

6

The Evolution of Citizens' Rights in Light of the European Union's Constitutional Development

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I. INTRODUCTION

THE CONSTITUTIONAL FOUNDATIONS of Union citizenship are bound to remain unstable due to the doctrinal and conceptual ambiguity of supranational citizens' rights. If that is correct, change need not present a linear progress towards 'more' citizenship, reflecting the EU's famous self-description as 'ever closer union'.¹ It could similarly result in friction, dead ends and retrogression. On this basis, this chapter sets out to explain the evolution of citizens' rights as a reflection of broader trends. Our heuristic device for rationalising the constitutional embeddedness will be a juxtaposition of two competing models of the concept of transnational mobility. Their impact on the case law and institutional practice will be exemplified through closer scrutiny of three thematic leitmotifs defining most accounts of citizenship with regard to solidarity, political participation and identity.

Having reminded readers of the underlying reasons for the legal and conceptual ambiguity of Union citizenship, it will be demonstrated that institutional practice fluctuates between two models: one based on residence and the other focusing on social integration. As ideal types, these models influence the resolution of specific questions, although positions of policy actors will most likely reflect a blend, thereby reinforcing the overall trend towards constant variation and conceptual indeterminacy (below II). The pertinence of this approach will be tested in relation to ongoing disputes about social benefits and transnational solidarity (III), political participation and the significance to nationality (IV) as well as migration

¹ Recital 1 of the preamble of the original EEC Treaty of 1957, the present Treaty on the Functioning of the European Union and the Charter of Fundamental Rights.

and collective identities (V). It will be shown that the evolution of citizens' rights in these areas is intimately connected to broader constitutional trends, such as the euro crisis, the failure of the Constitutional Treaty or arguments about immigration among the wider public. Answers to specific questions in the case law and the political process can be rationalised as building blocks of a European Union (EU) that accepts the limits of the federal vision by accommodating the continued diversity among Member States.

II. TWO COMPETING MODELS

Citizens' rights are no abstract category: they are intricately connected to a social context. Until recently in Western thought, this context concerned membership in statal communities and it remains uncertain whether the citizenship concept can be applied to a supranational polity such as the EU and whether doing so requires conceptual adaptation. This question has preoccupied the scholarly literature over past years and notable differences persist until today.² Against this background, this section suggests rationalising the evolution of citizens' rights through the juxtaposition of divergent visions of transnational mobility whose identification can serve as a heuristic device for reconstructing institutional practices.

This approach builds on the work of the American migration scholar Hiroshi Motomura who demonstrated that the US perspective on immigration evolved over time by distinguishing between three ways of construing the relationship between incoming migrants and US society: legal rules may be perceived, alternatively, as a quasi-automatic 'transition', as a 'contract' obliging newcomers to comply with certain conditions, or as an 'affiliation' when immigrants gradually get involved with the nation's life.³ Such a constructivist account recognises that different ideals coexist and can change over time. It can be particularly useful in relation to Union citizenship whose significance remains contested.⁴

To identify different visions of transnational membership is not to say that the European Court of Justice (ECJ) or other EU institutions hold a uniform citizenship concept. Arguably, it is not the function of judges to actively engage in theoretical debate: they should resolve legal disputes.⁵ We cannot expect a Grand Chamber of 15 judges to have a uniform understanding or to reflect on it openly in their judgments. Although the standard invocation of Union citizenship as

² For an overview, see D Kostakopoulou, 'European Union Citizenship: Writing the Future' (2007) 13 *European Law Journal* (ELJ) 623; and D Kochenov, 'The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate' (2013) 62 *ICLQ* 97.

³ See H Motomura, *Americans in Waiting* (Oxford, Oxford University Press, 2006).

⁴ The argument in this section builds upon D Thym, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' (2015) 52 *CML Rev* 17, 33–39.

⁵ cf CR Sunstein, *One Case at a Time* (Cambridge, MA, Harvard University Press, 1999).

'fundamental status' may be taken to hint at an underlying theory on the part of the ECJ, it might not exist.⁶ This does not prevent academic commentators, however, from reconstructing the theoretical infrastructure. Such academic reconstructions are ideal types which are modelled upon judgments and policy initiatives as legal phenomena and which accentuate theoretical features for analytical purposes. They are not mutually exclusive and the positions of policy actors will most likely reflect a blend, combining elements of different ideal types. Arguably, the discrepancies underlying many free movement rulings can be explained by this mixture; judges drift along.

In this section, I will present the methodological background (below A) and discuss, on this basis, two visions of transnational membership which I shall call the 'residence model' (B) and the 'integration model' (C). Their explanatory potential is limited to the EU context, where transnational mobility constitutes the hallmark of supranational citizens' rights to this date. It is not the purpose of this chapter to rationalise the meaning of citizenship more generally. Implications of the two models will be illustrated later in relation to three thematic leitmotifs that feature prominently in contemporary citizenship accounts: social solidarity, political participation and questions of collective identification.⁷ Doing so will link the discussion of Union citizenship to broader constitutional trends.

A. Methodological Background

There was and remains nothing inevitable in the evolution of Union citizenship. Even within a nation-state context, the notion of citizenship is a prime example of an essentially contested project which lends itself to different visions of what we mean by citizenship. In the EU, this volatility is reinforced by the transformative character of the European integration process and corresponding uncertainties about its *finalité*, which reinforce the inherent openness of the citizenship concept in the context of EU integration.⁸ Methodologically, these characteristics can be integrated into legal accounts on the basis of a contextually embedded doctrinal constructivism which accepts, in contrast to US-style legal realism, that legal concepts can have a semi-autonomous significance.⁹

Corresponding legal analyses are based on a reconstruction of the case law and its doctrinal foundations, thereby ideally supporting a better understanding of

⁶ cf A Williams, *The Ethos of Europe* (Cambridge, Cambridge University Press, 2011).

⁷ On recurring themes in debates about citizenship, see L Bosniak, 'Citizenship Denationalized' (2000) 7 *Indiana Journal of Global Legal Studies* 447; and R Bellamy, *Citizenship. A Very Short Introduction* (Oxford, Oxford University Press, 2008).

⁸ For further comments see the introduction to this volume, section II.

⁹ See T Horsley, 'Reflections on the Role of the Court of Justice as the "Motor" of European Integration' (2013) 50 *CML Rev.* 931, 934–54; and G Beck, *The Legal Reasoning of the Court of Justice of the EU* (Oxford, Hart Publishing, 2012).

the systematic coherence of the law and its internal inconsistencies.¹⁰ Doing so assumes that doctrinal arguments and constraints should be taken seriously in a discursive community involving academics in the constant reconstruction of the legal infrastructure.¹¹ Meanwhile, abstract legal concepts, such as free movement, citizenship or human rights, require a broader constitutional analysis in a process Armin von Bogdandy has aptly described as a doctrinal argument about constitutional principles.¹² This chapter follows this approach by extrapolating the constitutional infrastructure guiding the interpretation of the supranational rules on Union citizenship.

Such focus on questions of doctrinal interpretation and constitutional reconstruction does not imply that legal debates exist in splendid isolation. To the contrary, constitutional principles such as citizenship convey a set of normative values and express basic choices of societies, which can change over time.¹³ Citizens' rights, like human rights, present fields of the law resonating with broader social and political developments. Their conceptual openness was one factor facilitating progressive interpretation by the ECJ that has been described by academic observers as a process of judicial transformation transcending the original rationale of market integration.¹⁴ However, such an outcome was and is no foregone conclusion. The broader social and political context may similarly support restrictive tendencies, thematic shifts or judicial changes of direction.¹⁵ Our analysis will show that the evolution of Union citizenship discloses such reorientation and that political actors and social practices can influence these interpretative metamorphoses.

B. 'Residence Model'

The novelty factor of Union citizenship lies in its supranational character. It grants rights to transnational movement, equal treatment and political participation across state borders, thereby overcoming the Westphalian model of territorial

¹⁰ See R van Gestel and H-W Micklitz, 'Why Methods Matter in European Legal Scholarship' (2014) 20 *ELJ* 292.

¹¹ See M Kumm, 'On the Past and Future of European Constitutional Scholarship' (2009) 7 *ICON* 401, 406–11.

