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Unions and citizens: membership status and political rights in Scotland, the UK and the EU

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ABSTRACT
This chapter – in a volume analysing aspects of the putative withdrawal of a Member State from the European Union and/or the secession of a 'region' from a (Member) state – makes use of the lenses of citizenship to explore the interaction between the two dimensions of 'troubled membership'. It applies a law-and-politics approach, which locates legal change in its broader political context and focuses on the contestation of the boundaries of polity membership. After setting the scene (Section 2), the chapter explores the content of a possible future Scottish citizenship regime (Section 3) and then examines the intertwining of formal legal membership and political citizenship in respect of both the Scottish referendum and the UK's referendum on EU membership (Section 4). The threads are drawn together in the conclusions (Section 5) through a discussion of how the EU referendum outcomes may impact upon the issue at the heart of the Scottish referendum debate, namely the ongoing viability of the UK as a union state.

KEYWORDS
Citizenship, Scotland, European Union, political rights, migration, constitutionalism, referendums, United Kingdom

1. Introduction

The primary objective of this volume is to analyse aspects of the putative withdrawal of a Member State from the European Union and/or the secession of a 'region' from a (Member) state. This raises important legal, political and normative questions, with few precedents to help us. This chapter uses the lenses of citizenship to explore the interaction between the two dimensions of 'troubled membership', applying a law-and-politics approach which locates legal change in its broader political context and focuses on the contestation of the boundaries of polity membership.[1] After setting the scene (Section 2), the chapter explores the

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* This paper draws on J. Shaw, 'Citizenship in an independent Scotland: legal status and political implications' CITSEE Working Paper 2013/34 and J. Shaw 'Citizenship in an independent Scotland', Evidence submitted to the European and External Relations Committee of the Scottish Parliament, 15 May 2014. I am grateful to the editor for very helpful guidance on reshaping a first draft of this paper. I alone remain responsible for errors.

[1] Space precludes a detailed discussion of how the two referendums discussed in this chapter have come about or an analysis of the referendum debates themselves. Suffice it to say that the holding of referendums – constitutional or otherwise – represents the outcome of a political process (Stephen Tierney describes it as an 'inauspicious history' in the UK context: S. Tierney, 'Reclaiming Politics: Popular Democracy in Britain after the Scottish Referendum', (2015) 86 *The Political Quarterly* 226–233), and is apt to show that one side or indeed both see a political advantage in invoking the notion of a plebiscite.

content of a possible future Scottish citizenship regime (Section 3) and then examines the intertwining of formal legal membership and political citizenship in respect of both the Scottish referendum and the UK's 2016 EU referendum (Section 4). The threads are drawn together in the conclusions (Section 5) through a discussion of how the EU referendum outcome is already impacting upon the issue at the heart of the Scottish referendum debate, namely the ongoing viability of the UK as a union state.

2. Setting the scene: citizenship and constitutional change in Scotland, the United Kingdom and the European Union

As an example of troubled membership, the situation in the UK is unique. Two unions are simultaneously contested. The 300-plus-year Union between England and Scotland which formed the basis of what we now know as the United Kingdom of Great Britain and Northern Ireland was directly challenged in a September 2014 referendum on Scottish independence. This referendum was framed by a political agreement between the Scottish and UK Governments (the so-called Edinburgh Agreement)[2] implemented by legislation in the Westminster and Scottish Parliaments.[3] In the event, Scotland voted by a margin of 55 percent to 45 percent to remain in the UK.

The forty-year 'union' brought about by UK accession to the European Communities on 1 January 1973 has also been also contested. On 23 June 2016, the UK voted in a referendum on EU membership. After the Treaty of Lisbon, such a national referendum has been validated as a legitimate political trigger for constitutional change, with Article 50 TEU now regulating the terms of consensual withdrawal from the Union.[4] By a margin of 52 percent to 48 percent on a turnout of more than 72 percent (i.e. comparing well with a 66 percent turnout in the 2015 General Election), the voters of the UK answered 'Leave' to the question 'Should the United Kingdom remain a member of the European Union or leave the European Union?'.

In both cases, a 'yes' or 'leave' vote was always going to bring about a new constitutional situation with uncertain consequences. It would provide an important (and legally challenging) case study of how polities emerge, evolve, decay and sometimes disappear over time. This would have significant effects on citizenship regimes, as polity change brings about constitutional change and new sites of contestation over belonging and membership. The outcome is all the more complex because in recent years, we have seen the decline of the so-called

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[2] *Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland*, Edinburgh, 15 October 2012, www.gov.scot/About/Government/concordats/Referendum-on-independence, accessed 19 July 2016.

[3] The UK/Westminster Parliament and the Scottish Parliament both adopted an Order in Council under Section 30 of the Scotland Act 1998, to allow a single question referendum to take place on the question of Scottish independence, with details, including the date, the franchise and the question to be determined by legislation adopted by the Scottish Parliament. This alters the schedule of powers reserved to the UK Parliament under the current devolution settlement. The Scottish Independence Referendum Act 2013 and the Scottish Independence Referendum (Franchise) Act 2013 set out the details of the referendum.

[4] See C. Closa in this volume

Westphalian states system as the exclusive underpinning element of citizenship, and the rise of a variety of semi-sovereign polities at the regional, national, supranational and international level, often conferring a range of citizenship-like rights upon individuals on a territorial or a jurisdictional basis. In the context provided by the EU treaties and other international and transnational legal instruments, polities emerge and evolve not just under the shadow of the law, but through the law itself, under the shadow of politics, political practice and constitutional principles, such as the principles of democracy and human rights. In like manner, as political space is restructured, the different legal frameworks governing membership statuses and rights emerge, evolve, decay and sometimes disappear, sometimes under conditions of considerable legal uncertainty as regards the implications of and for domestic law, EU law and international law.

But the need to connect the individual and the polity or polities occupying the territorial or legal space or spaces within which the individual resides, works or travels, or to which he or she otherwise enjoys a connection, is an enduring one. It is one that sets many of the boundaries of the most significant life opportunities, both in principle and in practice. Being born with, or subsequently acquiring the citizenship status of certain states[5] currently conveys significant life opportunities not available to others.[6] This was one reason why many saw the prospect of continued or renewed EU membership for Scotland after independence as a central element of the argument that a small Scotland could be a viable and prosperous state. EU citizenship, although not a new 'nationality' as such but rather a bundle of rights associated with a legal status which derives its scope not just from the EU treaties but also from national citizenship laws, was seen as a vital element of the EU membership package, both for putative Scottish citizens and for those coming to or resident in Scotland who would enjoy free movement rights if Scotland remained a Member State. Equally, EU citizenship has been a factor in the UK EU referendum debate, especially as free movement rights have become a highly contested element of UK politics.[7] In sum, while the death of national citizenship is frequently announced, it retains an enduring importance which becomes particularly acute at the moments which polities emerge, evolve, decay or disappear, and in the EU context it is supplemented in important ways by EU citizenship. This premise lies at the heart of this chapter.

The possible creation of an independent Scotland (iScotland), with an uncertain status in relation to the EU as well as to the rest of the UK (rUK), has significant citizenship implications. The primary question concerns the identification of who

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[5] The point is well illustrated by reference to the increase in the share of non-EU born EU citizens as part of the overall population of EU citizens resident in the UK between 2004 and 2015: see Commentary, *Recent Trends in EU nationals born inside and outside the EU* (16 July 2015) www.migrationobservatory.ox.ac.uk/sites/files/migobs/commentary-recent%20trends%20eu%20nationals_0.pdf, accessed 19 July 2016. To put it another way, the prior acquisition of the citizenship of an EU Member State seems to have become a significant factor in migration to the UK.

[6] A. Shachar, *The Birthright Lottery. Citizenship and Global Inequality* (Cambridge MA: Harvard University Press, 2009); B. Milanovic, 'Global Inequality in Numbers: In History and Now' (2013) 4 *Global Policy* 198–208 refers to a 'citizenship premium' enjoyed by citizens of rich states.

[7] J. Shaw, 'Between law and political truth? Member State preferences, EU free movement rules and national immigration law' (2015) 17 *Cambridge Yearbook of European Legal Studies* 247–286.

the Scottish citizens who might benefit from EU citizenship are. To avoid uncertainty in the event of secession, it is reasonable to expect that prior to any independence referendum, especially one conducted under democratic conditions and framed by law, it should already be more or less clear who the *ab initio* citizens of the new state would actually be. And one of the first acts of any new state must always be to define by law the new citizenry not only for the moment of independence but also *for the future*, by determining the rules on the future acquisition and/or transmission of citizenship at birth and thereafter. The next section explores these issues.

But the territorial boundaries of membership regimes rarely coincide precisely with formal legal membership, and many benefits are conferred by states upon lawfully resident non-citizens, sometimes as a result of international obligations which states choose to take on as well as those which are associated with membership of certain organisations, such as the Council of Europe or the European Union. In particular, EU Member States are obliged by EU law to ensure equal treatment for non-national EU citizens in certain areas, pursuant to the EU treaties. Indeed sometimes they choose to do so without any supervening obligations. That the UK has permitted EU citizens to vote in Scottish Parliament and other devolved elections, as well as in the referendum on Scottish independence, is an example of this type of asymmetry between legal membership and political rights. The provision made under UK law goes well beyond the EU rules on local electoral rights for resident EU citizens under Articles 20 and 22 TFEU. That said, EU citizens were not able to vote in the referendum on EU membership, as we shall see in Section 4.

