Frontiers of EU Citizenship: Three Trajectories and their Methodological Foundations

Daniel Thym*

I. Introduction

As a supranational polity, the European Union depends – much more than a nation-state – upon the law and judges to preserve its viability and to develop its constitutional infrastructure. It therefore did not come as a great surprise when the ECJ started exploring the potential of the Treaty rules on Union citizenship. However, the outcome of individual cases and the overall orientation of the case law have remained controversial. There was and remains nothing inevitable in the evolution of Union citizenship, since there are different visions of how to conceptualise the legal rules which direct judicial decisions and underlie academic interventions on the topic (below II). To highlight these divergent trajectories supports an enhanced methodological sensitivity on the part of academics, who often argue for particular outcomes without explicitly explaining their underlying decisions and the alternatives they rejected (III).

Against this background, this contribution will extrapolate three trajectories which define the academic debate on the judicial evolution of Union citizenship. Many authors support a certain degree of ‘aspirational citizenship’ that promotes social change and supports the inclusion of outsiders, such as third-country nationals (IV). In contrast, proponents of ‘citizenship as a legal creation’ focus on the wording and structure of the EU Treaties: they emphasise the need for sound doctrinal hermeneutics, including respect for the wider constitutional landscape (V). Finally, ‘citizenship as a social fact’ explores the empirical underpinnings of citizens’ rights and highlights their corresponding weaknesses (VI). Throughout this chapter, I will use selected examples to explain the relevance of these routes in the resolution of individual cases disclosing the status of Union citizenship.

II. Frontiers of Union citizenship

* Professor of Public, European and International Law and Director of the Research Centre Immigration & Asylum Law at the University of Konstanz.
When Union citizenship was introduced by the Treaty of Maastricht, the initial reaction was temperate. Early comments criticised the new rules for not having added much substance; citizenship was perceived to be essentially a label attached to free movement guarantees and direct elections to the European Parliament. Commentators highlighted the ‘weakness’ of its legal framework and castigated the new status as a misnomer bound to remain an ‘empty gesture’, a sort of ‘cynical public relations exercise’ on the part of the High Contracting Parties. It is well known that the situation changed in the late 1990s, when the Court started interpreting Treaty rules. Ever since, the citizenship judgments have remained among the most ambitious and tantalising lines of case law in recent memory.

Throughout this period, certain recurring themes have dominated the case law and wider academic debates. In this chapter I will rely on three of these thematic leitmotifs to illustrate the impact of the different citizenship trajectories. These examples concern access to social benefits during stays abroad, residence rights for family members with the nationality of a third state and political participation. However, my argument is not primarily concerned with the resolution of the corresponding disputes; my focus lies on the underlying visions of how to conceptualise the interpretation and evolution of the Treaty rules on Union citizenship. By extrapolating these related routes, I hope to support greater methodological sensitivity in the debates about the legal underpinnings of supranational citizenship.

The examples mentioned have one thing in common: they concern the spread of citizenship rules into areas hitherto beyond their reach. In other words, these prominent debates can aptly be described as exploring the ‘frontiers’ of EU citizenship, transition zones where the limits of the status quo are tested and frequently extended. Making use of the ‘frontier’ metaphor is in itself a device in describing our object of study. Ever since the late nineteenth century, the term ‘frontier’ has had largely positive connotations in Western thought: it has concerned the expansion of Western civilisation, not least in the American West. It seems to me that debates about Union citizenship can be reconstructed along similar lines: they have often concerned the potential expansion of European Treaty rules into new domains. Put differently, the citizenship concept has often been considered a fixed star guiding transformative interpretation. The use of the ‘frontier’ metaphor in the heading of this paper should be conceived, consequently, not as a normative bias, but as an investigative device to encourage the examination of the approaches underlying the legal disputes on Union citizenship, which arguably reflect deeper discrepancies about the role of EU law and of supranational citizenship. Although

4 Of course, this positive narrative has always had its darker side, such as the fate of the ‘native’ population or the environmental impact of colonisation; cf. L. Obregón Tarazona, ‘The Civilized and the Uncivilized’, in B. Fassbender and A. Peters (eds.), *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012).
my preferences will become clear, I will not side with one or several trajectories unequivocally. My intention is not to promote a specific approach, but to highlight diverse positions to the legal fundamentals of Union citizenship and their dynamic evolution.

III. Methodological background

There is something genuinely European about the dynamism of Union citizenship underlying the frontier metaphor. The integration process has often been described as the result of ‘integration through law’: in the EU, the law is much less a factor for stabilising pre-existing situations than an instrument for change. The belief in the effectiveness of the legally-driven modification of social and economic realities was strengthened in the 1990s by the success of the single market programme. In retrospect, the quarter century between the Single European Act and the entry into force of the Treaty of Lisbon appears as a period of almost continuous Treaty changes, which arguably reached its climax in the endeavour to foster the steady advance towards political union through an enhanced role for the European Parliament, the introduction of Union citizenship, a legally binding Charter of Fundamental Rights and the Constitutional Treaty project. In all these instances, the law was employed transformatively to change social realities.

This tradition of ‘integration through law’ arguably explains the inclination towards progressive interpretation on the part of EU law experts, who often consider the law and its patron, the Court of Justice, to constitute the avant-garde of the integration process. Judges, academics and civil servants have frequently been described as perceiving themselves as pioneers pushing out the frontiers of the European project. This general trend extends to Union citizenship and is reinforced in the citizenship context by its aspirational aspect, discussed below. From a methodological perspective, we can discern two expressions of this movement,

which often overlap in practice, since academics working on EU law do not always openly reflect the methodology underlying their interventions.

