[71] Kostakopoulou, *European Union Citizenship Law and Policy: Beyond Brexit* (n 6) 67.

Article 24.[72] This left the Court with two options: to follow its 'fundamental status' line of Union citizenship jurisprudence or to apply the conditions as laid down in the Directive.

The Directive meant that the Member States could determine whom to grant social assistance to until they had resided in the host state for five years irrespective of whether they were workers. This resulted in certain Member States using the Directive to introduce clauses into their social policy to exclude Union citizens and their family members from social assistance for the first three months of residence.[73] Upon the 2004 EU enlargement, the UK introduced the 'right to reside' test which prevented Union citizens who were neither workers, relevant dependents nor self-sufficient from claiming a range of benefits under UK law.[74] The problem created here is that if access to social welfare benefits lacks coherence across the Member States, then a resident in a Member State with a generous social assistance system may be considered to be more of a Union citizen than a resident in a State with less generous benefits.[75]

The Directive could certainly be viewed as an effort to quell the fears over suspected 'benefits tourism' throughout the EU.[76] The Court, although continuing to rule in favour of the Union citizen at this time, introduced conditions that must be met for periods of residence longer than three months: the Union citizen must be legally resident in the host state, they 'should have a genuine link' with the

[72] Council Directive 2004/38/EC (n 68), 84.
[73] See Charlotte O'Brien, 'Real Links, Abstract Rights and False Alarms: The Relationship Between the ECJ's "Real Link" Case Law and National Solidarity' (2008) 33 EL Rev 643; Alexander Somek, 'Solidarity Decomposed: Being and Time in European Citizenship' (2007) 32 EL Rev 787.
[74] Paul Minderhoud, 'Directive 2004/38 and Access to Social Assistance Benefits' in Elspeth Guild, Cristina J Gortazar Rotaeche and Dora Kostakopoulou (eds), *The Reconceptualization of European Union Citizenship* (Brill Nijhoff 2014) 221. See also Charlotte O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Hart Publishing 2017) 20-21.
[75] Derek Heater, *What Is Citizenship?* (Polity Press 1999) 131.
[76] See Christian Dustmann and Tommaso Frattini, 'The Fiscal Effects of Immigration to the UK' (2014) 124 The Economic Journal 593, 628.

employment market of the host state in order to come within the scope of Article 45 TFEU,[77] but this does not need to be undertaken under the *sui generis* nature of employment under national law,[78] or, alternatively, they need to demonstrate a degree of integration into the society of the host State.[79] However, the Court can favour an interpretive approach to protect the fundamental rights of the Union citizen over enforcing the genuine link test.[80]

What this demonstrates is that on the one hand, the Court has made it clear that the non-discrimination of Union citizens on the basis of nationality cannot be used as a letter of safe conduct for social tourism,[81] but, on the other, it shows that a Member State can no longer serve only its nationals and must include all Union citizens who demonstrate a sufficient degree of integration into its society.[82]

The Citizens' Rights Directive made the right to free movement for economically inactive Union citizens and their TCN family members easier, albeit conditional. However, the Court would continue to uphold the fundamental status of Union citizenship and this principle would underlie several cases regarding the rights of TCNs to reside alongside their Union citizen family members.

The *Chen* case is one example. Upon following advice to evade China's one-child policy, Man Lavette Chen, a Chinese national who was working in the UK for her husband, travelled to Belfast to give birth to her daughter and sought to derive

[77] Case C-224/98 *Marie-Nathalie D'Hoop v Office national de l'emploi* EU:C:2002:432. See also Case C-138/02 *Brian Francis Collins v Secretary of State for Work and Pensions* EU:C:2004:172, paras 67-70.
[78] Case C-456/02 *Michel Trojani v Centre Public d'aide Sociale de Bruxelles* EU:C:2004:488, para 16.
[79] Case C-209/03 *The Queen, on the Application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills* EU:C:2005:169, para 57.
[80] ibid, Opinion of AG Geelhoed, para71. See also Shuibhne, 'The Third Age of EU Citizenship: Directive 2004/38 in the Case Law of the Court of Justice' (n 11) 350.
[81] Case C-209/03 (n 79) para 56.
[82] Koen Lenaerts and Tinne Heremans, 'Contours of a European Social Union in the Case-Law of the European Court of Justice' (2006) 2 European Constitutional Law Review 101, 107.

a right of residence in the UK through applying for a UK residence permit given the baby's acquisition of Irish citizenship and therefore Union citizenship.[83] However, the UK refused to grant a residence permit. AG Tizzano noted that where a child's welfare requires the acquisition of a Member State nationality, then there is nothing abusive about taking this action.[84] The Court of Justice held that although *Chen* cannot claim to be dependent upon her Irish daughter, the refusal to allow the parent who is the primary carer of a child to whom satisfies the criteria for residence as a Union citizen would 'deprive the child's right to residence of any useful effect.'[85] Therefore, it was held that the child as a Union citizen was entitled to be accompanied by their primary carer as long as they do not become an unreasonable burden to the finances of the host State.[86]

In adding to the rights of Union citizens to secure the residence of TCN family members AG Maduro made a poignant claim in his opinion in the *Panayotova* case:

> [A]liens … cannot benefit from all the rights granted to the citizens of that particular political community, but it is precisely for the same reason that they deserve added judicial protection where rights granted to them are affected by decisions of the same political community.[87]

This principle would be further applied in *Metock*. Mr Metock, a national of Cameroon; his wife, a UK national who moved to Ireland for work; had married in Ireland after establishing a prior relationship in Cameroon with her husband. They later had two children together with one being born in Ireland as a Union citizen. Mr

[83] Dimitry Kochenov and Justin Lindeboom, 'Breaking Chinese Law - Making European One: The Story of *Chen*, or Two Winners, Two Losers, Two Truths' in Fernanda Nicola and Bill Davies (eds), *EU Law Stories: Contextual and Critical Histories of European Jurisprudence* (CUP 2016) 201-23
[84] Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* EU:C:2004:639, Opinion of AG Tizzano, para 120.
[85] Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* EU:C:2004:639, para 44-45.
[86] ibid paras 45-47.
[87] Case C-327/02 *Lili Georgieva Panayotova and Others v Minister voor Vreemdelingenzaken en Integratie* EU:C:2004:110, Opinion of AG Maduro, para 47.

Metock applied for a residence card as the spouse of a Union citizen but was refused given that Mr Metock had no prior lawful residence in another Member State. The Court held that the Directive set no such condition meaning that Mr Metock, as a TCN spouse and parent, could join his Union citizen wife who had exercised her right of freedom of movement to work in Ireland.[88]

The interpretive role of the Court certainly aided the expansion of Union citizenship, but in ending this section it is worth reiterating that those rights are only triggered once a Union citizen has exercised their right to free movement in the EU. The requirement to cross the EU's internal borders has set the limits of the status and it is questionable as to whether the status can ever be deemed fundamental while this requirement remains in place. Ultimately, those who never move remain subjected to a form of reverse discrimination and in turn it can be argued that a category of second-class Union citizens emerges as a result.[89]

IV. Union Citizenship as an Independent Status?

The EU Treaties received further amendments through the Treaty of Lisbon (signed 13 December 2007; entering into force 1 December 2009). In respect to Union citizenship, the amendments contained both substantial and cosmetic changes. On the substantial side, Lisbon allowed for the express withdrawal from the EU under Article 50 TEU where previously the Member States would have relied upon the Vienna Convention;[90] and the Charter of Fundamental Rights (CFR) became

[88] Case C-127/08 *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform* EU:C:2008:449, para 58.
[89] Besson and Utzinger (n 17) 583.
[90] Christophe Hillion, 'Accession and Withdrawal in the Law of the European Union' in Anthony Arnull and Damien Chalmers (eds), *The Oxford Handbook of European Union Law* (OUP 2015) 149.

primary EU law. The elevation of the CFR provides not only tangible benefits to Union citizens, but also represents an important symbol of the EU's continued recognition of its citizens by enshrining them with a bill of rights with equal significance to the Treaties.[91] On the cosmetic side, the TEC Treaty was rebranded as the Treaty on the Functioning of the European Union (TFEU), the word 'Community' was replaced by 'Union' and the citizenship provisions were renumbered to Articles 20-24 TFEU.[92] In respect to additional rights, Lisbon added the European Citizen's Initiative to allow for the right to petition the Commission with the signature of one million Union citizens from at least one-quarter of the Member States (Art. 11(4) TEU; Art. 24(1) TFEU). This is to help European citizens mobilise and make their concerns heard at the supranational level.

There was one cosmetic change that may or may not have represented a changing dynamic in Union citizenship. While maintaining that Union citizenship is derived through a Member State nationality, the Treaty nevertheless rebranded Union citizenship as an *additional* status of citizenship rather than a complementary one as previously established by the Amsterdam amendments. Schrauwen contends that this change in wording was done for a reason: to support a move towards a more autonomous Union citizenship.[93] If this is the case, then it implies that the Union citizen can invoke their rights without having to cross Member State borders.[94] This may seem a reasonable assumption given that the term additional has been said to hold its own with or without the thing it adds to, therefore

[91] Daniel Sarmiento and Eleanor Sharpston, 'European Citizenship and Its New Union: Time to Move On?' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017) 231.
[92] Jean-Claude Piris, *The Lisbon Treaty: A Legal and Political Analysis* (CUP 2010) 35.
[93] Schrauwen (n 22) 59. See also de Waele (n 51) 327,
[94] Spaventa, 'Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects' (n 19) 36.

commanding greater respect than the term complement.[95] Schrauwen rightly notes that if Union citizenship is destined to be fundamental, then how can a complementary status ever be deemed as such?[96]

However, if Union citizenship is to become truly independent then it ought to be asked if it could ever become uncoupled from Member State nationality. In taking the Lisbon amendments into account, Schrauwen asks whether Union citizenship and national citizenship have become two separate variables and whether there can 'one day be Union citizenship without national citizenship.'[97] This can be taken to mean that TCNs may one day be able to acquire Union citizenship without the requirement to first hold a Member State nationality.[98] Schrauwen admits the need for a treaty revision to ensure this but nevertheless suggests that the current Treaty framework provides for this possibility. However, even if this could ever be made possible, it has been said elsewhere that TCNs may not be granted full Union citizenship.[99] In sum, this change in wording must mean something. Clearly, such a change was no accident caused by 'sloppy editing'.[100] The question is whether this new phrasing made any difference in practice.

The *Rottman* case first alluded that Union citizenship could be decoupled from Member State nationality and the requirement to cross Member State borders. The case concerned Dr Rottman, an Austrian national who, while being the subject of judicial investigations, moved to Germany in 1995. Two years later, an arrest warrant was issued against him by Austria. In February 1999, Dr Rottman acquired

[95] de Waele (n 51) 323.
[96] Schrauwen (n 22) 60.
[97] ibid.
[98] ibid. See also Waele (n 51) 332-33.
[99] Besson and Utzinger (n 17) 580. See also Jo Shaw, 'Alien Suffrage in the European Union' (2003) 12 The Good Society 29.
[100] Waele (n 51) 322.

German nationality by way of naturalisation. Dual nationality is not accepted in Austria meaning that Dr Rottman had to surrender his Austrian nationality. However, in August of 1999, Austria informed Germany of the arrest warrant and in doing so Germany had discovered that Dr Rottman had not disclosed that he was the subject of judicial investigations in Austria and withdrew his naturalisation with retroactive effect on the basis that it had been acquired through deception. If the withdrawal of German nationality were to become definitive, then Dr Rottman would not only have been deprived of his Union citizenship, but he would also become stateless.

The question was whether it is contrary to EU law for a Member State to withdraw from a Union citizen their Member State nationality where that nationality has been acquired by deception to effectively render the individual concerned stateless while also depriving that individual of their Union citizenship.[101] Additionally, it was asked whether the Member States ought to have due regard to EU law when withdrawing a nationality that was acquired through deception when the loss of Union citizenship is at stake. Both Austria and Germany submitted that the rules on the acquisition and loss of nationality fall within the competence of the Member States as stated in Declaration No 2 annexed to the TEU.[102] Additionally, both Austria and Germany argued that a purely internal situation had occurred given that at the time of the withdrawal of German nationality, the matter concerned a German national living in Germany.[103]

Although acknowledging Declaration No 2, this does not alter the fact that the national rules must have due regard to EU law.[104] Therefore, the Court determined that:

[101] Case C-135/09 *Janko Rottman v Freistaat Bayern* EU:C:2010:104, paras 35-36.
[102] ibid, para 37.
[103] ibid, para 38.
[104] ibid, paras 39-41 and 45.

> It is clear that the situation of a citizen of the Union who … is faced with a decision withdrawing his naturalisation … 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 20 TFEU] and the rights attaching thereto *falls, by reason of its nature and its consequences, within the ambit of European Union law*.[105]

The Court appeared to affirm AG Maduro's opinion dismissing the claim that a purely internal situation had occurred by claiming that 'only a situation which is confined in all respects within a single Member State constitutes a purely internal situation.'[106] However, the Court accepted the invitation to disregard his earlier movement from Austria to Germany and instead looked to the future to consider the consequences of withdrawing his German nationality. Additionally, the Court further elaborated that Union citizenship is intended to be the fundamental status of Member State nationals.[107]

However, the Court determines that a Member State nationality, and therefore Union citizenship, can be withdrawn based on a public interest and to protect the special relationship of solidarity and good faith between a State and its nationals.[108] However, this cannot be an arbitrary decision and consequently:

> In such a case, it is, however, for the national court to ascertain whether the withdrawal decision at issue in the main proceedings *observes the principle of proportionality* … [and to] take into account the consequences that the decision entails for the person concerned and, if relevant, for the members of his family with regard to the loss of the rights enjoyed by every citizen of the Union.[109]

The Court held that it is not contrary to EU law for a Member State to withdraw its nationality on the basis that it had been acquired by deception and consequently deprive the individual concerned of their Union citizenship. However, this can only

[105] ibid, para 42 (emphasis added).
[106] ibid, Opinion of AG Maduro, paras 10-11.
[107] *Rottman* (n 101), para 43.
[108] ibid, para 51.
[109] ibid, paras 55-56 (emphasis added).

be the case for as long as the principle of proportionality has been observed and the consequences for the individual have been considered.[110]

On the one hand, it can be said that the *Rottman* judgment provided a further step in taming Member State discretion over nationality matters.[111] In other words, the *Rottman* judgment appeared to have represented the crowbar that could break open the nationality laws of the Member States.[112] However, on the other hand, this approach proved controversial with critics arguing that 'the Court of Justice cannot depart from the letter of Treaty in order to satisfy post-national anxieties.'[113] The judgment could also be seen to undermine Article 4(2) TEU given that the national identities of the Member States can arguably be defined by who the Member States determine are its nationals. This departure from the letter of the Treaty was considered by AG Maduro in his opinion given prior to the Court's judgment:

> Union citizenship assumes nationality of a Member State but it is also a legal and political concept *independent of that of nationality*. Nationality of a Member State not only provides access to enjoyment of the rights conferred by Community law; it also makes us citizens of the Union. European citizenship is more than a body of rights which, in themselves, *could be granted even to those who do not possess it*. … That is the miracle of Union citizenship: it strengthens the ties between us and our States … and, at the same time, it emancipates us from them. [114]

In taking Maduro's opinion into account, Union citizenship has the potential to become a truly independent status without requiring the possession of a Member State nationality. However, this ambition has failed to materialise and shall be considered in detail in subsequent chapters. Nevertheless, it has been suggested

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[110] ibid, para 59.
[111] Kochenov, 'Where is EU Citizenship Going? The Fraudulent Dr. Rottmann and the State of the Union (n 28) 245.
[112] Dimitry Kochenov, 'The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon' (2013) 63 International and Comparative Law Quarterly 97, 115.
[113] Mario Savino, 'EU Citizenship: Post-National or Post-Nationalist? Revisiting the *Rottman* Case Through Administrative Lenses' (2011) 23 European Review of Public Law 39, 44.
[114] *Janko Rottman* (n 101), Opinion of AG Poiares Maduro, para 23 (emphasis added).

that the Court in *Rottman* considered Union citizenship as being fundamental enough to allude to a new way of triggering the Treaty's citizenship provisions that did not involve crossing borders.[115] However, *Rottman* does confirm that the loss of a Member State nationality, and therefore Union citizenship, is compatible with EU law for as long as the principle of proportionality has been observed.

The independent nature of Union citizenship appeared to be somewhat confirmed by the *Ruiz Zambrano* judgment.[116] The case dealt directly with the derived residency rights of TCN family members and the right to private and family life of Union citizens. The case also dealt with the Treaty rights of static Union citizens and clarified the confusion surrounding whether it was Directive 2004/38 or the Treaty provisions that applied in such circumstances.

Following a period of civil unrest in their country of origin, that being Colombia, Mr. Zambrano, his wife and their young child applied for asylum in Belgium. The request was refused by the Belgian authorities but the principle of non-refoulment prevented their deportation. Mr Zambrano subsequently applied for a Belgian residence permit and was refused on three occasions. Mr Zambrano sought the annulment of that decision and to suspend the order requiring him and his family to leave Belgium. Mr Zambrano later secured work in Belgium but did not hold a work permit, he nevertheless paid social security contributions. In 2003, his wife gave birth to his second child and, in 2006, his third child was born in Belgium and were thus granted Belgian nationality. Mr Zambrano's work contract was suspended and would later attempt to claim unemployment benefits but was refused. Mr Zambrano

[115] Jo Shaw and others, 'Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?' (2011) EUI Working Paper RSCAS 2011/62 <https://cadmus.eui.eu/bitstream/handle/1814/19654/RSCAS_2011_62.corr.pdf?sequence=3&isAllowed=y> Accessed 10 August 2020.
[116] Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi* EU:C:2011:124.

claimed that he ought to derive a right of residency and entitlement to the welfare benefit in Belgium given that two of his children were of Belgian nationality and were therefore Union citizens. The facts of this case were akin to the cases of *Garcia Avello* and *Chen* given that the minor Union citizen had not yet exercised their right to free movement, but they were dependent upon the TCN parents to care for them.[117]

The *Zambrano* case presented a timely opportunity to clarify whether or not cross-border movement was required to trigger the rights of Union citizenship.[118] AG Sharpston was clear in her opinion that she did not believe that the cross-border test was necessary for the triggering of Union citizenship rights stating that this creates a 'lottery rather than logic' approach to fundamental rights protection.[119] Therefore, AG Sharpston recommended that the Court recognise the existence of a free-standing right to residence that is independent of the right to move between Member States and that 'EU fundamental rights should protect the citizen of the EU *even if such competence has not yet been exercised*.'[120] However, such provision ought not to preclude a Member State from refusing a derived right of residence to a TCN family member of a Union citizen provided that the decision observes and complies with the principle of proportionality.[121]

The Court in its judgment once again further affirmed that Union citizenship is intended to be the fundamental status of Member State nationals.[122] To that end, the Court held that:

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[117] Yong (n 60) 103.
[118] *Ruiz Zambrano* (n 116) para 35. See also Anja Wiesbrock, 'Union Citizenship and the Redefinition of the "Internal Situations" Rule: The Implications of Zambrano' (2011) 12 German Law Journal 2077, 2084.
[119] ibid, Opinion of AG Sharpston, paras 77, 88, 91-92, and 96.
[120] ibid, paras 101, 122, 163 178.
[121] ibid, para 178.
[122] *Ruiz Zambrano* (n 116), paras 40-41.

> Article 20 TFEU precludes national measures which have the effect of *depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as a citizen of the Union*.[123]

And,

> The refusal to grant a right of residence to a third country national with dependent minor children in the Member State where those children are nationals and reside, and also a refusal to grant a person a work permit, has such an effect.[124]

The effect of depriving a derived right of residence for Mr Zambrano would have meant that his Union citizen children would have been unable to benefit from their Union citizenship rights given that they *would have to leave the territory of the Union* in order to accompany their TCN parents.[125] Therefore, the correct interpretation of Article 20 TFEU precludes a Member State from refusing a residence and work permit to a TCN upon whom his minor Union citizen children are dependent in so far as such decisions deprive those children of the genuine enjoyment of the substance of rights attaching to their Union citizenship.[126] This appeared to signify an end to the purely internal situations rule upheld by *Uecker and Jacquet*.

Taking Zambrano into account it can be said at this stage that Union citizenship appeared to shift from being a mere cosmetic status as formalised within the Maastricht Treaty towards a more substantive status of citizenship. The *Zambrano* Judgment demonstrates Union citizenship's potential to become a truly independent and autonomous status.[127] Although it has been argued that sympathy played its

[123] ibid para 42 (emphasis added).
[124] ibid, para 43.
[125] ibid, para 44.
[126] ibid, para 45. See also Peter Van Elsuwege, 'Shifting the Boundaries? European Union Citizenship and the Scope of Application of EU Law: Case No. C-34/09, Gerardo Ruiz Zambrano v. Office national de l'emploi' (2011) 38 Legal Issues of Economic Integration 263, 268.
[127] Yong (n 60) 96.

part throughout *Zambrano* in an effort to tackle issues of social justice,[128] such analysis down-plays the objectives of the EU.[129] Kostakopoulou noted this striking and perhaps unfortunate feature in the development of Union citizenship: it has not been the Member States that have willingly relaxed their political boundaries from within, these boundaries have been ruptured from the outside through the conferral of EU level rights that are to be enforced before the national courts.[130] It appears that Union citizenship in this period represents its 'golden age' as it edged ever closer to AG Jacobs's opinion that the Union citizen should be entitled to decree '*civis europeus sum*' to invoke that status to oppose any violation of his fundamental EU rights.[131]

However, the post-Lisbon transformation of Union citizenship ought not to be taken as final. The derivative character of Union citizenship has remained explicitly stated in the Treaties and the Court can just as easily interpret the status doctrinally to apply the Treaties and Directive 2004/38 to favour the interests of a Eurosceptic Member State.[132] It can be claimed that the post-Lisbon interpretations of Union citizenship may have been premature and overly optimistic, and the case law that followed *Zambrano* has appeared to limit the potential of Union citizenship.

[128] Loïc Azoulai, '"Euro-Bonds": The *Ruiz Zambrano* Judgment or the Real Invention of EU Citizenship' (2011) Perspectives on Federalism 31, 34; Thym, 'Towards "Real" Citizenship? The Judicial Construction of Union Citizenship and Its Limits' (n 7) 166-70.
[129] Article 3 TEU.
[130] Kostakopoulou, *European Union Citizenship Law and Policy: Beyond Brexit* (n 6) 32.
[131] Case C-168/91 *Christos Konstantinidis v Stadt Altensteig* EU:C:1993:115, Opinion of AG Jacobs, para 46.
[132] Yong (n 60) 1.

V. Euroscepticism and the Court of Justice

There are two ways in which to view Union citizenship jurisprudence: on the one hand, there are those who favour the protection of EU fundamental rights; and, on the other, there are those who favour the strict application of the positive law of the Treaties and secondary EU legislation.[133] This contrast has taken place in the Court of Justice following the 30 April 2006 deadline for transposing the Citizens' Rights Directive into national law.[134] This ushered in what has been referred to as the third age of Union citizenship where Court judgements became more unpredictable in respect to the social rights of Union citizens.[135] This restrictive turn took further shape following the *Zambrano* judgment. This section shall demonstrate how the Court of Justice's lack of clarity has allowed for Union citizens to become caught in a legal limbo.

The Court of Justice once sought to progressively furnish Union citizenship with fundamental rights to aid Union citizens and their family members.[136] However, there was a noticeable climate of change following the *Zambrano* judgment. It can be argued that the *Zambrano* judgment was supposed to represent the culmination of Union citizenship given that it made clear that the status and the rights attached

[133] Koen Lenaerts and José A Gutiérrez-Fons, 'Epilogue on EU Citizenship: Hopes and Fears' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017) 751-52.
[134] See Eleanor Spaventa, 'Mice or Horses? British Citizens in the EU 27 After Brexit as "Former EU Citizens"' (2019) 44 EL Rev 589, 594.
[135] See Case C-158/07 *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep* EU:C:2008:630, para 49 and paras-51-55; Joined Cases C-22/08 and C-23/08 *Athanasios Vatsouras and Josif Koupatantze v Arbeitgemeinschaft (ARGE) Nürnberg 900* EU:C:2009:344. See also Oxana Golynker, 'Case Comment: Case C-158/07, *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep*, Judgment of the Court (Grand Chamber) of 18 November 2008, not yet reported' (2009) 46 CML Rev 6; Shuibhne, 'The Third Age of EU Citizenship: Directive 2004/38 in the Case Law of the Court of Justice' (n 11) 333; Michael Dougan, 'The Bubble That Burst: Exploring the Legitimacy of the Case Law on the Free Movement of Union Citizens' in Maurice Adams and others (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013) 140-41.
[136] Dora Kostakopoulou, 'Had Coudenhove-Kalergi's *Pan-Europa* Foreseen the United Kingdom's Nationalist Hour (Brexit)?' (2020) 5 European Papers 691, 693.

thereto can be relied upon independently without requiring the Union citizen to cross Member State borders. In doing so, it is argued further that the Court was not taking an innovative step but was acknowledging 'what has been an obvious reality for years by now.'[137] However, what should have been a momentous occasion in the development of EU law became soured by the Court's failure to define how one's genuine enjoyment of Union citizenship can be deprived.[138]

There exists a Eurosceptic rise among the Member States, and this has altered the post-*Sala* legal culture of the Court. This has seen a return to Union citizens becoming once again tied to economic activity and the cross-border test as the trigger for rights protection. The Eurosceptic backdrop cannot be ignored. It is important to state that, irrespective of political preference, Eurosceptic demands have reduced the status of Union citizenship to a less meaningful position. Where Union citizens and their family members could once rely upon their status and the rights contained within, this has since been subjected to a Eurosceptic battering ram. In the wake of the *Zambrano* judgment, some questioned the EU's self-confidence as a supranational polity,[139] and the ability of the European judge to handle external political pressure following a period of 'citizenship exhaustion'.[140] After all, as Shaw notes, 'Judges are not immune to political pressures. They read newspapers.'[141] The following cases shall demonstrate this as an empirical reality

[137] Dimitry Kochenov and Richard Plender, 'EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text' (2012) 37 EL Rev 369, 387.
[138] Niamh Nic Shuibhne, 'Seven Questions for Seven Paragraphs' (2011) 36 EL Rev 161, 162; Niamh Nic Shuibhne, '(Some of) The Kids Are All Right: Comment on McCarthy and Dereci' (2012) 49 CML Rev 349, 375
[139] Daniel Thym, 'The Evolution of Citizens' Rights in Light of the European Union's Constitutional Development' in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing 2017) 133-34; Daniel Thym, 'The Failure of Union Citizenship Beyond the Single Market' in Rainer Bauböck (ed), *Debating European Citizenship* (Springer 2019) 101.
[140] Sarmiento and Sharpston (n 91) 229.
[141] Jo Shaw, 'EU Citizenship: Still a Fundamental Status?' in Rainer Bauböck (ed), *Debating European Citizenship* (Springer 2019) 8. See also Karen J Alter, Laurence R Helfer and Mikael R

given the Court's propensity to capitulate when faced with the demands of a Eurosceptic Member State.

The *McCarthy* judgment presented the first opportunity for the Court to clarify the deprivation of genuine enjoyment test. Mrs McCarthy was an economically inactive and static dual citizen of the United Kingdom and Ireland who sought to derive a right of residency under EU law in order for her TCN Jamaican spouse, who lacked leave to remain in the UK, to derive a right of residence given that there was no comparable right under the immigration rules of the UK.

AG Kokott in her opinion explained that Directive 2004/38 (CRD) can not apply to a Union citizen when they are in the Member State of which they are a national and in which they have always resided.[142] In other words, the fact that Mrs McCarthy resided in, and never moved from, the UK meant that Mrs McCarthy could not be considered a beneficiary for the purposes of Article 3(1) of the CRD and therefore did not fall within its personal scope. The same is true of her TCN spouse given that their rights are not autonomous under EU law and are only derived from the Union citizen to give effect to their rights.[143] The CRD is to be interpreted and applied consistently with primary EU law,[144] and if Mrs McCarthy could rely upon Article 16 CRD then this would ultimately be 'cherry picking' given that the Union citizen could enjoy the advantages of the Directive without first having met the conditions set out under Article 7(1) for periods of residence longer than three months.[145]

Madsen, 'How Context Shapes the Authority of International Courts' (2016) 79 Law & Contemporary Problems 1; Urška Šadl and Suvi Sankari, 'Why Did the Citizenship Jurisprudence Change?' in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing 2017) 91; Eleanor Spaventa, 'Earned Citizenship - Understanding Union Citizenship Through Its Scope' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017) 209.

[142] Case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* EU:C:2011:277, Opinion of AG Kokott, paras 25, 45, 58 and 61.

[143] ibid, para 30.

[144] ibid, para 31.

[145] ibid, para 56.

The Court's judgment confirmed AG Kokott's opinion and rejected the application of the CRD given Ms McCarthy's lack of cross-border movement.[146] Additionally, the Court confirmed that having dual-nationality would not in itself trigger the Directive.[147] The Court turned away from the CRD and towards the deprivation of genuine enjoyment test to establish whether the claimant could claim rights under Article 21 TFEU. The question being asked was whether Ms McCarthy would be deprived of her genuine enjoyment of the substantive rights of her Union citizenship if her TCN spouse would be unable to reside with her in the UK. The Court held that there was no element that had the effect of depriving Mrs McCarthy of the genuine enjoyment of the substance of rights associated with her status as a Union citizen, or that impeded the exercise of her right to freedom of movement and residence under Article 21 TFEU.[148] In contrast to the *Zambrano* judgment, the refusal to grant a derived right of residence did not have the effect of obliging the claimant to leave the territory of the EU.[149] As the judgment explains:

> It follows that Article 21 TFEU is not applicable to a Union citizen who has never exercised his [sic] right to free movement, who has resided in a Member State of which he is a national and who is also a national of another Member State.[150]

In sum, even after accepting Union citizenship as the fundamental status,[151] the Court interpreted the deprivation of enjoyment test strictly to claim that it would only consider situations where the Union citizen would be forced out of the territory of the EU.[152] It is argued that where *Rottmann* and *Zambrano* sought to remove the cross-

[146] Case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* EU:C:2011:277, paras 39, 43 and 57.
[147] ibid, para 41.
[148] ibid, para 49.
[149] ibid, para 50.
[150] ibid, para 56. See also Chiara Raucea, 'Fundamental Rights: The Missing Pieces of European Citizenship' (2013) 14 German Law Journal 2021, 2034.
[151] ibid, para 47.
[152] ibid, para 56.

border element in claiming Union citizenship rights, the *McCarthy* judgment brought it back into the picture.[153]

Although *Zambrano* confirmed that Union citizens are not required to cross-borders to claim rights under the Treaty if the denial of such rights would result in their expulsion from the EU, Union citizens nevertheless find themselves in a position where they are afforded additional rights under the CRD if they move.[154] Shuibhne has pointed out that this proves that the cross-border element still carries judicial weight in the Court's assessment, and it reflects the Court's refusal to remove itself from the free movement principles of the internal market.[155] This is troubling considering that the Court had previously recognised the Union citizen as a Union citizen and protected their fundamental rights as such.[156] Kochenov argued that the Court in *McCarthy* 'failed to distinguish *Zambrano* in a convincing manner' that has resulted in inevitable confusion for Union citizens.[157]

Six months later, the Court was provided with a further opportunity to clarify the extent to which the deprivation of genuine enjoyment test could be applied. The *Dereci and Others* case saw five TCNs seeking to derive a right to residence in Austria with their Union citizen family members who had never exercised their right to free movement. Mr Dereci, a Turkish national, entered Austria in 2001 and subsequently married an Austrian national in 2003. Later they had three children, all of whom were Union citizens given their Austrian nationality. However, Mr Dereci's family members were not dependent upon him. The CRD could not apply

[153] Peter van Elsuwege, 'Court of Justice of the European Union: European Union Citizenship and the Purely Internal Situations Rule Revisited Decision of 5 May 2011, Case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department*' (2011) 7 European Constitutional Law Review 308, 313.
[154] Yong (n 60) 118.
[155] Shuibhne, '(Some of) The Kids Are All Right: Comment on McCarthy and Dereci' (n 139) 350.
[156] Yong (n 60) 118.
[157] Dimitry Kochenov, 'A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe' (2011) 8 Columbia Journal of European Law 55, 88.

given the lack of cross-border movement on the part of the Union citizens so the question was whether the Union citizens would be deprived of the genuine enjoyment of the substance of rights attaching to their Union citizenship if their TCN family members were unable to derive a right of residence.

AG Mengozzi's opinion claimed that the facts of *Dereci* could not compare to the facts of *Zambrano*. In *Zambrano* it was necessary to establish whether a right of residence could be derived as the failure to do so would have resulted in his Union citizen children being forced out of the territory of the EU given that both TCN parents were of Colombian nationality.[158] However, the refusal to grant Mr Dereci a residence permit in Austria would not have resulted in his wife and young children having to leave the territory of the EU given that they were not dependent upon him.[159]

The Court in its judgment confirmed that the Union citizens cannot be considered beneficiaries under Article 3(1) CRD given that they had not exercised free movement rights.[160] Further, the Court acknowledged that the facts of *Dereci* are not comparable to that of *Zambrano* given that there was no risk of the Union citizens being deprived of their means of subsistence that would ultimately force them out of the EU to accompany Mr Dereci.[161] In determining whether Mr Dereci could derive a right of residence, the Court's judgment reflected that of *McCarthy*. The Court held that the deprivation of the genuine enjoyment of Union citizenship 'refers to situations in which the Union citizen has to leave not only the territory of the Member

[158] Case C-256/11 *Murat Dereci and Others v Bundesministerium für Inneres* EU:C:2011:734, Opinion of AG Mengozzi, para 18.
[159] ibid, para 34.
[160] Case C-256/11 *Murat Dereci and Others v Bundesministerium für Inneres* EU:C:2011:734, paras 57-58.
[161] ibid, paras 32 and 40.

State of which he or she is a national *but also the territory of the Union as a whole*.'[162] Additionally, the Court ruled that the mere fact a Union citizen may wish to reside in the territory of the EU with their TCN spouse for economic reasons or to keep the family unit together is not in itself sufficient to support the view that the Union citizen would be forced to leave Union territory if a right of residence is not granted.[163] Therefore, EU law does not preclude a Member State from refusing to grant a residence permit as long as the decision does not deprive the Union citizens of the substance of their rights, that is as long as they are not forced to leave the territory of the EU.[164]

The *Dereci* judgment represents a turn away from the rights protection the Court had offered since *Martínez Sala*. As Kochenov explains, 'the *Ruiz Zambrano* detour was all too brief, and we seem to be back to square one.'[165] The *Dereci* judgment presented a minimalist understanding of *Zambrano* confirming the case 'was expectational and did not entail the risk of a "Copernican" revolution of the traditional paradigms of free movement and EU citizenship.'[166] The *McCarthy* and *Dereci* judgments confirm that the deprivation of genuine enjoyment test applies only when the facts require the Union citizen to be forced out of the EU's territory. Interpreting the genuine enjoyment test as set out in *McCarthy* marks the beginning of a decline in the influence of fundamental rights in Union citizenship law.[167] This stark reality

[162] ibid, para 66 (emphasis added).
[163] ibid, para 68.
[164] ibid, para 74.
[165] Dimitry Kochenov, 'The Citizenship of Personal Circumstances in Europe' in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing 2017) 56.
[166] Stanislas Adan and Peter van Elsuwege, 'Citizenship Rights and the Federal Balance Between the European Union and its Member States: Comment on *Dereci*' (2012) 37 EL Rev 176, 182; Martijn van den Brink, 'The Origins and the Potential Federalising Effects of the Substance of Rights Test' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017) 86.
[167] Yong (n 60) 120.

is to act as 'cold comfort' for both the Union citizen and the TCN given what is at stake.[168]

The *Zambrano*, *McCarthy* and *Dereci* judgments suggest that judges in Luxembourg disagree over the application of Union citizenship.[169] Consequently, it is not clear whether it can become an independent source of legal rights.[170] This obvious and detrimental shift in the Court's legal culture requires clarification. Adrienne Yong argues that this backwards step is due to the growing frustration of the Member States towards EU free movement law and with the EU as a whole.[171] However, it is clear that the genuine enjoyment test did not reach its potential when assessing whether the Union citizen can rely upon the Treaties to guarantee rights as the case law that followed *McCarthy* and *Dereci* have made clear.[172] In sum, the test is to be applied as a last resort and although there is a right to stay in the Union, EU law does not grant an absolute right to stay in any particular part of it and the case law has made that much clear.[173]

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[168] Niamh Nic Shuibhne, *The Coherence of EU Free Movement Law* (OUP 2013) 153.

[169] Stephen Weatherill, 'The Court's Case Law on the Internal Market: "A Circumloquacious Statement of the Result, Rather than a Reason for Arriving at It?"' in Maurice Adams and others (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013) 101.

[170] Peter van Elsuwege and Dimitry Kochenov, 'On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights' (2011) 13 European Journal of Migration and Law 443, 453.

[171] Yong (n 60) 123.

[172] Case C-40/11 *Yoshikazu Iida v Stadt Ulm* EU:C:2012:691, paras 66-67 and 76; Joined Cases C-356/11 and C-357/11 *O and S v Maahanmuuttovirasto and Maahanmuuttovirasto v L* EU:C:2012:776, paras 55-56; Case C-87/12 *Kreshnik Ymeraga and Others v Ministre du Travail, de l'Emploi et de l'Immigration* EU:C:2013:291; Case C-86/12 *Adzo Domenyo Alokpa and Others v Ministre du Travail, de l'Emploi et de l'Immigration* EU:C:2013:645; Case C-133/15 *H.C. Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others* EU:C:2017:354, para 72; Case C-181/19 *Jobcenter Krefeld - Widerspruchsstelle v JD* EU:C2020:794. See also Daniel Thym, 'Family as Link: Explaining the Judicial Change of Direction on Residence Rights of Family Members from Third States' in Herwig Verschueren (ed), *Residence, Employment and Social Rights of Mobile Persons: On How the EU Defines Where They Belong* (Intersentia 2016) 25-28.

[173] Keon Lenaerts, 'The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice' in Maurice Adams and others (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013) 58-59; Sara Iglesias Sánchez, 'A Citizenship Right to Stay? The Right Not to Move in a Union Based on Free Movement' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017) 386.

VI. The Marshallian Fall: National Protectionism and the Court of Justice

It should be reiterated that if Union citizenship is to become the fundamental status then, under the Marshallian model, it must provide for genuine and enforceable social rights. Where the 'second age' of Union citizenship saw the *Sala* and *Grzelczyk* judgments holding that to deny a mobile and lawfully resident Union citizen of social assistance was to suffer discrimination on the grounds of nationality, the more recent case law has sought to limit the material scope of the Treaty by applying the unreasonable burden test to deter Union citizens from making use of their free movement rights. The Court's attack on social rights fits neatly with the Eurosceptic rise referred to above as it amounts to tackling the fears of welfare tourism among the Member States.

The Eurosceptic tension is perhaps most profound in the *Dano* judgment which has been criticised for being more concerned with politics than law.[174] The case concerned Ms Dano, a Romanian national who moved to Germany with her son to live with her sister who provided for them materially. She had no resources and no comprehensive sickness insurance meaning she could not satisfy the conditions of residence for a period longer than three months.[175] Ms Dano was also low-skilled, only able to express herself simply in German and had no prior work experience in either Romania or Germany — there was also no evidence that she was looking for

[174] Michael Blauberger and Susanne K Schmidt, 'Welfare Migration? Free Movement of EU Citizens and Access to Social Benefits' (2014) 1 Research & Politics 1, 3; Daniel Thym, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' (2015) 52 CMLR 17, 20. See also Gareth Davies, 'Originalism at the European Court of Justice' in Sacha Garben and Inge Govaere (eds), *The Internal Market 2.0* (Hart Publishing 2020) 329.
[175] Case C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* EU:C:2014:2358, Opinion of AG Wathelet, para 92.

work.[176] Ms Dano sought job seekers' benefits and was rejected on the grounds stated above. The German authorities argued that her motive was to move to Germany solely in order to obtain benefits which was precluded by national law.

AG Wathelet in his opinion argued that the Treaties refer directly to the limitations and conditions imposed to give effect to the rights attaching to them and claimed that Regulation 883/2004 and the CRD 2004/38 constitute such limitations.[177] Therefore, Ms Dano was required to have sufficient resources to not become an unreasonable burden. On this basis, it was claimed that the unequal treatment of free-moving Union citizens is an 'inevitable consequence of Directive 2004/38.'[178] Additionally, it was claimed that the grant of social benefits to economically inactive Union citizens is dependent upon a degree of integration in the labour market of the host Member State to avoid 'benefits tourism'.[179] Therefore, in the view of AG Wathelet, EU law does not preclude a Member State from refusing social benefits where there is an absence of a genuine link in order to prevent an unreasonable burden on the social assistance system of the Member State.[180]

The Court of Justice upheld the opinion.[181] The Court only examined the preliminary questions through the prism of secondary EU law to hold that Article 7(1)(b) CRD: 'seeks to prevent economically inactive Union citizens from using the host Member State's welfare system to fund their means of subsistence.'[182] Without

[176] Case C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* EU:C:2014:2358, para 39.
[177] *Dano*, Opinion of AG Wathelet (n 177), para 90.
[178] ibid, paras 93-96.
[179] ibid, paras 129 and 131.
[180] ibid, para 131 and 152.
[181] *Dano* (n 176), paras 77-78 and 83. See also Steve Peers, 'Benefit Tourism by EU Citizens: The CJEU Just Says No' (*EU Law Analysis,* 11 November 2014) <http://eulawanalysis.blogspot.com/2014/11/benefit-tourism-by-eu-citizens-cjeu.html> accessed 21 July 2020; Johannes Peyrl, 'The Judgments of *Brey*, *Dano* and *Alimanovic*: A Case of Derogation or a Need to Solve the Riddle?' in Sandra Mantu, Paul Minderhoud and Elspeth Guild (eds), *EU Citizenship and Free Movement Rights: Taking Supranational Citizenship Seriously* (Brill Nijhoff 2020) 110-11.
[182] *Dano* (n 176) para 76.

the claimant having first satisfied the conditions under Article 7(1) CRD they are unable to rely upon the Article 24 CRD right to equal treatment.[183] Therefore, EU law does not preclude the Member State from refusing social benefits if the claimant does not have a right of residence under the CRD.[184] Explaining further the Court held: '[T]he Member States thus have [the] competence to determine the conditions for the grant of such benefits'.[185] No proportionality assessment was carried out to determine whether Ms Dano was a burden to the social assistance system of the Member State. Instead, the Court considered Ms Dano's motivation behind exercising her free movement rights to effectively reverse the objective of the CRD.[186] In previous case law, such as *Brey*, it was held that not having sufficient resources could *indicate* that the claimant may present an unreasonable burden, but in Ms Dano's case the Court held that it was *certain*.[187]

It is important to note the increasingly tense political atmosphere regarding benefits tourism in the EU. It has been said that the judgment in *Dano* took a back seat in response to these external political factors.[188] The judgment was accepted as 'common sense' by the then UK Prime Minister David Cameron as he sought to make free movement 'less free'.[189] Such comments indicated that the arguably

[183] ibid, para 81.
[184] ibid, paras 84 and 93.
[185] ibid, para 90.
[186] Peyrl (n 181) 113.
[187] Case C-140/12 *Pensionsversicherungsanstalt v Peter Brey* EU:C:2013:565, paras 61 and 77. See also Paul Minderhoud and Sandra Mantu, 'Back to the Roots? No Access to Social Assistance for Union Citizens who are Economically Inactive' in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing 2017) 197-99; Charlotte O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Hart Publishing 2017) 44.
[188] Anne Pieter van der Mei, 'Overview of Recent Cases before the Court of Justice of the European Union (October-December 2014)' (2015) 17 European Journal of Social Security 103, 105.
[189] BBC News, 'EU "Benefit Tourism" Court Ruling Is Common Sense, Says Cameron' (*BBC News,* 11 November 2014) <https://www.bbc.co.uk/news/uk-politics-30002138> accessed 28 July 2020; David Cameron, 'Free Movement within Europe Needs to be Less Free' (*The Financial Times*, 26 November 2013) <https://www.ft.com/content/add36222-56be-11e3-ab12-00144feabdc0#axzz2lpEpnxHv> accessed 17 November 2020. See also Colin Yeo, *Welcome to Britain: Fixing Our Broken Immigration System* (Biteback Publishing 2020) ch 9.

unfounded fear of Union citizens moving to claim benefits had re-emerged as the focal point for Eurosceptic political parties.[190] The *Dano* judgment provided an answer to the benefits tourism question and did so without requiring any amendments to the Treaty or EU secondary legislation.[191] What *Dano* represents is the Court's changing attitude towards who can make use of the rights to free movement and non-discrimination. It reneges on the *Sala* judgment and no longer treats the Article 18 TFEU right to non-discrimination as the determining factor and re-introduces economic activity as the basis for securing Article 20-21 TFEU rights.

It can be said that this has rebirthed the European market citizen. Jo Shaw noted how the market citizenship concept as explained by Everson became more durable than anticipated and how the Court is to blame for this.[192] Additionally, as noted by Kochenov, the 'good' Union citizen is one who brings good work with them:[193] perhaps that is the real duty of Union citizenship. It has been argued that the *Dano* judgment holds that free movement 'is not a right attached to the "fundamental status of all EU citizens", but rather a privilege that European playboys are allowed to make use of.'[194] In other words, it is not for the poor.[195] The rights of the economically inactive Union citizen must be earned through 'wealth, health and good behaviour.'[196] The *Dano* judgment leaves Union citizenship law in a peculiar

[190] Dustmann and Frattini (n 76) 628; Eiko Thielemann and Daniel Schade, 'Buying into Myths: Free Movement of People and Immigration' (2016) 87 The Political Quarterly 139. See also Jo Shaw and Nina Miller, 'When World's Collide: An Exploration of What Happens when EU free Movement Law Meets UK Immigration Law' (2013) 38 EL Rev 137.
[191] Herwig Verschueren, 'Preventing "Benefits Tourism" in the EU: A Narrow or Broad Interpretation of the Possibilities Offered by the ECJ in *Dano*?' (2015) 52 CML Rev 363, 370.
[192] Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism' (n 59) 580.
[193] Kochenov, 'The Oxymoron of "Market Citizenship" and the Future Union' (n 11) 226.
[194] Floris De Witte, 'Freedom of Movement Needs to Be Defended as the Core of EU Citizenship' in Rainer Bauböck (ed), *Debating European Citizenship* (Springer 2019) 97.
[195] Herwig Verschueren, 'Free Movement of EU Citizens: Including for the Poor?' (2015) 22 Maastricht Journal of European and Comparative Law 10, 34. See also Kochenov, 'On Tiles and Pillars: EU Citizenship as a Federal Denominator' (n 28) 38-41; Sandra Mantu, 'Economic or Social EU Citizenship: The Never Ending Quest for Transnational Social Rights' (2024) 38 NST 81, 96, 98.
[196] Spaventa, 'Earned Citizenship - Understanding Union Citizenship Through Its Scope' (n 141) 221.

place as a Union citizen would only be entitled to social assistance if they already had sufficient resources, and therefore had no need to rely on social assistance.[197] To use Spaventa's argument again, an Orwellian EU ought to be avoided where some Union citizens are more equal than others.[198]

While these arguments are convincing, the perspectives of those who advocate the positive application of Article 19 TEU and the secondary EU legislation should also be recognised. There are those who argue that these criticisms 'go too far'[199] given the single market case law cannot be extended indefinitely to cover all those who remain economically inactive.[200] It is said that the Court alone should not decide on the scope of EU mobility rights without taking into account legislative intent.[201] This argument holds that the Court ought to simply apply Article 7(1) CRD and if the mobile Union citizen cannot satisfy its requirements then they shall become an unreasonable burden for the purpose of Article 14 and, therefore, cannot rely on the Article 24 right to equal treatment. O'Brien has called this a 'law as lists' approach.[202] However, the argument posed by van den Brink claims that if the Court continues to ignore the legislative decisions set out in the CRD, then those who oppose free movement are more likely to do so.[203] As Schmidt claims, any judicial extension of

[197] Verschueren (n 191) 381; Minderhoud and Mantu (n 187) 199.
[198] Spaventa, 'Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and Its Constitutional Effects' (n 19) 45.
[199] Ferdinand Wollenschläger, 'Consolidating Union Citizenship: Residence and Solidarity Rights for Jobseekers and the Economically Inactive in the Post-Dano Era' in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing 2017) 190.
[200] Thym, 'The Failure of Union Citizenship Beyond the Single Market' (n 139) 104.
[201] ibid.
[202] O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (n 187).
[203] Martijn van den Brink, 'The Court and the Legislators: Who Should Define the Scope of Free Movement in the EU?' in Rainer Bauböck (ed), *Debating European Citizenship* (Springer 2019) 136.

