

EU citizenship and (fundamental) rights: Empirical, normative, and conceptual problems

Martijn van den Brink*

Abstract

There is a close connection between EU citizenship and rights, both in the law and literature. This article claims that EU lawyers' understanding of EU citizenship and rights suffers from empirical, normative, and conceptual shortcomings. I will point out that there has been insufficient awareness for the boundedness of EU citizenship, the political structure of the EU and the constraints this (realistically) imposes on the 'meaningfulness' of EU citizenship. EU citizenship must not be understood as requiring an elaborate set of equal rights for all Union citizens throughout the EU, but valued for its ability to allow its status holders to enjoy (almost) full membership in the Member States of which they do not possess nationality.

1 | INTRODUCTION

There is a close connection between EU citizenship and rights, both in the law and literature. When the Court of Justice of the European Union (CJEU) decides a case bearing on the position of an EU citizen, one question almost inevitably emerges: did it sufficiently safeguard EU citizenship rights?¹ The strengthening of the rights of Union citizens is often said to contribute to a more 'real' or 'meaningful' citizenship.² If, on the other hand, the Court undermines previously acquired rights, EU lawyers speak of the return of EU citizenship to its market origins and find that it fails to live up to its potential.³ I believe that much is missed by such rights-based approaches. Questions of authority and legitimacy—who is to decide questions of Union citizenship—remain underexplored,⁴ but most of all, I shall argue in this article, EU lawyers' understanding of EU citizenship and rights is problematic in itself. It suffers from empirical, normative, and conceptual shortcomings.

*Max-Planck-Institut zur Erforschung multireligiöser und multiethnischer Gesellschaften. I wish to thank Claire Kilpatrick, Daniel Halberstam, Rebecca Scott, and Filipe Brito Bastos for comments on earlier drafts. The usual disclaimer applies.

¹An instructive example: D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017).

²D. Kochenov, 'A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe' (2011) 18 *Columbia Journal of European Law*, 55; A. Tryfonidou, 'Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach' (2009) 15 *European Law Journal*, 634.

³For two good examples of that approach, see C. O'Brien, 'Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights' (2016) 53 *Common Market Law Review*, 937; E. Spaventa, 'Earned Citizenship: Understanding Union Citizenship Through Its Scope', in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017).

⁴The classic exception remains K. Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42 *Common Market Law Review*, 1245. See, also, N.N. Shuibhne, 'The Third Age of EU Citizenship: Directive 2004/38 in the Case Law of the Court of Justice', in P. Syrpis (ed.), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press, 2012).

Rather than providing for an elaborate set of equal rights for all Union citizens throughout the EU, the true strength of EU citizenship emanates from its ability to allow its status holders to enjoy (almost) full membership in the Member States of which they do not possess nationality. To explore these issues, I will zoom in onto one particular aspect of the debate on EU citizenship and rights, namely the interaction between EU citizenship and fundamental rights.⁵ For heuristic purposes, I will focus on the empirical, normative, and conceptual assumptions underlying the by now famous Heidelberg proposal for the protection of fundamental rights through EU citizenship.⁶ I will argue that we would be mistaken, empirically, normatively, and conceptually, to intertwine citizenship and fundamental rights. Through that discussion, I will draw attention to broader conceptual and normative shortcomings in dominant approaches to EU citizenship, on its relationship with rights, its position within the EU's political framework, and the position of those not enjoying EU citizenship status. I will point out that there has been insufficient awareness of the boundedness of EU citizenship, the political structure of the EU and the constraints this (realistically) imposes on the 'meaningfulness' of EU citizenship. EU citizenship must not be understood as requiring an elaborate set of equal rights for all Union citizens throughout the EU, but valued for its ability to allow its status holders to enjoy (almost) full membership in the Member States of which they do not possess nationality.

Having provided an outline of the core arguments in favour of a stronger connection between EU citizenship and fundamental rights (section 2), I will go on to demonstrate the empirical, normative, and conceptual weaknesses of these proposals. Section 3 discusses the empirical side and explains that debate has overlooked the disentanglement between citizenship and rights that has occurred in recent decades. Section 4 argues that this disentanglement is also normatively desirable over providing only those in the possession of the status of citizenship with a set of basic rights; fundamental rights' presumption of universality is diametrically opposed to the bounded and exclusionary nature of citizenship. The project of linking fundamental rights and EU citizenship may be motivated by the intention to overcome existing divisions within the EU, but it presupposes a new fault line based on the boundaries of nationality, which likely comes at the expense of third-country nationals. Section 5 challenges on conceptual grounds the idea that for EU citizenship to have sufficient substance, an all-encompassing set of European-wide fundamental rights is needed. Adherents of this idea tend to misconceptualise the concept and misunderstand EU citizenship's normative import, resulting in a questionable push for homogenisation and harmonisation.

2 | FUNDAMENTAL RIGHTS AND THE SUBSTANCE OF EU CITIZENSHIP

The Treaty of Maastricht introduced a common European Union citizenship for all nationals of EU Member States. To many, that new common citizenship did not live up to its potential and it was dismissed as a meaningless addition to the Treaties, a symbolic gesture at most: a 'pie in the sky'⁷ and 'a cynical exercise in public relations'.⁸ That is because

⁵I have focused on this interaction in the past. Readers familiar with my earlier argument will note that the argument developed in this article represents a break with my earlier thoughts on the matter. A few years ago, I argued for a deeper interaction between fundamental rights and EU citizenship (M. van den Brink, 'EU Citizenship and Fundamental Rights: Taking EU Citizenship Rights Seriously?' (2012) 39 *Legal Issues of Economic Integration*, 273). Some of the downsides of such deeper interaction I addressed earlier in, M. van den Brink, 'The Origins and Potential Federalising Effects of the Substance of Rights Doctrine' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017). This article explores in greater detail the various arguments against creating a tighter connection between EU citizenship and fundamental rights.

⁶A.V. Bogdandy et al., 'Reverse Solange—Protecting the Essence of Fundamental Rights against EU Member States' (2012) 49 *Common Market Law Review*, 489.

⁷H.U. Jessurun d'Oliveira, 'Union Citizenship: Pie in the Sky?', in A. Rosas and E. Antola (eds.), *A Citizens' Europe: In Search of a New Order* (Sage Publications, 1995).

⁸J.H.H. Weiler, 'European Citizenship and Human Rights', in J.A. Winter et al. (eds.), *Reforming the Treaty on European Union: The Legal Debate* (Kluwer Law International, 1996), 68.

those who looked for something substantially new in the Treaties were searching in vain.⁹ The Treaties reiterated traditional free movement and non-discrimination rights. EU citizens enjoy the right to move freely around the European Union and take up residence in Member States of which they do not possess nationality. The principle of non-discrimination on grounds of nationality, moreover, allows EU citizens to enjoy, albeit with some exceptions, full membership in Member States of which they are not nationals.¹⁰ In addition, it laid down the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence and a set of seemingly less relevant rights: the right to diplomatic protection in the territory of a third country by the diplomatic authorities of any Member State if the Member State of nationality is not represented there, and the right to petition the European Parliament and the Ombudsman.¹¹

For many, EU citizenship is the concept that signifies, or ought to signify, the EU's transition beyond a mere economic actor concerned with interstate movement¹²—the 'fundamental status'¹³ that is supposed to strengthen the EU's social and democratic face. EU law, however, still permits Member States to discriminate against EU citizens who do not enjoy their nationality and treat them less favourably than their own nationals, by withholding from them social assistance under certain circumstances, by denying them the right to vote in national elections, and by subjecting them to expulsion measures on certain grounds.¹⁴ These are all reasons that have led to the belief that EU citizenship's promise remains unfulfilled. Still today, over two decades after its introduction, EU lawyers remain preoccupied with the alleged need to give more substance to EU citizenship.

