

The Existential Crisis of Citizenship of the European Union: The Argument for an Autonomous Status

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Abstract

This article argues for the (re)construction of citizenship of the European Union as an autonomous status. As opposed to the current legal regime, whereby individuals with nationality of a Member State are automatically granted citizenship of the Union, under this proposal individuals would be free to choose whether or not to adopt the status of citizen of an incipient European polity. At present, the *telos* and essence of citizenship of the Union is contested. It may be argued that the status is partial or incomplete. This has informed competing normative perspectives. ‘Maximalist’ positions praise the judicial construction of Union citizenship as destined to be the ‘fundamental status’ for all Member State nationals. By contrast, ‘minimalist’ positions argue that the status should remain ‘additional to’ Member State nationality, and the rights created therein should remain supplementary to the status and rights derived from national citizenship. This article will argue for a new approach to the dilemma. By emancipating the condition for acquisition of EU citizenship from nationality of a Member State, and reconstructing it as an autonomous choice for individuals, it is tentatively suggested that a new constitutional settlement for Europe may be generated.

Keywords: EU citizenship, existential crisis, future of Europe, autonomous status, European Union

I. INTRODUCTION: EXISTENCE PRECEDES ESSENCE

What is citizenship of the European Union? Is it a fundamental legal, political, and societal status for those who hold it? Or is it a disparate collection of economically orientated international treaty rights granted in order to facilitate the *raison d’être* of European market integration? The ambiguity of this question is microcosmic of the general ambiguity surrounding the contested concept and *telos* of the European

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Union. It remains the paradigmatic ‘Unidentified Political Object’.¹ This indeterminacy means that citizenship of the European Union is both an existential and an *existentialist* concept—its ‘existence precedes its essence’.² Following its coming into existence, in what is now Article 20 of the Treaty on Functioning of the European Union (‘TFEU’), its essence has been constructed in an iterative and *ad hoc* manner through the case law of the Court of Justice of the European Union (‘CJEU’).

Such *avant-garde* application of law was praised in the hubristic afterglow of Maastricht and the Eastern expansion in the 1990s and 2000s. However, in the last decade, the manifold failures of the Union have provoked a prevailing nausea. Crises—constitutional, financial, humanitarian, and most recently secessionist—have agglomerated and become endemic: the European Union now finds itself in existential crisis.³ Such crisis over existence and essence spreads also to citizenship. The ‘constructive’ nature of citizenship now looks precarious rather than progressive. At the micro-level, a shift in the case law of the CJEU to a more restrictive interpretation of the ambit of EU citizens’ rights has provoked uncertainty for individuals and claims of inequity from academics. At the macro-level, the looming loss of the status for every national of the United Kingdom as a result of the Member State’s withdrawal has shattered the Court’s idealistic vision that citizenship of the Union is set to become *the* fundamental status for the peoples of Europe.⁴ This contestation could have come to a crescendo if the CJEU were called upon to determine whether nationality of a Member State is a necessary condition for the retention of the status in the same way that it is a condition *sine qua non* for its acquisition. On 7 February 2018, in proceedings brought by UK nationals resident in the Netherlands, the Amsterdam District Court made the decision to refer to the CJEU the question of whether the withdrawal of the United Kingdom automatically leads to the loss of EU citizenship for that Member State’s nationals.⁵ This could have precipitated the authoritative pronouncement of a settled and binding definition of the existential status. However,

¹ J Delors, Speech at the First Intergovernmental Conference in Luxembourg, 9 September 1985.

² ‘What do we mean by saying that existence precedes essence? We mean that man first of all exists, encounters himself, surges up in the world—and defines himself afterwards’. J-P Sartre, ‘Existentialism Is a Humanism’, Lecture of 29 October 1945.

³ A-J Menendez, ‘The Existential Crisis of the European Union’ in ‘Special Issue: Regeneration Europe’ (2013) 14(5) *German Law Journal* 453.

⁴ For more detailed discussion of this phenomenon, see O Garner *After Brexit: Protecting EU Citizens and Citizenship from Fragmentation* (EUI Law, 2016) Working Paper 2016/22.

⁵ C/13/640244 / KG ZA 17-1327 of the Rechtbank Amsterdam of 7 February 2018 – NL: RBAMS:2018:605, available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2018:605>. For an English translation, see Jolyon Maugham, ‘Decision of the District Court in Amsterdam’ (*Waiting for Godot*, 13 February 2018) <https://waitingfortax.com/2018/02/13/decision-of-the-district-court-in-amsterdam>; see also comment at Oliver Garner, ‘Does Member State Withdrawal from The European Union Extinguish EU Citizenship C/13/640244 / KG ZA 17-1327 of the Rechtbank Amsterdam (“The Amsterdam Case”)?’ (*European Law Blog*, 19 February 2018) <http://europeanlawblog.eu/2018/02/19/does-member-state-withdrawal-from-the-european-union-extinguish-eu-citizenship-c13640244-kg-za-17-1327-rechtbank-amsterdam-the-amsterdam-case>.

on 19 June 2018, the decision to refer these questions was reversed on appeal on the basis that the claims were not yet ‘sufficiently concrete’.⁶ Regardless of the outcome of this specific case, disquiet remains regarding the normative legitimacy of a judicial body fulfilling such a constitutive role.

This article will provide an argument for the future of citizenship of the Union as an autonomous status. In Section II, four eras in the development of the existential status will be presented. In Section III, the different academic positions on the essence of citizenship will be analysed. These will be categorised according to a reductive dichotomy between ‘maximal’ and ‘minimal’ approaches. This will inform the proposal in Section IV for a third normative approach advocating the creation of citizenship as an autonomous status for those who choose to constitute themselves as a European people. Within such a proposal, an individual’s ‘nationality’ is recognised as an immutable element of their facticity. By contrast, an individual’s ‘citizenship’ is construed as a choice that falls within the ambit of the existential freedom that every individual possesses, and may choose to exercise in order to constitute themselves into a collective. It is envisaged that the creation of such a status would be generative of a new constitutional settlement for Europe. This would allow for the definition of the essence of European citizenship by those who choose to hold it, two decades after its coming into existence.

II. THE FOUR ERAS OF EU CITIZENSHIP: FROM AN INCIPIENT ESSENCE TO REGRESSION

This section will identify four eras in the development of citizenship of the European Union. Such categorisation is useful for establishing the current essence of the status. In turn, this orientates the arguments for future development. These eras are: (1) the pre-Maastricht ‘incipient status’ era in which the disparate threads of the individual’s legal status in EU law were developed; (2) the post-Maastricht ‘scepticism’ era in which these threads were agglomerated into the holistic status of a ‘citizenship’ that was perceived as deficient; (3) the post-*Rudy Grzelczyk* ‘fundamental destiny’ era in which the CJEU actively constructed the substance of citizenship; and (4) the post-*Dano* ‘regression’ era in which decisions of the Court limiting the ambit of rights for Union citizens have been fiercely criticised on the basis of their perceived injustice. These eras are indicative of a status that undergoes an iterative process of self-definition, development, and change in a manner comparable to philosophical existential views on the malleability of human nature. This suggests that EU citizenship is capable of entering a new era predicated upon autonomy and the choice of individuals to become the constituent subjects of a new European constitutional order.

⁶ C/13/640244/ KG ZA 17-1327 of the Rechtbank Amsterdam of 19 June 2018 – NL:GHAMS:2018:2009, available at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2018:2009&pk_campaign=rss&pk_medium=rss&pk_keyword=uitspraken.