Union citizenship rights without political backing creates nothing short of a 'hollow hope' for those seeking to rely on the status.[204]

Whether the protection of fundamental rights or a positive application of the Treaties is preferred and whether the *Dano* judgment is just is beside the point.[205] The point is that Union citizens can no longer rely upon their status with the same degree of certainty given that the fundamental nature of their Union citizenship has been questioned.[206] The Eurosceptic advance has created a legal culture in which Court rulings have become more unforeseeable and if this position is to continue, then it should come as no surprise that Union citizens may feel a sense of disassociation with the EU project in having been left with no sense of value in their status as a Union citizen. However, despite this, the Court remained consistent in regard to its negative stance toward social assistance benefits in the cases immediately following *Dano* by not allowing for a proportionality assessment to be carried out.[207]

VII. Conclusion

The question posed in the introduction to this chapter asked what does Union citizenship amount to. On the one hand, the status has secured the rights of many Europeans, yet, on the other, it can be said that the status has failed to live up to its

[204] Susanne K Schmidt, 'Extending Citizenship Rights and Losing it All: Brexit and the Perils of "Over-Constitutionalisation"' in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing 2017) 18-19.
[205] See Wollenschläger (n 199) 180-81. See also Verschueren (n 191) 370ff.
[206] Minderhoud and Mantu (n 187) 206.
[207] See Case C-67/14 *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others* EU:C:2015:597, para 44-49 and 57-58; Case C-299/14 *Vestische Arbeit Jobcenter Kreis Recklinghausen v Jovanna García-Nieto and Others* EU:C:2016:114, para 53; Case C-308/14 *European Commission v United Kingdom of Great Britain and Northern Ireland* EU:C:2016:436. See also O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights' (n 35) 946-53.

potential given that it has not met the desired Marshallian standard that has been applied to national citizenship. The inability of the status to secure the rights of Union citizens solely on the basis that they are in fact Union citizens would appear to undermine the supposedly fundamental nature of the status. The requirements to cross Member State borders, to demonstrate economic links and to be in the possession of sufficient resources have remained firm in the Court of Justice's jurisprudence.

Union citizens could once rely upon their status to facilitate their free movement, lawful residence and to not be discriminated against on the basis of their nationalities. However, they are now no longer able to confidently rely upon EU law for such protection.[208] The failure of the Court to guarantee the social rights of Union citizens has confirmed that the status cannot compare to the national citizenships of the Member States. This is a troubling development and is especially so given that the Court's change in direction has been somewhat motivated by rising Euroscepticism throughout certain Member States. Quite simply, if rising Euroscepticism and a change of judge in the CJEU changes the law, then it is not clear what the law surrounding Union citizenship even is.[209]

It ought to be asked where the limits of Union citizenship are to be drawn given that it is clear that Union citizenship law has become more about the interests of the Member States rather than the interests of Union citizens.[210] The more Union citizens are protected by the Treaties, the more likely it will be that they shall create a sense of identity and belonging to the EU. The Court of Justice ought to recognise

[208] Yong (n 60) 139-41.
[209] See Richard A Posner, *How Judges Think* (Harvard University Press 2008) 1.
[210] Anja Wiesbrock, 'Disentangling the "Union Citizenship Puzzle" The *McCarthy* Case' (2011) 36 EL Rev 861, 862; Niamh Nic Shuibhne, 'Integrating Union Citizenship and the Charter of Fundamental Rights' in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing 2017) 238.

this reality. However, for all the Court's flaws it also has its many merits given the constraints imposed upon it by the EU Treaties and secondary legislation.[211] It is said here that the EU and its Member States ought to reconsider the status and decide whether Union citizenship is to remain a marketised form of citizenship,[212] or whether it is to provide for something more fundamental that recognises the Union citizen simply as a Union citizen. Union citizens require something akin to the *Cassis de Dijon* rule relating to the free movement of goods where the same conditions are applied to them in the receiving Member State.[213] However, the status quo has allowed the Member States 'to discriminate against Union citizens who do not enjoy their nationality and treat them less favourably than their own nationals.'[214]

In sum, the legality of this situation is retained in Article 9 TEU and Article 20 TFEU and it is argued by some that it is unlikely that this will change in the foreseeable future.[215] Therefore, it can be said that Union citizenship remains an additional status of citizenship for the nationals of the Member States and although there are numerous rights attaching to that status, they have remained dependent upon exercising the right to freedom of movement and upon having sufficient resources. Notwithstanding the efforts of the Court to put flesh on the bones of the infantile Union citizen, it would still appear that the Union citizen 'still has many more years of growth before he or she can be said to have reached full adulthood.'[216] In

[211] See Jukka Snell, 'The Legitimacy of Free Movement Case Law: Process and Substance' Maurice Adams and others (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013) 126.
[212] Niamh Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 CML Rev 1597, 1599 and 1605; O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (n 187) 1.
[213] Shuibhne, 'Free Movement of Persons and the Wholly Internal Rule: Time to Move On?' (n 36) 738; Verhofstadt (n 29) 142; Allan Rosas and Lorna Armati, *EU Constitutional Law: An Introduction* (3rd edn, Hart Publishing 2018) 155.
[214] Brink, 'EU Citizenship and (Fundamental) Rights: Empirical, Normative, and Conceptual Problems' (n 18) 3.
[215] Yong (n 60) 144.
[216] James D Mather, 'The Court of Justice and the Union Citizen' (2005) 11 ELJ 722, 743.

other words, Union citizenship is still very far away from being the fundamental status of the Member State nationals given that it cannot guarantee the Marshallian standard of citizenship.

Chapter IV

Union Citizenship and Its Theoretical Limitations

I. Introduction

The previous chapter cast doubt over the fundamental nature of Union citizenship given that it has been unable to meet the Marshallian standard of citizenship to provide for the social rights of certain economically inactive free-moving Union citizens. However, Union citizenship clearly has some weight. There have been arguments to hold that Union citizenship represents a post-national form of citizenship given that is has allowed for effective cross-border rights without the requirement to hold the nationality of the community in which those rights are being exercised. This chapter shall explore this concept.

The previous chapter demonstrated how Member State nationality provides the legal link to Union citizenship and how the Member States continue to act as the gatekeepers to the status. In the contemporary EU, Member State nationality is belonging: it provides both the legal link and the identity that warrants full entry and inclusion through Union citizenship. This reality remains underpinned by Article 9 TEU and Article 20 TFEU. However, the sense of identity individuals have towards the EU and their host Member State is often overlooked. This chapter shall explore the relationship between citizenship and identity and begin to question why the holding of a Member State nationality continues to be the only available method for admitting an individual to Union citizenship and how the status continues to exclude

those who identify with the EU, its values and its principles on the basis that such peoples do not hold a Member State nationality. It is recognised here that identity and citizenship are indeed separate, although related, concepts: not holding the nationality of a Member State does not necessarily mean that an individual does not share in this identity.

This chapter shall demonstrate how Union citizenship's continued dependence upon the holding of a Member State nationality has weakened its potential.[1] The chapter shall address the following: first, is to consider how constructivist approaches to identity building might provide a theoretical basis for an alternative to a nationality-based Union citizenship; second, is to take into account the scholarly works that have recognised this shift in identity formation and have used such to provide the theoretical underpinnings for a post-national Union citizenship that is decoupled form the nationality principle. The chapter concludes by recognising that the current conception of Union citizenship does not offer a truly post-national status of citizenship. The chapter argues that Union citizenship can only gain a post-national status if the EU and its Member States recognise and have due regard for the identities that its citizens have towards it and uses them for the gaining and exercising of its citizenship.

II. Identity: Essentialist or Constructivist?

Identity has traditionally been associated with nationhood given that it provides a pre-defined collective identity. Therefore, identity is often conflated with nationality in respect to legal scholarship. Although national identity is accepted, it should be

[1] See Dora Kostakopoulou, 'European Citizenship: Writing the Future' (2007) 13 ELJ 623, 626.

asked whether it operates as the primary, or only, factor that makes up an individual's identity. The complex web of relations resulting from the globalisation of markets, the increasing channels of international communication and the recognition of universal human rights has exposed how identity is not limited to a specific national territory.

AG Maduro claimed that the miracle of Union citizenship is that it strengthens the ties between us and our nation-states and at the same time it emancipates us from them.[2] However, the point to consider is whether Union citizenship is capable of such. Initially, many scholars considered the status to be a merely symbolic exercise that offered little to the rights already available to the Member State nationals.[3] The question is whether Union citizenship still falls prey to such critique or whether the nationals of the Member States and lawfully resident TCNs have since engendered a genuine sense of identity to the EU.

It should be recognised that identity formation is both a complex and time-consuming process. Traditionally it has been the case that the population must feel at ease with their collective identity before it is legally formalised into a status of citizenship. It is contended here that with the establishment of Union citizenship came the legal recognition of the EU identity that was first discussed in the 1973

[2] Case C-135/09 *Janko Rottman v Freistaat Bayern* EU:C:2010:104, Opinion of AG Poiares Maduro, para 23.

[3] Hans Ulrich Jessurun d'Oliveira, 'Union Citizenship: Pie in the Sky?' in Allan Rosas and Esko Antola (eds), *A Citizens' Europe: In Search of a New Order* (Sage 1995) 82; See also David O'Keeffe, 'Union Citizenship' in David O'Keeffe and Patrick M Twomey (eds), *Legal Issues of the Maastricht Treaty* (John Wiley & Sons 1994); Síofra O'Leary, *The Evolving Concept of Community Citizenship* (Kluwer 1996) 304-07; Elspeth Guild, 'The Legal Framework of Citizenship of the European Union' in David Cesarani and Mary Fulbrook (eds), *Citizenship, Nationality and Migration in Europe* (Routledge 1996) 30; JHH Weiler, 'European Citizenship and Human Rights' in Jan A Winter and others (eds), *Reforming the Treaty on European Union: The Legal* Debate (TMC Asser 1996) 57, 68 and 73; JHH Weiler, 'Introduction: European Citizenship, Identity and Differentity' in Massimo La Torre (ed), *European Citizenship: An Institutional Challenge* (Kluwer Law International 1998) 10.

Copenhagen Declaration on European identity.[4] In other words, the EU identity continued to grow following its official recognition in 1973 and the establishment of Union citizenship within the Maastricht Treaty crystallised the EU identity as it stood in 1992. The point argued here is that the construction of and the acceptance of an identity usually precedes citizenship.[5] Therefore, it can be said that an identity represents the core of citizenship.

Scholars such as Shaw have argued that there is no conclusive answer as to whether identity forms citizenship or vice versa.[6] However, the position taken here is that identity acts as the basis for legitimising a legally binding citizenship. To take Shaw's own argument, if the EU is to function it will require Europeans and this can only be achieved if the EU can inspire a sense of loyalty and even an identity among the peoples of Europe.[7] Kostakopoulou adds to this by stating that these people are those who will willingly participate in its structure and support it in times of crisis.[8]

Therefore, if Union citizenship is to function it also requires an EU identity to underpin and legitimise that citizenship. Some may argue that a transfer of allegiance to the EU from the nation-state is required for a successful European Union.[9] However, it is said here that a total transfer need not occur. All that should take place is the recognition of an additional EU identity that operates alongside and

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[4] Antje Wiener, 'The Constructive Potential of Citizenship: Building European Union' (1999) 27 Policy & Politics 271, 277-78.
[5] See David Miller, *On Nationality* (OUP 1995).
[6] Jo Shaw, 'Citizenship of the Union: Towards Post-National Membership?' (*The Jean Monnet Center for International and Regional Economic Law & Justice*, 1998) <https://jeanmonnetprogram.org/archive/papers/97/97-06-.html> accessed 16 June 2020. See also Ulrich K Preuß, 'Citizenship and Identity: Aspects of a Political Theory of Citizenship' in Richard Bellamy, Vittorio Bufacchi and Dario Castiglione (eds), *Democracy and Constitutional Culture in the Union of Europe* (Lothian Foundation Press 1995) 108; Peter H Schuck, 'Liberal Citizenship' in Engin F Isin and Bryan S Turner (eds), *Handbook of Citizenship Studies* (Sage Publications 2002) 131-44; Lynn Dobson, *Supranational Citizenship* (Manchester UP 2006) 56.
[7] Jo Shaw, 'European Union Citizenship: The IGC and Beyond' (1997) 3 EPL 413, 415.
[8] Theodora Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (Manchester UP 2001) 14.
[9] See Richard Bellamy, 'Evaluating Union Citizenship: Belonging, Rights and Participation Within the EU' (2008) 12 Citizenship Studies 597, 609.

is complementary to national identities and other related interests.[10] In other words, EU identity and Union citizenship should not seek to replace national identities nor national citizenships.

III. Integration and Identity in a Post-Soviet Europe

The fall of the Iron Curtain, the collapse of the Soviet Union and the end of the Cold War drastically altered European geopolitics, and for some it was seen as the entering into a post-ideological world where: 'for the first time in perhaps all history, man does not have to invent a system by which to live.'[11] As Eastern European nations began to unshackle the yoke of communism in favour of pluralism and parliamentary democracy, it appeared that the Western ideal of liberal democracy had triumphed and would remain uncontested.[12] Such optimism appeared to usher in the advent of a 'new world order' where geopolitics would no longer be determined by competing ideologies.[13] However, Žižek may have been right in arguing that this is nothing more than a 'postmodern trap'.[14] Instead of conversations regarding the merits of individualism over collectivism and vice versa, it could be said that these types of conversations have merely shifted towards debates of a different kind such as the merits of supranationalism over nationalism, the merits of European identities over national identities and the merits of a European Union citizenship over national

[10] Jeffrey T Checkel and Peter J Katzenstein, 'The Politicization of European Identities' in Jeffrey T Checkel and Peter J Katzenstein (eds), *European Identity* (CUP 2009) 8.
[11] George HW Bush, 'Inaugural Address of George Bush' (*Washington DC*, 20 January 1989) <https://avalon.law.yale.edu/20th_century/bush.asp> accessed 10 September 2020.
[12] Francis Fukuyama, 'The End of History?' (1989) 16 The National Interest 3, 4. See also Derek Heater, *What Is Citizenship?* (Polity Press 1999) 33. See also Lech Wałęsa, *The Struggle and the Triumph* (Skyhorse Publishing 1992) ch 20; Václav Havel, *The Power of the Powerless* (first published 1978, Vintage Classics 2018). See also Anna Funder, *Stasiland* (first published 2003, Granta Books 2021) 1-9.
[13] Paul Close, *Citizenship, Europe and Change* (Palgrave Macmillan 1995) x.
[14] Slavoj Žižek, *The Sublime Object of Ideology* (2nd edn, Verso 2008) xxxi.

citizenships. In other words, ideologies are still determining geopolitics, it is just that their nature and end goals differ. This aside, it should be recognised that it was in this setting of western optimism and high modernity to which a supranational European Union citizenship would become established through the Treaty of Maastricht.[15]

By 1998, ten Eastern European States began to knock on the EU's door, and it was argued that deciding how best to define the European cultural identity was crucial to the EU's future success. Atilla Agh claimed that eastern EU enlargement would cause a clash of political cultures.[16] Guild highlighted how certain actors sought to deepen the relationships between the then already existing Member States.[17] Additionally, some warned that EU enlargement could lead to large-scale benefits migration.[18] In other words, it is argued by some that the wider the EU becomes, the shallower it must be.[19] Despite these concerns, the eastern EU enlargement project was complete by 1 May 2004. Its completion has been described by Michel Barnier as a 'great moment of reunification of the European continent.' To concur with Barnier, the EU has since welcomed more than one hundred million Union citizens who left poverty and dictatorship for the promise of shared progress, something no other continent has achieved.[20]

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[15] Daniel Thym, 'Introduction: Challenges and Crises of Union Citizenship' in Dora Kostakopoulou and Daniel Thym (eds), *Research Handbook on European Union Citizenship Law and Policy* (Edward Elgar 2022) 1.
[16] Attila Agh, 'Citizenship and Civil Society in Central Europe' in Bart van Steenbergen (ed), *The Condition of Citizenship* (Sage 1994) 108-26.
[17] Elspeth Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law* (Kluwer Law International 2004) 150-51.
[18] See Michael Dougan, 'A Spectre Is Haunting Europe…Free Movement of Persons and the Eastern Enlargement' in Christophe Hillion (ed), *EU Enlargement: A Legal Approach* (Hart 2004) 111-12.
[19] See Perry Anderson, 'The Europe to Come' (*London Review of Books*, 25 January 1996) <https://www.lrb.co.uk/the-paper/v18/n02/perry-anderson/the-europe-to-come> accessed 23 October 2020.
[20] Michel Barnier, *My Secret Brexit Diary: A Glorious Illusion* (Robin Mackay tr, Polity Press 2021).

However, many would continue to question whether the integration of many different cultures would cause an identity crisis in the EU. These concerns are reminiscent of Aristotle's citizenship philosophy contending that any polity should allow its citizens to know one another.[21] What can perhaps be considered a retreat into preconceived understandings of belonging led some to conclude that European integration was beginning to 'reach its limit' as intergovernmental actors claimed that too many Member States could paralyse the EU institutions.[22] Upon this realisation, nationalism was quick to bite at the heels of progress in furthering European integration, and with it came its habit of assuming that whole blocs of nation-states can be confidently labelled good or bad.[23] Nationalism as an ideology will not accept heterogeneity as it seeks to assert its own national identity to sustain a homogenous polity.[24] The nationalist weaponizes nostalgia and views the EU as a new Leviathan that will annihilate national sovereignty and identity while basing this claim upon the false idea that the nation-state in Europe is dead,[25] or is at least being 'withered away' to a certain extent.[26]

The issue is that as European integration expands, so does its culture, and as the citizenry of the EU expands, the experiences of those within widen. The peoples of Europe began to exercise their Marshallian civil, political and social rights outside

[21] Aristotle, *The Politics* (Penguin Classics 1992) 405. See also Damian Chalmers, 'Post-nationalism and the Quest for Constitutional Substitutes' (2000) 27 Journal of Law and Society 178, 181.
[22] See Brigid Laffan, 'The Politics of Identity and Political Order in Europe' (1996) 34 JCMS 81, 100. See also Lynn Dobson (n 6) 4.
[23] See George Orwell, 'Notes on Nationalism' in George Orwell, *Essays* (Penguin Classics 2000) 300. See also JHH Weiler, 'Does Europe Need a Constitution Demos, Telos and the German Maastricht Decision' (1995) 1 ELJ 219, 223.
[24] Anthony D Smith, 'National Identity and the Idea of European Unity' (1992) 68 International Affairs 55, 56.
[25] Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (n 8) 16. See also Kalypso Nicolaïdis, 'The Political Mantra: Brexit, Control and the Transformation of the European Order' in Federico Fabbrini (ed), *The Law & Politics of Brexit* (OUP 2017) 44.
[26] See Karl Marx and Frederick Engels, *Collected Works*, vol 25 (Richard Dixon and others trs, International Publishers 1987) 268; Karl Marx and Friedrich Engels, *The Communist Manifesto* (first published 1888, Penguin Classics 2015) 30-35. See also Arendt (n 92) 441.

of their State of origin and thus began to form an identity in the place where these rights were being exercised. Additionally, it can be said that those who remained within their State of origin also began to share in this identity given the possibility that such rights could be exercised in the future. As a result, a more heterogeneous and European society emerged where cultures, values and customs began to weave together. Therefore, it appears that a simple return to the principles of modernity and a homogenous identity based upon ethno-cultural terms cannot successfully operate as the supranational EU identity.[27] The EU by definition is plural as there cannot be such a thing as European integration without first accepting that there are differences to integrate.[28] This has meant that there is not one identity in the EU but multiple identities that overlap.[29]

In respect to identity formation, those who favour the traditional approach employ an essentialist position with its virtue being its clarity as to what constitutes an identity for a people.[30] Identity is therefore grounded within the nation-state. To concur with de Witte: 'to put it as bluntly as possible, the nation state's mode of social integration reduces the incredibly complex individual to a one-dimensional being: a national.'[31] It is a simple and effective mechanism for one to know who belongs to and is protected by the State.

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[27] Percy B Lehning, 'European Citizenship: Towards a European Identity?' (2001) 20 Law and Philosophy 239, 264.
[28] Bryan S Turner, 'Postmodern Culture/Modern Citizens' in Bart van Steenbergen (ed), *The Condition of Citizenship* (Sage 1994) 166.
[29] Antje Wiener, *'European' Citizenship Practice: Building Institutions of a Non-State* (Westview Press 1998) 301; Theodora Kostakopoulou, 'European Union Citizenship as a Model of Citizenship Beyond the Nation State: Possibilities and Limits' in Albert Weale and Michael Nentwich (eds), *Political Theory and the European Union: Legitimacy, Constitutional Choice and Citizenship* (Routledge 1998) 158; Chalmers (n 21) 206; Guild (n 17) 2.
[30] Juan M Delgado-Moreira, *Multicultural Citizenship of the European Union* (first published 2000, Routledge 2018) 60-64.
[31] Floris De Witte, 'Freedom of Movement Needs to Be Defended as the Core of EU Citizenship' in Rainer Bauböck (ed), *Debating European Citizenship* (Springer 2019) 94.

Union citizenship has remained dependent upon the possession of a Member State nationality. Therefore, the EU institutions must defer to Member State prerogatives before determining whether an individual can be admitted to Union citizenship. This has led some to claim that Union citizens do not entirely belong to the EU.[32] The only way in which a Union citizen may control access to the status is in their collective decision to elect national representatives with either pro or anti-EU policies. These representatives can then amend domestic nationality laws to make it either easier or more difficult to hold their nationality and therefore Union citizenship.

The decision to underpin Union citizenship admission criteria solely upon the holding of a Member State nationality is not without a cost given that it has emphasised the importance of national identities over actualising an identity towards the EU.[33] The fact that European integration has begun to weave together the different cultures, traditions and identities of the Member States has led some to argue that the EU has since engineered a polity that can be perceived to be a post-modern, post-Enlightenment or post-statist political entity with a corresponding constructivist identity. In recognition of such, legitimate questions can be asked: why does a national citizenship remain the only prerequisite criteria for being admitted to a supranational citizenship; and could Union citizenship be reconceptualised so that its admission could also be based upon alternative criteria to allow for those who share in the European Union identity to be admitted to Union citizenship?

A post-modern understanding of identity presents this alternative as it questions totalising metanarratives that have been found in expressions of history, religion,

[32] See Alex Warleigh, 'Frozen: Citizenship and European Unification' (1998) 1 Critical Review of International Social and Political Philosophy 113, 120.
[33] Adrienne Yong, *The Rise and Decline of Fundamental Rights in EU Citizenship* (Hart Publishing 2019) 14.

science or political ideologies and promotes instead the need for the reinterpretation of knowledge.[34] Both Lyotard and Derrida were concerned that Europe was becoming a metanarrative as they claimed that Europe had attempted to establish an essentialist identity to the EU with a fixed and singular meaning. These writers acknowledged how this development was ironic and was due to a crisis in memory given that the European project was designed to respect the differences in identities to avoid another Auschwitz.[35] In other words, post-modernism promotes constructivist interpretations to hold that identity is a multifaceted concept.[36] It contends that the process of European integration has meant that the assumed position of nationality-based citizenship can no longer effectively manage the heterogeneous nature of the EU.

A post-modern approach is necessary for two further reasons: first, Union citizenship differs from the traditional notions of citizenship established in international and domestic legislation; and second, the status has not been conceived organically through centuries-long discourse.[37] In regard to the first reason, it should be recognised that citizenship has often been used as a justification to exclude those who do not hold the nationality of the State. Article 18 TFEU states that discrimination on the basis of nationality shall be prohibited. In respect to the second reason, the top-down approach to Union citizenship formation may be taken to mean that the EU lacks a sense of peoplehood and solidarity among

[34] Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge* (Geoff Bennington and Brian Maasumi trs, Manchester UP 1984) 37, 60 and 79-81.
[35] Jean-François Lyotard, *Heidegger and the 'the Jews'* (Andreas Michel and Mark Roberts trs, University of Minnesota Press 1990) 39; Lyotard, *The Postmodern Condition: A Report on Knowledge* (n 34) 81-82; Jacques Derrida, *The Other Heading: Reflections on Today's Europe* (Pascale Anne Brault and Michael B Naas trs, Indiana UP 1992) 3-13, 24-5, 29-32. See also Ian Ward, 'Identity and Difference: The European Union and Postmodernism' in Jo Shaw and Gillian More (eds), *New Legal Dynamics of European Union* (OUP 1995) 15-16.
[36] Delgado-Moreira (n 30) 65-72.
[37] Willem Maas, *Creating European Citizens* (Rowman & Littlefield 2007) 45.

the nationals of the Member States to form a common status of Union citizenship. In other words, some would argue that is no European demos.

Post-modernism recognises that citizenship and identity are differing and at times contested concepts. Take, for example, a citizen who is a member of the LGBT community who had joined a wider community group within an oppressive State. It would be unlikely that they would identify with their State of nationality. Instead, it is likely that their social connections would serve as the foundation for their primary identity. These types of identities are not found in common origin nor ethnic background, yet they are a type of identity that can be more real to that individual than their nationality ever could be. To that individual, their identity to the social group is of higher value than their sense of national belonging.

The same logic can be applied in the context of the EU as although a TCN may not hold the nationality of a Member State, and therefore Union citizenship, they may nevertheless form a genuine identity to the EU after a period of lawful residence, positive contribution and in the promotion and protection of its values.[38] In defining what counts as positive contribution, Hammar considers property ownership, being a part of the labour force, enjoying the cultural life of the society, the sending of their children to schools and the payment of taxes.[39] This logic can be applied to the UK nationals. Although their Union citizenship has been stripped from them as a consequence of Brexit, they still nevertheless share in this identity to the EU given that they had previously been Union citizens. It is illogical to suggest that the withdrawal of the United Kingdom from the EU stripped these peoples of this identity.

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[38] See Joseph Carens, *The Ethics of Immigration* (OUP 2013) ch 8.
[39] Tomas Hammar, 'Citizenship: Membership of a Nation and of a State' (1986) 24 International Migration 735, 742; Tomas Hammar, *Democracy and the Nation State: Aliens, Denizens and Citizens in a World of International Migration* (first published 1990, Routledge 2016) 35.

This demonstrates how identity can have a problematic relationship to citizenship. Legislation seeks to identify those who belong to a political community through citizenship, but given that there is also a genuine identity that has underpinned the legal formation of that status and has been based upon shared attributes to a group found outside of nationality, this raises the argument as to whether an identity can be protected by legislation in order to facilitate a legal belonging to a space in which they identify or belong.[40] As is currently the case, the first of the two groups outlined above would carry the citizenship of that political community although they may not have a strong sense of identity to it, and the second of these groups would not even though they do hold a strong sense of identity to it — 'the question of whether an individual belongs to a state is not a psychological but a legal question.'[41] Therefore, it is argued here citizenship is neither a purely sociological nor legal concept but instead is a contested concept that embodies elements of both.[42]

Kostakopoulou has pointed out that the inbuilt bias towards national statism renders difficulty in conceiving an EU identity formulated under something other than national sovereignty.[43] Horizontal national identities satisfy the psychological need to belong somewhere: 'it is a shield against existential aloneness.'[44] However, post-modern approaches to identity demonstrates how individuals can occupy multiple identities simultaneously.[45] Castiglione characterises this point well by stating that

[40] See Iris Marion Young, *Justice and the Politics of Difference* (Princeton UP 1990) 44.
[41] Hans Kelsen, *Pure Theory of Law* (Max Knight trs, first published 1934, The Lawbook Exchange Ltd 2009) 288.
[42] Engin F Isin and Patricia K Wood, *Citizenship & Identity* (SAGE Publications 1999) 4.
[43] Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (n 8) 16; Dora Kostakopoulou, *European Union Citizenship Law and Policy: Beyond Brexit* (Edward Elgar Publishing Ltd 2020) 14.
[44] Weiler, 'Does Europe Need a Constitution Demos, Telos and the German Maastricht Decision' (n 23) 245-47; JHH Weiler, 'To Be a European Citizen - Eros and Civilization' (1997) 4 Journal of European Public Policy 495, 504.
[45] Turner (n 28) 166.

there is no contradiction in feeling a sense of belonging to multiple, yet functionally different, organisations.[46] It should be recognised that although the nationality link is strong, it is by no means the only defining feature of an individual.[47] In other words, our identities are not solely defined by sharp borders.[48]

Ultimately, what post-modern thought seeks to achieve in respect to identity is the undermining of national belonging acting as the only mechanism for legal belonging.[49] This is necessary given the growing acceptance of dual nationality,[50] the desire to provide non-nationals with political and welfare rights and with the increasing recognition of transnational minorities.[51] Citizenship viewed through post-modernity attempts to reconceptualise the rational tradition upon which the Enlightenment is found.[52] The problem is that the law is the chosen method for satisfying the human need to categorise.[53] It is said that legislation must determine who belongs to and benefits from a political community and who is to be excluded,[54] and currently the EU continues to rely solely upon a nationality-based model of supranational citizenship to facilitate this need.

Admittedly, it is difficult to establish what is meant by a post-modern identity. It is an identity that 'cannot fully know itself…. Universal recognition is simply not

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[46] Dario Castiglione, 'Political Identity in a Community of Strangers' in Jeffrey T Checkel and Peter J Katzenstein (eds), *European Identity* (CUP 2009) 31.
[47] Elizabeth Meehan, *Citizenship and the European Community* (Sage 1993) 5.
[48] Lehning (n 27) 265. See also Kostakopoulou, *European Union Citizenship Law and Policy: Beyond Brexit* (n 43) 35.
[49] Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (n 8) 25.
[50] Peter J Spiro, 'Dual Nationality and the Meaning of Citizenship' (1997) 46 Emory Law Journal 1411.
[51] Jo Shaw and Igor Štiks, 'The Europeanisation of Citizenship in the Successor States of the Former Yugoslavia: An Introduction' (2010) CITSEE Working Paper 2010/01, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1914387> accessed 4 May 2020.
[52] Young (n 40) 58-61. See also Sanja Ivic, *European Identity and Citizenship: Between Modernity and Postmodernity* (Palgrave Macmillan 2016) 23.
[53] Dora Kostakopoulou, 'Legal and Political Concepts as Contextures' (2020) 49 Netherlands Journal of Legal Philosophy 22, 22.
[54] Hammar, *Democracy and the Nation State: Aliens, Denizens and Citizens in a World of International Migration* (n 39) 211.

possible.'[55] Consequently, it can be criticised as an artificial, memoryless and shallow construction.[56] However, as complex as it may appear it should be recognised that one of its main goals is to recognise the separateness of identity and citizenship. One possible answer to the concerns of both Lyotard and Derrida contends that rather than promoting a common EU identity the EU should instead promote the 'Europeanisation of national spheres'[57] to create a polity dedicated to the 'plurality of peoples'[58] who are to be recognised and accepted rather than peoples to be assimilated.[59]

IV. Theoretical Approaches to European Identity

The EU is perhaps best described as a multi-level system of governance with each layer carrying with it its own identity. The question then is how to define the foundations for a more specific European Union identity. Numerous scholars have given accounts on how best to conceptualise this identity and the work of Dora Kostakopoulou shall be used as a basis for outlining some of these perspectives.[60]

[55] Chalmers (n 21) 207-08. See also Castiglione (n 46) 29.
[56] See Anthony D Smith, *National Identity* (Penguin 1991) 158. See also Francis Fukuyama, *Liberalism and Its Discontents* (Profile Books 2022) 94.
[57] Justine Lacroix, 'Is Transnational Citizenship (Still) Enough?' in Dimitry Kochenov, Gráinne de Búrca and Andrew Williams (eds), *Europe's Justice Deficit?* (Hart Publishing 2015) 179.
[58] Jan-Werner Müller, 'The Promise of *Demoi*-cracy: Democracy, Diversity and Domination in the European Public Order' in Jürgen Neyer and Antje Wiener (eds), *Political Theory of the European Union* (OUP 2011) 197.
[59] See Peter J Katzenstein and Jeffrey T Checkel, 'Conclusion — European Identity in Context' in Jeffrey T Checkel and Peter J Katzenstein (eds), *European Identity* (CUP 2009) 213.
[60] See Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (n 8) ch 1.

III.I Euro-Nationalist Identity

Some contend that in order for a European Union identity to succeed, it must be built upon the pre-existing components of national cultures and identities, with the ultimate aim of producing a European people.[61] Justification for this idea is grounded in the fact that national identity has remained the main form of collective identification regardless of the recognition and acceptance of more post-modern arguments for identity formation.[62] If nationalism is to provide the foundation for a European Union identity then it needs to be asked what type of national sentiment should cement an emerging European identity? It is argued by some that ethnicity has been the most traditional of the 'ties that bind' and has long served as the basis for defining a community to the exclusion of the other. However, nationalism need not be based upon common ethnic ties. Instead, a more forward-thinking civic nationalism that adheres to political institutions and the values and rights of citizenship can be taken to provide the identity of the community.

Anthony Smith contended that European integration is perhaps the most promising experiment for taming the extremities of unbridled nationalism.[63] However, it needed to be asked what kind of European political community ought to emerge: is it to become a 'super-state', a 'super-nation' or something entirely new. Smith dismissed the idea that the EU could ever become a super-state and equally regarded the establishment of a European super-nation an impossible task.[64] In regard to the EU establishing a new political community Smith contended that this would be dependent upon the rise of a sense of specifically European heritage and

[61] Smith, 'National Identity and the Idea of European Unity' (n 24) 66.
[62] Smith, *National Identity* (n 56) 170.
[63] ibid 150-51.
[64] ibid 152.

upon the growth of accepted European memories and myths.[65] Smith argued that the use of such memories have been implemented by virtually all nationalist leaders to buttress national unity and highlighted how communities without strong ethnic histories have had a high failure rate in establishing a nation and a cultural identity.[66]

Although a European identity or heritage has emerged, this is not to say that the national identities of the Member States have begun to dwindle in its presence.[67] However, Smith argued that patterns of European culture have created a common European cultural heritage that has permeated national boundaries. Smith argued that it is these shared values that should provide the foundation for a cultural Pan-European nationalism that could take Europe beyond the nation.[68] However, it is said that a strong emphasis should be given to the ethnic and territorial past as this explains the national present and it is argued that the construction of a European identity lacks a secure ethnic base upon which common memories and values can become engendered.[69] Therefore, in Smith's view, Pan-European nationalism must seek to forge common European myths, symbols and memories if it is to have popular resonance and must do so without competing with the national cultures and collective identities of each Member State.[70]

Kostakopoulou's scrutiny of Smith's position questions why a set of common memories, myths, symbols and traditions are considered a necessary underpinning for the construction of a European identity. Common memories carry pride, but they

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[65] ibid 153. See also Smith, 'National Identity and the Idea of European Unity' (n 24) 58, 65 and 74; Anthony D Smith, 'A Europe of Nations – Or the Nation of Europe' (1993) 30 Journal of Peace Research 129, 130 and 134.
[66] Anthony D Smith, 'The Myth of the "Modern Nation" and the Myths of Nations' (1988) 11 Ethnic and Racial Studies 1, 6.
[67] Smith, 'A Europe of Nations – Or the Nation of Europe' (n 65) 134.
[68] Smith, *National Identity* (n 56) 174.
[69] Anthony D Smith, 'Gastronomy or Geology? The Role of Nationalism in the Reconstruction of Nations' (1995) 1 Nations and Nationalism 3, 10.
[70] Smith, *National Identity* (n 56) 175.

also reflect previous catastrophes and remorse. The peoples of Europe could associate their past with ties to slavery, colonialism or the holocaust rather than the Enlightened values that have commonly defined Europe. Kostakopoulou argues that the identity of the European project does not lie in Europe's past but rather in its future, arguing that a forward-thinking identity that recognises the possibility for new beginnings is required. In sum, and to concur with Kostakopoulou, Smith's proposal rests upon the incorrect assumption that identity construction is only possible by excluding others.[71]

The proposal for a civic-nationalist European identity concerns itself with a set of common political values and shared aspirations as opposed to identifying a historically traceable ethnic base.[72] The requirement for common ethnic roots is replaced by a forward thinking and idealist project which holds that the peoples of Europe should focus on their shared destiny towards becoming a part of a wider and more European community.[73] It is claimed that with the establishment of the EU institutions, and the additional rights that are provided to Union citizens, the peoples of Europe began to identify with it.[74] The recognition and perceived legitimacy of such rights, without them necessarily being exercised, is sufficient for the establishment of a common European identity.[75] In other words, the social cement, or requisite underpinnings, for a modern political community should be the recognition that others are of the same community.[76] If a community of Europeans

[71] Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (n 8) 29-30.
[72] Paul Howe, 'A Community of Europeans: The Requisite Underpinnings' (1995) 33 JCMS 27, 43-44.
[73] ibid 32.
[74] ibid 34-37.
[75] ibid 42.
[76] ibid 43.

starts to coalesce, events will naturally occur to provide these peoples with the historical material equivalent to national lore.[77]

Although this approach is aimed at providing a softer attitude towards immigration and minority cultures,[78] it is contended that it cannot given that the exclusionary concept of the nation-state remains as the foundation for such an identity.[79] Further, civic-nationalism could be reappropriated by ethno-national actors.[80] In other words, there is no guarantee that the nation will continue to value its political institutions and the values they uphold. It is said here that if the EU remains unwilling to distance itself from the nation-state, then all that happens is the ties that bind an individual to the nation-state, either ethnic or civic, are shifted up towards the supranational EU level.

III.II Constitutional Patriotism

Jürgen Habermas attempted to tackle the conflict between nation and State to allow for a national understanding that is grounded upon citizenship as opposed to ethnicity.[81] Habermas observed that those who believe that they derive their identity from the nation are in fact deriving it from the use of their civil rights in their everyday activities.[82] This leads him to conclude that citizens have never been conceptually

[77] ibid 32 and 44.
[78] Paul Howe, 'Insiders and Outsiders in a Community of Europeans: A Reply to Kostakopoulou' (1997) 35 JCMS 309, 311-12.
[79] Theodora Kostakopoulou, 'Why a Community of Europeans' Could be a Community of Exclusion: A Reply to Howe' (1997) 35 JCMS 301, 302-303.
[80] Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (n 8) 30.
[81] Jürgen Habermas, 'Struggles for Recognition in the Democratic Constitutional State' in Charles Taylor and others (eds), *Multiculturalism: Examining the Politics of Recognition* (Princeton UP 1994) 148.
[82] Jürgen Habermas, 'Citizenship and National Identity: Some Reflections on the Future of Europe' in Ronald Beiner (ed), *Theorizing Citizenship* (State University of New York Press 1995) 258. See

tied to their national or ethnic identities, nor a community of fate shaped by common descent, language or history.[83]

Habermas used the examples of Switzerland and the USA as federal states to demonstrate how it is not language and ethnic origin that embeds constitutional principles. In these States, it has been the political culture that has served as the common denominator for a 'constitutional patriotism': a patriotism that 'simultaneously sharpens the awareness of the multiplicity and integrity of different forms of life which co-exist in a multicultural society.'[84] Habermas's notion is constitutional because it acknowledges and respects the institutions of the nation-state, and it is patriotic because the citizen is reliant upon the availability of a shared set of motives and beliefs that are aimed towards a common good as opposed to being concerned with ethnic heritage.[85]

To understand Habermas's version of constitutional patriotism some context is needed. Dolf Sternberger originally adopted the idea to ensure peace in Germany in the aftermath of World War II. He believed that Germany required a new identity that was grounded upon a commitment to liberally accepted principles. This was deemed necessary given Germany's actions that culminated in the Holocaust and the sense of national guilt that followed. Sternberger recognised that prior to the end of the eighteenth century, all forms of patriotism had not been conceptually tied to national sentiments. Sternberger considered the Aristotelian pre-modern society and Aristotle's concept of Concord to argue that a constitutional patriotism could

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also Lehning (n 27) 246. See also John Rawls, *A Theory of Justice* (first published 1971, Harvard UP 1999) 474.

[83] Jürgen Habermas, 'Why Europe Needs a Constitution' (2001) 11 New Left Review 5, 15.

[84] Habermas, 'Citizenship and National Identity: Some Reflections on the Future of Europe' (n 82) 259-64.

[85] ibid.

inspire friendship among citizens.[86] Constitutional patriotism is therefore understood as the love of the laws and the common liberties that the citizens live under and abide by.[87]

Habermas recognised Sternberger's proposal to claim that Europe ought to move away from the notion of ethnically homogenous nation-states.[88] He believed that Europe was getting a second chance and if the uniting of its peoples were to be achieved, then the power politics of yester-year must shift towards a new arrangement by understanding and learning from other cultures.[89] However, unlike Sternberger, Habermas's constitutional patriotism proposes that the disenchantment of the modern world would render a straightforward return to an Aristotelian styled polity based upon friendship impossible.[90]

The remarkable pace of European integration during the 1980-90s opened debate as to what values could hold Europe together.[91] Consequently, certain actors began to turn away from the traditional treaty instrument and towards a model of EU polity-making that would be founded upon the basis of a written constitution.[92] Habermas argued that the dissolution of the historical relationship between republicanism and nationalism was necessary for a plural EU to succeed.[93] This version of constitutional patriotism holds that the social identity of the EU would no

[86] Jan-Werner Müller, 'On the Origins of Constitutional Patriotism' (2006) 5 Contemporary Political Theory 278, 283.
[87] ibid.
[88] Jan-Werner Müller, *Constitutional Patriotism* (Princeton UP 2007) 6.
[89] Jürgen Habermas, 'Citizenship and National Identity' in Bart van Steenbergen (ed), *The Condition of Citizenship* (Sage 1994) 34.
[90] Müller, *Constitutional Patriotism* (n 88) 27.
[91] Jürgen Habermas, 'The European Nation State. Its Achievements and Its Limitations. On the Past and Future of Sovereignty and Citizenship' (1996) 9 Ratio Juris 125, 133.
[92] Jürgen Habermas, 'Remarks on Dieter Grimm's "Does Europe Need a Constitution"' (1995) ELJ 303; Habermas, 'Why Europe Needs a Constitution' (n 83) 5. See also Neil Walker, 'Habermas's European Constitution: Catalyst, Reconstruction, Refounding' (2019) 25 ELJ 508, 509.
[93] Jürgen Habermas, *The Postnational Constellation: Political Essays* (Max Pensky tr and ed, MIT Press 2001) 76.

longer be built upon the idea of national belonging but would instead be based upon the shared principles of the constitution, democracy, human rights and the rule of law.[94] In other words, constitutional patriotism asks how can a heterogeneously defined and liberal political culture that is shared by all participants replace the cultural context of the homogenous nation that currently underpins citizenship.[95]

Habermas was also concerned about how best to unify the post-war German identity. He argued that several conservative historians were attempting to normalise the German identity by returning to a conventional, or even a hardened, form of national pride.[96] He argued that both individual and collective identities are no longer formed by uncritically internalising religious or nationalist narratives.[97] Instead, Habermas proposed that individuals must develop a 'post-conventional identity' in their 'post-traditional society' where universal claims are to be shifted from concepts such as religion or nationhood and towards a universalism that is realised under a system of basic rights and constitutional norms.[98] This is not to be understood as a mere replacement of national identities with post-conventional alternatives but it is rather about recognising that identity itself has become de-centred from national traditions.[99] What it seeks to achieve is the separation of political membership within a community (*demos*) from the ascriptive and preconceived identities of the State (*ethnos*) to forge a European political identity

[94] Matthias Flatscher and Sergej Seitz, 'Of Citizens and Plebeians: Postnational Political Figures in Jürgen Habermas and Jacques Rancière' (2019) 25 ELJ 502, 504.
[95] Habermas, 'The European Nation State. Its Achievements and Its Limitations. On the Past and Future of Sovereignty and Citizenship' (n 91) 133.
[96] Habermas, *The Postnational Constellation: Political Essays* (n 93) 64; Müller, 'On the Origins of Constitutional Patriotism' (n 86) 286; Müller, *Constitutional Patriotism* (n 88) 26.
[97] ibid.
[98] Jürgen Habermas, *The Theory of Communicative Action Volume 2: Lifeworld and System: A Critique of Functionalist Reason* (Thomas McCarthy tr, Beacon Press 1987) 178-79. See also Müller, 'On the Origins of Constitutional Patriotism' (n 86) 284.
[99] Müller, *Constitutional Patriotism* (n 88) 32.

that is shared by all its citizens irrespective of their ethnic heritage.[100] If Europe is to operate as an integrated and multi-level polity, then Union citizens will have to learn to recognise one another as equal members irrespective of their differences.[101]

It is hoped that a European Union citizenship that is grounded upon such identities may lead to better societal outcomes.[102] The resulting identity that follows from constitutional patriotism is a universalistic one that allows for full inclusion if they are acting within the principles of the constitution.[103] Consequently, it follows that a post-national conception of solidarity that is centred on a fair distribution of rights rather than such rights being limited to nationals would emerge.[104] To achieve such the citizens are expected to communicate openly in the public sphere and to collectively discover what constitutional norms and ideals are best for their society.[105] In other words, the constitution is to be sought continuously and its terms are to be reappropriated if it is deemed necessary.[106]

Although the EU Treaties can be taken as the de facto constitution of the EU,[107] Habermas's version of a constitutional patriotism has so far been unable to succeed in transforming the required underpinning of Union citizenship away from the holding

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[100] Habermas, 'Citizenship and National Identity' (n 89) 23.
[101] Habermas, *The Postnational Constellation: Political Essays* (n 93) 99.
[102] Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo De Greiff eds, MIT Press 1998) 117.
[103] Flatscher and Seitz (n 95) 504; Sanja Ivic, *EU Citizenship: Towards a Postmodern Conception of Citizenship?* (Vernon Press 2019) 83.
[104] Habermas, *The Postnational Constellation: Political Essays* (n 93) 77.
[105] ibid 65. See also Jürgen Habermas, 'The Public Sphere: An Encyclopaedia Article (1964)' 3 New German Critique 49; Jürgen Habermas, *The Structural Transformation of the Public Sphere* (Polity Press 2011) 36; Müller, *Constitutional Patriotism* (n 88) 29-30.
[106] Jürgen Habermas, 'On Law and Disagreement: Some Comments on "Interpretive Pluralism"' (2003) 16 Ratio Juris 187, 193.
[107] Case 294/83 *Parti écologiste "Les Verts" v European Parliament* EU:C:1986:166, para 23; Opinion 1/91 Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty - Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area EU:C:1991:490, para 21. See also See Jürgen Habermas, 'Democracy in Europe: Why the Development of the EU into a Transnational Democracy is Necessary and How it is Possible' (2015) 21 ELJ 546, 547.

of a Member State nationality and towards an adherence to basic and accepted liberal democratic values.[108] The proponents of Habermas's constitutional patriotism argue that it can be said to satisfy the need for an identification mechanism for the civic body of the EU,[109] but its critics argue that it cannot be identified with any particular polity that is currently in existence.[110] In addition, Habermas claimed that 'post-conventional' identities are most likely to emerge in times where national traditions have been put into question and where citizens feel ambivalent about affirming their historical traditions.[111] The issue is whether there exists any polity other than post-war Germany that would feel a sense of collective guilt to such an extent that it would abandon their existing national identities and traditions in favour of a constitutional patriotism.

