



THE UNIVERSITY *of* EDINBURGH

Edinburgh Research Explorer

Recasting EU citizenship as federal citizenship

Citation for published version:

Nic Shuibhne, N 2017, Recasting EU citizenship as federal citizenship: What are the implications for the citizen when the polity bargain is privileged? in D Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights*. Cambridge University Press, Cambridge, pp. 125-146.
<https://doi.org/10.1017/9781139680714.007>

Digital Object Identifier (DOI):

[10.1017/9781139680714.007](https://doi.org/10.1017/9781139680714.007)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Peer reviewed version

Published In:

EU Citizenship and Federalism

Publisher Rights Statement:

This material has been published in *EU Citizenship and Federalism: The Role of Rights* by / edited by Dimitry Kochenov,. This version is free to view and download for personal use only. Not for re-distribution, re-sale or use in derivative works. © Cambridge University Press." <https://doi.org/10.1017/9781139680714>

General rights

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact openaccess@ed.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.



Recasting EU Citizenship as Federal Citizenship: What Are the Implications for the Citizen when the Polity Bargain Is Privileged?

Niamh Nic Shuibhne*

I. Introduction

In her Opinion in *Audiolux*, Advocate General Trstenjak characterised the obligation now expressed in Article 4(3) of the Treaty on European Union (TEU)¹ as ‘[t]he recognition of *federal commitments* within the European [Union] [which] includes the frequently highlighted principle of cooperation among the Member States and their obligations to cooperate in relation to the [Union]’.² Her careful phrasing captures the basic position also mirrored across the literature: the EU is not a federation at the formal level, but it is distinctly *federal* nevertheless. Accepting that premise as a starting point, this chapter explores two linked questions. First, if the EU legal order is viewed through a template of federalism, what are the implications for how we perceive the leadership of the Court of Justice in its shaping of EU citizenship?³ However, second, what added value does that analysis actually bring, and for whom?

The chapter’s central claim has two parts. First, I argue that adopting federalism as a framework for analysis works well in an explanatory sense – in particular, it provides some justification for more restrictive case law on citizenship where rights are refracted or curtailed. In other words, when the boundaries prescribed by the EU federal bargain are placed at the centre of the analysis, the lines drawn by the Court around the scope of EU citizenship find better rationalisation. Viewed in this light, more conservative jurisprudence exhibits a dynamic of ‘correction’ on the part of the Court, a self-reorienting of its leadership role towards classic federal court markers. In particular, it will be argued that the changes

* University of Edinburgh; I am extremely grateful to Dimitry Kochenov for his comments on an earlier draft, and to the authors’ workshop participants for broader debates and discussions.

¹ Consolidated version of the Treaty on European Union (TEU), OJ 2012 No. C326/13.

² Case C-101/08, *Audiolux SA and Others v. Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others*, EU:C:2009:626, [2009] ECR I-9823, Opinion of AG Trstenjak, EU:C:2009:410, para. 72 (emphasis added); she expressed the same point in Case C-282/10, *Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, EU:C:2012:33, Opinion of AG Trstenjak, EU:C:2011:559, para. 97. In a different context, AG Sharpston argued in *Ruiz Zambrano* that ‘[m]aking the application of EU fundamental rights dependent solely on the existence of exclusive or shared EU competence would involve introducing an *overtly* federal element into the structure of the EU’s legal and political system’, underscoring the radical implications of such a step by drawing parallels with US constitutional history: Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l’emploi (ONEm)*, EU:C:2011:124, [2011] ECR I-1177, Opinion of AG Sharpston, EU:C:2010:560, para. 172 (emphasis added). The classic federal statement came from AG Lagrange in Case 8/55, *Fédération Charbonnière de Belgique v. High Authority of the European Coal and Steel Community*, EU:C:1956:7, [1954–1956] ECR 245, Opinion of AG Lagrange, EU:C:1956:8, 277.

³ Emphasis of the judicial leadership provided by the Court of Justice should, however, be placed on awareness that the EU is a ‘federation that continues to largely rely on its Member States to apply and implement [Union] law’: R. Schütze, ‘On “Federal” Ground: The European Union as an (Inter)national Phenomenon’ (2009) 46 *Common Market Law Review* 1069 at 1087–88.

induced by the Lisbon Treaty compel a constitutional recalibration towards *decentralisation* in that regard. However, second, reflecting on the normative desirability of that outcome raises more difficult questions. Emphasising the EU as a federal construct does not ensure that the rights of Union citizens are protected as consistently or as deeply as they might be in a more substantive sense: if concern for the federal deal emerges (or re-emerges) at the interpretative centre of things, how is concern for the citizen to be properly accommodated?

To develop these claims, the chapter first outlines the concepts associated with federalism and federal citizenship that will be focused on here, and translates that discourse to the EU context (Section 2). The role of the apex court within a federal system and the implications of the Lisbon Treaty for the federal character of the Union are also presented in Section 2, before assessing in Section 3 whether and how the trajectories of the Court's citizenship case law can be mapped onto those coordinates. In Section 4 the implications of applying federal analysis – for the citizen, for the Court and for the EU more generally – are then considered. It is important to emphasise from the outset that gaps in citizenship protection are not wholly attributable to a failure of the Court or of its judicial leadership. Rather, the diverse and contested understandings of the political basis of EU federalism held by the State partners who retain definitive oversight of its nature and direction leave an acutely constrictive imprint on the potential of EU citizenship with which we persistently struggle to come to terms. Even so, however, when a shift in emphasis does occur in the case law, the course of rights protection can also be altered in a more substantive sense: and what happens then? What happens to the substantive rights at issue and to the citizens who claimed them? Here it will be argued that there is a more primal rule of law question that needs to be answered.

II. The EU as a federal polity

For present purposes, the *concept* of federalism can be distinguished from the particularity of different federal *structures*: as Koslowski puts it, 'federalism is an idea, a theory, an ideology...that manifests itself in several political forms, *the most important* being federation and confederation'.⁴ Characterisation of the EU as a federal polity is not being tested here; rather, it provides a starting point.⁵ In substantive debates on the nature of EU federalism, the differences between *types* of federalism – for example, between integrative and devolutionary federalism, or between cooperative and dual federalism – become important.⁶ However, a

⁴ R. Koslowski, 'A Constructivist Approach to Understanding the European Union as a Federal Polity' (1999) 6 *Journal of European Public Policy* 561 at 563 (emphasis added).

⁵ The key protagonists of the federal character of the EU include Koen Lenaerts, in e.g. 'Federalism: Essential Concepts in Evolution – The Case of the European Union' (1998) 21 *Fordham International Law Journal* 746; 'Federalism and the Rule of Law: Perspectives from the European Court of Justice' (2010) 33 *Fordham International Law Journal* 1338; and Robert Schütze, in e.g. *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford: Oxford University Press, 2009); 'On "Federal" Ground', note 3 above). See also, Koslowski, 'A Constructivist Approach', note 4 above, 567–68: '[a]lthough intentional efforts to build a European federation have indeed failed to produce a federal state, it does not mean that political practices that lacked a federal intent have not produced a federal outcome, regardless of what it may be called'. Others have been more cautious; see e.g., J. H. H. Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration* (Cambridge: Cambridge University Press, 1999), who tends to use the term 'non-unitary system' to describe the EU.

⁶ See e.g., K. Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 *American Journal of Comparative Law* 205 at 206. Relatedly, Schönberger contrasts the nature of 'federalism by aggregation' with a

more basic or operational template of federalism can be constructed by mapping the extent to which key federal markers appear and overlap in that discussion. In essence, five basic elements must be present: a federal governance system (1) does not need to take the form of a nation state, but must represent a *commitment to common or shared values*;⁷ (2) it must be based on the *division of power* (broadly speaking, legislative, executive and judicial power) between a *central authority* and *component entities or units*;⁸ (3) that power-dividing or power-sharing relationship must be structured and preserved by *central constitutional principles*;⁹ (4) and it must be characterised by *divided sovereignty*¹⁰ (5) in *certain areas*.¹¹

From this brief outline of the essential qualities of federalism, both the nature of and contestations about the EU emerge identifiably. An important thematic link that brings the individual elements together is the idea of *self-containment*: in other words, the central authority and the component units are each ‘responsible for the exercise of their own powers’.¹² Federalism thus establishes and sustains a *deliberately* binary or dual system of competences, and it does not in and of itself demand an inherent ambition for or propulsion towards a seamless unitary entity.¹³ Lenaerts explains this further by illuminating the dynamism at the heart of self-containment as an ongoing labour of self-preservation: ‘federalism searches for the balance between the desire to create and/or retain an *efficient central authority* that can find its origin in historic, social or other considerations, and the concern of the component entities to keep or gain their autonomy *so that they can defend their own interests*’.¹⁴

Similarly, he refers to ‘the central authority [being] perceived as the most efficient way of pursuing *a single set of common values held by a plurality of different peoples* that are eager to see their identity preserved in all circumstances’.¹⁵ That sentence also reflects the complex challenges that must be managed within a federal system: because it is never clear that there is a ‘single set of common values’ that can guide the resolution of disputes or the filling of grey spaces; and it is never clear that the pursuit of even commonly agreed values can be reconciled with the preservation of pluralist identities ‘in all circumstances’. However, that challenge is also, in part at least, a feature of all political systems – something that occurs naturally, in other words, even in the absence of more overt disputes about polity structure. As Fuller observes, ‘[t]he ideals that keep a social institution alive and functioning are never perceived with complete clarity, so that even if there is no failure of good intentions, the existent institution will never be quite what it might have been had it been supported by a clearer insight into its guiding principles’.¹⁶

‘process of disaggregation’. C. Schönberger, ‘European Citizenship as Federal Citizenship: Some Citizenship Lessons of Comparative Federalism’ (2007) 19 *Revue Européenne de Droit Public* 61 at 64.

⁷ E.g. Lenaerts, ‘Federalism: Essential Concepts’, note 5 above, 749–50.