Among the main reasons that EU citizenship is professed as lacking substance is because of the absence of a set of uniform rights, which can be invoked against the EU and the Member States regardless of the exercise of free movement rights.¹⁵ With some exceptions, EU citizens enjoy their substantive rights through the right to free movement and non-discrimination.¹⁶ In other words, it provides 'deference to the states on the substantive content of

⁹C. Lyons, 'Citizenship in the Constitution of the European Union: Rhetoric or Reality?', in R. Bellamy (ed.), *Constitutionalism, Democracy and Sovereignty: American and European Perspectives* (Avebury, 1996); Weiler, above, n. 8.

¹⁰For such a view, see, also, J. Lacroix, 'Is Transnational Citizenship (Still) Enough?', in D. Kochenov, G. de Búrca and A. Williams (eds.), *Europe's Justice Deficit?* (Hart, 2015), 178.

¹¹For those rights, see Articles 20–24 TFEU.

¹²E. Guild, C. Gortázar and T. Kostakopoulou (eds.), *The Reconceptualization of European Union Citizenship* (Brill Nijhoff, 2014), 2; F. Wollenschläger, 'A New Fundamental Freedom Beyond Market Integration: Union Citizenship and Its Dynamics for Shifting the Economic Paradigm of European Integration' (2011) 17 *European Law Journal*, 1.

¹³Case C-184/99, *Grzelczyk*, ECLI:EU:C:2001:458, para. 31; Case C-413/99, *Baumbast*, ECLI:EU:C:2002:493, para. 82; Joined Cases C-482/01 and C-493/01, *Orfanopoulos and Oliveri*, ECLI:EU:C:2004:262, para. 65; Case C-34/09, *Ruiz Zambrano*, ECLI:EU:C:2011:124, para. 41. For a persuasive critique of this rhetoric, see J.H.H. Weiler, 'Epilogue: Judging the Judges—Apology and Critique', in M. Adams et al. (eds.), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart, 2013).

¹⁴These are the three main exceptions to the right to non-discrimination on grounds of nationality. The entitlement to social assistance in the host Member State is conditional upon having fulfilled certain periods of employment or residence. See, for example, Articles 7(3) and 24(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ L158/77). Secondly, citizens can be expelled from the host Member States on grounds of public policy, security, and health. Most important in that regard is Article 28 of that same Directive. Thirdly, EU citizens do not enjoy the right to vote in the elections of the host Member State. Article 19(1) TFEU stipulates that an EU citizen 'residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State'.

¹⁵For some of those comments, see D. Kochenov and R. Plender, 'EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text' (2012) 37 *European Law Review*, 369; C. O'Brien, 'I Trade, Therefore I Am: Legal Personhood in the European Union' (2013) 50 *Common Market Law Review*, 1643.

¹⁶Persons who have not exercised free movement rights cannot normally enjoy protection under EU law. This was first decided in Case C-35/82 *Morson and Jhanjan*, ECLI:EU:C:1982:368. Concerning family reunification, this so-called purely internal rule, according to which only those situations with a cross-border element fall within the scope of EU law, has by and large been maintained ever since. Case C-459/99 *MRAX*, ECLI:EU:C:2002:461, para. 39; Case C-127/08 *Metock*, ECLI:EU:C:2008:449, para. 77. The main exception is *Ruiz Zambrano*, above, n. 13. On *Ruiz Zambrano* and family reunification, see D. Kochenov and P. Van Elsuwege, 'On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights' (2011) 13 *European Journal of Migration and Law*, 443.

citizenship'.¹⁷ A German national resident in Italy is entitled, certain important exceptions aside, to be treated as an Italian national. That EU citizens enjoy equal treatment only under national law and not directly under EU law is one of the pitfalls of the concept, many seem to believe.

That certainly is the case when it comes to fundamental rights, which many believe to be the key to reinforcing the 'fundamental status' provided by EU citizenship. Shortly after its introduction, notable scholars such as O'Leary, O'Keefe, and Bernitz all adopted the view that EU citizenship should have implications for the balance of powers with respect to fundamental rights protection within the EU.¹⁸ That the European Parliament and Commission had opted for incorporating an explicit link between EU citizenship and fundamental rights in the Treaties during the Maastricht negotiations might explain some of those views.¹⁹ Fostering this belief also, the Charter of Fundamental Rights, adopted in 2000, reiterates that the EU 'places the individual at the heart of its activities, by establishing the citizenship of the Union'.²⁰ The Charter contains only one specific chapter laying down the rights attached to the status of EU citizenship and none of the other chapters draws a direct connection between citizenship and fundamental rights.²¹ Perhaps, however, the citizenship chapter has resulted in some confusion, creating the idea that 'the Charter will establish a direct link between the European institutions and citizenship'.²²

But more than anything, it was the case law of the ECJ that fuelled the dreams and aspirations of EU lawyers. It was Advocate General Jacobs who, upon the introduction of EU citizenship, famously proclaimed that EU citizens, when exercising the right to free movement, should be 'entitled to say "*civis europeus sum*" and be able to invoke that status to oppose any violation of their fundamental rights'.²³ While never unequivocally accepting this idea, reading fundamental rights considerations into the Court's citizenship jurisprudence is not very complicated. It was, to give an example, under the impetus of EU citizenship that the ECJ extended the right to family reunification for those who availed themselves of the right to free movement.²⁴ EU citizenship, additionally, has been used to protect the weak

¹⁷This was also the meaning of nineteenth-century citizenship in the US, as pointed out by W.J. Novak, 'The Legal Transformation of Citizenship in Nineteenth-Century America', *The Democratic Experiment: New Directions in American Political History* (Princeton University Press, 2003), 88.

¹⁸S. O'Leary, 'The Relationship between Community Citizenship and the Protection of Fundamental Rights in Community Law' (1995) 32 *Common Market Law Review*, 519; D. O'Keefe and A. Bavasso, 'Fundamental Rights and the European Citizen', in M. La Torre (ed.), *European Citizenship: An Institutional Challenge* (Kluwer, 1998); U. Bernitz and H. Lokrantz Bernitz, 'Human Rights and European Identity: The Debate about European Citizenship', in P. Alston (ed.), *The EU and Human Rights* (Hart, 1999).

¹⁹O'Leary, above, n. 18, at 520.

²⁰Preamble of the Charter.

²¹That chapter is Title V of the Charter, which is more or less a copy of the rights of EU citizenship we find in the Treaties. Other than the provisions in Title V laying down the citizens' rights, only two articles explicitly mention EU citizenship. The first is Article 12 of the Charter, stating that '[p]olitical parties at Union level contribute to expressing the political will of the citizens of the Union'. The second is Article 15, which reads as follows: 'Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State'. That the Treaty provides rights of democratic participation to EU citizens only and also allows for distinctions between EU citizens and third-country nationals with respect to economic free movement rights explains the invocation of EU citizenship in those Charter provisions.

²²F. Balaguer, 'European Identity, Citizenship and the Model of Integration', in A. Silveira, M. Canotilho and P.M. Froufe (eds.), *Citizenship and Solidarity in the European Union: From the Charter of Fundamental Rights to the Crisis, the State of the Art* (PIE Peter Lang, 2013), 233. The Charter language also seems to have confused the scholars who have written the famous Heidelberg proposal, which is discussed below. Von Bogdandy et al., above, n. 6, at 506.

²³Case C-168/91, *Konstantinidis*, ECLI:EU:C:1992:504, Opinion of AG Jacobs, para. 46. For another Advocate General who saw the need to protect the EU citizens' common code of fundamental rights, though only in very limited circumstances, see Case C-380/05, *Centro Europa 7*, ECLI:EU:C:2007:505, Opinion of AG Maduro, para. 19. See, also, Case C-228/07, *Petersen*, ECLI:EU:C:2008:281, Opinion of AG Ruiz-Jarabo Colomer, para. 27.