¹² See A von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch' (2010) 16 *ELJ* 95, 98–100.

¹³ See RM Cover, 'Foreword: *Nomos* and Narrative' (1983) 97 *Harvard Law Review* 4, 11–44.

¹⁴ See E Spaventa, 'From *Gebhard* to *Carpenter*' (2004) 41 *CML Rev* 743, 764–68; and S Kadelbach, 'Union Citizenship' in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law*, 2nd edn (Oxford, Hart Publishing, 2009) 461–66.

¹⁵ See D Kostakopoulou, 'Co-creating European Union Citizenship' (2012/13) 15 *Cambridge Yearbook of European Legal Studies* 255, 259–66; and J Shaw and N Miller, 'When Legal Worlds Collide: An Exploration of What Happens when EU Free Movement Law meets UK Immigration Law' (2013) 38 *EL Rev* 137.

sovereignty. The individual right to free movement for broadly defined categories of economic activity and corresponding guarantees of equal treatment, which up until now pinpoint the essence of citizens' rights, do not abolish political communities at national level, but oblige them to treat Union citizens similarly to nationals. When Union citizens move, territorial presence often replaces the formal link of nationality as the demarcation line between insiders and outsiders participating in solidary communities.¹⁶ Below I will discuss to what extent this model can help us rationalise the evolution of citizens' rights at EU level.

Academic discourse on EU law presents us with two visions behind the residence model that coincide insofar as the rights of Union citizens are concerned, but which can diverge in relation to individuals from outside the EU—reflecting an underlying ambiguity as to how to relate European integration to the rest of the world. While some propagate the emergence of a generic model of stakeholder citizenship that is conceptually not restricted to the EU context and may pave the way for the general realignment of membership,¹⁷ others describe the EU and its citizenship in (con-)federal terms.¹⁸ This discrepancy takes centre stage when we analyse migration law towards third-country nationals,¹⁹ but it is less relevant for the distinction between the 'residence model' and the 'integration model', since both the federal and the universalist frame of reference converge on the treatment of intra-European mobility.

C. 'Integration Model'

The 'integration model' rejects the quasi-automatic acquisition of citizens' rights whenever someone takes up habitual residence. Instead, it highlights qualitative factors connecting individuals to a political community, which often includes an expectation that one should actively pursue incorporation into societal structures. Success or failure of this venture may regulate the degree of residence security and equal treatment under EU law.²⁰ From this perspective, the Union is more

¹⁶ For an early description of this idea, see G Davies, "Any Place I Hang My Hat" or: Residence is the New Nationality' (2005) 11 *ELJ* 43, 47–49.

¹⁷ See esp D Kostakopoulou, *The Future Governance of Citizenship* (Cambridge, Cambridge University Press, 2008) ch 4; and Y Soysal, *Limits of Citizenship* (Chicago, IL, University of Chicago Press, 1994) ch 8.

¹⁸ This approach is particularly common among scholars from continental Europe, such as C Schönberger, *Unionsbürger* (Tübingen, Mohr Siebeck, 2005); Kadelbach (n 14) 469–75; or AP van der Mei, *Free Movement of Persons within the European Community* (Oxford, Hart Publishing, 2003).

¹⁹ See D Thym, 'Citizens and Foreigners in EU Law: Migration Law and its Cosmopolitan Outlook' (2016) 22 *ELJ* 296, 302–06.

²⁰ See L Azoulay, 'Transfiguring European Citizenship: From Member State Territory to Union Territory' in D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge, Cambridge University Press, 2017).

than an emancipatory ‘playground of opportunities’²¹ enhancing the freedom of choice of individuals through the pursuit of one’s preferences; here, not anyone residing abroad is automatically considered an insider like under the ‘residence model’ discussed above. Rather, the ‘integration model’ emphasises the value of social cohesion as a precondition for democratic allegiance and social solidarity. It makes access to social benefits and other rights associated with membership in a specific community conditional upon certain prerequisites without which equal treatment with nationals will be denied.

It is important to note that there is a variety of theoretical explanations for the significance of social cohesion which can result in different responses to specific questions.²² In particular, social cohesion does not necessarily imply ethno-cultural closure and may support quite the reverse, namely changing self-perceptions of European societies in response to transnational mobility and cultural diversity. The argument for social cohesion is not about classic nationalism: it recognises, rather, that political communities require a sense of shared identity if our societies are to be more than the sum of their parts.²³ Despite the inherent emphasis on liberty, the doctrinal infrastructure of EU free movement law embraces important expressions of the ‘integration model’, which the Court has strengthened in a number of controversial judgments concerning access to social benefits and the limits of residence security in recent years. It is a central objective of this chapter to try to clarify this reorientation of the case law.

III. SOCIAL BENEFITS AND TRANSNATIONAL SOLIDARITY

Equal access to social benefits has received much attention in scholarly treatises on Union citizenship over the years. Judgments delivered by the ECJ on cases such as *Martínez Sala*, *Grzelczyk*, *Förster* or, most recently, *Dano* and *Alimanovic* feature prominently in academic accounts of Union citizenship. Moreover, the issue presents itself as a perfect thematic prism to elucidate the conceptual (re-)orientation of supranational citizenship, since welfare provision represents a core ingredient of modern statehood and corresponding citizens’ rights.²⁴ It epitomises the component of individual rights which lies at the heart of many citizenship theories, in particular those written by legal academics. Our analysis will proceed in two steps highlighting the Court’s position first (below A) and discussing contextual factors that may explain the change of direction thereafter (B).

²¹ Kochenov, ‘The Essence of EU Citizenship’ (n 2) 130.

²² For an overview see M Moore, ‘Cosmopolitanism and Political Communities’ (2006) 32 *Social Theory and Practice* 627; or S Song, ‘Three Models of Civic Solidarity’ in RM Smith (ed), *Citizenship, Borders, and Human Needs* (Pennsylvania, PA, Penn Press, 2011).

²³ See C Joppke, *Citizenship and Immigration* (Cambridge, Polity Press, 2010) ch 4.

²⁴ See TH Marshall, *Class, Citizenship, and Social Development* (Garden City, NY, Doubleday, 1964).

A. Judicial Change of Direction

Access to social benefits is a perfect test case to highlight the pertinence of the 'residence model' and the 'integration model' described above, since their distinct features coincide with changing parameters of the free movement rules. There is a noticeable difference between the classic position of EU law on the equal treatment of those who are economically active (below i) and the integration requirements for other citizens which have been fortified in a number of more recent judgments (ii).²⁵

i. 'Residence Model'

The classic foundation of the residence model can be found in the recitals of implementing legislation on the free movement of workers: widespread equal treatment is perceived as a means to facilitate social integration, thus allowing migrant workers to enjoy the same rights from day one as a matter of principle.²⁶ On this basis, the Court reaffirmed in a number of judgments delivered over past decades that Union citizens who are working in another Member State 'shall enjoy the same social and tax advantages as national workers.'²⁷ This trend towards residence-based equality was reaffirmed by the social security coordination regime that links special non-contributory cash benefits to the place of residence through legislation. This also applies to individuals other than workers.²⁸ The ECJ endorsed this approach by the legislature in light of primary law, since non-contributory benefits are 'closely linked with the social environment'.²⁹ This has important ramifications for our topic: mobility is perceived to entail a changing of the guard in the realm of welfare benefits, since the state of residence is expected to take over whenever someone moves across borders.

A strict version of the residence model would focus, in line with social security coordination, on the place of 'habitual residence' to determine the state bearing responsibility for social assistance: the crucial question would be 'where the habitual centre of their interests is to be found'.³⁰ We would have to distinguish, for that matter, between temporary 'visitors', who are physically present but retain habitual residence elsewhere, and 'residents', who relocate their centre of

²⁵ The argument in this section builds upon Thym, 'The Elusive Limits of Solidarity' (n 4) 33–39.

²⁶ *cf* Recital 5 Regulation (EEC) No 1612/68 [1968] OJ L257/2 and today's Recital 6 Regulation (EU) No 492/2011; see also ECJ, *Cowan*, 186/87, EU:C:1989:47, paras 16–17.