Firstly, many participants follow an essentially analytical approach and adopt an extra-legal standpoint from which they evaluate legal developments, including the citizenship case law.\textsuperscript{10} Depending on the preferences of individual authors, such analytical perspective can on the one hand adopt an interdisciplinary standpoint, assessing legal developments in the light of integration theory, sociology, political philosophy or other disciplines.\textsuperscript{11} On the other hand, scholars can promote their vision of supranational citizenship, either by presenting their model in theoretical terms\textsuperscript{12} or by defending a different interpretation of the law.\textsuperscript{13} Court judgments or other developments in the realm of citizens’ rights which go down a different line of argument than the position defended by the author are then criticised.

Secondly, many academics adopt various degrees of a doctrinal approach, a practice which remains particularly common among academics from civil law jurisdictions in continental Europe – the vast majority of EU Member States. Doctrinal contributions present themselves in many forms, from crude descriptions of developments in positive law\textsuperscript{14} to ambitious studies analysing the systemic coherence of the law\textsuperscript{15} or embarking upon wider constitutional treatises.\textsuperscript{16} Their common ground is the assumption that intra-legal arguments and constraints should be taken seriously and that legal academics belong to a discursive community which is involved in the constant reconstruction of the doctrinal infrastructure of the legal system.\textsuperscript{17} The relative weight accorded to academics and their doctrinal publications varies greatly between

\textsuperscript{12} See for example, D. Kostakopoulou, \textit{The Future Governance of Citizenship} (Cambridge: Cambridge University Press, 2008).
\textsuperscript{13} For a prominent example, see D. Kochenov and R. Plender, ‘EU Citizenship: From an Incipient Form to an Incipient Substance?’ (2012) 37 \textit{European Law Review} 369.
\textsuperscript{14} They often take the form of articles summarising the facts and the outcome of a series court cases with no or minimal analytical input.
\textsuperscript{15} For examples in the field of citizenship, see F. Wollenschläger, \textit{Grundfreiheit ohne Markt} (Tübingen: Mohr Siebeck, 2007); N. Nic Shuibhne, \textit{The Coherence of EU Free Movement Law} (Oxford: Oxford University Press, 2013); and A. Iliopoulou, \textit{Libre circulation et non-discrimination, éléments du statut de citoyen de l’Union européenne} (Brussels: Bruylant, 2008).
\textsuperscript{17} Cf. the sociological study by P. Bourdieu, ‘La force du loi. Éléments pour une sociologie du champ juridique’ (1986) 64 \textit{Actes de la recherche en sciences sociales} 3.
jurisdictions: among the larger Member States, academics have traditionally been most influential in Germany and least visible in Britain. It is the responsibility of those working doctrinally to reflect and to explain their methodology in international and interdisciplinary settings which are not familiar with continental legal cultures.

Doctrinal work in the European tradition can encompass both specific questions of statutory interpretation and broader constitutional analyses which are arguably particularly helpful in understanding basic concepts of EU law, such as citizenship. Constitutional principles in this sense convey a set of normative values and express basic social choices which change over time. For that reason, doctrinal work in the form of constitutional inquiries can benefit from a confrontation with non-legal perspectives in a process that Armin von Bogdandy has aptly described as a methodological approach he calls ‘doctrinal constructivism’. Doing so is prone to criticism of normative bias, since constitutional accounts along these lines partake in the constant reconstruction of the citizenship concept. Doctrinal constructivism cannot evade this pitfall entirely, but it can try to minimise the risk by exposing preconceptions and by discussing underlying concepts and possible alternatives. Doctrinal constructivism and constitutional analyses become contextually embedded on this basis.

It is the deeper motivation of this article to support greater reflection on the methodological dissonances in the construction of Union citizenship. Academics should reflect the methodological infrastructure and the underlying conceptual choices more consciously. There is nothing natural or quasi-automatic in the evolution of EU citizenship; there are alternatives, which the different trajectories extrapolate.

IV. Aspirational citizenship

The introduction of Union citizenship did not have immediate implications on institutional practice at EU level beyond the general invocations of the citizenship paradigm in the political
declarations of the supranational institutions. Nevertheless, commentators predicted early on that the new status would not permanently remain an empty normative shell. They expected the citizenship label to have a transformative impact, reflecting its historic weight in earlier struggles for equal treatment (below A). Within the EU context, its bearing was interconnected, moreover, with the inherent conceptual ambiguity of the new status (B). The example of family members from third countries illustrates how the aspirational citizenship trajectory can influence progressive interpretation in practice (C).

A. Background: historic struggles for equal citizenship

Historically, invocations of citizenship have often been linked to ongoing struggles for equal treatment and social inclusion. This is exemplified by the American advance towards the abolition of slavery and the later civil rights movement, which often invoked equal citizenship in their struggle for freedom. In Europe the end of serfdom, the recognition of Jews as equal members of societies and the extension of the right to vote to ever-wider categories of male inhabitants throughout the nineteenth century were often discussed in terms of equal citizenship, as was the construction of the welfare state. More recently, women, ethnic minorities and gays and lesbians have fought for emancipation by invoking ‘citizenship’. Along similar lines, philosophical works, from Kant’s ‘Perpetual Peace’ to the works of German idealism – often invoked in contemporary studies of transnational citizenship – were principled treatises on prospective and theoretical regimes emanating from the use of reason.

For our purposes, the normative surplus of these historic examples stands out. Calls for equal ‘citizenship’ did not reflect social realities on the ground, but were meant to buttress political and societal change. In other words, historic invocations of citizenship have often been aspirational: they justified political demands and guided the reform agenda as a normative anchor. A telling example is the climax of the American civil rights movement, when Martin Luther King Jr., in his speech at the Lincoln Memorial, described a ‘dream’ of equal civil rights.