Despite the prefix 'post' in notions such as 'post-conventional identity' and 'post-traditional society' Kostakopoulou points out that Habermas's contribution to the theory does not present any attack on the nation-state.[112] It represents a shade of civic nationalism that could quite easily be reappropriated to become restrictive in its values rather than inclusive.[113] Subsequently, Habermas's constitutional patriotism does nothing to include the TCN in the EU directly as it remains the prerogative of the nation-state to decide whether they are to be included.[114] To concur with Kostakopoulou, if Habermas's contribution is to mean anything it is to simply 'civilise' or 'tame' the nation.[115]

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[108] Dora Kostakopoulou, *The Future Governance of Citizenship* (CUP 2008) 67.
[109] Müller, *Constitutional Patriotism* (n 88) 3.
[110] Ivic, *EU Citizenship: Towards a Postmodern Conception of Citizenship?* (n 103) 83.
[111] Müller, *Constitutional Patriotism* (n 88) 30.
[112] Dora Kostakopoulou, 'Thick, Thin and Thinner Patriotisms: Is This All There Is?' (2006) 26 Oxford Journal of Legal Studies 73, 75-76; Kostakopoulou, *The Future Governance of Citizenship* (n 108) 68.
[113] ibid.
[114] David Abraham, 'Constitutional Patriotism, Citizenship, and Belonging' (2008) 6 ICON 137, 150-52.
[115] Kostakopoulou, *The Future Governance of Citizenship* (n 108) 69.

III.III Corrective European Identity

Joseph Weiler argued that European civic publics co-exist with national publics without threatening their importance.[116] Weiler recognised that the telos of European integration has been built upon the prospect of an ever closer union among the *peoples* of Europe as enshrined under Article 1 TEU. This statement alone can be taken to mean that the EU is not seeking to create a European nation, nor super state, but is instead concerned with the recognition and integration of the many different and separate national cultures.[117] Additionally, Article 4(2) TEU states explicitly that the national identities and institutions of the Member States are to be respected.

Weiler, unlike Habermas, does not require a written constitution in order for a European sense of peoplehood to emerge: 'What Europe needs, therefore, is not a constitution but an ethos and telos to justify, if it can, the constitutional order it has already embraced.'[118] Weiler contends that Habermas's constitutional patriotism continues to conflate citizenship and nationality to therefore make the former dependent upon possession of the latter notwithstanding the fact that Habermas sought to replace citizenship acquisition from ethnic nationality with constitutional values.[119] In addition, Weiler argues that the brand of constitutionalism that the EU has already embraced has appeared to work in the past and it should be asked

[116] JHH Weiler, 'European Neo-Constitutionalism: In Search of Foundations for the European Constitutional Order' (1996) 44 Political Studies 517, 526; Weiler, 'Introduction: European Citizenship, Identity and Differentity' (n 3) 16-17.
[117] JHH Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403, 2481; Weiler, 'Introduction: European Citizenship, Identity and Differentity' (n 3) 1 and 8.
[118] Weiler, 'European Neo-Constitutionalism: In Search of Foundations for the European Constitutional Order' (n 116) 518.
[119] ibid 527.

whether it is necessary to restructure this on the basis of a written constitution.[120] Arguably, it has been the Court of Justice, and not so much the European Parliament, Commission or Council that increasingly legitimised the Union citizen by managing to transform the Treaty of Rome into a quasi-constitution to subsequently lay the groundwork for an integrated EU polity.[121]

However, as alluded to in the previous section, some would reject the notion of a European demos: a collective grouping of European peoples, equivalent to a nation, who share a subjective collective identity and loyalty and an objective grounding based upon the cultural conditions on which a peoplehood depend, such as a shared history or language.[122] This claim is largely held upon the assumption that a top-down approach to citizenship and identity building cannot foster a sense of peoplehood. Subsequently, it is said that the EU institutions lack legitimacy when compared to those at the level of the nation-state.[123]

Weiler asks whether the European demos is to be understood exclusively in homogenous terms and whether or not it is possible to conceive a European demos based not upon an ethnic culture, but instead 'on the basis of shared values, a shared understanding of rights and societal duties and shared rational, intellectual culture which transcend organic-national differences.'[124] If ethnic ties and shared histories were to be replaced by such values, then it is argued that the outcome

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[120] See JHH Weiler, 'In Defence of the Status Quo: Europe's Constitutional *Sonderweg*' in JHH Weiler and Marlene Wind (eds), *European Constitutionalism Beyond the State* (CUP 2003) 9.
[121] Case 294/83 *Parti écologiste "Les Verts" v European Parliament* EU:C:1986:166, para 23; Opinion 1/91 (n 107) para 21. See also Dobson (n 6) 2.
[122] Weiler, 'European Neo-Constitutionalism: In Search of Foundations for the European Constitutional Order' (n 116) 523-24; Weiler, 'Introduction: European Citizenship, Identity and Differentity' (n 3) 8.
[123] See Weiler, 'Does Europe Need a Constitution Demos, Telos and the German Maastricht Decision' (n 23) 229-31 and 254; Weiler, 'Introduction: European Citizenship, Identity and Differentity' (n 3) 9.
[124] Weiler, 'Introduction: European Citizenship, Identity and Differentity' (n 3) 16. See also Weiler, 'To Be a European Citizen - Eros and Civilization' (n 44) 509.

would be the emergence of an additional, yet separate, European demos who carry their own EU identity that operates alongside their national cultures, interests and identities. The European demos would ultimately become those who are committed to the shared values of the EU as expressed in the EU Treaties. In other words, if a European demos is to emerge then national identities cannot function as the basis of its identity given that the EU is composed of citizens who do not share the same nationality.[125]

The question then is could this emergent European demos and emerging European identity act as a justification for the decoupling of citizenship from nationality? Could it be made possible to envisage an EU polity where its citizenship admission criteria are determined by adherence to civic values? It is argued that citizenship is not just about statehood and the introduction of Union citizenship should not be taken to mean that the EU is heading towards a statist direction.[126] Citizenship is not only about politics and the legitimacy of public authority; it is also about the social realities of peoplehood and the identity of the polity.[127] It is this that justifies the decoupling of Union citizenship from nationality. It is argued that Union citizenship does not require a foundation that is buried in national memories or myths: Europe should not be thought of either as creating the type of emotional attachments that have traditionally been associated with nationality-based citizenship.[128]

Rather than thinking about a European demos, Weiler argued that the decoupling of nationality and citizenship opens up the possibility for thinking of co-existing

[125] Weiler, 'To Be a European Citizen - Eros and Civilization' (n 44) 509; Weiler, 'Introduction: European Citizenship, Identity and Differentity' (n 3) 16.
[126] Weiler, 'Introduction: European Citizenship, Identity and Differentity' (n 3) 16.
[127] ibid 7.
[128] Weiler, 'To Be a European Citizen - Eros and Civilization' (n 44) 509.

multiple demoi.[129] In this sense it has been argued that the EU represents a demoi-cracy: 'a Union of peoples, understood as States and as citizens, who govern together but not as one.'[130] This idea posits that there is not a holistic EU democratic sphere.[131] If Union citizenship could detach itself from its exclusive relationship with nationality and base its admission criteria upon shared civic values, then this would invite the citizens 'to see themselves as belonging simultaneously to two *demoi*, based, critically, on different subjective factors of identification.'[132] In other words, they would belong to both the EU and their national communities simultaneously without one undermining the other.

If this is to be the case, then it should be asked whether this dispersal of peoples is able to generate sufficient solidarity among Union citizens to establish a European wide system of social welfare that is necessary for Union citizenship to meet the Marshallian standard of citizenship.[133] Bellamy and Castiglione argue that a pure cosmopolitan understanding of rights fails to create the thick social obligations that are necessary for these rights to be legitimised and enforced. It is said that a civic-

[129] Weiler, 'European Neo-Constitutionalism: In Search of Foundations for the European Constitutional Order' (n 116) 526; Weiler, 'Introduction: European Citizenship, Identity and Differentity' (n 3) 17.
[130] Kalypso Nicolaïdis, 'The Idea of European Democracy' in Julie Dickson and Pavlos Eleftheriadis (eds), *The Philosophical Foundations of European Union Law* (OUP 2010); Kalypso Nicolaïdis, 'The New Constitution as European "Demoi-cracy"?' (2004) 7 Critical Review of International Social and Political Philosophy 76; Nicolaïdis, 'The Political Mantra: Brexit, Control and the Transformation of the European Order' (n 25) 28. See also JHH Weiler, 'The Reformation of European Constitutionalism' (1997) 35 JCMS 97, 117-18; Lehning (n 27) 266; Francis Cheneval and Frank Schimmelfennig, 'The Case for *Demoicracy* in the European Union' (2013) 51 JCMS 334, 343.
[131] Jo Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 582-83. See also Samantha Besson, 'Deliberative Demoi-cracy in the European Union: Towards the Deterritorialization of Democracy' in Samantha Besson and José Luis Martí (eds), *Deliberative Democracy and its Discontents* (Ashgate 2006) 181-232; Samantha Besson and André Utzinger, 'Towards European Citizenship' (2008) 39 Journal of Social Policy 185; Kalypso Nicolaïdis, 'We, the People of Europe…' (2004) 83 Foreign Affairs 97; Koen Lenaerts and José A Gutiérrez-Fons, 'Epilogue on EU Citizenship: Hopes and Fears' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017) 756-57.
[132] Weiler, 'To Be a European Citizen - Eros and Civilization' (n 44) 509; JHH Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration* (CUP 1999) 346.
[133] Dobson (n 6) 56.

nationalism, or communitarian perspective, is required to reinforce these cosmopolitan ideals and to ensure that national welfare systems can function (a cosmopolitan-communitarianism).[134] In other words, an external outlook toward the EU must be substantiated by a civic-nationalism that supports its ideals. Therefore, it is said that Union citizens belong to concentric circles in a multi-level system of governance in which belonging can exist at the supranational, national and even regional levels with the same intensity of identity.[135] This work contends that the EU Treaties in this regard are to be seen as a supranational social contract that has been ratified in accordance with the constitutional requirements of each Member State.

III.IV Constructivist European Identity

Constructivism is capable of recognising that the notion of citizenship is as much a practice of identity as well as a legal concept.[136] In other words, institutions not only act to construct legal norms, but also identity.[137] A constructivist interpretation of European identity takes a holistic approach and views it as a task, or a process, that is never truly defined nor established and is therefore reformable.[138] This approach

[134] Richard Bellamy and Dario Castiglione, 'The Normative Challenge of a European Polity: Cosmopolitan and Communitarian Models Compared, Criticised and Combined' in Andreas Føllesdal and Peter Koslowski (eds), *Democracy and the European Union* (Springer 1998) 265-67.
[135] Weiler, 'Introduction: European Citizenship, Identity and Differentity' (n 3) 17. See also Hammar, *Democracy and the Nation State: Aliens, Denizens and Citizens in a World of International Migration* (n 39) 17-18; Rogers Brubaker, *Nationalism Reframed: Nationhood and the National Question in the New Europe* (CUP 1996) 43-44.
[136] Antje Wiener, 'The Constructive Potential of Citizenship: Building European Union' (1999) 27 Policy & Politics 271, 286.
[137] Martin Steinfeld, 'A Social-constructivist Approach Towards the Evolution of EU Citizenship' in Dora Kostakopoulou and Daniel Thym (eds), *Research Handbook on European Union Citizenship Law and Policy* (Edward Elgar 2022) 36.
[138] Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (n 8) 2 and 35-36.

recognises that the EU itself is an evolving community that has been, and will continue to be, subject to change and that its identity should also be flexible to accommodate such changes.

It is argued that the EU identity should be grounded upon the ethical responsibility to respect others and to welcome their differences. This is to represent a direct opposite to national identities that have traditionally defined a community on the basis of commonalities. The giving of status to others is not viewed as disintegration or the beginning of a fragmented community but instead, this proposal recognises that the European polity is already a community of diverse differences and does not seek to create a homogenous European people.[139] In sum, it is an attempt to provide both majority and minority cultures with equal status and rights to define the EU's public culture and future. Further clarification of this approach shall be provided in the following section to uncover how it has been used to justify the potential for a post-national Union citizenship.

III.V Summarising Conceptions of European Identity

It is contended that Weiler's conception of European Union identity provides the most persuasive account when coupled together with constructivist accounts of EU identity building. This work concurs with the idea that there does not need to be a European identity that has been underpinned by a European constitution nor through a European ethnic culture carrying its own memories or myths equivalent to national lore. Instead, this work accepts the multiple demoi argument to contend

[139] Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (n 8) 36-37.

that European belonging does not have to compete with national identities nor citizenships but can coexist alongside such interests.

Although Habermas advocates for a written European constitution, the difficulties of achieving such ought to be acknowledged. It is unlikely that the Member States will be willing to accept a European Union constitution in the contemporary EU. It is equally unlikely that a sense constitutional patriotism could be instilled towards this newfound constitution. Therefore, it is argued that the appropriate theoretical underpinning for the European identity ought to be established through adherence to the values and principles of the EU as currently established by the EU Treaties.

V. A Post-National Union Citizenship?

This work contends that if Union citizenship is to represent a form of post-national citizenship, then it must meet two criteria: first, it must provide the full set of Marshallian citizenship rights; and second, such rights must be granted without the requirement to first hold a Member State nationality. Although it appeared that Union citizenship in its initial stages took something of a Marshallian leap, the status can still exclude those who do not have sufficient resources from social rights.[140] Additionally, Union citizenship continues to exclude mobile Union citizens from the political right to vote in the national elections of their host Member State.[141] The political disenfranchisement of Union citizens in this regard represents an obvious barrier to movement.[142] The absence of such rights has led some to argue that

[140] See Case C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* EU:C:2014:2358; Case C-67/14 *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others* EU:C:2015:597
[141] Agustín José Menéndez and Espen D H Olsen, *Challenging European Citizenship: Ideas and Realities in Contrast* (Palgrave Macmillan 2020) ch 4.
[142] Jo Shaw, 'EU Citizenship and Political Rights in an Evolving European Union' (2007) 75 Fordham Law Review 2549.

Union citizenship represents no form of citizenship at all, given that it does not facilitate full inclusion in a manner that is comparable to the democratic and social state.[143] In respect to the holding of a Member State nationality, the status quo is maintained through Article 9 TEU and Article 20 TFEU. Although it has become increasingly difficult to maintain that Union citizenship represents a post-national status after Brexit, it arguably still represents the most elaborate form of this ideal.[144] Attempts to define Union citizenship upon post-national terms have indeed been made and such ideas are worth reconsideration.[145]

Yasemin Soysal considered the post-WWII denizens who came to rebuild Europe. It became evident that these peoples would remain within the European territory and consequently the access points to rights that had traditionally been associated with citizenship began to be established upon the basis of their lawful residence and their claims to universal human rights.[146] In other words, national identity and

[143] Menéndez and Olsen (n 141) 175. See also John Crowley, 'Some Thoughts on Theorizing European Citizenship' (1999) 12 Innovation 471, 474.
[144] Yasemin Nuhoğlu Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (The University of Chicago Press 1994) 148.
[145] See Weiler, 'To Be a European Citizen - Eros and Civilization' (n 44) 509; Richard Bellamy and Dario Castiglione, 'Between Cosmopolis and Community: Three Models of Rights and Democracy within the European Union' in Daniele Archibugi, David Held and Martin Köhler (eds), *Re-imagining Political Community: Studies in Cosmopolitan Democracy* (Polity Press 1998) 173; Shaw, 'Citizenship of the Union: Towards Post-National Membership?' (n 6); Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration* (n 132) 346; Jo Shaw, 'Citizenship and Electoral Rights in the Multi-Level "Euro-Polity": The Case of the United Kingdom' in Hans Lindahl (ed), *A Right to Inclusion and Exclusion?: Normative Fault Lines of the EU's Area of Freedom, Security and Justice* (Hart Publishing 2009) 258-59.
[146] David Jacobson, *Rights Across Borders: Immigration and the Decline of Citizenship* (John Hopkins UP 1997) 7 and 38-40. See also Hammar, *Democracy and the Nation State: Aliens, Denizens and Citizens in a World of International Migration* (n 39) 1; Guild (n 17) 14; Dobson (n 6) 26-27; David Owen, 'Citizenship and Human Rights' in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (OUP 2017) 258-59.

citizenship rights became increasingly decoupled[147] or unbundled[148] as the nation could no longer define the State.[149]

The ECtHR would give these migrants a voice and began to protect their long-term residence in their host territories. As a consequence, the human right to residence security in a State without being required to hold its nationality emerged.[150] To refuse such a right could undermine the liberal democratic values of Western society.[151] The use of Article 8 ECHR to justify a right to residence security indicated that the remarkable elasticity of nationality-based citizenship had begun to reach its limit.[152] In response, Soysal claimed that the admission criteria for a truly post-national Union citizenship should be based upon the values of universal personhood as found within the Universal Declaration of Human Rights and the European Convention of Human Rights.[153] Soysal contended that if such became possible, the outcome would be that nationality-based citizenship would become meaningless.[154]

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[147] Yasemin Nuhoğlu Soysal, 'Changing Citizenship in Europe: Remarks on Postnational Membership and the National State' in David Cesarani and Mary Fulbrook (eds), *Citizenship, Nationality and Migration in Europe* (Routledge 1996) 18.

[148] Will Kymlicka, 'Liberal Nationalism and Cosmopolitan Justice' in Robert Post (ed), *Another Cosmopolitanism* (OUP 2006) 138.

[149] Damian Tambini, 'Post-national Citizenship' (2001) 24 Ethnic and Racial Studies 195, 211-12. See also Zig Layton-Henry, 'The Political Rights of Migrant Workers in Western Europe' in Ursula Vogel and Michael Moran (eds), *The Frontiers of Citizenship* (Palgrave Macmillan 1991) 118.

[150] Daniel Thym, 'Residence as De Facto Citizenship? Protection of Long-term Residence Under Article 8 ECHR' in Ruth Rubio-Marin (ed), *Human Rights and Immigration* (OUP 2014) 107-08 and 129. See also David Jacobson and Galya Benarieh Ruffer, 'Courts Across Borders: The Implications of Judicial Agency for Human Rights and Democracy' (2005) 3 Human Rights Quarterly 74.

[151] Joseph H Carens, 'Aliens and Citizens: The Case for Open Borders' (1987) 49 The Review of Politics 251, 268-71.

[152] Dora Kostakopoulou, 'Why Naturalisation?' (2003) 4 Perspectives on European Politics and Society 85, 88; Kostakopoulou, *The Future Governance of Citizenship* (n 108) 199-200.

[153] Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (n 144) 148; Yasemin Nuhoğlu Soysal, 'Postnational Citizenship: Reconfiguring the Familiar Terrain' in Kate Nash and Alan Scott (eds), *The Blackwell Companion to Political Sociology* (Blackwell 2008) 336. See also David Jacobson and Zeynep Kilic, 'European Citizenship and the Republican Tradition' (2003) 12 The Good Society 31, 32; Saskia Sassen, 'Towards Post-national and Denationalized Citizenship' in Engin F Isin and Bryan S Turner (eds), *Handbook of Citizenship Studies* (Sage Publications 2002) 277-78.

[154] Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (n 144) 162.

However, Kostakopoulou criticised this approach arguing that it only recognises citizenship in formalistic terms and fails to recognise the subjective sense of belonging an individual has towards a political territory.[155] It is also argued that Soysal's post-national model of citizenship fails to recognise that the nation-state remains the guarantor of human rights in the EU given that the rights assured by the ECHR are derived through the States continued recognition of it. In other words, if the State is not a signatory to the ECHR then the individual would have no guarantee that their personhood will be protected.[156]

Instead, Kostakopoulou seeks to transcend the nationality-based model of Union citizenship by adopting a concept of constructive Union citizenship.[157] This concept directly tackles the criticism that it is merely a symbolic status by providing an account for its wider socio-political transformation.[158] The constructive model proposes that the acquisition criteria to Union citizenship should be grounded upon the principle of domicile following a period of five years of lawful residence.[159] Therefore, after five years of lawful residence in the EU the TCN would be automatically transformed into a Union citizen irrespective of whether they hold a Member State nationality.[160]

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[155] Theodora Kostakopoulou, 'Nested "Old' and "New" Citizenships in the European Union: Bringing Out the Complexity' (1999) 5 Columbia Journal of European Law 389, 392.
[156] Kostakopoulou, 'Thick, Thin and Thinner Patriotisms: Is This All There Is?' (n 112) 86. See also Randall Hansen, 'The Poverty of Postnationalism: Citizenship, Immigration, and the New Europe' (2009) 38 Theory and Society 1, 9.
[157] Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (n 8) 101.
[158] Kostakopoulou, *European Union Citizenship Law and Policy: Beyond Brexit* (n 43) 15.
[159] Kostakopoulou, 'European Union Citizenship as a Model of Citizenship Beyond the Nation State: Possibilities and Limits' (n 29) 157-59; Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (n 8) 103-04; Kostakopoulou, *The Future Governance of Citizenship* (n 108) 114; Dora Kostakopoulou, 'Who Should Be a Citizen of the Union? Toward an Autonomous European Union Citizenship' (2019) EUI Working Paper RSCAS 2019/24 <https://cadmus.eui.eu/handle/1814/62229> accessed 14 July 2020. See also Gareth Davies, '"Any Place I Hang My Hat" or: Residence Is the New Nationality' (2005) 11 ELJ 43, 55.
[160] Kostakopoulou, 'Nested "Old' and "New" Citizenships in the European Union: Bringing Out the Complexity' (n 155) 389, 406; Kostakopoulou, 'European Citizenship: Writing the Future' (n 1) 644; Kostakopoulou, *European Union Citizenship Law and Policy: Beyond Brexit* (n 43) 33.

Having a citizenship paradigm that prioritises domicile allows the individual to make a particular territory of their choosing the centre of one's interest.[161] At the heart of domicile lies the idea of a permanent home where the individual must intend to make the chosen country the hub of their interests in addition to their residence.[162] It is not be confused with residence where the person concerned only intends to live on the territory to a relatively fixed extent.[163] In other words, domicile not only links an individual to a territory, but also to its legal order.[164]

This proposal rethinks the notions of community, membership and belonging in the EU.[165] The foundation for building a European Union upon the basis of a Union citizenship should be the willingness to take part in the collective shaping of the community.[166] Democracy must be taken seriously by fostering processes of democratic decision-making and ought to include all those who express a will to share in a common experience.[167] In addition, its duties concern the promotion of equality, the tackling of xenophobic discourse and the combating of the marginalisation of any people.[168] If Union citizenship were to allow for this, then it would become a genuinely post-national status. Kostakopoulou argues that Union citizenship as grounded in Member State nationality undermines the constructive, transformative and socio-political potential that Union citizenship can offer.[169]

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[161] Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (n 8) 104.
[162] *Whicker v Hume* [1858] 7 WLUK 82; Kostakopoulou, *The Future Governance of Citizenship* (n 108) 113.
[163] Marie-José Garot, 'A New Basis for European Citizenship: Residence?' in Massimo La Torre (ed), *European Citizenship: An Institutional Challenge* (Kluwer Law International 1998) 236-37.
[164] ibid 238.
[165] Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (n 8) 106.
[166] ibid.
[167] Sheldon S Wolin, 'Democracy, Difference and Re-cognition' (1993) 21 Political Theory 464, 472.
[168] Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (n 8) 120.
[169] Theodora Kostakopoulou, 'Towards a Theory of Constructive Citizenship in Europe' (1996) The Journal of Political Philosophy 337; Kostakopoulou, 'Nested "Old' and "New" Citizenships in the European Union: Bringing Out the Complexity' (n 155) 393; Kostakopoulou, *Citizenship, Identity and*

However, constructive citizenship still holds that citizenship remains the best method to address the problem of unjust exclusion in the EU.[170] Kostakopoulou's argument is not to assume that the institution of citizenship has perished but rather that it must be remade to become more inclusive.[171] Such a redesign appears to be required given that the process of European integration has provided unprecedented expressions of political identifications.[172] Arguably, neither the cosmopolitan nor communitarian positions consider appropriately the complexity of the multi-level EU as both approaches fail to analyse how exclusion develops in nation-states.[173] Instead of being liberal or communitarian, it is argued that citizenship becomes 'connexive' as it becomes distributed to all participants in each network.[174]

It is unlikely that Union citizenship's acquisition will become dependent upon claiming a domicile due to reasons of political pragmatism given that certain actors may hold Aristotelian assumptions to claim that one cannot become a citizen through merely residing and then claiming a domicile within a territory.[175] However, the idea that citizens must be compact enough to know one another to participate

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Immigration in the European Union: Between Past and Future (n 8) 79; Kostakopoulou, 'European Citizenship: Writing the Future' (n 1) 627 and 642; Kostakopoulou, *European Union Citizenship Law and Policy: Beyond Brexit* (n 43) 14. See also Elizabeth Meehan, 'Political Pluralism and European Citizenship' in Percy Lehning and Albert Weale (eds), *Citizenship, Democracy and Justice in the New Europe* (Routledge 1997).

[170] Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (n 8) 101.

[171] Ayelet Shachar, 'The Future of National Citizenship: Going, Going, Gone' (2009) 59 University of Toronto Law Journal 579, 580.

[172] Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (n 8) 102.

[173] ibid. See also Carens (n 38) ch 8.

[174] Kostakopoulou, *The Future Governance of Citizenship* (n 108) 112.

[175] Aristotle (n 21) 169. See also Hammar, 'Citizenship: Membership of a Nation and of a State' (n 39) 745-46; Miller (n 5); Steve Peers, 'Building Fortress Europe: The Development of EU Migration Law' (1998) 35 CML Rev 1235, 1271-72; Steve Peers, 'Who is Watching the Watchmen? The Judicial System of the "Area of Freedom, Security and Justice" (1998) 18 YEL 337; Neil Walker, 'Denizenship and Deterritorialisation in the European Union' in Hans Lindahl (ed), *A Right to Inclusion and Exclusion?: Normative Fault Lines of the EU's Area of Freedom, Security and Justice* (Hart Publishing 2009) 261.

in a shared vision of the future fails to recognise that it is not just citizens who share this vision, but all those who live and work in that community and who are subject to its laws.[176] Although it is difficult to determine whether the TCN intends to remain within the political territory indefinitely, the State should nevertheless recognise their positive contributions.[177] Others would argue that such redesigns to citizenship would impact the welfare state as the automatic acceptance of migrants to Union citizenship may attract the self-interested citizen. The establishment of the welfare state has increased the need for nation-states to determine who is to be included but as Kostakopoulou notes, if they are contributing to national insurance schemes then it is questionable as to why TCNs should remain excluded.[178]

However, the self-interested citizen may emerge who in times of economic or political crisis would be free to move their resources and interests elsewhere. Shachar makes this point and considers it the main issue in not requiring citizens to demonstrate any degree of formal identification with a political territory.[179] The result may be a radical shift in the State's political economy resulting in the minimalist state where welfare systems cannot be sustained since the State becomes unable to motivate its citizens to contribute resources.[180] A residence-based or domicile based citizenship could end up benefitting those who are better off financially and those who are more culturally and politically aware and can afford to travel across international borders.[181] Additionally, it has also been argued that the granting of Union citizenship automatically runs counter to the liberal idea of consent. Kostakopoulou recognises this and argues that no one is forced into using their free

[176] Kostakopoulou, *The Future Governance of Citizenship* (n 108) 115.
[177] ibid 114-15.
[178] ibid 105.
[179] Shachar (n 171) 582-84.
[180] ibid 584. See also Crowley (n 143) 482.
[181] ibid 586.

movement rights but when they do, they are choosing where they prefer to act.[182] In other words, Union citizenship has little encroachment on people's lives if they decide to remain within their State of nationality.

Kostakopoulou's proposal for a post-national Union citizenship based upon the idea of a domicile sits within vague legal concepts that have long eluded clear legal definitions. It is unclear why the Member States would give up their gatekeeping role to allow for automatic admission to Union citizenship based solely upon a person's subjective intent to remain within its territory indefinitely.[183] Soysal's proposal for admission upon the basis of universal personhood fails to recognise that the values of such are not anchored directly within EU law. It is debatable as to why people should accept admission to Union citizenship upon principles that are found outside of the EU Treaty framework given that the nation-state would continue to determine who is afforded the status. However, and to concur with Kostakopoulou, if Union citizenship is to develop towards a genuine form of post-national citizenship that is uncoupled from the nationality principle, then its normative foundations and boundaries of membership must be rethought.[184]

If the EU is to be taken as a type of post-modern polity in that its citizens do not only derive their identities, rights and status from the nation but also from the EU, then this implies that a post-national citizenship should be established to complement its structure. Although Soysal was correct to state that Union citizenship does represent the post-national ideal in its most elaborate legal form,[185]

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[182] Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (n 8) 105.
[183] Shachar (n 171) 583.
[184] Kostakopoulou, 'Nested "Old' and "New" Citizenships in the European Union: Bringing Out the Complexity' (n 155) 393; Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (n 8) 79.
[185] Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (n 144) 148.

the status nevertheless fails to reflect this ideal. If Union citizenship is to fully realise its potential, then it must readdress the nationality principle as it is currently embedded within the EU Treaties. For as long as the holding of a Member State nationality continues to determine who can be a Union citizen, then the Union citizen shall remain grounded in the ethics of the nation and statehood.

The efforts to give Union citizenship an independent status have so far failed to be adopted in the Treaties.[186] The Treaties explicitly state 'that EU citizenship is a form of citizenship beyond the state, but not post-national in the sense meant by Soysal'.[187] In respect to Union citizenship being the fundamental status of Member State nationals, it is not clear that the *Grzelczyk* judgment represents a legal argument as this cannot be squared with the text, teleology and legislative history of the Treaties.[188] If anything, it can be said that Article 20 TFEU suggests that national citizenship is intended to be the fundamental status of Member State nationals.[189] Additionally, the Member States have refused to accede to the European Parliament, Commission and the Court of Justice to harmonise their nationality legislation given that the Treaties specify that policies regarding the acquisition and loss of Member State nationality, and therefore Union citizenship, remain within the competence of the Member States.[190]

[186] Willem Maas, 'European Governance of Citizenship and Nationality' (2016) 12 Journal of Contemporary European Research 532, 534.
[187] Martijn van den Brink, 'EU Citizenship and (Fundamental) Rights: Empirical, Normative, and Conceptual Problems' (2018) 25 ELJ 1, 10. See also Hansen (n 156) 6.
[188] Joseph HH Weiler, 'Epilogue: Judging the Judges – Apology and Critique' in Maurice Adams and others (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013) 248.
[189] Martijn van den Brink, 'The Relationship Between National and EU Citizenship: What is it and What Should it Be?' in Dora Kostakopoulou and Daniel Thym (eds), *Research Handbook on European Union Citizenship Law and Policy* (Edward Elgar 2022) 105.
[190] Maas, 'European Governance of Citizenship and Nationality' (n 186) 544.

This emphasises the sovereignty of the nation-state in determining who can acquire Union citizenship.[191] Therefore, Union citizenship can only be considered a post-national status in so far that it extends the national citizenships of the Member States into a system of multi-level governance in the EU.[192] In other words, an individual is only able to acquire Union citizenship if their state of nationality either chooses to become or remain as a Member State of the EU. Failing this they would have to acquire the nationality of another Member State. This is to represent the limits of Union citizenship as a post-national citizenship.

If a Member State chooses to no longer operate within the EU, then its nationals would cease to be Union citizens: an amendment to the Treaties would be required to alter this position.[193] This is how Brexit has undermined the ideas that have sought to supply Union citizenship with a post-national foundation. Although it can be said that the UK abandoned its ties to the EU paradigm of identity building and belonging, UK nationals need to be taken seriously as post-European Union TCNs.[194] The reason for such is due the fact that these peoples share in the EU identity given that they had previously been Union citizens. However, if the current condition of EU law recognises that a Member State withdrawal from the EU institutions renders its nationals as TCNs, then Union citizenship is incapable of being a truly post-national status upon this basis alone.

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[191] Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (n 144) 159-60.
[192] Carole Lyons, 'Citizenship in the Constitution of the European Union: Rhetoric or Reality?' in Richard Bellamy (ed), *Constitutionalism, Democracy and Sovereignty: American and European Perspectives* (Avebury 1996) 97-98.
[193] Brink, 'The Relationship Between National and EU Citizenship: What is it and What Should it Be?' (n 189) 101.
[194] See Ghia Nodia, 'The End of the Postnational Illusion' (2017) 28 Journal of Democracy 5, 11. See also Eleanor Spaventa, 'Mice or Horses? British Citizens in the EU 27 After Brexit as "Former EU Citizens"' (2019) 44 EL Rev 589.

It is becoming increasingly difficult to maintain that Europe is moving toward post-national ideals.[195] It can be said that confusion over sources of authority and decision making in the EU has facilitated a continued identification with the individual's state of nationality.[196] If Union citizenship is to become a post-national status, then it must be capable of guaranteeing legal rights to its citizens even when a Member State no longer wishes to participate within the EU. The argument put forward by Weiler for Union citizenship to become based upon a legitimately held identity to the EU in the place of Member State nationality would allow for such. Currently, Union citizenship is still embedded at the level of the nation-state and will remain so if the status continues to be acquired by way of Member State nationality. However, this position is unlikely to change given that the Member States would value the preservation of their sovereignty in this regard.[197]

The result of Union citizenship being confined within a statal paradigm is that the status remains an exclusionary membership scheme that operates at the supranational level as opposed to the national level. The status fails to remove the 'us' and 'them' binaries but merely shifts these up towards the supranational level. In other words, the EU only widens the scope of who can be included, it does not directly tackle the exclusion of those who do not legally belong to it through their Member State nationalities. Therefore, perhaps the best description of Union citizenship is that it operates more like a multi-level citizenship as opposed to a post-national one given that it has created a new political sphere that is additional to and

[195] ibid.
[196] Mathieu Deflem and Fred C Pampel, 'The Myth of Postnational Identity: Popular Support for European Unification' (1996) 75 Social Forces 119, 137,38.
[197] Yong (n 33). See also Dimitry Kochenov and Justin Lindeboom, 'Pluralism Through Its Denial: The Success of EU Citizenship' in Gareth Davies and Matej Avbelj (eds), *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar 2018) 180 and 196.

above their nation-state yet is still tied to it.[198] Therefore, it appears correct to claim that no genuine post-national shift has yet occurred.

At present it may be fair to say that the EU has achieved a type of Europeanisation of the national citizenships of its Member States. The EU and its Member States must decide if Union citizenship is to remain a status that is solely dependent upon the holding of a Member State nationality, or whether it can also become grounded upon the acceptance of the values of the EU.[199] It is said here that if Union citizenship is to become a truly post-national status, then the EU and its Member States need to have due regard to the fact that the EU identity acts as the core of Union citizenship. Until such takes place, the status shall remain a form of multi-level citizenship in Europe that merely extends the national citizenships of the Member States and can be taken away upon a Member State withdrawal from the EU.[200]

VI. Conclusion

The EU Member States have retained their gatekeeping character by only allowing those who hold their nationality to be Union citizens. Therefore, it cannot be said with any serious weight that Union citizenship currently represents a form of post-national citizenship given that those who do not hold such a nationality cannot claim

[198] Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism' (n 132) 578. See also Besson and Utzinger (n 131) 196; Maas, 'European Governance of Citizenship and Nationality' (n 186) 544; Rainer Bauböck, 'The Three Levels of Citizenship Within the European Union' (2014) 15 German Law Journal 751, 752.
[199] Weiler, 'Introduction: European Citizenship, Identity and Differentity' (n 3).
[200] See Case C-673/20 *EP v Préfet du Gers and Institut national de la statistique et des études économiques (INSEE)* EU:C:2022:449 ; Case C-499/21 P *Joshua David Silver and Others v Council of the European Union* EU:C:2023:479. See also Case C-501/21 P *Harry Shindler and Others v Council of the European Union* EU:C:2023:480; Case C-502/21 P *David Price v Council of the European Union* EU:C:2023:482.

entitlement to it. The withdrawal of the United Kingdom from the European Union and the removal of Union citizenship for UK nationals appears to have confirmed this position.

However, it can be said that there is a sufficient theoretical basis for establishing Union citizenship as a truly post-national status given that there does exist a legitimate European Union identity that has shifted beyond the traditional notions of national belonging. The argument made here is that an identity is a necessary precondition if a legal status of citizenship is to be legitimised by the people it represents. In other words, identity represents the core of citizenship and acts as the social precursor to the construction of a legal status of citizenship and it ought to be recognised that it is not only Union citizens who share in this identity but all those who adhere to the values and principles that are underpinned by it. It is also said here that the identities people have towards the EU have grown exponentially, albeit at varying levels of intensity.

This chapter concurs with Weiler and his argument proclaiming that the EU identity has been engendered through the adherence to and in the promotion of the common values and principles of the EU and that such are already underpinning Union citizenship. Therefore, should it not be the case that those who share in this identity to the EU should also be allowed to participate as full and equal members through Union citizenship? Here it is contended that Weiler's proposal for a European identity provides the most convincing account for underpinning a Union citizenship that is truly post-national in its nature. In other words, it is this identity that represents the consistent theme running throughout European belonging and it ought to be questioned as to why admission to Union citizenship has remained

limited only to those who hold a Member State nationality given that those who do not meet these criteria are capable of sharing in this identity.

Although Brexit has removed the Union citizenship of UK nationals, it is said here that UK nationals as post-European Union citizens continue to share in the European Union identity. In other words, it is recognised here that a withdrawal from the EU is incapable of stripping an individual of their EU identity: although it is possible to strip an individual of the legal construction that is Union citizenship, it is not possible to strip them of the social construction that is their European Union identity. Consequently, it is argued that there exists the theoretical possibility that those who do not hold a Member State nationality could be admitted to Union citizenship upon alternative criteria provided that such peoples share in this identity to the EU. It is argued here that the EU and its Member States should have due regard to the EU identity when considering the criteria for admission to Union citizenship as to allow for such would realise the potential for a truly post-national Union citizenship that is capable of meeting the Marshallian standard of citizenship.

PART III

Chapter V

Brexit

I. Introduction

Prior to Brexit, a Member State had never triggered Article 50 TEU to withdraw from the EU and deprive its nationals of their Union citizenship.[1] There have been arguments to claim that the Treaties make no provisions for the loss of Union citizenship upon the withdrawal of a Member State.[2] However, this chapter argues the contrary given that Article 50(3) TEU states explicitly that the Treaties shall cease to apply following the ratification of a Withdrawal Agreement, or, failing this, two years after the Article 50 notification unless an extension is unanimously agreed. Once the Treaties ceased to apply in the UK, the UK was no longer an EU Member State. Without the UK acting as an EU Member State, its nationals could no longer be nationals of an EU Member State. Therefore, pursuant to Article 9 TEU and Article 20 TFEU, UK nationals can no longer be Union citizens under the current framework of EU law. On this basis, the idea of Union citizenship representing a post-national status appears to have been overplayed.[3]

[1] Dimitry Kochenov, 'EU Citizenship and Withdrawals from the Union: How Inevitable Is the Radical Downgrading of Rights?' in Carlos Closa (ed), *Secession from a Member State and Withdrawal from the European Union: Troubled Membership* (CUP 2017) 273.
[2] Clemens M Rieder, 'The Withdrawal Clause of the Lisbon Treaty in the Light of EU Citizenship (Between Disintegration and Integration)' (2013) 37 Fordham International Law Journal 147, 172.
[3] Gerard Delanty, 'European Citizenship: A Critical Assessment' (2007) 11 Citizenship Studies 63, 64.

This chapter is to provide an explanatory overview of Brexit and is structured as follows: first, an account of the Brexit referendum and the Article 50 TEU procedure shall be provided; second, an account of how the Brexit Withdrawal Agreement has affected the rights and status of UK nationals and Union citizens will be given; third, an explanatory account of the post-Brexit tension surrounding the Northern Ireland Protocol shall be provided; and, finally, the chapter provides its conclusions maintaining that, under the current framework of EU law, UK nationals have indeed lost their Union citizenship as a result of Brexit.

II. Brexit

II.I The Referendum: The Cameron Era

The three main justifications for the referendum were concerns regarding a lack of EU identity in the UK and losing sovereignty over immigration and economic policy.[4] Free movement was seen to undermine UK sovereignty given that net migration to the UK increased following the 2004 EU enlargement project. This would lead some to believe that further pressure would be put on public services. Such concerns led to the election of the Conservative coalition government led by David Cameron and Nick Clegg in 2010 upon the promise to reduce net migration. The European Union Act 2011 became UK law and subsequently any further revisions to the EU Treaties would have to be authorised by a referendum.[5] In 2012, Theresa May, then Home

[4] Nathaniel Copsey and Tim Haughton, 'Farewell Britannia? "Issue Capture" and the Politics of David Cameron's 2013 EU Referendum Pledge' (2014) 52 JCMS 74, 81; John Curtice, 'Why Leave Won the UK's EU Referendum' (2017) 55 JCMS 1, 3; Brigid Laffan, 'Sovereignty: Driving British Divergence' in Federico Fabbrini (ed), *The Law & Politics of Brexit Volume III: The Framework of New EU-UK Relations* (OUP 2021).
[5] See Paul Craig, 'The European Union Act: Locks, Limits and Legality' (2011) 48 CMLR 1915.

Secretary, proudly announced that the UK Home Office would create a hostile environment for illegal migrants. In 2013, David Cameron, then Prime Minister, promised to renegotiate the terms of UK membership in the EU and to put the outcome of those negotiations to the electorate in the form of an in/out referendum if he were to be re-elected.[6] Cameron would win an overall majority in the 2015 UK general election.

The 18-19 February 2016 European Council would see Camron renegotiate Article 7 of Regulation 492/2011 on the employment and equality of treatment for workers to allow for a brake on newly arrived Union citizens from accessing welfare benefits.[7] It was claimed that the UK had a certain pull factor given its generous social security system.[8] However, this overlooked how the UK's employment market had become increasingly reliant upon zero-hour contracts and low-paid work that is often only possible through claiming in-work benefits.[9] It was also argued that neither proposal would have any major effect upon EU migration while introducing blatant discrimination against Union workers on the basis of their nationality.[10]

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[6] David Cameron, 'EU Speech at Bloomberg' (*Gov.UK*, 23 January 2013) <https://www.gov.uk/government/speeches/eu-speech-at-bloomberg> accessed 11 August 2022; Copsey and Haughton (n 4) 74-75. See also Andrew Gamble, 'Better Off Out? Britain and Europe' (2012) 83 Political Quarterly 468, 468.

[7] Decision of the Heads of State of Government meeting within the European Council, concerning a New Settlement for the United Kingdom within the European Union, Annex I to the Conclusions of the European Council Meeting (18/19 February 2016 (Brussels, 19 February 2016, EUCO 1/16,8. See also Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L141/1; Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L166/1; Regulation (EC) No.987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No. 88/2004 on the coordination of social security systems [2009] OJ L284/1.

[8] See David Cameron, 'David Cameron's Immigration Speech' (*Gov.UK*, 25 March 2013) <https://www.gov.uk/government/speeches/david-camerons-immigration-speech> accessed 12 January 2023.

[9] Keith Puttick, 'EEA Workers' Free Movement and Social Rights After *Dano* and *St Prix*: Is a Pandora's Box of New Economic Integration and "Contribution" Requirements Opening?' (2015) 37 Journal of Social Welfare and Family Law 253.

[10] Jonathan Portes, 'Immigration, Free Movement and the EU Referendum' (2016) 236 National Institute Economic Review 14; Stephanie Reynolds, '(De)constructing the Road to Brexit: Paving the Way to Further Limitations on Free Movement and Equal Treatment?' in Daniel Thym (ed),

Additionally, the negotiations would grant the UK 'red card' powers to veto EU legislative proposals and to provide for an amendment to the EU Treaties to make a clear statement that the UK would be exempt from the ever-closer union.[11] It was announced that the EU referendum would take place on 23 June 2016. Cameron stated that a special status had been secured and that the UK would be 'safer, stronger and better off in a reformed European Union'.[12]

The Remain campaign was officially led by Britain Stronger in Europe and argued for the economic benefits of continued UK membership. The EU was to be seen as an economic project as opposed to a citizens Europe. Union citizenship, EU identity and the peace achieved throughout the continent would hardly feature throughout their campaign.[13] The leave campaign was officially led by Vote Leave and would concentrate on the financial contributions that the UK made to the EU, the fact that the UK had to accept the supremacy of CJEU judgments and talked of the benefits of being able to strike independent trade deals.

The argument for Leave became subject to much controversy.[14] The Brexit bus, which claimed that cutting UK contributions to the EU budget would give the NHS an extra £350 million per week, was one contentious instance. Further, Nigel Farage, a part of the unofficial Leave.EU campaign, unveiled his 'Breaking Point' poster that pictured migrants fleeing conflicts in the Middle East at the Croatian-

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Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU (Hart Publishing 2017) 59.

[11] Michael Gordon, 'The UK's Sovereignty Situation: Brexit, Bewilderment and Beyond…' (2016) 27 King's Law Journal 333, 334.

[12] David Cameron, 'PM Statement Following Cabinet Meeting on EU Settlement, 20 February 2016' (*Gov.UK*, 20 February 2016) <https://www.gov.uk/government/speeches/pms-statement-following-cabinet-meeting-on-eu-settlement-20-february-2016> accessed 23 August 2022.

[13] See Christopher McCrudden, 'Introduction' in Christopher McCrudden (ed), *The Law and Practice of the Ireland-Northern Ireland Protocol* (CUP 2022) 1. See also Oliver Garner, 'Does Member State Withdrawal Automatically Extinguish EU Citizenship?' in Dora Kostakopoulou and Daniel Thym (eds), *Research Handbook on European Union Citizenship Law and Policy* (Edward Elgar 2022).

[14] See Michael Dougan, 'Editor's Introduction' in Michael Dougan (ed), *The UK After Brexit: Legal and Policy Challenges* (Intersentia 2017) 6.

Slovenian border and conflated this issue with EU freedom of movement.[15] Additionally, it would later emerge that Leave.EU broke electoral spending laws.

There was a clear social divide that was demonstrated by the referendum outcome.[16] However, and more importantly, Kostakopoulou correctly asserts that the result of the referendum saw the status of an estimated 3.9 million Union citizens resident on UK territory transform into 'guests' or 'foreigners' in a community they consider their own.[17] The UK electorate had appeared to reject not only Cameron's deal but also the very concept of supranationalism and, for the first time, European integration was being reversed.[18] Perhaps worse still is that many UK nationals who had resided abroad for fifteen years or more were disenfranchised from the referendum.[19] It is likely that these peoples would have voted to remain given that their residence rights had been derived from their Union citizenship.

In effect, the referendum result was UK nationals voting collectively to abandon their Union citizenship. In 2017, Patricia Mindus argued that the loss of Union citizenship

[15] Tim Shipman, *All Out War: The Full Story of Brexit* (HarperCollins 2016) 389-90.
[16] See Curtice (n 3) 16; Robert Tombs, *This Sovereign Isle: Britain In and Out of Europe* (Penguin 2021) 60-67.
[17] Dora Kostakopoulou, *European Union Citizenship Law and Policy: Beyond Brexit* (Edward Elgar Publishing Ltd 2020) 8. See also Catherine Barnard, Sarah Fraser Butlin and Fiona Costello, 'The Changing Status of European Union Nationals in the United Kingdom Following Brexit: The Lived Experience of the European Union Settlement Scheme' (2021) 31 Social & Legal Studies 365, 369-71.
[18] Douglas Webber, 'How Likely Is It That European Integration Will *Dis*integrate? A Critical Analysis of Competing Theoretical Perspectives' (2013) 20 European Journal of International Relations 341. See also Markus Patberg, 'The Levelling Up of Constituent Power in the European Union' (2017) 55 JCMS 203, 212.
[19] See also *Shindler v UK* (2013) App no 19840/09 (ECtHR, 7 May 2013); *R (on the Application of Shindler and Another) (Appellants) v Chancellor of the Dutchy of Lancaster and another (Respondents)* [2016] EWCA Civ 469, [2017] QBD 226. See also Ruvi Ziegler, 'The Brexit Referendum: We Need to Talk About the (*General Election*) Franchise' (*UK Constitutional Law Association*, 7 October 2015) <https://ukconstitutionallaw.org/2015/10/07/ruvi-ziegler-the-brexit-referendum-we-need-to-talk-about-the-general-election-franchise/> accessed 17 December 2020; Samo Bardutzky, 'The Position of EU Citizens in the UK and of the UK Citizens in the EU27 Post-Brexit: Between Law and Political Constitutionalism' in Nazaré da Costa Cabral, José Renato Gonçalves and Nuno Cunha Rodrigues (eds), *After Brexit: Consequences for the European Union* (Palgrave Macmillan 2017) 234; Kostakopoulou (n 17) 145; Willem Maas, 'European Citizenship in the Ongoing Brexit Process' (2021) 58 International Studies 168, 171.

for UK nationals would be involuntary given that 48% of the active electorate expressed their intention to remain, with certain territories overwhelmingly expressing this desire.[20] William Worster added to the line of argument stating that the removal of Union citizenship would be unjustified given that the question on the referendum ballot did not contain any mention of losing Union citizenship.[21] Interestingly, the second most Googled question in the UK the day after the Brexit referendum read simply 'what is the EU?'[22] To agree with d'Oliveira, the status had not really sunk in, and many people only became aware of it because of Brexit.[23] Perhaps this should not be taken as a mere gaffe on the part of the UK electorate but rather as a failure of the EU to offer a coherent explanation to its citizens regarding its structure, how its authority is legitimised and what benefits it offers to its citizens.