⁸ E.g. J. Rinze, ‘The Role of the European Court of Justice as a Federal Constitutional Court’ [1993] *Public Law* 426 at 427.

⁹ E.g. Koslowski, ‘A Constructivist Approach’, note 4 above, 565.

¹⁰ E.g. Lenaerts, ‘Constitutionalism’, note 6 above, 263.

¹¹ E.g. B. Friedman and E. F. Delaney, ‘Becoming Supreme: The Federal Foundation of Judicial Supremacy’ (2011) 111 *Columbia Law Review* 1137 at 1147.

¹² E.g. Lenaerts, ‘Federalism: Essential Concepts’, note 5 above, 748.

¹³ See further, J. Snell, ‘Who’s got the power? Free movement and allocation of competences in EC law’ (2003) 22 *Yearbook of European Law* 323.

¹⁴ Lenaerts, ‘Federalism: Essential Concepts’, note 5 above, 748 (emphasis added).

¹⁵ *Ibid.*, 749 (emphasis added).

¹⁶ L. H. Fuller, ‘The Forms and Limits of Adjudication’ (1978) 92 *Harvard Law Review* 353 at 356.

We should also heed Fuller’s caution that ‘it is, in the long run, the actively shared and at least vaguely understood aims that give the association its motive power [...] without some actual sharing of aims affirmatively entertained, however impoverished the aims and however restricted the sharing, no government is possible’.¹⁷ Post-Lisbon, the Treaty framework is saturated with apparently shared aims expressed through the language of objectives and values;¹⁸ but the tension between Union and Member State *ownership* of those aims is never far from the surface,¹⁹ a point developed further in Section 2c below. Similarly, the statements in Article 4 TEU about competences shared by the Union and the Member States do not – could not – neatly resolve the persisting boundary questions that actually shape their *exercise* on a practical basis. Writing about the democracy deficit and social legitimacy concerns typically associated with the Union, Weiler suggests that ‘[t]he primary factor is, at least arguably, that the European electorate (in most Member States) only grudgingly accepts the notion that crucial areas of public life should be governed by a decisional process in which their national voice becomes a minority which can be overridden by a majority of representatives some other European countries’.²⁰ Moreover, the *extent* of public disagreement about the Union’s nature and purpose as a transnational polity cannot but leave an imprint on the nature and purpose of its citizenship.

At a basic level, ‘the very values on which federalism is built [include] co-operation, recognition of diversity (pluralism), solidarity, and limitation of powers’.²¹ But commitment to a more substantive set of shared values is surely also needed, in order to sustain and deepen the agreement originally entered into – there is more to the federal polity, in other words, than preservation of the federal structure in the abstract: what *kind* of polity, normatively speaking, does the structure actually stand for? This fundamental question becomes, therefore, the central guiding standard for the analysis of EU citizenship, which follows in Sections 3 and 4 below.

A. The role of the apex federal court

The Court of Justice does not share all of the expected features of an apex federal court. It does not, for example, have direct appellate jurisdiction over the courts of the Member States and it cannot annul a national measure that conflict with EU law. Rinze highlights these constraints as ‘major differences between the Court of Justice and the constitutional courts in federal states...[T]he power of a constitutional court in a federal state to review state law for its compatibility with federal law is absolutely crucial for the continued existence of the federal state’.²² However, the Court has ensured that it exercises broadly equivalent powers in reality – by widening the scope of the preliminary rulings procedure, for example, by

¹⁷ Ibid., 359.

¹⁸ See in particular, Arts. 2 and 3 TEU.

¹⁹ See in particular, Art. 4(2) TEU: ‘The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State’.

²⁰ J. H. H. Weiler, ‘The Transformation of Europe’, in J. H. H. Weiler, *The Constitution of Europe: “Do the New Clothes Have an Emperor?” and Other Essays on European Integration* (Cambridge: Cambridge University Press, 1999), p. 84.

²¹ Lenaerts, ‘Federalism: Essential Concepts’, note 5 above, 787.

²² Rinze, ‘The Role of the European Court of Justice’, note 8 above, 431.

requiring the disapplication of national measures that do not comply with EU law, and by establishing that preliminary rulings have *erga omnes* effect.²³

More generally, it is apparent that the main features of federal courts are, in any event, more context-specific than inherently ordained.²⁴ For example, writing about the US, Fuller observed:

In our own history the Supreme Court at an early date excluded from its jurisdiction certain issues designated as ‘political’. This exclusion could hardly be said to rest on any principle made explicit in the Constitution; it was grounded rather in a conviction that certain problems by their intrinsic nature fall beyond the proper limits of adjudication, though how these problems are to be defined remains even today a subject for debate.²⁵

It would be fair to say that the Court of Justice is not usually written about in similar terms of self-restraint as regards the carving out of its own jurisdiction,²⁶ but support for the fact that a significant degree of leeway *should* be accorded to apex federal courts is not difficult to find. Fuller himself argues that ‘[i]n working out the implications of federalism... a court is *not an inert mirror* reflecting mores *but an active participant* in the enterprise of articulating the implications of shared purposes’.²⁷ In the context of ‘maintaining a working federalism’, Freund puts it this way: ‘judicial review is not merely a derivative from a society in agreement on fundamentals; in itself it is an *educative and formative influence* which... may have consequences beyond its immediate application for the mind of a people’.²⁸ Similarly, Stone Sweet suggests that ‘[t]he power of judicial review is the power to determine constitutional policy, *prospectively*’.²⁹

In the performance of that role, however – even accepting the Court as an ‘active participant’ and ‘educative and formative influence’ – the preservation of agreed regulatory

²³ Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, EU:C:1978:49, [1978] ECR 629; and Case 66/80, *SpA International Chemical Corporation v. Amministrazione delle finanze dello Stato*, EU:C:1981:102, [1981] ECR 1191 respectively.

²⁴ E.g. assessing the contrasting approaches of the Court of Justice and the Supreme Court of Canada to barriers to trade, see A. Hinarejos, ‘Free Movement, Federalism and Institutional Choice: A Canada–EU Comparison’ (2012) 71 *Cambridge Law Journal* 537.

²⁵ Fuller, ‘The Forms and Limits’, note 16 above, 355.

²⁶ There is a vast literature on the institutional character of the Court of Justice and the implications and propriety of its law-making choices; see just as a starting point, E. Stein, ‘Lawyers, Judges and the Making of a Transnational Constitution’ (1981) 75 *American Journal of International Law* 1; J. H. H. Weiler, ‘The Transformation of Europe’ (1991) 100 *Yale Law Journal* 2403; A. Stone Sweet, *The Judicial Construction of Europe* (Oxford: Oxford University Press, 2004); M. Everson and J. Eisner, *The Making of a European Constitution: Judges and Law Beyond Constitutive Power* (London: Routledge, 2007); and M. Adams et al. (eds.), *Judging Europe’s Judges: The Legitimacy of the Case Law of the European Court of Justice Examined* (Oxford: Hart Publishing, 2013).

²⁷ Fuller, ‘The Forms and Limits’, note 16 above, 378 (emphasis added); similarly, he contends that ‘the demands of a viable system of federalism are by no means immediately obvious. In gradually discovering and articulating the principles that will make federalism work, the courts may exemplify the process Mansfield had in mind when he spoke of the law “working itself pure”’ (377, referring to W. Holdsworth, *A History of English Law* (Boston, MA: Little Brown, 1938), p. 551).

²⁸ See generally, P. A. Freund, ‘Umpiring the Federal System’ (1954) 54 *Columbia Law Journal* 561 at 578 (emphasis added).

²⁹ A. Stone Sweet, ‘Why Europe Rejected American Judicial Review and Why It May Not Matter’ (2003) 101 *Michigan Law Review* 2744 at 2778 (emphasis added).

limits for the central authority (represented by the EU institutions) and for the component units (the Member States) respectively, must provide the constitutional lodestar for the Court of Justice when it resolves disputes and, through that process, ‘works out the implications’ of EU federalism as well as its ‘shared purposes’. This is not an easy task, especially when connected to doubts about the extent of genuinely *shared* values outlined earlier. Weiler notes that ‘[i]n most federal polities the demarcation of competences between the general polity and its constituent units is the most explosive of “federal” battlegrounds’.³⁰ He has also argued that the Court of Justice ‘did not build up a repository of credibility as a body which effectively patrols the jurisdictional boundaries between the [Union] and Member States’.³¹ Added to that, the *dual* role played by the Member States in the EU – of ‘participants in the [Union] decision-making and of antipodes to the legal order of the [Union] as such’³² – is also important.

The most common descriptor of courts attached to a federal system is that they are ‘umpires’ of the lines that delineate competence i.e. their fundamental purpose is to ‘strike the *appropriate balance of powers* between the federation and its component entities’.³³ Importantly, that purpose also indicates their *primary* function or loyalty vis-à-vis a constitution containing multiple values and principles that need to be balanced against each other in concrete cases. Linking this responsibility back to the template of federalism outlined above, federal courts are charged with protecting the borders between powers that may be exercised by the central authority and those that may be exercised by the component entities. The decisions of federal courts enjoy a specified degree of insulation from political override for precisely that reason: importantly for this chapter, federal courts are charged with protecting something *more entrenched* than the natural flows of political agreement and dispute, and something *more comprehensive* than the idiosyncrasies of a specific topic or issue. However, whether the realisation of that function can, in reality, engage the expected degree of separation of the political from the constitutional is surely less straightforward in practice than in theory.