²⁴Case C-127/08, *Metock*, ECLI:EU:C:2008:449; Case C-551/07, *Sahin*, ECLI:EU:C:2008:755; Case C-1/05, *Jia*, ECLI:EU:C:2007:1; Case C-423/12, *Reyes*, ECLI:EU:C:2014:16.

and the less well-off.²⁵ Occasionally, the Court even hinted at there being a strong link between EU citizenship and fundamental rights, stating that national legislation should comply 'with the requirements of EU law concerning the effective protection of the fundamental rights conferred on EU citizens'.²⁶

This idea, which has entertained scholars since the 1990s, gained more traction in recent years, particularly following the Court's decision in *Ruiz Zambrano*. In her elaborate Opinion, Advocate General Sharpston called for a reconsideration of the bonds between the EU citizen and the EU. That had to come about through a more expansive protection of fundamental rights for EU citizens.²⁷ The ECJ followed up by deciding that Member States could no longer deprive Union citizens of the 'genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'.²⁸ What it meant by that, and what the precise scope of the substance of the rights of EU citizens was, it failed to elucidate at the time, but the expectation that it had to have implications for the division of competences within the EU concerning the protection of fundamental rights was justified.²⁹ Belgium was precluded from expelling EU citizens from their territory and,³⁰ of course, had the Court's intention been the protection of one of the rights of EU citizens already enshrined in the Treaties, one would have expected the decision to have clarified this.³¹ Scholars keen to add further substance to EU citizenship were keen to stress, therefore, that 'the Charter should eventually become a significant part of the said "substance of the rights attached to the status of citizenship"'.³²

Many members of the legal academic community have sided with the idea that fundamental rights constitute the core of EU citizenship.³³ The most famous elaboration of the potential of *Ruiz Zambrano* for the protection of fundamental rights within the EU has been the Heidelberg proposal, instigated by Von Bogdandy. Accordingly, *Ruiz Zambrano* should be interpreted as a reversal of the *Solange* case law of the German Constitutional Court.³⁴ The idea is that 'Member States remain autonomous in fundamental rights protection *as long as* it can be presumed that they

²⁵Case C-456/02, *Trojani* [2004] ECR I-7573; Case C-200/01, *Zhu and Chen*, ECLI:EU:C:2004:639. Though some of them might have been better off than commonly presumed: D. Kochenov and J. Lindeboom, 'Breaking Chinese Law—Making European One: The Story of Chen, Or: Two Winners, Two Losers, Two Truths', in B. Davies and F. Nicola (eds.), *EU Law Stories* (Cambridge University Press, 2017).

²⁶Joined Cases C-372/09 and C-373/09, *Josep Peñarroja Fa* [2011] ECLI:EU:C:2011:156, para. 62.

²⁷Case C-34/09, *Ruiz Zambrano*, ECLI:EU:C:2010:560, Opinion of AG Sharpston.

²⁸*Ruiz Zambrano*, above, n. 13, para. 42.

²⁹H. van Eijken and S.A. de Vries, 'A New Route into the Promised Land? Being a European Citizen After *Ruiz Zambrano*' (2011) 5 *European Law Review*, 704; M. Hailbronner and Sara Iglesias Sánchez, 'The European Court of Justice and Citizenship of the European Union: New Developments towards a Truly Fundamental Status' (2011) 5 *Vienna Journal on International Constitutional Law*, 498. As I have demonstrated elsewhere, not including fundamental rights in the substance of the rights of EU citizens essentially renders the substance of the rights test meaningless. Since one should hope that fundamental rights will not be linked to the rights attached to EU citizenship, this might be for the better. van den Brink, 'The Origins and Potential Federalising Effects', above, n. 5.

³⁰*Ruiz Zambrano*, above, n. 13, paras. 42–44.

³¹In that sense, President Lenaerts' recent claim that the case was about free movement is not wholly convincing. K. Lenaerts and J.A. Gutiérrez-Fons, 'Epilogue on EU Citizenship: Hopes and Fears', in Dimitry Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017). For criticism of this position, M. van den Brink, 'The Origins and the Potential Federalising Effects of the Substance of Rights Test', in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017).

³²D. Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe' (2013) 50 *Common Market Law Review*, 1267, 1272. See, also, D. Sarmiento, 'The EU's Constitutional Core', in A. Saiz Arnaiz and C. Alcobarro Llivina (eds.), *National Constitutional Identity and European Integration* (Intersentia, 2013); I. Canor, 'My Brother's Keeper? Horizontal *Solange*: "An Ever Closer Distrust among the Peoples of Europe"' (2013) 50 *Common Market Law Review*, 383, 403.

³³This group includes notable scholars in the field of EU citizenship, such as: S. Iglesias Sánchez, 'Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison?' (2014) 20 *European Law Journal*, 464; S. Kadelbach, 'Union Citizenship', in A. Von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law* (Hart, 2007); Sarmiento, 'Who's Afraid of the Charter?', above, n. 32; A. Torres Perez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (Oxford University Press, 2009), 80–81. But, for an alternative view, see C. Closa, 'EU Citizenship at the 1996 IGC', in R. Hansen and P. Weil (eds.), *Dual Nationality, Social Rights, and Federal Citizenship in the U.S. and Europe: The Reinvention of Citizenship* (Berghahn Books, 2002), 304; Lyons, above, n. 9, fn. 8.

³⁴BVerfGE 73, 339, 376 (1986) (*Solange II*).

ensure the essence of fundamental rights enshrined in Article 2 TEU.³⁵ The rationale of this proposal is inspired, not just by the Court's decisions, but by the deeper conceptual meaning of citizenship as understood by the Heidelberg group. They put forward three reasons for constructing a closer relationship between EU citizenship and fundamental rights.

*Firstly, it is in line with the historical emergence of fundamental rights as citizens' rights in European States. Secondly, with regard to EU law, there is an even more pronounced historical and teleological connection: both discourses developed around the same period in reaction to the pressing legitimacy question. Citizenship and fundamental rights are therefore two mutually strengthening concepts which essentially pursue the same objective, i.e. to bring the Union closer to the individual (...). Finally, if Union citizenship is to be taken seriously, it cannot be completely separated from fundamental rights questions.*³⁶

The strength of this proposal has been oft-discussed, but, interestingly, these discussions leave largely unquestioned the citizenship rationale that forms the normative and conceptual foundation for their thesis. While some dubbed the proposal to be too intrusive and unfit for the current state of EU integration,³⁷ others dismissed it for its too limited scope.³⁸ Hardly anyone has considered the Heidelberg group's interpretation of the meaning and place of citizenship within the EU.

In what follows, I will discuss the empirical, normative, and conceptual aspects of the Heidelberg proposal and show that linking EU citizenship and (fundamental) rights is more problematic than commonly thought. The Heidelberg group's understanding of EU citizenship is far from unique, however; others who seek to premise fundamental rights on EU citizenship share their assumptions at least in part. Based on a discussion of the assumptions supporting the Heidelberg group's proposal, I will draw attention to the empirical, normative, and conceptual problems of the wider academic discussion on EU citizenship. The analysis that follows, therefore, allows for broader conceptual and normative reflection on EU citizenship and rights, the position within the EU's political framework and the questions of legitimacy that are raised thereby, and the status of those individuals not enjoying EU citizenship status. It allows for a reconsideration of the idea that providing some degree of equality of rights throughout the EU is essential for the meaningfulness of EU citizenship. I will argue that the Heidelberg group's argument that a historical connection exists between fundamental rights and citizenship rights is empirically questionable (section 3); the notion that fundamental rights and citizenship serve the same legitimising function, by bringing the EU closer to the individual, is normatively problematic (section 4); the thesis that Union citizenship cannot be taken seriously without adequate fundamental rights protection by the EU is conceptually problematic (section 5).

3 | EU CITIZENSHIP AND FUNDAMENTAL RIGHTS—EMPIRICAL PROBLEMS

The literature assumes the existence of an intimate historical connection between citizenship and (fundamental) rights. That assumption is easily understood. Both ideas share a common origin in Enlightenment principles³⁹

³⁵Von Bogdandy et al., above, n. 6. Such a 'reverse-Solange' approach was earlier detected in the ECJ's case law by D. Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States', in J.L. Dunoff and J.P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, 2009), 353.

³⁶Von Bogdandy et al., above, n. 6, 506 (footnotes in quotation omitted).