One central concern over the referendum result was whether we ought to accept political judgements that have been formed due to disinformation or outright lies.[24] However, the social contract theory and the works of Locke and Rousseau should be taken into consideration. This concerns the will of the majority in political judgements; Locke argued that every man consenting with others to make one political body therefore puts themselves under the obligation to submit to the decision of the majority.[25] Rousseau on his idea of the General Will argued that it is

[20] Patricia Mindus, *European Citizenship After Brexit: Freedom of Movement and Rights of Residence* (Palgrave Macmillan 2017) 78.
[21] William Thomas Worster, 'Brexit as an Arbitrary Withdrawal of European Union Citizenship' (2021) 33 Florida Journal of International Law 95, 131.
[22] Brian Fung, 'Britons Are Frantically Googling What the EU Is After Voting to Leave it' (*Independent*, 24 June 2016) <https://www.independent.co.uk/news/uk/politics/britons-are-frantically-googling-what-eu-after-voting-leave-it-a7101856.html> accessed 28 June 2021. See also Signe Rehling Larsen, *The Constitutional Theory of the Federation and the European Union* (OUP 2021) 1.
[23] Hans Ulrich Jessurun d'Oliveira, 'Union Citizenship and Beyond' in Nathan Cambien, Dimitry Kochenov and Elise Muir (eds), *European Citizenship Under Stress* (Brill Nijhoff 2020) 28.
[24] See Ivor Gaber and Caroline Fisher, '"Strategic Lying": The Case of Brexit and the 2019 U.K. Election' (2021) 27 The International Journal of Press/Politics 460, 468-71.
[25] John Locke, *Second Treatise of Government* (first published 1689, OUP 2016) 49.

always rightful although the judgement that guides it is not always enlightened.[26] On the one hand, exercising 'the will of the people' provides some justification, yet, on the other, it demonstrates how the preconceived and Enlightened notions of the nation and the State have continued to determine EU membership and the continuity of Union citizenship. However, Ghia Nodia has argued that any attempts to liberate democracy from the people is unlikely to end well and could lead to larger majorities producing outcomes that we do not like.[27] In other words, the constitutional requirements of the UK hold that whatever the sovereign enacts in Parliament is law.[28] Perhaps the last word on this is best left for David Cameron:

> Yes, there was fake news. But there was also the biggest distribution of leaflets in recent British history. There was a ubiquitous campaign led by the most well known and respected voices. The view that the people aren't qualified to vote on an issue that is so complex and important is one that I do not share.[29]

II.II The Negotiations: The May Era

The day after the referendum, David Cameron would resign. In his resignation speech he remarked that 'the will of the British people is an instruction that must be delivered.'[30] However, there are two points to consider: first, the European Union Referendum Act 2015 made no provision for the result to be legally binding; second, the concept of a legally binding referendum runs counter to what is widely regarded as the core principle of the UK's constitution, that of Parliamentary sovereignty.[31]

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[26] Jean-Jacques Rousseau, *The Social Contract* (first published 1762, Penguin Classics 1968) 83.
[27] Ghia Nodia, 'The End of the Postnational Illusion' (2017) 28 Journal of Democracy 5, 18.
[28] See HLA Hart, *The Concept of Law* (first published 1961, 3rd edn, OUP 2012) 107 and 116.
[29] David Cameron, *For the Record* (William Collins 2020) 699.
[30] David Cameron, 'EU Referendum Outcome: PM Statement, 24 June 2016' (*Gov.UK*, 24 June 2016) <https://www.gov.uk/government/speeches/eu-referendum-outcome-pm-statement-24-june-2016> accessed 23 August 2022.
[31] Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (first published 1885, Forgotten Books 1982) 38. See Gordon (n 11) 337 for an alternative point of view.

Following a Conservative leadership contest Theresa May was installed as the UK Prime Minister. On 17 January 2017 in her Lancaster House speech, May set out her red lines for the Brexit negotiations with a clear commitment to securing the continued rights of Union citizens and UK nationals after Brexit. However, the possibility for a type of associate EU membership was ruled out. This would further exacerbate political infighting within the Conservative Party over what the outcome of Brexit ought to look like.[32]

May had hoped that Article 50 TEU could be triggered to begin the formal withdrawal procedure. However, Article 50(1) TEU states that the withdrawing state must leave according to its own constitutional requirements. The UK Government sought to trigger Article 50 as an act of Royal Prerogative to avoid the need for an Act of Parliament to approve the UK's notification to withdraw. Further, this decision would become subject to much scrutiny given that the government sought to trigger the Article without first consulting the devolved legislatures of Scotland, Wales and Northern Ireland.[33]

This issue would ultimately be decided by the UK Supreme Court (UKSC) which ruled that the UK government could not invoke Article 50 TEU without an Act of Parliament mandating it to do so.[34] The UKSC ruled that the UK's dualist constitutional system meant that the transposition of EU law in the UK legal system through the European Communities Act 1972 had created a new and direct source of UK domestic law.[35] This shifted the legal question from the domain of international

[32] Emily Jones, 'The Negotiations' in Federico Fabbrini (ed), *The Law & Politics of Brexit Volume II: The Withdrawal Agreement* (OUP 2020) 37. See also Tim Shipman, *Fall Out: A Year of Political Mayhem* (HarperCollins 2017).
[33] See Sionaidh Douglas-Scott, 'The Future of the United Kingdom After Brexit' in Federico Fabbrini (ed), *The Law & Politics of Brexit Volume II: The Withdrawal Agreement* (OUP 2020) 236-37.
[34] *R (on the Application of Miller and Another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61, [50], [61], [67], [78], [81]-[82], [86] and [222].
[35] ibid [61] and [86]. See also Paul Craig, 'The Process: Brexit and the Anatomy of Article 50' in Federico Fabbrini (ed), *The Law & Politics of Brexit* (OUP 2017) 49-57; Keith Ewing, 'Brexit and

law, in which the prerogatives of the Crown normally operate and into the domain of domestic law, in which the principle of Parliamentary sovereignty operates.[36] Subsequently, the government would issue a bill to Parliament that would become the European Union (Notification of Withdrawal) Act 2017 which later received Royal assent on 16 March 2017. Article 50 was formally triggered on 29 March 2017 and thus began the two-year negotiation period as set out under Article 50(2). Much was said about the timing of the notification. However, the decision to trigger Article 50 was valid.[37]

Ultimately, the withdrawal negotiations did not go according to plan. May would later change her outlook on Brexit away from the 'no deal is better than a bad deal' position and would later accept in her Mansion House speech (2 March 2018) that an orderly Brexit would ultimately require compromises, including a continued role for the Court of Justice for a limited time post-withdrawal. Article 50(3) was used on two occasions to extend the withdrawal deadline, meaning that the UK remained a full Member State of the EU and its nationals remained Union citizens who could participate in the 2019 elections to the European Parliament.[38] Throughout this period the Court of Justice ruled that the UK's withdrawal notification could be unilaterally rescinded through a further Act of Parliament.[39] Additionally, May's Government was found to have been in contempt of Parliament for the first time in

Parliamentary Sovereignty' (2017) 80 MLR 711; Daniel Wincott, John Peterson and Alan Convery, 'Introduction: Studying Brexit's Causes and Consequences' (2017) 19 The British Journal of Politics and International Relations 429.

[36] Nicholas Aroney, '*R (Miller) v Secretary of State for Existing the European Union*: Three Competing Syllogisms' (2017) 80 MLR 726, 738.

[37] See *R (on the Application of Elizabeth Webster) v Secretary of State for Exiting the European Union* [2018] EWHC 1543 (Admin), [2019] 1 CMLR 8.

[38] See Federico Fabbrini and Rebecca Schmidt, 'The Extensions' in Federico Fabbrini (ed), *The Law & Politics of Brexit Volume II: The Withdrawal Agreement* (OUP 2020) 71.

[39] Case C-621/18 *Andy Wightman and Others v Secretary of State for Exiting the European Union* EU:C:2018:999, paras 50, 57 and 65. See also Aurel Sari, 'Reversing a Withdrawal Notification Under Article 50 TEU: Can a Member State Change Its Mind? (2017) 42 EL Rev 451, 472-73.

UK history, given that it did not publish all legal advice it had received regarding the draft withdrawal agreement. May would later face a confidence vote which she won by a slim margin.

The two words that could best summarise the May era would be the following: parliamentary deadlock. May will perhaps be best remembered for her miscalculation in calling an early general election in 2017. The election resulted in a hung parliament and the Conservative Party forming a minority government with the Democratic Unionist Party (DUP). It would be fair to say this arrangement was an unstable one given the DUP's refusal to accept May's Brexit deal and the Irish backstop given the possibility of a trade border in the Irish Sea that could undermine Northern Ireland's position in the UK. This is what subsequently left the UK in a weaker position when starting the formal withdrawal negotiations with the European Commission.[40]

However, the May era secured several objectives: first, the majority of what would become the Withdrawal Agreement was agreed, including the citizens' rights aspect, which shall be accounted for in the following section; second, was the passing of the European Union (Withdrawal) Act 2018 that would convert the EU legal *acquis* into UK law upon withdrawal and establish a new category of domestic legislation aptly titled 'retained EU law' to which Parliament can now either retain, amend or repeal;[41] and third, May's cabinet provided the framework for the future relationship between the UK and EU.[42]

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[40] Federico Fabbrini, 'Introduction' in Federico Fabbrini (ed), *The Law & Politics of Brexit Volume II: The Withdrawal Agreement* (OUP 2020) 3-6.
[41] See European Union (Withdrawal) Act 2018, s.2-7. See also Department for Exiting the European Union, *Legislating for the United Kingdom's Withdrawal from the European Union* (Cm 9446, 2017) 1.13; Department for Exiting the European Union, *Legislating for the Withdrawal Agreement Between the United Kingdom and the European Union* (Cm 9674, 2018) 60-62.
[42] See Paul Craig, 'The Ratifications' in Federico Fabbrini (ed), *The Law & Politics of Brexit Volume II: The Withdrawal Agreement* (OUP 2020) 83 and 96.

Nevertheless, Theresa May's draft withdrawal agreement failed to pass through the House of Commons on three occasions despite her promise to resign if successful.[43] The Irish backstop would ultimately prevent its passing.[44] If successful, May's proposals would have prevented the UK from striking independent trade deals with third countries while also continuing the role of the CJEU. Such concessions would prompt high-profile resignations from Boris Johnson, then Foreign Secretary, and David Davis, then Secretary of State for Exiting the EU, and later his successor Dominic Rabb. May ultimately resigned on 24 May 2019 following the failure of her draft Brexit agreement and given the success of the single-issue Brexit Party in the 2019 election to the European Parliament. Arguably, the fact that the UK had to hold EP elections some thirty-five months after voting to leave the EU was in itself an indication that the Brexit process was failing.[45]

II.III The Negotiations: The Johnson Era

Following another Conservative leadership contest, Boris Johnson became the UK Prime Minister on 24 July 2019. Although Johnson sought to renegotiate the Irish backstop, he would nevertheless commit to leave the EU on 31 October 2019, with or without a deal. What followed was a prorogation of Parliament that was ruled to be unlawful by all eleven justices of the UKSC given that this was an attempt to force through a no deal Brexit without being subject to proper Parliamentary scrutiny.[46]

[43] See European Union (Withdrawal) Act 2018, s.13.
[44] See HM Government, *The Future Relationship Between the United Kingdom and the European Union* (Cm 9593, 2018).
[45] Fabbrini (n 40) 15.
[46] *R (on the Application of Miller) v The Prime Minister* and *Cherry and Others v Advocate General for Scotland* [2019] UKSC 41, [2020] AC 373 [61], [69].

Parliament was recalled on 25 September 2019 and on 2 October 2019 the government published its White Paper outlining its plan to replace the Irish backstop.

On 17 October 2019, the UK, European Commission and European Council agreed to a revised Withdrawal Agreement containing a new protocol on Northern Ireland and a new non-binding Political Declaration setting out the future vision for UK/EU relations. The revised NI Protocol was negotiated for democratic reasons given that NI did not vote for Brexit.[47] The Protocol sought to respect the Good Friday Agreement (GFA), the UK-Ireland Common Travel Area and ensured that no physical border controls, checks on goods nor tariffs would be in place at the Irish land border.[48] Additionally, paragraph 136 of the Political Declaration commits both the UK and the EU to protecting the GFA in all its parts. Article 182 of the Withdrawal Agreement maintains that the Protocol is an integral part of the agreement, and under Article 164(3) WA, the Joint Committee shall be responsible for its application.

Under Article 13(2), the Protocol kept Northern Ireland within the EU single market for goods while being subject to the relevant case law of the Court of Justice.[49] However, Article 6 clarified that Northern Ireland remained within the UK internal market and customs territory while also being a beneficiary of any independent trade deals made by the UK. On the other hand, Great Britain would be fully removed from both the EU single market and customs union. Consequently, under Article 5 of the Protocol, all goods arriving into Northern Ireland from Great Britain must meet EU standards if they are at risk of entering the EU. This is hardly

[47] Brenden O'Leary, 'Consent: Lies, Perfidy, the Protocol, and the Imaginary Unionist Veto' in Federico Fabbrini (ed), *The Law & Politics of Brexit Volume IV: The Protocol on Ireland/Northern Ireland* (OUP 2022) 245.
[48] See Imelda Maher, 'The Common Travel Area' in Federico Fabbrini (ed), *The Law & Politics of Brexit Volume IV: The Protocol on Ireland/Northern Ireland* (OUP 2022) 120-21.
[49] Niall Moran, 'Customs and Movement of Goods' in Federico Fabbrini (ed), *The Law & Politics of Brexit Volume IV: The Protocol on Ireland/Northern Ireland* (OUP 2022) 145.

a satisfying outcome for Northern Ireland unionists, given the establishment of a de facto border through the Irish Sea that created regulatory divergence between itself and Great Britain, especially so given that Boris Johnson promised that this would not happen.[50]

The Protocol provides for safeguard measures under Article 16. The Article states,

> If the application of this Protocol leads to serious economic, social or environmental difficulties that are liable to persist, or to diversion of trade, the Union or the UK may unilaterally take appropriate safeguard measures.

Therefore, the UK or the EU, can suspend application of the Protocol if the above criteria have been met. Additionally, Article 18 of the Protocol allows for the Northern Ireland Assembly to decide if it is to continue or terminate Articles 5-10 by 31 December 2024. If the Northern Ireland Assembly decided to end this agreement, then, under Article 18(4) of the protocol, it would become subject to a two-year cooling-off period to find an alternative solution.

Parliament was called to debate the revised agreement on 19 October 2019, a Saturday sitting. Parliament voted in favour of an amendment that would require Parliamentary approval of legislation implementing the Withdrawal Agreement before a vote on the Agreement itself could take place. Notably, numerous Conservative MPs supported the amendment. This would ultimately trigger a further delay to the Brexit deadline given that no agreement had been reached. The amendment forced the Prime Minister to formally request this extension under the

[50] See Heather Stewart, Jennifer Rankin and Lisa O'Carroll, 'Johnson Accused of Misleading Public Over Brexit Deal After NI Remarks' (*The Guardian*, 8 November 2019) <https://www.theguardian.com/politics/2019/nov/08/boris-johnson-goods-from-northern-ireland-to-gb-wont-be-checked-brexit> accessed 17 September 2022.

European Union (Withdrawal) (No. 2) Act 2019 to delay exit day to 31 January 2020. The European Council would agree to this extension.

It was clear that Parliament remained gridlocked. Upon the expulsion of the Conservative MPs who voted to extend the Brexit deadline, Johnson had effectively deprived the Conservative Party of a majority in the House of Commons. Therefore, a further general election was required to secure a large enough mandate to ratify the revised withdrawal agreement. The Early Parliamentary General Election Act 2019 received Royal Assent on 31 October 2019, and subsequently, an early general election was carried out on 12 December 2019. The result was an eighty-seat Conservative majority following Johnson's seemingly single-issue campaign of 'getting Brexit done'.

The 2019 general election gave the UK Government the mandate it needed to implement the Withdrawal Agreement into UK domestic legislation on 23 January 2020.[51] The European Parliament gave its consent to the Withdrawal Agreement on 29 January 2020,[52] and it was concluded in the Council on 30 January 2020.[53] The UK left the EU on 31 January 2020 and, in doing so it repealed the European Communities Act 1972 (although the European Union (Withdrawal Agreement) Act 2020 amended the EUWA 2018 to extend the effects of this Act until the end of the transition period)[54] and thus began the undoing of forty-seven years of unity while

[51] European Union (Withdrawal Agreement) Act 2020.
[52] European Parliament, 'European Parliament Legislative Resolution of 29 January 2020 on the Draft Council Decision on the Conclusion of the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, P9_TA (2020) 0018' (*europarl.europa.eu*, 29 January 2020) <https://www.europarl.europa.eu/doceo/document/TA-9-2020-01-29_EN.html> accessed 15 January 2021.
[53] Council Decision (EU) 2020/135 of 30 January 2020 on the Conclusion of the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Economic Community [2020] OJ L29/1.
[54] European Union (Withdrawal Agreement) Act 2020, s.1(A).

stripping UK nationals of their Union citizenship and their EU free movement rights.[55]

The UK formally removed itself from the EU single market and customs union on 31 December 2020 after ratifying the European Union (Future Relationship) Act 2020. This means that the EU-UK relationship is now regulated by the EU-UK Trade and Cooperation Agreement (TCA) after it entered into force on 1 May 2021.[56] The TCA has cemented EU-UK relations within an arguably unstable framework given that it is an atypical free trade agreement that raises barriers rather than seeking to remove them.[57] Most notably, the TCA ended EU freedom of movement in the UK without establishing alternative mobility arrangements.

Brexit has ultimately been defined as a winner takes all decision and, to agree with Strumia, this is troubling as what the winner takes is not only seats in a parliament for a number of years, but they also take the right of each UK national to have transnational rights through Union citizenship.[58] Strumia provides further analysis:

> The right to have rights through national citizenship could not be collectively taken away just as easily. International law entails protection of the right to a nationality, as well as safeguards against statelessness and collective expulsion. Supranational citizenship enjoys no comparable protection and can thus be taken away at the diktat of political voice, without any appeal, and without any required individual consent, as a majority is sufficient to strip citizenship from all.[59]

[55] Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020, s 1.
[56] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [2020] OJ L149/10. See also EU-UK Trade and Cooperation Agreement – Notification by the Union [2020] OJ L444/1486.
[57] Federico Fabbrini, 'Introduction' in Federico Fabbrini (ed), *The Law & Politics of Brexit Volume III: The Framework of New EU-UK Relations* (OUP 2021) 25; Paola Mariani and Giorgio Sacerdoti, 'Trade in Goods and Level Playing Field' in Federico Fabbrini (ed), *The Law & Politics of Brexit Volume III: The Framework of New EU-UK Relations* (OUP 2021) 95.
[58] Francesca Strumia, 'European Citizenship and Transnational Rights: Chronicles of a Troubled Narrative' in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing 2017) 158-59.
[59] ibid 158-59.

It is said here that the nation-state is unlikely to regain its old strength by retreating into its shell.[60] However, this work accepts Brexit as a legally legitimate decision irrespective of its damaging consequences.

III. The Brexit Withdrawal Agreement: Citizens' Rights

The Withdrawal Agreement (WA)[61] is heavily based upon pre-existing EU law and has many merits: first, it avoided the no deal scenario that could have resulted in millions of Union citizens and UK nationals being unable to assert their rights to live, work, study, recognise their professional qualifications, access healthcare and social security in their host territories; second, the WA secured the UK's financial settlement to the EU; third, the WA avoided a hard border on the island of Ireland; fourth, the WA set out a transition period of eleven months to negotiate an EU/UK trade agreement as opposed to automatically relying upon World Trade Organisation rules;[62] and fifth, it sets out a series of rights that are directly enforceable.

Article 4(1) WA establishes the EU law principles of direct effect and supremacy to allow all who fall under the personal scope of the agreement to challenge violations of their rights before national courts.[63] Article 4(2) obligates the UK to ensure such through the adoption of domestic primary legalisation. Although

[60] Jürgen Habermas, *The Postnational Constellation: Political Essays* (Max Pensky tr and ed, MIT Press 2001) 81.
[61] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2020] OJ L29/07.
[62] See Giorgio Sacerdoti, 'The Prospects: The UK Trade Regime with the EU and the World: Options and Constraints Post-Brexit' in Federico Fabbrini (ed), *The Law & Politics of Brexit* (OUP 2017) 71-91.
[63] See Catherine Barnard and Emilia Leinarte, 'Citizens' Rights' in Federico Fabbrini (ed), *The Law and Politics of Brexit Volume II: The Withdrawal Agreement* (OUP 2020) 110-15.

promising, this could prove to be one of the flaws of the agreement given that the EU has assumed that the transfer of concepts such as direct effect and supremacy into an international agreement with a non-EU country will continue to protect the rights of peoples as if they were inside of the EU.[64] It remains to be seen if people relying upon the WA will be able to enforce their rights effectively.[65]

However, the WA confirms that UK nationals have lost their Union citizenship. Article 2(c) of the WA states that a Union citizen is any person who holds the nationality of a Member State. Given that the UK is no longer an EU Member State, UK nationals can no longer be Union citizens. However, that is not to say that all rights pertaining to Union citizenship for all UK nationals in the EU and vice versa have been lost.

Part Two of the WA provides both the content of rights and the personal scope to which it applies. In many ways, the agreement mirrors Articles 6 and 7 of the Citizens Rights Directive 2004/38.[66] However, Article 10 WA has limited the personal scope only to those Union citizens and UK nationals who have made use of their free movement rights before the end of the transition period (31 December 2020). Only these persons are covered by the WA and can claim violations of their rights if such were to occur. Article 13 WA provides that these peoples and their TCN family members can continue to reside under the same conditions as they did when the

[64] Stijn Smismans, 'EU Citizens' Rights Post Brexit: Why Direct Effect Beyond the EU Is Not Enough' (2018) 14 European Constitutional Law Review 443, 445-60.
[65] Barnard and Leinarte (n 63) 129.
[66] See Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360 EEC, 72/194 EEC, 73/148/ EEC. 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77.

UK was an EU Member State. However, in respect to UK nationals the WA does not provide for the ongoing or circular right of free movement.[67]

Those covered by the WA are guaranteed the continued right to non-discrimination on grounds of nationality under Article 12 and the continued right to equal treatment under Article 23. However, securing the right to permanent residence is further limited to those who have established five years of lawful residence in accordance with EU law prior to the end of the transition period (Article 15(1) WA). Once secured, the right of permanent residence can only be lost following an absence exceeding five years from the host state (Article 15(3) WA). Those who established lawful residence under Directive 2004/38 prior to the end of the transition period but have not resided for a period exceeding five years have become subject to the 'accumulation of periods' as set out under Article 16 of the WA. Although their continued residence is secured, the right of permanent residence will only be guaranteed once they have completed five years of lawful residence.

Article 17 WA allows the individual to change their status and remain unaffected (e.g., from student to worker, or from worker to retired). The ability of UK nationals in the EU and vice versa to prove their status is covered by Article 18 WA. Article 18(1) states that the host state may require those covered by the WA to apply for a new residence status accompanied by a document, which may be in digital form, evidencing such. The deadline for applying shall not be less than six months from the end of the transition period and the host state shall ensure that the application procedure is smooth, transparent and simple while avoiding any unnecessary administrative burdens. Additionally, the issuing of documents shall be free of

[67] See Case C-370/90 *R v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department* EU:C:1992:296. See also Eleanor Spaventa, 'The Rights of Citizens Under the Withdrawal Agreement: A Critical Analysis' (2020) 45 EL Rev 193, 197.

charge. Once secured, Article 39 WA guarantees lifelong protection. That is unless they leave the host state for a period exceeding five years (Art 15(3) WA) or secure their residence through other means.

Where violations of rights occur, and a question is raised by UK courts over the correct interpretation of Part Two of the WA then the Article 267 TFEU preliminary reference procedure can apply for a further eight years post-transition and shall have the same legal effects as when the UK was an EU Member State. Article 4(4) WA obliges UK courts to interpret EU law principles contained within the agreement in accordance with the relevant CJEU case law handed down before the end of the transition period. Article 4(5) states that UK courts are to have due regard to relevant CJEU case law handed down after transition.[68] In addition, Article 163 of the WA further compels UK courts to engage in dialogue with the CJEU to facilitate a consistent interpretation of the WA. However, UK courts are not obliged to refer questions to the CJEU and will only do so on a voluntary basis.[69] It should be noted that when the UK was an EU Member State its courts were the most reluctant to refer questions to the CJEU.[70] It is likely that this tendency will only increase as a result of Brexit.[71] Also, Union citizens will be unable to claim *Francovich* type damages against the UK if it breaches its obligations under the Withdrawal Agreement.[72]

Although the WA offers a sense of security to UK nationals and Union citizens in respect to their continued lawful residence, it has nevertheless provided for a

[68] See *Lidl GB Ltd. v Tesco Stores Ltd.* [2023] EWHC 873 (Ch) [238].
[69] Barnard and Leinarte (n 63) 123.
[70] Takis Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure' (2003) 40 CMLR 9, 38.
[71] Smismans (n 64) 465.
[72] See Joined Cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* EU:C:1991:428, para 35; Case C-224/01 *Gerhard Köbler v Republik Österreich* EU:C:2003:513.

settled, or pre-settled, status that affords less rights than Union citizenship. In addition, before and during the negotiations many UK nationals and Union citizens were subject to a lengthy period of uncertainty regarding their status and the lawfulness of their future residence.

III.I Union Citizens in the UK

Union citizens in the UK became subject to a period of uncertainty following the referendum after no swift assurances were given by the UK Government in respect to their continued residence.[73] Many Union citizens applied for permanent residence under Directive 2004/38 Article 16 only to discover that they could not prove the length of their lawful residence, or, in certain cases, they discovered that they had been illegally staying in the UK and became subject to a letter from the Home Office informing them that they should make preparations to leave the UK.[74]

In addition to relying upon EU law, many Union citizens may have been in a position to naturalise as a British citizen.[75] It has been said that many of those who secured their continued residence in the UK through British citizenship may have done so through convenience as opposed to having any sense of identification with

[73] House of Commons Exiting the European Union Committee, *The Governments Negotiating Objectives: The Rights of UK and EU Citizens* (HC 2016-17, 1071) para 16; HM Government, *The United Kingdom's Exit from and New Partnership with the European Union* (Cm 9417, 2017) 30; HM Government, *The United Kingdom's Exit from the European Union: Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU* (Cm 9464, 2017) para 6. See also Stephanie Reynolds, 'May We Stay? Assessing Security of Residence for EU Citizens Living in the UK' in Michael Dougan (ed), *The UK After Brexit: Legal and Policy Challenges* (Intersentia Ltd 2017) 182-86.

[74] ibid para 77. See also Gillian More, 'From Union Citizen to Third-Country National: Brexit, the UK Withdrawal Agreement, No-Deal Preparations and Britons Living in the European Union' in Nathan Cambien, Dimitry Kochenov and Elise Muir (eds), *European Citizenship Under Stress* (Brill Nijhoff 2020) 465.

[75] See Evelyn Ederveen, 'The Right of Residency of EU Citizens in the UK After Brexit' in Jennifer Hillman and Gary Horlick (eds), *Legal Aspects of Brexit: Implications of the United Kingdom's Decision to Withdraw from the European Union* (Institute of International Economic Law 2017) 263-64.

the status itself.[76] However, and to concur with Kostakopoulou, neither of these routes to residence security was an adequate policy option.[77] Union citizenship cannot compare to naturalising as the latter is about acquiring a sedentary status and the former is about moving freely within the EU.[78]

The options detailed above were unavailable to many Union citizens for the following reasons: they had not been lawfully resident in the UK for long enough; they could not afford the application; they may fail integration tests; they may not earn enough to satisfy the minimum income required to make an application; or they would not want to renounce the nationality of their home country if their country of origin does not accept dual nationality. The point is that when these Union citizens exercised their rights under the EU Treaties and Directive 2004/38, their lawful residence was secured without the need to jump through the litany of administrative hurdles at the national level. To concur with Shaw, these obstacles further demonstrate how national citizenship is not the same thing as exercising Union citizenship rights.[79]

It was argued by some that a simple right to be in the UK would be insufficient and that the international law principle of acquired rights ought to be considered.[80] In June 2017, the UK Government and the European Commission put forward their phase I negotiation proposals concerning citizens' rights. The Commission

[76] Barnard, Butlin and Costello (n 17) 383.
[77] Kostakopoulou (n 17) 8 and 145.
[78] Dimitry Kochenov and Justin Lindeboom, 'Pluralism Through Its Denial: The Success of EU Citizenship' in Gareth Davies and Matej Avbelj (eds), *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar 2018) 194; Dora Kostakopoulou, '*Scala Civium*: Citizenship Templates Post-Brexit and the European Union's Duty to Protect EU Citizens' (2018) 56 JCMS 854, 856; Kostakopoulou (n 16) 131.
[79] Jo Shaw, 'Citizenship and Free Movement in a Changing EU: Navigating an Archipelago of Contradictions' in Benjamin Martill and Uta Staiger (eds), *Brexit and Beyond: Rethinking the Futures of Europe* (UCL Press 2018) 158.
[80] Reynolds (n 73) 194; House of Lords European Union Committee, *Brexit: Acquired Rights* (HL 2016-17, 82) para 121.

concluded that EU/UK citizens who had acquired residence rights before the UK's withdrawal should enjoy the same rights. The UK Government also recognised the need to honour Union citizens who made a significant life choice to reside in the UK prior to Brexit: 'The choice made in the referendum was about our arrangements going forward, not about unravelling [our] previous commitments.'[81] Reaching an agreement, at least in principle, regarding the rights of citizens proved to be easier than expected.[82] The joint report concluded on 8 December 2017 recognised the past life choices of citizens and their family members and sought to protect the rights they had derived through EU law.[83]

However, as noted above, Article 10 of the WA limits the scope of the agreement only to those who arrived prior to the end of the transition period, and further, Article 18 WA entitles each Member State to require the issuance of a new residence document to prove their right to lawfully reside in its territory under the terms of the WA. Therefore, Union citizens in the UK became subject to the EU Settlement Scheme (EUSS).[84] The scheme became operational on 30 March 2019 and allowed for a period up until the end of the Brexit transition period to establish residence in the UK and to apply no later than six months after transition.

If the Union citizen can prove five years of lawful residence in the UK under Directive 2004/38 then they will be granted settled status in the UK. Settled status

[81] HM Government, *The United Kingdom's Exit from the European Union: Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU* (Cmd 9464, 2017) para 3.
[82] Barnard and Leinarte (n 63) 108.
[83] European Commission, 'Joint Report from the Negotiators of the European Union and the United Kingdom Government on Progress During Phase 1 of Negotiations Under Article 50 TEU on the United Kingdom's Orderly Withdrawal from the European Union' (*Europa.eu*, 8 December 2017) <https://ec.europa.eu/info/publications/joint-report-negotiators-european-union-and-united-kingdom-government-progress-during-phase-1-negotiations-under-article-50-teu-united-kingdoms-orderly-withdrawal-european-union_en> accessed 1 September 2022.
[84] HM Government (n 81) para 6; HM Government, *Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community* (OGL 2019) 3.

provides Union citizens in the UK with indefinite leave to remain carrying with it the rights to work, use the NHS, enrol in education activities, maintain access to public funds and to travel in and out of the UK.[85] Union citizens who established residence prior to the end of the transition period but cannot prove five years of lawful residence shall become subject to Article 16 WA until they are able to prove such. These peoples shall be granted pre-settled status, and upon providing proof of their five years of lawful residence, they shall be granted full settled status. Pre-settled status provides for a right of continued residence, but it falls short of providing access to social assistance unless an additional right to reside can be demonstrated.[86]

Barnard and Leinarte have referred to the EUSS as a beat the clock policy that will inevitably leave some people behind.[87] All Union citizens who previously had their permanent residence secured under EU law had to actively re-apply to the Home Office to benefit from the EUSS.[88] The EUSS could either be accessed online or through the smartphone app. Initially, the smartphone application was only available on Android phones, which left many unable to make an application.[89] This approach failed to recognise the vulnerable who may not have digital access.[90] Those who resided in the UK before the end of the transition period but failed to

[85] Maas (n 19) 172.
[86] *Fratila and Another (AP) (Respondents) v Secretary of State for Work and Pensions (Appellant)* [2021] UKSC 53, [2022] 3 All ER 1045. See also Alice Welsh, 'Permission to Discriminate – EU Nationals, Pre-Settled Status and Access to Social Assistance' (2022) 44 Journal of Social Welfare and Family Law 133,134.
[87] Catherine Barnard and Emilija Leinarte, 'Brexit and Citizens' Rights' (2019) 11 European Journal of Legal Studies 117, 12; Barnard and Leinarte (n 63) 110-15.
[88] HM Government (n 81) para 6, 10, 17 and 39.
[89] Eglé Dagilyté, 'The Promised Land of Milk and Honey? From EU Citizens to Third Country Nationals after Brexit' in Sandra Mantu, Paul Minderhoud and Elspeth Guild (eds), *EU Citizenship and Free Movement Rights Taking Supranational Citizenship Seriously* (Brill Nijhoff 2020) 357.
[90] Barnard and Leinarte (n 63) 110; Adrienne Yong, 'A Gendered EU Settlement Scheme: Intersectional Oppression of Immigrant Women in a Post-Brexit Britain' (2022) 0 Social & Legal Studies 1, 16-17. See also BBC News, 'EU Settlement Scheme: Vulnerable "Struggling to Apply"' (*BBC News*, 28 February 2020) <https://www.bbc.co.uk/news/uk-politics-51675813> accessed 2 March 2020.

secure their status under the EUSS by its 30 June 2021 deadline will be considered to be in the UK unlawfully. Consequently, they will be unable to continue their residence under the more favourable terms set out under the Withdrawal Agreement,[91] and would thus become subject to the UK's points-based immigration system. Failing to register with the EUSS would make Union citizens in the UK an illegal migrant who may become subject to deportation.[92] At present, it is unclear as to what extent their residence rights could be cemented outside of the framework of EU law under Article 8 ECHR.[93] However, Article 18(d) of the Withdrawal Agreement does allow for late applications to the EUSS if reasonable grounds exist for missing the deadline.

It would seem inevitable that many will fail to secure their continued residence. Colin Yeo has claimed that tens, if not hundreds, of thousands of Union citizens may miss the EUSS deadline.[94] The 3 Million group has rightly pointed out that 'no application scheme … has ever managed to reach 100% of its target audience.'[95] It is inevitable that numerous hard cases will arise and it is clear that 1 July 2021 represented a major cliff edge for many Union citizens. To concur with Smismans, this has the potential to create a 'Windrush scandal on steroids.'[96] The Windrush

[91] Barnard and Leinarte (n 63) 109.
[92] Immigration and Asylum Act 1999 s.10.
[93] See *Kurić and Others v Slovenia* App no 26828/06 (ECtHR, 26 June 2012); See Opinion 2/13 on Accession of the European Union to the European Convention of Human Rights (2014) EU:C:2014:2454. See also Guayasén Marrero González, '"Brexit" Consequences for Citizenship of the Union and Residence Rights' (2016) 23 Maastricht Journal of European and Comparative Law 796; Nathan Cambien, 'Residence Rights for EU Citizens and Their Family Members: Navigating the New Normal' in Nathan Cambien, Dimitry Kochenov and Elise Muir (eds), *European Citizenship Under Stress* (Brill Nijhoff 2020) 209; Dora Kostakopoulou, 'When a Country Is Not a Home: The Numbered (EU Citizens) 'Others' and the Quest for Human Dignity Under Brexit' in Moritz Jesse (ed), *European Societies, Migration, and the Law: The 'Others' Amongst 'Us'* (CUP 2020) 271.
[94] Colin Yeo, *Welcome to Britain: Fixing Our Broken Immigration System* (Biteback Publishing 2020) ch 9.
[95] Monique Hawkins, 'The Proposed Immigration System Will Inflict Untold Damage' (*blogs.lse.ac.uk*, 27 February 2020) <https://blogs.lse.ac.uk/brexit/2020/02/27/the-proposed-immigration-policy-will-inflict-untold-damage/> accessed 14 April 2020.
[96] Stijn Smismans, 'Protecting EU Citizens in the UK From a Brexit "Windrush on Steroids": A Legislative Proposal for a Declaratory Registration System' (2019) DCU Institute Working Paper

generation had a right to be in the UK but struggled to prove such, but Union citizens who have not applied to the EUSS will have no such right.[97]

The UK has since established the Independent Monitoring Authority (IMA) pursuant to Article 159 WA. The IMA has been given authority comparable to the European Commission in order to oversee public bodies' adherence to Part Two of the WA. The IMA became operational upon the end of the transition period and is secured under section 15 and schedule 2 of the European Union (Withdrawal Agreement) Act 2020. The IMA has since defended the rights of those with pre-settled status in the High Court. The High Court held that the requirement for those with pre-settled status to reapply for full settled status or risk losing their rights under the WA was unlawful.[98]

Settled status cannot compare to exercising rights as a Union citizen. In the post-transition UK, Union citizens who want to live in the UK will be treated rather like the market citizens from the pre-Maastricht era.[99] The ending of EU free movement and the replacement of it with a points-based immigration system seeks to ensure market-based migration in the UK. As noted by Barnard and Leinarte, the personal scope of the TCA has cemented the transformation of the EU/UK relationship away from a union of states tied by a common supranational citizenship to that of an economic partnership where mobility is only to be considered for highly skilled Union

2019, 8 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3433055> accessed 29 17 December 2020.

[97] Stijn Smismans, 'This Is How to Stop Brexit Causing a New Windrush Scandal for EU Citizens' (*Free Movement*, 9 August 2019) <https://www.freemovement.org.uk/this-is-how-to-stop-brexit-causing-a-new-windrush-scandal-for-eu-citizens/> accessed 12 April 2020.

[98] See *R (on the Application of the Independent Monitoring Authority for the Citizens' Rights Agreement) v Secretary of State for the Home Department* [2022] EWHC 3274 (Admin), [2022] 12 WLUK 334.

[99] See Carlos Vargas-Silva, 'EU Migration to and From the UK After Brexit' (2016) 5 Intereconomics 251.

citizens in respect to trade in services.[100] However, it is not clear whether skilled Union citizens will choose the UK as their destination.[101] Consequently, the triumphs of Union citizenship in the post-*Sala* era will be reduced to further harm ideas for a post-national Union citizenship. In one sense, the new EUSS confirms the failure of a post-national Union citizenship given that Brexit has demonstrated that Union citizenship in its current form fails to withstand the test of national legislation motivated by deep-seated Euroscepticism.

To summarise, Union citizens residing in the UK are anything but lucky immigrants.[102] They are people who relied on their right to freedom of movement in good faith only to have their residence security under EU law snatched away at a later date while being made to reapply for it without being given any chance to object to such measures. The difficulties, anxieties and confusion associated with securing their future is another reality of the hostile environment that the UK has sought to implement.[103] Making someone reapply for something that they previously held is not only a needless exercise but at its worst, it is an unalterable life-changing one if it does not go to plan. As Yeo comments, the result of the hostile environment has

[100] Catherine Barnard and Emilija Leinarte, 'Mobility of Persons' in Federico Fabbrini (ed), *The Law & Politics of Brexit Volume III: The Framework of New EU-UK Relations* (OUP 2021) 137.
[101] Ioanna Ntampoudi, 'Post-Brexit Models and Migration Policies: Possible Citizenship and Welfare Implications for EU Nationals in the UK' in Nazaré da Costa Cabral, José Renato Gonçalves and Nuno Cunha Rodrigues (eds), *After Brexit: Consequences for the European Union* (Palgrave Macmillan 2017) 265; Aija Lulle, Laura Moroşanu and Russell King, 'And Then Came Brexit: Experiences and Future Plans of Young EU Migrants in the London Region' (2017) 24 Population, Space and Place 1-11.
[102] Jo Shaw, 'Citizenship, Migration and Free Movement in Brexit Britain' (2016) 17 German Law Journal 99, 101.
[103] Yeo (n 94) ch 3. See also James Kirkup and Robert Winnett, 'Theresa May Interview: "We're Going to Give Illegal Migrants a Really Hostile Reception"' (*The Telegraph*, 25 May 2012) <https://www.telegraph.co.uk/news/0/theresa-may-interview-going-give-illegal-migrants-really-hostile/> accessed 15 June 2020.

created a routine of avoidable citizen-on-citizen immigration checks on everyday life.[104]

III.II UK Nationals in the EU

The impact of Brexit differs for UK nationals in a more detrimental way, given they have been stripped of their Union citizenship.[105] Brexit has created two categories of UK nationals: on the one hand, there are the UK nationals who exercised their EU law right to freedom of movement prior to the end of the Brexit transition period which the WA has provided for their continued lawful residence in their host state, and, on the other, there are the millions of UK nationals who are now unable to make use of such rights post-transition. As a result, UK nationals are now subject to national restrictions if their residence was not secured through the WA.[106] However, visa requirements have been waived for short-term visits not exceeding ninety days in any one-hundred-and-eighty-day period.[107] It is also worth reiterating that many UK nationals already resident in the EU were disenfranchised from the Brexit referendum given their fifteen years of residence outside of the UK. It would have been highly likely that these peoples would have objected to Brexit.[108]

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[104] Colin Yeo, 'Briefing: What is the Hostile Environment, Where Does it Come From, Who Does it Affect?' (*Freemovement.org.uk*, 1 May 2018) <https://www.freemovement.org.uk/briefing-what-is-the-hostile-environment-where-does-it-come-from-who-does-it-affect/> accessed 6 June 2020.
[105] See More (n 74) 457.
[106] Steve Peers, 'Migration, Internal Security and the UK's EU Membership' (2016) 87 The Political Quarterly 247, 251.
[107] Regulation (EU) 2019/592 of the European Parliament and of the Council of 10 April 2019 amending Regulation (EU) 2018/1806 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, as regards the withdrawal of the United Kingdom from the Union [2019] OJ L1031/1.
[108] *R (on the Application of Shindler and Another) (Appellants) v Chancellor of the Dutchy of Lancaster and another (Respondents)* [2016] EWCA Civ 469, [2017] QBD 226. See also Ziegler (n 18); Bardutzky (n 19) 234; Kostakopoulou (n 17) 145; Maas (n 19) 171.

It is now confirmed that all UK nationals have been stripped of the opportunities that were previously provided through the EU *acquis communautaire*. UK nationals have not only lost the right to free movement and residence across the EU Member States, but also their European Parliament voting rights, their right to consular protection by another EU country, their right to adhere to the European citizens' initiative and, perhaps most importantly, UK nationals who seek to travel, live, work or study throughout the EU Member States post-transition will no longer be guaranteed the right to non-discrimination on the grounds of nationality through the EU Treaties.

Brexit represents the first automatic and collective lapse of Union citizenship.[109] The significant life choices of UK nationals made under the assumption that their Union citizenship would protect their status has done nothing to prevent them from becoming a TCN in the EU.[110] The status of TCN implies a sense of Otherness and in the case of UK nationals, this process of othering should be questioned.[111] It is correct to state that national legislation can revoke Union citizenship following a withdrawal from the EU according to its own constitutional requirements, but it should be recognised that UK nationals have contributed to and shared in the building of a perhaps post-statist and supranational EU identity to which many have subsequently attached themselves. The question remains as to whether a withdrawal can strip these individuals of their identities in which they presumably continue to share with Union citizens throughout their host territories.

[109] Mindus (n 20) 34.
[110] That is unless they also hold the nationality of another EU Member State.
[111] Moritz Jesse, 'European Societies, Migration, and the Law' in Moritz Jesse (ed), *European Societies, Migration, and the Law* (CUP 2022) 1-7; Moritz Jesse, 'The Immigrant As the "Other"' in Moritz Jesse (ed), *European Societies, Migration, and the Law* (CUP 2022) 20-25.

Prior to the end of the transition period, all UK nationals who were resident throughout the Member State territories were required to secure their residence under the domestic settlement scheme of their host Member State. The European Commission devised a single form akin to the long-term residence permit,[112] although it was left to each Member State to implement its own requirements pursuant to Article 18 of the WA.[113] Thirteen Member States followed the UK example to require those covered by the WA to apply for their continued residence security,[114] and fourteen Member States opted for the more favourable declaratory system, which included the Member States that hosts the largest number of UK nationals (Spain, Ireland and Germany).[115] Therefore, all Union citizens are required to apply to the EUSS whereas the majority of UK nationals in the EU will benefit from declaratory systems.[116] Additionally, unlike Union citizens in the UK, UK nationals throughout the EU shall also benefit from the receipt of a physical document to certify their status under the WA.[117] However, once their settled status is secured, they will be unable to move freely between the other Member States. This transition from freedom to restriction will be a painful one and, like the position described above in regard to Union citizens, there are likely to be many who will fall through the cracks.[118]

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[112] Commission, 'Commission Implementing Decision of 21 February 2020 on documents to be issued by Member States pursuant to Article 18(1) and (4) and Article 26 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community' COM (2020) 1114 final.
[113] Barnard and Leinarte (n 63) 112.
[114] That being Belgium, Denmark, France, Latvia, Luxembourg, Hungary, Malta the Netherlands, Austria, Romania, Slovenia, Finland and Sweden.
[115] That being, Bulgaria, the Czech Republic, Germany, Estonia, Ireland, Greece, Spain, Croatia, Italy, Cyprus, Lithuania, Poland, Portugal and Slovakia.
[116] Dagmar Schiek, 'Brexit and the Implementation of the Withdrawal Agreement' in Federico Fabbrini (ed), *The Law & Politics of Brexit Volume III: The Framework of New EU-UK Relations* (OUP 2021) 56-57.
[117] Commission (n 112).
[118] Shaw (n 102) 103. See also Mass (n 19) 172.

The Brexit vote saw a surge in UK nationals applying for the national citizenship of another Member State to secure their Union citizenship.[119] However, it should be recognised that UK nationals are now exposed to the different domestic naturalisation systems of the twenty-seven Member States. In other words, if they choose naturalisation as their route to residence security, their status would be subject to a Member State lottery where the EU will be unable to intervene.[120] The dual nationality principle has been the main hurdle to securing Union citizenship through naturalising in another Member State. Spain, an EU Member State that does not accept dual nationality with the UK, while hosting the largest number of UK nationals, requires ten years of residence before an application can be made. Many retired UK nationals who reside in Spain would argue that if Brexit was a vote to strengthen their domestic nationality, then the fact that these people may have to renounce it runs counter to this argument.[121]

One concern surrounding the application for national citizenship is the integration conditions that may deter or even prevent UK nationals and their family members from making an application. The CJEU has already decided this matter when determining the right to family reunification under Directive 2003/86 and concluded that any integration requirement that restricts family reunification must be strictly interpreted to prevent the Directive from losing its effectiveness.[122] Additionally, integration conditions must be subject to the principle of proportionality,[123] and even where a genuine willingness to pass the integration examination resulted in failure,

[119] Mass (n 19) 173.
[120] Kostakopoulou (n 78) 861; Kostakopoulou (n 17) 138.
[121] Kochenov (n 1) 284.
[122] Case C-578/08 *Rhimou Chakroun v Minister van Buitenlandse Zaken* EU:C:2010:117, para 43.
[123] Case C-138/13 *Naime Dogan v Bundesrepublik Deutschland* EU:C:2014:287, Opinion of AG Mengozzi, para 59.

then this ought not to automatically deny residence in the host territory for the purpose of family reunification.[124]

One advantage the UK had in the initial negotiations on citizens' rights is the existing framework for the protection of long-term resident TCNs in the EU. The Long-Term Residence Directive (LTRD)[125] is an important piece of secondary EU legislation as it has the potential to establish a subsidiary form of Union citizenship that is not controlled directly by the Member States.[126] The importance of the Directive is that UK nationals may wish to rely upon it if they fail to meet the deadlines for securing their residence under the domestic settlement scheme of their host Member State.