Defending the ‘absolute judicial line’ that applies in the EU context, Lenaerts states that it would be ‘inadmissible that the Member States use their right to participation in the decision-making process of the [Union] with a view to regaining the powers they have transferred to the latter’.³⁴ For that reason, a decision of the Court of Justice – its interpretation of ‘the law’ in accordance with Article 19 TEU – can normally be altered only by the engagement of *constitutional*, not legislative, processes i.e. by Treaty amendment. Rinze expresses the point as follows: ‘as in federal states, the observance of [Union] rules by all Member States is absolutely crucial for the continued existence of the [Union], and there must be an independent and neutral arbiter of conflicts between [Union] law and national law’.³⁵ However, this assessment reflects another acknowledged tension within federal systems – a judicial bias towards the centre. As Freund puts it, ‘judicial review is intended

³⁰ Weiler, ‘The Transformation’, note 20 above, p. 39.

³¹ J. H. H. Weiler, ‘The Autonomy of the Community Legal Order: Through the Looking Glass’, in J. H. H. Weiler, *The Constitution of Europe: “Do the New Clothes Have an Emperor?” and Other Essays on European Integration* (Cambridge: Cambridge University Press, 1999), p. 320, using strands of the Court’s expansionist case law in the 1970s and 1980s to illustrate the claim.

³² Lenaerts, ‘Constitutionalism’, note 6 above, 262.

³³ E.g. *ibid.*, 205 (emphasis added); see further, 263.

³⁴ *Ibid.*, 260–61.

³⁵ Rinze, ‘The Role of the European Court of Justice’, note 8 above, 436.

pre-eminently as a restraint on state action'.³⁶ But the fact that the Court of Justice has never, to date at least, reviewed the constitutionality of an amendment to the Treaty *after* it has been adopted,³⁷ places an outer limits-type qualifier on the expected 'judicial bias towards the centre' that can be detected in other federal polities, and on the constitutional (and sovereign) growth capacity of the EU 'centre' more generally.

Interestingly, however, the constitutional construction of Union citizenship acknowledges, in Articles 20 and 21 of the Treaty on the Functioning of the European Union (TFEU),³⁸ that limits and conditions can be placed on citizenship rights not only by the Treaties but also by the measures laid down to give effect to those provisions i.e. *by legislation*. This atypical inversion of EU constitutional hierarchy further tempers the potential for bias towards the centre in the regulation of citizenship, but it also brings a distinctive layer of complexity to the role of the Court as an 'active participant' in the development of Union citizenship that we have to bear in mind. We normally evaluate legislation against constitutional principles: in the EU context, principles that are either articulated expressly in the Treaties or extracted more implicitly as general principles of EU law (historically, at least, noting that the constitutional place of general principles such as proportionality and fundamental rights has also gradually been written into the Treaties directly). The presumption of a primary/secondary norm hierarchy is the nucleus of constitutional (judicial) review, irrespective of the polity or system in question. Structuring the provisions on citizenship so that secondary law measures can limit the exercise of primary law rights is thus a fundamental disruption of the standard hierarchy. It also carries with it particular challenges for the Court's discharging of its obligation to ensure that the law is observed. How *far* can legislative conditions limit primary rights? Does the wording of Articles 20 and 21 introduce a *new* hierarchy or a more complex *balancing* obligation? Either way, where do the other constitutional principles and values of the Union, and of Union law, fit in the Court's determinations? Citizenship rights may be grouped together in one set of provisions, but they are also integrated into a much broader and much deeper Treaty framework, the implications of which will be picked up again in greater detail below.

Finally, we should recall once again the series of related tensions exposed across this summary: between the centre and the Member States; between the constitutional and the political; between protecting and determining; and between the demands of specific interests and the bigger, federal picture.

B. The premises of federal citizenship

Lenaerts notes that 'in a federal form of government, both the rules laid down by the central authority and by the component entities are aimed at affecting the legal sphere of individuals'.³⁹ The Court of Justice established this dimension of the Union legal order in *Van*

³⁶ Freund, 'Umpiring', note 28 above, 567.

³⁷ The Court can, however, offer a view on the constitutionality of actions being proposed outwith a completed Treaty amendment process; see e.g. Opinion 2/94, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, EU:C:1996:140, [1996] ECR I-1759. Discussion of the outer limits of judicial review by the Court of Justice is often revived in the wake of 'shot across the bow' judgments from national constitutional courts see e.g., G. Beck, 'The *Lisbon* Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of *Kompetenz-Kompetenz*: A Conflict between Right and Right in Which There is No *Praetor*' (2011) 17 *European Law Journal* 470.

³⁸ Consolidated version of the Treaty on the Functioning of the European Union (TFEU), OJ 2012 No. C326/47.

³⁹ Lenaerts, 'Federalism: Essential Concepts', note 5 above, 773.

Gend en Loos and *Costa v. ENEL*,⁴⁰ but the political creation of Union citizenship delivered another *order* of commitment to Member State nationals. In his characterisation of EU citizenship as a form of federal citizenship, Schönberger states that ‘[t]he most salient feature of federal citizenship is the fact that it usually implies a *dual citizenship of the same person at the state and the federal level*’.⁴¹ To illustrate the point, he draws from Justice Kennedy’s judgment in *US Term Limits, Inc v. Thornton*:

The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other...each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.⁴²

We saw earlier that the idea of ‘each protected from incursion by the other’ is a classic marker of federalism in general. It is not surprising, therefore, that federal citizenship signals a primary intention of self-containment, even within inevitably overlapping or shared regulatory spaces. Drawing further on parallels with US constitutional history, Schönberger identifies the primary means through which EU citizenship reflects the substance of federal citizenship: ‘two rights – free movement between the states and the obligation for the states to treat the citizens of the sister states on an equal footing with their own citizens – are the true kernel of federal citizenship’.⁴³ Several Advocates General have suggested, similarly, that these rights are indeed the ‘kernel’ of EU citizenship.⁴⁴ Schönberger does not, however, confine his analysis to the US: drawing from Switzerland, he emphasises that state citizenship, being the individual’s *primary* legal relationship, is not unique to the EU.⁴⁵ Thus ‘there is no need to explain the *derivative* character of European citizenship by the peculiarities of European integration; on the contrary, they follow the general path of federal citizenship in federal unions by aggregation’.⁴⁶

It is also worth reflecting on Weiler’s comment about the ‘ever closer union among the *peoples* of Europe’ committed to by Article 1 TEU: ‘[i]n that, Europe was always different from all federal states which...whilst purporting to preserve all manner of diversity,

⁴⁰ Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingen*, EU:C:1963:1, [1963] ECR (Special English Edition) 1; Case 6/64, *Flaminio Costa v. ENEL*, EU:C:1964:66, [1964] ECR 585.

⁴¹ Schönberger, ‘European Citizenship’, note 6 above, 66 (emphasis in original).

⁴² *US Term Limits, Incorporated and Others, Petitioners v. Ray Thornton and Others; Winston Bryant, Attorney General of Arkansas, Petitioner v. Bobbie E. Hill and Others*, 514 US 779, 838 (22 May 1995), cited by *ibid*.

⁴³ Schönberger, ‘European Citizenship’, note 6 above, 68.

⁴⁴ E.g. Case C-34/09, *Ruiz Zambrano*, EU:C:2011:124, [2011] ECR I-1177, Opinion of AG Sharpston, EU:C:2010:560, para. 80; Case C-524/06, *Heinz Huber v. Federal Republic of Germany*, EU:C:2008:724, [2008] ECR I-9705, Opinion of AG Poiares Maduro, EU:C:2008:194, para. 19; and Joined cases C-11/06 and C-12/06, *Rhiannon Morgan v. Bezirksregierung Köln and Iris Bucher v. Landrat des Kreises Düren*, EU:C:2007:626, [2007] ECR I-9161, Opinion of AG Ruiz-Jarabo Colomer, EU:C:2007:174, para. 67.

⁴⁵ A point also made with regard to the US in other work; see e.g. T. Fischer and S. Neff, ‘Some American Thoughts about European “Federalism”’ (1995) 44 *International and Comparative Law Quarterly* 904 at 913.

⁴⁶ Schönberger, ‘European Citizenship’, note 6 above, 76 (emphasis added). Addressing long-standing debates on citizenship and demos, Koslowski suggests that if national voting rights became part of EU citizenship, then the European demos would ‘more closely resemble traditional federal models’. Koslowski, ‘A Constructivist Approach’, note 4 above, 573).

real and imaginary, always insisted on the existence of a single people at the federal level'.⁴⁷ Schönberger makes a similar point to develop one potential dimension of Weiler's proposition i.e. to denote the limits of EU citizenship, arguing that '[t]he horizontal integration of particular individuals into the society of the host Member State cannot contribute significantly to a stronger common identity of the European Union as a whole. This strong identity would have to develop at the level of the Union itself, in the immediate relationship between the Union and its citizens'.⁴⁸ Emphasising identity as a core cell of citizenship is not, however, a straightforward or uncontested argument: in particular, it raises the more subjective nature of 'identity' generally and the usefulness of that type of concept as a marker of *transnational* citizenship specifically.⁴⁹ An alternative method might consist of better communicating the fact that the relationship between the host State and the migrant stems not from 'immediacy' but rather from the wholly engineered, artificial assembly of the Union per se. Moreover, the *wider* experience of transnational life that most Member State nationals have could be showcased when measuring the catalytic role of the Union – people but also services and products move about its territory, both physically and virtually, *all* the time, through processes profoundly yet almost imperceptibly influenced and facilitated by the Union and Union law.

Making a similar point, Koslowski suggests that '[t]he everyday practicalities of internal movement have facilitated the process of legal integration by creating circumstances leading to legal conflicts between resident aliens and the member states in which they reside', conflicts then resolved by raising EU law arguments in national courts.⁵⁰ However, while he uses the language of 'resident aliens', his example is *Cowan* – an archetypal case of brief and temporary movement.⁵¹ Is this really, however, the core material of *citizenship*? The single *people* who have dominated the concern of the federal Union to date could perhaps be described as the *transnationally engaged* because, as will be seen in Section 3, EU case law pierces beyond the cross-border benchmark in only the most extreme of circumstances. Concern for the transnational does of course leave most Union citizens outside the protective net of citizenship rights unless all kinds of cross-border connections and experiences are repackaged as instances of citizenship – a strategy that could communicate the virtues of integration more concretely to more citizens, on the one hand, but could displace the purpose and potential of having a distinctive *citizenship* of the Union at all, on the other. Moreover, the current *political* debate on these questions is utterly disheartening, especially when linked explicitly – as it now so often is – to the objective of *curbing* the legacy of free movement.⁵² We should be cautious, therefore, about assuming that the fundamentals of Union law, even at the basic level of delivering a transnational market enterprise, are secure.