²⁷ Art 7(2) Regulation (EU) No 492/2011 in line with Regulation (EEC) No 1612/68.

²⁸ See Art 70 of Regulation (EC) No 883/2004.

²⁹ ECJ, *Bartlett et al*, C-537/09, EU:C:2011:278, para 38; for further reading see M Dougan, 'Expanding the Frontiers of European Union Citizenship by Dismantling the Territorial Boundaries of the National Welfare States?' in C Barnard and O Odudu (eds), *The Outer Limits of European Union Law* (Oxford, Hart Publishing, 2009) 144–50.

³⁰ Definition of the term 'habitual residence' in ECJ, C-90/97, *Swaddling*, EU:C:1999:96, para 29; for details see van der Mei (n 18) 161–64.

interests enduringly.³¹ Social security experts maintain that the ECJ should have moved down this road in *Brey* and *Dano* when it had to decide on the equal treatment of citizens residing abroad without being economically active there.³²

Things turned out differently. Instead of relying on the residence-based rationale of Regulation (EC) No 883/2004 to resolve the dispute, the ECJ effectively diminished its relevance by arguing that the Social Security Coordination Regulation should be construed, first and foremost, as a coordination instrument that identifies the legal order applicable and does not harmonise national rules governing access to specific social benefits.³³ This meant that other rules took over. The latter gave more flexibility to the Court on the basis of the EU Treaties and the Citizenship Directive 2004/38/EC, although their contents had often been applied in a manner which effectively extended domestic welfare systems to all those who are physically present as residents. *Martínez Sala*, *Trojani* and *Grzelczyk* are the most pertinent examples of such residence-based reasoning by the ECJ on the basis of the regular rules on the free movement of persons.³⁴ However, this was not the only possible outcome: the same rules could be interpreted in a way that directs the case law in a different direction.

ii. 'Integration Model'

In the *Förster* ruling, the ECJ embarked upon a fully-fledged version of the 'integration model' for the first time when it made equal access to study grants for EU citizens living abroad conditional upon 'a certain degree of integration',³⁵ thereby denying equal access to study grants to Union citizens who had resided in the host State for less than five years.³⁶ Without doubt, the integration criterion had been developed by the Court in a number of earlier judgments, but these had employed it in a way that focused on territorial presence in line with the 'residence model'.³⁷ *Förster* departed from this line of reasoning by making equal treatment conditional upon other qualitative factors.

³¹ For practical examples, see Commission, *Practical Guide: The Legislation that Applies to Workers* (2013), section 3.

³² See H Verschuere, 'Preventing "Benefit Tourism" in the EU: A Narrow or Broad Interpretation of the Possibilities Offered by the ECJ in *Dano*?' (2015) 52 *CML Rev* 363, 377–81; and A Farahat, 'Solidarität und Inklusion: Umstrittene Dimensionen der Unionsbürgerschaft' (2016) *Die Öffentliche Verwaltung* 45, 47–49.

³³ See ECJ, *Brey*, C-140/12, EU:C:2013:565, paras 39–43; reaffirmed by ECJ, *Commission v United Kingdom*, C-308/14, EU:C:2016:436, paras 63–67; and the critique by H Verschuere, 'Free Movement or Benefit Tourism: The Unreasonable Burden of *Brey*' (2014) 16 *European Journal of Migration and Law* 147, 159–64.

³⁴ See ECJ, *Martínez Sala*, C-85/96, EU:C:1998:217; ECJ, *Trojani*, C-456/02, EU:C:2004:488; and ECJ, *Grzelczyk*, C-184/99, EU:C:2001:458.

³⁵ ECJ, *Förster*, C-158/07, EU:C:2008:630, para 49.

³⁶ cf Art 24(2) Directive 2004/38/EC, whose compatibility with primary law the ECJ reaffirmed in *Förster*, *ibid*, paras 51–55.

³⁷ See, in particular, ECJ, *Collins*, C-138/02, EU:C:2004:172, para 72; ECJ, *Bidar*, C-209/03, EU:C:2005:169, paras 58–62; and ECJ, *Ioannidis*, C-258/04, EU:C:2005:559, para 35.

The essence of the integration model concerns the rejection of equal treatment whenever someone fails to satisfy the 'real/genuine link'³⁸ or 'certain degree of integration'³⁹ standard established by the Court.⁴⁰ Doctrinally, it is construed as an objective consideration for justifying unequal treatment under Article 18 TFEU, Article 24 Directive 2004/38/EC, Article 4 Regulation (EC) No 883/2004 or Article 7 Regulation (EU) No 492/2011 which the Court interprets in parallel.⁴¹ Nonetheless, inspection of the case law shows that it is difficult to identify clear patterns on the basis of the ECJ case law about how the integration criterion should be applied to specific scenarios.⁴²

The inherent difficulties in the application of the real link standard to individual cases may have been one deciding factor for the Court to opt for a clear-cut answer in *Dano* and *Alimanovic* when it flatly denied equal treatment to certain categories of Union citizens irrespective of the circumstances of the individual case, since it construed the rejection of equal treatment to flow directly from Directive 2004/38/EC⁴³—a conclusion it justified, among others, by the high degree of legal certainty and transparency for domestic authorities and individuals concerned.⁴⁴ It is difficult to imagine a more radical deviation from the residence model: territorial presence is deemed irrelevant under EU law; unlawful presence in another Member States brings about no legally significant link to the host society.⁴⁵

It should be noted that the integration model has implications for both incoming and outgoing citizens when it comes to social benefits. While the former may be excluded from welfare provision (as in *Förster*), the latter can rely on the integration argument to 'export' benefits when moving abroad. Conceptually, limitations on incoming citizens and generosity for outgoing nationals are two sides of the same coin if social affiliation—not territorial presence—guides the scope of transnational rights.⁴⁶ Against this background, it was conceptually coherent that the ECJ allowed students in a number of judgments throughout the years to export study grants, which host societies can withhold from incoming foreigners.

³⁸ ECJ, *D'Hoop*, C-224/9, EU:C:2002:432, para 38; and ECJ, *Collins* (n 37) para 67 for jobseekers.

³⁹ *Bidar* (n 37) para 57 for other Union citizens.

⁴⁰ On the emergence of a coherent concept, see M Jesse, 'The Value of "Integration" in European Law' (2011) 27 *ELJ* 172, 174–82.

⁴¹ See Thym, 'The Elusive Limits of Solidarity' (n 4) 23–24.

⁴² See M Dougan, 'The Bubble that Burst' in M Adams et al (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Oxford, Hart Publishing, 2013) 140–45; and Thym, 'The Elusive Limits of Solidarity' (n 4) 45–49.

⁴³ See ECJ, *Dano*, C-333/13, EU:C:2014:2358, para 77; ECJ, *Alimanovic*, C-67/14, EU:C:2015:597, paras 59–60; and N Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52 *CML Rev* 889, 908–11.

⁴⁴ *Alimanovic* (n 43) para 61; and ECJ, *García-Nieto et al*, C-299/14, EU:C:2016:114, para 49.

⁴⁵ See also D Thym, 'When Union Citizens Turn into Illegal Migrants: The *Dano* Case' (2015) 40 *EL Rev* 249, 256–58.

⁴⁶ See R Bauböck, 'Global Justice, Freedom of Movement and Democratic Citizenship' (2009) 50 *European Journal of Sociology* 1, 19–22; and Davies (n 16) 49–54.