A. The 'Incipient' Era

Although it has been suggested already that the existence of EU citizenship precedes its essence, it is possible to identify some incipient threads of this essence in the era preceding the creation of the status in 1992. Carlos Closa has argued that an 'incipient and partial form of citizenship was being developed in parallel to two facts: the rights that the progressive completion of the internal market ... granted to individuals ... and the need to differentiate between those individuals from citizens of non-Member States'.⁷ This first element captures how individuals, as a result of the integration process between their Member States, became the passive recipients of the legal right of free movement that would come to form the ostensible 'core'⁸ of citizenship. The second element pertains to the political requirement to establish boundaries between those who belong in a community and those who do not. The generation and definition of these boundaries is a crucial aspect of the constituent role of individuals in constructing and legitimating constitutional orders.⁹ However, the reason why this status was only *partial* is because the granting of the first dimension of legal rights was not predicated on the generation of boundaries on the basis of equality between all of the nationals of the Member States. Instead, internal boundaries were perpetuated by which only those with the recognised autonomous sub-status of 'worker' could enjoy the full ambit of legal rights to free movement.¹⁰

Before 1992 the status and rights of individuals in the European legal order were an instrument to achieve the goals of the then-Community's micro-economic constitution¹¹ rather than being a self-constituted existential status of belonging. Therefore, the rights of individuals who did not fulfil the condition of economic activity, as defined in the CJEU's case law,¹² were determined in a piecemeal manner through secondary legislation.¹³ Although this extended and codified the rights of free movement to the further sub-statuses of students and the retired, the stratification along the lines of financial capability was perpetuated by the condition that such individuals must have sufficient resources to avoid becoming a burden on national social assistance systems.¹⁴ On the input side of the political rights that

⁷ C Closa, 'The Concept of Citizenship in the Treaty on European Union' (1992) 29(6) *Common Market Law Review* 1137, pp 1139–40.

⁸ F de Witte, R Bauböck and J Shaw (eds), *Freedom of Movement under Attack: Is It Worth Defending as the Core of EU Citizenship?* (RSCAS, 2016) Working Paper 2016/69.

⁹ See H Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford University Press, 2013).

¹⁰ Article 45 TFEU.

¹¹ See K Tuori, *European Constitutionalism* (Cambridge University Press, 2015), ch 5.

¹² See, *inter alia*, *Hoekstra v Administration of the Industrial Board for Retail Trades and Businesses* C-75/63, EU:C:1964:19; *Brian Francis Collins v Secretary of State for Work and Pensions* C-138/02, EU:C:2004:172.

¹³ Council Directive (EEC) No 90/364 on the right of residence: [1990] OJ L180/26; Council Directive (EEC) No 90/65 on the right of residence for employees and self-employed persons who have ceased occupational activity: [1990] OJ L189/17; Council Directive (EEC) No 90/36 on right of residence for students: [1990] OJ L180/30.

¹⁴ Article 1 of Council Directive (EEC) No 90/364: [1990] OJ L180/26.

enable individuals to participate as subjects in the formulation of legal norms, the status of Member State national fell far short of fulfilling the basic condition of equality necessary to sustain a polity. No harmonisation existed regarding the rights of individuals to vote in local and European elections in a Member State other than their own before 1992. Furthermore, before the Council Act of 1976,¹⁵ by which universal suffrage was established for the European Parliament, individuals were not even directly represented in the creation of norms in the Union legal order. Even after the change was made to direct election to the European Parliament from national parliaments electing representatives, the Act left the determination of the definition and scope of voting rights to the Member States.

Therefore, an asymmetry existed between the incipient citizen of the European Union as a passive beneficiary and object of the legal rights that would facilitate their instrumental integration into other societies, and the incipient citizen as the active political subject with control over the destiny of how these legal norms are formulated and applied. The approaches to the creation of a holistic status of citizenship of the Union that would address this asymmetry may be categorised according to whether they advocated citizenship as an incremental agglomeration of the pre-existing legal and political benefits accruing to nationals of the Member States,¹⁶ or whether they emphasised the creation of citizenship anew as an autonomous status.¹⁷ The final shape of the status in the Treaty of Maastricht may be regarded as a compromise between these two positions. This will be explicated in the section below. The nature of this compromise can help to explain how the academic reaction to citizenship changed drastically from initial sceptical dismissal to celebration in the following two eras.

B. The 'Scepticism' Era

Closa divides the constitutionalisation of citizenship of the Union at Maastricht into three parts: a definition of the status; the catalogue of rights attached to the condition of citizenship; and a procedure for future development of this Part of the Treaty.¹⁸ The substance of this tripartite division is now incorporated in Article 9 of the Treaty on European Union ('TEU') and Article 20 TFEU. Article 8(1) of the Treaty of Maastricht declared that: 'Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union'. Predication upon nationality of a Member State means that no direct connection was created between the individual and the European Union constitutional order. Instead,

¹⁵ Act concerning the election of the Members of the European Parliament by direct universal suffrage OJ L278/5.

¹⁶ The position of the Dublin European Council of 1990, see note 7 above, p 1154: '[The European Council] endorsed the development of the concept from the limited form of citizenship already existing within the EC and not created *ex novo*'.

¹⁷ The position of the Spanish delegation, see *ibid*: 'The creation of a new instance of political power, ie the Union, would require the definition of rights and duties of the affected individuals, as happens in national states'.

¹⁸ *Ibid*, p 1157.

the Member States remained the interface for the acquisition and functioning of the status. Thus, this passive acquisition may be regarded as a grand gesture of inclusion of all Member State nationals under one status. However, in addition to strengthening the second-class status of third country nationals,¹⁹ this inclusive move may also be argued to have led to the perceived *exclusion* of those individuals who rely on their Member State nationality as their fundamental status for the pursuit of fulfilment. It may be suggested that such individuals perceived their passive acquisition of EU citizenship and its consequent development as detrimental to rather than empowering of their own capacity for political self-determination. This is exacerbated by the fact that the rights created by citizenship focused on free movement and the political rights to vote in local and European elections to enable the integration of mobile individuals, thus weighing the substance of citizenship against those individuals who do not exercise these rights.

The catalogue of the rights that constitute the substance of citizenship are the right to move and reside freely within the territory of the Member States;²⁰ the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in the Member State of residence, under the same conditions as nationals of the State;²¹ the right to enjoy, in the territory of a third country in which the individual's Member State is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;²² and the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.²³

On an initial reading of the *prima facie* content of these rights, it may be argued that the new status was successful in eliminating the divergences in the treatment of nationals of the Member States in both the political input and the legal output dimensions. The integration rights that individuals may rely upon in the territories of other Member States are no longer explicitly limited to certain subcategories, but are linked to the holistic condition of citizenship. Furthermore, the rights of participation in European and local elections have been explicitly made subject to non-discrimination on the basis of nationality, thus instituting a bare minimum level of equality of treatment as a political subject. The capacity to rely upon the consular protection of another Member State whilst outside the territory of the Union on the same condition as national citizens can be seen as providing a unified external face to the Union's political and legal community, thus defining the inclusion of all Member State nationals. It is telling, however, that the right is only applicable when the EU citizen's home state does not have a consulate, thus emphasising the primacy of the

¹⁹ On the 'citizenship-foreigner cleavage' see D Thym, 'Ambiguities of Personhood, Citizenship, Migration and Fundamental Rights in EU Law' in L Azoulai, S Barbou des Places and E Pataut (eds), *Constructing the Person in EU Law: Rights, Roles, Identities* (Hart Publishing, 2016).

²⁰ Article 20(2)(a) and Article 21 TFEU.

²¹ Article 20(2)(b) and Article 22 TFEU.

²² Article 20(2)(c) and Article 23 TFEU.