³⁷P. Lindseth, 'Rescue Package for Fundamental Rights: Comments by Peter Lindseth', available at: <http://www.verfassungsblog.de/rescue-package-fundamental-rights-comments-peter-lindseth/#.Vjlbh_kvflU> (last accessed 3 November 2015); M. Hailbronner, 'Rescue Package for Fundamental Rights: Comments by Michaela Hailbronner', available at: <<http://www.verfassungsblog.de/rescue-package-fundamental-rights-comments-michaela-hailbronner/#.VjlcZPkvfIU>> (last accessed 3 November 2015).

³⁸D. Kochenov, 'Rescue Package for Fundamental Rights: Comments by Dimitry Kochenov', available at: <<http://www.verfassungsblog.de/rescue-package-fundamental-rights-comments-dimitry-kochenov/#.VjlbDvkvfIU>> (last accessed 3 November 2015).

³⁹T. Basok, S. Ilcan and J. Noonan, 'Citizenship, Human Rights, and Social Justice' (2006) 10 *Citizenship Studies*, 267. The idea of fundamental or human rights was deeply ambivalent in the Enlightenment period though, since rights were certainly not extended to all human beings. G. Shafir and A. Brysk, 'The Globalization of Rights: From Citizenship to Human Rights' (2006) 10 *Citizenship Studies*, 275, 278.

and Arendt described citizenship as 'the right to have rights'.⁴⁰ Marshall's famous account of citizenship, moreover, treats the concept as one of an expansion of rights—from civil, to political, to social.⁴¹ However, if the work of these scholars shaped the beliefs of EU lawyers, they ignored the context from which these arguments emanated.⁴² Arendt understood the strength of citizenship very well, but did not intend to deny non-citizens rights protection. Instead, as Benhabib has clarified, Arendt's notion of citizenship 'transcends the contingencies of birth which differentiate and divide us from one another'.⁴³ Arendt herself explained that her concern was with 'the right of every individual to belong to humanity'.⁴⁴ Marshall's taxonomy of citizenship and rights also arises from a specific social and historical context and cannot be taken as the single model of citizenship.⁴⁵ In the contemporary world, it is far from evident that access to those rights defined by Marshall as citizenship rights is still qualified by citizenship.⁴⁶

That fundamental rights have become detached, not only as an ideal but also in practice, from notions of citizenship and nationality becomes evident upon examination of the international human rights regime that emerged over the last decades.⁴⁷ The Universal Declaration of Human Rights proclaims that '[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as (...) national or social origin, property, birth or other status'.⁴⁸ The only exception to this universal ambition is probably the right of universal suffrage, which the International Covenant on Civil and Political Rights reserves for citizens.⁴⁹ However, also this Covenant reiterates the Universal Declaration of Human Rights' aspiration of universal human rights.⁵⁰ To what extent the right to vote can be withheld from non-citizens has been subject to considerable debate moreover,⁵¹ and increasingly countries have started to include this group in their franchise.

The aspirations of those international documents have seen translation and application into our day-to-day practices. In fact, the practice of extending rights to non-citizens predates the international human rights regime. An exemplar case from the US is the 1886 *Yick Wo v. Hopkins* decision. The case, decided by the US Supreme Court, concerned an ordinance adopted by San Francisco, which made it unlawful to carry on a laundry in a wooden building before permission had been obtained from local authorities. This law was administered discriminately against those in

⁴⁰H. Arendt, *The Origins of Totalitarianism* (Harcourt, 1966), at 296.

⁴¹T.H. Marshall, *Citizenship and Social Class* (Pluto Press, 1992).

⁴²J.H. Carens, *The Ethics of Immigration* (Oxford University Press, 2013), at 93. In addition, as Bosniak has explained, Arendt's depiction of citizenship 'is simply not accurate today'. L. Bosniak, 'Status Non-Citizens', in A. Shachar et al. (eds.), *The Oxford Handbook of Citizenship* (Oxford University Press, 2017), at 331.

⁴³S. Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press, 2004), at 59. There is, accurately noted by Benhabib, nonetheless, a tension between Arendt's aspiration of universalism and her reliance on the nation-state (at p. 66). See, also, E. Balibar, '(De)Constructing the Human as Human Institution: A Reflection on the Coherence of Hannah Arendt's Practical Philosophy' (2007) 3 *Social Research*, 727, 733; L. Bosniak, 'Persons and Citizens in Constitutional Thought' (2010) 8 *International Journal of Constitutional Law*, 9, 11.

⁴⁴Arendt, above, n. 40, at 298.

⁴⁵For some of the limits of Marshall's account, see G. Delanty, *Citizenship in a Global Age: Society, Culture, Politics* (Open University Press, 2000), 17–20. See, also, R. Bellamy, 'Constitutive Citizenship versus Constitutional Rights: Republican Reflections on the EU Charter and the Human Rights Act', in T. Campbell, K. Ewing and A. Tomkins (eds.), *Sceptical Essays on Human Rights* (Oxford University Press, 2001), 17.

⁴⁶D. Owen, 'Citizenship and Human Rights', in A. Shachar et al. (eds.), *The Oxford Handbook of Citizenship* (Oxford University Press, 2017), at 258–259; L. Dobson, *Supranational Citizenship* (Manchester University Press, 2012), at 26–27.

⁴⁷See, also, Benhabib, above, n. 43, at 7.

⁴⁸Universal Declaration of Human Rights, Art. 2.

⁴⁹International Covenant on Civil and Political Rights, Art. 25.

⁵⁰*Ibid.*, Art. 2.

⁵¹For a variation of perspectives, see R.A. Dahl, *Democracy and Its Critics* (Yale University Press, 1991); R.E. Goodin, 'Enfranchising All Affected Interests, and Its Alternatives' (2007) 35 *Philosophy & Public Affairs*, 40; R. Bauböck, 'Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting' (2007) 75 *Fordham Law Review*, 2393.

the laundry business that were of Chinese descent. The US Supreme Court decided this law to be unconstitutional and to be in violation of the Equal Protection Clause,⁵² which is 'universal in their application to all persons within the territorial jurisdiction'.⁵³

Also within Europe we have witnessed a trend towards a decoupling of rights from the status of citizenship. Under the pressure of international human rights regimes and increased labour migration, it was residence, not citizenship, that came to define who was provided civil, social, and at times political rights within Europe.⁵⁴ To some, this signifies the development towards forms of 'postnational membership', to use Soysal's famous description,⁵⁵ meaning the move away from citizenship to personhood as the signifier of who deserves protection. This development has been so pervasive that 'in many respects, the status of aliens in liberal democratic societies is hardly distinguishable from that of citizens'.⁵⁶

Evidently, this development has not been linear and uniform. National citizenship still matters and not all non-citizens have been able to benefit from the extension of the scope of fundamental rights—the current refugee crisis within the EU once more demonstrates the acuteness of this situation. A more accurate description of the current status quo might be one that draws the boundary between residents and non-residents,⁵⁷ though even that does not fully cover the complexity of the current legal regimes within Europe and beyond.⁵⁸ What is beyond dispute though is that citizenship has become a less relevant factor during the last decades with respect to the acquisition of rights.

This is a development that extends beyond the nation-state and also the EU has felt morally obliged to include those not holding the status of EU citizenship and to developed a separate legal framework for the different classes of non-citizens. According to the conclusions of the Tampere European Council,

*[t]he legal status of third-country nationals should be approximated to that of Member States' nationals. A person, who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit, should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens; e.g. the right to reside, receive education, and work as an employee or self-employed person, as well as the principle of non-discrimination vis-à-vis the citizens of the state of residence. The European Council endorses the objective that long-term legally resident third-country nationals be offered the opportunity to obtain the nationality of the Member State in which they are resident.*⁵⁹

The EU has adopted a whole range of legislative measures that re-defined the position of third-country nationals and extended their rights, including Directive 2003/109/EC on the status of third-country nationals who are long-term

⁵²Which read as follows: 'nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws'.