---

29 By way of example, see S. Benhabib, *The Rights of Others* (Cambridge: Cambridge University Press, 2004), ch. 1.
to be achieved in the future, highlighting its absence from the status quo. Those advocating for
a transformative approach to Union citizenship perceive it similarly as a projection lens, which
could orientate legal debates towards a normative ideal of justice.

The writing of the editor of this volume illustrates this point: in his reconstruction of the
legal debates about Union citizenship, Kochenov addresses legal questions such as the vertical
delimitation of competences between the EU and its Member States: in doing so, he employs
‘citizenship logic’ as a new paradigm for progressive interpretation beyond the established pa-
rameters of ECJ case law on matters such as the purely internal rule. To do so is an almost
pure expression of ‘aspirational citizenship’ in the context of EU law.

B. Ambiguity of the concept of citizenship

The downside of transformative accounts is not only their potential conflict with the alternative
approaches discussed below: challenges also emanates from the fluidity of the citizenship con-
cept. To recognise that citizenship can serve as a projection lens for normative visions of social
justice does not in itself indicate the content of these values. To be sure, the citizenship concept
has a bias towards equality and inclusion, political participation and the protection of civil lib-
erties. However, the basic consensus comes to an end when we move beyond such overarch-
ing themes and try to define normative expectations. Even within a nation-state context, the
notion of citizenship is a prime example of an essentially contested project, an open concept
which lends itself to different visions of what we mean by citizenship. In other words, the
invocation of ‘citizenship’ does not provide a simple or complete answer to many disputes.

Even in the heyday of the nation-state, there was no agreement on the content of state
citizenship. Socialists would propagate a different vision to modernisers or conservatives. At
an abstract level, we can distinguish liberal, republican, socialist and ethnic conceptions of clas-
cic state citizenship, among others. In the terminology of constitutional theory, ‘citizenship’
can be construed as an incompletely theorised contract whose conceptual openness to divergent
interpretation underlies the abstract agreement that state citizenship should exist. This inher-
et ambiguity is reflected in the flexible use of the term Bürgerschaft in the German language,
which arguably projects much less meaning on the term in isolation. The German term Bürger
can mean both citoyen and bourgeois and is often qualified with a prefix, such as Marktbürger
(market citizen), Staatsbürger (state citizen), Weltbürger (cosmopolitan citizenship) or Un-
ionsbürger (union citizen). In short, the precise meaning of citizenship depends on the context
and remains subject to divergent interpretation in specific settings.

34 Cf. Kostakopoulou, The Future Governance, note 12 above, chs. 1–3; and Magnette, Citizenship, note 27 above, ch. 3.
When it comes to ‘Union citizenship’, its meaning is further complicated by uncertainties about the nature of the European Union. Due to its supranational features, it is disputable whether and if so to what extent traditional notions of state citizenship can be transferred to the European level, both from an empirical perspective, discussed below, and from a normative one.\(^{36}\) From a normative perspective, it can certainly be argued that the increasing de-territorialisation of public authority, not only in the European Union, requires finding new forms of trans-, supra- or post-national membership.\(^{37}\) However, the implications of this hypothesis for the European Union are far from certain.\(^{38}\) Some authors argue that Union citizenship epitomises a move towards post-national membership. Yet this outcome is not guaranteed; alternative positions can be defended.\(^{39}\) Even more so than in the state context, the bearing of the citizenship concept beyond the state remains inherently ambiguous.

This is not to say, crucially, that the aspirational trajectory is irrelevant and should be abandoned. All I would say is that it is insufficient to claim that the need for a certain outcome is ‘crystal clear’ and presents itself as a ‘natural and fitting conclusion’.\(^{40}\) Whether that is correct depends on the underlying vision of supranational citizenship the author holds, not least since we could conclude with Kochenov that the citizenship topos could be incorrectly applied to the collection of supranational rights.\(^{41}\) Abstract appeals to ‘real’ citizenship remain unsatisfactory for the simple reason that the citizenship concept is chameleonic: its meaning in specific scenarios depends on the theoretical position of the author. Again, the editor of this volume is an excellent example, whose quotations above could ultimately reflect an understanding of ‘citizenship without duties’.\(^{42}\) That position may be shared by some, but it will be opposed by others. Such debates about the underlying vision are where we need to look to understand the virtues and vices of academic accounts or institutional practice.

This appeal for methodological sensitivity and conceptual openness does not extend unequivocally to the ECJ. Arguably, it is not the function of judges to actively engage in theoretical debates: they should resolve legal disputes and define the contents of the law.\(^{43}\) We cannot

---


42 See D. Kochenov, ‘EU Citizenship without Duties’ (2014) 20 European Law Journal 482, whose focus is the rejection of the historic notion of duties (as the corollary of rights), but which has a broader undercurrent limiting the value of social cohesion.

expect a Grand Chamber of fifteen judges to have a uniform concept of citizenship, let alone describe it in their judgments (and though the standard reference to Union citizenship as a ‘fundamental status’ could be taken to hint at an underlying philosophical position on the part of the Court, this might not exist). However, such inhibition towards theoretical conceptions is specific to the judicial function and does not extend to academics, also in doctrinal legal cultures. While judges must decide cases, academics should discuss the underlying theoretical choices and possible alternatives.

In line with the methodological comments above, corresponding interventions could either assume an extra-legal standpoint when evaluating judicial developments, or they may alternatively adopt a constitutional perspective to explore underlying principles. If these studies claim to be doctrinal, they must comply with the established principles of legal hermeneutics and account for wider implications, such as the impact upon the vertical balance of power. In this way, abstract concepts of citizenship can be fed into the legal debate on legal arguments. Rules on citizenship serve, in a similar way as human rights, as entries for normative arguments: they can be used as trajectories for the expansion of individual rights by means of dynamic interpretation. Aspirational citizenship accounts activate this potential and explore its normative options, as the residence status of third-country national family members demonstrates.