⁴⁷ Weiler, 'The Autonomy', note 31 above, pp. 327–28.

⁴⁸ Schönberger, 'European Citizenship', note 6 above, 79.

⁴⁹ Framing identity questions around *intuitive* and *institutional* markers, see G. Palombella, 'Structures and Process in the Constitutional Self: Coping with the Future?' (2011) 8 *International Journal of Constitutional Law* 656.

⁵⁰ Koslowski, 'A Constructivist Approach', note 4 above, 570; similarly, at 573, he notes that 'the politically contested practical realization of the rights and duties of citizens within the jurisdictional spaces created' can be a 'potential source of legitimacy'.

⁵¹ Case 186/87, *Ian William Cowan v. Trésor public*, EU:C:1989:47, [1989] ECR 195.

⁵² See further, the analysis under Question 15 in particular (on national media reporting of Union citizenship issues) in N. Nic Shuibhne and J. Shaw, 'Union Citizenship: Development, Impact and Challenges' (FIDE XXVI, Copenhagen, 28–31 May 2014).

C. Pulses of decentralisation? Interpreting the federal signals of the Lisbon Treaty

It was suggested above that the Lisbon Treaty (re-)asserted rather than diminished the weight of the *national* in the Union federal bargain, using Article 4(2) TEU as an example. If we reframe that example as one instance of a broader pulse of *decentralisation*, a myriad of other examples also materialise.⁵³ Staying with the theme of renewing the national, for example, consider the requirement of protecting rights ‘in accordance with national law and practices’ – a phrase that appears in several provisions of the Charter of Fundamental Rights (CFR)⁵⁴ and is reinforced more generally in Article 52(6) CFR: a provision that was not, moreover, included in the original text of the Charter.⁵⁵ Importantly, the instruction acquired primary law status alongside the substantive rights that the Charter protects,⁵⁶ and – as illustrated further in Section 3 below – the Court has referred directly to the constraints confirmed by the Charter and not only to the rights that it protects; in other words, in several of its post-Lisbon citizenship judgments.⁵⁷

Tracing the momentum of decentralisation even more consciously through a federal prism, perhaps the most striking Lisbon contribution is the explicit demarcation, for the first time, of both EU and Member State competences in Articles 4–6 TFEU. The intentional empowerment of national parliaments as institutions participating in Union law-making – most notably as guardians (or, in federal language, patrollers) of the principle of subsidiarity⁵⁸ – provides another example, as reflected in Article 12 TEU. A less obvious example concerns the issue of individual standing before the Court of Justice; rather than effecting a fundamental overhaul of that framework in a way that opens up standing directly before the EU Courts,⁵⁹ Article 19(1) TEU outlines that it is the responsibility of the Member States to ‘provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’. A perhaps less obvious, though no less relevant, example can still be seen in Article 17(1) TFEU, which states that ‘[t]he Union respects and does not prejudice *the status under national law* of churches and religious associations or communities in the Member States (emphasis added).

Decentralisation is not always about the State, either. For example, the mechanism of the citizens’ initiative (Articles 11(4) TEU and 24 TFEU) is intended to facilitate direct citizen engagement with the shaping of Union law and policy. The Lisbon Treaty also

⁵³ For a comprehensive analysis of the Lisbon Treaty, see M. Dougan, ‘The Treaty of Lisbon 2007: Winning Minds, Not Hearts’ (2008) 45 *Common Market Law Review* 617.

⁵⁴ Charter of Fundamental Rights of the European Union (CFR), OJ 2012 No. C326/391.

⁵⁵ Cf. Charter of Fundamental Rights of the European Union, OJ 2000 No. C364/1.

⁵⁶ See further, K. Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (2012) 8 *European Constitutional Law Review* 375.

⁵⁷ E.g. citing the limits imposed by Art. 51(1) CFR, see Case C-87/12, *Kreshnik Ymeraga and Others v. Ministre du Travail, de l’Emploi et de l’Immigration*, EU:C:2013:291, para. 4; Case C-256/11, *Murat Dereçi and Others v. Bundesministerium für Inneres*, EU:C:2011:734, [2011] ECR I-11315, para. 71; and Case C-40/11, *Yoshikazu Iida v. Stadt Ulm*, EU:C:2012:691, paras. 78–81.

⁵⁸ See further, Protocol (No. 1) on the role of national parliaments in the European Union, OJ 2012 No. C326/203 and Protocol (No. 2) on the application of the principles of subsidiarity and proportionality, OJ 2012 No. C326/206.

⁵⁹ Art. 263 TFEU (ex Art. 230 Consolidated version of the Treaty establishing the European Community (EC), OJ 2006 No. C326/37) does now extend the standing of natural and legal persons in actions for judicial review to challenge ‘a regulatory act which is of direct concern to them and does not entail implementing measures’, but the Court has been careful to delimit the scope of that addition; see further, A. Kornezov, ‘Shaping the New Architecture of the EU System of Judicial Remedies: Comment on *Inuit*’ (2014) 39 *European Law Review* 251.

strengthens the impression of ‘checking’ the centre through its introduction of various methods for enhanced scrutiny. For example, Article 15(2) TFEU includes the requirement that the Council must meet in public ‘when considering and voting on a draft legislative act’; Article 6(2) TEU compels EU accession to the European Convention on Human Rights (ECHR);⁶⁰ and Article 255 TFEU establishes a panel to oversee the appointment of judges to the Court of Justice and General Court.

Section 3 argues that these constitutional signals have transmitted a recalibrated federal message that the Court of Justice seems to have taken on board in more recent citizenship case law. It is not that the Lisbon Treaty has radically altered the premises of Union citizenship in a direct sense;⁶¹ rather, the argument is that the Treaty has altered the broader constitutional – and thus the broader federal – *context* within which Union citizenship is now being developed and, more specifically, the context within which Union citizenship disputes are now being adjudicated. The consequences of the resulting case law shift for *citizens* will be addressed in Section IV.

III. Recasting EU citizenship case law as federal citizenship case law?

Articles 3 and 6 TFEU, which delimit Union and Member State competences that are either exclusive to the Union or confined to ‘competence to carry out actions to support, coordinate or supplement the actions of the Member States’,⁶² are silent about responsibility for the regulation of Union citizenship. This means that such regulation is a joint endeavour according to Article 4(1) TFEU. Shared competence for Union citizenship makes conceptual sense: it is a distinctive EU status; but it is also dependent upon the holding of Member State nationality and conceived of as being ‘additional’ to national citizenship.⁶³ In reality, however, the Member States have had little scope to *share* the manifestation of that competence in any meaningful sense: mainly because Union citizenship law has been a heavily centralised enterprise, building, as it does, on decades of EU legislation and case law on the free movement of persons. For example, even the gateway condition of Member State nationality can be assessed against the requirements of EU law. In *Micheletti*, the Court held that:

[I]t is for each Member State, having due regard to [Union] law, to lay down the conditions for the acquisition and loss of nationality. *However*, it is not permissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty.⁶⁴

⁶⁰ Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Rome, 4 November 1950, entered into force 3 September 1953, ETS 5; 213 UNTS 221.

⁶¹ See further, N. Nic Shuibhne, ‘EU Citizenship after Lisbon’, in D. Ashiagbor, N. Countouris and I. Lianos (eds.), *The European Union after the Treaty of Lisbon* (Cambridge: Cambridge University Press, 2012), and the contribution to this volume by... [Dimitry: you said this is also the premise of another chapter in the volume, can you add the specifics here? Thanks!]

⁶² Art. 6 TFEU.

⁶³ Art. 20 TFEU.

⁶⁴ Case C-369/90, *Mario Vicente Micheletti and Others v. Delegación del Gobierno en Cantabria*, EU:C:1992:295, [1992] ECR I-4239, para. 10 (emphasis added).

In *Rottmann*, the Court went further, widening the *Micheletti* focus on grant of nationality as ‘conditions for the loss and acquisition of nationality’⁶⁵ and asserting that ‘a decision withdrawing naturalisation...is amenable to judicial review carried out in the light of European Union law’,⁶⁶ with particular emphasis on the requirements of proportionality.⁶⁷ It is arguable that the level of interference with national decision-making that a reminder about proportionality actually imposes is going to be slight in reality. However, the pervasiveness of Union law in regulatory spheres that were presumed to fall more discretely within national competence still poses a challenge to the federal concern with self-containment at the conceptual level. In any event, preservation of the need *first* to demonstrate a connection to Union law – even if that connection amounts to the mere holding of Union citizenship per se⁶⁸ – before the Court can review national measures of this kind is what preserves the federal compact.⁶⁹ Even if that holds true at the formal level, however, the Court’s (then) prevailing tendency to *expand* the Union ‘side’ of citizenship regulation – on which more below – does raise questions about whether its *primary* loyalty really was directed towards preserving the underpinning federal deal.

Most of the contributions to this volume include detailed analysis of the Court’s citizenship case law, and so the discussion here draws from that work to identify more general trends and trajectories. The first point to make is that the *expansionist dynamic* introduced above in the discussion on *Rottmann* is also reflective of citizenship case law more generally – at least up to and including the ruling in *Ruiz Zambrano*.⁷⁰ Thus, following the paradigm shift brought about by *Martínez Sala*, which detached citizenship rights from economic activity in order to establish a citizenship-specific route into the personal scope of EU law,⁷¹ the Court chose to stimulate the ‘fundamental status’⁷² that Union citizenship was – *in its view* – destined to become. Representative case law examples include the mitigation of legislatively agreed conditions attached to lawful residence in a host Member State⁷³ and the

⁶⁵ Case C-135/08, *Janko Rottmann v. Freistaat Bayern*, EU:C:2010:104, [2010] ECR I-1449, para. 39.