The LTRD applies in all Member States except for Denmark and Ireland.[127] Under Article 4(1) a UK national as a TCN who lawfully resides in a Member State for a continuous period of five years shall be able to make an application. Article 5(2) states that the applicant must have sufficient resources and comprehensive sickness insurance to avoid becoming an unreasonable burden on the host state's finances, and, if required, the host state is able to subject the applicant to proportionate integration conditions as the determination of legal residence falls to the competence of the individual Member State.[128] The CJEU has ruled that integration conditions do not in themselves infringe the objectives of the Directive.[129] However, in situations where the national integration conditions offset the aim of the

[124] Case C-153/14 *Minister van Buitenlandse Zaken v K and A* EU:C:2015:453, para 56.
[125] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L16/44.
[126] Diego Acosta Arcarazo, *The Long-Term Residence Status as a Subsidiary Form of EU Citizenship: An Analysis of Directive 2003/*109 (Brill 2011) 4.
[127] In Ireland UK nationals have a free-standing right to residence under the Ireland Act 1949.
[128] Case C-502/10 *Staatssecretaris van Justitie v Mangat Singh* EU:C:2012:636, paras 39-40. See also Mass (n 19) 171-72.
[129] Case C-579/13 *P and S v Commissie Sociale Zekerheid Breda and College van Burgemeester en Wethouders van de gemeente Amstelveen* EU:C:2015:369, para 34.

LTRD, the CJEU can intervene.[130] Under Article 14(2), the applicant is required to be employed or self-employed, in the pursuit of studies or vocational training or resident for other purposes. Once the Article 14(2) conditions are satisfied, they then 'have the right to obtain long-term resident status as well as the other rights which stem from the grant of that status.'[131] Treating LTR TCNs equally is to be considered the norm and any derogation under Article 14(2) must be interpreted strictly.[132]

It should be noted that Article 12 of the Directive provides enhanced, but not absolute, protection against expulsion, stating that the Member State can expel a long-term TCN but only when they constitute an actual and sufficiently serious threat to public policy or public security. In the vast majority of circumstances, a LTR will enjoy protection from expulsion on the same basis as Union citizens.[133] The *López Pastuzano* judgment held that the expulsion of an LTR following a criminal conviction could not be automatic but could only occur upon proving the measure is proportionate.[134] However, in situations where residence documents have been falsified or have been acquired by fraud, then the Member State is not precluded from withdrawing LTR status (Article 9(1)(a) LTRD).[135]

One problematic element with obtaining LTR status is that it can be revoked if the individual concerned resides outside of their host-state for a period exceeding twelve months (Art. 9(1)(c) LTRD). This is a critical difference between securing residence through the LTRD over the WA given that settled status can only be

[130] ibid paras 51 and 54.
[131] Case C-508/10 *European Commission v Kingdom of the Netherlands* EU:C:2012:243, para 68.
[132] Case C-571/10 *Servet Kamberaj v Istituto per l'Edilizia Sociale della Provincia autonoma di Bolzano (IPES) and Others* EU:C:2012:233, para 86.
[133] Case C-340/97 *Ömer Nazli, Caglar Nazli and Melike Nazli v Stadt Nürnberg* EU:C:2000:77, para 64.
[134] Case C-636/16 *Wilber López Pastuzano v Delegación del Gobierno en Navarra* EU:C:2017:949, para 27.
[135] Case C-577/17 *Staatssecretaris van Veiligheid en Justitie v Y.Z. and Others* EU:C:2019:203, para 57.

revoked following an absence from the host territory that exceeds five years. For UK nationals who did not secure their residence in the EU before 1 January 2021, the LTRD offers some reassurance, but it imposes the same requirement in that the individual concerned must actively apply for the status given that the LTRD does not automatically confer LTR status upon TCNs (LTRD Article 7).[136]

The question that is yet to be answered is whether the EU is willing to change its one-size-fits-all approach to LTRs and extend the scope of the Directive to cater for UK nationals as post-EU citizens. Reuven Ziegler makes the point that a modest change to the LTRD could be made to automatically grant UK nationals the status without requiring them to prove five years of continuous residence or any other requirements.[137] The Von der Leyen European Commission has been open-minded to the idea of reviewing the current state of the LTRD,[138] but it remains to be seen if any such measures will be taken. However, it has been argued that this may not be adequate, given that any reforms to the LTRD in the contemporary setting of the EU could result in stricter measures being imposed on TCNs seeking LTR status.[139]

However, as assuring as this may be for UK nationals, the LTRD does not confer true free movement and denies LTR's political rights all while subjecting them to integration conditions.[140] In the post-Brexit EU, it must be asked whether integration conditions will be used proportionately. They may operate as a covert selection mechanism by the receiving State to filter out migrants whom they believe to be, or may become, a burden upon its public finances. In other words, the term 'condition'

[136] See Case C-40/11 *Yoshikazu Iida v Stadt Ulm* EU:C:2012:691.
[137] Reuven Ziegler, 'UK Citizens as Former EU Citizens: Predicament and Remedies' in Rainer Bauböck (ed), *Debating European Citizenship* (Springer 2019) 160.
[138] Claudia Delpero, 'Could British Citizens Benefit from a New EU Long-Term Residence Directive?' (*europestreet.news*, 13 October 2019) <https://europestreet.news/could-brits-benefit-from-a-new-eu-long-term-residence-directive/> accessed 2 September 2020.
[139] Kostakopoulou (n 17) 159.
[140] ibid 137.

can be used as a euphemism for 'restrict'.[141] The question is why this should apply to UK nationals as former Union citizens, should they not be able to retain their Union citizenship?

IV. Post-Brexit Tension: The Northern Ireland Protocol and the Windsor Framework

The Northern Ireland Protocol was subject to much controversy throughout the Brexit transition period. The European Research Group (ERG) and the Democratic Unionist Party (DUP) were dissatisfied with Northern Ireland's post-Brexit arrangements given the Irish Sea border and the continued oversight of the Court of Justice. Before the ink had seemingly dried on the NI Protocol, Boris Johnson, then Prime Minister, and David Frost, then the government's chief negotiator with the EU, sought to unilaterally renegotiate the Withdrawal Agreement even though they themselves had only just negotiated and signed up to it.

On 16 July 2020, the UK Government published its Internal Market white paper that sought to continue frictionless trade between the four devolved nations of the UK.[142] The UK Government sought to disapply export declarations for goods coming from Northern Ireland into Great Britain as established under Article 5 of the Protocol and to also disapply EU rules regarding state aid established under Article 10 of the Protocol. On 8 September 2020, Brandon Lewis, then Secretary of State for Northern Ireland, stated in Parliament that the UK Internal Market Bill would amend

[141] Kees Groenendijk, 'Pre-Departure Integration Strategies in the European Union: Integration or Immigration Policy?' (2011) 13 European Journal of Migration and Law 1, 7. See also Ricky van Oers, Eva Ersbøll and Dora Kostakopoulou (eds), *A Re-definition of Belonging? Language and Integration Tests in Europe* (Nijhoff 2010).
[142] HM Government, *UK Internal Market* (Cm 278, 2020), para 26.

the WA to break international law in a 'very specific and limited way.'[143] Theresa May pointed out that the UK agreed to the Withdrawal Agreement, including the NI Protocol, and stated that if the Government were to unilaterally amend the deal, then how could international partners trust the UK to adhere to international agreements.[144] The Vienna Convention on the Law of Treaties requires that states maintain their treaty obligations, although Article 62 annuls such obligations if a fundamental change of circumstances should arise. Article 62 has never been successfully defended before any court or tribunal and it would have been difficult to claim such given the UK had only recently concluded the WA and would have had full knowledge of both its contents and limitations.[145]

The UK Government would publish the bill the following day. The European Commission commenced Article 258 TFEU infringement proceedings against the UK, claiming that the UK had breached the good faith clause under Article 5 of the Withdrawal Agreement.[146] Ken Clarke provided a scathing critique of the Bill in the House of Lords, effectively arguing that the NI Protocol was what the UK government agreed to and stated that he would find it unbelievable if such a piece of legislation made it to the UK Statute book given its incompatibility.[147] The House of Lords voted 433 to 165 to reject the Bill and to remove Part 5 relating to the Northern Ireland Protocol. The Bill ultimately became something much different than intended and ultimately could not override the NI Protocol.[148] On 8 December 2020, the UK and EU confirmed that their interpretation of the NI Protocol was in alignment

[143] HC Deb 8 September 2020, vol 679, col 509. See also O'Leary (n 47) 231-32.
[144] ibid col 499.
[145] See Steven R Ratner, 'International Law Rules on Treaty Interpretation' in Christopher McCrudden (ed), *The Law and Practice of the Northern Ireland Protocol* (CUP 2022) 80-91.
[146] See Steve Peers, 'The End: or a New Beginning? The EU/UK Withdrawal Agreement' (2020) 39 Yearbook of European Law 122, 172.
[147] HL Deb 9 November 2020, vol 807, col 882.
[148] Michael Keating, 'The United Kingdom: Devolution and Disintegration' in Federico Fabbrini (ed), *The Law & Politics of Brexit Volume IV: The Protocol on Ireland/Northern Ireland* (OUP 2022) 36-37.

and the UK dropped the clauses that would have broken international law.[149] The Internal Market Act 2020 subsequently created a new framework for a UK-wide internal market, although in reality it is GB-wide, that has been based upon the EU single market concept.[150] The Act is partial in its territorial application given the requirement to implement and adhere to the NI Protocol.[151]

However, despite the concessions made under the Internal Market Act, the Protocol would continue to be a source of political tension. Section 47 of the Act reflects that of Article 6(2) of the Protocol, yet section 46 of the Act adopts a more expansive view of trade between Great Britain and Northern Ireland.[152] This allowed the UK Government to complain that the Protocol does not deliver upon its objective to secure NI's place in the UK internal market.[153] On 2 February 2021, the UK government threatened to trigger the Article 16 safeguard measures of the Protocol unless radical changes were adopted in respect to UK trade.[154]

Negotiations with the Commission were unsuccessful. In February 2021, the Commission would also threaten to trigger Article 16 to facilitate new export controls following its dispute over Covid-19 vaccine distribution. This decision was subject to much criticism given that this would have resulted in a hard border on the island of Ireland with the Commission u-turning on this position relatively quickly.[155] On 3

[149] Cabinet Office, 'Joint Statement by the Co-chairs of the EU-UK Joint Committee' (*Gov.UK*, 8 December 2020) <https://www.gov.uk/government/publications/eu-uk-joint-committee-statement-on-implementation-of-the-withdrawal-agreement/eu-uk-joint-committee-statement-on-implementation-of-the-withdrawal-agreement> accessed 11 June 2023.
[150] Catherine Barnard, 'Protection of the UK Internal Market' in Federico Fabbrini (ed), *The Law & Politics of Brexit Volume IV: The Protocol on Ireland/Northern Ireland* (OUP 2022) 175.
[151] ibid.
[152] ibid 182.
[153] ibid.
[154] HM Government, 'Letter from the Chancellor of the Duchy of Lancaster to the Vice President of the European Commission: 2 February 2021' (*Gov.UK*, 2 February 2021) <https://www.gov.uk/government/publications/letter-from-the-chancellor-of-the-duchy-of-lancaster-to-the-vice-president-of-the-european-commission-2-february-2021> accessed 12 June 2023.
[155] See Lisa O'Carroll, 'EU's Article 16 Blunder has Focused Minds on Northern Ireland' (*The Guardian*, 4 February 2021) <https://www.theguardian.com/uk-news/2021/feb/04/eus-article-16-blunder-should-focus-minds-on-northern-ireland> accessed 15 June 2023.

March 2021, the UK unilaterally extended the grace period to exempt specific goods from customs checks that were being moved between Northern Ireland and Great Britain until October 2021.[156] This resulted in further infringement proceedings being brought against the UK.[157]

On 21 July 2021, the UK Government published a command paper stating that the NI protocol was causing serious economic and societal difficulties that resulted in a diversion of trade and threatened to trigger the Article 16 safeguard procedure. The command paper argued that the Protocol was 'not sustainable' and was putting a strain upon community relations in Northern Ireland.[158] In addition, it sought to remove the continued oversight of the Court of Justice.

Although the NI protocol sought to protect the UK's internal market, it was clear that it was damaging that very concept.[159] Such requests were rejected by the Commission, stating that it would not agree to a renegotiation of the Protocol. However, on 28 July 2021, the Commission did suspend its legal proceedings to allow for engagement with the UK. On 14 September 2021, the UK government unilaterally extended, for a third time, the deadline for the introduction of full customs checks for goods incoming from the EU into the UK. In October 2021, proposals from the Commission were duly rejected by the UK with its insistence for the triggering of Article 16. Lord Frost, saw the NI Protocol as an EU overreach when the UK's negotiating hands were tied and it was inevitable that it would be replaced

[156] Federico Fabbrini, 'Introduction' in Federico Fabbrini (ed), *The Law & Politics of Brexit Volume IV: The Protocol on Ireland/Northern Ireland* (OUP 2022) 13-15.
[157] ibid.
[158] HM Government, *Northern Ireland Protocol: The Way Forward* (Cm 502, 2021) para 27 and 31.
[159] See Barnard (n 150) 180.

further down the line.[160] However, it should be noted that Article 16 was never intended to be used as a tool for renegotiating the Protocol.[161]

The Northern Ireland Assembly once again collapsed in February 2022 following the First Minister's resignation in protest to the Protocol. In May 2022, the election to the Northern Ireland Assembly produced, for the first time, Sinn Féin, a republican/nationalist party, as the largest party. However, unionist parties remained as a majority although the unionist vote was split across the DUP, Ulster Unionist Party and the more hardened Traditional Unionist Voice (TUV). Additionally, Alliance, that is defined neither as unionist nor republican, became the third largest party. As of August 2023, the DUP, the largest unionist party, is yet to nominate a deputy First Minister to restore power sharing in the Assembly.

Despite the Assembly election result and the collapse of power sharing, UK/EU negotiations over the Protocol continued without success. Liz Truss, who replaced David Frost as the UK's chief negotiator with the EU in December 2021, subsequently introduced the Northern Ireland Protocol Bill in June 2022. The Bill sought to unilaterally override elements of the Protocol through domestic legislation, rather than through the Article 16 safeguards procedure, to reduce checks on goods moving between NI and GB. This would once again seek to break international law with, Sinn Féin and Alliance strongly opposing the Bill for such reasons. However, the DUP supported the Bill given that it sought to realign Northern Ireland with Great

[160] See HM Government, 'Lord Frost Speech: Observations on the Present State of the Nation' (*Gov.UK*, 12 October 2021) <https://www.gov.uk/government/speeches/lord-frost-speech-observations-on-the-present-state-of-the-nation-12-october-2021> accessed 14 June 2023.
[161] Robert Howse, 'Safeguards: This is Not an Exit – Article 16 in the Ireland/Northern Ireland Protocol' in Federico Fabbrini (ed), *The Law & Politics of Brexit Volume IV: The Protocol on Ireland/Northern Ireland* (OUP 2022) 253-54.

Britain. As a result of the Bill, the Commission restarted its infringement proceedings against the UK.[162]

The UK underwent dramatic political and constitutional changes during the second half of 2022. Boris Johnson was ousted as Prime Minister and following a Conservative Party leadership race Liz Truss was positioned as UK Prime Minister. The less said about Truss's premiership is for the betterment of this work given that there were no substantial movements relating to Brexit. In September 2022, the UK received a new Monarch in the form of Charles III following the death of Queen Elizabeth II and it remains unclear as to what the constitutional consequences of such an event may be. However, following Truss's six weeks as Prime Minister, Rishi Sunak was installed as UK Prime Minister.

The UK has received its fifth Prime Minister since the UK voted to leave the EU on 23 June 2016. The question is whether the Sunak era will come to represent stability or further turmoil regarding the post-Brexit UK/EU relationship given Sunak inherited the political tension surrounding the Protocol. Clearly the issue of the Irish Sea border and continued Court of Justice oversight needed to be resolved one way or another. Therefore, there was a clear need to renegotiate the Protocol.

In February 2023, the UK and European Commission reached a new agreement. The Windsor Framework (WF) establishes that Northern Ireland shall have full and unconditional access to the UK's internal market while maintaining their privileged access to the whole of the EU single market.[163] The framework achieves such through the establishment of a new green lane and red lane for goods movement.

[162] European Commission, 'Commission Launches Infringement Proceedings Against the UK for Breaking International Law and Provides Further Details on Possible Solutions to Facilitate the Movement of Goods Between Great Britain and Norther Ireland' (*European Commission*, 15 June 2022) <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_3676> accessed 17 May 2023.
[163] HM Government, *The Windsor Framework: A New Way Forward* (Cm 806, 2023) para j.

Goods moving between GB and NI and are to remain within the UK are subject to the green lane and shall only be subjected to usual checks. In contrast, goods moving into the EU through the red lane shall be subject to normal third-country processes and requirements.[164] Most importantly, this has effectively removed the border in the Irish Sea for internal UK trade.[165]

An essential component of this new framework is the new Stormont Brake that allows for the NI Assembly with the support of at least thirty MLAs across two or more parties to unilaterally disapply new EU rules relating to goods. The Stormont Brake shall apply to any new or amended EU goods rules that would have a significant impact on the day-to-day lives of businesses and citizens.[166] However, the Brake shall not be pulled for trivial reasons and only when there is something significantly different about a new rule.[167]

Once pulled, the Brake will provide the UK Government the sovereign power to veto the new EU rule from ever applying in Northern Ireland and this cannot be challenged by the Court of Justice.[168] The agreement sets out that the EU shall disapply rules fundamental to goods movement, while allowing for future rules to be vetoed, without disrupting internal UK trade nor jeopardising access for Northern Ireland's firms to the EU market.[169] In addition, the WF removes the requirement for NI to apply EU VAT and excise rules and guarantees NI's position within the UK's VAT and excise area while still maintaining frictionless trade with the EU.[170]

[164] ibid para 10.
[165] ibid.
[166] ibid para i.
[167] ibid para 60.
[168] ibid, para 63.
[169] ibid, para k.
[170] ibid, para 33.

In response to the new framework, the UK Government dropped its NI Protocol Bill, and the Commission suspended its infringement proceedings.[171] Although not required, on 22 March 2023 the House of Commons voted through the WF with a large majority. Notably, Boris Johnson and Jefferey Donaldson, the leader of the DUP, voted against the framework maintaining that NI would remain subject to EU law.

It remains to be seen whether Northern Ireland will come to accept this post-Brexit framework and whether it will ever be used in practice. Many questions remain unanswered with one being when a rule change is significant enough to justify pulling the Stormont Brake.[172] The Brake may come to be seen as an 'ornament' that is never to be used in practice although in theory it is a very powerful legal instrument.[173] However, for the Brake to be used, numerous safeguards have been put in place. Most notable is the requirement to have a functioning NI Executive.[174] Although the Brake was negotiated as an incentive to restore power sharing in the NI Assembly, as of August 2023 such has not yet been achieved. The 2023 Northern Ireland local elections continued the rise of Sinn Féin as the largest party. On 30 January 2024, the DUP agreed to restore power sharing in the NI Assembly to put an end to a twenty-three month long deadlock. However, at the time of writing, we shall have to see how this situation plays out and to see whether the NI Assembly votes to continue the application of the Protocol and the Windsor Framework in December 2024.

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[171] ibid, para 75.
[172] See Steve Peers, 'Just Say No? The New "Stormont Brake" in the Windsor Framework' (*EU Analysis Blog*, 5 March 2023) <https://eulawanalysis.blogspot.com/2023/03/just-say-no-new-stormont-brake-in.html> accessed 23 March 2023.
[173] David Allen Green, Is the "Stormont Brake" an Instrument or an Ornament? And Does It Matter?' (*The Law and Policy Blog*, 28 February 2023) <https://davidallengreen.com/2023/02/is-the-stormont-brake-an-instrument-or-an-ornament-and-does-it-matter/> accessed 2 March 2023.
[174] ibid.

Although, on the one hand, it can be said that Brexit is now more 'done' than it has ever been, on the other, many loose ends remain. One such example is the Retained EU Law (Revocation and Reform) Act 2023. It is unclear how ministers in Westminster and across the devolved assemblies will restate, revoke or replace retained/assimilated EU law as new domestic law before 23 June 2026.[175]

V. Conclusion

Brexit appears to confirm that Union citizenship cannot be considered as the fundamental status for Member State nationals. However, it is argued here that Union citizenship has become more than a status that facilitates European integration and the single market and has since evolved into a status to which notions such as belonging and identity are engendered.[176]

Although Union citizenship can become the fundamental status for those who seek to rely upon it, the current state of EU law does not allow for such. UK nationals in the EU who secured their residence prior to the end of the Brexit transition period are now subject to the terms of the Withdrawal Agreement regardless of their personal predilections. However, although the settled status schemes have been established by the Member States, it should be recognised that these systems do not fully guarantee the status of UK nationals in the EU as they remain at the mercy of internal political developments to which they will have no say.[177] All UK nationals seeking to reside, work or study in the EU after the transition period, and all Union

[175] Retained EU Law (Revocation and Reform) Act 2023, s.11, s.12 and s.14.
[176] See Dimitry Kochenov, 'The Right to Have What Rights? EU Citizenship in Need of Clarification' (2013) ELJ 502.
[177] Jakob Huber, 'EU Citizens in Post-Brexit UK: The Case for Automatic Naturalisation' (2019) 41 Journal of European Integration 801, 807.

citizens seeking such rights in the UK, have now become subject to restrictions imposed at the national level. The EU is unable to cater for the free movement of UK nationals throughout its Member States and Union citizens are now unable to make use of their Union citizenship rights in the UK.

Chapter VI

Brexit, Union Citizenship and the Court of Justice

I. Introduction

The Court of Justice has further confirmed that UK nationals have lost their Union citizenship. This was a devastating result for many UK nationals and especially for those who had previously relied upon their Union citizenship to establish themselves throughout the EU Member States. However, prior to and following Brexit, many UK nationals sought clarification from the Court of Justice as to whether the possibility existed for the retention of their Union citizenship. Perhaps it was thought that Union citizenship could enter a new age in the post-Brexit EU where the Court would return to its more citizen-orientated jurisprudence to favour the protection of their supposedly fundamental status. However, as this chapter demonstrates, this scenario has become increasingly unlikely.

The European Union is embedded in numerous principles as detailed throughout the Treaties and the Charter of Fundamental Rights. Article 13(1) TEU mandates the Court of Justice to promote and advance such principles while simultaneously serving the interests of its Member States. However, Article 19(1) TEU also mandates the Court to ensure that the law is observed when it interprets the Treaties. Arguably, the Court has favoured the application of Article 19(1) TEU when considering the loss of Union citizenship for UK nationals. In other words, given that judges are not elected officials some would argue that the Court ought not to

interfere with what are ultimately political matters and simply apply the Treaties to the facts of the matter presented before it.[1] In respect to UK nationals after Brexit, it has been said that judicial intervention at the EU level could be considered as a Treaty revision by the back door that would ultimately cause further political unease.[2] However, this approach to judicial decision making overlooks the reality of the European project and how the principles that underpin it have been adopted by judges in Luxembourg.

It can be said that the founding Treaties were heavily based upon traditional notions of international law. However, the Court of Justice constitutionalised them through its arguably activist jurisprudence and subsequently limited the sovereignty of the Member States in certain areas.[3] In other words, the Court allowed for flesh to be put on the bones of the EU legal order.[4] The Court expanded its *ratione materiae* through the establishment of concepts such as direct effects, supremacy, indirect effects and state liability and the guarantee of fundamental rights without there being any express statement of such within the text of the Treaties.[5] This approach to jurisprudence allowed the Court to break the political deadlock that

[1] Keon Lenaerts, 'The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice' in Maurice Adams and others (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013) 13.
[2] Koen Lenaerts and José A Gutiérrez-Fons, 'Epilogue on EU Citizenship: Hopes and Fears' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017) 751.
[3] Matej Avbelj, 'Revitalisation of EU Constitutionalism' (2021) 46 EL Rev 3, 10. See also Keon Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 American Journal of Comparative Law 205; Ingolf Pernice, 'Multilevel Constitutionalism in the European Union' (2002) 27 EL Rev 514.
[4] See Síofra O'Leary, 'Putting Flesh on the Bones of European Union Citizenship' (1999) 24 EL Rev 68.
[5] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* EU:C:1963:1 12-13; Case 6/64 *Flaminio Costa v E.N.E.L.* [1964] EU:C:1964:66, 593; See also Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* EU:C:1984:153; Joined Cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* EU:C:1991:428; Case 4/73 *J. Nold, Kohlen-und Baustoffgroßhandlung v Commission of the European Communities* EU:C:1974:51, para 13.

prevented the completion of the EU's internal market.[6] However, despite this, the Court ultimately determined that its role did not extend to the protection of Union citizenship for nationals of a former Member State of the EU.[7]

This chapter has five aims: first, it shall offer a theoretical justification for how the Court of Justice could have intervened to protect UK nationals from the loss of their Union citizenship; second, it shall consider the Union citizenship jurisprudence following the Brexit referendum; third, the chapter shall analyse certain aspects of the Court's post-Brexit Union citizenship jurisprudence; fourth, an analysis of these judgments shall be provided; fifth, the chapter shall offer its conclusions to argue that the readmission of UK nationals to Union citizenship must become a political and legislative issue rather than a judicial one.

II. A Justification for Judicial Intervention

What is being asked here is whether the legal principles upon which the EU operates could have protected UK nationals from the loss of their Union citizenship. Many would claim that the Court of Justice has no grounds to decide such arguing that legal rights cannot pre-exist legislation.[8] However, this being said, the Court has established legal rules that did not exist prior to the case before it was decided and justified the creation of these new rules through adhering to the principles and objectives upon which the EU was founded.[9] In other words, it can be said that the

[6] Joseph HH Weiler, 'Epilogue: Judging the Judges – Apology and Critique' in Maurice Adams and others (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013) 240-41.
[7] Case C-673/20 *EP v Préfet du Gers and Institut national de la statistique et des études économiques (INSEE)* EU:C:2022:449, paras 46-52.
[8] See Ronald Dworkin, *Taking Rights Seriously* (first published 1977, Bloomsbury 2022) 6.
[9] ibid 45.

Court of Justice may change an existing legal rule where the change further advances one of the EU's objectives or principles.[10] Arguably it could be said that the principle that the EU is to secure the well-being of its peoples as established under Article 3 TEU ought to have been interpreted to also apply to those who have previously been Union citizens and who continue to reside within its territory.

The Court of Justice is not directly bound by the doctrine of precedent, but this is not to say that it does not consider its previous decisions. In other words, it has been said that the Court takes a stone-by-stone approach when ruling on the rights of Union citizens in hard cases.[11] The Treaties have been subjected to both interpretation and reinterpretation in the Court of Justice and it can be argued that such has occurred even when the result has not carried out what the EU political institutions intended.[12] The Court in *Van Gend en Loos* did such in claiming that the then EEC Treaty established a new legal order of international law to which the subjects of the Treaty were not only the Member States but also their nationals when many argued that the EEC Treaty ought to have represented a typical international trade agreement.[13]

However, Chapter III highlighted both the Court's judicial activism and then judicial restraint in respect to the rights of Union citizens. On the one hand, the Court had previously decided hard cases on the basis that the claimant had in fact been a Union citizen and subsequently interpreted the Treaties to allow for a wider scope, but, on the other, the Court later decided such cases doctrinally on the basis of

[10] ibid 55.
[11] Lenaerts (n 1) 60.
[12] Dworkin, *Taking Rights Seriously* (n 8) 54. See also Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 6-7.
[13] Case 26/62 (n 5).

whether these Union citizens had sufficient resources.[14] Such positivistic interpretations run contrary to the fundamental status line of jurisprudence.[15] The varying economic circumstances of the Member States may appear to justify this intervention, but it does not answer the question of whether judgments based upon economic considerations carry less moral or ethical weight.[16] Here it can be said that the Court of Justice decided cases on the basis of policy rather than principle.[17] In other words, the Court decided that Union citizenship was not for the poor who have the potential to burden the social assistance systems of their host Member State.[18]

After the Brexit referendum, many UK nationals had hoped for a *Grzelczyk* styled moment where the Court would decide that Union citizenship is fundamental enough to prevent its erasure following a withdrawal from the EU. However, it ought to be asked what could have justified this interpretation. There is something to be said of the work of Ronald Dworkin, and particularly his concept of law as integrity. Dworkin argued that rights must be given weight in adjudication and the role of judges is to appeal to interpretations that uphold legal principles as well as legal rules. What is being considered here is whether the previously held Union citizenship rights of UK nationals were given significant weight in the jurisprudence of the Court of Justice

[14] See Case C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* EU:C:2014:2358. See also Charlotte O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Hart Publishing 2017).
[15] Eleanor Spaventa, 'Mice or Horses? British Citizens in the EU 27 After Brexit as "Former EU Citizens"' (2019) 44 EL Rev 589, 590.
[16] Dworkin, *Taking Rights Seriously* (n 8) 19. See also Ronald Dworkin, 'Hard Cases' (1975) 88 Harvard Law Review 1057, 1074-78.
[17] ibid 122.
[18] See Herwig Verschueren, 'Free Movement of EU Citizens: Including for the Poor?' (2015) 22 Maastricht Journal of European and Comparative Law 10, 34. See also Dimitry Kochenov, 'On Tiles and Pillars: EU Citizenship as a Federal Denominator' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017) 38-41; Eleanor Spaventa, 'Earned Citizenship - Understanding Union Citizenship Through Its Scope' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017) 209.

following the referendum and then after Brexit. In other words, were UK nationals to be considered as former EU citizens who continue to share in the European Union identity, or merely as third-country nationals?[19]

Law as integrity argues the following:

> [Law as Integrity] argues that rights and responsibilities flow from past decisions and so count as legal, not just when they are explicit in these decisions but also when they follow from the principles of personal and political morality…[20]

And how a judge applies this concept,

> Law as integrity supposes that people are entitled to a coherent and principled extension of past political decisions even when judges profoundly disagree about what this means.[21]

Dworkin argued that law as integrity must consider how past political decisions shall be allowed some special powers in adjudication. In doing so, a judge must take a holistic approach to conceive the body of law relating to Union citizenship as a whole.[22] Judges who accept integrity decide hard cases by accepting that the political history of the community will sometimes check other political convictions in their overall judgment.[23] A central concern with Brexit is how far the past political decision to ratify the EU Treaties should lock in the United Kingdom to its previous commitment to grant its nationals Union citizenship.

If the UK is under no obligation to protect the Union citizenship of its nationals, then can it be said that this duty falls upon the EU institutions? Kostakopoulou argues that the EU has such a responsibility given that the rights UK nationals

[19] See Spaventa (n 15).
[20] Ronald Dworkin, *Law's Empire* (first published 1986, Hart Publishing 2019) 96.
[21] ibid 134.
[22] ibid 167.
[23] ibid 255.

exercised were derived directly from EU law.[24] However, if the Court of Justice had taken on such a task, then arguably there would have been a further smattering of different judicial interpretations as to what a Union citizen is, what rights they hold and how fundamental the status is intended to become. There is reason to assume that judges in Luxembourg disagree in this regard.[25]

However, if such a duty did fall upon the Court, then integrity asks a judge to consider the intentions of all those who were involved.[26] It asks what the legislators would have intended if the problem was presented to them. One peculiarity of the Article 50 TEU withdrawal procedure is that Lord Kerr, the drafter of that Article, never intended it to be used unless there was a coup in an EU Member State. The EU would then use the Treaty Article to suspend the membership rights of that State. In a BBC interview, he stated that it had never occurred to him that the UK would use it to withdraw from the EU.[27]

This philosophy of law is not to allow judges to interpret what they believe the best result is, but to justify their interpretation of past legislative events by considering the story as a whole and not just on its ending.[28] It makes no attempt to deny the General Will, given that it recommends that the citizens should remain the authors of the law, but argues that this ideal requires integrity.[29] The 'will of the people' was provided as a possible justification for the UK's commitment to EU

[24] Dora Kostakopoulou, *European Union Citizenship Law and Policy: Beyond Brexit* (Edward Elgar Publishing Ltd 2020) 144.
[25] Stephen Weatherill, 'The Court's Case Law on the Internal Market: "A Circumloquacious Statement of the Result, Rather than a Reason for Arriving at It?"' in Maurice Adams and others (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013) 101.
[26] Dworkin, *Law's Empire* (n 20) 318.
[27] BBC News, 'Lord Kerr Says Article 50 was Drawn Up in the Event of a Coup' (*BBC News*, 3 November 2016) <https://www.bbc.co.uk/news/av/uk-scotland-37861911> accessed 17 December 2020.
[28] Dworkin, *Law's Empire* (n 20) 338.
[29] ibid 189.

withdrawal. However, integrity is to check this justification to consider the story holistically rather than relying on a transient majority defined as it was on 23 June 2016. Additionally, integrity acknowledges that legislation is seen in the best light when the State has not misled the public, and there would be many who would like to point out how the UK electorate was misled during the 2016 Brexit referendum. Therefore, a judge acting under integrity may prefer an interpretation that matches statements of formal legislative purpose, particularly when citizens might well have made life changing decisions based on these statements as many UK nationals did due to their Union citizenship.[30]

This is not to confuse the ideal of integrity with Rawls's justice as fairness concept in that whatever happens through fair procedure is just,[31] and that society is to be conceived as a fair system of cooperation that adopts the concept of the citizen to go with this idea.[32] In deciding which intention is best, integrity holds that fairness demands deference to stable and abstract features of the national political culture and not to the views of a transient political majority just because these have triumphed or failed on a particular occasion.[33] In other words, integrity is to be achieved when people disagree about either justice or fairness. If such disagreement were to occur, then the fairness of justice must, on certain occasions, be sacrificed to integrity.[34]

It could be said that the Court of Justice could have intervened to protect the Union citizenship of UK nationals through a decision that allowed for the extension

[30] ibid 346.
[31] John Rawls, *A Theory of Justice* (first published 1971, Harvard UP 1999) 10 and 197-98.
[32] John Rawls, 'Justice as Fairness in the Liberal Polity' in Gershon Shafir (ed), *The Citizenship Debates* (University of Minnesota Press 1998) 59.
[33] Dworkin, *Law's Empire* (n 20) 377.
[34] ibid 178.

of the UK's past political decision to ratify the EU Treaties.[35] However, the Court has not done so and it is increasingly unlikely that the Court considers Union citizenship as being fundamental enough to prevent its erasure upon a Member State withdrawal from the EU. Although the Court could have intervened it arguably did not do so given the inevitable political backlash. Judges in the High Court of England & Wales were labelled 'enemies of the people' for correctly interpreting the UK Constitutional framework when ruling on the ability of the UK Executive to trigger Article 50 TEU.[36] How likely was it that similar headlines would have occurred if the Court of Justice protected the Union citizenship of UK nationals?

Rights are important as they represent the majority's promise to the minority that their dignity and equality will be respected.[37] This ought to apply in the supranational as well as the national setting. However, if the EU institutions do not take the rights of Union citizens, and those who have been Union citizens, seriously, then it can be said that it does not take law seriously either.[38] It ought to be recognised that if the EU cannot act upon a coherent set of principles, then it will fail to act with integrity given that it cannot similarly treat individuals to the grant of Union citizenship rights in the EU.[39] What justifies this claim is the fact that there are currently millions of Union citizens who are now residing on the basis of a status that can be stripped from them upon the withdrawal of their Member State from the EU. However, if it can be argued that if the Court of Justice has made a mistake when deciding cases

[35] ibid 119-28.
[36] See Joshua Rozenberg, *Enemies of the People?: How Judges Shape Society* (Bristol University Press 2020) vii and 29-33. See also James Slack, 'Enemies of the People: Fury Over "Out of Touch" Judges Who Have "Declared War on Democracy" by Defying 17.4m Brexit Voters and Who Could Trigger Constitutional Crisis' *Daily Mail* (London, 3-4 November 2016) https://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html accessed 22 December 2022.
[37] Dworkin, *Taking Rights Seriously* (n 8) 246.
[38] ibid 247.
[39] See Scott J Shapiro, *Legality* (Harvard University Press) 298-99.

that touch upon fundamental personal or political rights, then those impacted by its decision are within their social rights in refusing to accept that decision as conclusive.[40] It should be recognised that courts are not legally infallible.[41]

III. The CJEU After the Referendum

Following the Brexit referendum, many argued that the loss of Union citizenship for UK nationals ought to be subjected to the principle of proportionality.[42] Certain scholars argued that the *Rottman* judgment could provide a sufficient legal basis for retaining Union citizenship for UK nationals.[43] The argument was whether nationals of a withdrawing Member State would lose their Union citizenship.[44] However, relying solely upon *Rottman* appears problematic from the outset as the judgment demonstrates that a Member State can withdraw Union citizenship.[45] Additionally, *Rottman* considered statelessness and no UK national was at risk of statelessness as the result of Brexit. However, the limitations of *Rottman* aside, UK nationals resident in the EU Member States sought judicial clarification. The interesting point here is that these individuals sought the interpretation of the Court rather than

[40] Dworkin, *Taking Rights Seriously* (n 8) 259.
[41] Scott J Shapiro, *Legality* (Harvard University Press) 15.
[42] See Case C-120/94 *Commission of the European Communities v Hellenic Republic* EU:C:1995:199, Opinion of AG Jacobs, para 70.
[43] Patricia Mindus, *European Citizenship After Brexit: Freedom of Movement and Rights of Residence* (Palgrave Macmillan 2017) 82-83. See also Stephen Coutts, 'Brexit and Citizenship: The Past, Present and Future of Free Movement' (*Deli Law Blog*, 12 September 2016) <https://delilawblog.wordpress.com/2016/09/12/stephen-coutts-brexit-and-citizenship-the-past-present-and-future-of-free-movement/> accessed 1 April 2019; Phoebus L Athanassiou and Stéphanie Laullhé Shaelou, 'EU Citizenship and Its Relevance for EU Exit and Secession' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017) 744.
[44] A P van der Mei, 'Member State Nationality, EU Citizenship and Associate European Citizenship' in Nathan Cambien, Dimitry Kochenov and Elise Muir (eds), *European Citizenship Under Stress* (Brill Nijhoff 2020) 449-50.
[45] Joakim Nergelius, 'Former EU Citizen' in Antonio Bartolini, Roberto Cippitani and Valentina Colcelli (eds), *Dictionary of Statuses within EU Law: The Individual Statuses as Pillar of European Union Integration* (Springer 2019) 276.

waiting for the conclusion of the withdrawal negotiations. This was primarily because, at the time, discussions of an associate style of Union citizenship were vague at best and the settlement schemes were yet to be introduced.

The 7 February 2018 decision of the Amsterdam District Court attempted to clarify whether *Rottman* could apply to preclude the loss of Union citizenship for UK nationals upon a non-negotiated withdrawal. The 'Brexpat' case concerned UK nationals lawfully residing in the Netherlands who sought to impose the principle of proportionality upon their host Member State to require an individual assessment before their rights derived from EU law could be restricted. The claimants were rightfully concerned that the Netherlands could classify them as unlawfully resident TCNs and order their removal. The District Court submitted two questions to the CJEU to determine whether the absence of a withdrawal agreement would result in the automatic loss of Union citizenship, and if not, then would the rights derived from their Union citizenship become subject to any conditions or limitations.

However, the Amsterdam Court of Appeal rejected the preliminary reference claiming that it would be premature as the future status of the claimants would be resolved by the withdrawal negotiations.[46] On the one hand, it can be said that the national court correctly followed the CJEU recommendations to not use Article 267 TEFU to refer hypothetical questions.[47] However, on the other, the *Wightman* judgment indicates that the CJEU will interpret hypothetical issues where it is of

[46] Oliver Garner, 'The Existential Crisis of Citizenship of the European Union: The Argument for an Autonomous Status' (2018) 20 Cambridge Yearbook of European Legal Studies 117-18. See also Nathan Cambien, 'Residence Rights for EU Citizens and Their Family Members: Navigating the New Normal' in Nathan Cambien, Dimitry Kochenov and Elise Muir (eds), *European Citizenship Under Stress* (Brill Nijhoff 2020) 205-06.

[47] Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings [2019] OJ C 380/1, para 26. See also Case C-83/91 *Wienand Meilicke v ADV/ORGA F. A. Meyer AG* EU:C:1992:332.

interest to it.[48] Taking this into account, it remains unclear why the Amsterdam Court of Appeal reversed the preliminary reference as this could have offered legally binding authority over what should be the future scope of Union citizenship. Had a judgment been given, the Brexit negotiations could have then continued upon a correct interpretation of the status.[49] It is not clear why Article 20 TFEU would be seen as inferior to a withdrawal arrangement that had yet to be concluded considering that, at the time, UK nationals were still Union citizens who sought to rely upon the Court to interpret their status and the rights guaranteed by it.

It is debatable whether the CJEU would have favoured an interpretive approach to prevent the loss of Union citizenship. This was a possibility, but this should be balanced against the Court's previous proclivity to limit the fundamental character of Union citizenship.[50] The Court could have decided that the *Rottman* doctrine applies only to circumstances that risk statelessness. This argument alone is sufficient to claim that there would be no guarantee that the Court would apply the *Rottman* doctrine widely to allow for the retention of Union citizenship for UK nationals.[51] The argument provided by Mei is that the withdrawal of nationality for an individual compares in no serious way to a Member State withdrawal from the EU.[52] It can be argued that if the Court were to take on an activist role, then it would

[48] Case C-621/18 *Andy Wightman and Others v Secretary of State for Exiting the European Union* EU:C:2018:999.
[49] Anthony Arnull, 'UK Nationals and EU citizenship: References to the European Court of Justice and the February 2018 Decision of the District Court, Amsterdam' (*EU Law Analysis*, 28 March 2018) <http://eulawanalysis.blogspot.com/2018/03/uk-nationals-and-eu-citizenship.html> accessed 22 September 2020.
[50] See Case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* EU:C:2011:277, para 50; Case C-256/11 *Murat Dereci and Others v Bundesministerium für Inneres* EU:C:2011:734, para 66.
[51] Annette Schrauwen, '(Not) Losing Out from Brexit' (2017) 1 Europe and the World: A Law Review 1, 4; Mindus (n 43) ch 7; Jo Shaw, 'EU Citizenship: Still a Fundamental Status?' in Rainer Bauböck (ed), *Debating European Citizenship* (Springer 2019) 17.
[52] Mei (n 44) 451. See also Martijn Van den Brink, 'A Qualified Defence of the Primacy of Nationality Over European Union Citizenship' (2020) 69 International & Comparative Law Quarterly 177, 183.

be acting contrary to the intentions of the Treaties.[53] In Mei's view, the EU political institutions provide the only mechanism in which to prevent the loss of Union citizenship for UK nationals.[54] If the Court were to interpret *Rottman* to prevent the automatic loss of Union citizenship upon withdrawal, then it could be argued that this would undermine national sovereignty to a far greater degree than *Van Gend* or *Costa* ever did.[55] It may be argued that the Court's role is not to participate in theoretical discussion but rather to resolve legal disputes and establish legal norms.[56]

However, the *Lounes* Judgment demonstrated that the Court of Justice was open to furthering the rights of Union citizens. Mr Lounes, an Algerian national, entered the UK on a six-month visitor visa on 20 January 2010 and illegally overstayed in British territory. Mr Lounes married Ms Ormazábal on 1 January 2014 in the UK. Ms Ormazábal is a Spanish national of origin who moved to the UK in 1996. On 15 April 2014, Mr Lounes applied for a UK residence permit as a family member of an EEA national pursuant to the EEA regulations 2006 which transposed Directive 2004/38 into UK law. Mr Lounes was refused a residence permit and was subsequently issued with a notice to leave the UK. The notice stated that given Ms Ormazábal had acquired British nationality on 12 August 2009 she could no longer be determined as a free moving EEA national, even though she retained her Spanish nationality. Therefore, she could no longer be considered a beneficiary for the

[53] Mei (n 44) 451. See also Martijn van den Brink, 'The Court and the Legislators: Who Should Define the Scope of Free Movement in the EU?' in Rainer Bauböck (ed), *Debating European Citizenship* (Springer 2019).
[54] Mei (n 44) 452.
[55] Gareth Davies, 'Union Citizenship - Still a Europeans' Destiny After Brexit?' (*European Law Blog*, 7 July 2016) <https://europeanlawblog.eu/2016/07/07/union-citizenship-still-europeans-destiny-after-brexit/> accessed 29 April 2019.
[56] Daniel Thym, 'Frontiers of EU Citizenship: Three Trajectories and Their Methodological Limitations' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017) 714.

purposes of Article 3(1) 2004/38. Consequently, it was argued that Mr Lounes could not derive a right of residence under the Directive.

AG Bot in his opinion argued that this could not be considered on the same footing as a purely internal situation stating that the connecting factor with EU law was obvious.[57] The fact that Ms Ormazábal's naturalisation was seen to place her in a position where she would be liable to the loss of rights conferred by Directive 2004/38 fell, because of its nature and consequences, within the ambit of EU law.[58] However, the fact that Ms Ormazábal had naturalised in the UK did change her civil status to consequently exclude her *ipso facto* from entitlement to the rights conferred by the Directive.[59] Therefore, by definition she could not be considered a beneficiary for the purposes of Article 3(1) of the Directive.[60] However, AG Bot concluded that Mr Lounes could derive a right to residence from Article 21(1) TFEU given that Ms Ormazábal had relied upon Article 16 of the Directive to enable her to claim British nationality. To deprive Ms Ormazábal of the right to have her TCN spouse with her where this would have been possible prior to her naturalisation would have illogically annihilated the effectiveness of the rights that she derives from Article 21(1) TFEU given that if she moved to another Member State, then Mr Lounes would have been able to accompany her and derive a right of residence under the Directive.[61]

The Court further confirmed that Ms Ormazábal could not rely upon the Directive to derive a right of residence for her TCN spouse.[62] However, The Court agreed that a right of residence for TCN family members can be derived directly from Article 21

[57] Case C-165/16 *Toufik Lounes v Secretary of State for the Home Department* EU:C:2017:862, opinion of AG Bot, paras 35-36.
[58] ibid, para 39.
[59] ibid, para 61.
[60] ibid, para 62.
[61] ibid, paras 86-88.
[62] ibid,paras 41-44.

TFEU.[63] Despite being a British national, the Court found that Ms Ormazábal could not be compared with British nationals who had never resided abroad and therefore her naturalisation did not bring her entirely within the scope of the domestic nationality laws of the Member State.[64] In other words, it was held that the migrant history of Ms Ormazábal meant that she should be given differential treatment.[65] Therefore, where a Union citizen exercises their right to freedom of movement and subsequently acquires the nationality of their host state, they can rely on their Union citizenship rights against one of those two Member States as to allow otherwise would undermine the effectiveness of Article 21(1) TFEU.[66] This can be called the logic of gradual integration, a process that should not limit her rights as a Union citizen.[67] The Court held that if Article 21(1) TFEU is to be effective, then Ms Ormazábal ought to continue to enjoy the rights arising under that provision and to derive a right of residence for her TCN spouse.[68]

If the goal of the EU is to facilitate integration and solidarity, then there is no logical reason as to why the Court should provide a judgment that deters Union citizens from naturalising. Had the Court failed to recognise Ms Ormazábal's cross border movement prior to her naturalisation then it can be said that Union citizens would question naturalising in their host state given that they would be afforded less rights to family life. Additionally, given that the Court took this position without

[63] ibid, para 45. See also Case C-456/12 *O. v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B.* EU:C:2014:135, paras 44-50; Case C-133/15 *H.C. Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others* EU:C:2017:354, para 54.
[64] ibid, para 49.
[65] Gareth Davies, 'Lounes, Naturalisation and Brexit' (*European Law Blog*, 5 March 2018) <https://europeanlawblog.eu/2018/03/05/lounes-naturalisation-and-brexit/> accessed 27 February 2021. See also Polly Ruth Polak, 'A Commentary on the Lounes Case and the Protection of EU Citizens' Rights Post-Brexit' (2018) Revista General de Derecho Europeo, 44 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3132348> accessed 15 May 2021.
[66] Case C-65/16 (n 57) para 51-53.1
[67] ibid, para 56.
[68] ibid, para 60-62.

referring to Article 8 ECHR or Art 7 CFR, it could be taken to imply that such a right is contained within Article 21(1) TFEU itself.[69]

The *Tjebbes and others* judgment appears to confirm the applicability of EU law in the domestic nationality laws of the Member States. Decided a few days before the UK's initial withdrawal date from the EU, the case involved four claimants, including one child, who held Canadian, Swiss and Iranian nationality who lost their Netherlands nationality and their Union citizenship due to being resident outside the Netherlands, and the territory to which the EU Treaties apply, for an uninterrupted period that exceeded ten years. The referring national court asked two questions: first, does Articles 20-21 TFEU, when read in the light of Article 7 of the Charter of Fundamental Rights, preclude a Member State from withdrawing nationality by operation of law; second, does Articles 20-21 TFEU, when read in the light of Article 24(2) CFR, preclude the loss of Union citizenship for a minor as the consequence of his or her parent losing a Member State nationality? The claimants were essentially asking the Court whether it would extend the *Rottmann* judgment beyond situations where the deprivation of Member State nationality would result in statelessness.