C. Test case: third-country national family members

Various chapters in this volume address the substance-of-rights test introduced by the Ruiz Zambrano ruling and developed further in later judgments. All these cases concerned citizens’ rights only indirectly, through the impact upon the residence rights of family members without an EU passport. Closer inspection shows that this focus is no novel phenomenon. If you consider the controversial citizenship cases over the past decade, the residence status of third-country national family members demonstrates.

46 See section III above.
47 See section IV below.
52 On the origin of the substance of rights formula, see M. van den Brink, ‘The Origins and the Potential Federalising Effects of the Substance of Rights Test’, in this volume.
country nationals constitutes a crucial common thread in judgments such as Baumbast, Carpenter, Akrich, Eind, Metock or Ibrahim. Like Ruiz Zambrano and subsequent decisions, these cases had one thing in common: they concerned the interface between Union citizenship and third-country nationals regarding residence rights.

This line of cases is a perfect test bed for transformative citizenship, since third-country nationals cannot rely on citizens’ rights directly. They instead benefit from free movement in the form of ‘derived rights’ – as family members of a sponsor holding the nationality of an EU Member State. As a result, most judgments were not primarily about a functional understanding of free movement for economic purposes; they revolved around the treatment of migrant family members as a corollary of economic mobility. These developments culminated in Ruiz Zambrano when the Grand Chamber grounded its verdict not in the fundamental freedoms, but in a newly-discovered ‘substance of rights’ test, which flowed directly from the very status of Union citizenship enshrined in Article 20 of the Treaty on the Functioning of the European Union (TFEU) and covered purely internal situations with little or no economic dimension. This appeared to some as a welcome move beyond ‘market citizenship’, with the Court embracing citizenship as a vehicle for the promotion of social justice, protecting human wellbeing as an end in itself, not as a tool for market integration.

It is quite revealing that the Court explained its brief reasoning in Ruiz Zambrano essentially by way of a teleological argument: the ‘fundamental status’ the Court had Union citizenship previously identified as being ‘destined to be,’ Invoking the telos can be perceived as an attempt on the side of the Court to detect the rationale of the citizenship concept – in line with the aspirational trajectory. This move beyond the status quo precipitated creative proposals by EU experts who expected the Court to deploy citizens’ rights as an instrument for far-
reaching changes that would overhaul immigration laws for third-country nationals\textsuperscript{60} or enhance the fundamental rights protection within the Member States.\textsuperscript{61} Judicial developments did not follow these suggestions, however, and were instead quick to minimise the impact of the substance-of-rights test.\textsuperscript{62} Arguably, this later retrogression was related to wider constitutional considerations.

V. Citizenship as a legal creation

I argue that the legal evolution of Union citizenship is influenced by the established principles of legal hermeneutics, including the text of the EU Treaties.\textsuperscript{63} The Court of Justice might have interpreted these provisions generously in the light of the ‘fundamental status’ that it considers Union citizenship to be destined to be, but these judgments never came out of the blue, they were always declared to be grounded in positive law. For sure, the precise meaning of individual guarantees will always be contested, but the plurality of interpretative opportunities should not be confused with the irrelevance of legal arguments.\textsuperscript{64} The ‘citizenship as legal creation’ path concentrates on arguments emphasising these legal foundations. This section will exemplify the pertinence of legal hermeneutics with regard to social benefits (below A), the federal balance of powers (B) and the interaction with an alternative constitutional frame of reference for the migration status of third-country national family members (C).

A. Fundamental status vs. textual limits

The normative surplus underlying aspirational citizenship can be contrasted with the rather sober Treaty language. The main aspirational element in the Treaty text is the term ‘citizenship’; other formulations are weak in comparison. To this day, the EU Treaties maintain, for instance, that EU citizenship should be additional to national citizenship and ‘shall not replace it’.\textsuperscript{65}

\textsuperscript{60} See for example, B. Huber, ‘Die ausländerrechtlichen Folgen des EuGH-Urteils Zambrano’ [2011] Neue Zeitschrift für Verwaltungsrecht 856.


\textsuperscript{63} Political and other social scientists in particular tend to overlook the relevance of intra-legal arguments when analysing the roles of Court; see T. Horsley, ‘Reflections on the Role of the Court of Justice as the “Motor” of European Integration’ (2013) 50 Common Market Law Review 931.


\textsuperscript{65} Art. 9(3) Consolidated version of the Treaty on European Union, OJ 2012 No. C326/13 (TEU), which was introduced, in a slightly different formulation, in Art. 17(1) Consolidated version of the Treaty establishing the European Community, OJ 2006 No. C326/37 (EC), as amended by the Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Amsterdam,
specifically, Article 20 TFEU states: ‘Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties’.66 Put differently, the introduction of citizenship did not add much substance apart from the citizenship label. It was limited to a codification of pre-existing rights and the introduction of some new guarantees, such as direct elections to the European Parliament for citizens residing abroad and the generic right to move of the economically inactive, which the Treaty has always assured ‘subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect’.67 Of course, today’s Article 25 TFEU provides for a simplified revision procedure ‘to strengthen or to add to the rights’,68, but this invitation turned out to be a dead letter and was never activated despite the initial excitement.69 Notwithstanding some minor adaptations, the rather unimaginative wording of the Treaty provisions has remained stable for more than twenty years.70