⁶⁶ Case C-135/08, *Rottmann*, EU:C:2010:104, [2010] ECR I-1449, para. 48.

⁶⁷ Case C-135/08, *Rottmann*, EU:C:2010:104, [2010] ECR I-1449, paras. 55–59.

⁶⁸ See generally, E. Spaventa, ‘Seeing the Wood despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects’ (2008) 45 *Common Market Law Review* 13.

⁶⁹ On *Rottmann* specifically, see further D. Kochenov, ‘Case C-135/08, *Janko Rottman v. Freistaat Bayern*, Judgement of 2 March 2010 (Grand Chamber)’ (2010) 47 *Common Market Law Review* 1831; and see generally, Lenaerts, ‘Federalism and the Rule of Law’, note 5 above, 1344 and 1386 in particular: ‘There are no enclaves of national sovereignty precluding EU law from displaying its pervasive effects [...] provided that there is a link with the substantive law of the Union, there is an EU framework that percolates through all areas of national law, limiting the discretion of national legislators and administrative authorities’.

⁷⁰ Case C-34/09, *Ruiz Zambrano*, EU:C:2011:124, [2011] ECR I-1177.

⁷¹ Case C-85/96, *María Martínez Sala v. Freistaat Bayern*, EU:C:1998:217, [1998] ECR I-2691.

⁷² Case C-184/99, *Rudy Grzelczyk v. Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve*, EU:C:2001:458, [2001] ECR I-6193, para. 31.

⁷³ E.g. forgiving less than ‘comprehensive’ sickness insurance (a condition now specified in Art. 7 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ 2004 No. L158/77) in Case C-413/99, *Baumbast and R. v. Secretary of State for the Home Department*, EU:C:2002:493, [2002] ECR I-7091; excusing Union citizens who reside in a host State on the basis of that State’s *national* law from compliance with the conditions on self-sufficiency (prescribed by Art. 7 of the Directive) in Case C-456/02, *Michel Trojani v. Centre public d’aide sociale de Bruxelles (CPAS)*, EU:C:2004:488, [2004] ECR I-7573; and removing benefits

revisiting of restrictive case law on the explicit basis of citizenship's transformative legal power.⁷⁴ The invigoration of citizenship rights concretely and of the status of Union citizenship more abstractly that resulted from this case law is well documented.⁷⁵ Importantly, within that jurisprudence, a decision that was more limiting of citizenship rights stood out awkwardly as an exception rather than a rule, even when the relevant limit could be clearly traced to a condition laid down in secondary legislation.⁷⁶

Ruiz Zambrano marked the pinnacle of the rights-expanding trajectory in many respects, as the first case in which the Court explicitly established a role for Union citizenship rights in family reunification situations wholly confined to one Member State.⁷⁷ Kochenov characterised the resulting legal sea change as follows: '[t]he possession of EU citizenship as such – not a flexible interpretation of whether the concrete situation at issue is within the material scope of EU law – came to play the fundamental role...marking a radical departure from previous practice'.⁷⁸

But Kochenov went on to capture the second key point that needs to be emphasised here: '[h]aving promised in *Rottmann* and *Ruiz Zambrano* to turn EU citizenship rights into the fundamental lens through which to regard fundamental rights and the essence of EU federalism (moving from purely market-oriented cross-border logic to a citizenship and

connected to support for jobseekers from the scope of Art. 24(2) of the Directive in Joined cases C-22 and C-23/08, *Athanasios Vatsouras and Josif Koupatantze v. Arbeitsgemeinschaft (ARGE) Nürnberg 900*, EU:C:2009:344, [2009] ECR I-4585, through a compound 'citizen-worker' status. On the implications of that hybrid status more generally, noting its blending together of economic and non-economic frameworks in particular, see N. Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (Oxford: Oxford University Press, 2013), pp. 74–81.

⁷⁴ E.g. to bring student maintenance grants within the scope of Union law (Case C-209/03, *R., on the application of Dany Bidar v. London Borough of Ealing and Secretary of State for Education and Skills*, EU:C:2005:169, [2005] ECR I-2119); and to expunge a prior lawful residence requirement from the rules concerning the family members of Union citizens (Case C-127/08, *Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform*, EU:C:2008:449, [2008] ECR I-6241).

⁷⁵ E.g. D. Kochenov, 'The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon?' (2013) 62 *International and Comparative Law Quarterly* 97; M. Dougan, 'Judicial Activism or Constitutional Interaction? Policymaking by the ECJ in the field of Union Citizenship', in H. Micklitz and B. de Witte (eds.), *The European Court of Justice and the Autonomy of the Member States* (Antwerp: Intersentia, 2012); and 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* 34.

⁷⁶ E.g. Case C-158/07, *Jacqueline Förster v. Hoofddirectie van de Informatie Beheer Groep*, EU:C:2008:630, [2008] ECR I-8507; see further, the powerful critique of this case by S. O'Leary, 'Equal Treatment and EU Citizens: A New Chapter on Cross-Border Educational Mobility and Access to Student Financial Assistance' (2009) 34 *European Law Review* 612.

⁷⁷ Cf. Case C-64/96, *Land Nordrhein-Westfalen v. Kari Uecker and Vera Jacquet v. Land Nordrhein-Westfalen*, EU:C:1997:285, [1997] ECR I-3171. Earlier examples of case law where citizenship rights made an impact in internal situations could include e.g. Case C-300/04, *M. G. Eman and O. B. Sevinger v. College van burgemeester en wethouders van Den Haag*, EU:C:2006:545, [2006] ECR I-8055 (although this case was about the setting of residence requirements in the context of European Parliament elections and thus based on Art. 22 TFEU and Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, OJ 1993 No. L329/34) or Case C-135/08, *Rottmann*, EU:C:2010:104, [2010] ECR I-1449 (although the applicant had moved from Austria to Germany in this case, a cross-border connection, in the background of the case at least, that is discussed more in the Opinion of AG Poiares Maduro, EU:C:2009:588, than by the Court).

⁷⁸ D. Kochenov, 'The Right to Have *What* Rights? EU Citizenship in Need of Clarification' (2011) 19 *European Law Journal* 502 at 506–07.

rights-based constitution of the vertical delimitation of the national and EU-level competences), the Court seems to be taking back its own word in *McCarthy* and *Dereci*.⁷⁹ In *McCarthy* the Court qualified the potential breadth of the *Ruiz Zambrano* test that protects the boundaries of internal situations against *undue* intrusion by EU law – deprivation of the genuine enjoyment of the substance of citizenship rights – by stressing that it applies only in exceptional and extreme circumstances, such as the forced departure of a Union citizen from the territory of the Union as a whole.⁸⁰ Reinforcing that point in *Dereci*, the Court also confirmed that infringement of fundamental rights is not as such sufficient to displace the wholly internal rule, referring to the limits of the Charter (Article 51(1) CFR in this case) as well as to the substantive right at issue (Article 7 CFR on respect for family life).⁸¹

These decisions do not detract from the fundamental constitutional step taken in *Ruiz Zambrano*, but they do restore the transnationally engaged as the primary beneficiaries of Union citizenship rights.⁸² However, the Court was also less generous in its interpretation of the more traditional route into the scope of the Treaty – impact on free movement rights – in these cases. For example, in *McCarthy*, the Court distinguished the applicant’s circumstances from the situation in *Garcia Avello*, where dual national citizens had successfully claimed a right under EU law to register their surnames in Belgium in accordance with the format established by Spanish law:

[I]n circumstances such as those examined in *Garcia Avello*, what mattered was [...] the fact that that discrepancy [in surnames] was liable to cause serious inconvenience for the Union citizens concerned that constituted an obstacle to freedom of movement that could be justified only if it was based on objective considerations and was proportionate to the legitimate aim pursued... Thus, in *Ruiz Zambrano* and *Garcia Avello*, the national measure at issue had the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status or of impeding the exercise of their right of free movement and residence within the territory of the Member States... [I]n the context of the main proceedings in this case, the fact that Mrs McCarthy, in addition to being a national of the United Kingdom, is also a national of Ireland does not mean that a Member State has applied measures that have the effect of depriving her of the genuine enjoyment of the substance of the rights conferred by virtue of her status as a Union citizen or of impeding the exercise of her right of free movement and residence within the territory of the Member States. Accordingly, in such a context, such a factor is not sufficient, in itself, for a finding that the situation of the person concerned is covered by Article 21 TFEU.⁸³

It is astonishing that being the carer of her disabled son in her home State was not raised as constituting an obstacle to Mrs McCarthy’s ability to move to another State purely in order to generate a residence right there with her for her third-country national spouse – especially

⁷⁹ *Ibid.*, 511.

⁸⁰ Case C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department*, EU:C:2011:277, [2011] ECR I-3375, esp. paras. 49–50.

⁸¹ Case C-256/11, *Dereci*, EU:C:2011:734, [2011] ECR I-11315, esp. paras. 63–71.

⁸² Comparing the ‘restraint’ of the Court in *McCarthy* and *Dereci* with the ruling in *Ruiz Zambrano* from a federal perspective, see S Adam and P Van Elswege, ‘Citizenship rights and the federal balance between the European Union and its Member States: comment on *Dereci*’ (2012) 37 *European Law Review* 176.

⁸³ Case C-434/09, *McCarthy*, EU:C:2011:277, [2011] ECR I-3375, esp. paras. 52–54 (emphasis added); Case C-148/02, *Carlos Garcia Avello v. Kingdom of Belgium*, EU:C:2003:539, [2003] ECR I-11613.

since the seemingly low threshold of ‘serious inconvenience’ was reaffirmed by the Court.⁸⁴ It is therefore difficult to avoid thinking that Mrs McCarthy ‘lost’ something she might otherwise have had; that she might not have failed in her claim had the judgment in her case not followed the ruling in *Ruiz Zambrano*, or followed, more specifically, the strident criticism of that ruling that surely contributed to the Court’s subsequent search for extreme circumstances.