⁵³*Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

⁵⁴D. Jacobson, *Rights across Borders: Immigration and the Decline of Citizenship* (Johns Hopkins University Press, 1997), at 38–40.

⁵⁵Y. Nuhoğlu Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago Press, 1994). See, also, M. Feldblum, 'Reconfiguring Citizenship in Western Europe', in Christian Joppke (ed.), *Challenge to the Nation-State: Immigration in Western Europe and the United States* (Oxford University Press, 1998). For a critique of postnationalism, see R. Hansen, 'The Poverty of Postnationalism: Citizenship, Immigration, and the New Europe' (2009) 38 *Theory and Society*, 1.

⁵⁶L. Bosniak, 'Citizenship', in P. Cane and M.V. Tushnet (eds.), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2005), at 198.

⁵⁷R. Rubio-Marín, 'Introduction: Human Rights and the Citizen/Non-Citizen Distinction Revisited', in R. Rubio-Marín (ed.), *Human Rights and Immigration* (Oxford University Press, 2014), at 12.

⁵⁸D. Thym, 'Residence as De Facto Citizenship? Protection of Long-Term Residence under Article 8 ECHR', in Ruth Rubio-Marín (ed.), *Human Rights and Immigration* (Oxford University Press, 2014), at 136–137.

⁵⁹Presidency Conclusions, Tampere European Council 15, 16 October 1999. A reference to the Presidency Conclusions is provided in the Preamble to Directive 2003/109/EC, rec. 2, para. 21.

residents.⁶⁰ Those policies have unravelled the relationship between EU citizenship and many of the rights enjoyed by them, thereby providing large groups of third-country nationals within the EU with quasi-citizenship rights.⁶¹

This section once more confirms that '[t]he idea that citizenship is the special status that distinguishes insiders from outsiders is so deeply rooted in our traditions of thought and expression that it is hard sometimes to recognize how poorly this fits with our actual practices'.⁶² While it is not completely incorrect to ascribe an important right-bearing status to citizenship, it is not the case, contrary to claim of the Heidelberg group, that fundamental rights have historically been defined as citizenship rights. Certainly, when we take into consideration the developments in the most recent decades, the Member States as well as the EU have expanded the scope of many (fundamental) rights so as to protect the basic rights of its (resident) non-citizens.

4 | EU CITIZENSHIP AND FUNDAMENTAL RIGHTS—NORMATIVE PROBLEMS

To describe these historical developments is not the same as offering a normative defence. However, I argue in this section that the disentanglement of citizenship and rights that took place in recent decades is also normatively desirable and should not be undone by EU law. Citizenship is contingent on the accidents of birth.⁶³ The great majority of individuals enjoy citizenship either of their country of birth (*ius soli*) or of the country of citizenship of their parents (*ius sanguinis*). While there may be certain advantages of assigning citizenship to individuals by birth, citizenship should not for most practical purposes be decisive and condition individuals' legal entitlements. In our democratic societies, non-citizen residents enjoy many of the legal rights and duties of citizenship and there are good reasons for thinking that this is desirable.

All residents should be in the position from which they can challenge government decisions. Hence, it is not the status of citizenship that should determine who stands in a position of power vis-à-vis the state. Principles of fairness and justice, moreover, demand that those who participate and contribute to society can demand a fair return. Residents pay taxes and participate in civil society in ways that are indistinguishable from citizens, which is why they should for most purposes receive the same treatment. Following that intuition, Walzer believed 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'.⁶⁴ Recent theories of membership have refined that position somewhat. For Carens, for example, 'residence and time are the keys to social membership',⁶⁵ according to which it is periods of residence that condition the foreigners' moral claims towards the state, and Bosniak has adopted the principle of 'territorial personhood',⁶⁶ which mandates a circumspect scope of citizenship rights. Following these theories, I argue that it is a demand of justice that it is not citizenship but social membership that should define whom to include in the circle of membership.⁶⁷ In sum, because of the non-citizen's reciprocal ties with the state and to offer protection

⁶⁰Directive 2003/109/EC, OJ L16/44, 2004. For an analysis, see D. Acosta Arcarazo, *The Long-Term Residence Status as a Subsidiary Form of EU Citizenship: An Analysis of Directive 2003/109* (Brill, 2011); A. Wiesbrock, *Legal Migration to the European Union* (Martinus Nijhoff, 2010).

⁶¹For a detailed overview of the different legal regimes in place for third-country nationals within the EU, see D. Kochenov and M. van den Brink, 'Pretending There Is No Union: Non-Derivative Quasi-Citizenship Rights of Third-Country Nationals in the EU', in D. Thym and M. Zoetewij-Turhan (eds.), *Rights of Third-Country Nationals under EU Association Agreements: Degrees of Free Movement and Citizenship* (Brill Nijhoff, 2015).

⁶²Carens, above, n. 42, at 109. See, also, Bosniak, above, n. 42.

⁶³A. Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press, 2009).

⁶⁴M. Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books, 1983), at 61.

⁶⁵Carens, above, n. 42, at 164.

⁶⁶L. Bosniak, *The Citizen and the Alien Dilemmas of Contemporary Membership* (Princeton University Press, 2008), at 55.

⁶⁷Carens, above, n. 42, at 96–108.

against a state's coercive powers, most rights should not be premised on citizenship.⁶⁸ That certainly is the case with respect to fundamental rights, which should be granted to everyone present within a state's jurisdiction.⁶⁹ That is, as Benhabib has put it, '[t]he status of alienage ought not to denude one of fundamental rights'.⁷⁰

At first sight, EU citizenship may seem like a status to which to attach an elaborate set of rights. EU citizenship has been characterised as a form of postnational citizenship,⁷¹ which is defined as membership on the basis of 'personhood'.⁷² Would this assessment be correct, linking fundamental rights to EU citizenship might not run into the normative difficulties outlined above. The Treaties, however, tell us that EU citizenship is a form of citizenship beyond the state, but not postnational in the sense meant by Soysal. Only those holding the nationality of a Member State are citizens of the Union.⁷³ EU citizenship thus is a bounded concept, 'defined so as to exclude'.⁷⁴ By only allowing those bearing the status of EU citizenship to vindicate their fundamental rights, only those in the possession of a Member State nationality could claim protection under EU law. That would create an arbitrary distinction with respect to who enjoys protection. Denigrating non-citizens to a second-class position with respect to basic rights is something to be condemned rather than promoted.

Premising fundamental rights on citizenship also opposes the values the EU stands for. If it is indeed the case that the ethos of European integration is about the inclusion rather than the exclusion of the other, and about integration rather than segregation,⁷⁵ fundamental rights should not be conflated with citizenship rights. Contrary to common perceptions,⁷⁶ moreover, the EU citizenship-fundamental rights connection would not reinforce the liberal democratic values the EU proclaims as foundational, but undermine those. The EU would not serve as the 'tamer' of the nation-state and of nationalism,⁷⁷ but reinforce the nationality of the Member States through EU citizenship. It would be a mistake to strengthen the nationalities of the Member States through EU citizenship at the expense of those not being a Member State national. To agree with Carens, 'we do not enhance the meaning of citizenship in any positive sense when we make citizenship the basis for a form of discrimination against people who are otherwise entitled to be treated as equals'.⁷⁸

⁶⁸S. Song, 'The Significance of Territorial Presence and the Rights of Immigrants', in S. Fine and L. Ypi (eds.), *Migration in Political Theory: The Ethics of Movement and Membership* (Oxford University Press, 2016); N. Walker, 'The Place of Territory in Citizenship', in A. Shachar et al. (eds.), *The Oxford Handbook of Citizenship* (Oxford University Press, 2017), at 568.

⁶⁹Carens, above, n. 42, at 93–96.

⁷⁰Benhabib, above, n. 43, at 3.

⁷¹Y. Soysal, 'Changing Boundaries of Participation in European Public Spheres: Reflections on Citizenship and Civil Society', in K. Eder and B. Giesen (eds.), *European Citizenship: Between National Legacies and Postnational Projects* (Oxford University Press, 2001), at 163; Delanty, above, n. 45, at 65.