Highlighting the textual foundations of Union citizenship does not imply that their interpretation is straightforward or that they provide easy answers to legal disputes. This is not the case, since the Treaty rules on citizenship are formulated openly and remain destined, like many constitutional norms, for interpretative metamorphoses.71 It is the inherent openness of the rules on citizenship which expound the pertinence of the ‘legal creation’ trajectory. Arguably, the evolution of the case law can be described as fluctuating between the aspirational potential of the ‘fundamental status’ described above, and attention to the textual infrastructure – as the judgments on access to social benefits illustrates. Whereas the aspirational account gained


66 Art. 20(2) TFEU.
67 Art. 21(1) TFEU, in line with the original Art. 8a(1) EC introduced by the Maastricht Treaty.
68 Art. 25 TFEU, in line with the original Art. 8e(2) EC.
the upper hand in cases such as Martínez Sala, Grzelczyk, Baumbast or Vatsouras & Koupatantze, the Court shifted towards emphasis on the restrictive Treaty text in judgments like Förster and, most recently, Dano. Those who conceive of EU citizenship primarily as a legal creation tend to downplay the relevance of the ‘citizenship’ label, focusing instead on doctrinal foundations and systemic implications.

This ambivalence extends to the classic ‘fundamental status’ formula, which on closer inspection has always been Janus-faced, with an introductory part stressing the aspirational vocation of equal citizenship, including through the use of the term ‘status’, which hints at the permanent affiliation of citizens with society at large. At the same time, the original version of the formula was accompanied by a subordinate clause highlighting persisting ‘exceptions’ and stressing that equal treatment would be limited to ‘those who find themselves in the same situation’, thereby curtailing the promise of equal status. Tellingly, this restrictive subordinate clause was omitted in some later reproductions of the fundamental status formula, especially in situations in which the Court supported a generous reading of Union citizenship. This anecdote exemplifies a broader fluctuation, on the part of the Court, between aspirational and technical arguments throughout the citizenship case law on access to social benefits.

---

78 See the classic position of German constitutional theory expressed by G. Jellinek, Das System der subjektiven Rechte, 2nd edn (Tübingen: J. C. B. Mohr, 1905), pp. 115–35.
80 Contrast the full citation in Case C-333/13, Dano, EU:C:2014:2358, para. 48 to the shorter version in Case C-413/99, Baumbast, EU:C:2002:493, [2002] ECR I-7091, para. 82; and Case C-34/09, Ruiz Zambrano,
Kay Hailbronner is probably the most prominent representative of the ‘legal creation’ camp. Although alternative positions can certainly be defended, including on the basis of the ‘legal creation’ trajectory, those focusing on the legal infrastructure tend towards more restrictive outcomes than those championing an aspirational approach.

B. The federal balance of power

In order to understand the ‘citizenship as legal creation’ trajectory, we should recognise that citizens’ rights do not exist in splendid isolation; they are embedded in the supranational legal order and have broader constitutional ramifications, including for the federal balance of power. Arguably, this wider constitutional landscape explains why the Court may have positioned itself for a great leap forward in judgments such as Ruiz Zambrano – but ultimately stopped short. The reasoning underlying this hypothesis is simple: citizenship is not the only constitutional principle defining the EU legal order; the federal balance of power, in particular, is woven deeply into the textual and conceptual fabric of EU law.

To assume that citizenship would be the central axis guiding the interpretation of the Treaty is arguably neither realistic nor constitutionally desirable. The pertinence of the federal question will be illustrated by the classic debate about the non-application of the free movement guarantees to purely internal situations and by the limited scope of the CFR.

It is well known that the Court has maintained for several decades that the free movement provisions apply only to situations with cross-border effects. EU experts also complain that the case law is very complex and sometimes difficult to understand. It has been argued on this basis that the unpredictability of individual cases and the non-economic aspirations of the citizenship concept call for an end to the purely internal rule and the resulting phenomenon of reverse discrimination.

However, the widespread incoherence of court decisions does not necessarily imply that the underlying constitutional rationale for the purely internal rule has lost its...
relevant, insofar as it gives Member States a certain leeway for autonomous regulatory decisions, thereby substantiating the federal structure of the European project, which remains founded on its Member States. To coherently demarcate the perimeters of the federal balance of power remains a core function of the Court, also when deciding citizenship cases.

Arguably, the rationale underlying the purely internal rule is not inherently linked to market integration, in whose context it was developed, either. In the legal literature on EU citizenship, the debate is often framed as an evolution from the (old) ‘market citizenship’ towards (new) ‘real, social or political citizenship’, including access to social benefits, voting rights, and the free movement of those who do not work. If we move from the former towards the latter, the rationale behind maintaining the allegedly old-fashioned purely internal rule seems to fade. Although this account is highly plausible and has many merits, we should recognise that it remains based upon a citizenship-centred analysis, which conceives the rules on EU citizenship as the central axis defining the resolution of disputes about citizens’ rights. That is not the full picture. To grant Member States leeway for autonomous decisions is arguably an end in itself in a federal entity like the European Union. If that is the case, the constitutional rationale for the purely internal rule does not automatically disappear when we move beyond market citizenship. It appears to me that experts on EU citizenship occasionally overlook the wider constitutional landscape, which the Court of Justice, by contrast, is bound to protect.

The experience of comparative federalism certainly shows that federal citizenship can have unifying effects and can serve as a legal factor in the gradual formation of federal statehood. Yet there is nothing automatic in these processes: whether and if so to what extent Union citizenship commands centripetal forces cannot be deduced from a simple comparison with nineteenth century state-building. Contextual factors and the broader state of European integration may prevent history repeating itself: it arguably lacks the broader social and political capital to replicate the nineteenth century, notwithstanding the legal similarities. Moreover, the broader political climate could occasionally have an impact. Indeed, there were noticeable parallels between the aspirational Court judgments and the rise of the Constitutional Treaty, whose failure might have afterwards paved the way for more restrictive judgments. Along similar lines, the conclusion in Dano that Union citizens without sufficient resources cannot

85 It should be acknowledged, however, that this widespread incoherence endangers legal certainty and can undermine the effet utile of supranational law if national courts are left unclear as to what EU law requires them to do; cf. Sarmiento, ‘Half a Case’, note 43 above, pp. 14–19.