The opinion of AG Mengozzi argued that given that the claimants could lose their Union citizenship the situation therefore falls, by reason of its nature and consequences, within the ambit of EU law.[70] However, AG Mengozzi's opinion aligned with the Netherlands Government claiming that nationality expresses the genuine link between it and its nationals and that residence abroad for long periods

[69] Elena Gualco, 'Is Toufik Lounes Another Brick in the Wall? The CJEU and the On-going Shaping of the EU Citizenship' (2018) 3 <https://www.europeanpapers.eu/en/system/files/pdf_version/EP_EF_2018_I_016_Elena_Gualco_00226.pdf> accessed 13 February 2021.

[70] Case C-221/17 *M.G. Tjebbes and Others v Minister van Buitenlandse Zaken* EU:C:2019:189, Opinion of AG Mengozzi, paras 28-30 and 37.

was sufficient to break this link. Therefore, the loss of nationality is legitimate provided the claimant does not become stateless.[71] The loss of nationality in this regard pursues a legitimate objective.[72]

AG Mengozzi argued that the claimants did not have a right for the *Rottman* criteria to be applied in a general way.[73] Mengozzi's reasoning for such was due to the fact that it would have been relatively easy for the claimants to renew their identity documents and given that the loss of Netherlands nationality was not irreversible.[74] Consequently, in the view of AG Mengozzi, the Netherlands law on nationality did not breach EU law even though the loss of Union citizenship was at stake.[75] AG Mengozzi claimed that EU law was restricted to assessing the proportionality of the measure that facilitates the withdrawal of Netherlands nationality in general and not to each individual assessment of the administrative decisions of the Netherlands.[76] However, this being said, AG Mengozzi did claim that Article 20 TFEU, when read in the light of Article 24 CFR, precludes the Member States from withdrawing the Member State nationality of a minor as the consequence of his or her parents losing their Member State nationality.[77]

The Court of Justice agreed with the opinion stating that the situation before it fell within the ambit of EU law given the loss of Union citizenship was at stake.[78] However, the Court did agree that nationality acts as the representation of the genuine link between a State and its nationals and that EU law does not in principle

[71] ibid, paras 53-55.
[72] ibid, para 59.
[73] ibid, paras 60-62 and 80-86.
[74] ibid, paras 95-103.
[75] ibid, paras 114-118.
[76] ibid, para 118.
[77] ibid, para 149.
[78] Case C-221/17 *M.G. Tjebbes and Others v Minister van Buitenlandse Zaken* EU:C:2019:189, para 32.

preclude a Member State from withdrawing its nationality, and subsequently Union citizenship, if doing so is in the public interest.[79]

However, unlike AG Mengozzi's opinion, the withdrawal of a Member State nationality from any individual, whether an adult or a minor, would be inconsistent with the principle of proportionality if the relevant national rules did not permit at any time an individual examination of the consequences of that loss for the person concerned.[80] Therefore, the Court extended the proportionality principle to cover for all circumstances where a Member State national is faced with losing their Union citizenship. The threshold for applying the proportionality principle has subsequently lowered as it is now the case that if the decision to withdraw nationality creates 'particular difficulties' for the retention of genuine connections with family members, or in exercising their professional activities,[81] an individual assessment must be carried out if the loss 'disproportionately affects the normal development of his or her family and professional life.'[82]

However, the Court did agree that the ten-year rule was justifiable as it maintains the genuine link between the citizen and the State, and more so in this case given that it would have been relatively simple for the claimant to recover their nationality *ex tunc* without succumbing to overly restrictive measures.[83] That being said, the Court did not assess whether this rule actually achieved a legitimate public interest.[84] Therefore, the claimants had no such link given that EU law in principle

[79] ibid, paras 35-39.
[80] ibid, paras 41-42.
[81] ibid, para 46. See also Martijn van den Brink, 'Bold, But Without Justification? *Tjebbes*' (2019) 4 European Papers <https://www.europeanpapers.eu/en/europeanforum/bold-without-justification-tjebbes> accessed 7 March 2021.
[82] ibid, para 44.
[83] ibid, para 22.
[84] Stephen Coutts, 'Bold and Thoughtful: The Court of Justice Intervenes in Nationality Law Case C-221/17 Tjebbes' (*European Law Blog*, 25 March 2019) <https://europeanlawblog.eu/2019/03/25/bold-and-thoughtful-the-court-of-justice-intervenes-in-nationality-law-case-c-221-17-tjebbes/> accessed 13 April 2021.

does not preclude the loss of Netherlands national *ex lege*, and consequently Union citizenship.[85] Notably, the Court has since upheld the genuine link logic in subsequent case law.[86]

The *Tjebbes and others* judgment is particularly frustrating given that, on the one hand, the Court confirms that the loss of Union citizenship ought to be subjected to the proportionality principle, yet, on the other, the Court does nothing to support the supposedly fundamental nature of Union citizenship.[87] The *Tjebbes* judgment highlights how the international law principle of the genuine link still operates as a basis for belonging to the EU. If followed strictly, then this principle shall forever take an individual back to their State of original citizenship.[88] The Court's approach here is at odds with *Eman and Sevinger* where it was held that residence outside of the territories of the Member States precluded national legislation of the Netherlands that denied European Parliament voting rights.[89] The only condition to vote was that the individual concerned was indeed a Union citizen who could therefore rely on Part II of the TFEU irrespective of their place of their place of residence.[90] The idea of the genuine link was also struck down in the Court's ruling in *Spain v UK* where it held that the rights recognised by the Treaties are not necessarily limited to Union citizens.[91] The Court struck down the genuine link logic in these cases but its revival in *Tjebbes* has been said to represent a new low in Union citizenship

[85] Case C-221/17 (n 78) paras 36-39 and 48.
[86] See Case C-689/21 *X v Udlændinge- og Integrationsministeriet* EU:C:2023:626, para 59.
[87] Anne Wesemann, *Citizenship in the European Union: Constitutionalism, Rights and Norms* (Edward Elgar 2020) 138.
[88] Dimitry Kochenov, *Citizenship* (MIT Press 2019) 116.
[89] See Case C-300/04 *M. G. Eman and O. B. Sevinger v College van burgemeester en wethouders van Den Haag* EU:C:2006:545.
[90] ibid, paras 29, 39, 55 and 61.
[91] Case C-145/04 *Kingdom of Spain v United Kingdom of Great Britain and Northern Ireland* EU:C:2006:543, para 74. See also Daniel Sarmiento and Eleanor Sharpston, 'European Citizenship and Its New Union: Time to Move On?' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017) 237.

jurisprudence.[92] The reliance upon international law norms in *Tjebbes* remains questionable given that the status of Union citizenship and its associated rights are derived through EU law.

Kochenov has provided a scathing critique of this judgment to argue that this ruling has downgraded the supposedly fundamental nature of Union citizenship into a state irrelevance for no tenable reason.[93] It is said that the stripping of Union citizenship for the non-renewal of a Member State passport is problematic as it misses the logic of EU integration.[94] Kochenov argues that the Court in calling for proportionality is not being 'proportionate about proportionality'.[95] This stems from the fact that under the Netherlands Law of Nationality there is no notification that the individual is about to be removed as one of its citizens, an erasure by stealth.[96] However, van den Brink counters this argument claiming that the Court is bound to respect the Treaties and not to remedy every national injustice.[97] It should be said that *Tjebbes and others* only adds to the evolving confusion of Union citizenship: the contest between those who view the status as being destined to become fundamental, and those who view it as an additional status that requires the holding of a Member State nationality. According to van den Brink, the fundamental status argument does not hold given that the Treaties make no reference for this being the case and the Court has no place to decide such given that under Article 19 TEU it is duty bound to uphold the Treaties to ensure that the law is observed.[98] Therefore,

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[92] Dimitry Kochenov, 'The Tjebbes Fail' (2019) 4 European Papers <https://www.europeanpapers.eu/en/europeanforum/the-tjebbes-fail> accessed 18 September 2020.
[93] ibid.
[94] ibid.
[95] Ibid.
[96] Ibid. See also Caia 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, 145.
[97] Brink (n 81).
[98] ibid.

it can be argued that the Court has derived a bundle of Union citizenship rights from a fundamental status that does not yet exist.[99]

The *Tjebbes* judgment has ensured that Union citizenship continuity is dependent upon not possessing an additional citizenship outside of the territories of the EU Member States.[100] The individual must, by renewal or by acquisition, hold a Member State nationality. However, the judgment does nothing to explain why having Canadian, Swiss or Iranian nationality undermines the concept of solidarity and good faith to the point where the loss of Union citizenship is justified. If this is the case, then nationality itself should also undermine Union citizenship even when the individual resides inside the territories of the EU Member States. Regrettably, *Tjebbes* assumes that it is continued residence inside a Member State that assesses the level of solidarity for dual national Union citizens. However, the *Tjebbes* judgment demonstrates that the Court will intervene in the nationality laws of the Member States where the loss of Union citizenship is concerned, even where the claimant has not exercised their free movement rights in the EU.

To summarise this section is to recognise certain features of the Union citizenship jurisprudence after the Brexit referendum vote. It now appears that the Court has confirmed the *Rottmann* doctrine and will intervene in the nationality laws of the Member States when the loss of Union citizenship is at stake. This appeared to be a promising development for UK nationals in the EU as it could have led to judicial interpretations that sought to protect their Union citizenship after Brexit. However, it shall be shown that this was not the case.

[99] Pavlos Eleftheriadis, 'The Content of European Citizenship' (2014) 15 German Law Journal 777, 780.
[100] Kochenov (n 92).

IV. The CJEU After Brexit

The *JY* judgment delivered at the start of 2022 further protected the fundamental nature of Union citizenship. The case concerned JY who had applied for Austrian citizenship on 15 December 2008. On 14 March 2014, Austria informed JY that she would be granted Austrian citizenship if, within two years, she could prove that she had relinquished her Estonian nationality. On 27 August 2015, it was confirmed that JY had renounced her Estonian nationality, and therefore Union citizenship, after receiving assurance from Austria that she would be granted Austrian citizenship. JY became stateless as a result.

However, on 6 July 2017, Austria revoked the assurance that it would grant JY its citizenship. The Defendant (Wiener Landesregierung) justified that decision by referring to the two motoring offences JY had committed since being given that assurance,[101] and the eight administrative offences committed prior to receiving that assurance. JY sought to appeal the decision. On 23 January 2018, the Austrian administrative court held that given that JY was already stateless, she could not rely upon the judgments given in *Rottman* and *Tjebbes and others*, and no examination as to the proportionality of the decision to withdraw the assurance from JY was required given that JY was not a Union citizen. JY appealed to the Supreme Court of Austria which found that the administrative court did not review the proportionality of the decision in the light of EU law. Therefore, it referred to the Court of Justice asking whether such circumstances fell within the scope of EU law and, if so, whether the competent national authorities are required to examine whether such revocation is compatible with the principle of proportionality.

[101] The failure to display a vehicle inspection disc and driving under the influence of alcohol.

The opinion of AG Szpunar recognised the submissions of JY who claimed that she never intended to renounce her Union citizenship given that she wanted, and legitimately expected, to acquire the nationality of another Member State. Therefore, she involuntarily lost her Union citizenship.[102] The opinion recognises as its starting point the judgment from *Micheletti and others* that holds that the Member States are to have due regard to EU law not only over the loss of nationality but also to its acquisition.[103] Therefore, given that the Member States must also have due regard to EU law concerning the acquisition of its nationality, JY's situation falls, by reason of its nature and consequences, within the scope of EU law given that she had a legitimate expectation that she would recover her Union citizenship.[104]

In respect to the proportionality principle, AG Szpunar considered the fact that Austria required the claimant to relinquish their Estonian nationality. Therefore, it was said that this could not be considered a voluntary renunciation of Union citizenship and that it was clear that JY wanted to retain her Union citizenship.[105] Accordingly, for the decision to revoke the assurance to be compatible with the principle of proportionality, the relevant national rules must permit an individual examination of the consequences of such a decision for the person concerned.[106] It was doubted whether the decision to revoke the assurance from JY is justified given the nature of her offences.[107] Although such offences ought to be punished, AG Szpunar did not believe that offences related to road safety could justify the permanent loss of Union citizenship, especially so considering that the offences did

[102] Case C-118/20 *JY v Wiener Landesregierung* EU:C:2022:34, Opinion of AG Szpunar, para 38.
[103] See Case C-369/90 *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria* EU:C:1992:295, para 10.
[104] Case C-118/20 (n 102) paras 44-52 and 63-67.
[105] ibid, paras 58-61.
[106] ibid, para 98-99.
[107] ibid, para 103.

not even entail the suspension of JY's driving licence in Austria.[108] Additionally, it was seen that JY did not present a sufficiently serious threat to public policy or to public security to warrant the removal of the assurance.[109] Furthermore, given that the assurance was provided in 2015, the Austrian authorities should have issued JY with Austrian nationality prior to such offences being committed given the length of time that had already passed.[110]

The Court of Justice agreed with the opinion. The Court held that, in such circumstances, JY could not have voluntarily renounced her Union citizenship given the requirements imposed by Austrian nationality laws.[111] The Court also held that it is for the Member States to have due regard to EU law over the acquisition, as well as the loss, of nationality.[112] However, it has been argued that *JY* is nested in an unacceptable core given that the judgment fails to set an absolute prohibition on the requirement to first surrender Union citizenship prior to the granting of a new Member State nationality.[113] Further, the Court considered Union citizenship as the fundamental status for Member State nationals, and in this case this even applied to those who had been Member State nationals, when they exercise their right to freedom of movement, and the loss of that status falls, by reason of its nature and consequences, within the scope of EU law.[114] Therefore, an individual examination of the consequences for the person concerned is required.[115] Additionally, the Court agreed with AG Szpunar in that JY did not present a sufficiently serious threat to

[108] Ibid, paras 108-110.
[109] ibid, para 113 and 123-24.
[110] ibid, para 115.
[111] Case C-118/20 *JY v Wiener Landesregierung* EU:C:2022:34, para 36.
[112] ibid, para 37.
[113] Dimitry Kochenov and David de Groot, 'Helpful, Convoluted and Ignorant in Principle: EU Citizenship in the Hands of the Grand Chamber in JY' (2022) 47 EL Rev 699; Dimitry Kochenov, 'Court of Justice's Grand Chamber In JY: Othering Europeans Is OK' (2022) EU Law Live https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4031066 accessed 24 January 2023.
[114] Case C-118/20 (n 102), paras 38-46.
[115] ibid, para 59-60.

public policy or to public security, stating that traffic offences cannot justify the revocation an assurance of nationality or justify the permanent loss of Union citizenship.[116] Therefore, the decision to revoke the assurance did not appear to be proportionate to the gravity of the offences committed.[117]

The Judgments from *Rottman*, *Zambrano*, *Lounes*, *Tjebbes*, and *JY* when read together appear to justify a certain level of judicial protection for UK nationals in the Court of Justice. However, given the difference between such judgments and the collective loss of Union citizenship for UK nationals, this was not to be the case.[118] The Court of Justice could have interpreted Union citizenship as a fundamental principle of the United Kingdom's membership of the European Union to protect the continued status of its nationals. Although politically unfeasible, this remained theoretically possible until the *INSEE* judgment.[119] The case concerned a British national who had resided in France since 1984 and is married to a French national but has not applied for nor obtained French nationality. Following the entry into force of the Withdrawal Agreement, the claimant was removed from the electoral roll in France. The claimant argued that she had been totally disenfranchised given that she no longer had the right to vote in the UK given her period of residence abroad exceeding fifteen years. This also meant that she was excluded from being able to vote in the Brexit referendum and the 2019 UK general election. Therefore, it was argued that the claimant cannot compare to other UK nationals given that she had

[116] ibid, 65-71.
[117] ibid, para 73.
[118] See Ilaria Gambardella, 'JY v Wiener Landesregierung: Adding Another Stone to the Case Law Built Up by the CJEU on Nationality and EU Citizenship' (2022) 7 European Papers <https://www.europeanpapers.eu/en/europeanforum/jy-wiener-landesregierung-another-stone-nationality-citizenship> accessed 17 January 2023.
[119] Case C-673/20 *EP v Préfet du Gers and Institut national de la statistique et des études économiques (INSEE)* EU:C:2022:449. See also John Chipman Gray, *The Nature and Sources of the Law* (first published 1909, 2nd end, The Macmillan Company 1948) 93-96; Dworkin, 'Hard Cases' (n 16) 1060.

also lost the right to vote in European Parliament elections and in the municipal elections in France. According to the claimant, the loss of Union citizenship cannot be automatic in such circumstances.

The referring court asked the following questions: first, must Article 50 TEU and the Withdrawal Agreement be interpreted as revoking the Union citizenship of UK nationals who, before the end of the transition period, exercised their right to freedom of movement in the territory of another Member State; second, if so then is the Withdrawal Agreement to be regarded as having allowed UK nationals to retain, without exception, the rights to Union citizenship that they enjoyed prior to Brexit; third, if not, then is the Withdrawal Agreement invalid in so far as it infringes the principles underlying the EU identity and the principle of proportionality; fourth, is Article 127(1)(b) of the Withdrawal Agreement invalid given that it deprives Union citizens who have exercised their right to freedom of movement the right to vote and stand as candidates in the municipal elections in their host State?

The opinion of AG Collins was hardly favourable stating that Article 9 TEU and Article 20 TFEU provide that Union citizens must be nationals of a Member State and that the EU is powerless to create a Union citizenship that is independent of Member State nationality.[120] AG Collins argued that given Article 50(1) TEU acknowledges that a Member State can withdraw from the EU in accordance with its own constitutional requirements, and that Article 50(3) states explicitly that the Treaties shall cease to apply from the date of entry into force of the Withdrawal Agreement. Therefore, UK nationals have ceased to be Union citizens from 23:00 31 January 2020.[121]

[120] Case C-673/20 *EP v Préfet du Gers and Institut national de la statistique et des études économiques (INSEE)* EU:C:2022:449, Opinion of AG Collins, para 22.
[121] ibid, 27-28.

In the view of AG Collins, the claimant was not entitled to vote in the municipal elections of France. In fact, it was said that it was paradoxical given the claimant's links to France that she denied to do the one thing that would automatically secure her Union citizenship: that is, apply to become a French national.[122] AG Collins was also quick to strike down AG Maduro's opinion from *Rottman* stating that the Member States did not intend for Union citizenship to question an individual's primary allegiance to a national body politic and that the acquisition and loss of Union citizenship are not governed by EU law.[123] The Judgments from *Rottman* and *Tjebbes and others* concerned the withdrawal of Member State nationality from individual persons and could not be relied upon by the claimant given her loss of Union citizenship was the result of the collective loss of Union citizenship for UK nationals after Brexit.[124] Additionally, the claimant is not at risk of becoming stateless and she can address any issue regarding her status or rights as a British national to the United Kingdom.[125] Therefore, it was recommended that the Court does not restore the Union citizenship of UK nationals.[126]

The Court confirmed AG Collins's opinion even after the claimant sought to reopen the oral hearing.[127] The Court confirmed that Union citizenship requires the holding of a Member States nationality and without such the claimant could not be entitled to the rights stemming from that status.[128] Given that the EU Treaties ceased to apply to the UK upon the entry into force of the Withdrawal Agreement, UK nationals no longer held Union citizenship as of 23:00 GMT 31 January 2020.[129]

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[122] ibid, para 33.
[123] ibid, para 36.
[124] ibid, para 41-42.
[125] ibid, para 43.
[126] ibid, para 63.
[127] Case C-673/20 *EP v Préfet du Gers and Institut national de la statistique et des études économiques (INSEE)* EU:C:2022:449, paras 39-44.
[128] ibid, paras 46-52.
[129] ibid, paras 55-56.

Therefore, the loss of Member State nationality entails the automatic loss of Union citizenship and all corresponding rights regardless of whether UK nationals had previously exercised their right to reside in another Member State.[130]

The fact that the claimant could not vote in UK elections was due to the fact that the fifteen-year rule was the choice of the UK, now a third state.[131] In such circumstances, it is not for the national authorities of the Member States to carry out an individual examination of the consequences of the loss of Union citizenship for the person concerned in the light of the principle of proportionality.[132] Given Article 185 of the Withdrawal Agreement ensures reciprocal protection, the Court held that allowing UK nationals to vote in the municipal elections of their host Member State would create an asymmetry between UK nationals in the EU and Union citizens residing in the UK, especially so considering the Withdrawal Agreement does not provide for the continued right to vote in this regard.[133] Therefore, the claimant could not rely upon the prohibition of discrimination to vote or stand as a candidate in the municipal elections of France.[134]

The Court concluded by stating that Articles 9 and 50 TEU and Articles 20-22 TFEU, when read in conjunction with the Withdrawal Agreement, must be interpreted as meaning that UK nationals no longer hold Union citizenship and are subsequently unable to vote and stand as a candidate in the municipal elections of their host Member State.[135] Additionally, the Court does not consider the Withdrawal Agreement and Decision 2020/135 to be invalid given that it does not confer upon

[130] ibid, paras 57-58.
[131] ibid, para 60.
[132] ibid, paras 61-62.
[133] ibid, para 72-75.
[134] ibid, paras 77-81.
[135] ibid, para 83.

UK nationals, after 23:00 31 January 2020 GMT, the continued right to vote.[136] The Court of Justice has since upheld the view that one cannot be a Union citizen without having met the prerequisite requirement that one holds the nationality of a European Union Member State.[137]

V. Analysis

The Court of Justice could have intervened to protect UK nationals from the loss of their Union citizenship. It is said here that there is enough of a theoretical justification for such action. However, it chose not to. In other words, the principles upon which the EU has been built were not given sufficient weight to prevent the erasure of Union citizenship for UK nationals.

It could be argued that the fundamental status line of Union citizenship case law ought to have justified such protection, yet it is acknowledged there will be many who would argue that the Court is only bound to ensure that the law is observed as it has been laid down by the EU Treaties. Admittedly, the EU Treaties and the Withdrawal Agreement continue to hold that Union citizenship is an additional status that is dependent upon the holding of a Member State nationality. This is the current reality that underpins citizenship of the European Union.

The Court of Justice has had a history of intervening to build upon vague legal concepts as they were initially drafted within the Treaties.[138] However, it has been suggested that if the Treaties were written today, then they would be more restrictive

[136] ibid, paras 93-97.
[137] Case C-499/21 P *Joshua David Silver and Others v Council of the European Union* EU:C:2023:479, paras 44-46. See also Case C-501/21 P *Harry Shindler and Others v Council of the European Union* EU:C:2023:480; Case C-502/21 P *David Price v Council of the European Union* EU:C:2023:482.
[138] O'Leary (n 4).

due to the changing European political climate.[139] In other words, it remains to be seen if Union citizenship can remain a juridico-political political institution given the increasing pressures being placed upon the Court of Justice by the institutions of certain EU Member States.[140]

In the meantime, it can be said that the Court has established Union citizenship as a citizenship of legitimate expectations: if the person concerned legitimately expected to gain or retain Union citizenship then they ought to be able to do so. The question here is whether UK nationals genuinely expected to retain their Union citizenship after Brexit. There are two sides to consider: on the one hand, it is difficult to claim that UK nationals expected to retain their Union citizenship given such was not accounted for in the withdrawal negotiations, and subsequently in the Withdrawal Agreement; however, on the other hand, the UK nationals who had made us of their right to freedom of movement had done so in good faith with the legitimate expectation that their rights and status as a Union citizen would be protected indefinitely.

The Court's judgment in the case of *JY* is peculiar when read in the light of UK nationals losing their Union citizenship. The judgment holds that Union citizenship is to be considered as the fundamental status of Member State nationals and that where the person concerned had previously been a Union citizen then this ought to fall within the scope of EU law. However, the limitation is that the person concerned must have legitimately expected to retain or regain their Union citizenship after first becoming stateless. Given that UK nationals who made use of their right to free movement under EU law were not at risk of becoming stateless, the *JY* judgment

[139] Gareth Davies, 'Originalism at the European Court of Justice' in Sacha Garben and Inge Govaere (eds), *The Internal Market 2.0* (Hart Publishing 2020) 332.
[140] Kostakopoulou (n 24) 132.

could not be applicable to their situation. Perhaps more could have been expected from the Court in this regard.[141]

The *INSEE* judgment holds that UK nationals could not have legitimately expected to retain their Union citizenship after Brexit. In other words, the Court of Justice did not give sufficient weight to the identities free-moving UK nationals had with the EU and their host territories. In the case of UK nationals, their Union citizenship has been sacrificed on the altar of Brexit.[142] In other words, the *INSEE* judgment represented a big nail being hammered into the coffin of Union citizenship.[143]

However, it can be argued that *INSEE* is the logical conclusion to the UK's withdrawal from the EU.[144] Had the Court decided otherwise it would be likely that floods of UK nationals would seek a proportionality assessment with the hope of restoring their Union citizenship. If, on the other hand, the Court had decided to extend this principle to other UK nationals, then this would undermine its traditional stone-by-stone approach in respect to Union citizenship cases.[145] The hope for another *Grzelczyk* type judgment in the future has become seemingly unlikely. It has become clear that if UK nationals are to regain their Union citizenship, then this ultimately must be a political issue managed by the EU political institutions and the EU Member States.

The Court of Justice has further confirmed that UK nationals who have failed to make use of their previously held right to freedom of movement and those who have

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[141] Guido Bellenghi, 'The Court of Justice in *JY v. Weiner Landesregierung*: Could We Expect More?' (2023) 30 Maastricht Journal of European and Comparative Law 83, 94.
[142] See Serhii Lashyn, 'Sacrificing EU Citizenship on the Alter of Brexit' (2022) Maastricht Journal of European and Comparative law 1.
[143] Spaventa (n 15) 604.
[144] See Martijn van den Brink and Dimitry Kochenov, 'Claiming "We Are Out but I Am In" Post-Brexit' (*Verfassungsblog*, 25 February 2022) <https://verfassungsblog.de/claiming-we-are-out-but-i-am-in-post-brexit/> accessed 12 January 2023.
[145] Lenaerts (n 1) 60.

failed to secure their residence under the settlement scheme of their host state shall now be subjected to national immigration controls or shall have to derive a right of residence through their Union citizen family members if such applies to their situation. The only additional benefit available to UK nationals from the post-referendum jurisprudence is that their Union citizen partners may be afforded *Lounes* type protection where they have chosen to naturalise in their host Member State after exercising their right to freedom of movement. Consequently, UK nationals may be able to derive a right of residence even where their Union citizen family member has naturalised in their host state. However, *Lounes* leaves many questions unanswered. One example being how long does *Lounes* type protection last after the Union citizen has naturalised in their host Member State?[146] The question is whether the Court will choose to interpret *Lounes* in subsequent case law to only apply when a citizen has been naturalised for no longer than Ms Ormazábal had been. Another example is whether the *Lounes* ruling only applies to those who naturalise after exercising their free movement rights.[147] Peers has argued that it would be odd to deny this to those who have acquired dual nationality before moving, and to those who have held dual nationality since birth.[148]

The *Tjebbes and Others* judgment confirms the genuine link doctrine in EU law and arguably the Court of Justice considered such to confirm that UK nationals no longer have a genuine link to the EU. However, this being said, the argument that your Europeanness is erased upon the withdrawal of Member State nationality is ill-founded. Even without Member State nationality, it should be recognised that many

[146] Davies (n 65).
[147] Steve Peers, 'Dual Citizens and EU Citizenship: Clarification from the ECJ' (*EU Law Analysis*, 15 November 2017) <http://eulawanalysis.blogspot.com/2017/11/dual-citizens-and-eu-citizenship.html> accessed 12 May 2021.
[148] ibid.

UK nationals still possess an identity towards the EU and their host territories that have been qualified through their residence and contribution. In other words, it can be argued that the time spent in the EU has provided these peoples with a strong enough sense of identity to warrant their full inclusion. The mere fact that an individual is not a Member State national does not in principle strip them of their attachment to a particular place, make their contribution any less relevant nor make them any less a part of the EU project.

VI. Conclusion

Had the Court of Justice allowed for Dworkin's theory of judicial interpretation, it could have genuinely engaged with the possibility for the retention of Union citizenship for UK nationals. It can be said that Union citizenship and the right not to be discriminated against on the basis of nationality represent constitutional norms of the EU that have been underenforced by the Court in its Brexit related jurisprudence.[149] To this extent, it has become more difficult for Union citizens to maintain their faith in the Court's jurisprudence.[150] Although theoretically possible, the Court has determined that its role does not extend to the protection of Union citizenship for the nationals of a previous Member State.

Subsequently, it has become increasingly difficult to maintain that Union citizenship represents a truly fundamental, or even post-national, form of citizenship.

[149] See Lawrence Sager, 'Fair Measure: The Legal Status of Underenforced Constitutional Norms' (1978) 91 Harvard Law Review 1212, 1221 and 1263-64; Lawrence Sager, 'Material Rights, Underenforcement, and the Adjudication Thesis' (2010) 90 Boston University Law Review 579, 592-93. See also Joined cases C-402/05 and C-415/05 *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* EU:C:2008:461, para 278.
[150] See Lisa Conant, 'Failing Backward? EU Citizenship, the Court of Justice, and Brexit' (2021) 28 Journal of European Public Policy 1592, 1603.

In the case of UK nationals after Brexit, if their Union citizenship is to be restored then three options are available: first, the UK re-joins the EU; second, they seek the nationality of another EU Member State; third, the EU political institutions and the Member States accept the need for change in respect to the current EU Treaty framework and secondary legislation to allow for their inclusion.

The regaining of Union citizenship for UK nationals must become a legislative issue. Although inconceivable at present, it is not impossible to envisage a further Member State withdrawal from the EU.[151] Without further amendments to the EU Treaties there can be no guarantee that free-moving Union citizens will not become unlawful migrants in their host territory following the withdrawal of their State of nationality from the EU. In other words, it is not guaranteed that citizens' rights would be protected as the withdrawal negotiations may become frustrated. Quite simply, the current state of EU law opens the possibility for a Member State to trigger Article 50 TEU, negotiate nothing and then leave the EU without securing the status of their own nationals nor the status of the Union citizens residing within its territory. However unlikely an outcome, the EU Treaties must close the door on this possibility.

It is also clear that the status can no longer rely upon the interpretations of the Court of Justice without substantial backing from the text of the Treaties. Union citizens can no longer rely upon the game of chance that has previously underpinned the jurisprudence of the Court in respect to certain Union citizenship cases.[152] It is said here that if UK nationals are to regain their Union citizenship,

[151] See Marlene Wind, 'Brexit and Euroskepticism: Will "Leaving Europe" be Emulated Elsewhere?' in Federico Fabbrini (ed), *The Law & Politics of Brexit* (OUP 2017) 221-45.
[152] See Daniel Thym, 'Towards "Real" Citizenship? The Judicial Construction of Union Citizenship and Its Limits' in Maurice Adams and others (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013) 164.

then the EU political institutions and the EU Member States ought to pursue a further revision to the EU Treaties to establish a Union citizenship that is truly post-national in nature.[153] This would take the first step towards properly establishing Union citizenship as the fundamental status of all Member State nationals: one that is so fundamental that it cannot be automatically revoked upon a Member State withdrawal from the EU. Without such changes, the Court of Justice shall be justified in upholding the removal of Union citizenship for the nationals of a former EU Member State.

[153] See Martijn van den Brink, 'The Relationship Between National and EU Citizenship: What is it and What Should it Be?' in Dora Kostakopoulou and Daniel Thym (eds), *Research Handbook on European Union Citizenship Law and Policy* (Edward Elgar 2022) 101.

Chapter VII

Reforming the Personal Scope of Union Citizenship

I. Introduction

The legal construction of Union citizenship does not adequately reflect the social construction of the EU identity given that access to it has been limited to those who hold a Member State nationality.[1] Chapters V and VI confirm that the current state of EU law holds that a Member State withdrawal results in the forfeiture of Union citizenship for its nationals. However, as argued in Chapter IV, it is possible for those who do not hold Union citizenship to have an identity towards the European Union. The question raised in this chapter is whether such an identity could operate as an alternative underpinning for Union citizenship admission.

In respect to UK nationals, it ought to be considered whether such are to be determined purely as third-country nationals (TCNs) or as post-European Union citizens. The reason for such distinction is found in the fact that UK nationals had previously been Union citizens, and many continue to share in the common values and principles established under Article 2 TEU. It ought to be recognised that a Member State withdrawal from the EU is incapable of stripping an individual of such an identity. This work concurs with Joseph Weiler to argue that the adherence to

[1] See Daniel Thym, 'Frontiers of EU Citizenship: Three Trajectories and Their Methodological Limitations' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017) 727.

and promotion of such values engenders such peoples with an identity towards the European Union, and that such an identity as considered in Chapter IV could theoretically be used as an alternative underpinning for Union citizenship in the place of Member State nationality.[2] The chapter does not argue for the removal of Member State nationality as a qualifying criterion for Union citizenship admission but rather argues that Member State nationality ought to be one of numerous methods for admitting peoples to the status.

The above would allow for a Union citizenship that is truly post-national in nature. If Union citizenship can be transformed into a post-national status, then it can be said that it can take the first step towards becoming a truly fundamental one: one that is so fundamental that it cannot be automatically revoked upon a Member State withdrawal. A further question asked here is whether the EU, its Member States and the United Kingdom will accept changes to EU legislation and the Withdrawal Agreement to facilitate a Union citizenship that is underpinned by the European Union identity. However, the proposal offered here is specifically about the admission to and the retention of Union citizenship. It is not necessarily about the exercising of those rights contained within. As discussed in Chapter III, movement across Member State borders shall remain the trigger for activating the status's full potential, but what should be recognised is the ability to make use of the rights of Union citizenship if one desires to do so. In other words, this proposal does not seek to resolve the debates regarding reverse discrimination in the EU.[3] Additionally, it is

[2] JHH Weiler, 'European Neo-Constitutionalism: In Search of Foundations for the European Constitutional Order' (1996) 44 Political Studies 517, 526; JHH Weiler, 'To Be a European Citizen - Eros and Civilization' (1997) 4 Journal of European Public Policy 495, 509; JHH Weiler, 'Introduction: European Citizenship, Identity and Differentity' in Massimo La Torre (ed), *European Citizenship: An Institutional Challenge* (Kluwer Law International 1998) 16; JHH Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration* (CUP 1999) 346.

[3] See Martijn van den Brink, 'A Typology of Reverse Discrimination in EU Citizenship Law' (2023) 2 European Law Open 57, 57 and 64.

said here that there is no need to constitutionalise the EU to achieve this aim. This chapter holds that the existing framework of EU law is sufficient to incorporate such, although the challenges of doing so are acknowledged.

The chapter has six aims: first, to demonstrate that there is already a desire to redefine the scope of Union citizenship; second, to explore the possibility for Union citizenship admission through lawful residence; third, an account of how UK nationals could have retained Union citizenship and now how they could be readmitted to Union citizenship is provided; fourth, a proposal amending the legislation is provided; fifth, an attempt to foresee objections to a proposal offered within the chapter will be addressed; and finally, the chapter offers its conclusions arguing that the Treaties are capable of accommodating alternative routes to Union citizenship admission.

II. The Rationale for Union Citizenship Reform

The European Parliament and the European Commission are of the view that Union citizenship is yet to achieve its full potential.[4] It is argued that the EU has not paid significant attention to its citizenship due to rising Euroscepticism throughout its Member States. However, the EU and its Member States ought to seriously consider ideas for a Union citizenship that is post-national in its nature.[5] It is a well-

[4] European Parliament, 'Report on the Implementation of the Treaty Provisions Related to EU Citizenship' A80041/2019 3; Commission, 'EU Citizenship Report 2020: Empowering Citizens and Protecting Their Rights' (*European Commission*, 2020) <https://commission.europa.eu/system/files/2020-12/eu_citizenship_report_2020_-_empowering_citizens_and_protecting_their_rights_en.pdf> accessed 17 June 2023.

[5] See Yasemin Nuhoğlu Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (The University of Chicago Press 1994) 148.

established principle that the EU has a duty to protect its citizens,[6] but it ought to be asked it should also have a duty to provide Union citizenship for post-European Union citizens and other long-term and lawfully resident TCNs. The issue is that the EU Treaties do not adequately reflect the lived realities of many Union citizens, UK nationals and other TCNs.[7]

EU law continues to assume that only those who hold a Member State nationality could ever be admitted to Union citizenship. However, a choice must be made: either the EU accepts the limitations encoded into the Treaties or it begins to push for a political revision of the status quo.[8] Although this work does not agree with Brexit as a political decision, it is not here to contest its legitimacy. Instead, Brexit is accepted and used as a case study to consider the institutional developments that could further realise the potential of Union citizenship.[9] Although it has become difficult to maintain that Union citizenship in its current form represents a fundamental or post-national status, it should be recognised that the EU is a citizenship-*capable* polity[10] and that Union citizenship is not only about rights and courts;[11] it is also about belonging and political participation.[12] Therefore, Union

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[6] Dora Kostakopoulou, '*Scala Civium*: Citizenship Templates Post-Brexit and the European Union's Duty to Protect EU Citizens' (2018) 56 JCMS 854, 862-65.
[7] Dora Kostakopoulou, *European Union Citizenship Law and Policy: Beyond Brexit* (Edward Elgar Publishing Ltd 2020) 145.
[8] Niamh Nic Shuibhne, 'EU Citizenship as Federal Citizenship' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017) 176.
[9] See Kostakopoulou, *European Union Citizenship Law and Policy: Beyond Brexit* (n 7) 145. See also Mark Dawson and Daniel Augenstein, 'After Brexit: Time for a Further Decoupling of European and National Citizenship?' (*Verfassungsblog*, 14 July 2016) <https://verfassungsblog.de/brexit-decoupling-european-national-citizenship/> accessed 22 February 2019.
[10] Niamh Nic Shuibhne, 'The Outer Limits of EU Citizenship: Displacing Economic Free Movement Rights?' in Catherine Bernard and Okeoghene Odudu (eds), *The Outer Limits of European Union Law* (Hart Publishing 2009) 168.
[11] Thym (n 1) 724. See also Linda Bosniak, 'Citizenship Denationalized' (2000) 7 Indiana Journal of Global Legal Studies 447, 464-70; Richard Bellamy, 'Evaluating Union Citizenship: Belonging, Rights and Participation in the EU' (2008) 12 Citizenship Studies 597, 603-06; Seyla Benhabib, 'Claiming Rights Across Borders: International Human Rights and Democratic Sovereignty' (2009) 103 American Political Science Review 691, 697-99.
[12] Theodora Kostakopoulou, 'Nested "Old' and "New" Citizenships in the European Union: Bringing Out the Complexity' (1999) 5 Columbia Journal of European Law 389, 392; Daniel Sarmiento and

citizenship should not be considered a finished institution given that it is both an interpretive concept that ought to be subject to societal demands for change.[13] In light of this, it may be time to re-think its foundations in order to construct it upon firmer ground.[14]

It is not clear whether another Member State withdrawal will occur. If this is to be the case, then it is necessary to re-design Union citizenship to ensure its continuity. This would ensure that Union citizenship no longer remains the hollow hope that Schmidt claims the status currently represents.[15] It is said here that debates regarding Union citizenship should not be concerned with what the status currently represents but should rather be concerned about what it ought to become.[16] In other words, it is said here that Union citizenship is worthy of protection and confidence in it ought to be restored.[17]

Eleanor Sharpston, 'European Citizenship and Its New Union: Time to Move On?' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017) 235.

[13] Dora Kostakopoulou, 'European Citizenship: Writing the Future' (2007) 13 ELJ 623, 638; Kostakopoulou, *European Union Citizenship Law and Policy: Beyond Brexit* (n 7) 27-31 and 130.

[14] Federico Fabbrini, 'Brexit and EU Treaty Reform: A Window of Opportunity for Constitutional Change?' in Federico Fabbrini (ed), *The Law & Politics of Brexit* (OUP 2017) 267-68; Sarmiento and Sharpston (n 12) 241. See also Andrew T Williams, 'Taking Values Seriously: Towards a Philosophy of EU law' (2009) 29 Oxford Journal of Legal Studies 549; Adrienne Yong, 'The Future of EU Citizenship Status During Crisis – Is There a Role for Fundamental Rights Protection' (2020) 7 JICL 471, 473. See also Martijn van den Brink, 'The Origins and the Potential Federalising Effects of the Substance of Rights Test' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017) 86.

[15] Susanne K Schmidt, 'Extending Citizenship Rights and Losing it All: Brexit and the Perils of "Over-Constitutionalisation"' in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing 2017) 18-19.

[16] Elizabeth Meehan, 'Political Pluralism and European Citizenship' in Percy Lehning and Albert Weale (eds), *Citizenship, Democracy and Justice in the New Europe* (Routledge 1997); Kostakopoulou, 'Nested "Old' and "New" Citizenships in the European Union: Bringing Out the Complexity' (n 12) 391; Kostakopoulou, 'European Citizenship: Writing the Future' (n 13) 633. See also Dimitry Kochenov, 'The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon' (2013) 63 International and Comparative Law Quarterly 97, 99 and 135-36.

[17] Phoebus L Athanassiou and Stéphanie Laullhé Shaelou, 'EU Citizenship and Its Relevance for EU Exit and Secession' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017) 748-49.

No matter the crises facing the EU, bad times do not need to create bad laws.[18] However, reforms are unlikely to be a natural progression.[19] There is currently little political will to reform the EU Treaties and the intergovernmental nature of the European Council has acted as the graveyard for such initiatives.[20] Nevertheless, the EU should begin to seriously consider Treaty reform. Such reforms may be necessary given that it appears we are still very far away from guaranteeing 'the fundamental status so dear to the Court in its earlier case law.'[21] This can be taken to mean that Union citizenship is currently nothing more than a certificate of full participation in the EU whose exercise thereof is dependent upon economic links, not becoming an unreasonable burden to the host state's finances and the continued holding of a Member State nationality.

The question raised here is whether Union citizenship is fit for purpose in a post-Brexit EU. This question is legitimate given that it is asking what exactly is meant by the concept of a European legal heritage,[22] how far this legal bond stretches beyond national territories and whether such a bond should be afforded protection under EU law.[23] Brexit should not be taken as the definitive answer on how to withdraw from the EU. Federico Fabbrini has argued that Brexit should prompt a rethinking of the EU's constitutional structure and the European integration process.[24] Fabbrini

[18] Eleanor Spaventa, 'Earned Citizenship - Understanding Union Citizenship Through Its Scope' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017) 225.
[19] Kostakopoulou, 'Nested "Old' and "New" Citizenships in the European Union: Bringing Out the Complexity' (n 12) 627 and 645; Kostakopoulou, *European Union Citizenship Law and Policy: Beyond Brexit* (n 7) 34. See also Fabbrini, 'Brexit and EU Treaty Reform: A Window of Opportunity for Constitutional Change?' (n 14) 282.
[20] Guy Verhofstadt, *Europe's Last Chance: Why the European States Must Form a More Perfect Union* (Basic Books 2017) 30 and 263.
[21] Spaventa (n 18) 221.
[22] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* EU:C:1963:1, para 4. See also Chapter II of this work.
[23] William Thomas Worster, 'Brexit and the International Law Prohibitions on the Loss of EU Citizenship' (2018) 15 International Organizations Law Review 341, 356.
[24] Elspeth Guild, 'Migration, Security and European Citizenship' in Engin F Isin and Peter Nyers (eds), *Routledge Handbook of Global Citizenship Studies* (Routledge 2014) 424; Federico Fabbrini, *Brexit and the Future of the European Union: The Case for Constitutional Reform* (OUP 2020) 2-4.

proposes the drafting of a new Treaty to establish a political compact that does away with the Article 48 TEU unanimity requirement and replaces such with a super majority vote.[25]

Guy Verhofstadt MEP has proposed that the post-Brexit EU should move towards a federal union claiming that Europe is close to the brink. It is said that a United States of Europe could make the EU more effective and reliable in the eyes of its citizens.[26] However, this remains an unlikely outcome given that the EU Member States are unlikely to federalise under a new EU constitution.

Verhofstadt has also been a leading voice in calling for an associate Union citizenship.[27] The proposed associate status sought to continue freedom of movement and European Parliament voting rights. However, individuals seeking associate Union citizenship must be willing to continue supporting the fundamental values of the EU.[28] Some argue that the status could be purchased given that Malta allows for the purchase of their national citizenship, and thus Union citizenship.[29] The EU institutions have expressed concerns over citizenship for sale schemes claiming that they undermine the very concept of Union citizenship.[30] The

[25] See Fabbrini, 'Brexit and EU Treaty Reform: A Window of Opportunity for Constitutional Change?' (n 14); Federico Fabbrini, 'The Future of the EU After Brexit, and Covid-19' in Federico Fabbrini (ed), *The Law and Politics of Brexit Volume II: The Withdrawal Agreement* (OUP 2020); Federico Fabbrini, 'Integration: Regenerating Europe's Project Beyond Covid-19' in Federico Fabbrini (ed), *The Law & Politics of Brexit Volume III: The Framework of New EU-UK Relations* (OUP 2021).
[26] Verhofstadt (n 20) 1.
[27] European Parliament, Report on Possible Evolutions of and Adjustments to the Current Institutional Set-Up of the European Union (A-80390/2016) 9/31. See also Volker Roeben and others, 'The Feasibility of Associate EU Citizenship for UK Citizens Post-Brexit' (2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3178055> accessed 14 July 2021.
[28] European Citizen Action Service, 'Charles Goerens: We Should Never Say No to Associate Citizenship' (*ecsa.org*, 21 December 2017) <https://ecas.org/charles-goerens-brexit-interview/> accessed 17 June 2019.
[29] Eglé Dagilyté, 'The Promised Land of Milk and Honey? From EU Citizens to Third Country Nationals After Brexit' in Sandra Mantu, Paul Minderhoud and Elspeth Guild (eds), *EU Citizenship and Free Movement Rights: Taking Supranational Citizenship Seriously* (Brill Nijhoff 2020) 364.
[30] Commission, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Investor Citizenship and Residence in the European Union' COM (2019) 12 final.

Commission has since brought Article 258 TFEU proceedings against Malta arguing that the purchase of Union citizenship without any genuine link is to act against the principle of sincere cooperation enshrined in Article 4(3) TEU.[31]

The main issue regarding an associate status is the unanimity requirement to change the Treaties.[32] Despite arguments against the need for Treaty revision,[33] Jean Claude-Piris rejected the idea that such be written into the Treaties without adhering to Article 48 TEU.[34] Irrespective of Treaty amendment, some have argued that the granting of an associate status would undermine Article 50 TEU while providing an incentive for further Member State withdrawals from the EU.[35] Additionally, it could be seen as EU meddling in the domestic affairs of former Member States.[36] Ultimately, the proposal failed given the lack of political will to secure it.[37] However, the proposal for an associate status does provide a genuine alternative that ought to be taken seriously in the post-Brexit EU.