²³ Article 20(d) and Article 24 TFEU.

national bond and confirming the residual and supplementary nature of the benefits of EU citizenship. The right to petition the ombudsman and the European Parliament, which was born out of a desire to provide direct administrative routes for enforcing the rights of citizenship, can be understood as bolstering the status of EU citizens as objects and beneficiaries of EU law. It has been argued that these petition rights are superfluous as citizenship rights as they are duplicated and explicitly outlined as being enjoyable by ‘any person’ in what are now Articles 227 and 228 TFEU.²⁴ Although it is true that the text of Article 24 TFEU mirrors these provisions, the key added benefit seems to be that every citizen may write and receive a reply in one of the language outlined in Article 55(1) TEU: this citizenship right could therefore be reconstructed as a right to linguistic diversity. This reemphasises the purpose of providing a basic minimum of equality within the input and output sides of norm formulation for all individuals holding the status of citizen through the elimination of the administrative burdens that may arise from the plurality of languages within the European Union.

However, it is important to note that the scope of these rights is subject to conditions. It may be argued that the equality of EU citizens is a rebuttable presumption. Article 20 outlines that the rights shall be exercised ‘in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder’. As will be seen, the secondary legislation which would implement the free movement rights of Union citizenship continued to preserve the cleavages along economic lines between Union citizens. This manifests itself in the qualitative and quantitative conditions imposed upon different categories of individuals. Furthermore, Article 22(1) details that the rights to vote and stand in local and European elections are subject to the possibility of derogation where ‘warranted by problems specific to a Member States’. The capacity for the Union legislative process to impose limitations upon citizenship rights challenges the perspective that the status provides for legal and political equality between all European citizens. For this reason, the manner in which citizenship of the European Union was brought into existence was greeted by a sceptical reaction from academics, who emphasised the partial and deficient nature of the status.

Joseph Weiler provides a paradigmatically sceptical account, proposing that ‘the Citizenship clause in the TEU is little more than a cynical exercise in public relations ... [more] noteworthy by what it does not do than what it does’.²⁵ Weiler confronts the specific legal integration rights created by the status, arguing that the rights are limited to individuals ‘not in their capacity as human beings, let alone citizens, but in their capacity as factors of production’.²⁶ The crux of Weiler’s criticism is that positive law rights are insufficient to generate the thick normative

²⁴ D Kochenov and M Van den Brink, ‘Pretending There Is No Union: Non-derivative *Quasi-Citizenship* Rights of Third Country Nationals in the EU’ in D Thym and M Zoetewij-Turhan (eds), *Rights of Third Country Nationals under EU Association Agreements* (Brill Nijhoff, 2015).

²⁵ J Weiler, ‘Introduction’ in M La Torre (ed), *European Citizenship: An Institutional Challenge* (Springer, 1998), p 13.

²⁶ *Ibid.*

conception of citizenship as belonging to a holistic collective detached from the economic productivity of the constituent individuals thereof. In attempting to create the state of consciousness and self-understanding of citizenship through law in the Treaty of Maastricht, it may be argued that the European Union placed the cart before the horse. Hans Ulrich Jessun d'Oliveira provides another famous soundbite: '[Union] citizenship is ... almost exclusively a symbolic plaything without substantive content'.²⁷ Jessun d'Oliveira's critique focuses more on the underdeveloped political dimension of citizenship.²⁸ He argues that the crystallisation of the notion of Union citizenship around free movement stands in contrast to the historical development of citizenship as accruing around the political rights of the individual.²⁹ In addition to the limited scope of rights, a defining feature of Union citizenship, is the absence of duties, despite mention being made of this in Article 20(2).³⁰ Weiler assesses this phenomenon thus: 'rights are surely important, but in the classic discourse of citizenship surely duties, the things the polity asks of its members, are as critical as that which it gives them'.³¹ The dismissal of European Union citizenship's birth at Maastricht by these scholars, amongst others, may be connected to their normative position³² that citizenship *should* provide for a means of political belonging beyond the nation-state. The connection between such 'maximal' conceptions of citizenship and reactions to its development will be explored further in Section III.

C. The 'Destiny' Era

Carlos Closa finishes his initial 1992 survey of the concept of citizenship with consideration of its future potential. He argues that what is now Article 25 TFEU provided a solid basis for the further enlargement of the catalogue of rights attached to citizenship, and that '[t]he institutional role for the development of the dynamic character of citizenship will be the determinant factor to produce a qualitative leap forward'.³³ However, rather than this institutional development occurring through the political means envisaged in Article 25 TFEU, the next era in the development of citizenship would instead be driven by the progressive adjudication of the CJEU. The (in)famous dicta from 2001 that 'Union citizenship is destined to be the

²⁷ J d'Oliveira, 'Union Citizenship: Pie in the Sky?' in A Rosas and E Antola (eds), *A Citizen's Europe: In Search of a New Order* (Sage Publications, 1995), p 82.

²⁸ *Ibid*, p 83.

²⁹ *Ibid*.

³⁰ 'Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties'. Article 20(2) TFEU. However, no such duties are derived from the Treaties.

³¹ See note 25 above, p 14.

³² Weiler argues that 'there is ... immense promise ... [for] a demos understood in non-organic civic terms'. *Ibid*, p 16. Similarly, d'Oliveira argues that 'European citizenship may be useful as a laboratory for this procedural concept of proto-cosmopolitan citizenship'. J d'Oliveira, 'European Citizenship: Its Meaning, Its Potential' in R Dehousse (ed), *Europe After Maastricht: An Ever Closer Union?* (Springer, 1994).

³³ See note 7 above, p 1168.

fundamental status of nationals of the Member State'³⁴ would come to be the mission statement for the aspirational nature of Union citizenship. This would prove to be the *telos* by which the Court would orientate its interpretation of primary and secondary law in this period.

A preliminary observation pertains to the discrepancy in the volume of litigation and legislation between the free movement rights contained in Article 20(2)(a) TFEU, and the political rights contained within Article 20(2)(b) TFEU. The cases surveyed below arise exclusively from the exercise of the former right to move and reside freely. With regard to the right to vote and stand as candidates in local and European Parliamentary elections, the only case that may be regarded as 'major' is the *Matthews*³⁵ case brought before the European Court of Human Rights on the enfranchisement of citizens of the UK overseas territory of Gibraltar, which culminated in an Article 258 TFEU infringement action being brought by Spain against the United Kingdom.³⁶ In terms of secondary legislation, the political rights in subsection (b) are implemented by a 1994 directive. By contrast to the legislation implementing the subsection (a) rights—discussed below—this directive has not been reformed nor updated in nearly a quarter of a century.³⁷ Tentatively, one may infer from these litigative and legislative phenomena that individuals regard their rights to establish themselves within the society of another Member State as more important to their self-fulfilment than their right to exercise their political self-determination in the election of local and European representatives. Simply stated, individuals appear to care more about the legal 'output' than their political 'input' with regard to these norms. This poses questions regarding the extent to which mobile EU citizens in fact rely upon public institutions and representatives as opposed to professional and social institutions in their pursuit of life-plans throughout Europe. The answer to such questions lies outside the ambit of the argument in this piece and requires detailed social scientific research. Such extensive consideration of the exercise of the political rights granted by EU citizenship is currently the subject of academic and civil society projects partly funded by the European institutions.³⁸

Alexander Somek has criticised this dictum of EU citizenship being a fundamental status from a formalistic perspective: '[the statement] appears in a ruling, without explicit and unequivocal anchor in the Treaty'.³⁹ The charge seems to be that the CJEU has not adhered sufficiently to the 'sources thesis'⁴⁰ of legal positivism in its

³⁴ *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* C-184/99, EU: C:2001:458.

³⁵ *Matthews v United Kingdom*, (Application no. 24833/94) (1999) 28 EHRR 361.

³⁶ *Spain v the United Kingdom (Gibraltar)* C-145/04, EU:C:2006:543.