87 For example, see the varied accounts by Spaventa, ‘Seeing the Wood’, note 57 above, 14–30; Tryfonidou, Reverse Discrimination, note 84 above, ch. 4; Shaw, ‘Citizenship’, note 70 above; and Kochenov, ‘The Citizenship Paradigm’, note 31 above, 205–11.


89 See the comparison of Germany, Switzerland and the US by C. Schönberger, Unionsbürger (Tübingen: Mohr Siebeck, 2005).

90 See also section VI.B below.

91 See Dougan, ‘The Bubble That Burst’, note 75 above, 150.
invoke either equal treatment or the CFR arguably responded to the attack that free movement and the EU as a whole have come under in several Member States.\textsuperscript{92}

The relationship between EU citizenship and human rights reaffirms that it would be one-sided to analyse citizens’ rights in isolation. Both Advocates General Jacobs and Sharpston had tried twice to steer the Court towards a comprehensive application of EU fundamental rights, including in purely internal situations.\textsuperscript{93} In \textit{Ruiz Zambrano}, the Court evaded the argument by establishing the ‘substance of rights’ test,\textsuperscript{94} which it later explained to be limited to exceptional scenarios. By doing so, the Court refrained from a reversal of its standpoint on reverse discrimination and eschewed the thorny issue of the scope of the CFR, which constitutes one of the most controversial aspects of the federal balance of power at this juncture.\textsuperscript{95} Instead of further relying upon the substance-of-rights test, judges confronted the question more directly in \textit{Dereci} and made clear that Union citizenship is not meant to supplant Article 51 CFR: beyond the realm of citizens’ rights, domestic courts should apply national constitutional guarantees and the European Convention on Human Rights (as interpreted by the European Court of Human Rights),\textsuperscript{96} not the CFR (as interpreted by the ECJ).\textsuperscript{97} This outcome may have reduced the relevance of supranational citizenship, but it preserved another important principle: the autonomy of the Member States.

This is not to say that the outcome was inevitable from a legal perspective; alternative positions are defensible, also from the perspective of the ‘citizenship as legal creation’ trajectory. The example was meant to illustrate the pertinence of the federal balance of power in citizenship cases, thereby explaining how the legal construction of the supranational status interacts with broader constitutional principles.

C. Alternative constitutional framework: migration and human rights

It was mentioned previously that the residence status of third-country national family members featured prominently among recent citizenship cases.\textsuperscript{98} Ambiguities on the part of the Court in deciding this line of cases arguably also reflect broader constitutional considerations, this time


\textsuperscript{94} See Hailbronner and Thym, ‘Case C-34/09’, note 56 above, 1257–58; and Thym, ‘Towards “Real” Citizenship?’, note 54 above, 168–69.


\textsuperscript{96} 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.


\textsuperscript{98} See section IV.C. above.
in relation to the EU legislature. Why? By discussing the residence status of third-country national family members primarily within the framework of citizens’ rights, the ECJ ignored, at least initially, an alternative frame of reference: the recently introduced Treaty rules on migration and asylum within the area of freedom, security and justice. Generally, these rules leave more leeway to the legislature, since third-country nationals, in contrast to EU citizens, cannot invoke quasi-constitutional free-movement rights. Instead, they may ‘only’ invoke human rights which, under normal circumstances, guarantee no right to entry and a lesser degree of security of residence. In short, the Treaty grants more leeway to the legislature to design migration policy than citizenship status.

By discussing the residence status of third-country national family members solely within the citizenship context, the ECJ ignored migration policy as an alternative point of reference in all cases up to and including Ruiz Zambrano. This later changed in judgments such as Dereci, Iida, O & S and Ymeraga, in which the Court elaborated on the content of related migration policy instruments over several paragraphs, thereby broadening the legal analysis beyond the sphere of citizenship. Doing so implied closer attention to the prerogatives of the Union legislature and national implementing measures (in a similar way to how the Court had deferred to the legislature in some social benefits judgments).

It is not the purpose of this chapter to trace this debate in detail or to propose solutions for specific scenarios. The aim is rather to highlight in general terms how the ‘citizenship as legal creation’ trajectory links the academic debate to sound doctrinal hermeneutics, including its implications for the broader constitutional landscape.

VI. Citizenship as a social fact

Both ‘aspirational citizenship’ and ‘citizenship as legal creation’ have one thing in common: they conceive of supranational citizenship as a creation either of positive law or normative ideals of justice and therefore not intrinsically linked to social realities. In short, both accounts are idealistic in essence. This section will highlight an alternative approach, focusing on empirical

---

99 Contrast Arts. 77–79 TFEU to Arts. 18–21 TFEU.
104 For more comments, see Horsley, ‘Reflections’, note 63 above, 956–63.
facts regarding the situation on the ground: the ‘citizenship as social fact’ trajectory. Generally speaking, purely idealistic and empiricist approaches can be defended methodologically from the perspective of legal theory, although legal arguments tend to fluctuate between ideas and facts in practice, without resolving the underlying conundrum. I will demonstrate how those supporting a facts-oriented analysis emphasise the empiricist dimension against the dominant focus on individual rights in legal contributions (below A). Moreover, the financial crisis has highlighted the limits of identificatory communalities among the citizens of Europe which constrain pan-European solidarity and political legitimacy (B).