In addition, external non-resident citizens also often benefit under national law from a range of rights extending beyond the right to return, often including the right to vote in some or all elections.[8] Again, EU law has some effects in this domain. EU citizens returning to their home state after exercising their free movement rights are protected, in respect of certain non-discrimination and family reunification rights, by EU law.[9] But EU law *does not* guarantee free movers external electoral rights *outside* the territory of the home state, although some commentators and NGOs have argued that it should do. As we shall see, no external citizens voted in the Scottish referendum, but those absent from the UK for 15 years or fewer were able to vote in the EU referendum.

There are, therefore, significant tensions between being a (national and EU) citizen and exercising political citizenship, especially where there are potentially shifting polity boundaries in a multi-level constitutional framework such as Scotland/UK/EU. In order to explore these tensions, this chapter uses the analytical framework of the citizenship regime. This combines the status of legal membership with the body of 'citizenship rights'. Studying citizenship regimes can reveal the 'lived details'[10] of a polity and illuminates both the constitutional and

[8] R. Bauböck, 'Morphing the Demos into the right shape. Normative principles for enfranchising resident aliens and expatriate citizens' (2015) 22 *Democratization* 820–839.
[9] Case C-370/90 *Surinder Singh* ECLI:EU:C:1992:296.
[10] K. L. Scheppele, 'Constitutional ethnography: an introduction' (2004) 38 *Law and Society Review* 389–406.

the practice dimensions of the 'we'. There has been, as Sandra Seubert has noted, a discernible 'turn to practice' in the context of citizenship studies over the years, bringing in both the formal and informal dimensions of citizenship laws and practices.[11] The contestation of the boundaries of citizenship regimes (membership status and rights) helps us to understand the broader nature of the polity and the shifting constitutional landscape. Moreover, the effects of referendums are not simple top down read-offs from ballot box results. They can, and do, also have complex indirect effects upon the citizenship regimes of the polities affected, before, during and after referendum campaigns.

Such a citizenship-focused analysis can provide useful insights wherever there are active and politically well-supported secessionist and/or withdrawal movements, raising claims in the context of mainstream politics, and not just in the Scotland/UK context. However, this paper will concentrate solely upon the case of UK/Scotland, where the September 2014 referendum on independence resulted in a vote of 55 percent in favour of remaining in the UK. This demonstrated that there is a substantial groundswell of opinion in favour of independence in Scotland, although not a majority at the time of the referendum.[12]

The outcome of the EU referendum for the UK was closer than that in Scotland in 2014 (52/48 as against 55/45) and demonstrated significant territorial disparities in terms of support for leave/remain across the UK.[13] 62 percent of people in Scotland voted in favour of the UK remaining in the EU. Meanwhile England voted 53.5/46.5 for leave (although most of London voted heavily to remain), Wales voted 52.5/47.5 to leave, and Northern Ireland voted 56/44 to remain, with a distinct divergence across the two communities in the province. There are important respects in which the continuing debate about Scottish independence, which the 2014 referendum did not entirely foreclose, are likely to influence the impact and eventual consequences of the EU referendum and may have influenced the clear difference in orientation discernible between the Scotland, on the one hand, and England and Wales on the other.

In any altered constitutional situation, whether that results from a secession or a withdrawal referendum, there will be changes to the conditions of political membership in all of the polities affected, demanding political intervention to facilitate the 'right-sizing' of the demos both in terms of membership status and political rights. Even just the threat or suggestion of change can have implications for the notion of 'who we are'. Do we define ourselves, for example, by reference to a territory and residence or a distinct ethnicity? Who should have a say? Defining citizenship in new (and renewed) states under democratic conditions of secession or withdrawal means grappling with the central question of democratic participation and the right to vote as a paradigmatic expression of how the 'we' in

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[11] S. Seubert, 'Dynamics of Modern Citizenship Democracy and Peopleness in a Global Era', (2014) 21 *Constellations* 547–559.

[12] For an overview see T. Mullen, 'The Scottish Independence Referendum 2014' (2014) 41 *Journal of Law and Society* 627–40.

[13] For details of the EU referendum results, see http://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/upcoming-elections-and-referendums/eu-referendum/electorate-and-count-information, accessed 19 July 2016.

any new polity is defined. It raises important and complex citizenship questions for which there is little obvious precedent, especially were the UK to vote to withdraw from the EU and this were to have a knock on effect on the Scottish independence movement and the UK's territorial integrity.

3. Citizenship in a new state: how it might work in Scotland

a. The purposes of citizenship laws

Citizenship laws have a number of complementary societal purposes.[14] Perhaps the most important is the assurance of a stable population, especially through the transmission of 'membership' across generations, where most people acquire citizenship involuntarily at birth. But citizenship laws also determine the degree of territorial inclusivity by setting out the terms under which long term resident immigrants can become citizens. In addition, they will determine whether citizenship must be an exclusive relationship, or whether a person may hold dual or multiple citizenships. Citizenship laws also regulate issues such as special ties to the state, or other forms of genuine link for those who have left the territory or are attached to it only by descent from a citizen born in the territory, by providing for preferential naturalisation and/or citizenship by descent. Citizenship laws not only regulate who can *acquire* citizenship, but also who *loses* it, whether through absence from the territory, through voluntary acts of renunciation or as a result of an act of deprivation, e.g. decisions taken by state authorities on public interest or national security grounds. Finally, and perhaps most significantly for our purposes in this chapter, citizenship laws generally set the *prima facie* boundaries of political *demos*, in the sense of providing – in most cases – the preliminary determination of who can vote and who can stand for election, especially in national elections.

In new states, all of these issues and more come to the fore, as the new state will have to define its own citizenry *ab initio*. Law and politics will influence the outcome. In iScotland, a distinctive politics of identity would certainly be important, as would Scottish demography. The design of citizenship laws would offer one of the routes by which iScotland could simultaneously both distinguish itself from rUK (e.g. in respect of the conditions it might place on naturalisation, in its approach to the transmission of citizenship outside the territory, or in its approach to rights attaching to citizenship), whilst at the same time reassuring new Scots about the validity and durability of their continuing social and economic ties across these islands. This latter is part of a tactic of postulating secession as a relatively 'soft' process in which some key aspects of life would not change, or would change little, and in which changes would come about consensually and through democratic processes.

b. The Scottish context – an emerging distinctive identity against a history of emigration

Even though Scotland has not been an independent state for more than 300 years, claims about the nature of Scotland as a 'nation' within the UK have always been

[14] M. Vink and R. Bauböck, 'Citizenship configurations: Analysing the multiple purposes of citizenship regimes in Europe' (2013) 11(1) *Comparative European Politics* 621–648.

closely intertwined with the ebbs and flows of a distinctive Scottish identity *within* the ebbs and flows of the British state.[15] This can be seen most clearly after the Second World War, when stronger movements for greater self-government and independence emerged in Scotland.

Between the 1970s (when it had its first major electoral breakthroughs) and 2007, when it first formed a minority government under the devolved powers of the Scotland Act 1998, the Scottish National Party (SNP) has transformed into 'civic nationalist' party.[16] Territory and residence, not descent or ethnicity, have become the central elements of attachment to Scotland in elite discourse and to a degree, in the public imagination.

In addition, as Jonathan White has highlighted, the prevailing identity-based approach to politics in Scotland has latterly partly shifted towards a partisan approach based on opposing austerity as an economic policy.[17] By adopting the trope of opposition to austerity as a badge of identity, the SNP has gone beyond regionalism and the politics of territory, and posed itself as lying at the heart of a larger alternative narrative for British politics as well as just Scottish politics.

This basis for a national sense of self has grafted itself comfortably onto the sense of Scottishness which emerged after 1979. The election of Margaret Thatcher's first Conservative Government, which saw cold winds of de-industrialisation sweeping through much of Scotland, followed hard on the heels of the March 1979 devolution referendum, in which the SNP called for a no vote. The proposal to institute devolved institutions failed, even though it was supported by a majority at the ballot box, because a required threshold of 40 percent of the registered electorate supporting the initiative was not met. Throughout the eighteen years of Conservative Party government, a strong sense of grievance at the imposition of policies by outsiders and a lack of control of the instruments of government developed. Conservative Party support (and parliamentary representation) collapsed completely in Scotland, from a high point of more than 50 percent in 1955 to a low point of less than 15 percent in 2015. Initially, the decline of the Conservative vote resulted in Labour Party dominance. Labour had led the very popular pro-devolution movement before and after 1997. More recently, as Labour became increasingly compromised by its thirteen years in (Westminster) power, including the years of the global financial crisis, and its adherence to a neo-liberal anti-austerity rhetoric, the SNP has emerged as the utterly dominant actor in Scottish politics in the mid 2010s. It secured a landslide 56 of the 59 Scottish seats in the 2015 UK General Election, as well as a more substantial Yes vote in the 2014 referendum than was predicted by the polls and the expert observers when the campaign started. 2016 saw it re-elected, albeit no longer with an outright majority, as the dominant force in the Scottish Parliament and able to form a minority government

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[15] M. Pittock, 'Scottish sovereignty and the union of 1707: Then and now' (2012) 14 *National Identities* 11–21.
[16] M. Leith, 'Scottish National Party Representations of Scottishness and Scotland' (2008) 28 *Politics* 83–92; Andrew Mycock , 'SNP, identity and citizenship: Re-imagining state and nation' (2012) 14 *National Identities* 53–69.
[17] J. White, 'When Parties Make Peoples' (2015) 6 (1) *Global Policy* 106–114.