³⁷ Council Directive (EC) No 94/80 on the right to vote and to stand as a candidate in municipal elections: [1994] OJ L368/38.

³⁸ FAIREU, <https://faireu.ecas.org>.

³⁹ A Somek, 'Is Legality a Principle of EU Law?', available at http://www.academia.edu/24524007/Is_legality_a_principle_of_EU_law.

⁴⁰ See 'Legal Positivism' (*Stanford Encyclopedia of Philosophy*) <https://plato.stanford.edu/entries/legal-positivism>.

application of the legal norms concerning citizenship of the Union. However, a more charitable approach would recognise that the Court was faced with an internal plurality of sources that it had to deal with in the cases brought by individuals seeking to rely upon their citizenship rights. As noted above, the implementation of the rights found in Article 20 TFEU is made conditional upon secondary legislation. However, before the consolidating efforts of the 2004 ‘Citizen’s Directive’,⁴¹ the most contemporaneous secondary legislation fulfilling this criterion were the pre-Maastricht Directives on the rights of students and pensioners. The right of residence was dependent upon the national issuance of a residence permit with host Member State discretion to limit the right to reside to five years on a renewable basis, with a capacity to require revalidation of residence after two years.⁴² Such difference of treatment on the basis of nationality may be regarded as incompatible with the statement of the first clause of Article 21(1) TFEU: ‘Every citizen shall have the right to move and reside freely within the territory of the Member States’. This raises the theoretical issue of whether an application by the CJEU of secondary legislation may be regarded as ‘unconstitutional’ in the sense that the secondary legislation undermines provisions of primary Treaty law promulgated thereafter. Space precludes a more detailed examination of this pertinent constitutional issue. However, one may conclude that the Court’s subsequent case law confirms that the reliance of Member States upon restrictions and exemptions mandated by secondary legislation must be in conformity with the fundamental principles of the Union’s constitutional order.

This may be forwarded as the reason why the CJEU saw fit in the case of *Baum-bast* to find that the rights granted in the Treaty are ‘autonomous’ of secondary provisions and directly effective for individuals.⁴³ In interpreting whether the applicant’s lack of sickness insurance under Directive 90/364 disqualified him from the right of residence, the Court clarified that although the exercise of the Treaty rights is indeed subject to limitations and conditions, ‘the competent authorities and ... the national courts must ensure that those limitations and conditions are applied in compliance with the general principles of Community law and, in particular, the principle of proportionality’.⁴⁴ Thus, these cases may be regarded as an emancipatory⁴⁵ move by the CJEU to establish an autonomous concept of citizenship of the European Union as a status of equality. This would then enable the Court to decide the cases brought to it by individuals. As will be discussed in relation to the next era, when secondary legislation was explicitly created to establish the conditions for the exercise of citizenship rights in 2004, it may be argued that this created incoherence between the sources of the Court’s case law and secondary law

⁴¹ Council and European Parliament Directive (EC) No 2004/38 of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States: [2004] OJ L158/77.

⁴² Council Directive (EEC) No 90/364 on the right of residence: [1990] OJ L180/26.

⁴³ *Baumbast v Secretary of State for the Home Department* C-413/99, EU:C:2002:493, para 94.

⁴⁴ *Ibid.*

⁴⁵ See A Somek, ‘The Emancipation of Legal Dissonance’ (Social Science Research Network, 2009) SSRN Scholarly Paper ID 1333194, available at <https://papers.ssrn.com/abstract=1333194>.

promulgated by the Union's legislature. This may be pinned upon the EU legal order's undefined hierarchy of sources. Consequently, it may be proposed that the academic disquiet and claims of regression regarding recent cases is the result of the Court's movement away from its earlier emancipatory jurisprudence towards coherent alignment with the secondary legislation.

The 'destiny' dicta may be interpreted in either a minimal or a maximal manner. Under the former reading, EU citizenship as a 'fundamental status' may only refer to the status of nationals of the Member State when their situation falls under the scope of EU law. In accordance with *Baumbast*, therefore, the status of citizenship remains the vessel through which Member State nationals derive rights in EU law, with the subcategories of secondary legislation remaining subordinate and explicitly subject to the general principles of the Union legal order. A far more radical and maximal reading of the Court's claim in *Rudy Grzelczyk* is that citizenship of the Union will become the fundamental status for all nationals of the Member States even *outside* the scope of EU law. An alternative interpretation is that the Court extended the material scope of EU law in order to encapsulate such factual situations.⁴⁶

Such a reading may be supported by the dicta in *Ruiz Zambrano* that 'Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'.⁴⁷ This led to the decision in the case that citizenship rights of residence are extended to those who do not fulfil the conditions for EU citizenship of nationality of a Member State. Perhaps most strikingly, in the *Rottmann*⁴⁸ case, the same logic was utilised to establish that citizenship of the Union may not only be the destiny of Member State nationals, but also a residual safety net that may operate to preserve the EU law rights of individuals in cases of the disproportionate revocation of their nationality. This seems to extend the ambit of citizenship of the Union into the realm of providing a check upon the national sovereignty to determine who the constituent subjects of the state are. The precedent established in the *Rottmann* case was relied upon by the litigants in the 'Amsterdam Case' in support of their argument for the ultimate emancipation of the existence—or at least the retention—of EU citizenship from the condition of nationality of a Member State.⁴⁹ This maximal interpretation of the Court's statement regarding the *telos* of citizenship has informed the academic opinion that this era may not only have substantiated Article 20 TFEU, but that it has even contributed to a transformation of the concept of citizenship in the abstract. This is perhaps evidenced most strongly in Dora Kostakopoulou's evocation of 'constructive citizenship',⁵⁰ a maximal academic position on citizenship of the Union that will be analysed in Section III below.

⁴⁶ I thank Martijn van den Brink for this point.

⁴⁷ *Ruiz Zambrano v Office national de l'emploi* C-34/09, EU:C:2011:124, para 42.

⁴⁸ *Janko Rottmann v Freistaat Bayern* C-135/08, EU:C:2010:104.

⁴⁹ See note 5 above, para 5.7.

⁵⁰ D Kostakopoulou, 'European Union Citizenship: Writing the Future' (2007) 13(5) *European Law Journal* 623.

D. The 'Regression' Era

In 2014 and 2015 respectively, the CJEU delivered its judgments in the *Dano*⁵¹ and *Alimanovic*⁵² cases. Dion Kramer has argued that these cases taken together constitute a reversal of the Court's approach on claims of social assistance by EU citizens.⁵³ The case law in the 'destiny era' had emphasised that those who find themselves in the same situation enjoy, in principle, the same treatment in law irrespective of their nationality. In the case law that may be regarded as initiating the 'regression' era, however, the Court of Justice has climbed down with regard to access to social benefits. It has outlined that a Union citizen can claim equal treatment only on the condition that residence in the territory of the host Member State complies with the conditions for lawful residence as established in the Citizen's Directive.⁵⁴ The judgment may be regarded as a new cautious approach from the Court. This displays greater deference to the outcome of the democratic process found in EU secondary legislation rather than relying upon the inferred *telos* of the primary law. This is evidenced by the fact that in *Alimanovic* the Court departs from its previous *Brey*⁵⁵ judgment by stating that a proportionality test in the form of an individual assessment of the individual is not required. Furthermore, in *Alimanovic*, the right of residence of the mother was assessed on the basis of her purely being a 'job-seeker' under Article 14(4) of the 2004 Directive. Therefore, the judgments may be regarded as a regression back to earlier eras of assessing the entitlements of individuals on the basis of the various subcategories that they fall under as prescribed by secondary legislation, rather than through a holistic view of the concept and purpose of the status of Union citizenship.