A. Citizenship beyond rights

While early commentators underestimated the potential of Union citizenship to influence the Court’s case law, we can equally contend that many legal academics have tended to overvalue the impact of the legal rules on Union citizenship in recent years. This could be because legal academics are professionally prone to concentrate on individual rights and their enforcement through courts; yet citizenship is not only about rights and courts. Notwithstanding the plurality of theoretical positions, ‘citizenship’ is generally perceived to have a bias not only towards individual rights, but simultaneously to encompass political participation and a certain degree of shared feelings of mutual belonging. On this basis, different authors will put forward divergent conceptions of citizenship, but many would reject the application of the citizenship concept without a certain identificatory basis and political participation. That argument can be deployed in normative accounts, but is particularly prominent among those advocating a social fact approach or elements thereof.

The next subsection will demonstrate that the ‘citizenship as social fact’ trajectory highlights the shortcomings of the supranational status, in particular with regard to the identificatory infrastructure of Union citizenship and the limits of meaningful transnational public discourses, which would render the existing voting rights more practically relevant. From the perspective of the social fact trajectory, legal research would ideally have to integrate quantitative or qualitative methods into its design to measure the impact of legal rules and to identify the ‘social

109 See Bellamy, Citizenship, note 32 above; Magnette, Citizenship, note 27 above; and Bosniak, ‘Citizenship Denationalized’, note 33 above; note that this argument is normative in essence and not confined therefore to the citizenship as social fact trajectory.
110 In line with section IV.B. above, these conceptions may differ, among other things, in: (1) their theoretical outlook; (2) their evaluation of post-, trans- or supranational citizenship; and (3) their level of normative expectations for meaningful citizenship.
reality’ of European citizenship (the recent work of Jo Shaw hints to how this can be done in practice). In short, citizens’ rights would be connected to social practice, not least since historic experiences show that nationality, citizenship and rights are always social constructs whose evolutions depend on a range of factors.

This approach should not be misunderstood, however, as declaring Court judgments and other legal evolutions to be irrelevant to social practices (although some will minimise or deny their relevance). Court judgments can be instruments for real-life changes, at least insofar as they relate back to political debates and reflect wider social struggles. Without such interface, legal developments would unfold in a social vacuum as a sort of pipedream, establishing a legal virtual reality. In the realm of citizens’ rights, proponents of the social fact approach will argue that feedback loops can be particularly important, since they often express a vision of a good life and a just society which are inherently linked to broader social and political debates.

From the perspective of the social fact approach, citizens’ rights need to be connected to social practices in order not to remain empty labels, with the wording of the EU Treaties and corresponding court judgments seeming more ambitious than empirical realities would validate. The social fact approach takes seriously the possibility that the EU Treaties establish, to a certain extent at least, a mere façade of citizenship.

B. Identification, solidarity and political legitimacy

In its judgment on the Lisbon Treaty, the German Constitutional Court maintained that Union citizenship ‘is nothing which culturally or normatively precedes the current treaty law and from which legal effects that shape the constitution could emerge’. This mirrors the earlier observation about the specific European tradition of ‘integration through law’, which often employed legal rules in a transformative manner as instruments for changing social realities. Indeed, citizens’ rights in the EU Treaties were perceived by those sponsoring their introduction, as an

112 Cf. her projects on the Europeanisation of citizenship in the former Yugoslavia (CITSEE) and on the acquisition and loss of nationality in Europe (CITMODES), described online at http://www.law.ed.ac.uk/people/joshaw.
116 BVerfGE 123, 267, 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09 (30 June 2009), para. 348 (informal translation by the Court itself); for further comments on the legal context, see D. Thym, ‘In the Name of Sovereign Statehood’ (2009) 46 Common Market Law Review 1795 at 1812–20.
117 See section III above.
effort of social engineering to create some sort of federal Europe by way of constitutional fiat— in line with the aspirational approach discussed above. If that is correct, the counter-argument is apparent: it highlights the failures and pitfalls of the impact of legal rules in practice. To establish a fundamental status called ‘citizenship’ or to enact a legally binding Charter of Fundamental Rights are not self-fulfilling prophecies; proponents of the social fact camp will argue that meaningful citizenship rules need to be embedded into social structures and political life. This contribution will conclude by illustrating this position with two examples.

Firstly, supranational political participation has been buttressed in recent years both for citizens living in another Member State and those living in their home state, including by way of the citizens’ initiative. However, even an ideal legal-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. The rules in the EU Treaties and corresponding practices might, moreover, fail to create meaningful public discourses supporting a viable representative democracy at the European level. In short, participatory citizens’ rights at a supranational level may have limited impact.

Secondly, more than a decade ago the Court famously asserted that citizens from other Member States can expect ‘a certain degree of financial solidarity’ when residing abroad. While the precise meaning of this formula always remained somewhat elusive, judges in Luxembourg famously expanded the scope of transnational solidarity in a series of decisions which form the backbone of the citizenship case law to this date. On top of the doctrinal and conceptual challenges related to these rulings, the ‘citizenship as social fact’ camp would question how far these judicial developments have paved the way for shared feelings of mutual belonging among the citizens of Europe capable of sustaining, as an identificatory infrastructure for solidarious communities, broader redistributive policies. In that respect, the impact of su-