This sense of Scottish identity is also sustained by a perception that Scots are somehow more egalitarian and more interested in strong welfare state institutions than are the English, and that they are less animated by the hostility to immigration (and indeed free movement), which is an important factor in negative attitudes towards the EU in England.[18] Although this perception of greater attachment to egalitarianism barely finds support in public opinion or social attitudes-based research, it is strongly articulated electorally in terms of different voting patterns in Scotland to England, largely because of how Scots have built certain myths into their identity and their belief systems.[19] It has influenced perceptions of what a future Scotland ought to look like, and how it should regulate both citizenship and citizenship rights. Alongside these changes, the SNP has transformed itself from an anti-European[20] to a pro-European party, brandishing the slogan of 'Scotland in Europe', to sustain the idea that small states are those that do best from EU integration.[21]

Scotland's distinctive landscape of electoral support for parties and political elite preferences has also long played out in stronger popular support for the UK to remain in the EU, with 64 percent of voters indicating in the British Election survey that they would vote to remain in the EU, and 24 percent indicating they would vote to leave.[22] This support was present across voters for all of the main parties in Scotland, including the Conservatives. In the event, Scotland split 62/38 with no single Council area voting 'Leave'. From early on in the campaign a crucial and potentially painful difference between Scotland and the rest of the UK was visible.[23] In the event there was a 14 point difference between the outcomes in Scotland and the UK as a whole.

Finally, it is worth noting the demography of modern Scotland. For many centuries, Scotland has been a country of emigration. However, the picture has become more

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[18] J. Portes, 'Free movement: here to stay?' (10 January 2016) *NIESR* Blog, www.niesr.ac.uk/blog/free-movementhere-stay#.VpOgP_HezTE, accessed 19 July 2016.
[19] A. Henderson, 'The myth of meritocratic Scotland: political cultures in the UK', in P. Cowley and R. Ford (eds.) *Sex, Lies and the Ballot Box* (London: Biteback Publishing, 2014); and A. Henderson, C. Jeffrey and R. Lineira, 'National Identity or National Interest? Scottish, English and Welsh Attitudes to the Constitutional Debate' (2015) 86 *The Political Quarterly* 265–274.
[20] In the 1975 referendum the SNP campaigned for the UK to leave 'the common market', because initially it believed that this was the direction in which public opinion was heading. See J. Mitchell, 'The EU Referendum: Unpredictable in Scotland and the UK' (1 December 2015) *European Futures* Blog, http://www.europeanfutures.ed.ac.uk/article-2246, accessed 19 July 2016. In the event, every part of Scotland voted to remain in the EEC, apart from Orkney and Shetland.
[21] J. Shaw, 'Scotland: 40 Years of EU Membership' (2012) 8 *Journal of Contemporary European Research* 547–554.
[22] J. Curtice, *Britain Divided? Who supports and opposes EU Membership*, *What UK Thinks* (October 2015) Analysis Paper 1, http://whatukthinks.org/eu/wp-content/uploads/2015/10/Analysis-paper-1-Britain-divided.pdf, accessed 19 Juy 2016.
[23] 'Scots want to stay in EU, as the rest of Britain wants to say goodbye, says new poll' (2 November 2015) *The Herald*, www.heraldscotland.com/news/13187523.Scots_want_to_stay_in_EU__as_the_rest_of_Britain_wants_to_say_goodbye__says_new_poll/, accessed 19 July 2016. Nigel Farage famously described the 'Brexit' campaign in Scotland in February 2016 as 'a bit embryonic', see G. Campbell, 'Brexit campaign "embryonic" in Scotland' (1 February 2016) *BBC News*, www.bbc.co.uk/news/uk-scotland-scotland-politics-35458658, accessed 19 July 2016

complex in recent years. The historical patterns of emigration continue – with perhaps a million persons born in Scotland not resident there at present (against a current population of around 5.4m).[24] But Scotland has also become a migration destination and there are increasing numbers of non-UK citizens and non-UK born UK citizens resident in Scotland (as well as continuing high levels of mobility between Scotland and the rest of the UK). Scotland mirrors patterns of immigration visible elsewhere in the UK, although with lower numbers of migrants.[25] Citizenship laws would thus grant Scotland one means to respond to its distinctive demographic challenges in terms of a relatively stagnant population and – in common with other advanced post-industrial states – an ageing population,[26] as well as to express the distinctive identity politics sketched above.

c. *Theory into practice and identity politics into law: what would Scottish citizenship look like?*

There is guidance from both state practice and international law instruments to assist lawmakers in the creation of new norms of citizenship in seceding states. Scotland has no modern history of statehood – and no historical citizenry – on which to draw, and thus the 'restored state' model of new citizenship used in some states[27] cannot be invoked. Moreover, the 'federal' model of new citizenship building is not applicable, given the limited character of the UK's asymmetric devolution arrangements. Unlike the former federations Yugoslavia or Czechoslovakia, there is no former 'republican' or regional level citizenship, in a formal sense, on which to draw.[28] Consequently, iScotland would probably use the third model of *ab initio* citizenship building for new states, namely the residence-based or territorial model. This approach would be tempered by continuing close relationships across these islands, not only between iScotland and the rUK, but also with Ireland, which itself became independent from what we now call the United Kingdom by a complex (and often violent) process between 1919 and 1922. Ireland's own citizenship regime, built up over many years, remains partially entwined with that of the UK in ways which relate to the earlier independence process, to ongoing patterns of migration and – more recently – to the Northern

[24] See 'Scotland Analysis: Devolution and the implications of Scottish Independence' (2013) Cm 8544, at 20; and J. Carr and L. Cavanagh, 'Scotland's Diaspora and Overseas-Born Population' (2009) Scottish Government Social Research.
[25] For an overview see Migration Observatory Commentary, 'Bordering on confusion: International Migration and Implications for Scottish Independence' (16 September 2013), http://www.migrationobservatory.ox.ac.uk/commentary/bordering-confusion-international-migration-and-implications-scottish-independence, accessed 19 July 2016.
[26] Scottish Parliament Finance Committee Report, 'Demographic Change and an Ageing Population' (11 February 2013) 2nd Report, 2013 (Session 4), www.scottish.parliament.uk/S4_FinanceCommittee/Reports/fiR13-02_rev.pdf, accessed 19 July 2016.
[27] See O. Shevel, 'The Politics of Citizenship Policy in New States' (2009) 41 *Comparative Politics* 273–291.
[28] J. Shaw and I. Štiks (eds.), *Citizenship after Yugoslavia* (London: Taylor and Francis, 2012).

Ireland peace process.[29] Many of these key points were noted in UK government commentary on proposals for Scottish citizenship.[30]

In international law, the most important principle concerns protection against statelessness occurring as a result of the creation of a new state.[31] We should also bear in mind that the European Convention on Nationality (which the UK has not ratified) offers benchmarks in relation to key principles such as non-discrimination. As for EU law, its impact is far more attenuated. There has been little impact on the part of EU law on the cases of new citizenship regimes in Europe since 1989, although there is some evidence of pre-accession influence.[32] As for the existing Member States, some have argued that there is potential for EU law influence to grow, subsequent to the judgment of the Court of Justice in the *Rottmann* case.[33] This concluded that in certain respects national rules on loss of citizenship fell within the scope of EU law and could be affected by the importance of protecting the essence of EU citizenship.[34]

Before the referendum campaign began, there were few hints as to what future Scottish citizenship might look like. The points about territory and a sense of an inclusive and egalitarian identity discussed above can at least be found the Scottish Government 2009 White Paper *Your Scotland. Your Voice*:[35]

> Citizenship in an independent Scotland will be based upon an inclusive model. Many people in Scotland have ties to the rest of the United Kingdom, including familial, social and economic connections. An independent Scotland could recognise the complex shared history of Scotland and the United Kingdom by offering shared or dual citizenship.

A related 2009 document on *Europe and Foreign Affairs* also mentioned the importance of people identifying 'with the community in which they live and

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[29] B. Ryan, Written Evidence to the Scottish Affairs Select Committee, August 2012, www.publications.parliament.uk/pa/cm201213/cmselect/cmscotaf/139/139we02.htm, accessed 19 July 2016.
[30] Scotland Analysis, 'Borders and Citizenship' (January 2014) Cm 8726, www.gov.uk/government/publications/scotland-analysis-borders-and-citizenship, accessed 19 July 2016; J. Crawford and A. Boyle, 'Opinion: Referendum on the Independence of Scotland – International Law Aspects', published as Annex A to Scotland Analysis, 'Devolution and the implications of Scottish independence' (February 2013) Cm 8554, www.gov.uk/government/uploads/system/uploads/attachment_data/file/79408/Annex_A.pdf, accessed 19 July 2016.
[31] On this see the Draft Articles of the International Law Commission on Nationality of Natural Persons in relation to the Succession of States, 1999, www.unhcr.org/5465e1ca9.pdf, accessed 19 July 2016.
[32] J. Shaw, 'The constitutional mosaic across the boundaries of the European Union: citizenship regimes in the new states of South Eastern Europe', in N. Walker, S. Tierney and J. Shaw (eds.), *Europe's Constitutional Mosaic* (Oxford: Hart, 2011), pp. 137–170.
[33] Case C-135/08 *Rottmann* v. *Freistaat Bayern*, ECLI:EU:C:2010:104
[34] See the extended commentary in J. Shaw (ed.), 'Has the European Court of Justice challenged Member State sovereignty in nationality law?', EUI Working Paper, RSCAS 2011/62.
[35] Scottish Government, 'Your Scotland. Your Voice. A National Conversation' (November 2009), www.scotland.gov.uk/Publications/2009/11/26155932/0, accessed 19 July 2016, at 135 (para. 8.22).