Even more importantly, the impulse towards curtailment evident in *McCarthy* and *Dereci* also continues to be reflected more widely. Three recent case law examples can be used to demonstrate this claim in empirical terms. First, in its decision in *P. I.*, the Court of Justice provided an unexpectedly broad reading of ‘imperative grounds of public security’, an enhanced threshold against expulsion introduced by Article 28(3) of Directive 2004/38 for citizens who have resided in a host State for more than ten years or are minors.⁸⁵ The basic consequence of the decision is that States retain a degree of oversight over expulsion decisions against Union citizens who have resided in their territories for a longer time than the tiered scale of protection *against* expulsion established by the Directive seems to have intended.⁸⁶ More broadly, however, the Court undermines the citizen-centred – indeed, *centre-centred* – status of permanent residence, even though that status was created by the Directive precisely to ‘strengthen the feeling of Union citizenship’.⁸⁷ In so doing, the Court establishes a distinctly national role in the supervision of a distinctly Union construct.

A second example feeds into the same general theme of national supervision: the exclusion of periods of imprisonment in a host State from calculation of legal residence there, whether for the purpose of acquiring permanent residence under Article 16 of the Directive or qualifying for enhanced protection against expulsion under Article 28.⁸⁸ What becomes even more apparent in this example is that the Court is signalling a value judgement alongside its legal assessment: permanent residence is essentially conceived as a privilege and States are being given interpretative tools to ensure that *certain* citizens are excluded from its benefits.⁸⁹

The right to permanent residence is a significant innovation that was intended to bring some exceptional rights with it, so it is hardly unreasonable to ensure that its acquisition is clearly – and carefully – conditioned. However, the Court is making tougher interpretative choices in such cases when more than one solution is legally possible. The question of when periods of residence can be *excluded* from the calculation of permanent residence also provides the third example of rights-limiting case law. The Court stated in *Ziolkowski and Szeja* that legal residence is ‘an autonomous concept of European Union law which must be

⁸⁴ See generally, N. Nic Shuibhne, ‘(Some of) the Kids Are All Right: Comment on Case C-434/09 *McCarthy* and Case C-256/11 *Dereci*’ (2012) 49 *Common Market Law Review* 349.

⁸⁵ Case C-348/09, *P. I. v. Oberbürgermeisterin der Stadt Remscheid*, EU:C:2012:300.

⁸⁶ For a demonstration that the Court’s interpretation in *P. I.* is also out of step with conceptions of public security in free movement law more generally, see G. Anagnostaras, ‘Enhanced Protection of EU Nationals against Expulsion and the Concept of Internal Public Security: Comment on the *P. I.* Case’ (2012) 37 *European Law Review* 627.

⁸⁷ Recital 17 of Preamble to Directive 2004/38/EC on the right of citizens of the Union, OJ 2004 No. L158/77.

⁸⁸ See Case C-378/12, *Nnamdi Onuekwere v. Secretary of State for the Home Department*, EU:C:2014:13; and Case C-400/12, *Secretary of State for the Home Department v. M. G.*, EU:C:2014:9, respectively.

⁸⁹ Raising similar questions about the Court’s interpretation of integration in the context of expulsion, see D. Kochenov and B. Pirker, ‘Deporting Citizens within the European Union: A Counter-Intuitive Trend in Case C-348/09 *P. I. v. Oberbürgermeisterin der Stadt Remscheid*’ (2013) *Columbia Journal of European Law* 369.

interpreted in a uniform manner throughout the Member States'.⁹⁰ However, and drawing from the general scheme of the Directive in support,⁹¹ it then held:

[T]he concept of legal residence implied by the terms 'have resided legally' in Article 16(1)... should be construed as meaning a period of residence which complies with the conditions laid down in the directive, in particular those set out in Article 7(1). Consequently, a period of residence which complies with the law of a Member State but does not satisfy the conditions laid down in Article 7(1) of Directive 2004/38 cannot be regarded as a 'legal' period of residence within the meaning of Article 16(1).⁹²

Critically for present purposes, Advocate General Bot took a different view. In line with the approach applied in citizenship case law more generally, he argued that legal residence under *either* EU law or national law should be taken into account.⁹³ The Court was careful to point out that its approach does not preclude the application of more favourable national provisions.⁹⁴ However, it did ultimately prefer the stricter of the two interpretations that it could quite feasibly have applied. Moreover, the wider repercussions of that choice are apparent through considering case law in which it was confirmed, first, that children of migrant workers in host-State education have a right to reside there (under Regulation 492/2011) in order to complete their education and, second, that the parent who is their primary carer – irrespective of nationality – has a derived right to reside there with them.⁹⁵ On the second point, since these residence rights stem from the Regulation and not Directive 2004/38, there is no obligation on either the citizen or their carer to meet the Directive's self-sufficiency conditions, whether through economic activity or the holding of independent resources. But periods in which those conditions are not met cannot then be counted towards the acquisition of permanent residence – however long the duration of residence in the host State actually is.⁹⁶ Further examples of the same exclusionary tendency are provided by the emphasis on State discretion for Article 3(2) of the Directive when facilitating entry and residence rights for certain family members,⁹⁷ and the apparent creation of a new citizenship law test – *genuine* residence – to differentiate between periods of residence in another State

⁹⁰ Joined cases C- 424/10 and C- 425/10, *Tomasz Ziolkowski and Barbara Szeja and Others v. Land Berlin*, EU:C:2011:866, para. 33.

⁹¹ And noting, in particular, Arts. 1, 7, 12, 13, 14 and 18, as well as several recitals of the Preamble.

⁹² Joined cases C- 424/10 and C- 425/10, *Ziolkowski and Szeja*, EU:C:2011:866, paras. 46–47.

⁹³ Joined cases C- 424/10 and C- 425/10, *Ziolkowski and Szeja*, EU:C:2011:866, Opinion of AG Bot, EU:C:2011:575, para. 36ff. This view aligns with *Martínez Sala*, as confirmed by e.g. Case C-456/02, *Trojani*, EU:C:2004:488, [2004] ECR I-7573.

⁹⁴ Joined cases C- 424/10 and C- 425/10, *Ziolkowski and Szeja*, EU:C:2011:866, paras. 48–50.

⁹⁵ Case C-310/08, *London Borough of Harrow v. Nimco Hassan Ibrahim and Secretary of State for the Home Department*, EU:C:2010:80, [2010] ECR I-1065; Case C-480/08, *Maria Teixeira v. London Borough of Lambeth and Secretary of State for the Home Department*, EU:C:2010:83, [2010] ECR I-1107; Council Regulation (EEC) No. 492/2011 on the free movement of workers within the Community, OJ 2011 No. L141/1.

⁹⁶ Case C-529/11, *Olaitan Ajoke Alarape and Olukayode Azeez Tijani v. Secretary of State for the Home Department*, EU:C:2013:290, paras. 35–37.

⁹⁷ Case C-83/11, *Secretary of State for the Home Department v. Muhammad Sazzadur Rahman and Others*, EU:C:2012:519.

for up to and more than three months, which had repercussions for the extent to which Union law contributes to the legal situation of a Union citizen if they return to their home State.⁹⁸

These examples do not exhaust the case law on citizenship, but they *do* demonstrate that something is changing. One way to make sense of the Court's discernible shift towards conservatism is by applying the logic of federalism. The recent cases outlined in this Section cannot easily be explained as instances of 'more *Förster*', i.e. it is not as simple as a conclusion of judicial respect for the limits set down in secondary legislation. In fact, decisions such as that in *PI* have been shown to *undermine* the intentions of the Directive. However, the patterns of the case law do suggest, in explanatory terms, a process of *self-correction* on the part of the Court in response to the explicit constitutional recalibration – focused on both decentralisation generally and the restoration of the national as a more specific sub-dynamic of decentralisation – that results from the multiple allusions to self-containment we can find in several of the Lisbon Treaty amendments.⁹⁹ We cannot know, definitively, what has shaped either the individual decisions of the Court of Justice or the broader trends that materialise when those decisions are read together, but we can certainly reflect on the broader contexts shaping the constitution to which that Court is tethered at the relevant moments. The Treaty (including the Charter) is the constitutional reflection of the EU federal bargain, and recent revisions have, as argued in Section 2, altered the balance of Union and Member State powers respectively, reinforcing the basic federal premise of self-containment. Moreover, the Court is there to protect that (revised) balance.

This is no neatly symmetrical process. In some post-Lisbon case law – for example, on the reach of the Charter into national law¹⁰⁰ – the Court has been noticeably bolder. Arguably, however, a previously dominant outcome in favour of the *citizen* – evidenced through sustained emphasis on equal treatment, proportionality and the protection of fundamental rights – has given way to more competence-linked concerns about *citizenship* per se. What we see in recent case law is the Court, as a federal court, responding to the reframed federal deal. However, prioritising that responsiveness necessarily weakens its *active participation* in or *formative influence* on the development of citizenship rights it had already accomplished and the normative implications of this need to be considered in more detail.

IV. EU citizenship as federal citizenship: the value added – and the value lost

Section 2 showed that preserving the federal bargain is the primary task of an apex federal court, but Section 3 argued that fulfilment of that task seems to be generating an otherwise problematic outcome, where *protecting against the potential of citizenship* is accorded greater privilege than *protecting the citizen*. It is of course open to debate whether the dynamic of rights-expansion was truly – deliberately – citizen-centric, or merely reflective of something else: privileging the legacy of free movement, for example, or furthering the cause of European integration more instrumentally. For present purposes, that distinction is not so critical: the point is that citizens benefitted from the interpretative choices being made in the

⁹⁸ Case C-456/12, *O. v. Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v. B.*, EU:C:2014:135.