⁷²Soysal, above, n. 55, at 136. Even Joppke, a long-standing critic of Soysal's notion of postnational membership, thinks EU citizenship to be 'postnational citizenship in its most elaborate form, belatedly vindicating Yasemin Soysal's earlier claim in this respect'. C. Joppke, 'Transformation of Citizenship: Status, Rights, and Identity', in E.F. Isin, P. Nyers and B.S. Turner (eds.), *Citizenship Between Past and Future* (Taylor & Francis, 2008), at 41.

⁷³Article 20 TFEU determines that 'every person holding the nationality of a Member State shall be a citizen of the Union'. Furthermore, EU citizenship 'shall be additional to and not replace national citizenship'.

⁷⁴Lyons, above, n. 9, at 97–98.

⁷⁵See the contrast drawn between nationalism and the ethos of European integration by J. Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' And Other Essays on European Integration* (Cambridge University Press, 1999), at 87. I do not suggest that no deviations to this ideal are present within the EU. Some find the scope of the Treaty provisions on the free movement of labour, which only includes Member State nationals, debatable. For criticism, see A. Evans, 'Third Country Nationals and the Treaty on European Union' (1994) 5 *European Journal of International Law*, 199; Lyons, above, n. 9, at 102–103. See, more generally, J.H.H. Weiler, 'Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals—A Critique' (1992) 3 *European Journal of International Law*, 65.

⁷⁶As suggested by Von Bogdandy et al., above, n. 6. Article 2 TEU names as core values 'the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law'.

⁷⁷W. Kymlicka, 'Liberal Nationalism and Cosmopolitan Justice', in S. Benhabib and R. Post (eds.), *Another Cosmopolitanism* (Oxford University Press, 2006).

⁷⁸Carens, above, n. 42, at 107.

One may object that this does not offer a fair representation of the arguments of those who have advocated for EU citizenship being the avenue towards a better fundamental rights protection within the EU. Few, I think, truly want to create the distinction I criticise here. One may think that because the connection between citizenship status and rights has always been complex,⁷⁹ non-citizens might be entitled to the benefits of citizenship as well. Yet, citizenship by definition presupposes an 'other'.⁸⁰ As Bosniak has explained, 'while most scholars who champion the concept of equal citizenship tend to ignore citizenship's exclusionary face, it is ultimately presupposed in their project'.⁸¹ The project of linking fundamental rights and EU citizenship may be motivated by the intention to overcome existing divisions within the EU, but it presupposes a new fault line based on the boundaries of nationality. It is no surprise that Carens, fully aware of citizenship's exclusionary tendencies, found that within the EU, 'the gap between the rights of citizens and residents widened for a time as a result of developments in the European Union that granted a number of rights on the basis of citizenship in a member state'.⁸² That gap may have been partly closed by legislation that conferred the rights enjoyed by EU citizens also on residents not in the possession of a Member State nationality, but it still persists.⁸³

We should resist widening that gap between EU citizens and third-country nationals by instilling further 'meaning' into EU citizenship through the establishment of a connection with fundamental rights for the reasons set out above. Citizenship and fundamental rights are, contrary to what many EU lawyers have come to believe, 'two mutually strengthening concepts which essentially pursue the same objective',⁸⁴ whose entanglement would enhance the legitimacy of the EU. Citizenship is a powerful tool for the promotion and protection of rights, but does not serve the same purpose as fundamental rights. Both are informed by different rationales, external closure being the idea informing citizenship and universality being that of fundamental rights. We should resist conflating the two.

5 | EU CITIZENSHIP AND FUNDAMENTAL RIGHTS—CONCEPTUAL PROBLEMS

Prevalent is the idea that EU citizenship is an insufficiently meaningful construct, due to the weak direct link between the EU citizen and the EU. Many think that there is little value in a form of citizenship that is only 'activated' by the exercise of free movement.⁸⁵ The literature on EU citizenship and fundamental rights adopts a similar understanding. According to the Heidelberg group, only when linked to fundamental rights can EU citizenship 'be taken seriously'.⁸⁶ This section challenges these ideas, since they rest upon an implicit but unfortunate misconceptualisation of EU citizenship.

⁷⁹On the distinction between citizenship as status and citizenship as rights, see L. Bosniak, 'Citizenship Denationalized' (2000) 7 *Indiana Journal of Global Legal Studies*, 2. See, also, Bosniak, above, n. 66, at 81.

⁸⁰S. Choudhry and C. Saunders, 'Symposium on Citizenship: Foreword' (2010) 8 *International Journal of Constitutional Law*, 6, 6.

⁸¹Bosniak, above, n. 66, at 97.

⁸²Carens, above, n. 42, at 92.

⁸³Kochenov and van den Brink, above, n. 61.

⁸⁴Von Bogdandy et al., above, n. 6, at 506.

⁸⁵The literature on market citizenship reflects this well: M. Everson, 'The Legacy of the Market Citizen', in J. Shaw and G. More (eds.), *New Legal Dynamics of European Union* (Clarendon Press, 1995); O'Brien, above, n. 15; D. Kochenov, 'On Tiles and Pillars: EU Citizenship as a Federal Denominator', in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017). See, also, H. Toner, 'Judicial Interpretation of European Union Citizenship—Transformation or Consolidation' (2000) 7 *Maastricht Journal of European and Comparative Law*, 158, 170. For a more positive appraisal of the market citizen, see N.N. Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 *Common Market Law Review*, 1597.

⁸⁶Von Bogdandy et al., above, n. 6, at 506. See, also, O'Leary, above, n. 18.

Citizenship is no longer exclusively tied to the nation-state.⁸⁷ Nonetheless, the traditional understanding of citizenship as inextricably connected to the state still defines much of our thinking about this concept. As Carens aptly formulated:

*talk about citizenship sometimes presupposes, as a background assumption, an idealized (and misleading) conception of the nation-state as an administratively centralized, culturally homogeneous form of political community in which citizenship is treated primarily as a legal status that is universal, equal, and democratic.*⁸⁸

While citizenship conceptualisations are rarely, if ever, this extreme, it certainly is the case that a 'state-centric, unitary vision of [citizenship]'⁸⁹ implicitly drives the debate on EU citizenship.

Not surprisingly, such a vision on citizenship results in a push for more homogenisation and harmonisation. If the aspiration is to elevate EU citizenship above free movement, national conceptions of justice, rights, and the good must be replaced with a common (and, most likely, Court-imposed) European one. Equal citizenship is understood as equal citizenship rights for all throughout the entire polity, which expresses a clear preference for uniformity and supranationality over diversity and local democratic self-government. Not only is this a faint and far-away 'ideal', but it simply cannot be squared with the EU's current political and social structures, its division of powers and the democratic legitimacy offered by national representative processes of decision-making. One can submit that the EU as a polity must be shaped with the purpose of making it compatible with our or the ECJ's best understanding of EU citizenship,⁹⁰ but that would turn things on its head. Rather, to agree with Carens, 'our conceptions of citizenship and political community should grow out of, rather than determine, the political and social arrangements that we choose.'⁹¹ First, a determination must be made of the arrangements that are desirable and legitimate within the EU, before we search for an understanding of EU citizenship that is compatible with it.

An alternative conceptualisation of EU citizenship that is possible to embed within existing arrangements is possible. A comparative perspective allows us to comprehend why EU citizenship is neither unique nor meaningless.⁹² Conceptually speaking, EU citizenship possesses the key characteristics of what is called the federal citizenship family, the most particular feature of which is that it is a form of dual citizenship. Federal citizens possess 'membership in two political communities within the same state.'⁹³ A federal citizen is a member of the federation as a whole as well as of one of the federation's constituent states.⁹⁴ Also EU citizens, according to Article 20 TFEU, enjoy dual membership: 'every person holding the nationality of a Member State shall be a citizen of the Union'.