[feeling] valued and part of Scottish society.[36] The inclusive model is 'designed to support economic growth, integration and promotion of diversity.'

The 2013 White Paper *Scotland's Future*, setting the prospectus for independence, continues this line of thinking:

> At the point of independence, this Government proposes an inclusive model of citizenship for people whether or not they define themselves as primarily or exclusively Scottish or wish to become a Scottish passport holder. People in Scotland are accustomed to multiple identities, be they national, regional, ethnic, linguistic or religious, and a commitment to a multi-cultural Scotland will be a cornerstone of the nation on independence.[37]

Scotland's Future outlined a number of pathways to citizenship, both on and after independence. These are relatively standard when viewed in international comparison.[38]

Table 1

Current status	Scottish Citizenship?
At the date of independence	
British citizen habitually resident in Scotland on day one of independence	**Yes, automatically** a Scottish citizen
British citizens born in Scotland but living outside of Scotland on day one of independence	**Yes, automatically** a Scottish citizen
After the date of independence	
Child born in Scotland to at least one parent who has Scottish citizenship or indefinite leave to remain at the time of their birth	**Yes, automatically** a Scottish citizen
Child born outside Scotland to at least one parent who has Scottish citizenship	**Yes, automatically** a Scottish citizen (the birth must be registered in Scotland to take effect)
British national living outside Scotland with at least one parent who qualifies for Scottish citizenship	Can **register** as a Scottish citizen (will need to provide evidence to substantiate)
Citizens of any country, who have a parent or grandparent who qualifies for Scottish citizenship	Can **register** as a Scottish citizen (will need to provide evidence to substantiate)
Migrants in Scotland legally	**May apply** for naturalisation as a Scottish citizen (subject to meeting good character, residency and any other requirements set out under Scottish

[36] Scottish Government, 'Europe and Foreign Affairs. Taking Forward our National Conversation' (Edinburgh, 2009), www.scotland.gov.uk/Resource/Doc/283886/0086022.pdf, accessed 19 July 2016, at 24–25 (para. 5.13).
[37] Scottish Government, 'Scotland's Future' (November 2013) White Paper, www.gov.scot/Publications/2013/11/9348, accessed 19 July 2016, at 271.
[38] 'Scotland's Future', 273; also available at www.gov.scot/Publications/2013/11/9348/11.

	immigration law
Citizens of any country who have spent at least ten years living in Scotland at any time and have an ongoing connection with Scotland	**May apply** for naturalisation as a Scottish citizen (subject to meeting good character and any other requirements set out under Scottish immigration law

Source: *Scotland's Future*, November 2013

Specifically, the Government proposed an approach to citizenship *ab initio* which combined residence with descent. Citizenship would be automatically attributed to those UK citizens habitually resident in Scotland on the date of independence and to those UK citizens who were born in Scotland and but were resident outside Scotland. No explicit reference is made to a right to choose on the part of those putative citizens who may have other citizenships, but the approach suggests that iScotland would have (at least potentially) a substantial number of external citizens, resident either in rUK or elsewhere. After independence, the routes to citizenship would either be automatic (at birth), by registration (for those with close ties) or on application for naturalisation as a citizen, subject to conditions.

If implemented, the overall scheme would probably have been somewhat more generous than UK citizenship is at present, allowing also for registration by citizens of other states who have a grandparent who qualifies for Scottish citizenship. This suggested quite a strong focus on ethnically defined citizenship transmission across generations, notwithstanding the rhetoric of territorial and residence-based inclusion given such attention in the political documentation.

However, one proposed route to naturalisation was rather curious and raised some questions about the balance between territory, ethnicity and other forms of affiliation. This was the case of 'citizenship by connection'. A person – regardless of nationality – could apply for naturalisation as a Scottish citizen on the basis of ten years of prior residency, whenever that might have been and regardless of whether that residency was still subsisting. This possibility was intended to operate in addition to ordinary naturalisation for non-citizen residents. This is more liberal than ordinary naturalisation because it does not require residence at the time of application, although ten years of (past) residence is longer than the UK currently requires for naturalisation. This is an unusual mode of acquisition, without direct equivalent in other states, perhaps closest in character to the socialisation based modes of acquisition found in some states, although these generally require residence as a condition.[39] It shades towards an arbitrary and overbroad preference for a group based on a dubious and undefined criterion of 'connection'. It is a category of citizenship acquisition which could easily be subject to 'deflection effects'. This is what occurs when a person exploits some condition (e.g. descent from former citizens or, in this case, earlier residence) in order to obtain a passport they intend to use not in order to reside in the target state (or at least not for more than a minimum of time) but in order to reside and work in another state (in this case, by virtue of EU free movement laws or domestic

[39] For more details see the EUDO Citizenship Observatory's modes of acquisition databases, in particular mode A07: http://eudo-citizenship.eu/databases/modes-of-acquisition?p=&application=modesAcquisition&search=1&modeby=idmode&idmode=A07, accessed 19 July 2016.

arrangements made to accommodate Scottish citizens in rUK). The possibility that such deflection effects might operate to the rUK's detriment was highlighted in UK Government commentary on citizenship.[40]

In sum, iScotland's citizenship law seemed likely to be rather inclusive, not only on a territorial basis, but also on the basis of other connections to Scotland, including ethnicity and descent, as well as *past* residence. Such a broad citizenship law, perhaps over-inclusive across some dimensions, presented an interesting contrast with the discussion – developed in the next section – of the *residence-based* franchise which was applied to the independence referendum, notwithstanding the loud objections of persons born in Scotland and now resident elsewhere, especially in England. For some, this franchise was *under-inclusive*.

But any future Scottish citizenship law (which is bound to be contested, not only initially but for a longer period after independence by those who felt it was too restrictive, as much as by those who felt it was too inclusive) would not sit in isolation. Geographically and geopolitically, a new citizenship regime can never be an island, with its legal boundaries creating a hermetically sealed space. Scotland would be no different. *Scotland's Future* acknowledged this, but seemed to predict that a framework of softer citizenship boundaries might emerge. This tone was struck probably in order to provide assurance to Scottish voters that little would change in the citizenship sphere despite secession.

The proposals envisaged the possibility of a very substantial overlap between Scottish citizenship and rUK citizenship, involving mutual tolerance of dual citizenship. It is implicit in *Scotland's Future* that the Scottish Government envisaged that new Scottish citizens would have the right to opt (i.e. presumably to choose to be 'British' and/or 'Scottish'). It had perhaps looked, amongst other sources of inspiration, at the right of option in Northern Ireland as the guide for this.[41]

But this may be a situation that the rUK would choose to prevent, although we cannot at this moment predict how the rUK might react to such features of a Scottish citizenship regime. The rUK might, for example, consider the withdrawal – in accordance with international law and common state practice[42] – of UK citizenship from those resident in Scotland and enjoying the benefit of Scottish citizenship, who lacked a connection with the rest of the UK (e.g. those born in Scotland who had never been resident in the rest of the UK). Such a separation of citizenship regimes is what occurred, for example, when many former UK colonies and dominions became independent, and some have argued it would be the appropriate response in the Scottish case.[43] Furthermore, the rUK could adopt a

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[40] See 'Borders and Citizenship' (n30), at para. 4.48.
[41] Northern Ireland Peace Agreement (Good Friday Agreement), April 1998, read in conjunction with Irish nationality law (see Ryan (n29)).
[42] B. Ryan, 'At the Borders of Sovereignty: Nationality and Immigration Policy in an Independent Scotland' (2014) 28 *Journal of Immigration Asylum and Nationality Law*, 146–164.
[43] C. Yeo, 'Dual Citizenship and Scottish Independence' (15 September 2013) *Free Movement* Blog, www.freemovement.org.uk/dual-citizenship-and-scottish-independence/, accessed 19 July 2016, criticising *inter alia* Nick Barber, 'After the vote: the citizenship question' (4 August 2014) *UK*

hostile stance towards dual citizenship, thus making it hard even for those with a connection to both states to hold the two citizenships simultaneously.

But even if there were a large measure of separation between the two citizenship regimes, akin to that which occurred when the colonies and dominions became independent, there may not be a high degree of social acceptance of such a separation, if it ended up dividing families in ways which created anomalies or boundaries which were hard to understand. There would be pressure on those boundaries from those who found themselves just one side or the other, and long-term contestation of both the Scottish and the rUK citizenship regimes. Moreover, the numbers of (theoretical if not actual) dual citizens might still be quite large, given the degree of cross-border mobility across the UK.