Although the judgments may be praised for encouraging legal certainty by deferring to the quantitative and qualitative conditions outlined for entitlement to national social assistance in the implementing legislation, they are more problematic on the basis that the CJEU's formerly expansive reading of the status and its entitlements has created expectations in the practice of individuals. The problem may be framed as one of internal norms pluralism: the precedents established by the Court and the conditions established by the legislature stand in ostensible conflict. This creates uncertainty for individuals as to what norms they may be able to rely on in their pursuit of life plans. This is exacerbated by the drafting of the Citizen's Directive, and the apparent inconsistency between the conditions for residence and the conditions for access to social assistance. On this basis, the judgments in *Dano* and *Alimanovic* have been criticised vociferously on the basis that they are liable to create injustice for individuals, in addition to undermining the concept of Union citizenship as a status of basic political and legal equality.

⁵¹ *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* C-333/13, EU:C:2014:2358.

⁵² *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others* C-67/14, EU:C:2015:597.

⁵³ Dion Kramer, 'Had They Only Worked One Month Longer! An Analysis of the Alimanovic Case [2015] C-67/14' (*European Law Blog*, 29 September 2015) <http://europeanlawblog.eu/2015/09/29/had-they-only-worked-one-month-longer-an-analysis-of-the-alimanovic-case-2015-c-6714>. See also D Kramer, 'Earning Social Citizenship in the European Union: Free Movement and Access to Social Assistance Reconstructed' (2016) 18 *Cambridge Yearbook of European Legal Studies* 270.

⁵⁴ *Ibid.*

⁵⁵ *Pensionsversicherungsanstalt v Peter Brey* C-140/12, EU:C:2013:565.

Floris de Witte makes the strong argument that the judgments ‘legally mandate the creation of a European underclass of vulnerable citizens who, *because of this exercise of free movement*, are neither politically represented nor materially protected from the most egregious forms of exclusion’.⁵⁶ Daniel Thym argues that the reason for this is the lack of a ‘thick’ conception of social justice at the European level. The status of economically inactive citizens ‘transcends the single market and emanates directly from the rights attached to Union citizenship, their reach has never been subject to principled political consensus’.⁵⁷ The strongest claim that such a phenomenon is indicative of a regression in the concept of citizenship of the Union is provided by Charlotte O’Brien. She claims that ‘welfare nationalism is washing away the traces of EU citizenship, with decreasing resistance from the Court of Justice’.⁵⁸ O’Brien claims that the Citizen’s Directive has been redefined in this era from an expression of rights to an expression of limitations protecting Member States’ welfare systems.⁵⁹ She claims that *Commission v UK*⁶⁰ has extended this reconceptualization to the other implementing secondary legislation including Regulation 883/2004 on the coordination of social security systems.⁶¹ O’Brien therefore argues that a new fundamental principle of benefit restriction has been created that is now read in to the implementing legislation on citizenship.⁶² This signifies a complete reversal from secondary legislation being interpreted in accordance with the perceived *telos* that the status and its attendant entitlements is destined to be fundamental for Member State nationals.

The academic consensus on the regression era of the CJEU’s case law on EU citizenship is that although it is methodologically legitimate, the reduced activism on the part of the Court in the application of norms has undermined the potential for the status to promote equality between all Member State nationals. It can be inferred that, as a result of popular push-back against European integration, the balance between nationals of the Member State and citizens of the Union has been reset. Greater deference is exercised towards unilateral Member State determinations of entitlement on the basis of interpretations of secondary legislation which are held valid by the Court. There has been some attempt by the Advocate Generals to resuscitate the destiny *telos* of citizenship in recent cases which have confirmed the decisions on derived rights of third country national parents.⁶³ However, the regression era may be evidence that the limits of the extent to which the Court as a

⁵⁶ F de Witte, ‘Freedom of Movement under Attack’ in note 8 above, p 3.

⁵⁷ D Thym, ‘The Failure of Union Citizenship Beyond the Single Market’ in *ibid*, p 7.

⁵⁸ C O’Brien, ‘Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights’ (2016) 53(4) *Common Market Law Review* 937, p 937.

⁵⁹ *Ibid*, p 939.

⁶⁰ *Commission v United Kingdom* Case C-308/14, EU:C:2016:436.

⁶¹ Council and European Parliament Regulation (EC) No 883/2004 on the coordination of social security systems: [2004] OJ L166/1.

⁶² See note 58 above, p 951.

⁶³ Opinion of Advocate General Szpunar in *Alfredo Rendon Marin v Administracion del Estado* C-304/15, EU:C:2016:75, points 107–10.

norm-applying body may define the contours of the concept of citizenship of the Union have been reached. The litmus test for such a proposition would be the Luxembourg court's response to being asked in preliminary reference to answer the question of whether one must remain a national of a Member State to remain a citizen of the Union. However, following the decision on appeal by the judge in the Amsterdam District Court not to refer this question to the CJEU,⁶⁴ the answer remains hypothetical at the present moment. As opposed to a judicial pronouncement thereupon, it may be argued that to constitute European citizenship as a true status of belonging, a display of popular legitimation is required. This may be necessary to ensure that the status is not entirely hollowed out by challenges to European integration.

The necessity of such a radical move has been brought sharply into focus by the United Kingdom's decision to withdraw from the European Union. For the first time in the history of citizenship of the Union, the uneasy foundations of the status being predicated upon nationality of Member States have been exposed. The retention of the sovereignty of these states to withdraw from the Treaties means that individuals may be deprived of the status of citizenship of the Union against their will. Tentative academic arguments have been proposed as to how the *Rottmann* case law could be used to preserve the rights and status of citizens after the United Kingdom's withdrawal.⁶⁵ These arguments have manifested themselves in the pleadings of the claimants in the 'Amsterdam Case'.⁶⁶ However, these arguments seem to rely on a conception of citizenship that is not supported by the positive law of the Treaties. Article 20(1) TFEU makes clear that a necessary condition for the acquisition of citizenship of the Union is nationality of a Member State. Article 50(3) TEU explicitly provides that the Treaties shall cease to apply to the State which has decided to withdraw from the Union. Thus, the nationals of that state will no longer fulfil the condition of nationality of a Member State, and instead their status will convert to that of third country nationals.⁶⁷ This is confirmed by the European Council's withdrawal negotiation guidelines. Furthermore, the guidelines' claim that 'a future relationship between the Union and the United Kingdom as such can only be finalised and concluded once the United Kingdom has become a third country'⁶⁸ seems to preclude the possibility of an arrangement being made to retain the status of citizenship of the Union for UK nationals before they lose it. The present draft of the Withdrawal Treaty, whereby the United Kingdom will fulfil the conditions

⁶⁴ See note 6 above.

⁶⁵ P Mindus, *European Citizenship after Brexit* (Palgrave Macmillan, 2017). See also Gareth Davies' argument for why *Rottmann* is inapplicable to the consequences of Brexit, Gareth Davies, 'Union Citizenship – Still Europeans' Destiny after Brexit?' (*European Law Blog*, 7 July 2016) <https://europeanlawblog.eu/2016/07/07/union-citizenship-still-europeans-destiny-after-brexit>.

⁶⁶ See note 5 above.

⁶⁷ However, for the alternative teleological argument that these positive sources may establish the condition for the *acquisition* of EU citizenship but that they do not necessarily establish the condition for the *loss or retention* thereof, see note 5 above.

⁶⁸ European Council (Art. 50) Guidelines for Brexit Negotiations, <http://www.consilium.europa.eu/en/press/press-releases/2017/04/29-euco-brexit-guidelines.life>

of Article 50(3) TEU, preserves the disparate free movement rights of UK citizens that were created by Article 20(2)(a) TFEU.⁶⁹ However, it does not preserve the status of citizenship created by Article 20(1) TFEU as the holistic silo thereof. At both the micro-level of individual cases and the macro-level of an entire state polity, it may be concluded that the regressive era of citizenship has shed doubt upon the essence, existence, and value of citizenship of the Union. In order to propose a solution to this existential crisis, it is necessary first to outline the normative positions on what the status *should* mean for individuals.