It delivered a remarkable line of rulings emphasising the responsibility of the home state through benefits' exportation in various domains.⁴⁷

B. Constitutional Context

There are at least three contextual factors which help rationalise the move towards the integration model in light of the broader constitutional outlook. First, the Court may have yielded to the EU legislature, since it should be remembered that the initial enthusiasm for equal treatment was shared by the legislature, whose generous interpretation of the Treaty regime throughout the 1960s preceded later Court judgments.⁴⁸ That is not to say that the Court wasn't innovative; it certainly was, but its attention mostly focused on national rules in domestic legal orders. Judges often corrected Member States, but there were few instances throughout the years in which it positioned itself consciously against the EU legislature in free movement cases. The most prominent examples are *Grzelczyk* and *Baumbast*, when it scrutinised free movement legislation in light of primary law.⁴⁹

It went along these lines in *Vatsouras*, although judges shied away from declaring the restriction in Article 24(2) of the Citizenship Directive to be an outright violation of the EU Treaties.⁵⁰ Corresponding uncertainties about the implications of the judgments ultimately led to another reference by the same German court in *Alimanovic* in response to which the ECJ decided not to challenge the exemption on the basis of primary law any longer.⁵¹ The same holds for *Förster* where judges indirectly confirmed statutory rules on not granting study grants before the acquisition of permanent residence status.⁵² In *Dano*, the ECJ was confronted with deliberate ambiguity on the part of the EU legislature and opted for a conservative standpoint.⁵³ Doing so had the side effect of rendering it easier to satisfy the demands of the British Government in the run-up to the Brexit referendum.⁵⁴ It could be interpreted, therefore, as an act of defiance towards the potential future

⁴⁷ See N Rennuy, 'The Emergence of a Parallel System of Social Security Coordination' (2013) 50 *CML Rev* 1221, 1232–50; and Dougan (n 29) 136–62.

⁴⁸ See D Thym, 'Family as Link. Explaining the Judicial Change of Direction on Residence Rights of Family Members from Third States' in H Verschueren (ed), *Residence, Employment and Social Rights of Mobile Persons. On How EU Law Defines Where They Belong* (Antwerp, Intersentia, 2016) 16–18; and S Goedings, *Labor Migration in an Integrating Europe* (The Hague, SDU Uitgevers, 2005).

⁴⁹ See M Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship' (2006) 31 *EL Rev* 613.

⁵⁰ *cf* ECJ, *Vatsouras & Koupatantze*, C-22/08 and C-23/08, EU:C:2009:344, paras 33 et seq.

⁵¹ See the contribution by Ferdinand Wollenschläger, chapter 9 in this volume.

⁵² *Förster* (n 35) para 55 notes Art 24(2) Directive 2004/38/EC which did not apply directly to the case *ratione temporis*.

⁵³ See the chapter by Paul Minderhoud and Sandra Mantu, chapter 10 in this volume.

⁵⁴ See the chapter by Stephanie Reynolds, chapter 4 in this volume.

will of the EU legislature on a highly politicised topic. In short, the restrictive turn could be an expression of judicial restraint.⁵⁵

Second, the doctrinal infrastructure of the free movement rules for workers and those who do not work may be similar, but their constitutional context differs markedly. While the former (Articles 45, 49, 56, 59 TFEU) have been an integral part of the common market ever since the original Treaty of Rome, the latter (Article 21 TFEU) are closely linked to the concept of Union citizenship brought about by Treaty of Maastricht. Its introduction reiterated the political dream of building some sort of federal Europe, which culminated in the move towards the Constitutional Treaty. Against this background, it can be argued that both the initial enthusiasm of the Court's early citizenship case law and later hesitation reflect a broader integrationist reorientation,⁵⁶ in particular for those who are not economically active. Potential feedback loops between the Court's case law and the evolution of political union will be discussed below.

Third, there is no uniform concept of solidarity underlying equal access to social benefits, since we have to distinguish between work-related benefits and broader social assistance to anyone in accordance with most domestic welfare systems. Granting equal treatment to workers was and is largely uncontroversial, since most Member States gradually embraced territoriality instead of nationality as the door-opener for various forms of social benefits after the Second World War.⁵⁷ Equal treatment for incoming workers was also meant to prevent downward pressure on legislation protecting the domestic population.⁵⁸ One may certainly question the outer limits of this equality, such as in-work benefits for part-time workers or the level of payments for children living abroad.⁵⁹ But such disputes about the fringes should not distract from the essentially economic rationale of equal treatment for workers in line with classic free movement law and corresponding equal treatment guarantees for those who are economically active.

By contrast, there may be no solid normative vision of how transnational solidarity should be construed outside the labour market (it does certainly not follow from the basic agreement on how to treat workers). Floris de Witte has shown that the equal treatment of workers, which one may reconstruct theoretically as an expression of a Durkheimian organic solidarity, does not necessarily pre-empt our

⁵⁵ See K Lenaerts, 'The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice' in M Adams et al, *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Oxford, Hart Publishing, 2013) 17–28; Dougan, 'The Bubble that Burst' (n 42) 145–53; and V Hatzopoulos, 'Actively Talking to Each Other: The Court and the Political Institutions' in M Dawson et al (eds), *Judicial Activism at the European Court of Justice* (Cheltenham, Edward Elgar, 2013).

⁵⁶ See Dougan, 'The Bubble that Burst' (n 42) 150–51.

⁵⁷ See M Ferrera, *The Boundaries of Welfare* (Oxford, Oxford University Press, 2005); and T Kingreen, *Soziale Rechte und Migration* (Baden-Baden, Nomos, 2010).

⁵⁸ See Goedings (n 48) 122–26; and S O'Leary, 'Free Movement of Persons and Services' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford, Oxford University Press, 2011) 508–11.

⁵⁹ Both questions featured prominently in the reform package agreed upon in the run-up to the Brexit referendum; see chapter 4 by Stephanie Reynolds in this volume.

position on transnational solidarity for those in need.⁶⁰ Similar rights for those who are economically inactive require a broader vision of social justice beyond the paradigms of the single market. Certainly, the Court could have constructed such vision, but it could not draw, when doing so, on the basic political consensus for workers. Again, it may be no surprise therefore, that the innovative judgments were delivered during a period of optimism in the late 1990s and early 2000s, while the more restrictive turn coincided with the economic crisis which engulfed the eurozone after 2010.⁶¹ At the time, it became more visible that the EU lacked a meaningful social policy, about the emergence of which commentators had been cautiously optimistic a decade earlier.⁶²

IV. MEMBERSHIP IN POLITICAL COMMUNITIES

In recent Western thought, citizenship has most commonly been associated with membership in political communities.⁶³ These communities have traditionally been states and the transfer of the citizenship idea to the European Union may necessitate, therefore, conceptual translation exploring how far established patterns of state membership can be applied to the EU.⁶⁴ Recent events reinforced the uncertainty whether such conceptual translation may succeed. This section explores corresponding changes (below A) and relates them to broader constitutional trends characterising the ongoing crisis of the European project (B).

A. Evolution of Citizens' Rights

The most visible expression of membership in a political community is the right to vote, but it also presupposes the status defining someone as a member of this community and giving her a basic right to remain.⁶⁵ In both respects, we can observe a reorientation of supranational citizens' rights in the evolution of the EU Treaties and case law. While residence abroad appeared as the central axis for political participation and the right to remain for many years (below i), attachment to the state of origin was reinforced more recently (ii).

⁶⁰ See F de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford, Oxford University Press, 2015) ch 3.

⁶¹ cf S Giubboni, 'Free Movement of Persons and European Solidarity: A Melancholic Eulogy' in H Verschueren (ed), *Residence, Employment and Social Rights of Mobile Persons: On How EU Law Defines Where They Belong* (Antwerp, Intersentia, 2016) 80–81.

⁶² cf C Barnard, 'EU "Social" Policy' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford, Oxford University Press, 2011).

⁶³ See D Leydet, 'Citizenship' in *Stanford Encyclopedia of Philosophy*, Fall 2011 edition: plato.stanford.edu/entries/citizenship.

⁶⁴ cf N Walker, 'Postnational Constitutionalism and the Problem of Translation' in JHH Weiler and M Wind (eds), *European Constitutionalism Beyond the State* (Cambridge, Cambridge University Press, 2003).

⁶⁵ See Bosniak (n 7) 456–63, 470–79.

i. 'Residence Model'

The Treaty of Maastricht endowed the newly established category of Union citizenship with distinct rights, including the right to vote in municipal and European elections while living in another Member State.⁶⁶ This transnational right to vote presents an obvious move towards residence as the decisive factor for political participation. At the time, it could be expected that the voting rights in municipal and European elections might be followed by further moves towards a European democracy. A legal expression of this forward-looking dynamic was today's Article 25 TFEU which called on the EU institutions 'to strengthen [Union citizenship] or to add to the rights' by means of a simplified Treaty revision procedure.⁶⁷ In contrast to the original excitement,⁶⁸ the provision turned out to be a dead letter and was not activated a single time over the past 25 years.