Furthermore, experience with the creation of new states highlights that whether people choose to 'adopt' new citizenships that they are given after birth as a result of the establishment of new states often tends to be the result of pragmatic considerations. The decision to opt for more than one citizenship is frequently influenced by considerations such as access to travel documents, political rights, socioeconomic rights such as the right to live and work in more than one state, and to welfare rights, perhaps with a dash of 'identity' thrown into the mix. For those who voted against independence, would taking a Scottish passport be seen as approving separation after the event?

The nestedness of citizenship regimes thus has both geopolitical and individual characteristics and consequences. There are complex interdependencies within citizenship regimes and between different regimes, often as a result of the piecemeal historical evolution of status, rights and identity. This is certainly true within the UK's current regime, where any attempts to change certain aspects of the regime (e.g. the UK's system of voting rights for Irish and certain Commonwealth citizens who are not subject to immigration control) in order to make the regime cohere around a specific model of attachment and polity membership are likely to run aground on other aspects of the regime, such as the historically close links across these islands and the UK's imperial history.[44] The point about complex and hard-to-fathom membership models becomes ever clearer when we explore in more detail the interactions between the legal status of citizenship and other dimensions of the concept of citizenship, in particular political rights, as voting is a paradigmatic expression of the democratic 'we'. This is the task of the next and final substantive section of this chapter.

4. Citizenship and the evolving polity: 'rightsizing' the demos

A new citizenship regime is the product of a political act of self-determination. In the Scottish case, this is rightly characterised by Rainer Bauböck as consensual and

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Constitutional Law Association Blog, http://ukconstitutionallaw.org/2014/08/04/nick-barber-after-the-vote-the-citizenship-question/, accessed 19 July 2016.

[44] J. Shaw, 'Citizenship and Electoral Rights in the Multi-Level 'Euro-Polity': the case of the United Kingdom', in H. Lindahl (ed.), *A Right to Inclusion and Exclusion? Normative Fault Lines of the EU's Area of Freedom, Security and Justice* (Oxford: Hart Publishing, 2009), pp. 241–253.

democratic in character, rather than remedial.[45] A similar point can be made about a vote on state membership of the European Union, since the EU treaties now include a provision explicitly providing for the possibility of withdrawal, based on a negotiation between the withdrawing state and the other Member States (Article 50 TEU). But how should the self-determining 'we' be defined in these cases? Three groups of issues can be separated out:

- Who should vote in any independence referendum? Citizens? Residents? Some combination of the two? In the case of a referendum on EU membership (characterised by Eurosceptic forces precisely as an 'independence' referendum), are the questions (and the balance of interests) just the same as they are for a secession referendum *within* a state?
- In the event of a 'yes' vote creating a new state such as iScotland, who should be able to vote in the first general election in that newly constituted state? Has the vote to leave the EU, thus arguably re-constituting the sovereignty the UK, changed the constellation of interests which determine the scope of the general election franchise in the UK?
- And, finally, who might participate – and how – in any constitutional convention to prepare a long term written constitution for the newly reconstituted state? This is presently only an issue for iScotland,[46] as despite the uncertainties to which it has given rise, there is no immediate suggestion that the leave vote in the EU referendum could lead to a constitutional reformation of the UK. However, as we shall discuss below, the UK is unlikely to be left constitutionally unchanged by the vote to leave the EU.

This section concentrates on the questions within the first bullet point from an empirical and a normative perspective, as the second and third sets of questions are speculative at present; however, the normative considerations discussed below could be applicable in those cases as well. With respect to elections to what would then be a *national* parliament, it would have been interesting to see whether iScotland would innovate and allow EU citizens to vote on the basis of the precedent set in respect of the devolved institutions (and in line with arguments led by a number of NGOs in the context of a European Citizens' Initiative).[47] This would reflect and build upon the present reciprocal arrangements between Ireland

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[45] R. Bauböck, 'Regional Citizenship and Self-Determination', in R. Ziegler, J. Shaw and R. Bauböck (eds.), *Independence Referendums: Who should vote and who should be offered citizenship?* (2014) EUI Working Paper RSCAS 2014/90.

[46] As Aileen McHarg has noted (A. McHarg, 'The Constitutional Case for Independence' (December 2015), in A. McHarg, T. Mullen, A. Page and N. Walker (eds.) *The Scottish Independence Referendum: Constitutional and Political Implications* (Oxford: OUP, 2016), Forthcoming. available at SSRN: http://ssrn.com/abstract=2707102) constitutional questions may not have been to the fore in the referendum debate, but constitutional questions were undoubtedly central to a deeper understanding of how the case for 'Yes' needed to be understood.

[47] Let Me Vote was an unsuccessful European Citizens' Initiative (www.letmevote.eu/en/). The issues are discussed in depth in P. Cayala, C. Seth and R. Bauböck (eds.), *Should EU Citizens Living in other Member States Vote there in National Elections?* (2012) EUI Working Paper RSCAS 2012/32, available at http://cadmus.eui.eu/bitstream/handle/1814/22754/RSCAS_2012_32.pdf?sequence=1, accessed 19 July 2016.

and the UK.[48] Furthermore, with respect to participation in a longer-term constitution building process, leading to a likely written constitution for Scotland (in contradistinction to the current position in the UK),[49] a number of options for incorporating the interests of non-citizen residents might well have been on the table, e.g. via civil society participation.[50]

a) Legal and constitutional considerations: the Scottish referendum

The franchise for the 2014 referendum was settled by legislation, based on the Edinburgh Agreement. This handed the determination of the franchise over to the Scottish Parliament, where normally it was a matter reserved to the Westminster Parliament.

Under the Scottish Independence Referendum (Franchise) Act 2013, the referendum franchise was based on the local government and Scottish Parliament electoral register, with the addition of 16 and 17 year-olds. It was entirely residence-based and rejected the voting claims of non-resident 'Scots', whether they resided in the rest of the UK or elsewhere in the world, however recently they departed and however they claimed to be 'Scottish' (by descent, prior residence or birth). It therefore included resident EU, Irish and qualifying Commonwealth citizens (pursuant to a mix of UK law and EU law peculiar to the UK), but did not include any other non-citizens, including those who have indefinite leave to remain in the UK. It also excluded prisoners, in like manner to electoral franchises at all levels right across the UK.[51]

The exclusion of UK citizens with a connection to Scotland but no longer resident there encountered some public opposition, notably from London-based Scots. Some suggested that this exclusion was contrary to EU law,[52] although the issue was not tested in the courts. The inclusion of EU citizens resident in Scotland along with the other categories of residents (i.e. Irish and qualifying Commonwealth citizens), who are generally enfranchised under UK law, received relatively little comment in the media. While some elements within the resident EU citizen community publicly embraced the opportunity to cast a ballot,[53] research suggests that for some, having the vote was seen as a burdensome privilege rather than an important opportunity for political self-determination.[54]

It is interesting to note that the nationals of the other Member States were not part of the electorate for the 1979 devolution referendum, which was conducted on the

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[48] J. Shaw, *The Transformation of Citizenship in Europe* (Cambridge: CUP, 2007), pp. 251–263.
[49] See further McHarg above (n46).
[50] A. Renwick, *After the Referendum: Options for a Constitutional Convention* (London: The Constitution Society, 2014).
[51] This was confirmed by the judgment of the Supreme Court in *Moohan and Another* v. *Lord Advocate* [2014] UKSC 67. A. Tickell, 'Litigating with a Blunderbuss: Prisoner Votes, Moohan v Lord Advocate and the Independence Referendum Franchise' (2015) 19 *Edinburgh Law Review* 409–414.
[52] 'Legal Challenge to Scottish Expats Being Denied Vote in Independence Referendum' (14 March 2014) *Votes for Expats* Blog, http://votes-for-expat-brits-blog.com/2014/03/14/legal-challenge-to-scottish-expats-denial-of-vote-in-independence-referendum/, accessed 19 July 2016.
[53] See for example, www.facebook.com/EuCitizensForAnIndependentScotland.
[54] E. Piętka-Nykaza and D. McGhee, 'Stakeholder citizenship: the complexities of Polish migrants' citizenship attachments in the context of the Scottish independence referendum' (2015) *Citizenship Studies*, Online First View, DOI: 10.1080/13621025.2015.1054789.

basis of the Westminster (i.e. national) franchise. This preceded the establishment of EU voting rights. But using the Westminster franchise would still have included in the franchise Irish and qualifying Commonwealth citizens who have *always* voted in *all* UK elections – a principle which was recognised by the Court of Justice in the *Gibraltar case* as being constitutional in character for the UK.[55]

Furthermore, since the 1979 referendum, certain external voters have been included in the UK Westminster elections franchise, albeit with a maximum time limit at present of 15 years after departure from the UK.[56] The challenge of setting parameters for the inclusion of 'external' voters for the referendum would have been very tough. If 'external' voters had been included, presumably no distinction would have been drawn between those living in Paris and those living in London. Including external 'Scots' would have required significant innovation in comparison to existing electoral registration practices, and would have imposed additional costs (including allowing persons resident in one part of the UK to vote in another part of the UK), without an obvious improvement in the legitimacy of the process.