III. ‘MAXIMAL’ AND ‘MINIMAL’ CONCEPTIONS OF CITIZENSHIP OF THE UNION: A FUNDAMENTAL OR SUPPLEMENTARY STATUS?

As hinted at in the preceding section, much of the academic praise or criticism of the CJEU’s development of the status and rights of citizenship of the Union is implicitly predicated upon an author’s normative political theoretical conception of what the status should represent. Through a reductive dichotomy, ‘maximal’ conceptions of citizenship may be regarded as taking a cosmopolitan approach that emphasises the possibility of political belonging and self- and collective-determination beyond the boundaries of the nation state. By contrast, ‘minimal’ conceptions of citizenship take a predominantly statist approach and emphasise that the conditions for constitutional democracy can still only be fulfilled at the national level. Therefore, they argue that the ambit of citizenship of the Union should remain limited to a supplementary status to enable the targeted integration of individuals into other national polities for specifically defined purposes. These two positions can be roughly matched to the two potential roads that citizenship could have taken during the Intergovernmental Conference before Maastricht: a *de novo* fundamental political status, or an incremental agglomeration of pre-existing Treaty rights.

My argument will be that both positions are reductive insofar as they assume that citizenship of the Union can have a uniform meaning and significance for all nationals of the Member States. Instead, it is submitted that the 500 million citizens of Europe are differentiated along a graduated spectrum by their attitude towards whether the pursuit of their life-plans are predicated upon engagement with their European citizenship or limited to their national citizenship. Explicit recognition of this cleavage would allow for a concept of citizenship as an autonomous status which individuals can choose to undertake, thus providing them with the benefit of the pre-existing rights of free movement and political representation, but also putative future social and political rights and duties that are currently absent. The contours of this proposed autonomous status will be traced in Section IV below.

⁶⁹ See European Commission Draft Withdrawal Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, TF50 (2018) 33 – Commission to EU 27, 28 February 2018, https://ec.europa.eu/commission/publications/draft-withdrawal-agreement-withdrawal-united-kingdom-great-britain-and-northern-ireland-european-union-and-european-atomic-energy-community_en.

A. 'Maximal' Conceptions of Citizenship of the Union

Jürgen Habermas' arguments regarding European citizenship are a starting point for considering the 'maximal' position. Indeed, Habermas' view may be seen as the ultimate elaboration of a maximal or expansionist conception of citizenship due to his perception that a 'European constitutional patriotism' would be a staging post on the continuum between state citizenship and world citizenship.⁷⁰ However, Habermas perceives that a crucial prerequisite for such a convergence depends on the catalytic effect of a constitution in order to foster the civil society required to sustain democratic constitutional culture at the European level.⁷¹ In his latest treatise on European constitutionalisation,⁷² Habermas has outlined how individuals would be 'dual-constituent subjects' in their role both as citizens of the Union and nationals of the Member State. This would ensure that the constitutional states do not lose their freedom-guaranteeing function for constituent national subjects. In the final section of this article, the argument will be made that such a dual-constituent role could only be achieved through the active choice of those individuals who would be the subjects of the new European constitutional order.

The academic positions detailed in the previous sections that were critical of citizenship of the Union in the sceptical and regression eras, and positive in the fundamental status era, also exhibit elements of Habermasian post-national cosmopolitanism. In addition to the position taken by Weiler and Jessun d'Oliveira that citizenship of the Union could beckon a new form of civic cosmopolitan belonging, Vincenzo Lippolis argues that 'European citizenship ought to be perceived ... as the foundation of a deeper sense of European Unity, of Europe as an evolving "polis" capable of meeting the needs of the human community upon which it rests'.⁷³ The familial resemblance that connects these arguments is the perception that it is both possible in practice and desirable in theory for individuals to exercise their existential capacity for political self-determination and individual and collective self-fulfilment beyond the boundaries of the Westphalian nation-state.

The strongest endorsement of the maximal position is provided by Kostakopoulou's conception of 'constructive citizenship'. She endorses the phenomenon whereby 'the boundaries of national citizenship have not been relaxed "from within" as to allow Community [Union] nationals to obtain citizenship via naturalisation, but they have been "ruptured from outside" through the conferral of rights which are enforceable before national courts'.⁷⁴ She claims that this inclusiveness enlarges the social content of citizenship without undermining national social solidarity and means of redistribution,⁷⁵ and concludes her analysis with an alternative conception of citizenship as a 'network good': 'Individuals are thus no longer locked with a

⁷⁰ J Habermas, 'Citizenship and National Identity: Some Reflections on the Future of Europe' (1990) 12(1) *Praxis International* 1.

⁷¹ J Habermas, 'Why Europe Needs a Constitution' (2001) 11 *New Left Review* 5.

⁷² J Habermas, *The Crisis of the European Union: A Response* (Polity Press, 2013).

⁷³ V Lippolis, 'European Citizenship: What Is It and What It Could Be' in note 25 above, p 325.

⁷⁴ See note 50 above, p 643.

⁷⁵ *Ibid*, p 641.

single, unified and finite network commanding unqualified allegiance. Rather they are members of and participants in multiple associative networks to which rights and obligations are attached'.⁷⁶ Therefore, it is precisely the fact that European citizenship is not a finished artefact, but has a content that is flexible and dynamic that provides its primary normative appeal.⁷⁷ This enables Kostakopoulou to forward proposals as to how citizenship of the Union should be extended further. She argues that residence should be the new signifier of political belonging thus enabling third country nationals to gain European citizenship after five years.⁷⁸ Furthermore, she advocates enfranchising mobile citizens of the Union within their host Member State *demoi* for national general elections.⁷⁹ This would effectively collapse the operative distinction and balancing required between Member State nationality and citizenship of the Union in the 'dual constituent' process, and instead make citizenship of the Union the primary status of political and social belonging.

In addition to maximal positions developing in response to the CJEU's fundamental destiny dicta, such positions are also evident in the reaction against the perceived regression of the Court's case law in recent years. Floris de Witte's aforementioned critique that the *Dano* and *Alimanovic* cases mandate the creation of a European underclass may at a higher level of abstraction be regarded as criticism of the status of citizenship of the Union itself.⁸⁰ The perception is that the status is partial and exclusionary of certain strata of society rather than being maximally and optimally inclusive. For Article 20 TFEU has always been subject to the conditionality that was eventually implemented by, *inter alia*, the Citizen's Directive, and therefore the argument that the Court should have continued with a constructive role in mitigating possible injustice would seem to contradict the clear wording of the primary and secondary law. Similarly to Daniel Thym, de Witte seems to suggest that the status of citizenship of the Union should provide for a sufficiently thick form of solidarity in order to enable the realisation of social justice.

Maximal approaches to citizenship of the Union, however, may be subject to the charge that they assess the status according to a particular conception of its normative potential rather than the manifestation thereof in reality. Notwithstanding the aspirational dicta and creativity of the CJEU, on a qualitative level the status was born as and remains a disparate selection of economic and political rights the substance of which only becomes salient once a national of a Member State moves across borders. On a quantitative level, the consideration that the status could become fundamental to *all* nationals of the 27 Member States may be regarded as unviable in practice, as evidenced by the very small percentage of Union citizens that make use of their free movement rights. O'Brien provides a sceptical note along

⁷⁶ *Ibid*, p 645.

⁷⁷ *Ibid*, p 638.

⁷⁸ *Ibid*, p 645.