Undoubtedly, the Lisbon Treaty intended to strengthen political participation through, among other things, the introduction of a citizens' initiative and more ambitious Treaty language⁶⁹ but, as discussed below, this did not change much in practice. Regarding the right to vote, attempts failed to move further towards the residence model.⁷⁰ Luxembourg rejected voting rights for EU citizens in national elections in a referendum⁷¹ and the Commission adopted a recommendation requesting Member States to retain the right to vote for nationals living abroad⁷²—instead of taking up the citizens' initiative to extend transnational participation in the country of residence.⁷³ This episode may not be of crucial relevance, but it presents anecdotal evidence for the decline of the 'residence model'.

Along similar lines, EU citizenship was not considerably reinforced as a basic status. The official designation as 'Citizenship of the Union' may relate the individual to the Union's territory as a whole,⁷⁴ but this does not unmake the primary relevance of state nationality. It is sometimes forgotten that corresponding concerns were one of the reasons for the initial Danish rejection of the Maastricht Treaty: Danish voters worried that the EU would interfere with nationality laws.⁷⁵

⁶⁶ See today's Art 22 TFEU.

⁶⁷ Art 25 TFEU in line with the original Art 8e(2) as amended by the Treaty of Maastricht ([1992] OJ C224/36).

⁶⁸ *cf* S O'Leary, *The Evolving Concept of Community Citizenship* (The Hague, Kluwer, 1996) 308–14.

⁶⁹ See P Craig, *The Lisbon Treaty* (Oxford, Oxford University Press, 2010) 66–71; and J Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford, Oxford University Press, 2011) 597–608.

⁷⁰ For corresponding proposals, see F Fabbrini, 'Voting Rights for Non-Citizens' (2011) 7 *European Constitutional Law Review* 392, 404–05.

⁷¹ *cf* on the 2015 referendum, M Finck, 'Towards an Ever Closer Union Between Residents and Citizens?' (2015) 11 *European Constitutional Law Review* 78.

⁷² See Commission Recommendation 2014/53/EU ([2014] OJ L32/34).

⁷³ *cf* the Citizens' Initiative 'Let me vote' (No ECI(2013)000003), which failed to gather enough signatures in 2013/14.

⁷⁴ See Azoulai (n 20) section I.

⁷⁵ See D Howarth, 'The Compromise on Denmark and the Treaty on European Union' (1994) 31 *CML Rev* 765, 772–73.

As a result, the European Council adopted a decision, which was integrated into primary law five years later, that EU citizenship ‘shall complement and not replace national citizenship’.⁷⁶ It is true that this was reformulated by the Treaty of Lisbon in line with the erstwhile Constitutional Treaty, although it remained unclear whether the semantic shift from Union citizenship ‘complement[ing]’ to ‘be[ing] additional’ to nationality implied substantive change.⁷⁷

Against this background, it did not come as a surprise that the Court trod carefully when scrutinising nationality laws. In *Rottmann*, it may have obliged Member States to take into account the consequences of any deprivation of nationality for citizens’ rights under EU law, while being cautious not to limit state discretion extensively.⁷⁸ Notwithstanding the need for a proportionality test, it reaffirmed the domestic prerogative for acquiring or losing Union citizenship together with nationality in light of international law.⁷⁹ This seemed to change when the *Ruiz Zambrano* judgment set out to reinforce the legal significance of Union citizenship by proclaiming that citizens may invoke the status against measures of their home State depriving citizens of the genuine enjoyment of the substance of rights⁸⁰—a criterion reformulated later as relating to situations ‘where [Union citizens] would have to leave the territory of the Union’.⁸¹ To derive from Union citizenship a quasi-automatic guarantee to remain on EU territory presented us with a rich expression of the ‘residence model’.

ii. ‘Integration Model’

It is well known among experts of EU law that the Court may have positioned itself for a great leap forward in *Ruiz Zambrano*, but changed direction in later rulings, thereby retreating from the initial move towards the residence model.⁸² The practical relevance of the ‘substance of rights test’ was effectively limited to the situation of minor citizens with third-country national family members.⁸³ Moreover, the conceptual significance of the new approach was restricted when the Court emphasised that the guarantee to remain in the Union did not imply that a family could stay in Luxembourg where it was residing, since the children

⁷⁶ Art 17(1) EC Treaty as amended by the Treaty of Amsterdam ([1997] OJ C340/173) differed from Art 8(1) EC Treaty as amended in Maastricht (n 67).

⁷⁷ See A Schrauwen, ‘European Citizenship in the Treaty of Lisbon’ (2008) 15 *Maastricht Journal* 55, 59–60; and Shaw (n 69), 598–600.

⁷⁸ ECJ, *Rottmann*, C-135/08, EU:C:2010:104, para 40 noted the decision of the European Council in response to the first Danish referendum.

⁷⁹ *cf Rottmann*, *ibid*, para 39; and ECJ, *Micheletti*, C-369/90, EU:C:1992:295, para 10.

⁸⁰ *cf ECJ, Ruiz Zambrano*, C-34/09, EU:C:2011:124, para 42.

⁸¹ ECJ, *Dereci et al*, C-256/11, EU:C:2011:734, para 65.

⁸² For an overview, see D Kochenov, ‘The Right to Have What Rights? EU Citizenship in Need of Clarification’ (2013) 19 *ELJ* 502; and M Wendel, ‘Aufenthalt als Mittel zum Zweck’ (2014) *Die Öffentliche Verwaltung* 133.

⁸³ See chapter 11 by N Nic Shuibhne in this volume; and Thym, ‘Family as Link’ (n 48) 25–28.

held French passports and could be expected, therefore, to return to France.⁸⁴ Union citizenship may connect the individual to Union territory, but the residual responsibility rests with the home State, in line with the public international law.⁸⁵ Thus, judges accentuated social affiliation instead of territorial presence as the guiding principle for citizens' rights, in line with its conclusion on the EU–Turkey association agreement that 'the acquisition of the nationality of the host Member State represents, in principle, the most accomplished level of integration'.⁸⁶

Along similar lines, the ECJ realigned the significance of social affiliation in an area that had defined much of its early case law on free movement: the public policy exception on the basis of which Member States can expel Union citizens. Judges employed the concept of social integration to interpret the legal position of mobile citizens under the newly established permanent residence status in Directive 2004/38/EC: if citizens disappoint the integration objective, they obtain fewer rights and can be expelled more easily in light of 'integration-based reasoning'.⁸⁷ In *Dias*, this implied that formal factors (presence of national residence certificates) are outweighed by qualitative considerations (absence of sufficient resources) because 'the integration objective ... is based not only on territorial and time factors but also on qualitative elements'.⁸⁸ This approach has been reaffirmed in other (but not all) judgments on permanent residence.⁸⁹

The ECJ also employed the integration criterion to bolster its novel approach to the issue of public security.⁹⁰ This was manifest in the conclusion in *G*, that the seemingly precise 10-year rule for enhanced protection against expulsion should be understood as a proxy for a complex assessment of qualitative factors as a result of which periods of imprisonment need not to be taken into account.⁹¹ The doctrinal impact of these judgments should not be overestimated, since they primarily concerned those residing for more than five years and have no immediate bearing on the ECJ's well-established case law on other scenarios.⁹² Yet, they signal a conceptual shift away from residence-based equality towards an output-oriented assessment that links citizens' rights to the degree of integration.⁹³

⁸⁴ *cf* ECJ, *Aloka & Moudoulou*, C-86/12, EU:C:2013:645, para 34.

⁸⁵ See ECJ, *McCarthy*, C-434/09, EU:C:2011:277, para 29; for a thorough analysis, see F Haag, 'Die Letztverantwortung des Herkunftsmitgliedstaates im Unionsbürgerrecht' in D Thym and T Klarman (eds), *Unionsbürgerschaft und Migration im aktuellen Europarecht* (Baden-Baden, Nomos, 2017).

⁸⁶ ECJ, *Demirci et al*, C-171/13, EU:C:2015:8, para 54.