Finally, in 1997 a precedent had been set in that the devolution referendum was run using the local elections franchise (i.e. including EU citizens and limiting the franchise by reference to residence), and this then became the basis for the Scottish Parliament elections franchise from 1999 onwards. In sum, the outcome may seem peculiar (and it is unique in the EU context), but its probable rationale in the UK system has been to emphasise the *local* as opposed to *sovereign* character of Scottish Parliament elections.[57]

Now it was suggested, notably by Aidan O'Neill,[58] that the exclusion of non-resident Scottish-born UK citizens from the right to vote in the independence referendum was not compatible with EU law, because Member States – although they have the competence to determine a matter of national law such as the franchises in national elections or in an secession referendum – should act in compliance with EU law, including the principle of free movement, when exercising such a competence. The determination of the franchise is capable of affecting the extent to which individuals may exercise their free movement rights, because of the risk that the independence referendum would result in a vote for secession and that the new Scottish citizens (including those resident outside Scotland) may lose their EU citizenship and associated rights either for the shorter or the longer term. Member States must accordingly implement such a national competence in a manner not likely to impede free movement. Although this is a stretched definition of obstacles to free movement, O'Neill contended that the duties of the Member States extended that far nonetheless. He noted the interest that the European Commission has taken in the question of disenfranchisement of

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[55] Case C-145/04 *Spain* v. *United Kingdom (Gibraltar)*, ECLI:EU:C:2006:231, discussed in Shaw, *Transformation of Citizenship* (n48), pp. 180–187.
[56] See s. 141 Political Parties, Elections and Referendums Act 2000.
[57] See *AXA General Insurance Company Ltd v Lord Advocate* [2012] UKSC 122, in which the Supreme Court gave its view on the non-sovereign nature of the Scottish Parliament.
[58] A. O'Neill, '(Dis)enfranchisement and free movement', draft chapter, December 2015, on file with the author.

Member State nationals who are resident outside their state of citizenship, directing a Recommendation in particular at those Member States (including the UK) which limit the *national* voting rights of non-resident citizens.[59] For UK citizens resident for more than 15 years outside the UK, the consequence of free movement is indeed disenfranchisement from participation in UK elections, and thus the possible loss of any right to vote in a national election unless they have taken up citizenship in the host state. But this may not be possible (or desirable) if, for example, the 15-plus years absence from the UK has been spent in a variety of different host states, and/or if the host state does permit dual citizenship. The European Commission has recognised the difficulties that this raises, and highlighted that the vast majority of Member States do make external voting rights available without time limitation, but the Commission's measure is just that: a Recommendation without binding force.

Overall, any attempt to invoke EU law is likely to be unsuccessful. Certainly, it is true to say that the Scottish Parliament, in adopting the Scottish Independence Referendum (Franchise) Act 2013, did not have regard to the potential implications in relation to EU free movement, and it is also the case that such a vote does has the capacity to affect the EU citizenship status of the putative citizens of a new state, because of the uncertainties of the (re-)accession process. Moreover, since the referendum the connections between EU citizenship and national rules on the franchise seem to have been strengthened by the *Delvigne* case.[60] In this case, the Court of Justice held that French rules on the disenfranchisement of those who had committed a criminal offence (so far as they applied to European Parliament elections) fell within the scope of EU law and thus had to be justified as restrictions to the principle of universal suffrage enshrined *inter alia* in Article 39(2) of the Charter of Fundamental Rights as regards European Parliament elections (as well as in Article 14(3) TEU and Article 223 TFEU).

While this case opens up the possibility of a new level of scrutiny on restrictions on the right to vote in European Parliament elections by reference to EU law, it creates a connection between EU law and national voting rights rules only in that respect, and without regard to the free movement issue. Successful challenges to restrictions contained in such rules might have a knock on effect (in the same way that the extension of the right to vote in Scottish Parliament elections and in the Scottish independence referendum could be seen as knock on effects of the EU local electoral rights when understood in the particular constitutional context of the UK), but it does not in itself create a direct connection between EU law and EU citizenship and regional secession referendums. To that end, it is important to understand the limitations of the *Delvigne* case, reinforced by Judge Lenaerts, the

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[59] European Commission, Commission Communication addressing the consequences of disenfranchisement of Union citizens exercising their right to free movement, COM(2014) 33 final; European Commission, Commission Recommendation addressing the consequences of disenfranchisement of Union citizens exercising their right to free movement, C(2014) 391 final.
[60] Case C-650/13 *Delvigne* v. *Commune de Lesparre Médoc and Préfet de la Gironde*, ECLI:EU:C:2015:648. See J. Shaw, 'Prisoner Voting: Now a Matter of EU law' (15 October 2015) *EU Law Analysis* Blog, http://eulawanalysis.blogspot.co.uk/2015/10/prisoner-voting-now-matter-of-eu-law.html, accessed 19 July 2016.

newly (2015) elected President of the Court of Justice, writing extra-judicially.[61] He noted that it is significant that what he calls the 'seminal' case of *Delvigne* proceeds by recognising the constitutional autonomy of the principle of representative democracy, long embedded in the provisions on European Parliament elections and given greater salience after the Lisbon Treaty entered into force. *Delvigne* is not a judicial reading into the provisions on EU citizenship of an 'incorporation doctrine', possible in a federal state such as the United States of America, which opens the way for the highest court in the polity to scrutinise all legal provisions for their adherence to fundamental rights doctrines. Indeed, such a conclusion would require a more capacious construction of the constitutional significance of EU citizenship than has thus far been admitted by the Court of Justice, despite the rhetoric that it is 'destined to be the fundamental status of the nationals of the Member States'.[62] Any other conclusion, said Judge Lenaerts, would be contrary to the allocation of competences between the EU and the Member States enshrined in the treaties, and would also overstep the judicial function, by instituting a judge-led reformation of the content of EU citizenship rights.

b) Legal and constitutional considerations: the EU referendum

The franchise for the referendum on UK membership of the European Union was fixed at an early stage, as was the question.[63] The EU Referendum Act 2015[64] laid down that the franchise would be based on the general election franchise, with provision made also for members of the House of Lords to vote, along with electors in Gibraltar who vote in European Parliament elections pursuant to the *Matthews* case.[65] One of the most contentious issues concerned the extent to which non-resident UK citizens would be enfranchised.[66] The decision to continue with the 15-year external voting restriction in the case of the referendum franchise might be thought contestable, as the abolition of the rule was included in the 2015 general election manifesto of the Conservative Party and is the subject of a promised 'Votes for Life' Bill, likely to come under discussion before the next anticipated general election (2020).[67] Questions were also raised regarding the exclusion of resident EU citizens, given that they had voted in the Scottish independence referendum. The third issue raised was that of enfranchising 16 and

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[61] K. Lenaerts, 'Linking EU Citizenship to Democracy' (2015) 11 *Croatian Yearbook of European Law and Policy*, Editorial Note vii–xviii.

[62] Case C-184/99 *Grzelczyk*, ECLI:EU:C:2001:458, para. 31. See J. Shaw, 'Citizenship: contrasting dynamics at the interface of integration and constitutionalism', in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (2nd Edition, Oxford: OUP, 2011), pp. 575–609.

[63] The referendum was held on the question: 'Should the United Kingdom remain a member of the European Union or leave the European Union?', under s1(4) EU Referendum Act 2015.

[64] www.legislation.gov.uk/ukpga/2015/36/contents/enacted/data.htm.

[65] *Matthews* v. *the United Kingdom*, App No. 24833/94, ECHR 1999-I.

[66] For details of the House of Lords amendment proposed on enfranchising non-resident UK citizens regardless of time spent outside the UK see www.publications.parliament.uk/pa/ld201516/ldhansrd/text/151118-0002.htm#15111858000641, accessed 19 July 2016. For analysis see C. Hanretty, 'Does the #Brexit referendum franchise matter?' (15 May 2015) Blog, http://chrishanretty.co.uk/blog/index.php/2015/05/25/does-the-brexit-referendum-franchise-matter/, accessed 19 July 2016; and S. Peers, 'Who should get the vote in a Brexit referendum?' (29 January 2015) *EU Law Analysis* Blog, http://eulawanalysis.blogspot.co.uk/2015/01/who-should-get-vote-in-brexit-referendum.html, accessed 19 July 2016.

[67] For details see I White, 'Overseas Voters' (4 July 2016) House of Commons Library Briefing Paper No. 5923.

17 year-olds, who not only voted in the Scottish referendum but who have also, from 2016, voted in Scottish Parliament elections. Of all the points of contention, it was the latter which attracted most support in the Westminster Parliament. The House of Lords inserted an amendment to give 16 and 17 year olds the right to vote, but this was reversed by the House of Commons.[68]

In the end, all attempts to vary the Westminster franchise along these lines failed, despite the arguments that each group – resident EU citizens, UK 'expats' and young voters – all have particularly high stakes in the outcome of the referendum. There may be good political or justice-based arguments for including those who are taking advantage of EU free movement rights (in whichever direction) in the decision on whether the UK remains a member of the EU or not, not least because EU citizens are selectively franchised in the UK at present. Irish citizens and Maltese and Cypriot citizens (as Commonwealth citizens) benefit from the existing rules.[69] Moreover, as all of these groups are outnumbered by 'sedentary' citizens and voters, the case could perhaps be made for giving them a say. But one reason for not including either group of voters was the view – driven by opinion polling – that the overall outcome was likely to be close (as indeed it turned out to be), and the government, which largely drove the 'scene-setting' part of the process, did not want to be subject to the accusation of loading the dice in advance of the vote, however small or large the group included or excluded actually was. In that context, the Westminster franchise represented a safe haven.