⁸⁷Bosniak, 'Citizenship Denationalized', above, n. 79; S. Sassen, 'Towards Post-National and Denationalized Citizenship', in E.F. Isin and B.S. Turner (eds.), *Handbook of Citizenship Studies* (Sage Publications, 2002); G. Chaim, 'Citizenship and Nationhood', in A. Shachar et al. (eds.), *The Oxford Handbook of Citizenship* (Oxford University Press, 2017).

⁸⁸J.H. Carens, *Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness* (Oxford University Press, 2000), at 161. See, also, R. Bauböck, 'Recombinant Citizenship', in A.E. Woodward and M. Kohli (eds.), *Inclusions and Exclusions in European Societies* (Routledge, 2001), at 53.

⁸⁹O. Beaud, 'The Question of Nationality Within a Federation: A Neglected Issue in Nationality Law', in R. Hansen and P. Weil (eds.), *Dual Nationality, Social Rights and Federal Citizenship in the U.S. and Europe: The Reinvention of Citizenship* (Berghahn Books, 2002), at 315. See, also, C. Schönberger, 'European Citizenship as Federal Citizenship: Some Citizenship Lessons of Comparative Federalism' (2007) 19 *Revue Européenne de Droit Public*, 61, 62.

⁹⁰D. Kochenov, 'The Present and the Future of EU Citizenship: A Bird's Eye View of the Legal Debate' (2012) 02/12 Jean Monnet Working Paper 15.

⁹¹Carens, above, n. 88, at 162.

⁹²It is not, contrary to some suggestions, *sui generis*. K. Krüma, *EU Citizenship, Nationality and Migrant Status: An Ongoing Challenge* (Martinus Nijhoff, 2014), at 7; M. Everson, 'Special Issue EU Citizenship: Twenty Years On A Citizenship in Movement' (2014) 15 *German Law Journal*, 966.

⁹³Carens, above, n. 88, at 164.

⁹⁴The first section of the Fourteenth Amendment of the US Constitution, for example, determines that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside'.

As a result, EU citizenship, like other forms of federal citizenship, is characterised by a horizontal and a vertical dimension. The vertical dimension signifies the direct link between the EU citizen and EU institutions, mainly through the right to vote for the European Parliament. The horizontal dimension allows the Union citizen to move throughout the territory of the Union and to be treated equally to the citizens residing there.⁹⁵ The rights belonging to this horizontal dimension—the right to free movement and the right to equal treatment⁹⁶—also are the core rights of citizens in other federal states.⁹⁷ EU citizenship may indeed look rather meagre when considering solely its vertical dimension, but it is the horizontal dimension which provides it with real substance; EU citizenship allows its status holders to enjoy, albeit with some (far from irrelevant) exceptions, full membership in Member States of which they are not nationals.⁹⁸ The right to free movement provides Union citizens with the option to ‘vote with their feet’,⁹⁹ thereby enabling them to pursue their conception of ‘the good life’.¹⁰⁰

Federal citizenship does not depart from the ideal of equal citizenship, but merely takes into account the federal structure when determining to whom to extend equal treatment. Inevitably, there is a tension between equal citizenship and federalism. The division of powers in federations necessarily implies that not all citizens are granted uniform rights. Full equal citizenship and federalism are two conflicting ideals: ‘More equality between citizens across the federation almost necessarily implies less freedom ... for the component units’.¹⁰¹ Federal citizenship, instead, guarantees that in the case powers are retained by the constituting states, equality of treatment is guaranteed—although exceptions may be tolerated—within the boundaries of those states with respect to all citizens resident there. The right to non-discrimination on grounds of nationality guarantees virtually the same within the EU.¹⁰² That equal citizenship should require a uniformly applied bill of rights, or at least a set of minimum rights, is, therefore, debatable.

That this is a conceptual possibility does not explain its normative desirability.¹⁰³ I have explained that the dominant understanding of Union citizenship sits uncomfortably with the EU's political structures and the previous section explained the normative dilemmas of connecting EU citizenship and fundamental rights, but I should also explain the desirability of the federal over the uniform conception (beyond the complete mismatch between the latter and the EU's political setup).

The understanding of EU citizenship defended here recognises the EU's value plurality and that disagreements on justice and rights are for reasons of political legitimacy ideally decided through democratic procedures.¹⁰⁴ The

⁹⁵Schönberger, above, n. 89; Lacroix, above, n. 10; R. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press, 2009), at 51.

⁹⁶These are laid down in Articles 18 and 21 TFEU.

⁹⁷P.H. Schuck, ‘Citizenship in Federal Systems’ (2000) 48 *American Journal of Comparative Law*, 195, 216; Beaud, above, n. 89, at 323; Schönberger, above, n. 89, at 68–69.

⁹⁸For such a view, see, also, Lacroix, above, n. 10, at 178.

⁹⁹R.A. Epstein, ‘Exit Rights Under Federalism’ (1992) 55 *Law and Contemporary Problems*, 147; I. Somin, ‘Foot Voting, Federalism, and Political Freedom’, in J.E. Fleming and J.T. Levy (eds.), *Federalism and Subsidiarity* (New York University Press, 2014). For a more sceptical view, see D. Laycock, ‘Voting with Your Feet Is No Substitute for Constitutional Rights’ (2009) 32 *Harvard Journal of Law & Public Policy*, 29. For an application of this idea in the context of the EU, see D. Kochenov, ‘On Options of Citizens and Moral Choices of States: Gays and European Federalism’ (2009) 33 *Fordham International Law Journal*, 156.

¹⁰⁰F. de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press, 2015), at 61–64.

¹⁰¹P. Dardanelli, ‘Federal Democracy in Switzerland’, in M. Burgess and A-G. Gagnon (eds.), *Federal Democracies* (Routledge, 2010), at 155.

¹⁰²Although there remain important derogations from the right to non-discrimination, especially in the domains of social welfare and political participation. I will not deal with these exceptions here.

¹⁰³As Raz once explained, ‘concept is a product of a theory or a doctrine consisting of moral principles for the guidance and evaluation of political actions and institutions. One can derive a concept from a theory but not the other way round’. J. Raz, *The Morality of Freedom* (Clarendon Press, 1988), at 16.

¹⁰⁴F. de Witte, ‘Sex, Drugs & EU Law: The Recognition of Moral and Ethical Diversity in EU Law’ (2013) 50 *Common Market Law Review*, 1545.

use of the provisions on EU citizenship as a centralising device undermines the EU's value diversity and puts pressure on the national *demos*'s ability to decide these matters democratically.¹⁰⁵ Of course, none of the scholars who aspire to strengthen the connection between EU citizenship and fundamental rights tries to do away with diversity altogether. The Heidelberg group explicitly recognises the need to protect pluralism and, therefore, places limits upon the scope of their proposal.¹⁰⁶ Problematically, however, we often 'acknowledge "the fact of pluralism" yet seek to circumvent it'.¹⁰⁷ This inclination to preach diversity but to practice the opposite has a long history in European legal scholarship. As noted by Walker, 'what we observe in the history of the European Union is a jurisprudential "ratchet effect"—an equalization upwards of rights'.¹⁰⁸ It also informs many of the debates on EU citizenship, including the one on the relation between EU citizenship and fundamental rights. The direction taken by scholarship that is based on the idea that EU citizenship can be taken seriously only if a more substantive and elaborate set of rights is directly provided by the EU to its citizens, independent of the Member States, is unidimensional: it favours centralisation over diversity.

If there is concern for diversity at all, the idea of allowing for diversity and disagreement in the realm of fundamental rights finds less support. That view holds that there must be respect for the plurality of values within the EU, as long as fundamental rights are respected.¹⁰⁹ What such an argument ignores is that the definition and delineation of fundamental rights 'reflect fundamental societal choices and form an important part in the different identities of polities and societies'.¹¹⁰ Rather than exempting fundamental rights from the area of politics, making it the exclusive realm of courts, we should acknowledge the inevitability of disagreement and contestation with respect to fundamental rights, about their scope and their bearing on concrete policy matters.¹¹¹ For that reason, we should shy away from overly using the language of equality and pushing for uniform policy outcomes throughout the EU, and focus more, instead, on how we can better mediate between different visions on rights and the good, and how to manage moral conflicts.