⁹⁹ See further, G. van der Schyff, 'The Constitutional Relationship between the Union and its Member States: The Role of National Identity in Article 4(2) TEU' (2012) 37 *European Law Review* 563.

¹⁰⁰ See especially, Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, EU:C:2013:105.

adjudication of their citizenship disputes – and so the resulting judgments were citizen-centric, whether that occurred accidentally or on purpose.

On one view, it could be suggested that it was the expansive, citizen-centric case law that actually transgressed the agreed edges of EU federalism and that the renewal of those boundaries through the Lisbon process has merely caused a consequential but *appropriate* judicial backtrack. The complexities of disentangling the political from the constitutional should also be recalled from the discussion in Section 2. In that sense, recent case law does seem to be more in tune with political and public preferences too – which appear on balance to be leaning towards limiting rather than enriching free movement at the present time. It is also a typical characteristic of the case law that the *shape* of a particular right only becomes clearer over several judgments. Yet if Member State nationals have fewer rights now overall – and more specifically, fewer and/or more diluted rights than they *used* to have – does that suggest that a constitutionally illegitimate price has been paid in the rebalancing of *structural* over *substantive* federal citizenship? Alternatively, and perhaps even more provocatively, does overarching respect for the federal bargain actually evidence respect for the citizen at a more profound level? From that perspective, the citizen is being protected as the indirect architect of the federal bargain and any weaknesses in EU citizenship exposed along the way would be better addressed through broader political agreement than overly case-specific judicial processes anyway.

Commentators such as Eeckhout have addressed similar questions by examining the nexus between citizenship and the protection of fundamental rights:

If the concept of European citizenship is likely to pull the Charter in the direction of an ever-expanding field of application, and to turn it into a Charter not merely directed towards the EU institutions but containing rights on which European citizens can more generally rely, the principle of limited EU powers is likely to pull in the opposite direction.¹⁰¹

The TEU establishes that the Union ‘is *founded* on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights’¹⁰² – signalling that protection of fundamental rights has a central place in the EU federal bargain. However, Article 5 TEU provides that the limits of Union competences are governed by the principle of conferral, and their exercise by the principles of subsidiarity and proportionality. As seen in Section 3, reconciling the promise of rights with the constraints of conferral is also an enduring challenge in the case law on Union citizenship: crossing a jurisdictional line to enhance a citizen’s rights might therefore be defensible in substantive terms, but it will raise questions about undue encroachment of national regulatory autonomy.¹⁰³ Related to this, the relationship between the Charter with its express limits and the general principles of law will need to be resolved more concretely. Looking again at *Ruiz Zambrano*, for example, the Court does not rely on the Charter in its judgment and there is no reference to the right to respect for

¹⁰¹ P. Eeckhout, ‘The EU Charter of Fundamental Rights and the Federal Question’ (2002) 39 *Common Market Law Review* 945 at 973.

¹⁰² Art. 2 TEU.

¹⁰³ See e.g. E. Spaventa, ‘Federalisation versus Centralisation: Tensions in Fundamental Rights Discourse in the EU’, in M. Dougan and S. Currie (eds.), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Oxford: Hart Publishing, 2009), esp. p. 352; K. Lenaerts and J. A. Gutiérrez-Fons, ‘The Constitutional Allocation of Powers and General Principles of EU Law’ (2010) 47 *Common Market Law Review* 1629, esp. at 1630.

family life in any other guise either – and yet, the outcome of the case is profoundly respectful of – and rooted in – the preservation of family life. It is almost certainly the case that the Court avoided supporting references to the Charter precisely to avoid having to reconcile in turn its expansion of Union citizenship with the statement in Article 51(2) CFR that ‘[t]he Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify any powers and tasks as defined in the Treaties’.

It was also observed in Section 3 that citizenship has been (since *Martínez Sala*) a powerful opener of the personal scope of Union law – and then, once a situation can be conceived of as coming within that scope, the material protection of Union fundamental rights standards becomes salient. In *Dereci*, now invoking the limits of the Charter, the Court explained this position vis-à-vis ECHR rights as follows:

[I]f the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. On the other hand, if it takes the view that that situation is not covered by European Union law, it must undertake that examination in the light of Article 8(1) of the ECHR. All the Member States are, after all, parties to the ECHR which enshrines the right to respect for private and family life in Article 8.¹⁰⁴

This extract demonstrates an important limitation on the Union’s jurisdiction in cases that concern the protection of fundamental rights: however counter-intuitive it may seem, such concerns are a *second-level* issue – a link to Union law must be established *first*. That limitation highlights the exclusionary quality of Union citizenship – which is after all open to Member State nationals only. However, it also places conditions such as those codified in Article 51 Charter in their wider, federal context. Lenaerts and Gutiérrez-Fons characterise Article 51(2) Charter as ‘requir[ing] that, in interpreting and applying the Charter, the ECJ respects the principle of conferral as set out in Article 5(2) TEU. The scope of application of the Charter is therefore the keystone which guarantees that the principle of conferral is complied with’.¹⁰⁵ Similarly, while clearly advocating a maximalist scope for the protection of rights, Kochenov also cites AG Sharpston’s caveat that ‘the desire to promote appropriate protection of fundamental rights must not lead to the usurpation of competence’.¹⁰⁶

It would seem, then, that where we find EU rights, we also find limits, and that recourse to the Treaty alone will not definitively resolve the enduring tension between the two; noting the more evasive technique applied in *Ruiz Zambrano*, neither will it resolve the

¹⁰⁴ Case C-256/11, *Dereci*, EU:C:2011:734, [2011] ECR I-11315, paras. 72–73.

¹⁰⁵ Lenaerts and Gutiérrez-Fons, ‘The Constitutional Allocation’, note 103 above, 1657. See similarly, Eeckhout, ‘The EU Charter’, note 101 above, 945, also commenting on the Charter as a ‘paradoxical’ instrument (957) in that ‘it contains indivisible fundamental rights, but of strictly limited scope’ (958).

¹⁰⁶ Kochenov, ‘The Right to Have *What* Rights?’, note 78 above, 511, citing Case C-34/09, *Ruiz Zambrano*, EU:C:2011:124, [2011] ECR I-1177, Opinion of AG Sharpston, EU:C:2010:560, para. 168. See further, A. von Bogdandy, ‘The European Union as a Human Rights Organisation? Human Rights and the Core of the European Union’ (2000) 37 *Common Market Law Review* 1307, including the statement, at 1337, that ‘Europe could finish its federalizing process under the flag of human rights’ but urging caution in terms of methodology overall, emphasising the importance of ‘developing the Union according to its proper and hitherto successful constitutional logic’ (1338).

enduring tension between the written and the unwritten. However, Spaventa makes another important observation about the *focus* of EU rights discourse. She argues that questions about protecting fundamental rights at EU level are not primarily concerned with ‘the identification of the values which should be considered at the very heart of our conception of humanity’¹⁰⁷ – since that task was fulfilled by the drafting of the ECHR. Rather, ‘the debate revolves around the identification of the *locus*, supranational or domestic, where it is appropriate to carry out the balancing exercise between these conflicting values; and also, on the identification of the institution, judicial or political, which should carry out such balancing exercise’.¹⁰⁸ She goes on to depict the competing centripetal and centrifugal forces at play here in explicitly federal terms. Linking back to the critical importance of shared values for federal success outlined in Section 2, the arguments that follow do not aim, therefore, to *question* the values ‘at the heart of our conception of humanity’ but instead revisit the implications of the *deficit of shared citizenship values* for judicial/political as well as Union/Member State relations, before going on to address the repercussions of that deficit for the citizen from a rule of law perspective.

A. Locating shared citizenship values

It was noted earlier that the thinness of Union citizenship as a *shared* value is acutely apparent in the tenor of current political and public debate even on intra-Union migration, especially in light of the depressing rhetoric that seeks to degrade the EU rights of Bulgarian and Romanian nationals:¹⁰⁹ connected to that, the crisis-tinged persistence of protectionism has also been exposed.¹¹⁰ Section 2 argued that federalism templates overly simplify the singularity both of ‘normal’ political flows and more entrenched federal values, and thus underplay the complexities and the consequences of advocating for an ‘active participant’ role for apex federal courts. Consequently, against the reality that an increasing and increasingly vocal minority of Member States wants less open national borders and more closed national welfare systems, when does the impulse to free movement that underpins so much of Union citizenship law become *questionable* as a result? When should the leadership of the Court veer away from sustaining a more entrenched ‘Union’ commitment to citizenship in light of waning ‘State’ support for its fundamental premises? When is the constitutional promise of each sphere of governance being protected from incursion by the other *transformed* into something else, into a *changed* federal bargain in which free movement is *agreed* as being diminished as a shared value?

When, in other words, is the federal judiciary fighting to preserve something that should no longer be preserved in the same way? Davies presents the consequences of *presuming* shared values in his powerful warning against an elitist brand of Union citizenship, the elements of which can perhaps be identified in current debates on the fracturing of national welfare openness:

[The EU] is staffed by migrants who are beneficiaries of the new order, the new cosmopolitans, and it is an urgent institutional question whether these people are still

¹⁰⁷ Spaventa, ‘Federalisation versus Centralisation’, note 103 above, p. 343.

¹⁰⁸ Ibid.

¹⁰⁹ See again, Nic Shuibhne and Shaw, ‘Union Citizenship’, note 52 above.