Returning to the arguments about EU law made previously, is there a more plausible connection to EU law in respect of the determination of the franchise for a referendum on state membership of the EU, as opposed to regional secession? In line with the free movement based argument made in respect of the inclusion of non-resident Scottish born UK citizens in the Scottish referendum franchise, O'Neill has argued that a similar case could be made in respect of exclusion of EU citizens exercising their free movement rights (in either direction). The legislature should be under a duty, he argues, to set up a referendum franchise that has regard to their interests.[70]

As Counsel representing two claimant non-resident UK citizens Shindler and Maclennan in a 2016 case in the English courts challenging the UK's EU referendum franchise,[71] O'Neill had an opportunity to have his argument reviewed by the judiciary at several levels. Before the Divisional Court, the April 2016 judgment acknowledged that the rule in Section 2 of the EU Referendum Act 2015

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[68] For details of the passage of the bill see http://services.parliament.uk/bills/2015–16/europeanunionreferendum.html.

[69] R. Ziegler, 'The "Brexit" Referendum: We Need to Talk about the (General Election) Franchise' (7 October 2015) *UK Constitutional Law Association* Blog, https://ukconstitutionallaw.org/2015/10/07/ruvi-ziegler-the-brexit-referendum-we-need-to-talk-about-the-general-election-franchise/, accessed 19 July 2016.

[70] See O'Neill, '(Dis)enfranchisement', above n.58.

[71] *Shindler and Maclennan* v. *Chancellor of the Duchy of Lancaster and Secretary of State for Foreign and Commonwealth Affairs* [2016] EWHC 957 (Admin). For a brief comment, see H. Green, 'Expats lose Supreme Court bid for right to vote in EU referendum' (2 June 2016), https://aberdeenunilaw.wordpress.com/tag/r-shindler-and-anor-v-chancellor-of-the-duchy-of-lancaster-and-another/ accessed 19 July 2016.

settling the categories of persons entitled to vote in the referendum was quintessentially an exercise of national sovereignty or competence. Significantly the judges also accepted that such a national competence has to be exercised with due regard to EU law, and in particular the impact that the exercise of such a national competence would have on the exercise of rights under EU law, in particular the right of free movement. Notwithstanding that conclusion, the court followed the earlier ruling of the Court of Appeal in the *Preston* case in relation to the 15 year rule and UK parliamentary elections[72] that such an exclusionary rule could not be regarded as a 'restriction' on the rights of free movement of EU citizens for the purposes of the test currently applied by the Court of Justice. Specifically, it is not a measure 'liable to dissuade or deter EU citizens from exercising their rights of free movement'.[73] As in *Preston* the court acknowledged that the 15 year rule represents a 'disadvantage' that results from choosing to reside outside the UK, but not every 'disadvantage' can be characterized as a 'restriction'. It is hard to formulate legal test that might adequately capture how the disadvantage of losing the vote after 15 years could be understood as a 'restriction' that is liable to dissuade a person from exercising their free movement rights in the first place. To suggest otherwise, according to the Court of Appeal in *Preston*, would not 'square with ordinary human experience', or with the 'inevitable uncertainties' of 'crowded human lives'. There are simply too many unforeseeable circumstances between the decision to exercise free movement rights and the withdrawal of voting rights.[74]

The case proceeded quickly to the Court of Appeal, which handed down its judgment on 20 May 2016. This time, the court took a firmer line on the hard kernel of sovereignty at the heart of national decisions on the franchise on a referendum such as the one to be held in June 2016. Lord Dyson, the Master of the Rolls, concentrated his analysis on Article 50 TEU, and drew – in the absence of case law of the Court of Justice upon the matter – upon what he regarded as an influential analysis of that provision by the German Federal Constitutional Court in its judgment on the Treaty of Lisbon.[75] He picked out one comment in particular:

> Whether these [national constitutional] requirements [referred to in Article 50 TEU] have been complied with in the individual case can, however, only be verified by the Member State itself, not by the European Union or the other Member States.[76]

Accordingly, said Lord Dyson,

> It is clear from this analysis that the German Court did not accept that the domestic constitutional requirements applicable to a decision to withdraw were themselves subject to validation under EU law and could be overturned on grounds of incompatibility with the EU Treaties.

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[72] *R (Preston)* v. *Wandsworth London Borough Council* [2013] QB 687.
[73] Case C-192/05 *Tas Hagen* ECLI:EU:C:2006:676.
[74] *Preston* above n.72 at para. 80.
[75] Judgement No 2 BvE 2/08, 30 June 2009, http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html.
[76] Paragraph 330.

The Court of Appeal therefore distinguished the prior case of *Preston*, which concerned voting in UK parliamentary elections, on the grounds that the settling of the franchise for a national decision about whether to withdraw is an exercise of national sovereignty – recognised under Article 50 TEU – about whether to be bound by EU law at all. It would, concluded Lord Dyson

> be contrary to [Article 50] if articles of another EU Treaty [i.e. TFEU] relating to citizenship and free movement were to intervene so as to determine the constitutional requirements to be adopted by a Member State which is deciding whether to leave the EU.

On that view, the claimants' case fell at the first hurdle – although in any event, the judges indicated that they also agreed with the lower court's view of the issue of 'restriction' of free movement. The Supreme Court approved the conclusions of the Court of Appeal without holding a full hearing on the matter. What was most instructive about this case was that we saw the terrain of the argument moving away from the issue of free movement. By placing the emphasis on the issue of sovereignty the Court of Appeal decisively moved the issue onto quite different terrain, where it aligned itself with the traditionally sovereignty-sensitive German constitutional court on matters such as *Kompetenz-Kompetenz.* In view of the vote to leave the EU on 23 June 2016, and the extensive discussion of Article 50 TEU thereafter, this is an interesting move on the part of the court.

c) Normative considerations: a brief note

It is widely accepted that the franchise, at least for the Scottish referendum, was established as a result of a process of legitimate constitutional decision-making within the existing United Kingdom. Furthermore, it is likely that any other answer to the question of who should vote in that referendum would have been so indeterminate as to be illegitimate.[77] However, 'right-sizing' participation in votes such as independence referendums or referendums on membership of supranational associations such as the EU raises normative considerations as well as legal and practical complexities.[78]

Ruvi Ziegler has argued[79] that it is normatively desirable that there should be as much congruence as possible between those who are expected to be the citizens of a new state and those who vote in any independence referendum, on the grounds that this group represent the primary 'stakeholders' (adopting Rainer Bauböck's terminology for the normative basis on which citizenship should be granted)[80] in the referendum. His argument depends on accepting the principle that there should be a link between citizenship status and voting, which is widely, but not

[77] B. Ryan, 'The Scottish Referendum Franchise: Residence or Citizenship?', in Ziegler et al., 'Independence Referendums' (n45).
[78] This is discussed at length in Ziegler et al., 'Independence Referendums' (n45). Space precludes further discussion in this chapter.
[79] R. Ziegler, 'Kick Off Contribution', in Ziegler et al., 'Independence Referendums' (n45).
[80] See R. Bauböck, 'Stakeholder Citizenship and Transnational Political Participation: a normative evaluation of external voting' (2007) 75 *Fordham Law Review*, 2393–2447.

universally, accepted by commentators.[81] Indeed, with respect to many elections worldwide (especially but not only local elections), the vote is in practice accorded to many residents who do not (yet) have citizenship, and the UK has never had congruence between the two, more for reasons of historical accident than political principle.

Ziegler has argued that under-inclusiveness (i.e. the exclusion of putative citizens) 'would undermine the legitimacy of the referendum, not least for disenfranchised persons affected by a new legal reality'. Over-inclusiveness – i.e. the inclusion of groups who would not be expected to receive citizenship – mandates that the scope of the putative citizenry should be rethought. Perhaps those groups *should* be offered citizenship. In Ziegler's view the Scottish independence referendum franchise did not satisfy the test of congruence, although he acknowledged that it would be a hard test to satisfy in practice, not least because of the challenge of identifying the putative *external* citizens. It would have been difficult, if not impossible, to establish an electoral register that additionally distinguished between former Scottish residents on the basis of whether or not they had been born in Scotland (i.e. the putative citizenship criterion according to the White Paper). In like manner, Ziegler has argued that the EU referendum franchise demands that the UK should take a closer look at its general election franchise.[82] However, there is another way of looking at over-inclusiveness, as Ben Saunders has argued: it is generally better to err on the side of over rather than under-inclusiveness, not least because – as he suggested – not all those who are offered the vote need exercise it.[83]

Rainer Bauböck, in contrast, defended the approach of setting a residence-based franchise, on the grounds that giving normative force to the 'regional citizenship' that currently delimits the scope of the franchise for the Scottish Parliament elections correctly reflects the character of the referendum in such a case. As a case of consensual self-determination in which the national and the regional legislatures had agreed upon the terms of the vote, the decision concerns whether to *upgrade* the regional citizenship which currently exists into that of an independent state. This is the only 'real' *demos* which exists. The citizens of an independent state are only a putative *demos*, and according to Bauböck:

> The putative *demos* of an independent Scotland should not replace the existing *demos* of Scotland as part of the UK in a decision about independence because only the latter but not the former can be considered as democratically legitimate.[84]

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[81] For critiques see H. Lardy, 'Citizenship and the Right to Vote' (1997) 17 *Oxford Journal of Legal Studies*, 75–100; and D. Owen, 'Transnational citizenship and the democratic state: modes of membership and voting rights' (2011) 14 *Critical Review of International Social and Political Philosophy*, 641–663.
[82] See Ziegler, 'Brexit' (n69).
[83] B. Saunders, 'Not all who are enfranchised need participate', in Ziegler et al., 'Independence Referendums' (n45). For an extended articulation of Saunders' position, see B. Saunders, 'Scottish Independence and the All-Affected Interests Principle' (2013) 33 *Politics*, 47–55.
[84] Bauböck, 'Regional Citizenship' (n45).