⁸⁷ ECJ, *Lassal*, C-162/09, EU:C:2010:592, para 37 following AG Trstenjak, *ibid*, para 80.

⁸⁸ ECJ, *Dias*, C-325/09, EU:C:2011:498, para 64.

⁸⁹ Contrast ECJ, *Onuekwere*, C-378/12, EU:C:2014:13, paras 34–36 and ECJ, *Tahir*, C-469/13, EU:C:2014:2094, paras 33–34 to ECJ, *Ogieriakhi*, C-244/13, EU:C:2014:2068.

⁹⁰ See Azoulai (n 20).

⁹¹ *cf* ECJ, *G*, C-400/12, EU:C:2014:9, paras 29–36.

⁹² Doctrinally, the new approach remains limited—so far, at least—to Arts 16 and 28, not to Arts 7 and 27 of Directive 2004/38/EC.

⁹³ Similarly, see S Robin-Olivier, 'Libre circulation des travailleurs' (2011) 3 *Revue trimestrielle de droit européen* 599, 604–07; Nic Shuibhne (n 43) 916–26; and E Spaventa, 'Once a Foreigner, Always a Foreigner' in H Verschuere (ed), *Residence, Employment and Social Rights of Mobile Persons. On How EU Law Defines Where They Belong* (Antwerp, Intersentia, 2016).

B. Constitutional Context

Two contextual factors may help rationalise the move towards the integration model in light of the broader constitutional outlook. They concern the limited bearing of the traditional method of integration through law in the realms of democracy (below i) and the general crisis of legitimacy in which the EU has been engulfed in recent years (ii).

i. *The Limits of Integration through Law*

The process of EU integration has always relied on the transformative potential of ‘integration through law’ by employing the law as an instrument for change.⁹⁴ Union citizenship was an integral part of this endeavour: a special status for citizens with direct elections to the European Parliament and free movement for others than workers had been an integral part the political dream of building some sort of federal Europe through successive Treaty amendments and corresponding institutional practices,⁹⁵ which also informed the move towards Union citizenship in the Treaty of Maastricht.⁹⁶ We can perceive, on this basis, the introduction of citizens’ rights as an effort of social engineering to enhance the democratic legitimacy of the European project by way of constitutional fiat. If that is correct, the counter-argument is apparent: it highlights failures and pitfalls of the legal rules in practice.⁹⁷ To establish a fundamental status called ‘citizenship’ is not a self-fulfilling prophecy. Citizens’ rights need to be embedded into social structures and political life in order to fill the legal rules with substance.

At the time of the Treaty of Maastricht, it could be argued more convincingly than today that transnational voting rights might be a first move towards a supranational democracy based on enhanced participation and a genuine political culture with pan-European political parties and public discourses.⁹⁸ Success was certainly no foregone conclusion, but a cautious optimism prevailed among many observers at the time.⁹⁹ The experience of comparative federalism showed that citizens’ rights can have unifying effects.¹⁰⁰ Yet there is nothing automatic in such a process: whether and if so, to what extent Union citizenship commands

⁹⁴ See Thym, ‘Introduction’ in this volume, section III.

⁹⁵ cf A Wiener, *Building Institutions* (Boulder, CO, Westview, 1998) chs 2, 3; and F Wollenschläger, *Grundfreiheit ohne Markt: Die Herausbildung der Unionsbürgerschaft im unionsrechtlichen Freizügigkeitsregime* (Tübingen, Mohr Siebeck, 2007).

⁹⁶ See, again, Thym, ‘Introduction’ in this volume, section III.

⁹⁷ See U Haltern, ‘Pathos and Patina’ (2003) 9 *ELJ* 14, 26–32; and J Přibáň, ‘The Juridification of Identity’ (2009) 16 *Constellations* 44, 47–53.

⁹⁸ For the original optimism, notwithstanding principled caveats, see the German Federal Constitutional Court, Judgment of 12 October 1993, Cases 2 BvR 2134/92 and 2159/92, *Treaty of Maastricht*, BVerfGE 89, 155, 184–85.

⁹⁹ See, by way of example, J Habermas, ‘Remarks on Dieter Grimm’s “Does Europe Need a Constitution?”’ (1995) 1 *ELJ* 303.

¹⁰⁰ See the comparison by Schönberger (n 18).

centripetal forces cannot be deduced from a simple comparison with nineteenth-century state-building. Contextual factors may prevent history repeating itself—and these factors seem to have pointed in the opposite direction in recent years.

It was mentioned earlier that there is a notable parallel between the aspirational Court judgments on Union citizenship and the rise of the Constitutional Treaty, whose failure might have paved the way for a more restrictive turn.¹⁰¹ This trend seems to have gathered momentum as a result of the euro crisis and the rise of Euroscepticism across the continent. Arguably, events over past years have shown that even an ideal institutional setting for voting rights and other participatory elements would not necessarily give rise to a meaningful European democracy. Empirical studies show that citizens either do not use their rights in the first place or do not identify with the supranational polity when doing so.¹⁰² Citizens' rights have resulted in a limited degree of shared feelings of mutual belonging among the citizens of Europe capable of sustaining, as an identificatory infrastructure for solidarious communities, broader redistributive policies.¹⁰³ From an empirical perspective, the *legal* construction of Union citizenship need not coincide with the *social* construction of European identity.

ii. A Vision for the Union as a Whole

A first analysis of the Brexit referendum reveals a division between mobile and immobile citizens, since it was the latter who disproportionately supported the 'leave' campaign.¹⁰⁴ This coincides with earlier findings that those exercising their free movement rights are inclined to be more supportive of EU integration, while those who do not tend to be more critical.¹⁰⁵ By contrast, much of the academic literature focused on the mobile citizen living in another Member State, while ignoring the broader societal and political effects of the decision, by many citizens, to stay at home,¹⁰⁶ which, coincidentally, was a crucial consideration in the Spaak report paving the way for the Treaty of Rome.¹⁰⁷ A holistic analysis will have to overcome this primary attention to those crossing borders. The doctrinal proposal

¹⁰¹ See Dougan, 'The Bubble that Burst' (n 42) 150–51.

¹⁰² See A Favell, 'European Citizenship in Three Eurocities' (2010) 30 *Politique européenne* 187, 191–202.

¹⁰³ cf R Bellamy, 'Evaluating Union Citizenship: Belonging, Rights and Participation within the EU' (2008) 12 *Citizenship Studies* 597, 601–06; and G Delanty, 'European Citizenship' (2007) 11 *Citizenship Studies* 63.

¹⁰⁴ See R Bauböck in EUDO Citizenship Forum 'Free Movement under Attack' (2016).

¹⁰⁵ See the chapter 7 by Ettore Recchi in this volume; T Kuhn, *Experiencing European Integration: Transnational Lives and European Identity* (Oxford, Oxford University Press, 2015) ch 7; and N Fligstein, *Euro-Clash: The EU, European Identity, and the Future of Europe* (Oxford, Oxford University Press, 2010).

¹⁰⁶ For a rich discussion see S Iglesias Sánchez, 'A Citizenship Right to Stay?' *The Right Not to Move in a Union Based on Free Movement* in D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge, Cambridge University Press, 2017).

¹⁰⁷ cf Editorial Comments (2014) 51 *CML Rev* 729, 730; and Goedings (n 48) 121–23.

to apply citizens' rights to purely internal situations was rejected by the Court for reasons which arguably concerned the preservation of the federal balance of power.¹⁰⁸ The challenge remains how to relate the analysis of citizens' rights to wider effects for societies as a whole.