⁷⁹ *Ibid*.

⁸⁰ See note 8 above.

these lines: '[T]he great promise of EU citizenship had only ever really taken hold in the ivory towers of academic imagination and the ECJ'.⁸¹

This may also inform a critique of the normative desirability of the iterative construction of an apparently fundamental status through *ex post facto* judicial construction. Although such a process may provide exciting innovations for legal academics, for the ordinary individuals who are the holders of these rights such shifting sands are detrimental to the certainty they require in order to pursue their plans for individual and collective self-fulfilment outside of their home Member State. This is captured by Gareth Davies' observation that welfare states in Europe are harmonised by 'principles developed reactively, inductively, and out of individual situations, by the Court of Justice' rather than through policy making in the political arena.⁸² From the perspective of democratic input legitimacy, the current manifestation of citizenship may be regarded as disempowering both for the national solidarity of host Member States and for the mobile citizen of the Union. For the former, the claims of Union citizens to social benefits and social assistance are parasitic upon the thick social solidarity that underpins the democratic procedures by which systems of redistribution are generated and maintained. For the latter, the disempowerment arises from the fact that these mobile individuals have no means of contributing to this democratic will formation in their host Member State. This is because citizenship of the Union does not provide for voting rights in national general elections. Therefore, their only means of self-determination in ensuring their rights as citizens of the Union is through litigation after the democratic process has culminated in national legislation.

Citizens of the Union who exercise their free movement rights can be argued to fall into the no-man's land between the social solidarity that sustains their host Member State and their home Member State in the current construction of citizenship of the Union. In the host state, the resources that they require in order to integrate will only ever be parasitic upon national democratic and welfare regimes. In their home state they are no longer physically present and participating in the life-world of society, and even though they may still be entitled to vote in national elections and also claim social assistance in the first three months after moving to another Member State, these resources may not be sufficiently tailored to conditions in their new home society.⁸³

Therefore, it is concluded that the maximal normative conception of citizenship of the Union as a fundamental status of political and social belonging beyond the constitutional orders of the Member States is not supported by the reality of its current manifestation. The fact that citizens of the Union are only ever able to rely upon the solidarity mechanisms of either their home Member State or their host Member State could lead one to conclude that citizenship of the Union does not and

⁸¹ See note 58 above, p 974.

⁸² G Davies, *The Process and Side-Effects of Harmonisation of European Welfare States* (2006) Jean Monnet Working Paper No 02/2006, p 5.

⁸³ C Bruzelius, C Reinprecht and M Seeleib-Kaiser, 'Stratified Social Rights Limiting EU Citizenship' (2017) 55(6) *Journal of Common Market Studies* 1239.

is not intended to provide an existential status of belonging for individuals.⁸⁴ The argument may be made that Europe is no homeland—instead, the role of citizenship of the Union is limited to enabling the tailored coordination between national polities in assuring the welfare and capacity for self-fulfilment of those who fulfil the conditions to acquire citizenship of the Union.⁸⁵ This present reality may inform and consequently be justified by a normative position which emphasises the democratic nation state as the continuing basic unit of political belonging and individual and collective self-determination. This contrary conception may be regarded as the resemblance binding the ‘minimal’ conceptions of citizenship of the Union.

B. ‘Minimal’ Conceptions of Citizenship of the Union

Even before the Treaty of Maastricht came into force, the new status had received a minimalist interpretation by the German Constitutional Court: ‘The common Union citizenship established by the Maastricht Treaty forms a legal bond between the citizens of the individual Member States which is designed to be lasting; it is not characterised by an intensity comparable to that which follows from common membership in a single State’.⁸⁶ This dicta was subsequently strengthened in the case concerning ratification of the Treaty of Lisbon: ‘The concept of the “citizen of the Union” ... is exclusively founded on Treaty law. The citizenship of the Union is solely derived from the will of the Member States and does not constitute a people of the Union, which would be competent to exercise self-determination as a legal entity giving itself a constitution’.⁸⁷ This minimal conception of the Union’s constitutional order and the place of citizenship within it has been further elaborated in the academic work of the former justice of the German Constitutional Court Dieter Grimm. He asserts that the European Parliament does not constitute a European popular representative body ‘since there is as yet no European people’.⁸⁸ Therefore, these views limit the scope of citizenship to realising the goals of the Treaties establishing

⁸⁴ This is a reductive reading which does not take account of the sophisticated identification by Floris de Witte of the incipient forms of transnational solidarity: market solidarity, communitarian solidarity, and aspirational solidarity. However, these forms are in the early stages of their claimed emergence. Furthermore, as argued in the next section, a crucial predicate for their emergence would be an active decision of constitutive self-determination. See F de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press, 2015).

⁸⁵ A similar notion is expressed by Floris de Witte under the heading of ‘aspirational solidarity’: ‘Aspirational solidarity, as should be clear by now, serves to allocate responsibility for welfare resources between the home and the host state of a mobile citizen depending on his or her ties with the different states’. *Ibid.*, p 191. However, under a minimal conception of Union citizenship, any transnational dimension of this allocation of responsibility would be downplayed and kept within the ‘black-boxes’ of the solidarity present within the respective democratic states.

⁸⁶ *Manfred Brunner and Others v The European Union Treaty*, Federal Constitutional Court (Germany) 89 BVerfGE 155 (1993).

⁸⁷ *Lisbon*, Judgment of 30 June 2009, 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09, para 346.

⁸⁸ D Grimm, ‘Does Europe Need a Constitution?’ (1995) 1(3) *European Law Journal* 282.

the European Union as a basis for cooperation between the peoples of sovereign Member States.

Richard Bellamy's neo-Republican normative political theory also provides a sceptical perspective on the notion of European identity and belonging. 'Support for the EU is largely mediated through its being beneficial for national, regional and other interests rather than because of a straightforward allegiance to the European idea'.⁸⁹ This informs Bellamy's minimal conception of citizenship of the Union. Although in his aforementioned piece Bellamy praises the development of a form of active citizenship practice in Europe,⁹⁰ it may be argued that the value of this is purely instrumental to achieving the Republican goal of non-domination and coercion at the national level. As such, Bellamy has subsequently argued that the most sociologically plausible and normatively acceptable role for citizenship of the Union is for it to remain complementary to Member State nationality.⁹¹

Far from the maximalist claims of Kostakopoulou and others, Bellamy advocates this position on the basis that the judicial development of the rights of citizenship of the Union have undermined rather than enhanced national citizenship. He emphasises the lack of consensus among national constitutional regimes on the configuration of civil, political, and social rights and the disagreement over the legitimacy of the EU as a source for the enforcement of these rights.⁹² Bellamy thus argues that 'citizens should be able to move and trade freely between member states, but the enjoyment of such rights ought to be constrained by the need not to disrupt the rights enjoyed by national citizens—not least with regard to access to domestic services'.⁹³ This is intimately tied to the conception that the democratic legitimacy of the Union is 'largely lent to the EU through the old forms of democratic citizenship that prevail in the member states'.⁹⁴ With the possibility of such transnational democracy developing at the European level remaining remote, Bellamy concludes that 'European citizenship must continue to remain an adjunct to national citizenship'.⁹⁵

A key perceived deficiency that proponents argue necessitates this minimal reading of citizenship of the Union is the absence of duties for individuals holding the status. Bellamy criticises Dimitry Kochenov's philosophically anarchist argument for a 'de-dutification' of the concept of citizenship.⁹⁶ Bellamy argues that such a conception suggests a 'thin' form of EU citizenship that allows European citizens to choose which of the Member States they wish to become morally obliged to,

⁸⁹ R Bellamy, 'The "Right to Have Rights": Citizenship Practice and the Political Constitution of the EU' in R Bellamy and A Warleigh (eds), *Citizenship and Governance in the EU* (Bloomsbury, 2005), p 60.