Dora Kostakopoulou has called for the creation of a special status for UK nationals whereby the individual should be granted either automatic or semi-automatic naturalisation by registration or by declaration of option following ten or

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[31] Commission, 'Investor Citizenship Scheme: Commission Refers Malta to the Court of Justice' (*Europa.eu*, 29 September 2022) https://ec.europa.eu/commission/presscorner/detail/en/IP_22_5422 accessed 27 November 2022.
[32] Kostakopoulou, '*Scala Civium*: Citizenship Templates Post-Brexit and the European Union's Duty to Protect EU Citizens' (n 6) 855. See also the comments made by Professor Catherine Barnard in Laurence Peter, 'Brexit: Could UK Get "Associate EU Citizenship"?' (*BBC News*, 17 November 2016).
[33] See Roeben (n 27).
[34] See Jennifer Rankin, 'EU Citizenship Deal for British Nationals Has No Chance, Says Experts' (*The Guardian*, 12 December 2016) <https://www.theguardian.com/uk-news/2016/dec/12/eu-citizenship-deal-for-british-nationals-has-no-chance-say-experts> accessed 12 July 2021.
[35] Martijn Van Den Brink and Dimitry Kochenov, 'Against Associate EU Citizenship' (2019) 57 Journal of Common Market Studies 1366, 1368; Dagilyté (n 29); Gillian More, 'From Union Citizen to Third-Country National: Brexit, the UK Withdrawal Agreement, No-Deal Preparations and Britons Living in the European Union' in Nathan Cambien, Dimitry Kochenov and Elise Muir (eds), *European Citizenship Under Stress* (Brill Nijhoff 2020) 481.
[36] A P van der Mei, 'Member State Nationality, EU Citizenship and Associate European Citizenship' in Nathan Cambien, Dimitry Kochenov and Elise Muir (eds), *European Citizenship Under Stress* (Brill Nijhoff 2020) 453-56.
[37] Dagilyté (n 29) 364.

five years of lawful residence.[38] However, Kostakopoulou has since admitted that this proposal is incapable of managing the status of those affected by Brexit.[39] Therefore, a proposal to amend the wording of Article 20 TFEU has been given to state that the loss or absence of a Member State nationality would not automatically result in the forfeiture of Union citizenship.[40] In addition, Kostakopoulou has also argued for a European citizenship statute that would incorporate and centralise Union citizenship's values, rights and responsibilities.[41] However, it remains to be seen if such a proposal arouses sufficient political backing to actualise change.

Although re-development may be politically unfeasible, it is not legally impossible.[42] It has been said that the ambivalence of the EU institutions has left the idea of a European legal heritage an underspecified concept.[43] It is said here that Union citizens, UK nationals and TCNs respect their EU identities. However, their Union citizenship as a legal status does not reflect the lived realities upon which these identities are formed. The fact that Union citizenship can only be derived through Member State nationality continues to undermine Union citizenship given that it can be revoked upon a Member State withdrawal. It is upon this basis that it would appear necessary to rethink the boundaries of Union citizenship in the post-Brexit EU.

[38] Kostakopoulou, '*Scala Civium*: Citizenship Templates Post-Brexit and the European Union's Duty to Protect EU Citizens' (n 6) 857 and 861-62.
[39] Kostakopoulou, *European Union Citizenship Law and Policy: Beyond Brexit* (n 7) 155.
[40] ibid.
[41] Dora Kostakopoulou and Tony Venables, 'Towards a Statute on European Union Citizenship: A Manifesto' (2023) 25 European Journal of Migration and Law 109, 118-126.
[42] Dimitry Kochenov, 'EU Citizenship and Withdrawals from the Union: How Inevitable Is the Radical Downgrading of Rights?' in Carlos Closa (ed), *Secession from a Member State and Withdrawal from the European Union: Troubled Membership* (CUP 2017) 281.
[43] Francesca Strumia, 'European Citizenship and Transnational Rights: Chronicles of a Troubled Narrative' in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart Publishing 2017) 166.

III. Residence as an Alternative Route to Union Citizenship Admission

It should be recognised that TCNs who do not hold a Member State nationality can genuinely possess an identity to the EU. Therefore, can their lawful residence be used as an alternative criterion to admit such peoples to Union citizenship? If so, then this would allow for the dynamic nature of Union citizenship to become explicitly expressed in EU legislation.[44] First, there needs to be a framework upon which an identity to the EU can be defined, and second there needs to be an objective method for recognising when such a level of identity has been attained.

In respect to defining an EU identity, the work of Joseph Weiler ought to be considered. Weiler contends that the European Union identity is to be grounded upon the acceptance and promotion of the values laid down in the EU Treaties.[45] It is said here that all who lawfully reside throughout the EU Member States and simultaneously abide by Articles 1-6 of the TEU establish a belonging to the EU whether their State of nationality be a Member State of the EU or not. The goal of the EU is to establish an ever-closer union among the peoples of Europe. This commitment allows the EU to recognise both the differences and the similarities between its peoples to consequently grant them a shared identity and a common Union citizenship.[46] It ought to be asked whether this commitment should be extended to TCNs who are already a part of the European political space as the result of their lawful residence, positive participation and their sense of identity to

[44] See Sanja Ivic, 'EU Citizenship as a Mental Construct: Reconstruction of Postnational Model of Citizenship' (2012) 20 European Review 419, 422.
[45] Weiler, 'Introduction: European Citizenship, Identity and Differentity' (n 2) 16.
[46] Willem Maas, 'The Origins, Evolution, and Political Objectives of EU Citizenship' (2014) 15 German Law Journal 797.

their host territory and the EU. It is argued that such could justify full participation in the EU through Union citizenship.[47]

In respect to how their admission to Union citizenship upon the basis of their lawful residence could be qualified, the work of Dora Kostakopoulou ought to be accounted for. It is argued here that Kostakopoulou's proposal to admit TCNs to Union citizenship following a period of lawful residence that exceeds five years could be taken as a measure for qualifying a TCNs identity to the EU and their host Member State.[48] This identity and the confirmation of it through their lawful residence is what shall justify the TCNs claim to Union citizenship. Their continued exclusion remains unjustified given their lawful residence, their positive contributions and their identities to their host territories and their adherence to the values stated in the EU Treaties.

This proposal concurs with Weiler in that there is no need for the EU to further constitutionalise itself to achieve the above. The very concept of European integration has been said to represent a challenge to constitutional law itself by assuming a constitution without a political community that has been defined by it.[49] Weiler may be correct in stating that Europe must instead justify the constitutionalism it has already embraced.[50] Europe's brand of constitutionalism has

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[47] See Sheldon S Wolin, 'Democracy, Difference and Re-cognition' (1993) 21 Political Theory 464, 472.

[48] Theodora Kostakopoulou, 'European Union Citizenship as a Model of Citizenship Beyond the Nation State: Possibilities and Limits' in Albert Weale and Michael Nentwich (eds), *Political Theory and the European Union: Legitimacy, Constitutional Choice and Citizenship* (Routledge 1998) 157-59; Theodora Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (Manchester UP 2001) 103-04; Dora Kostakopoulou, *The Future Governance of Citizenship* (CUP 2008) 114. See also Gareth Davies, '"Any Place I Hang My Hat" or: Residence Is the New Nationality' (2005) 11 ELJ 43, 55.

[49] Miguel Poiares Maduro, *We, the Court, the European Court of Justice and the European Economic Constitution* (Hart Publishing 1998) 175.

[50] JHH Weiler, 'Does Europe Need a Constitution Demos, Telos and the German Maastricht Decision' (1995) 1 ELJ 219, 248-49; Weiler, 'European Neo-Constitutionalism: In Search of Foundations for the European Constitutional Order' (n 2) 518.

worked in the past so it should be questioned why some would argue for its retransformation.[51] The EU is not a State and it should not rely solely upon State methods for recognising an identity and a sense of belonging to the EU. Instead, this proposal recognises the multiple demoi argument to claim that the EU is not seeking to encroach upon the identities of its Member States.[52] This work holds that the EU is best seen as a separate actor in a system of multi-level governance that operates alongside the interests of each of its Member States without subordinating them.[53] Additionally, Article 4(2) TEU supports such interpretations given that it states explicitly that the national identities of the Member States is to be respected.

It is said here that identity represents the core of citizenship even though the two concepts might appear to be incompatible: not feeling a sense of belonging does not make you any less of a citizen in legal terms.[54] In this regard, citizenship can be viewed more as a legal status rather than an expression of identity.[55] Therefore, citizenship is not just about physical belonging as it also engenders and recognises broader concepts of social belonging.[56] It is argued here that an identity should not be reduced to a nationality in legal terms.[57] An identity that has been found outside of national identity can be seen as the uncoupling of the nation from the State given

[51] See JHH Weiler, 'In Defence of the Status Quo: Europe's Constitutional *Sonderweg*' in JHH Weiler and Marlene Wind (eds), *European Constitutionalism Beyond the State* (CUP 2003) 9.
[52] Weiler, 'European Neo-Constitutionalism: In Search of Foundations for the European Constitutional Order' (n 2) 526; Weiler, Introduction: European Citizenship, Identity and Differentity' (n 2) 17.
[53] See Matej Avbelj, 'Revitalisation of EU Constitutionalism' (2021) 46 EL Rev 3, 18. See also Hartmut Kaelble, 'Identification with Europe and Politicization of the EU Since the 1980's' in Jeffrey T Checkel and Peter J Katzenstein (eds), *European Identity* (CUP 2009) 208.
[54] Engin F Isin and Patricia K Wood, *Citizenship & Identity* (SAGE Publications 1999) 14; Dimitry Kochenov, *Citizenship* (MIT Press 2019).
[55] Ulrich Preuß, 'Citizenship and Identity: Aspects of a Political Theory of Citizenship' in Richard Bellamy, Vittorio Buffachi and Dario Castiglione (eds), *Democracy and Constitutional Culture in the Union of Europe* (Lothian Foundation Press 1995).
[56] Ulrich Preuß, 'Problems of a Concept of European Citizenship' (1995) 1 ELJ 267, 269.
[57] Elizabeth Meehan, *Citizenship and the European Community* (Sage 1993) 155.

that the identities of individuals are no longer solely dependent upon it.[58] The EU identity achieves this uncoupling somewhat successfully given the wide breadth of people who identify more so as European than as British, French German etc. Kostakopoulou highlighted how after the Brexit vote 70% of Europeans *felt* that they were Union citizens.[59] This argument is supported further through the 2020 and 2023 EU Citizenship Reports.[60] According to the reports, it is now the case that nine out of ten Union citizens are familiar with the term 'citizenship of the Union', the highest number on record.[61]

This sense of feeling European should not be undermined so quickly but rather it should be taken as an acknowledgement of the EU identity. Therefore, it is legitimate to ask whether lawful residence could underpin a TCNs claim to Union citizenship given that they share in this sense of identity. The reality is that their adherence to the stated values of the EU, their stable residence and their social ties have garnered a sense of belonging to their host Member State more so than obtaining its nationality ever could.[62]

The proposal for an additional route to Union citizenship through lawful residence does not alter the rights that are currently provided to Union citizens. Union citizens admitted upon the basis of their lawful residence would continue to enjoy the rights laid down in Articles 18-19 TFEU and Articles 21-24 TFEU. However, for those

[58] Gerard Delanty, 'Models of Citizenship: Defining European Identity and Citizenship' (1997) 1 Citizenship Studies 285, 295.
[59] Kostakopoulou, *European Union Citizenship Law and Policy: Beyond Brexit* (n 7) 165.
[60] Commission, 'EU Citizenship Report 2020' (n 4). Commission, 'EU Citizenship Report 2023: On Progress Towards Effective EU Citizenship 2020-2023' (*European Commission*, 6 December 2023) https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13699-EU-Citizenship-Report-2023_en accessed 29 December 2023.
[61] ibid 4.
[62] See Dora Kostakopoulou, 'Why Naturalisation?' (2003) 4 Perspectives on European Politics and Society 85, 97; Jakob Huber, 'EU Citizens in Post-Brexit UK: The Case for Automatic Naturalisation' (2019) Journal of European Integration 801, 805.

newly admitted Union citizens who cannot communicate in a Treaty language, it would not be too much of an unreasonable adjustment to expect the EU institutions to modify their communication to allow for their inclusion. It is surprising that Article 24 TFEU and Article 41 of the Charter have so far failed to account for such.

It is not in the interest of this proposal to further amend the rights of Union citizenship. Instead, it is concerned with reforming the requirements to access them. Once people can access the status, then the opportunity to invoke the Citizens Initiative under Article 11(4) TEU and Article 24 TFEU to argue for the strengthening or furthering of Union citizenship rights would become more widely available.[63] However, it is said here that any successful initiative shall remain advisory and only invite the Commission to consider such proposals.[64]

It has been argued that the EU has failed to engage its citizens in certain aspects of civic engagement after concentrating its citizenship too closely on the side of rights over duties.[65] However, this proposal holds that the duties of the Union citizen are simple: they must uphold the values established through Articles 1-6 TEU.[66] In other words, the duties of Union citizens should not form the core of Union citizenship.[67]

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[63] See Jože Štrus, 'Union Citizenship Re-Imagined: The Scope of Intervention of EU Institutions' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017) 700.
[64] See Case C-418/18 *European Citizens' Initiative One of Us and Others v European Commission* EU:C:2019:1113, para 66. See also Natassa Athanasiadou, 'The European Citizens' Initiative in Times of Brexit' in Nathan Cambien, Dimitry Kochenov and Elise Muir (eds), *European Citizenship Under Stress* (Brill Nijhoff 2020) 398 and 405-06; Oliver Garner, 'Does Member State Withdrawal Automatically Extinguish EU Citizenship?' in Dora Kostakopoulou and Daniel Thym (eds), *Research Handbook on European Union Citizenship Law and Policy* (Edward Elgar 2022) 209.
[65] Gerard Delanty, 'European Citizenship: A Critical Assessment' (2007) 11 Citizenship Studies 63, 66.
[66] See Jacques Derrida, *The Other Heading: Reflections on Today's Europe* (Pascale Anne Brault and Michael B Naas trs, Indiana UP 1992) 82.
[67] Dimitry Kochenov, 'EU Citizenship Without Duties' (2014) 20 European Law Journal 482, 483.

IV. Union Citizenship and UK Nationals

IV.I UK Nationals and the Retention of Their Union Citizenship

It is argued here that the 48% of the UK electorate who expressed their desire for the United Kingdom to remain as an EU Member State did so on the basis that they had engendered an identity towards the EU and their Union citizenship. It is also argued here that the identities to which the 48% had based their preference have not been undone by the withdrawal of their State of nationality from the EU. In other words, it can be said that many UK nationals continue to maintain a genuine link to the EU through their European Union identities. It is said here that such identities ought to have been respected throughout the Brexit negotiations and that the EU, its Member States and the United Kingdom should have secured the Union citizenship of UK nationals within the withdrawal agreement upon this basis.

Prior to the UK's withdrawal, there were arguments claiming that UK nationals ought to be able to retain their Union citizenship.[68] The argument in favour of retention stems from the position that Union citizenship is, or at least was, destined to become the fundamental status of all Member State nationals. If this is to be the case, then how can the status be taken away once it has been granted?[69] According to Clemens Rieder, given that no one forced the Member States into ratifying the

[68] See European Union, 'Permanent European Union Citizenship' (*Europa.eu*, 23 July 2018) <https://citizens-initiative.europa.eu/initiatives/details/2018/000003_en> accessed 18 September 2024.

[69] Dawson and Augenstein (n 9); Gareth Davies, 'The State of Play on Citizens' Rights and Brexit' (*European Law Blog*, 6 February 2018) <https://europeanlawblog.eu/2018/02/06/the-state-of-play-on-citizens-rights-and-brexit/> accessed 3 February 2020; Theodora Kostakopoulou, 'Who Should Be a Citizen of the Union? Toward an Autonomous European Union Citizenship' (*Verfassungsblog*, 16 January 2019) <https://verfassungsblog.de/who-should-be-a-citizen-of-the-union-toward-an-autonomous-european-union-citizenship/> accessed 22 November 2020.

EU Treaties, a withdrawing Member State cannot take Union citizenship from its nationals once acquired, that is unless the EU itself ceases to exist.[70] However, it should be recognised that retaining Union citizenship needs to be balanced against the claim that the text of the Treaties does not appear to support the retention of Union citizenship following a Member State withdrawal.[71] It is now clear that the European Commission and the United Kingdom adopted this approach.

Ideas for how UK nationals could have retained their Union citizenship ought to begin with an examination of the obligations of the EU and its Member States as established under the Treaties: Article 1 TEU mandates the EU and its Member States to work towards an ever closer union among the peoples of Europe; Article 2 TEU establishes that the EU shall be built upon the values associated with democracy, human rights and the rule of law; Article 3 TEU mandates that the EU shall ensure the well-being of its peoples and that the EU ought to contribute to the protection of its citizens; Article 4 TEU mandates the Member States to assist in and not frustrate these obligations; Article 8 and 21 TEU mandates the EU and its Member States to establish close and cooperative relationships with neighbouring countries founded upon the values of the European Union; Article 12 TEU mandates national parliaments to contribute towards the good functioning of the Union.

What should be considered is whether such Treaty obligations were given sufficient weight during the Brexit withdrawal negotiations. In respect to Article 1 TEU, the UK remained an express part of the ever closer union throughout the negotiations. In respect to Article 2 TEU, the works of Joseph Weiler ought to be

[70] Clemens M Rieder, 'The Withdrawal Clause of the Lisbon Treaty in the Light of EU Citizenship (Between Disintegration and Integration)' (2013) 37 Fordham International Law Journal 147, 172. See also Patricia Mindus, *European Citizenship After Brexit: Freedom of Movement and Rights of Residence* (Palgrave Macmillan 2017) 110; Kostakopoulou, '*Scala Civium*: Citizenship Templates Post-Brexit and the European Union's Duty to Protect EU Citizens' (n 6) 862.
[71] A P van der Mei (n 36) 451.

considered to argue that the withdrawal of the UK from the EU did not erase their sense of European identity.[72] In respect to Article 3 TEU, it ought to be asked how the European Union defines its peoples and how their well-being is to be secured.

Can it be said that the EU institutions are adhering to their obligations under the TEU given that it has appeared to undermine the ever closer union through its agreement to deprive UK nationals of their Union citizenship? On the one hand, the EU appears to accept Article 1 TEU, yet, on the other, it appears to be content in its derogation from such where a Member State expresses its desire to withdraw from the EU. It is said here that this fault also lies with the Member States given that they have undermined their obligations under Article 4 TEU to assist in the development and maintenance of this ever closer union. It also asked whether the EU has respected its obligations under Article 3 TEU given that whilst the UK was withdrawing from the EU, the EU institutions did not adequately consider the well-being of UK nationals while they were still Union citizens.

Brexit must ultimately mean something, and this section is not here to contest UK's withdrawal from the EU as a matter of positive law. However, this section is here to question how seriously the EU takes its own values and obligations when pitted against the withdrawal of a Member State. In other words, this section is here to remind the EU of its own obligations, and it is said here that the Article 50 TEU withdrawal procedure ought to be balanced against Articles 1-3 TEU. It is accepted that Brexit has resulted in the removal of the UK from the EU institutions, and, under the current Treaty framework, it is accepted that Brexit has resulted in the loss of

[72] Weiler, 'European Neo-Constitutionalism: In Search of Foundations for the European Constitutional Order' (n 2) 526; Weiler, 'To Be a European Citizen - Eros and Civilization' (n 2) 509; Weiler, 'Introduction: European Citizenship, Identity and Differentity' (n 2) 16; Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration* (n 2) 346.

Union citizenship for UK nationals. However, it ought to be questioned as to why the Treaties facilitate the removal of Union citizenship for those who continue to be included in the ever closer union and maintain a genuine link to it through their European Union identities.

IV.II UK Nationals and their Readmission to Union Citizenship

It is argued here that UK nationals could theoretically be readmitted to Union citizenship. The possibility for UK nationals to regain their Union citizenship rights stems from the fact that such peoples continue to share the common values and principles of the EU as established under Article 2 TEU.[73] In other words, it is said here that UK nationals continue to maintain a genuine link to the EU through their European Union identities. However, it is conceded that the longer UK nationals remain outside of the EU it will become increasingly difficult to maintain this line of argumentation.

This section concurs with Joseph Weiler and the idea that adherence to such values engenders such peoples with an identity towards the European Union. To reiterate, the withdrawal of the UK from the EU has not resulted in UK nationals abandoning their European Union identity. It is in this sense that UK nationals cannot be categorised purely as third-country nationals given their previous membership of the EU and their continued adherence to its values. Additionally, it is maintained here that the UK is still as much a part of what is commonly defined as Europe — even after Brexit. Therefore, it is said that UK nationals ought to have the opportunity to take advantage of Union citizenship rights upon the basis that

[73] See Weiler (n 2).

they continue to share in the European Union identity and given that they maintain a genuine link to the EU. Additionally, it ought to be recognised that UK nationals pose no real security risks given that many have been resident throughout the EU Member States for several years and given that they have previously been Union citizens who had the opportunity to engage in EU freedom of movement.

It needs to be considered how the access to such rights could be qualified. In other words, what could trigger their claim to Union citizenship rights given that such peoples do not hold a Member State nationality? It is argued here that UK nationals ought to be afforded the opportunity to pay for the access to certain Union citizenship rights. UK nationals could pay a fee to the Commission to access Articles 18-19 TFEU and Articles 21-24 TFEU Union citizenship rights for a period of ten years. It is argued here that the fee ought to be set by the Commission, yet it is advised that it should not be more than the cost of UK passport to ensure that the access to Union citizenship rights is accessible to the broadest range of UK nationals.[74] The purpose of allowing UK nationals the opportunity to access Union citizenship rights for a period of ten years is to allow for periods where the individual may seek to return to the UK without them forfeiting the ability to attain Union citizenship indefinitely through the residence route described in the previous section. Once UK nationals have resided throughout the Member States for a period that exceeds five years, they shall become permanently entitled to full Union citizenship and will not have to reapply for their Union citizenship rights.

This proposal appears to be at odds with the Commission's commitments towards preventing citizenship for sale schemes and its view that 'EU values are not for

[74] See Magni-Berton Raul, 'Citizenship for Those Who Invest into the Future of the State Is Not Wrong, the Price Is the Problem' in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (Springer 2018) 23.

sale.'[75] Additionally, numerous scholars have argued that the sale of Union citizenship threatens the very concept of Union citizenship itself.[76] However, it should be recognised that using pecuniary measures as a qualifying criterion for Union citizenship admission is no less random than requiring an individual to hold a Member State nationality.[77] In the case of UK nationals, it is argued that the EU institutions and the Member States could adhere to Articles 1-3 TEU to formally re-establish UK nationals as a part of the ever closer union. Additionally, it is argued that this proposal adheres to Articles 8 and 21 TEU to develop a special relationship with the UK and its nationals. Although the EU and UK have negotiated the Brexit Withdrawal Agreement, it is argued here that the agreement should not represent an endpoint in EU/UK relations. The EU/UK could secure further amendments to the Agreement along lines similar to the Windsor Framework to further cement the position of UK nationals as a part of the ever closer union. The requirement to develop a special relationship with the UK could be further upheld by a further amendment to the EU Treaties to allow its nationals to access Union citizenship rights if they desire to do so.

The counterargument to this proposal is to be found within Article 5(2) and 13(2) TEU. Access to Union citizenship rights has remained within the sole competence of the Member States since the TEU's inception, meaning that the EU is unable to provide for such rights without a further revision of the Treaties accompanied with

[75] Ursula von der Leyen, 'Building the World We Want to Live In: A Union of Vitality in a World of Fragility' (*European Commission*, 16 September 2020) <https://state-of-the-union.ec.europa.eu/system/files/2022-08/soteu_2020_en.pdf> accessed 15 November 2023; Commission (n 30); Commission (n 31). See also Commission, 'EU Citizenship Report 2023' (n 60).
[76] Ayelet Shachar, 'Dangerous Liaisons: Money and Citizenship' in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (Springer 2018) 15; Rainer Bauböck, 'What Is Wrong with Selling Citizenship? It Corrupts Democracy!' in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (Springer 2018) 41.
[77] Dimitry Kochenov, 'Citizenship for Real: Its Hypocrisy, Its Randomness, Its Price' in Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (Springer 2018) 52.

unanimous support from the Member States. However, it is maintained here that the ordinary revision procedure as established under Article 48 TEU is the appropriate mechanism for facilitating such changes and that the Member States ought to engage in such given their obligations under Article 12(d) TEU. Here it is argued that the granting of a supranational citizenship ought to be regulated at the supranational level and that the Member States ought to assist rather than frustrate this objective.[78] It is said here that the answer to this new method of belonging ought to be found directly within the EU Treaties. Further amendments to the Treaties and secondary legislation would provide for positive interpretations of Union citizenship and the Article 18 TFEU right not to be discriminated against in the Court of Justice. The difference is that the Court would not have to rely upon judicial activism to achieve such.

V. Reforming the Post-Brexit Framework

V.I The EU Legal Framework

It is proposed here that the EU Treaties ought to determine who can become a Union citizen. Upon the acceptance of Weiler's conception of European identity that views identity formation at the European level as being derived through the acceptance and adherence to the values of the EU as stated in Article 2 TEU and that it could theoretically represent the core component of Union citizenship in the

[78] See Magdalena Zabrocka, 'The Sale of EU Citizenship and the "Law" Behind It' (2023) 5 Stateless & Citizenship Review 44, 75.

place of Member State nationality, it then needs to be asked how the Treaties and secondary legislation could be amended to allow for such.

Article 2 TEU could add the following sentence,

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men prevail. *It shall be recognised that the adherence to these values and the protection and promotion of them engenders a burgeoning EU identity.*

The inclusion of this sentence recognises the arguments of Joseph Weiler in the Treaty text to state that all who adhere to the values of the EU begin to form an identity to it.[79] This Article, when read in conjunction with Articles 1-6 TEU, shall determine how an identity to the EU is to be defined.

Article 3 TEU could add the following subsection:

> (1) The Union's aim is to promote peace, its values and the well-being of its peoples.
>
> (2) *The Union's peoples are those who share the identity forming values established under Article 2 TEU.*

The inclusion of this subsection recognises that European belonging is facilitated through the European Union identity as opposed to the holding of a Member State nationality.

Article 9 TEU could be re-written as follows,

[79] See Weiler (n 2).

(1) 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.

(2) *'Union Citizen' means any person who shares in the European Union identity and satisfies one of the following criteria:*

(a) *Those who hold the nationality of a Member State shall be a citizen of the Union.*

(b) *Those who have lawfully resided throughout the Member States for a period exceeding five years shall be a citizen of the Union.*

(c) *Those who continue to share the European Union identity as post-European Union citizens and have made a financial contribution to access Union citizenship rights shall be recognised as a citizen of the Union'.*

(3) Citizenship of the Union *is an additional status in its own right and does not replace nor solely concern itself with the national citizenships of the Member States.*

The holding of a Member State nationality does not have to be the only method for admitting an individual to Union citizenship. As detailed in previous sections, the proposal for additional routes to Union citizenship admission makes no attempt to undermine national citizenship nor national identity: it is merely about widening the scope of who can be included and recognises those who are already a part of the European political space.

The statement that Union citizenship is to be additional to and not replace national citizenship causes no disruption to this proposal. However, given the debate over whether the change of wording from 'complementary' as stated in the Amsterdam Treaty to 'additional' in the Lisbon Treaty had any significant impact, the additional and separate nature of Union citizenship is expressly stated here to avoid any doubt over its relationship to national citizenship.[80] The explicit statement that Union citizenship exists as a status in its own right is to further confirm the opinion of AG Maduro who argued that Union citizenship strengthens our ties with our State and

[80] See Annette Schrauwen, 'European Union Citizenship in the Treaty of Lisbon: Any Change at All?' (2007) 15 MJ 55.

at the same time emancipates us from them.[81] If the status could exist in its own right then this allows for the possibility that the individual could be admitted to it independently of a Member State nationality.

In respect to qualifying admission, this would be covered by a re-written version of Article 20(1) TFEU,

> (1) Citizenship of the Union is hereby established. Citizenship of the Union *is an additional status in its own right and does not replace nor solely concern itself with the national citizenships of the Member States.*
>
> (a) Every person holding the nationality of a Member State shall be a citizen of the Union.
>
> (b) *Those who have lawfully resided within the territory of the Member States for a period that exceeds five years shall be a citizen of the Union.*
>
> (c) *Those who continue to share in the European Union identity as post-European Union citizens and have made a financial contribution to access Union citizenship rights shall be recognised as a citizen of the Union.*

The alternative routes to Union citizenship admission would shift the debate from how best to protect former Union citizens and TCNs in general. The focus would become targeted towards those who are already participating in the EU whilst respecting its principles and values and those who wish to continue participating following the withdrawal of their Member State of nationality from the EU. However, it is accepted that some form of Union citizenship identity document would need to be issued for those Union citizens do not hold a Member State nationality given that they would not hold a European Union passport.[82] Such documentation would allow for their free movement between the Member States.

[81] Case C-135/09 *Janko Rottman v Freistaat Bayern* EU:C:2010:104, Opinion of AG Poiares Maduro, para 23.
[82] See Case C-491/21 *WA v Direcţia pentru Evidenţa Persoanelor şi Administrarea Bazelor de Date din Ministerul Afacerilor Interne* EU:C:2023:362, Opinion of AG Szpunar, para 75.

The above Treaty amendments are based upon the accession process as currently laid down in Article 49 TEU. Under Article 49 TEU, any European State can apply for membership if they respect and promote the values of the EU. However, this rewrite of Article 20(1) TFEU allows for the inclusion of individuals who accept and promote these values. It is questionable as to why EU membership is only afforded to States and not individuals given that Article 1 TEU advances an ever closer union among the peoples of Europe as opposed to the States of Europe. It is said here that membership should be open to all who are committed to respecting these identity forming values. Further support for this re-interpretation can be found in the Preamble to the Charter of Fundamental Rights of the European Union: 'The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.' It is argued here that this peaceful future could also be substantiated through establishing alternative routes to Union citizenship.

Although their admission could be guaranteed without having to hold a Member State nationality, the triggering of the rights contained within would remain subject to crossing Member State borders. At this moment in time, it is difficult to envisage an alternative trigger for the activation of Union citizenship rights.[83] However, the point made here is about widening the scope of people who could choose to exercise their Union citizenship rights to pursue their conception of the good life.[84] Additionally, and to concur with Kostakopoulou, it would be advisable to incorporate

[83] See Martijn van den Brink, 'The Problem with Market Citizenship and the Beauty of Free Movement' in Fabian Amtenbrink and others (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (CUP 2019) 258. See also See also Floris De Witte, 'Freedom of Movement Needs to Be Defended as the Core of EU Citizenship' in Rainer Bauböck (ed), *Debating European Citizenship* (Springer 2019) 93-99.
[84] Floris de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (OUP 2015) 59.

Articles 1 and 7 of the Charter of Fundamental Rights into Part II of the TFEU.[85] This would allow for the right of human dignity and the right to a private and family life to become an unconditional requirement in the EU.[86]

It is perhaps fair to suggest that Article 50 TEU is in need of a substantial overhaul given that it was never intended to be used as a mechanism for a full Member State withdrawal from the EU.[87] Nevertheless, it is maintained here that the current mechanism for Member State withdrawal as found under Article 50 TEU is legitimate and remains the sovereign choice of each Member State.[88] However, this is not to say that the status quo should remain intact. It would be reasonable to suggest that the *Wightman* judgment ought to be incorporated into the Treaty text to allow for a withdrawing Member State to unilaterally rescind its withdrawal notification.[89]

It is an agreeable position to hold that Union citizenship should become the fundamental status for those who hold it, but it should also be noted that it has only been 'destined'[90] or 'intended'[91] to become fundamental.[92] Furthermore, there has been nothing in the Treaties to support this reading of Union citizenship.[93]

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[85] Dora Kostakopoulou, 'When a Country Is Not a Home: The Numbered (EU Citizens) 'Others' and the Quest for Human Dignity Under Brexit' in Moritz Jesse (ed), *European Societies, Migration, and the Law: The 'Others' Amongst 'Us'* (CUP 2020) 279.
[86] ibid.
[87] See BBC News, 'Lord Kerr Says Article 50 was Drawn Up in the Event of a Coup' (*BBC News*, 3 November 2016) <https://www.bbc.co.uk/news/av/uk-scotland-37861911> accessed 17 December 2020.
[88] Case C-621/18 *Andy Wightman and Others v Secretary of State for Exiting the European Union* EU:C:2018:999, para 50.
[89] Oliver Garner, 'Seven Reforms to Article 50 TEU' (2021) 46 EL Rev 784, 790-791.
[90] Case C-184/99 *Rudy Grzelczyk v Centre Public d'Aidec Sociale d'Ottignies-Louvain-La-Neuve* EU:C:2001:458, para 31.
[91] Case C-135/09 *Janko Rottman v Freistaat Bayern* EU:C:2010:104, para 43.
[92] Jo Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 576.
[93] Pavlos Eleftheriadis, 'The Content of European Citizenship' (2014) 15 German Law Journal 777, 780; Martijn van den Brink, 'Bold, But Without Justification? *Tjebbes*' (2019) 4 European Papers <https://www.europeanpapers.eu/en/europeanforum/bold-without-justification-tjebbes> accessed 7 March 2021.

Consequently, the loss of Union citizenship has remained a domestic issue: if a State no longer desires to continue its membership of the EU, then its nationals cease to be a national of a Member State and therefore a Union citizen. It is argued here that this position is appropriate given the current state of EU law. However, if Union citizenship is to be protected upon withdrawal, then three options are available: either the individual acquires another Member State nationality; this is negotiated between the EU and the withdrawing State under the current Article 50(2) procedure, or the Treaties be amended through the Article 48 TEU ordinary revision procedure to guarantee this position. Here it is proposed that the latter option should be considered.

The following additions to Article 50 TEU would ensure the continuation of Union citizenship for the nationals of a withdrawing State who have lawfully resided for a period that exceeds five years. Additionally, such proposals shall secure the continued lawful residence of those who are yet to lawfully reside for a period that exceeds five years.

> (1) Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements. '*In doing so, it shall respect the Union's institutional framework and the principle of sincere cooperation under Article 4(3) TEU.'*[94]
>
> (2) *A Member State withdrawal from the Union does not amount to the automatic abandonment of the European Union identity.*
>
> (3) A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union…
>
> (4) The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification *referred to in paragraph 3*, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

[94] Dora Kostakopoulou, 'Brexit, Voice and Loyalty: Reflections on Article 50 TEU' (2016) 41 EL Rev 486, 488.

(5) *For the purposes of paragraphs 3 and 4,* the member of the European Council representing the withdrawing Member State shall not participate in the discussions of the European Council or in decisions concerning it.

(6) *The withdrawing Member State shall enjoy the unilateral right to rescind its withdrawal notification.*

(7) *In the event of a non-negotiated exit, the EU, its Member States and the withdrawing State must ensure the establishment of settlement schemes to prevent former Union citizens from being unlawfully resident in their host territories.*

(8) If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49. *A former Member State can request to rejoin the Union at any point following its formal withdrawal.*

The additional sentence to paragraph 1 is to facilitate better cooperation between the withdrawing State and the EU by reminding them that they cannot ignore their obligations under the EU Treaties while they are still a part of it.[95] The inclusion of paragraph 2 is to allow for the recognition and legitimacy of the EU identity. This guarantees that the nationals of the withdrawing Member State who have resided in their host territory for a period exceeding five years shall not become illegal migrants in their host territories as a result of failed withdrawal negotiations. Those who are resident throughout the Member States but are yet to accrue five years of lawful residence in their host territory shall become subject to paragraph 7 of this proposal. This shall allow these peoples to continue to lawfully reside in their host territories until they have accrued five years of lawful residence, at which point they shall be entitled to claim Union citizenship. It is argued here that the EU, its Member States and the withdrawing State must agree to the establishment of settlement schemes equivalent to the EUSS to reduce the possibility that individuals could find themselves unlawfully resident as a result of failed withdrawal negotiations.

[95] ibid.

One theoretical question that is yet to be formally answered is whether a former Member State can re-join the EU at any point following its withdrawal or whether there exists some type of limitation period for readmission. Although the TEU does not express any limitation in this regard, the basis of this question has been derived from the Scottish independence referendum and how it has been coined as a 'once in a generation' or 'a once in a life time' vote.[96] To avoid doubt over the nature of European integration and how this is to be impacted by a Member State withdrawal, it is said that the TEU ought to make clear that a Member State withdrawal does not affect their ability to engage with the Article 49 TEU procedure if the former Member State desires to do so. This inclusion is to reinforce Article 1 TEU to work towards the ever closer union.

The fact that the EU Treaties will cease to apply makes no difference to the status of those nationals of the withdrawing State if they have lawfully resided in their host Member State for a period that exceeds five years. A Union citizenship that also allows for admission upon a period of lawful residence or through pecuniary measures would make the requirement to have an individual's State of nationality to apply the EU Treaties in its territory meaningless in respect to who can be admitted to Union citizenship.

In respect to Directive 2004/38, the criteria for defining a Union citizen as currently established under Article 2 would need to be redefined. Article 2 could be amended to include the following:

[96] See Andrew Sanger and Alison L Young, 'An Involuntary Union? Supreme Court Rejects Scotland's Claim for Unilateral Referendum on Independence' (2023) 82 Cambridge Law Journal 1, 7-8. See also *REFERENCE by the Lord Advocate of Devolution Issues Under Paragraph 34 of Schedule 6 to the Scotland Act 1998* [2022] UKSC 31, [2022] 1 WLR 5435.

> 'Union Citizen' means any person *who shares in the European Union identity while holding the nationality of a Member State, has lawfully resided throughout the Member States for a period exceeding five years and those who have made a nominal financial contribution to access Union citizenship rights.*

This should be the only amendment to the Directive. The fact that TCNs derive their Union citizenship from their lawful residence or from their financial contributions does nothing to alter the current arrangement afforded to Union citizens who seek to reside in another Member State for a period that exceeds three months.

Articles 6 and 7 of the Directive ought to remain, at least for now. Those who have acquired Union citizenship independently of a Member State nationality would be entitled to stay in another Member State territory for a period of three months provided they hold valid identity documents. If they choose to remain for a period exceeding three months, then the Union citizen would remain subject to same conditions that are currently imposed under Article 7 of the Directive. The Article 16 right to permanent residence shall apply to Union citizens and their family members who have resided in their host State for a period of five years. Following this period Article 19 shall apply to ensure the issuing of the relevant documentation to prove their status. The Article 24 right to equal treatment shall also be ensured for Union citizens and their family members. Article 27 shall continue to provide the Member States with the ability to expel Union citizens and their family members on the grounds of a genuine threat to public policy, public security or public health subject to a proportionality assessment. The only difference to the current state of the Directive is that the concept of a Union citizen is no longer limited to only those who hold the nationality of a Member State.

V.II The EU/UK Withdrawal Agreement

To ensure the protection of Union citizens in the UK, the EU/UK Withdrawal Agreement will require further amendments to accept that Member State nationality does not have to be the only qualifying criteria for admitting an individual to Union citizenship. It is argued here that Article 2(c) of the Withdrawal Agreement ought to be amended to mirror the proposed amendment to Article 9 TEU detailed in the previous section. This would ensure reciprocity between the EU and the UK given that any further revisions to the EU Treaties shall not be legally binding upon the UK. Admittedly, it is unlikely that the UK is going to agree to amend the withdrawal agreement on the basis of this proposal. However, the Windsor Framework proves that the EU and the UK are both capable and able to renegotiate the terms of the Withdrawal Agreement.

It is argued here that Union citizenship should not be subject to a Withdrawal Agreement following the Article 50 TEU negotiations. However, if a further Member State withdrawal were to occur, it is said here that the Union citizenship of the nationals of the withdrawing State ought to be subject to the Treaty revision presented in the previous section. If the EU/UK fail to amend the Withdrawal Agreement in respect to citizens' rights, then they could seek a new bilateral treaty to secure reciprocal rights and obligations between UK nationals and Union citizens.

To summarise, it is argued here that redefining the criteria for Union citizenship admission has become necessary after Brexit. The exclusionary nature of Union citizenship continues to undermine the overall objectives of the EU as laid down by the Treaties and the Charter of Fundamental Rights. If the EU is to protect its values

and its citizens, then it has become necessary to secure access to Union citizenship without its citizens having to fear that their State of nationality could withdraw from the EU. It is claimed here that originalist readings of the Treaties and the goals of the EU's founding fathers can only provide a limited analysis since they could not have envisaged the unexpected realities that the contemporary EU is confronted with.[97] In other words, Union citizenship must remain a dynamic concept that is open to re-interpretation to ensure the equality of status throughout the EU.[98]

There are many TCNs and former Union citizens who share in this identity to the EU, and it is said here that their exclusion from Union citizenship remains unjustified. This proposal would allow these peoples to be admitted to Union citizenship and to secure the rights provided by it irrespective of their nationality. Ultimately, it would create a Union citizenship that is truly post-national in its nature. Additionally, such proposals would guarantee the first step towards achieving the fundamental nature of Union citizenship given that a Member State withdrawal from the EU would not automatically result in its revocation.

VI. Objections

(1) The Ordinary Revision Procedure is likely to prevent the establishment of additional routes to Union citizenship admission.

The most obvious objection to this proposal is the ordinary revision procedure as currently laid down by Article 48 TEU. The intergovernmental nature of the Council

[97] Rainer Bauböck, 'Why European Citizenship? Normative Approaches to Supranational Union' (2007) 8 Theoretical Inquires in Law 453, 464.
[98] Dimitry Kochenov, 'The Oxymoron of "Market Citizenship" and the Future Union' in Fabian Amtenbrink and others (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (CUP 2019) 229.

has made it difficult to foresee substantial changes to Union citizenship admission given that the Member States are unlikely to cede further sovereignty to the EU over who could reside and enjoy rights within their territory. Certain State actors may come to veto this proposal given that they may not want to enfranchise peoples who would otherwise be considered TCNs to their local and EU elections.

Further, if there is ever to be another withdrawal from the EU then that State would be unlikely to want to take on the administrative burden involved in having a portion of its citizenry being Union citizens while others are not. In other words, actors at the Member State level could perceive this proposal as undermining their effective withdrawal from the EU if it ever desired to do so. Additionally, any reforms to Union citizenship are likely to involve lengthy political negotiation and debate while receiving much media attention that could result in increased scrutiny from the actors of the national institutions.[99] Therefore, without universal support for such initiatives, the proposal for additional routes to Union citizenship admission will likely remain a non-starter. In other words, the unanimity requirement may ultimately prove to be the Achilles heel of this proposal.[100]

Further amendments to the EU Treaties upon the basis of this proposal could be interpreted as encouraging further Member State withdrawals from the EU. This may or may not be the case, but it ought to be recognised that the EU is obligated under Article 1 TEU to secure an ever closer union among the *peoples* of Europe rather than the nation-states of Europe. It ought to be recognised that this proposal is about recognising those TCNs who are already a part of the European political space to

[99] Rik de Ruiter, 'Under the Radar? National Parliaments and the Ordinary Legislative Procedure in the European Union' (2013) 20 Journal of European Public Policy 1196, 1197.
[100] See Luis Jimena Quesada, 'The Revision Procedures of the Treaty' in Hermann-Josef Blanke and Stelio Mangiameli (eds), *The European Union After Lisbon: Constitutional Basis, Economic Order and External Action* (Springer 2012) 328.

Union citizenship. Therefore, it is proposed that Article 3 TEU ought to be amended to reflect this reality. The continued exclusion of long-term and lawfully resident TCNs and former Union citizens who continue to share in the European Union identity remains unjust. Their positive contributions to their host societies ought to afford them representation through Union citizenship.

This proposal is about providing legal possibilities rather than thinking too deeply about the limitations imposed by contemporary political realities. Although, admittedly, any ideas for additional routes to Union citizenship would likely fail to take hold in the contemporary EU, this is not to say that there is not a legitimate question to be asked. It is uncertain as to whether there shall be any substantial reforms to the European Treaties any time soon. Although we cannot say with any real certainty which way the EU is headed, Brexit has nevertheless exposed certain limitations in the EU's treaty architecture and its supranational citizenship. Given such events, there is now a basis to claim that reforms to the Treaties have become necessary to secure the goal of securing an ever closer union among the *peoples* of Europe.

This proposal does not seek to amend the ordinary revision procedure towards a system of qualified majority voting. The reason behind this is that such reforms ought to come about naturally as the result of Union citizens arguing for such. The collective and open-minded action of Union citizens is what shall ultimately determine the preferences of the Member States to agree to such changes to the EU Treaties and for national referenda to be successful. To take Jean Monnet's view towards the construction of a European constitution, he claimed that such would emerge only when it appeared natural to the European peoples to devise such.[101] It

[101] Jean Monnet, *Memoirs* (Richard Mayne tr, Collins 1978) 394-95.

is argued here that this mindset ought to be taken towards widening the personal scope of Union citizenship.

(2) How could the EU and the Member States prove that an individual's claim to the EU identity is legitimate?

A further objection is how would the EU and the Member States know that a TCN is being genuine in claiming their EU identities and that newly admitted Union citizens upon this basis will continue to respect its values. The Member States are likely to be sceptical of new waves of Union citizens residing within its territory who claim that they belong to the EU and their host territory on the basis of their EU identities. Such scepticism may encourage certain Member States to argue for the need to protect their national resources from potential welfare benefits claims from peoples who would have otherwise been considered as TCNs. Regrettably, it is conceded here that the economies of the Member States and of the Eurozone generally may need to recover before any ideas for additional routes to Union citizenship can become politically feasible.

However, it should be acknowledged that there are already many lawfully resident TCNs who have contributed financially to their host state through taxation whilst simultaneously respecting EU values. For example, UK nationals who are resident throughout the Member States each provide their own justification for this proposal. It is argued here that the prior holding of Union citizenship and the absence of a criminal record ought to qualify an individual's European identity and therefore their claim to Union citizenship. It is difficult to justify the exclusion of a certain group of peoples who until circumstances permitted otherwise had been active members of

their chosen communities while abiding by the laws, values and principles of that community.

Nevertheless, Member State resistance to inclusion is a likely scenario. The Member States could seek to adopt a Treaty Article to provide for the taking of an oath of allegiance and seek to apply a small administrative fee to the taking of such an oath.[102] It is argued here that such a position should be avoided given that it is difficult to justify TCNs, and UK nationals in particular, having to undertake numerous integration tests, classes or oaths given they have previously held Union citizenship and given that many have already been present in their host state for a significant period of time. In the case of UK national's resident inside the EU, it should be recognised that until Brexit they had been treated as equals through their Union citizenship without any requirement to undertake such oaths.[103] In respect to UK nationals resident outside of the EU, it ought to be recognised that they previously held Union citizenship without the requirement to undertake such oaths.

(3) How could the values that underpin the EU identity be recognised as the core of Union citizenship?

The no demos thesis argues that European wide belonging is currently a non-existent concept.[104] This addresses the difficulties over how certain societal issues such as the fair distribution of resources and the collective commitment towards

[102] Kostakopoulou, *European Union Citizenship Law and Policy: Beyond Brexit* (n 7) 142.
[103] Kostakopoulou, '*Scala Civium*: Citizenship Templates Post-Brexit and the European Union's Duty to Protect EU Citizens' (n 6) 861.
[104] See Weiler, 'Does Europe Need a Constitution Demos, Telos and the German Maastricht Decision' (n 50) 229-31 and 254; Weiler, 'To Be a European Citizen - Eros and Civilization' (n 2) 495. See also Percy Lehning, 'European Citizenship: A Mirage?' in Percy Lehning and Albert Weale (eds), *Citizenship, Democracy and Justice in the New Europe* (Routledge 1997) 182; Massimo La Torre, 'Citizenship, Constitution, and the European Union' in Massimo La Torre (ed), *European Citizenship: An Institutional Challenge* (Kluwer Law International 1998) 451.

building a community could be successful outside of the boundaries of a nation-state. It is argued that if the functioning of the social rights of Union citizenship are to be effective, then policies must become a reality through European wide will formation which is not possible without the existence of a basis of solidarity among its peoples.[105]

It can be argued that the EU does not wield equivalent legitimacy as its Member States in respect to concepts such as identity and belonging.[106] However, it is argued here that the EU and its Member States are capable of recognising the European identities of Union citizens, lawfully resident third-country nationals and former Union citizens and accepting such as the basis for their claim to Union citizenship admission. It is contended here that the issue is not a lacking EU identity, but instead it is argued that there currently exists no effective alternative to the traditional models of identity, belonging and citizenship other than those that have been traditionally laid down by nation-states.[107] Under this proposal solidarity will primarily be facilitated through the acceptance of the EU identity and the values that encompass it. The argument made here is that people are more likely to accept newcomers and form a sense of solidarity with them if they believe that they have arrived in 'their' territory upon the basis that they identify with it, its values and its peoples. This should not be too much to ask considering that there are many TCNs who lawfully reside throughout the EU Member States. However, it is accepted here

[105] Jürgen Habermas, *The Postnational Constellation: Political Essays* (Max Pensky tr and ed, MIT Press 2001) 99.
[106] See Teresa Pullano, 'Philosophies of Post-National Citizenship at a Crossroad' in Darian Meacham and Nicolas de Warren (eds), *The Routledge Handbook of Philosophy and Europe* (Routledge 2021) 186.
[107] See John Erik Fossum, 'Citizenship, Diversity, and Pluralism: The Case of the European Union' in Alan C Cairns and others (eds), *Citizenship, Diversity & Pluralism: Canadian and Comparative Perspectives* (McGill-Queen's UP 1999) 215.

that the EU and its Member States must take an active role and propose initiatives that would make the EU a deeper part of its citizens' lived realities.