Such broader outlook would connect discussions about transnational mobility to the state of the Union as a whole. Indeed, the citizenship case law is not the only area in which judges in Luxembourg shied away from fostering a supranational vision of social justice by means of Treaty interpretation: not assessing austerity measures in light of the Charter of Fundamental Rights is another example.¹⁰⁹ Thus, the reticence on the part of the Court to explore further the constitutional potential of Union citizenship may reflect a more general concern that guarantees in the EU Treaties cannot resolve the problems the EU is confronted with at this juncture. The Court may have decided implicitly not to develop a thick reading of constitutional rules on either citizenship or monetary union at time of profound economic and political crises. Anyone trying to change this will have to engage, therefore, in a general undertaking to develop a vision of social justice for the Union as a whole, not only for those moving across borders.¹¹⁰

This leaves us with the overall impression of both the EU institutions and its highest Court retracting from earlier attempts at constitutional engineering by means of enhanced citizens' rights and progressive constitutional adjudication. That need not be understood as resignation. It could be presented positively as a move towards a more confederal understanding of European integration which restrains the vision of some sort of federal Europe and accepts that the Member States will remain the primary political communities in years to come.¹¹¹ Doing so would not be a return to the closed nation-state, but build the European Union on domestic communities within a broader supranational structure of mutual respect and responsiveness.¹¹² The move away from residence-based voting rights and the strengthening of national citizenship in recent case law can be perceived as building block of such a European Union based on domestic political communities instead of promoting a quasi-federal vision of the EU.

V. MIGRATION, MOBILITY AND SOCIAL COHESION

Citizenship can have many meanings. Most accounts seem to concur, nonetheless, that it embraces questions of membership and belonging, although authors might

¹⁰⁸ For more detail, see D Thym, 'Frontiers of EU Citizenship' in D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge, Cambridge University Press, 2017) 719–22.

¹⁰⁹ See AJ Menéndez, 'Which Citizenship? Whose Europe?—The Many Paradoxes of European Citizenship' 2014 15 *German Law Journal* 907, 928–31.

¹¹⁰ The conclusion to this volume will explore trends in this direction.

¹¹¹ See the contribution by Francesca Strumia, chapter 8 in this volume.

¹¹² See K Nicolaidis, 'European Democracy and its Crisis' (2013) *Journal of Common Market Studies* 351; and R Bellamy, 'An Ever Closer Union of Peoples' (2013) 35 *Journal of European Integration* 499.

disagree about how the element of identity is to be construed normatively.¹¹³ The European Union is no exception, since it has been an integral part of the redefinition of statehood after the Second World War. More recently, this 'post-national' conception of Union citizenship was confronted with the increasing salience of migration from third-states, which became a prominent feature of EU activities and in domestic policy debates. This section will explore the interaction between both developments by linking the institutional practice on citizens' rights (below A) to debates about migration at European and national level (B).

A. Evolution of Citizens' Rights

Considering controversial citizenship cases, the residence status of family members of Union citizens holding the passport of a third state appears as a common thread in judgments such as *Baumbast*, *Carpenter*, *Akrich*, *Metock*, *Ibrahim*, *Ruiz Zambrano*, *Dereci* or *Alokpa*. This linkage between Union citizenship and migration law helps us rationalise the shift, on the part of the ECJ, from enhanced residence rights (below i) to a renewed focus on questions of social integration (ii).

i. 'Residence Model'

The introduction of Union citizenship has been an integral part of the redefinition of statehood. It was meant to symbolise the benefits EU integration brings to the individual, thereby supporting the '*rapprochement* of peoples who wish to go forward together'.¹¹⁴ Union citizenship can be said, therefore, to have a 'post-national' character. It appeared as a vehicle for overcoming the close nation-state with its traditional ethno-cultural definition of belonging.¹¹⁵ Citizens' rights could be construed, on this basis, as emancipatory in character giving the individual the option to choose different life plans and to pursue her happiness beyond her home state. It presented, in essence, an instrument to overcome established meanings of belonging. To find conclusive evidence that such vision motivated judges is inherently difficult, but cannot be excluded.¹¹⁶

It is much easier, by contrast, to trace the interaction between Union citizenship and the residence rights of third-country national family members. Their status came into the ambit of ECJ case law only indirectly, since third-country nationals cannot rely on citizens' rights. They benefit from free movement in the

¹¹³ See the chapter 13 by Karin de Vries; and chapter 14 by Clíodhna Murphy, in this volume.

¹¹⁴ European Union, Report by Leo Tindemans to the European Council, Bulletin of the EC Supplement 1/76, 27 (emphasis in the original).

¹¹⁵ See Kostakopoulou, *The Future Governance of Citizenship* (n 17) ch 4; and Soysal (n 17).

¹¹⁶ For instructive reading, see de Witte (n 60) 22–37; and JHH Weiler, 'To Be a European Citizen: Eros and Civilization' in JHH Weiler, *The Constitution of Europe* (Cambridge, Cambridge University Press, 1999).

form of ‘derived rights’¹¹⁷ as family members of a sponsor holding an EU passport. As a result, corresponding judgments were not primarily about transnational movement for economic purposes, which constituted the formal doctrinal basis for the Court’s intervention, but revolved around questions of family unity in substance.¹¹⁸ For some years, it seemed as if judges in Luxembourg were protecting family unity as an end in itself. The formal linkage to free movement rights was given little attention.¹¹⁹ Residence-based equality for Union citizens and third-country national family members appeared as the new hallmark of transnational citizens’ rights.

ii. ‘Integration Model’

In recent years, the Court of Justice has shown a noticeable sensitivity when dealing with family members from third countries. Judgments concerned diverse doctrinal scenarios, but they had one thing in common: they revealed an interpretative shift from a judicial style of argumentation based on the telos (purpose) and constitutional principles (human rights, free movement) to an examination of the wording and the general scheme of the supranational rules in question. This conclusion extends to judgments on social benefits and the more restrictive follow-up to *Ruiz Zambrano* discussed earlier in the same way as it concerns a third-country national family member.

The Court found, for instance, that a derived residence right after divorce does not come about if the partner left the Member State before initiating divorce proceedings¹²⁰ and that parents living across the border in another Member State cannot invoke derived rights.¹²¹ It also concluded that family members do not benefit from a derived residence status whenever a Union citizens moved abroad, marries there and returns to his home state before a period of three months, since free movement had not been exercised effectively in such a scenario.¹²² It is noticeable that such a conclusion puts less emphasis on family unity as an end in itself, reinforcing instead the classic concept of transnational mobility as the hallmark of free movement.¹²³ This did not undo the generosity of the earlier case law, which judges did not overturn, but it emphasised that citizens’ rights do not bring about indefinite equal treatment whenever residing abroad.

¹¹⁷ *Dereci et al* (n 81) para 55.

¹¹⁸ For further comments, see Thym, ‘Family as Link’ (n 48) 20–31.

¹¹⁹ See Spaventa, ‘From *Gebhard* to *Carpenter*’ (n 14) 764–68; and A Tryfonidou, ‘Family Reunification Rights of (Migrant) Union Citizens’ (2009) 15 *ELJ* 634.

¹²⁰ See ECJ, *Singh et al*, C-218/14, EU:C:2015:476.

¹²¹ See ECJ, *Iida*, C-40/11, EU:C:2012:2405, paras 46–65.

¹²² See ECJ, *O & B*, C-456/12, EU:C:2014:135, para 52.

¹²³ See E Spaventa, ‘Family Rights for Circular Migrants and Frontier Workers’ (2015) 52 *CML Rev* 753, 764–78; and E Pataut, ‘Citoyenneté de l’Union européenne’ (2014) *Revue trimestrielle de droit européen* 781, 791.

The perspective of migration law towards third-country nationals allows us to elucidate another element of the free movement case law: the qualitative approach to the 'integration' yardstick in recent rulings on social benefits and the public policy justification discussed above. Generally, the notion of 'integration' is used more frequently for cross-border movements of third-country nationals than for Union citizens. It became a central term in debates about immigration policy at national and European level from the mid-2000s onwards.¹²⁴ In the context of immigration law, the concept soon developed a life of its own emphasising the value of social cohesion besides residence-based quality; secondary legislation often employed the term in the context of opening clauses allowing Member States to make the residence status of foreigners conditional upon, for instance, integration requirements by promoting the knowledge of the national language.¹²⁵ The ECJ subscribed to this contextual approach in two judgments.¹²⁶

B. Constitutional Context

There are at least three contextual factors which help rationalise the move towards the integration model in light of the broader constitutional outlook. First, EU law had addressed cross-border movements of people mainly from the perspective of Union citizenship for many years. This may have changed given the newly found prominence of immigration from third countries both in political debates and the EU Treaties, which have comprised supranational competences for law-making on immigration law *sensu stricto* since the Treaty of Amsterdam, on the basis of which the EU legislature adopted a number of legislative instruments that can have a direct bearing on citizenship cases.¹²⁷ On closer inspection, various judgments on family members discuss these instruments alongside free movement rules,¹²⁸ although the ECJ had brushed aside a related argument some years before.¹²⁹ These new rules on third-country nationals differ markedly from Union citizenship—mirroring discrepancies between citizens' rights and the EU–Turkish association *acquis* in relation to which the Court explicitly recognised

¹²⁴ For a reliable overview, see S Carrera, *In Search of the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU* (Leiden, Martinus Nijhoff, 2009); and chapter 13 by Karin de Vries in this volume.