¹¹⁰ See e.g. F. Amtenbrink, ‘Europe in Times of Economic Crisis: Bringing Europe’s Citizens Closer to One Another?’, in M. Dougan, N. Nic Shuibhne, and E. Spaventa (eds.), *Empowerment and Disempowerment of the European Citizen* (Oxford: Hart Publishing, 2012).

in touch with the stay-at-home outsiders to EU law. The emphasis in policy and scholarship on migrants should sound alarm bells. EU citizenship may not be zero-sum, but it is not win-win either. Piling rights upon rights for the migrant minority, without looking at what these rights say and do to the position of the majority who live outside the EU legal order, or to the institutions to which they feel loyalty, is asking for political unrest in the future.¹¹¹

He continues, rightly, that '[t]here is a real risk of *divergence between documents and public mood*, with constitutional Treaties being experienced as a *rejection* of the values and bonds that people share, rather than as an *embodiment* of them'.¹¹² But a recurring theme throughout this contribution is that neither the generalities of federal discourse nor the specifics of the EU federal bargain provide a clear route forward in any event. Moreover, it has been emphasised that the Treaty framework presents us with a plethora of ostensibly shared values, but it fails adequately to signal how competing values should be actually balanced and reconciled. Articles 20 and 21 TFEU thus give us the rights of citizenship, but *also* its conditions and limits.

Fuller has argued that '[the] gradual tracing out of the full implications of a system already established...can take place only in an atmosphere *dominated* by the shared desire to make federalism work'.¹¹³ The idea of *domination* by shared desire is useful at one level for the present purposes, since it indicates realistically that absolute agreement all of the time is not necessary (which is just as well, since it is certainly not going to happen). However, when does the twig even of *dominance* snap? Consider also Koslowski's point about conflict in federal systems:

While increasing conflict can be interpreted as evidence of 'anarchy' and persistent member state 'sovereignty', increasing conflict in bargaining can also be indicative of increasing shared rule, that is of a federal political relationship. As member states accept the federal legal structure by not exiting, they bargain even more aggressively to protect their interests within these legal constraints and in the process confirm a federal relationship in the given policy area.¹¹⁴

In other words, we have to remember that the dynamics weakening overt political support for the bargain struck and/or for the conditions of its realisation are mixed in nature. These processes are also undoubtedly amplified by the sheer scale and diversity of the component units that now make up EU28. Fundamentally then, the charting of shared values and of the *extent* to which they are or remain shared will fluctuate. It is also a relatively amorphous measurement that can be *reflected* but not *determined* by law.

At one level, therefore – and noting that the ECHR also provides a relatively solid floor for the protection of fundamental rights in the EU – Spaventa is right when she suggests that 'oscillations' in the protection of rights are 'acceptable within the Union system'.¹¹⁵

¹¹¹ G. Davies, 'The Humiliation of the State as a Constitutional Tactic', in F. Amtenbrink and P. A. J. van den Berg, *The Constitutional Integrity of the European Union* (The Hague: T. M. C. Asser Press, 2010), p. 174.

¹¹² Ibid.

¹¹³ Fuller, 'The Forms and Limits', note 16 above, 377–78 (emphasis added).

¹¹⁴ Koslowski, 'A Constructivist Approach', note 4 above, 571; see similarly Hinarejos, 'Free Movement', note 24 above, 561.

¹¹⁵ Spaventa, 'Federalisation versus Centralisation', note 103 above, p. 359.

However, applying a tougher rule of law perspective to *citizenship* rights – which include but are not exhausted by fundamental rights – there is a different question to answer, even when the floor provided by the Convention is respected: should substantive rights be *withdrawn* by the federal court that gave flesh to them on the basis that the ‘greater good’ of respecting a politically-altered federal bargain is the main driver behind the change?

B. The constitutional, the political, and the rule of law

Section 3 argued that there is an evidenced shift from *rights-opening* to *rights-containing* in the Court’s citizenship case law, but that federal analysis can vindicate that shift in many respects: it induces consideration of the fact that the citizenship provisions in the Treaty point to conditions and limits as well as to rights; to Union citizenship as an additional status regulated by shared competence; and to the Member States as ultimate guardians of the gateway condition for Member State nationality. Additionally, reflection on the broader values underpinning Union citizenship signals a high degree of contestation, and that makes it difficult to identify values that are genuinely shared. A retreat from the previously prevailing rights-opening impetus is not, therefore, unexpected and neither is it indefensible.

And yet...there is an unshakeable queasiness attached to any substantive retraction of rights, even when endured for the benefit of an apparently greater federal good. When that loss amounts to a fundamental shift away from the rights-opening dynamic that lifted the manifestation of Union citizenship into something so much more than the symbolic words dropped casually into a Treaty for no real end, the normative loss glossed over by regarding Union citizenship as a federal citizenship cannot be ignored. Lenaerts has observed that ‘[d]ay after day...the Court of Justice must win the trust of the Member States and national supreme courts as the “ultimate judicial umpire of [European Union] competences”’;¹¹⁶ while Kochenov insists that, nonetheless, ‘it is up to the Court to convince us, EU citizens, that what is being done makes legal *and moral* sense’.¹¹⁷ More specifically, addressing the exceptional nature of the genuine enjoyment test established in *Ruiz Zambrano* then subsequently strictly delineated in *McCarthy* and *Dereci*, he argues that ‘[t]he Court’s unsystematic treatment of the notion of the “substance of rights”...shakes the moral ground on which EU law stands, by failing to protect the rights – what has traditionally been the rightly praised strength of the EU’.¹¹⁸

It should not be forgotten that the rule of law is another of the core values on which, according to Article 2 TEU, the Union is founded.¹¹⁹ The rights-containing impulse observed in more recent case law may, therefore, be understandable, it may be rationally explicable, and it may well have a vital part to play in the overall preservation of the EU federal bargain. Nevertheless, it represents a compromise. It is striking, for example, that the Court’s constitutional *aggression* – in a positive sense – with respect to the protection of rights continues to be seen, but more vis-à-vis systems beyond the Union and Union citizenship:

¹¹⁶ From Lenaerts, ‘Federalism: Essential Concepts’, note 5 above, 796.

¹¹⁷ Kochenov, ‘The Right to Have *What* Rights?’, note 78 above, 516 (emphasis added).

¹¹⁸ *Ibid.*, 515.

¹¹⁹ See van der Schyff, ‘The Constitutional Relationship’, note 99 above, 580–581; and see generally, W. Sadurski, ‘European Constitutional Identity?’ (2006) *EUI Working Papers* LAW No. 2006/33. On the specific question of *enforcing* EU values, see e.g., M. Dawson and E. Muir, ‘Enforcing Fundamental Values: EU Law and Governance in Hungary and Romania’ (2012) 19 *Maastricht Journal of European and Comparative Law* 469.

thinking in particular of the Court's defence of the autonomy of Union law and its concomitant standards of rights and judicial protection through the *Kadi* story.¹²⁰

The Court of Justice undoubtedly sits in a difficult and thankless position as the apex judicial institution of a contested federal polity. However, mapping the contours of Union federalism in the specific field of citizenship rights also reveals important questions about the *entrenchment* or *ownership* of constitutionally created rights, whether the context relates to a federal system or not – questions in respect of which the rule of law requires an answer. If we return the citizen to the centre of things, then the fundamental question is this: who is standing up for Union citizens and for the rights that the Treaty confers on them now? Union citizenship is overburdened with expectations, both polity-related and rights-related, which it simply cannot deliver. It is an exclusionary status, regulated by shared competence, its primary receptors remain the transnationally engaged, and both the instances and extent of disagreement about its nature, purpose and future are nowhere near being resolved. Nonetheless, citizenship rights are part of primary EU law and should be protected and developed in that light.

V. Conclusion

This chapter has argued that federalism does not inherently deliver a method or structure for protecting EU citizens or the fundamental rights that they enjoy, any more substantively or securely than other templates of governance. It is determinedly context-specific, and the Court of Justice, as the Union's apex federal court, must respond when that context changes. However, while judicial leadership is vitally important in any federal polity, it cannot necessarily make sense of the diverse or contested political and social values feeding into the federal compact. The work of the Court cannot, in other words, resolve fundamental political disputes that continue to restrain the capacity of the Union as a polity – and thus the capacity of its version of citizenship also. Moreover, the Treaties (including the Charter) prioritise conditions and conferral as much as rights and citizenship.

A distinctly federal lodestar has shaped more recent citizenship case law; however, that case law has, in turn, reduced the constitutional *intensity* of citizenship as a legal construct that had been established in previous decisions. This chapter has argued that there is – and that there should be – more to a federal polity than preservation of its federal structure in the abstract: that the *kind* of polity, in substance, that a particular federal structure stands for is the more important part of the project. Evaluating the trajectories of Union citizenship case law results in a more positive answer to the formal federal question, however, than to the substantive one.

Ultimately, we face a choice: either to accept the limitations coded into the current federal bargain – which we have to concede will as a consequence limit the capacity of the EU as a polity – or to agitate for conscious political revision of that bargain. The latter

¹²⁰ See esp. Joined cases C-402 and 415/05, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, EU:C:2008:461, [2008] ECR I-6351; and Joined cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission and Others v. Yassin Abdullah Kadi*, EU:C:2013:518. See generally, G. de Búrca, 'The European Court of Justice and the International Legal Order after *Kadi*' (2009) 51 *Harvard International Law Journal* 1; T. Tridimas, 'Terrorism and the ECJ: Empowerment and Democracy in the EC Legal Order' (2009) 34 *European Law Review* 103; and C. Gearty, 'In Praise of Awkwardness: *Kadi* in the CJEU' (2014) 10 *European Constitutional Law Review* 15.

solution would achieve more in principle, but is a dangerous strategy to promote in the present political climate, bearing in mind that many would use that opportunity not to develop the purpose and rights of EU citizenship *further* but to effect something altogether narrower. Recalling Fuller's words, '[the] gradual tracing out of the full implications of a system already established...can take place only in an atmosphere dominated by the shared desire to make federalism work'¹²¹ – which hardly evokes the atmosphere of Union politics at present. Until or unless we can have a frank conversation about the point of Union citizenship, it should be remembered at least that achieving federal balance in the abstract is not going to be enough, especially if federal citizens have to pay for that through the loss or dilution of their substantive rights.

¹²¹ Fuller, 'The Forms and Limits', note 16 above, 377–78.