It is said here that the EU and its Member States would benefit from a period of reflection to appreciate what it has already achieved. This includes the introduction of its symbolic elements such as the EU flag, anthem and passport. However, in doing so, it must also reconsider many of the proposals that were left on the table. In 1975 Leo Tindemans argued that if a common and united Europe were to succeed, then its citizens must be able to experience this in their everyday lives.[108] It is argued here that while the EU has achieved much since, it has nevertheless not gone far enough.

Tindemans alerted to the fact that this sense of Europeanness must be felt in the education systems of the Member States. It is argued here that the Commission ought to consider a proposal grounded upon Articles 165-167 TFEU for a European wide educational system to which its values can be recognised.[109] Perhaps the introduction of a single yet short module in the educational systems of the Member States would help the youth to better understand not only their status and rights in the EU, but also how the values of it have shaped their identities.[110] Something to this effect would aid the understanding as to why such values are integral to securing the continued rights and freedoms these peoples currently enjoy. The Commission has pledged further funding to primary and secondary school teachers in this regard.[111] This should not be designed to undermine the national histories and

[108] Commission, 'Report on European Union' (Tindemans Report, Bull E.C. suppl. 1/76, 29 December 1975) ch 1 pt A 3.
[109] ibid. See also European Parliament (n 4) 19; Anthony D Smith, 'National Identity and the Idea of European Unity' (1992) 68 International Affairs 55, 72.
[110] Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (n 48) 15.
[111] See Commission, 'EU Citizenship Report 2023' (n 60) 8.

traditions of the individual Member States but instead such measures should be introduced to make individuals aware of their numerous identities as both national and European citizens and how they have benefitted from each.

Tindemans also argued for a European wide news outlet.[112] This is a problematic proposal given the diversity of languages across the Member States. However, it is said here that the EU ought to introduce a European wide media outlet in which its citizens can access information and communicate such information upon the same basis. This would appear to be necessary given that many national news outlets fail to account for a European perspective when reporting on the EU.[113]

To further cement solidarity towards the EU identity, the EU and the Member States could work towards the establishment of an EU wide public holiday. One reasonable approach could be to work towards making Europe Day, celebrated every 9th of May, into a full public holiday.[114] Currently, Europe Day provides a holiday only for those who work in the EU institutions. It is regrettable that a day that is designed to celebrate peace and unity in Europe has so far not been recognised by the Member States and implemented into the lived realities of those who share in the European identity. Such a position would allow the European peoples the space to reflect upon their identities as well as their overall place as a part of the EU without restricting their patriotism to purely statist parameters.[115]

[112] Commission, 'Report on European Union' (Tindemans Report, Bull E.C. suppl. 1/76, 29 December 1975) ch 1 pt A 3
[113] Juan Diez Medrano, 'The Public Sphere and the European Union's Political Identity' in Jeffrey T Checkel and Peter J Katzenstein (eds), *European Identity* (CUP 2009) 90.
[114] See European Parliament (n 4) 18.
[115] See Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (n 48) 48.

(4) Offering additional routes to Union citizenship admission would not solve the contradictory nature of CJEU jurisprudence.

The issue here is that this proposal only seeks a minor amendment to Directive 2004/38. Although access to Union citizenship and the rights provided by it would be provided for without the requirement to hold a Member State nationality, this is not to say that the Court of Justice may impose restrictive judgments in respect to the exercising of their Union citizenship rights.

There are two ways in which the Court of Justice may interpret the Union citizenship provisions if they are to be reformed upon the basis of this proposal: either the Court would begin to interpret Union citizenship as being a separate yet equivalent status that each individual relies upon to exercise rights; or the Court could seek to apply restrictive judgments on the basis of their inability to guarantee that they will not become a burden to the host states finances. It is unclear whether the Court would continue to flesh out the rights of Union citizens as it did following the *Sala* judgment,[116] or whether external political pressures would continue to impose limited judgments.[117] One issue here is due to the fact that newly admitted Union citizens would receive rights and benefits in their host Member State without the nationals of that State receiving such benefits in turn from States that are not a Member State of the EU. In other words, the concept of reverse discrimination would only be heightened as a result of this proposal. This will demonstrate the tensions

[116] See Niamh Nic Shuibhne, 'The Third Age of EU Citizenship: Directive 2004/38 in the Case Law of the Court of Justice' in Philip Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (CUP 2012) 331-362.
[117] See Charlotte O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights' (2016) 53 CML Rev 937.

between the rights of Union citizens and the Article 18 TFEU right to non-discrimination against the interests to protect national welfare systems.[118]

However, what ideas of this kind produce is a further step towards establishing a method of legal belonging to the EU through means other than the holding of a Member State nationality. It is contended that the EU itself is best thought of as being a multi-levelled non-state polity that is made up of an association of States in which its citizens have multiple identities that are not limited to the boundaries of their State of nationality. Therefore, the EU should not be thought of, interpreted and designed along the lines that have been traditionally associated with national Statism. If this proposal is to be successful, then it is hoped that the Court will take this into consideration when it is asked to interpret the Treaties. It has already been argued that the Court has missed ample opportunities to establish the concept of solidarity as a meaningful value of the EU.[119]

VII. Conclusion

It is proposed here that the EU and its Member States ought to recognise that identity operates as the core component of citizenship and therefore due regard for such ought to be given when considering admission to Union citizenship. UK nationals and long-term and lawfully resident TCNs share in this identity irrespective of the nationalities they hold, and their continued exclusion form Union citizenship ought to be questioned.

[118] See Keon Lenaerts and Tinne Heremans, 'Contours of a European Social Union in the Case-Law of the European Court of Justice' (2006) 2 European Constitutional Law Review 101.
[119] Dagmar Schiek, 'Solidarity in the Case Law of the European Court of Justice: Opportunities Missed?' in Helle Krunke, Hanne Petersen and Ian Manners (eds), *Transnational Solidarity: Concept, Challenges and Opportunities* (CUP 2020) 252-300.

The ability of the EU to offer alternative routes to Union citizenship admission ought to be taken seriously. Allowing for admission upon a period of lawful residence and through pecuniary measures would ensure a Union citizenship that is truly post-national in nature. The requirement that a TCNs admission to Union citizenship be qualified by five years of lawful residence should satisfy anxieties at the Member State level over a new influx of Union citizens into their territories. In respect to UK nationals, they shall have the option to be admitted through their lawful residence, or they shall be provided with the opportunity to pay for such access until such for a ten-year period. The Member States ought to allow for this and engage in the ordinary revision procedure to secure such through the EU Treaties directly. However, it is regrettable that in the contemporary, and perhaps increasingly intergovernmental, EU this proposal is likely to be ruled out on the basis of political pragmatism.[120]

This proposal provides a basis for further developments to Union citizenship. If Union citizenship were to be made into a post-national status of citizenship upon the basis of this proposal, then it would take the first step towards becoming the fundamental status in so far that a Member State withdrawal from the EU would not automatically result in the revocation of the status. However, after securing access to the status outside of Member State nationality, a basis for further research would be to consider how to further transform it into a truly fundamental status whereby the Marshallian standard for equal access to the civil, political and social rights of Union citizenship could become secured solely upon the basis that these peoples are indeed free moving Union citizens. Perhaps most notable would be the full enfranchisement of Union citizens to the national elections of their host Member

[120] See Fabbrini (n 25) 261 and 269-70.

State.[121] Ultimately, Union citizenship ought to be considered as a concept in progress and this proposal should not represent an end point in its development.[122]

[121] Commission, 'EU Citizenship Report 2020' (n 4). See also Dimitry Kochenov, 'Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights' (2009) 15 Columbia Journal of European Law 169, 201; Federico Fabbrini, 'The Political Side of EU Citizenship in the Context of EU Federalism' Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017) 280-81.
[122] See La Torre (n 104) 437-38.

Conclusion

Union Citizenship: Meaning, Limitations and Potential

I. Introduction

This work has demonstrated that Union citizenship as currently expressed in the EU Treaties cannot be regarded as a post-national nor fundamental status of citizenship. The status cannot be fundamental given that the withdrawal of an individual's state of nationality from the EU is sufficient to strip the holder of it, and the status cannot be post-national given that the Treaties and the Court of Justice remain firm in asserting that one must hold the nationality of a Member State in order to be a Union citizen.[1] However, the question now is whether the EU and its Member States are to uphold the status quo or whether they may be willing to reconceptualise the criteria for being admitted to Union citizenship to accept that former Union citizens and many lawfully resident TCNs belong it regardless of their nationalities.

The purpose of this chapter is to summarise the main findings of this work and to offer a coherent account of the conclusions made and each section of this chapter is to summarise the three constituent parts that have made up the body of this work. The chapter ultimately concludes that the current reality underpinning the EU and Union citizenship is that third-country nationals, including UK nationals as former

[1] See Case C-673/20 *EP v Préfet du Gers and Institut national de la statistique et des études économiques (INSEE)* EU:C:2022:449 ; Case C-499/21 P *Joshua David Silver and Others v Council of the European Union* EU:C:2023:479. See also Case C-501/21 P *Harry Shindler and Others v Council of the European Union* EU:C:2023:480; Case C-502/21 P *David Price v Council of the European Union* EU:C:2023:482.

European Union citizens, cannot be considered Union citizens given the current text of the EU Treaties. However, this work holds that the EU and its citizenship should not be considered as a finished institution.[2] The chapter argues for the inclusion of UK nationals and long-term and lawfully resident TCNs to Union citizenship and that such could be made a reality if the EU accepts their admission upon criteria other than the holding of a Member States nationality.[3] Although this remains a theoretical possibility, it is argued that such changes are unlikely to materialise in the near future given the intergovernmental nature of the European Council and the unfolding crises the EU and its Member States are currently faced with.

II. Citizenship: Meaning and Potential

To ability to offer a coherent and simple definition that explains the meaning of citizenship still alludes scholars and policy practitioners. Therefore, it is said here that citizenship cannot have a singular nor fixed meaning. The reason for arriving at such a conclusion is simple: citizenship ought to be an inclusive status that is flexible enough to facilitate the legal belonging and participation of individuals. However, citizenship has always been an exclusionary status: you are either a citizen or you are not, and such is determined by prerequisite criteria that is established within legislation. This being said, citizenship has been subject to redefinition to become more inclusive following societal demands for change. Throughout numerous

[2] See Dora Kostakopoulou, 'European Citizenship: Writing the Future' (2007) 13 ELJ 623, 638; Dora Kostakopoulou, *European Union Citizenship Law and Policy: Beyond Brexit* (Edward Elgar Publishing Ltd 2020) 27-31 and 130.
[3] See JHH Weiler, 'Introduction: European Citizenship, Identity and Differentity' in Massimo La Torre (ed), *European Citizenship: An Institutional Challenge* (Kluwer Law International 1998); Theodora Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (Manchester UP 2001).

historical periods there have been numerous achievements that have resulted in the widening of citizenships personal scope to include those who previously found themselves excluded. Propertyless men, women and ethnic minorities are now admitted to citizenship throughout the European nation-states after hard fought campaigns for their inclusion. It is for such reasons why this work holds that citizenship is a malleable construction that is capable of redefinition where those to whom the status is meant to represent deem it necessary. It is also said here that the criteria for being admitted to the citizenly status and the content of rights contained within are also equally malleable constructs that have also been subject to change in order for citizenship to better reflect the communities that the status is supposed to represent.

It has become difficult to maintain that an individual is a purely political animal given that peoples also engender a genuine sense of social standing that ought to be afforded equivalent rights.[4] The Peace of Westphalia, the end of feudal authority and social contract theory raised the legitimacy of the nation-state and birthed the idea of the citizen-state relationship in which property and electoral rights would ensure protection from the state apparatus while also ensuring that the citizens themselves became the authors of the laws as the result of their democratic participation.[5] However, the nation-state remained exclusionary and was seemingly unable to properly facilitate the social rights of individuals. The social aspect of citizenship was perhaps best encapsulated by Thomas H Marshall writing in the era of post-World War II social reforms. Therefore, citizenship was to be viewed as not

[4] See Aristotle, *The Politics* (Penguin Classics 1992) 59.
[5] Thomas Hobbes, *Leviathan* (first published 1651, OUP 1998); John Locke, *Second Treatise of Government* (first published 1689, OUP 2016) 63; Jean-Jacques Rousseau, *The Social Contract* (first published 1762, Penguin Classics 1968) 61. See also Daniel Philpott, 'Sovereignty: An Introduction and Brief History' (1995) 48 Journal of International Affairs 353, 364.

only the guarantor of political and civil rights but also social rights to ensure that citizens can participate on an equal footing. With the recognition of such it can be said that social welfare, citizenship and social justice became interlinked.[6]

In the aftermath of World War II, the European nation-states began to recognise that they could no longer remain isolated communities that were grounded upon the idea of nationhood. In other words, there was a clear need for Europe to redefine itself in cultural, economic and political terms. Europe needed to be rebuilt physically and Franco-German relations required restoration. The Marshall Plan providing US funding for the rebuilding of Europe and the Schuman Declaration to integrate the coal and steel communities of the six initial Member States aided in the transition from conflict towards unity. With such initiatives came many foreign workers from both inside and outside of Europe which resulted in a form of market citizenship after their rights as individuals were protected upon their claim to international legislation providing for universal human rights.

It became clear that the migrant workers who came to rebuild Europe were there to stay. Upon this realisation, it became clear that an additional European identity emerged and began to operate alongside the national identities and interests of the European nation-states. The free movement of post-war workers accelerated this newfound sense of belonging and identity as their social, political, civil and economic commitments began to be found outside of the place of their nationality. With the establishment of the European Coal and Steel Community, migrant workers began to find that their rights were beginning to be protected on the supranational European level against their host territories. As a result, these peoples felt that their

[6] Charlotte O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Hart Publishing 2017) 9.

national citizenships no longer adequately reflected their supranational and European identities and therefore the need for a supranational status of European Union citizenship began to emerge.

Following the success of the European Coal and Steel Community, the integration of further economic sectors and the free movement of European workers established under the European Economic Community (EEC), questions emerged as to what kind of legal order had been created. Did the then EEC represent an international trade agreement, or had European integration produced an irreversible spillover effect resulting in the emergence of a new supranational European identity?[7]

The judgment from *van Gend en Loos* established that the EEC constituted a new legal order of international law whereby the Member States have limited their sovereignty in certain fields and that the subjects are not only the Member States but also their nationals.[8] The EEC Treaty not only imposed obligations upon individuals but also conferred upon them supranational rights that would form aspects of their European legal heritage.[9] Here it is argued that the Court of Justice recognised that a supranational European identity had emerged and that such an identity was worthy of protection. The Court later determined that the rights stemming from the EEC Treaty ought to be given primacy over competing national legislation.[10] Once again it became clear that the market citizens of Europe were to remain in their host territories indefinitely and would subsequently require the protection of their civil, political and social rights in their host territories. This would

[7] See Ernst B Haas, *The Uniting of Europe: Political, Social and Economic Forces* (Stanford UP 1958) 311 and 383.
[8] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* EU:C:1963:1, 12 (emphasis added).
[9] ibid.
[10] Case 6/64 *Flaminio Costa v E.N.E.L.* [1964] EU:C:1964:66, 593.

further the need for the establishment of a supranational status of European citizenship.

* * *

Throughout the 1970s it appeared that European nationals no longer viewed European integration with the same enthusiasm as they did during the 1950s. It was argued that the European identity was lacking and without such it would be difficult to underpin the common bond between the nationals of the Member States. Additionally, the widening of European integration to include the UK, Ireland and Denmark in 1973 arguably stagnated any ideas for the introduction of a common European citizenship. However, in 1975 two important policy documents were produced. The European Commission report titled 'Towards European Citizenship' and the Tindemans report both argued that the benefits of European integration needed to be seen throughout the everyday lives of the European peoples and also discussed the potential for a common passport union and European Parliament voting rights.[11] In addition, the 1979 election to the European Parliament through universal suffrage and the establishment of the passport union in 1981 were seen as an embryonic form of European citizenship.[12]

The question was whether a supranational European citizenship could alleviate all forms of hardened nationalism while also providing for the social rights free moving Europeans. The late 1980s would see the necessary institutional push towards the establishment of a European Union citizenship. Following the Single

[11] Commission, 'Towards European Citizenship' (Bull EC 7/75) COM (75) 322 final.
[12] Willem Maas, *Creating European Citizens* (Rowman & Littlefield 2007) 35; Patricia Mindus, *European Citizenship After Brexit: Freedom of Movement and Rights of Residence* (Palgrave Macmillan 2017) 9.

European Act and the setting of the objective to complete the EU single market by the end of 1992, the argument for a European citizenship took hold and it was concluded that it ought to be established in the eventual Treaty on European Union (TEU). This achievement was realised upon the signature to and ratification of the TEU establishing that every Member State national shall also be a European Union citizen. It is argued here that the establishment of Union citizenship legally formalised the supranational European identity.

The question now is whether the EU and its Member States would be willing to develop the status beyond its associations to Member State nationality. It is contested here that there is no concrete definition for citizenship in a national sense and, by the same logic, the same must apply to its supranational counterpart.[13] It is difficult to fully grasp what the intended or perhaps even true meaning of Union citizenship is: is it a market citizenship designed to facilitate the free movement of economically active Europeans, or is it something more fundamental that is supposed to facilitate the civil, political and social rights of Europeans throughout the European Union Member States? Arguably, it is the latter that Union citizenship should seek to achieve. The initial introduction of the status did little to facilitate the rights of Europeans other than to cement their role as a consumer and to provide for the right to participate in the elections to the European Parliament. However, it can be said that the status has come to reflect something more fundamental given the significant life choices that have been made while acting under it in good faith.[14] The reality is that originalist interpretations of the Treaties provide only a limited analysis given that they could not have been able to envisage the contemporary

[13] See Samantha Besson and André Utzinger, 'Introduction: Future Challenges of European Citizenship – Facing a Wide-Open Pandora's Box' (2007) 13 ELJ 573, 588.
[14] See Brigid Laffan, 'The Politics of Identity and Political Order in Europe' (1996) 34 JCMS 81, 94.

demands of European Union citizens, former Union citizens and TCNs.[15] It is for such reasons that this work holds that Union citizenship is a social construct that is capable of redefinition in order to better reflect the lived realities of those who identify with the EU and its Member States.

III. Union Citizenship: Legal and Theoretical Limitations

Union citizenship as it is currently conceptualised in the EU Treaties presents legislative challenges. Most notable is the fact that Article 9 TEU and Article 20(1) TFEU continue to state explicitly that Union citizenship is to be an additional status of citizenship that can only be derived through the holding of a Member State nationality. However, where the impracticalities of the Treaty text are best highlighted is when they have been interpreted by the Court of Justice when read in the light of the Article 18 TFEU right to not be discriminated against upon the basis of the claimant's nationality.

Following the ratification of the Maastricht Treaty, the Court of Justice took on an arguably activist approach to interpreting the Union citizenship provisions within the Treaties to furnish the status and to put the Marshallian flesh on the bones of Union citizenship through recognising and enforcing their social rights simply upon the basis that the individual concerned was a free moving Union citizen.[16] This appeared to end the concept of the market citizen and signalled a shift towards a genuine supranational citizenship that could guarantee the social rights of the

[15] See Dimitry Kochenov, 'The Oxymoron of "Market Citizenship" and the Future Union' in Fabian Amtenbrink and others (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley* (CUP 2019) 229.
[16] Case C-85/96 *María Martínez Sala v Freistaat Bayern* EU:C:1998:217, paras 61-65. See also Síofra O'Leary, 'Putting Flesh on the Bones of European Union Citizenship' (1999) 24 EL Rev 68.

individual. Such enthusiasm on the part of the Court arguably peaked when it declared that Union citizenship is destined to become the fundamental status for all the nationals of the European Union Member States without there being such backing within the text of the Treaties.[17]

To mitigate concerns at the Member State level, the Court of Justice began to require that the free-moving Union citizen does not become an unreasonable burden upon the finances of the host Member State. However, the Court continued to advance the interpretation that Union citizenship was destined to become the fundamental status, and, even where a Union citizen's employment came to an end, the host Member State could not deem them as an unreasonable burden given that Article 21 TFEU does not require the Union citizen to pursue a professional trade or activity.[18] In other words, as previously stated, they were able to enjoy the rights of Union citizenship given that they were indeed a free moving Union citizen.

Certain Member States remained hesitant towards the idea of allowing free-moving Union citizens access to their social assistance systems. The introduction of Directive 2004/38, and particularly Article 7 of that Directive, established formal criteria that ought to be met if the Union citizen sought a period of residence that exceeded three months. In short, the Union citizen must either be employed or self-employed; have sufficient resources; or be enrolled in a course of study if they are to lawfully reside in their host Member State for a period that exceeds three months. In addition, the Union citizen is also required to obtain comprehensive sickness insurance if they are not a worker or self-employed.

[17] Case C-184/99 *Rudy Grzelczyk v Centre Public d'Aidec Sociale d'Ottignies-Louvain-La-Neuve* EU:C:2001:458, para 31.
[18] Case C-184/99 *Baumbast and R v Secretary of State for the Home Department* EU:C:2002:493, paras 82-83.

The Directive allowed the Member States to refrain from the granting of social welfare assistance to free-moving Union citizens and provided for the inconsistent application of social welfare assistance.[19] The justification for doing so was that it was believed that the UK had a certain pull factor given that it offered a more generous social assistance system than other Member States.[20] This essentially shattered the idea that Union citizenship could become the fundamental status in that it offers the Marshallian civil, political and social rights to Union citizens throughout the Member States regardless of their economic standing.

The introduction of the Directive also saw the Court of Justice interpreting the Treaty provisions in light of the criteria established under Article 7 of the Directive. Ultimately, this resulted in more restrictive interpretations regarding how fundamental Union citizenship was destined to become.[21] The *Dano* judgment highlights this reality as the Court established that the Member States are not precluded from denying a free moving Union citizen from social welfare assistance where that Union citizen is not a worker, has no sufficient resources and no comprehensive sickness insurance. In other words, the claimant could not satisfy Article 7 of Directive 2004/38 and was therefore considered to be an unreasonable burden upon the host Member State's finances. The *Dano* judgment highlights the

[19] Paul Minderhoud, 'Directive 2004/38 and Access to Social Assistance Benefits' in Elspeth Guild, Cristina J Gortazar Rotaeche and Dora Kostakopoulou (eds), *The Reconceptualization of European Union Citizenship* (Brill Nijhoff 2014) 221. See also O'Brien (n 6) 20-21.
[20] Derek Heater, *What Is Citizenship?* (Polity Press 1999) 131.
[21] See Case C-158/07 *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep* EU:C:2008:630, para 49 and paras-51-55; Joined Cases C-22/08 and C-23/08 *Athanasios Vatsouras and Josif Koupatantze v Arbeitgemeinschaft (ARGE) Nürnberg 900* EU:C:2009:344. See also Oxana Golynker, 'Case Comment: Case C-158/07, *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep*, Judgment of the Court (Grand Chamber) of 18 November 2008, not yet reported' (2009) 46 CML Rev 6; Niamh Nic Shuibhne, 'The Third Age of EU Citizenship: Directive 2004/38 in the Case Law of the Court of Justice' in Philip Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (CUP 2012) 333; Michael Dougan, 'The Bubble That Burst: Exploring the Legitimacy of the Case Law on the Free Movement of Union Citizens' in Maurice Adams and others (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013) 140-41.

changing nature of the Court of Justice in respect to its Union citizenship jurisprudence. Where previously it recognised and respected the Article 18 TFEU right not to be discriminated against upon the basis of the individual's nationality, it now began to qualify this right and the Article 21 TFEU right to freedom of movement with not becoming a burden upon the host states finances. In other words, in Ms Dano's case, the Court determined that the Union citizen must move for work or have sufficient resources and comprehensive sickness insurance as to not become a burden upon the finances of the receiving state.[22]

The above represents the stark reality that currently underpins Union citizenship. It is upon this basis that certain scholars have argued that it might not actually represent a status of citizenship at all.[23] It should be noted that the supposedly fundamental nature of Union citizenship as characterised by the Court in its earlier jurisprudence has so far failed to be materialised in the text of the EU Treaties. The opportunity to do so did exist upon the Lisbon Treaty amendments, yet the EU and its Member States continued the status quo and merely changed the wording of the Treaty provisions to state that Union citizenship is now an 'additional' status of citizenship as opposed to a 'complementary' one.

In short, the EU Treaties continue to state that Union citizenship is merely additional to and is to be derived from Member State nationality, and EU secondary legislation continues to hold that the right to freedom of movement is qualified by not becoming a burden upon the host Member States finances. It has become clear that Union citizenship is unlikely to become the fundamental status in the sense that its citizens simply belong to their respective host territories on the basis of their

[22] See Charlotte O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights' (2016) 53 CML Rev 937, 974.
[23] Agustín José Menéndez and Espen D H Olsen, *Challenging European Citizenship: Ideas and Realities in Contrast* (Palgrave Macmillan 2020) ch 4.

Union citizenship. In other words, the status continues to be limited by Member State preferences, external political pressure and judicial interpretations. In sum, and as discussed in Chapter VI, it is argued here that the Court of Justice ought to reassert the primacy of primary EU law, such as Articles 18 and 21 TFEU, and to reinforce its duty of reviewing the proportionality of any derogations from such rights.[24]

This work has also argued that Union citizenship is fraught with theoretical limitations. The basis of this claim is found within the assumption that an identity precedes the establishment of a legally binding status of citizenship. It is contended here that this is particularly the case with respect to the European Union given that there had been a growing sense of a supranational European identity years prior to the formal establishment of Union citizenship in the TEU. It is also said here that a status of citizenship is established to legally cement the identity of the community in which the status represents. This work argues that identity is a fluid construct in which its meaning can be subject to change. In other words, the identity that underpins a community today may not best represent the community of tomorrow. Therefore, it is argued that citizenship must be capable of accommodating the changing nature of the identity that underpins it in order for the status to better represent those who live under it.

Here it is argued that the signature to and the ratification of the Maastricht Treaty legally cemented the EU identity that had been evolving throughout the European nation-states since the end of the Second World War and did so through the establishment of Union citizenship. The Maastricht Treaty legally captured the EU identity as it was found in 1992, an identity which held that only those who held a

[24] O'Brien (n 6) 272.

Member State nationality could ever be admitted to Union citizenship. The question now is whether Union citizenship is still capable of meeting the contemporary demands of the European Union, its Member States and its citizens. This work has argued that the EU identity has remained in a state of constant flux. Therefore, the EU identity as legally encapsulated in 1992 fails to adequately reflect the contemporary EU. In other words, it can be argued that Union citizenship itself no longer reflects the lived realities of its citizens.

It is said here that it is an identity that drives innovative redesigns of citizenship. If a citizenship strays too far from the identity of the community that it is supposed to legally capture, then the citizens begin to recognise that their legal status no longer reflects or mirrors their lived experiences. People's attitudes, realities and desires change and citizenship acting as a legal mechanism for officially recognising the people's identity must be malleable to account for such changes. If it cannot, then citizenship and identity shall remain in conflict with one another. As more Union citizens began to make use of their Union citizenship rights, their identities to the EU deepened. Once their identity to the EU is developed to the point where it can represent them and their way of life, they may then begin to question why their Union citizenship is derived from their Member State nationality given that their EU identities are more pertinent to their lived experience.

Union citizenship is a significant status given the many Union citizens who have relied upon it to secure their residence throughout the EU Member States. Such observations allowed for ideas to emerge to consider whether Union citizenship could ever become a post-national status of citizenship.[25] The establishment of a

[25] See Yasemin Nuhoğlu Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (The University of Chicago Press 1994).

truly post-national Union citizenship would ultimately mean allowing for admission to it upon criteria other than the holding of a certain nationality. However, Brexit has challenged this idea given that it has demonstrated that Union citizenship's continuity remains dependent upon the individual holding the nationality of an EU Member State. The Court of Justice has also confirmed such.[26] In other words, Union citizenship can only be considered a post-national status of citizenship in so far that an individual's State of nationality decides to continue its membership of the EU and remain as an EU Member State. Therefore, as it currently stands, Union citizenship cannot be considered to represent a properly post-national status of citizenship. The current state of Union citizenship is best viewed as a multi-levelled status of citizenship that on the one hand provides Member State nationals with additional rights on the supranational level and, on the other, can be taken away if their State of nationality no longer wishes to remain as an EU Member State.[27]

Union citizenship in its current form cannot be said to represent a truly post-national status. Therefore, it is argued here that reforms to the Union citizenship provisions are required if UK nationals as post-European Union citizens and other lawfully resident TCNs are to be admitted to the status. Brexit has highlighted the need for such reforms given that many UK nationals, who had exercised their previously held EU law rights in good faith, now find themselves in a less favourable position regarding their status in the territories they belong to and identify with. Additionally, it appears inevitable that many will be left behind as a result of the post-

[26] Case C-673/20 (n 1) paras 46-52.

[27] Samantha Besson and André Utzinger, 'Towards European Citizenship' (2008) 39 Journal of Social Policy 185, 196; Jo Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 578; Willem Maas, 'European Governance of Citizenship and Nationality' (2016) 12 Journal of Contemporary European Research 532, 544. See also Rainer Bauböck, 'The Three Levels of Citizenship Within the European Union' (2014) 15 German Law Journal 751, 752.

Brexit Settlement Schemes and at worst these people may come to be regarded as illegal migrants who are to be removed from their host territory.

It is argued here that if the EU identity is to act as a justification for allowing for alternative routes to Union citizenship admission, then it must be capable of being defined. In other words, what values and principles underpin this identity? This work agrees with Joseph Weiler to argue that the EU identity has not been engendered through ethnic ties nor a sense of supranational nationhood but has instead been derived through the adherence to and exercise of the values and principles that have been underpinned through Articles 1-6 TEU. Therefore, when Union citizens and third-country nationals move to another EU Member State and continue to lawfully reside there, they are in fact committing themselves to the upholding of these values and principles. In doing so, they naturally begin to feel a sense of belonging to their host community and consequently engender a burgeoning EU identity. It is upon this basis to which Joseph Weiler has claimed that such an identity could theoretically justify an individual's claim to Union citizenship.[28] If such could ever be written into the Treaties, then this would ultimately allow for the inclusion of UK nationals and other long-term and lawfully resident third-country nationals to Union citizenship. In other words, this would establish a truly post-national form of Union citizenship. However, the current reality of the European Union is that it would be expected that the Member States would likely question the idea of admitting third-country nationals to Union citizenship. Therefore, to subvert this expectation it is said throughout this work that the EU identity and their admission to Union citizenship must be qualified through objective criteria.

[28] Weiler (n 3) 16.

To qualify such identities, the work of Dora Kostakopoulou has been taken into account.[29] Following this, it is said here that a period of lawful residence that exceeds five years could theoretically qualify the EU identity of a third-country national to therefore justify their claim to Union citizenship. Here it is contended that the works of Joseph Weiler and Dora Kostakopoulou ought to be taken together as this provides both a defined framework that accounts for the values that encompass what it means to hold a European Union identity while also providing an objective measure as to when such an identity has been attained. It is hoped that the requirement to lawfully reside for a period that exceeds five years can quell the potential concerns of certain Member States given that this would not be about admitting newcomers to Union citizenship but rather about recognising those who are already a part of their community who also live under and abide by its laws, values and principles.

This proposal is not about removing the holding of a Member State nationality as a qualifying criterion for being admitted to Union citizenship. Those who hold a Member State nationality shall continue to be Union citizens. However, what this proposal does question is why this continues to be the available method for being admitted. In addition to five years of lawful residence, it is also said here that former Union citizens, in this case UK nationals, ought to be able to be admitted to Union citizenship through pecuniary measures set by the European Commission. It is argued here that UK nationals maintain a genuine link to the EU and continue to share in its identity-forming values as stated under Article 2 TEU. On such basis it is said that UK nationals ought to be afforded the opportunity to access Union citizenship rights for a period of ten years, that is unless the UK national lawfully

[29] See Kostakopoulou (n 3).

resides throughout the EU Member States for a period that exceeds five years at which point, they ought to be permanently entitled to Union citizenship.

In sum, it is said here that identity is a thicker concept than nationality, and such could therefore represent the core of Union citizenship in the place of a Member State nationality. It is for such reasons that this work has argued for the approaches of both Joseph Weiler and Dora Kostakopoulou to be taken together when considering Union citizenship reforms. Identity and residence are two important concepts that are necessary to establish a sense of belonging, however, it is arguable that in the contemporary EU neither concept would stand on its own as an alternative criterion for an alternative route to Union citizenship admission.

IV. Union Citizenship: Achieving Its Potential

There is no need to protect a national identity nor citizenship from EU encroachment: it would be ironic if the EU ethos that rejects aspects of hardened nationalism gave birth to a new European nation and European nationalism.[30] The TEU encapsulates this in its preamble stating that European integration is about establishing an ever closer Union among the peoples of Europe. It should be recognised that this goal is not about the creation of a single European people, but the union and recognition of many.[31] The admission of lawfully resident TCNs and former Union citizens to Union citizenship is in keeping with the ever closer union,

[30] JHH Weiler, 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403, 2481. See also Richard Bellamy and Dario Castiglione, 'The Normative Challenge of a European Polity: Cosmopolitan and Communitarian Models Compared, Criticised and Combined' in Andreas Føllesdal and Peter Koslowski (eds), *Democracy and the European Union* (Springer 1998) 280.
[31] Weiler (n 3) 1.

and rather than undermining the importance of nationality it is merely about recognising those who are already a part of the European integration project.

This proposal is about acknowledging that national practices relating to Union citizenship admission should not be taken as the norm for a supranational polity. In other words, it remains questionable as to why the holding of a certain nationality remains the prerequisite to the supranational citizenship of a supranational non-State polity. It is upon this basis that is claimed that Union citizenship admission could also become grounded upon criteria other than the holding of a Member State nationality. Habermas argued that the process of globalisation has meant that the nation-state can no longer provide the appropriate framework for the maintenance of democratic citizenship.[32] However, after thirty years of Union citizenship, access to the status remains limited through national models of citizenship.[33] The legal avenues to obtaining nationality continue to overlook the belonging that an individual has to their chosen society. To introduce alternative routes to Union citizenship admission would genuinely account for such.

The central theme surrounding this work has been that of Brexit and its resulting consequence that has seen every UK national being deprived of their Union citizenship. What should be recognised here is that Brexit as a political process has not undone the European identities of UK nationals. Upon this basis, it is argued that UK nationals continue to share in the European Union identity. However, as Brexit proved, this did nothing to prevent them from becoming third-country nationals in the EU. This is the harsh reality of a Member State withdrawal given how Union citizenship is currently contextualised under the EU Treaties. Therefore,

[32] Jürgen Habermas, 'The European Nation State. Its Achievements and Its Limitations. On the Past and Future of Sovereignty and Citizenship' (1996) 9 Ratio Juris 125, 137.
[33] Gerard Delanty, 'Models of Citizenship: Defining European Identity and Citizenship' (1997) 1 Citizenship Studies 285, 299.

it can be claimed that Union citizenship has so far failed to live up to its full potential.[34] The only methods that are currently available for the retention of Union citizenship following the withdrawal of your State of nationality from the EU are as follows: such is negotiated during the Article 50(2) TEU negotiations; or, you seek out or already hold another Member State nationality; or, as shall be argued in detail later, the EU Treaties and secondary legislation be amended to allow for such.

The UK has withdrawn from the EU and the rights of UK nationals resident throughout the EU and Union citizens resident throughout the UK are now governed by the terms of the Withdrawal Agreement assuming that they moved before 31 December 2020 and applied to their host state's settlement scheme prior to the 30 June 2021 deadline. However, it ought to be considered that prior to the UK's withdrawal, a Member State had never triggered Article 50 TEU. It should be recognised that Brexit only accounts for the UK's withdrawal and does not provide a solid framework for how a Member State withdrawal ought to be managed if another were to occur in the future. Although unlikely, we cannot say for certain whether another Member State will trigger Article 50 TEU.

The protection of residence rights for those UK nationals and Union citizens who had made use of their right to freedom of movement was secured with relative ease during the withdrawal negotiations. However, the Treaty framework currently allows a Member State to trigger Article 50 TEU and frustrate the negotiations for two years resulting in the Union citizens resident throughout the withdrawing State's territory and the nationals of the withdrawing Member State who are resident throughout the EU to become unlawful migrants. This hypothetical scenario ought to be avoided at

[34] See Commission, 'EU Citizenship Report 2020: Empowering Citizens and Protecting Their Rights' (*European Commission*, 2020) <https://commission.europa.eu/system/files/2020-12/eu_citizenship_report_2020_-_empowering_citizens_and_protecting_their_rights_en.pdf> accessed 17 June 2023.

all costs and it is for such reasons that it is argued here that Treaty revision ought to be seriously considered.

Ultimately, the retention of Union citizenship for the nationals of a withdrawing Member State must become a political issue and such ought to be achieved through the ordinary revision procedure as established under Article 48 TEU. It is argued here that the Union citizenship and residence status of the nationals of a withdrawing Member State ought to be protected directly through the EU Treaties and not be subject to a withdrawal agreement. It is now clear that this can no longer be a judicial issue as although the Court of Justice could have intervened, it determined that its role does not extend to the protection of Union citizenship for former EU Member State nationals.[35] Quite simply, neither the EU Treaties nor the Court of Justice will protect the Union citizenship of former Member State nationals, regardless of their length of lawful residence, their contributions to their receiving territory and their sense of identity to the EU and their host Member State. The question then is how the Treaties could be amended to allow for such.

It is said if that Union citizenship is to become the fundamental status for those who seek to rely upon it then it must meet two criteria: first, it must be a status that is capable of facilitating the Marshallian civil, political and social rights throughout the Member States simply upon the basis that the individual concerned is indeed a free moving Union citizen; second, it must be capable of being retained following the withdrawal of an individual's state of nationality from the EU. Therefore, for the status to become truly fundamental for those who seek to rely upon it, it must first

[35] Case C-673/20 (n 1) paras 55-58 ; Case C-499/21 (n 1) paras 44-46. See also Case C-501/21 (n 1); Case C-502/21 (n 1).

become a post-national status in that the individual can also be admitted to Union citizenship without first having to meet the criteria of having to hold the nationality of an EU Member State.

It is contended here that the European identities of UK nationals as post-European Union citizens and of long-term and lawfully resident third-country nationals could theoretically act as a justification for their admission to Union citizenship upon criteria other than the holding of a Member State nationality. As discussed previously, UK nationals ought to be afforded the opportunity to pay for the continued access to Union citizenship rights and once they have accrued five years of lawful residence throughout the EU Member States, they shall then be provided the opportunity to hold Union citizenship indefinitely. Other lawfully resident third-country nationals ought to be provided with the opportunity to secure Union citizenship following a period of residence throughout the EU Member States that exceeds five years. If such could be achieved, then this would create a Union citizenship that is truly post-national in nature and somewhat fundamental in nature given that the status cannot be automatically revoked upon a Member State withdrawal from the EU.

It should be recognised that the argument for reform is already present with numerous scholars offering their recommendations that would further widen the personal scope of Union citizenship. However, it is argued here that the Treaties would require further amendments if such were to be achieved. It is also said here that there is no need to further constitutionalise the EU in order to achieve such. Here it is argued that the ordinary revision procedure as established under Article 48 TEU ought to be considered as the appropriate approach. Although the obvious limitation of this approach is the unanimity requirement, it is maintained here that

such reforms ought to come from the EU political institutions, the Member States and most importantly from the Union citizens themselves. If such proposals could become primary EU law, then one of its consequences would be that more people would be able to exercise their right to the European Citizens' Initiative. It is hoped that an increased voice throughout the Member States can facilitate a more active and perhaps real form of citizenship which the EU institutions and Member States find difficult to ignore. Such would reduce the weight of the democratic deficit argument and help to further amend Union citizenship where necessary in order for the status to better reflect the contemporary concerns of Union citizens.

V. Conclusion

The EU and its Member States ought to seriously consider how post-European Union citizens and other long-term and lawfully resident third-country nationals could be included in the EU through Union citizenship. Citizenship has no real nor fixed meaning given that the status can be subjected to reinterpretation where the citizens believe that the status no longer reflects their identities and their lived experience. In taking this into account, it can be said that citizenship is a status of potential whereby the rights contained within and who is to be included can be continually sought after numerous periods of reflection and reform.

One of the questions posed throughout this work has been what is the intended or perhaps true meaning of Union citizenship, and has the status lived up to this potential? Ultimately, it is concluded here that Union citizenship ought to represent a fundamental status of citizenship that is capable of being retained by the nationals of a former Member State. Here it argued that the EU institutions, particularly the

Court of Justice, the Member States, and Union citizens themselves should not lose sight of Union citizenship becoming the fundamental status for those who seek to rely upon it. However, the status has so far failed to live up to this ambition and this has mostly been found in the inability of certain Member States to accept free-moving Union citizens as common European Union citizens regardless of their economic standing.

However, the status is currently flawed at the EU level given the current reality that underpins the European Union. The fact that the Treaties continue to assert that only a Member State national could ever be admitted to Union citizenship has overlooked the potential of the status. However, Union citizenship should not be regarded as a finished institution, and it is argued here that Union citizenship must be reformed by way of Treaty amendment if this fundamental status is to be guaranteed. The proposal provided here to reform the relevant Union citizenship provisions could genuinely establish a Union citizenship that is truly post-national. This would take a needed step that would be required if the status is to become fundamental given that a Member State withdrawal from the EU would not lead to its automatic revocation in many cases.

Although such a proposal is encouraging, it must still be conceded that the recommendation to implement such reforms through the ordinary revision procedure presents a serious limitation. The intergovernmental nature of the European Council is likely to obstruct any reforms to widen the personal scope of Union citizenship and there does not appear to be the political will to further amend the Treaties at this moment in time given the current crises the EU and its Member States are presented with. However, it must be said that the purpose of this proposal

is to present an alternative that provides an achievable, although theoretical, outcome.

The argument posed here is that Union citizenship remains a malleable construction that should not be limited to the nationals of the EU Member States but should instead be accessible to all peoples who share in the European Union identity. The status is capable of reform, and Brexit has only further highlighted the need to engage in institutional redesigns of what it means to be a Union citizen. It is regrettable that the limitations of the Treaties are yet to be addressed, and that it may be several years until such is achieved. However, it is argued here that the EU institutions, the Member States and Union citizens themselves must begin to discuss such possibilities and keep pursuing the idea of Union citizenship becoming the fundamental status for those who seek to rely upon it.

This work asks whether the European Union identity can supersede Member State nationality as the core component of Union citizenship. If such could be achieved, then alternative routes to Union citizenship admission become a theoretical possibility. This is not to replace Member State nationality as a route to admission but to question the legitimacy of reserving admission to Union citizenship to only those who hold a Member State nationality. One of the research questions asked throughout this work has been whether the European Union identity provides for a genuine link to the EU to allow for both United Kingdom nationals as former Union citizens and other lawfully resident third-country nationals to be admitted to Union citizenship.

In Chapter IV of this work, it is argued that this question can be answered through an analysis of the works of Joseph Weiler. It is said that Weiler's conception of European identity emerging as the result of adherence to the values of the EU as

established by Article 2 TEU provides a genuine link between the individual and the EU. Therefore, in Chapter VII of this work, it is argued that the EU and its Member States could recognise the European Union identities of UK nationals and other lawfully resident third-country nationals to allow for their admission to Union citizenship through their lawful residence that exceeds five years or through pecuniary measures. However, it is said that this would require a further revision of the EU Treaties through the Article 48 TEU ordinary revision procedure.

Union citizenship must be capable of meeting two criteria if it is to become the fundamental status for free-moving Union citizens: the status must be capable of being retained for the nationals of a withdrawing Member State, and it must be able to provide for the civil, political and social rights of citizenship solely upon the basis of their Union citizenship as opposed to their economic means. It is said here that Union citizenship cannot become a fundamental status until the Treaties can first establish it as a properly post-national status of citizenship. To allow for alternative routes to Union citizenship admission that have been underpinned by a genuinely held EU identity would genuinely allow for such. Given that an individual could be admitted to the status without having to hold a Member State nationality, it can be said that this could represent the first meaningful step towards establishing Union citizenship as the fundamental status for those who seek to rely upon it. However, it is regrettable that this proposal has only considered the first of these two criteria.

This work has concerned itself with the requirements to access Union citizenship and not so much with the overhauling of its content of rights once it has been attained. This work does not propose an alternative to the purely internal rule. Movement across Member State borders shall remain as the trigger for the full activation of the status and entitlement to the rights contained within. However, it is

argued here that this rule ought to be reconsidered in the future, and such ought to be subjected to further research.

Union citizenship still has much to achieve in respect to the political and social rights of Union citizens and such areas provide scope for further work. In respect to their political rights, it is hoped that free-moving Union citizens may one day be able to participate in the national elections of their host Member State. However, it is argued here that such reforms are more likely to be secured if the personal scope of Union citizenship is to be widened upon the basis of the proposal provided here. Once admitted, the Union citizens shall then be able to invoke the Citizens' Initiative to argue for such reforms. Regrettably, it is recognised that such proposals are unlikely to materialise any time soon given the apathy of certain Member States to fully enfranchise Union citizens to their national elections. This remains unjust given the Union citizen is required to live under its laws while being unable to democratically object to them.

In respect to furthering the social rights of Union citizens, a further amendment of Directive 2004/38 would be required to remove the requirement that the Union citizen does not become an unreasonable burden upon the host Member States finances. This would be difficult to achieve in the contemporary EU given the disparities between the economies and social assistance systems of the Member States. However, it is argued here that the EU Member States should consider harmonisation in this area to mitigate concerns regarding Union citizens moving to their territories to receive welfare benefits. Additionally, such reforms would allow the Court of Justice to return to the protection of Union citizens and their right not to be discriminated against upon the basis of their nationality. Without further amendments to the primary and secondary legislation, the Court is justified in its

decision to limit access to social welfare assistance to economically inactive Union citizens.[36] It is likely that future work in this regard shall adopt the philosophy of John Rawls and the idea of the original position to help justify equality for Union citizens in claiming social benefits throughout the EU Member States.[37] It is hoped that such could dilute, if not remove completely, the notion of EU market citizenship to allow for true social justice in respect to social welfare benefits in the EU.[38]

It is said here that a stone-by-stone approach to the redevelopment of the status is what is most likely to produce results. This is due to the nature of the EU institutions, and it could be argued that too much too soon could stifle reform. It is for such reasons that this work has limited its scope to consider Union citizenship's admission criteria. It is said here that a proposal to widen the personal scope of Union citizenship ought to be the first of many. What is hoped is that the EU and its Member States begin to rethink the boundaries of Union citizenship and European belonging more generally. However, it cannot be said with any real certainty which way the EU or the UK is headed, nor is it possible to predict how the relationship between the two shall unfold in the coming years. It is unclear whether the Treaties will be amended, it is unclear as to whether the UK may seek regulatory alignment with the EU single market in the form of EEA membership or a new bilateral Treaty, it is unclear as to whether the review of the Trade and Cooperation Agreement in 2026 shall achieve any significant results in respect to the removal of trade barriers, it is unclear as to whether the UK may even seek to re-join the EU, it also unclear as to what the consequences of the war in Ukraine will be. The list goes on and, at

[36] See Martijn van den Brink, 'Off Track, Again? EU Citizenship and the Right to Social Assistance' (2023) 11 Hungarian Yearbook of International Law and European Law 18.
[37] John Rawls, *A Theory of Justice* (first published 1971, Harvard UP 1999) 12-13 and 60.
[38] Charlotte O'Brien, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK* (Hart Publishing 2017) 269.

the time of writing, any suggestion as to any possible outcomes would merely be conjecture.[39] However, notwithstanding these realities, it is argued that the EU institutions and the EU Member States should keep the interests of those who share in the European Union identity in mind and allow for a Union citizenship that is truly post-national.

[39] See Federico Fabbrini, 'Review and Reform Options for Deepening EU-UK Cooperation in a Renewing Europe' in Federico Fabbrini (ed), *The Law & Politics of Brexit Volume V: The Trade and Cooperation Agreement* (OUP 2024) 235-53.

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