This conclusion accords with the actual practice adopted in Scotland in 2014, even if that practice itself could be said to be based on a rather muddled notion of the regional *demos* stemming from the highly contingent approach on the part of the UK over the years to the intertwining of citizenship and voting.

5. Conclusions: on the intertwining of citizenship and voting

The task undertaken in this chapter has been to bring together two dimensions of troubled membership, each complex in itself: the challenge of establishing or re-establishing a citizenship regime, in particular after a secession referendum, and the definition of political citizenship in the context of consensual acts of self-determination leading to secession/withdrawal. In both cases, the constitutional particularities of the UK (and the likely challenges facing an iScotland), as well as normative considerations attendant upon the definition of the boundaries of the *demos*, hang not too far in the background. Moreover, these contestations are ongoing and do not attach simply to separate and definable 'moments' of constitutional change. Each of the overlapping polities we are studying is constantly mutating and adapting to the new conditions.

The point is well illustrated if we reflect on the intersection between the continuing Scottish independence movement (bolstered by a relatively narrow defeat in 2014) and the Eurosceptic movement which pushed successive UK governments gradually closer to holding an in/out referendum on UK membership of the EU and triumphed in the 2016 EU referendum. For some, this amounts to juxtaposing Scottish nationalism and English nationalism, given the territorial disparities of the referendum results, although this downplays the complexities of navigating membership and attachment in a multilevel constitutional framework. The interactions between these two self-determination claims are complex and the outcomes which will flow from the result of the EU referendum are still hard to predict. Although the majority of the UK political elite remains avowedly Unionist, the distinct character of the result was one of the voting scenarios which was self-evidently likely to place intense pressures upon the viability of the British union state. In that sense the holding of an EU referendum to placate Eurosceptic forces is now widely accepted as having been a foolish political risk to take for those who support the continuation of the British state within its current boundaries.

Since the UK as a whole – led by the numerically superior English voting population – voted to leave, but Scotland, Northern Ireland and Gibraltar voted to remain, a series of major challenges now face the UK. This scenario did receive some attention in the press and amongst commentators in advance of the referendum, but the risks that it posed do not appear to have swayed the wider voting public.[85] Predictably, the Scottish First Minister Nicola Sturgeon (a

[85] See e.g. J. Nickerson, 'EU referendum: Could a Brexit vote lead to a second Scottish independence referendum?' (6 January 2016) City AM, www.cityam.com/231838/could-a-brexit-vote-lead-to-a-second-scottish-independence-referendum, accessed 19 July 2016; F. Perraudin, 'Sturgeon: new Scottish referendum "probably unstoppable" if UK votes to leave EU' (16 October 2015) *The Guardian*, www.theguardian.com/politics/2015/oct/16/nicola-sturgeon-new-scottish-referendum-probably-unstoppable-if-uk-votes-to-leave-eu, accessed 19 July 2016; K. Hughes, 'Rough waters ahead for Scotland if the UK votes "no" in EU referendum' (16 August 2015) *Open Democracy*, www.opendemocracy.net/can-europe-make-it/kirsty-hughes/rough-waters-ahead-for-

supporter of independence) has worked hard to highlight the Scottish 'difference', appointing a Standing Council on Europe to advise her on how the benefits of Scotland's EU membership can best be preserved.[86] While Sturgeon has not ruled out the possibility of a second referendum on Scottish independence, it is significant that the new UK Prime Minister Theresa May (herself described as a 'reluctant Remainer') made her first visit after appointment to Edinburgh to see FM Sturgeon and stated that she would not trigger the formal withdrawal talks under Article 50 TEU until she had secured 'a UK wide approach and objectives'.[87] This seems to suggest a prolonged period of uncertainty and negotiations.

It is also worth highlighting one other troublesome scenario which did not transpire, described by James Mitchell as 'the West Lothian Question writ large'.[88] What would have happened if England and Wales had voted narrowly in favour of leaving, but Scotland had voted overwhelmingly in favour of remaining, in sufficient numbers to tip the overall balance of the result?[89] This would have been a situation in which Scotland was seen to have affected the fate of the whole United Kingdom in relation to EU membership against the 'will' of England and Wales. Might this have led to the UK 'expelling' Scotland, rather than Scotland choosing to secede?

And finally, beyond the possibilities offered by territorial politics and the reconfiguration of state boundaries, what types of individual solutions might citizens find in order to improve their options and life chances, both in relation to political voice and also to migration/return migration potential? For example, anyone born in Northern Ireland is able to opt for Irish citizenship in addition to UK citizenship (as are those with Irish parents or grandparents), and it seems they are choosing to do so in increasing numbers to offset the risk of the UK leaving the EU.[90] Up to six million people in the UK are said to be eligible to seek Irish passports based on having an Irish parent or grandparent. EU citizens in the UK may seek to combine UK citizenship, along with their existing citizenship, and likewise UK citizens resident in other Member States may also seek citizenship

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scotland-if-uk-votes-'no'-in-eu-referendum, accessed 19 July 2016; Curtice, 'Might Scotland Vote' (n**Error! Bookmark not defined.**).

[86] Scottish Government, 'First Minister forms group to advise on Scotland's relationship with the EU', (28 June 2016) http://news.scotland.gov.uk/News/Standing-Council-on-Europe-25c6.aspx, accessed 19 July 2016.

[87] 'May says won't trigger EU divorce until UK-wide approach agreed'(15 July 2016) *Reuters*, http://www.reuters.com/article/us-britain-eu-scotland-may-idUSKCN0ZV1I0, accessed 19 July 2016.

[88] See Mitchell, 'Unpredictable' (n20). The West Lothian Question is usually described in terms of Scottish MPs voting on matters that only affect England (or at least not Scotland), and was recently addressed through the introduction of a limited version of English Votes for English Laws' (EVEL) by means of Standing Order changes in the Westminster Parliament.

[89] S. Carrell, 'EU referendum: English votes to leave could be offset by rest of UK' (2 December 2015) *The Guardian*, www.theguardian.com/politics/2015/dec/02/eu-referendum-english-votes-offset-by-scotland-wales-northern-ireland-uk, accessed 19 July 2016.

[90] This option was cited in the Scottish context by Jim Gallagher: see J. Gallagher, ' Citizenship, Borders and Migration in an Independent Scotland' (September 2013) *Policy Primer*, www.migrationobservatory.ox.ac.uk/policy-primers/citizenship-borders-and-migration-independent-scotland, accessed 19 July 2016. 'Britons swamp Ireland with passport applications' (27 June 2016) *Financial Times*, https://next.ft.com/content/b258cb28-3c82-11e6-9f2c-36b487ebd80a accessed 19 July 2016.

more actively than at present.[91] If, as seems anecdotally to be happening,[92] larger numbers of citizens choose these options it could lead to a substantial reconfiguration of the 'we' who inhabit these islands. These considerations are in addition to the complex citizenship changes we would expect in the event of a Scottish secession from the rest of the UK.

At the time of writing, the matters under discussion were fluid in character. But the complexities of the UK's case of troubled membership are already visible, if not always easy to comprehend, because so many different aspects of the UK's constitutional constellation are brought into question.

This chapter does not seek to assert that the Scottish case provides some sort of paradigm that others might follow. Each case of regional 'trouble' in the EU (e.g. Catalonia, Flanders, etc.) is different, characterised by different constellations of political forces and constitutional contexts, and the UK is unique in (currently) compounding its regional 'trouble' with an additional question of whether the state as a whole should remain a Member State of the European Union. What this chapter has sought to do is to show that citizenship – as a legal status and as the basis for political membership – operates as a useful prism through which to observe the interplay of individual status and rights, of competing and overlapping legal orders, and of political contestations of belonging and membership.

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[91] On EU citizens naturalizing in the UK, see Migration Observatory, 'Naturalisation as a British Citizen. Concepts and Trends' (March 2015) www.migrationobservatory.ox.ac.uk/briefings/naturalisation-british-citizen-concepts-and-trends, accessed 19 July 2016. Discerning the naturalisation rates for UK citizens in other EU Member States is a much more difficult task.

[92] 'Thousands of Brits rush for EU passports after Brexit vote' (18 July 2016) *CNN Money*, http://money.cnn.com/2016/07/18/news/uk-british-european-passports-citizenship-brexit/ accessed 19 July 2016.