Of course, against the background of the democratic backsliding in some EU Member States and the onslaught on those values the EU proclaims to be foundational, which is the Heidelberg group's main concern,¹¹² one could question this argument. Müller warned that '[d]iversity and pluralism are not values like liberty and democracy'.¹¹³

¹⁰⁵K. Nicolaidis, 'European Democracy and Its Crisis' (2013) 51 *Journal of Common Market Studies*, 351; R. Bellamy, 'An Ever Closer Union Among the Peoples of Europe': Republican Intergovernmentalism and *DemoCratic* Representation within the EU' (2013) 35 *Journal of European Integration*, 499; F. Cheneval and F. Schimmelfennig, 'The Case for Democracy in the European Union' (2013) 51 *Journal of Common Market Studies*, 334.

¹⁰⁶Von Bogdandy et al., above, n. 6, at 491.

¹⁰⁷Bellamy, above, n. 45, at 18.

¹⁰⁸N. Walker, 'Human Rights in a Postnational Order: Reconciling Political and Constitutional Pluralism', in T. Campbell, K. Ewing and A. Tomkins (eds.), *Sceptical Essays on Human Rights* (Oxford University Press, 2001), at 138.

¹⁰⁹A. Von Bogdandy and S. Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 *Common Market Law Review*, 1417, 1430.

¹¹⁰J.H.H. Weiler, 'Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights', in N.A. Neuwahl and A. Rosas (eds.), *The European Union and Human Rights* (Martinus Nijhoff, 1995), at 51.

¹¹¹The fact of disagreement has not received the recognition in EU law scholarship that it deserves, I think, and certainly has not produced the kind of reflection it produced in democratic theory. See, among others, J. Waldron, *Law and Disagreement* (Oxford University Press, 1999); T. Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (Oxford University Press, 2008); R. Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007); L. Valentini, 'Justice, Disagreement and Democracy' (2013) 43 *British Journal of Political Science*, 177. For an exception, Walker, above, n. 108. See, also, de Witte, above, n. 104; L. Azoulai, 'The European Court of Justice and the Duty to Respect Sensitive National Interests', in M. Dawson, B. de Witte and E. Muir (eds.), *Judicial Activism at the European Court of Justice* (Edward Elgar, 2013).

¹¹²This does not change the problematic nature of the assumptions underlying their proposal of course. Note also that most proposals seeking to realise a stronger connection between EU citizenship and fundamental rights did not specifically address the democratic backsliding that is taking place.

¹¹³J.-W. Müller, 'The Failure of European Intellectuals?' (2012) *Eurozine*, available at <<http://www.eurozine.com/articles/2012-04-11-muller-en.html>> accessed 22 February 2016.

That is certainly correct, but the argument here does not defend diversity and pluralism as intrinsically valuable, but holds that it is precisely because of questions of legitimacy, which arise so clearly once we bear in mind our reasonable disagreements on the common good, that the federal understanding of EU citizenship is desirable. This ties in with more political conceptions of citizenship defended by democratic accounts of the European Union.¹¹⁴ Deference to the substantive content of the Member States is desirable not because a plurality of substantive results is desirable, but because these are the product of national democratic processes of decision-making and legitimate, therefore, for content-independent reasons.¹¹⁵ Diversity and pluralism cannot be juxtaposed so easily with democracy.

EU citizenship, and most of all the principle of non-discrimination on grounds of nationality, thus can fulfil an important democratic function, in the sense that it provides limits to the extent the EU can intrude in the democratically legitimated political decisions by the Member States. As accurately noted by Menéndez,

*[a]s long as free movement of persons was considered as an operationalisation of the principle of non-discrimination on the basis of nationality, the constitutional standards being applied were still national ones, an outcome in full accordance with the key legal role played by the collective of national constitutions as the deep constitution of the European Union, and consequently as the key source of democratic legitimacy of the synthetic constitutional order.*¹¹⁶

Not only does the right to non-discrimination on grounds of nationality provide the Union citizen with the capacity to settle elsewhere and to pursue their desired life there, it also respects the democratic outcomes within the Member States. There is reason, therefore, to be suspicious about deviations from this right and to advance an understanding of EU citizenship that requires full equality of treatment throughout the EU.

Does this require the EU to be silent on the democratic backsliding taking place within certain Member States? I do not think so. All Member States signed up to certain basic values when they signed up to the Treaties and an EU response is legitimate, needed even, when Member States are sacrificing these. The EU wants its Member States to remain democratic, if only because its legitimacy is contingent thereupon. We should not think, however, that the democratic shortcomings in certain Member States are remediable by establishing a connection between EU citizenship and fundamental rights. For that, existing problems are far too profound and too deeply engrained within those states. Political pressure and measures rather than judicial solutions are needed in such circumstances.¹¹⁷ It is only when the EU and the Member States are willing to undertake concerted action against the individual state that fails to uphold the adequate standards that the situation may change. This is clearly a topic that deserves more attention than I can give it here, and so is another, which I will only flag here. My emphasis on legitimate decision-making against the background of disagreement raises the question under which conditions the EU exercises authority legitimately. I believe that this requires deeper consideration of the value of legislative as opposed to judicial decision-making within the EU.¹¹⁸ That topic also cannot be considered here in more detail unfortunately.

¹¹⁴Nicolaïdis, above, n. 105; Bellamy, above, n. 105; Cheneval and Schimmelfennig, above, n. 105.

¹¹⁵On the contrast between content-dependent and content-independent accounts of legitimacy, see T. Christiano, 'The Authority of Democracy' (2004) 12 *Journal of Political Philosophy*, 266.

¹¹⁶A.J. Menéndez, 'European Citizenship after Martínez Sala and Baumbast' (2009) 11/2009 ARENA Working Paper 1, 37. Of course, non-discrimination is a very slippery concept. It is difficult to draw a line between tackling discrimination and other obstacles to free movement. A. Somek, 'The Argument from Transnational Effects I: Representing Outsiders through Freedom of Movement' (2010) 16 *European Law Journal*, 315.

¹¹⁷P. Blokker, 'EU Democratic Oversight and Domestic Deviation from the Rule of Law: Sociological Reflections', in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press, 2016).

¹¹⁸A useful starting point, it seems to me, is offered by the literature on democracy and their claim that EU decision-making must remain under the equal and shared control of the Member States. See the principles set out by Nicolaïdis, above, n. 105, at 362–365. See, also, Bellamy, above, n. 105.

6 | EU CITIZENSHIP AND RIGHTS: SOME CONCLUDING REFLECTIONS

This article addressed the idea of premising fundamental rights on EU citizenship. Through that discussion, it brought to light some common misunderstandings about (EU) citizenship. Even though rights remain an important component of citizenship, residents enjoy most of the legal rights (as well as duties) enjoyed by citizens. For most practical purposes, citizenship makes no difference. As I argued, following commonly accepted theories of membership, it would also be highly undesirable if citizenship were to condition access to most rights, certainly fundamental rights. These observations put in question the common idea that fundamental rights have historically been premised on citizenship and that it would be normatively desirable if EU citizenship would condition access to fundamental rights. While we commonly associate EU citizenship with inclusion, allowing Member State nationals to settle and claim rights in another Member State, we should not ignore the other, exclusionary, side of EU citizenship. Finally, I demonstrated that a state-centric and unitary vision of citizenship drives the debate on EU citizenship, according to which EU citizenship is to result in equal treatment of Union citizens throughout the EU. Not only is that understanding conceptually inadequate and ignores that EU citizenship has far more in common with the federal citizenship family than citizenship in unitary states, it also results in a push for homogenisation and harmonisation that risks undermining legitimate diversity and local self-determination within the EU.

How to cite this article: van den Brink M. EU citizenship and (fundamental) rights: Empirical, normative, and conceptual problems. *Eur Law J.* 2019;25:21–36. <https://doi.org/10.1111/eulj.12300>