¹²⁵ See Jesse (n 40) 182–88; and Carrera (n 124) ch 4.

¹²⁶ See ECJ, *P & S*, C-579/13, EU:C:2015:369; and ECJ, *K & A*, C-153/14, EU:C:2015:453; and the analysis by Clíodhna Murphy, chapter 14 in this volume; and D Thym, 'Towards a Contextual Conception of Social Integration in EU Immigration Law: Comments on *P&S* and *K&A*' (2016) 18 *European Journal of Migration and Law* 89.

¹²⁷ See Horsley (n 9) 956–63; and A Lansbergen and N Miller, 'European Citizenship Rights in Internal Situations' (2011) 7 *European Constitutional Law Review* 287, 300–01.

¹²⁸ See esp *Dereci et al* (n 81), paras 71–72; *O & B* (n 122) paras 78–81; ECJ, *Ymeraga et al*, C-87/12, EU:C:2013:291, para 42.

¹²⁹ Despite calls to the contrary by AG Geelhoed the ECJ, *Metock*, C-127/08, EU:C:2008:449, para 66 neglected the immigration dimension.

that it pursued different objectives from EU citizenship and that, therefore, ‘the two legal schemes in question cannot be considered equivalent’.¹³⁰ In short, the change could be the result of an adaptation, on the part of judges, to a modified legal and constitutional context.

Second, the distinction between Union citizenship and immigration law towards third-country nationals has constitutional implications, since the latter leaves the EU legislature more discretion.¹³¹ When adopting corresponding rules, the Member States rejected a transfer of the residence-based logic of the (early) citizenship regime to immigration law. Instead, they promoted a more contextualised meaning of social integration mentioned earlier. It can be argued that the qualitative realignment of the ‘integration’ yardstick in the more recent citizenship case law integrates this immigration-based logic into free movement rules (while many commentators had expected the influence to run in the opposite direction).¹³² The language used by the British Government before the Brexit referendum did the same: it constantly branded Union citizens as ‘migrants’ and warned against instances of ‘benefits tourism’, thereby tearing down the semantic wall between the ‘mobility’ of EU citizens and the ‘immigration’ status of third-country nationals the Commission had tried to erect in its official communications.¹³³

Third, the Court may have responded to calls from national governments after intense reactions to both the *Metock* judgment and the *Ruiz Zambrano* ruling had signalled fundamental concerns.¹³⁴ We should be careful, however, not to equate this call for proactive integration policies with right-wing populism even if it can be (mis)used for this purpose. To allow Member States to pursue integration policies within certain limits, need not contradict the ‘post-national’ orientation of Union citizenship, which helped overcome the closed nation-state. Supranational rules would continue to direct the reconfiguration of collective identities away from traditional notions of ethno-cultural essentialism to embrace diversity and non-discrimination,¹³⁵ without however preventing Member States from seeking a new sense of mutual trust and collective belonging on the basis of some sort of rights-based and discourse-oriented constitutional patriotism, be it at national level or for an emerging European democracy.¹³⁶ Such outlook would suit earlier

¹³⁰ ECJ, *Ziebell*, C-371/08, EU:C:2011:809, para 74.

¹³¹ See D Thym, ‘EU Migration Policy and its Constitutional Rationale: A Cosmopolitan Outlook’ (2013) 50 *CML Rev* 709, 716–25.

¹³² See Jesse (n 40) 188–89; and K Groenendijk, ‘Recent Developments in EU Law on Migration’ (2014) 16 *European Journal of Migration and Law* 313.

¹³³ cf Thym, ‘When Union Citizens Turn into Illegal Migrants’ (n 45) 256.

¹³⁴ See N Nic Shuibhne and J Shaw, ‘General Report’ in U Neergaard et al (eds), *Union Citizenship: Development, Impact and Challenges. The XXVI FIDE Congress in Copenhagen* (Copenhagen, DJØF Publishing, 2014) 139–50.

¹³⁵ See Joppke (n 23) ch 4; and Thym, ‘Citizens and Foreigners in EU Law’ (n 19) 314–15.

¹³⁶ See J Habermas, ‘Staatsbürgerschaft und nationale Identität’ (1990) in J Habermas, *Faktizität und Geltung* (Berlin, Suhrkamp, 1992); Delanty (n 103) 67; and JW Müller, *Constitutional Patriotism* (Princeton, NJ, Princeton University Press, 2007).

findings that the EU institutions started recognising the value of social cohesion at a time when the financial crisis and Brexit indicate that some sort of political union at supranational level is not forthcoming.

VI. CONCLUSION

While the legal rules on Union citizenship have been relatively stable, their interpretation changed markedly over the years and remains subject to intense debates about Court judgments and wider institutional practice. This chapter set out to rationalise these arguments in light of broader constitutional trends defining the state of the European integration process at this juncture. It employed two distinct visions of how to construe supranational citizenship as a heuristic device for reconstructing discussions on diverse subject matters such as welfare benefits, political participation, nationality law, residence security and interaction with immigration law towards citizens of third countries. Doing so allowed us to highlight a common trend underlying Court judgments and institutional practice: they epitomise a drift away from residence-based equality towards a novel emphasis on the value of social cohesion when the meaning of citizens' rights is intricately linked to the degree of integration in host societies.

How to explain this normative reconfiguration of supranational citizenship. This chapter argues that the volatile character of Union citizenship and the move towards the 'integration model' can be rationalised by the constitutional context. Although each scenario is defined by specific circumstances discussed above, there are three overarching themes connecting the evolution of citizens' rights to broader constitutional trends. First the ECJ's restrictive turn on social benefits and family members can be explained by greater deference to the legislature, which had always sent out mixed signals when it came to social benefits for Union citizens who do not work and to the immigration status of third-country nationals. Although judges in Luxembourg had emphasised the dynamic potential of Union citizenship in earlier cases, new judgments are defined by a conservative style or argumentation which accentuates the limits of Union law and recognises the significance of the new provisions on immigration law.

Second, there is a notable parallel between shifting institutional practices and the rise and fall of the Constitutional Treaty. The latter arguably presented the high point of the 'integration through law' concept which employed EU law as an instrument for political and social change. Union citizenship was an integral part of these endeavours, since it had always been aimed at fostering the link between the European project and its citizens. The momentum behind this idea seems to have been lost. This is most visible in discussions on political participation and the significance of nationality in relation to which the initial drive towards transnational equality based on residence gave way to a fortification of membership and democratic legitimacy in the Member States. Institutional practices emphasising the value of social integration appear as epitaphs of a Union losing self-confidence

as a supranational polity, emphasising instead the continued significance of solidary political communities at national level.

Third, there is nothing automatic in the projection of a legal solution from one policy field to another. Thus, the equality-based reasoning behind economic market integration cannot justify access to social benefits across borders for those who do not work. To do so requires a distinct normative vision of social justice. In this respect, a general deficit of European constitutionalism became apparent in recent years. The Court of Justice hesitates to develop a thick normative understanding of supranational rules that may guide the resolution of intricate political questions. Union citizenship is not the only area in which the Court trod carefully, not least in the run-up to the Brexit referendum. It similarly showed constraint in the context of the euro crisis. The novel emphasis on social integration in the citizenship case law need not contradict this tendency. It can be explained as an expression of institutional practices which accept the limits of supranational constitutionalism while recognising that the Union should be built on functioning communities at national level. The evolution of citizens' rights can be construed as an integral part of this wider trend.