---

118 For the political debate about citizens’ rights since the 1970s, see Wiener, Building Institutions, note 24 above; and for developments after Maastricht, see Wollenschläger, Grundfreiheit, note 15 above, pp. 106–21.
122 Again, authors require different grades of ‘thin’ or ‘thick’ public discourses to buttress meaningful political participation; for a restrictive position, see D. Grimm, ‘Does Europe Need a Constitution?’ (1995) 1 European Law Journal 282.
125 For an overview, see Dougan, ‘The Bubble That Burst’, note 75 above.
pranational citizens’ rights might be more minimal than the wording of Court judgments suggests. From an empirical perspective, the legal construction of Union citizenship does not necessarily coincide with the social construction of European identity.\textsuperscript{126} Of course, ECJ cases always emanate from domestic proceedings and the Court may well be trying to connect citizens’ rights to society at large.\textsuperscript{127} However, they might still be failing to contribute effectively to the emergence of a pan-European identificatory infrastructure for broader social, political and economic integration.\textsuperscript{128} In this respect, the financial crisis might have further darkened the outlook and it could be quite telling – not only from a social fact approach perspective – that citizens’ rights seem to have little bearing on the judicial response to the crisis.\textsuperscript{129} In \textit{Dano} the ECJ maintained that citizens without sufficient resources cannot even invoke the free movement and equal treatment guarantees in the EU Treaties, and the social rights in the CFR were also deemed inapplicable.\textsuperscript{130} In a similar vein, EU citizens in Portugal could not rely on the CFR to challenge the legality of national austerity measures within the broader context of the ESM Treaty and macroeconomic surveillance.\textsuperscript{131} The Court’s position is certainly open to criticism, but proponents of the ‘citizenship as social fact’ trajectory can portray it nonetheless as reflecting apprehension, on the part of the Court, that there are limits to what citizens’ rights are capable of achieving.

\section*{VII. Conclusion}

Judgments on Union citizenship from Luxembourg have received much attention over the years, and yet the outcome of individual cases and the overall orientation of the case law has remained surprisingly unstable. Against this background, this contribution did not set out to resolve substantive questions, but embarked upon a broader methodological assessment of the arguments and assumptions underlying academic and judicial interventions on Union citizenship. These are generally speaking characterised by a principled curiosity to explore the transformative potential of Union citizenship by extending its ‘frontiers’ into new domains, hitherto

\begin{flushleft}
\footnotesize

\textsuperscript{127}See L. Azoulai, ‘Transfiguring European Citizenship: From Member State Territory to Union Territory’, in this volume; and Azoulai, ‘La Citoyenneté européenne’, note 16 above.


\textsuperscript{129}In contrast, earlier debates about the social benefits case law or the substance-of-rights test were dominated by academics more than by politicians, in part because of the limited number of persons to which the judgments applied: the Court may have been more generous because of the limited salience of the issue; cf. S. O’Leary, ‘Developing an Ever Closer Union between the Peoples of Europe?’ (2009) 27 \textit{Yearbook of European Law} 167 at 174–77.


\textsuperscript{131}See Menéndez, ‘Which Citizenship?’, note 114 above, 928–31.
\end{flushleft}
left untouched by the case law. This transformative potential invites us to explore the approaches underlying judicial decisions and interventions by academic authors. This contribution distinguishes three such trajectories, which arguably reflect deeper discrepancies about the role of EU law and supranational citizenship.

Firstly, ‘aspirational citizenship’ reflects the traditional role of citizenship in struggles for emancipation or social change through the liberation or integration of outsiders, such as slaves, Jews or more recently, women and minorities. Those propagating an aspirational approach to Union citizenship perceive it to be a projection lens to orientate legal debates towards a normative ideal of justice. In the EU context the ‘fundamental status’ that judges consider citizenship to be ‘destined to be’ can be conceived of as a semantic reflection of the aspirational trajectory. In practice, the operation of the aspirational approach is complicated by the inherent openness of the citizenship concept. It is a prime example of an essentially contested project, an open idea that lends itself to different visions of its own meaning. Invoking citizenship alone is insufficient, therefore, since its precise meaning depends on its context and remains subject to divergent interpretation in specific settings.

Secondly, the ‘citizenship as legal creation’ approach focuses on the wording and structure of the EU Treaties and argues for sound doctrinal hermeneutics, including respect for broader constitutional principles. Court judgments on access to social benefits can be reconstructed to fluctuate between aspirational possibilities and attention to the textual infrastructure. Moreover, citizens’ rights do not exist in isolation, but fully integrate into the supranational constitutional order which the Court is bound to develop and protect. In this respect, the aspirational potential of citizenship could conflict with essential constitutional principles, such as the federal balance of power. Respect for national autonomy presents the core justification for maintaining the purely internal rule; to expand equal treatment and the application of EU fundamental rights would substantially alter the federal balance of power. Similar respect should be paid, to a certain extent at least, to the functions of the EU legislature.

Thirdly, the ‘citizenship as social fact’ trajectory concentrates on the empirical situation on the ground and examines whether and if so to what extent supranational rights are connected to social practices. It takes seriously the possibility that the EU Treaties establish a mere façade of citizenship which has little or no impact in practice. This can best be shown in relation to political participation and social solidarity. Even an ideal legal-institutional setting for voting rights would not necessarily give rise to a meaningful European democracy. In a similar vein, the Court may well have famously stipulated that citizens may expect ‘a certain degree of financial solidarity’ when residing abroad, but we may question, however, how far this translates to shared feelings of mutual belonging capable of sustaining, as an identificatory infrastructure, redistributive policies. From an empirical perspective, the legal construction of Union citizenship does not necessarily coincide with the social construction of European identity.

In practice, the three trajectories discussed in this chapter will not usually exist in a pure form, but complement one another. Highlighting them nonetheless supports greater reflection among academics on the methodological dissonances in the legal evolution of Union citizenship. There was and remains nothing natural or quasi-automatic in this legal development: there are alternatives that can be extrapolated from the various trajectories.