⁹⁰ *Ibid*, p 66.

⁹¹ R Bellamy, 'Evaluating Union Citizenship: Belonging, Rights and Participation within the EU' (2008) 12(6) *Citizenship Studies* 597, pp 597–611.

⁹² *Ibid*, p 605.

⁹³ *Ibid*, p 606.

⁹⁴ *Ibid*.

⁹⁵ *Ibid*.

⁹⁶ D Kochenov, 'EU Citizenship without Duties' (2014) 20(4) *European Law Journal* 482.

rather than mandating a ‘thicker’ form of EU level citizenship that could only arise by creating civic obligations at the EU level.⁹⁷ Such a thin conception may be argued to co-align with Bellamy’s own minimal political constitutionalist view of citizenship of the Union. Insofar, it enables for a nuancing of Bellamy’s normative position. It may be argued that Bellamy does not believe a ‘thick’ form of EU citizenship is normatively undesirable *per se*. However, with regard to its current ‘thin’ form of economic rights that are not tied to the obligations of belonging in a political community, it is and would be normatively undesirable for citizenship of the Union to provide an alternative to the fundamental status of democratic citizenship of the Member States. Thus, it may be more useful to define this position as a *political constitutionalist* conception of citizenship of the Union as opposed to a minimal conception: insofar as the ‘circumstances of citizenship’⁹⁸ provide the basis for the continuous constitution of individuals as members of a political community which enables them to be free from coercion and domination, in its current duty-free guise citizenship of the European Union is not appropriate as a fundamental status for European individuals.

Bellamy’s arguments are framed as critiques of the development of citizenship of the Union during the ‘destiny’ era. As opposed to a ‘political constitutionalist’ outlook—which emphasis the primary role of representative norm-creation bodies—this case law may be regarded as paradigmatic of the school of ‘legal constitutionalism’ that affords primacy within a constitutional order to the judicial norm-application bodies. Bellamy refers to the case law of the CJEU⁹⁹ which challenges the Rawlsian ‘natural duty to uphold just institutions’¹⁰⁰ in the host Member State as corresponding to what has been referred to as ‘juridical nihilism’.¹⁰¹ Minimal conceptions of citizenship of the Union have also been espoused as an endorsement of the Court’s case law in the ‘regression’ era. These arguments thus go against the tide of the majority of academic opinion. Martijn Van den Brink is explicitly critical of the ‘destiny’ era, and praises the subsequent reversal and potential new era of judicial restraint. He claims that ‘if one would have claimed in the mid-1990s, shortly after the introduction of EU citizenship, that in 2016 many EU lawyers would have serious misgivings about a decision that denies social assistance benefits to economically inactive EU citizens with very weak links to the Member State of residence, many would have been quite surprised’.¹⁰²

This conclusion is further strengthened by the fact that the outcome of the democratic processes which led to the Citizen’s Directive established the basic rule

⁹⁷ R Bellamy, ‘A Duty-Free Europe? What’s Wrong with Kochenov’s Account of EU Citizenship Rights’ (2015) 21(4) *European Law Journal* 558.

⁹⁸ *Ibid*, p 562.

⁹⁹ *Ibid*, p 563. Bellamy references, *inter alia*, *Schwarz and Gootjes-Schwarz v Finanzamt Bergisch Gladbach* C-76/05, EU:C:2007:49.

¹⁰⁰ *Ibid*, quoting J Rawls, *A Theory of Justice* (Harvard University Press, 1971), pp 333–42.

¹⁰¹ *Ibid*, p 562, quoting N Irti, *Nichilismo giuridico* (Laterza, 2005).

¹⁰² M Van den Brink, ‘The Court and the Legislators: Who Should Defend the Scope of Free Movement in the EU?’ in note 8 above, p 23.

that the economically inactive are not entitled under EU law to benefits before they have acquired permanent residence. Such will formation is crucial for sensitive issues pertaining to financial solidarity and redistribution, and as such Van den Brink questions the consensus whereby the CJEU is perceived to be the legitimate institution to settle such issues of distributive justice.¹⁰³ This accords with Bellamy's minimalist arguments that the Court of Justice should not develop citizenship of the Union and its attendant entitlements in such a way that it would undermine national citizenship and its entitlements. In a similar vein, Rainer Bauböck argues that 'the battle for free movement and European integration is no longer fought primarily in courts where individual rights can trump majority preferences; it is increasingly fought in polling stations, parliament and the mass media'.¹⁰⁴ This can be interpreted as an argument for the limits of the Court in defining the destiny of the status of Union citizenship on the basis of an expansive and maximalist *telos*. Instead, it is necessary that political consensus is formed on the definition and essence of this status. With regard to who may legitimately participate in the formation of such political consensus, Bauböck argues that only those with a 'genuine link' to the polity in question should be included.¹⁰⁵

Although the minimal conceptions of citizenship of the Union accurately recognise its limited scope in reality, I would assert that they downplay the symbolic and practical significance that the status has for many Europeans. Many of these scholars cite the low absolute percentage of Europeans who either make practical use of their free movement rights or feel a sense of European identity. However, this misses the point that single-figure percentages of more than 500 million individuals still add up to tens of millions of individuals—much more than the population of many modern nation-state polities. Arguably, in the modern world, these individuals are bound together by a putative form of solidarity on the basis of their shared practice and experience of physically moving beyond their Member State boundaries and attempting to integrate into another Member State society. It may be asserted that, through some form of 'comparative method' of life-practice, these individuals become bound together through a recognition of the convergence and divergence of experiences and practices within diverse societies which may ultimately enable the identification of a defined set of shared values. Although Habermas' envisaged Europe-wide media communicative networks have not arisen, the rise of social media means that they are not necessary—many Europeans are able to establish such communicative networks for themselves in order to foster the shared values that are constructed through communicative discourse.

The position I adopt is that an incipient polity of Europeans already exists today. However, the current institutional design of citizenship of the Union, with its emphasis on tailored economic rights that are parasitic on host Member State democratic procedures, means that it is not possible for these putative European

¹⁰³ Ibid.

¹⁰⁴ R Bauböck, 'The New Cleavage Between Mobile and Immobile Europeans' in note 8 above, p 20.

¹⁰⁵ J-T Arrighi and R Bauböck, 'A Multilevel Puzzle: Migrants' Voting Rights in National and Local Elections' (2016) 56(3) *European Journal of Political Research* 619.

citizens to constitute themselves into a political community. Thus, the final section of this article will consider the possibility of a middle-point between the maximalist and minimalist conceptions of European citizenship. This advocates untethering the status from nationality, thus making it a fundamental status of political existence for those who *want* it to be through the exercise of their existential freedom. Crucially, however, such a proposal would neither disregard the symbolic importance of nor dispense with the practical legal and political manifestation of ‘nationality’. Instead, it is proposed that the two concepts of ‘citizenship’ and ‘nationality’ should be regarded as logically separable. Whereas the former may be regarded as variable¹⁰⁶ on the basis of the exercise of existential freedom, the latter may be regarded as immutable and forming part of one’s ‘facticity’—the life conditions that cannot be altered and thus constrain the exercise of existential freedom. It is suggested that the recognition of such a distinction in the context of the European Union could enable the separation in practice of Member State nationality and citizenship of the European Union. This would open the door to the (re)construction of the latter as autonomous from the former by those who currently hold both statuses.

IV. AN AUTONOMOUS STATUS AS AN EXPRESSION OF CONSTITUTIVE SELF-DETERMINATION

Our response to the intermediate conclusion that citizenship of the European Union does not currently embody a fundamental status, but instead a partial entitlement to integration in a host Member State, could be to abandon the status all together. In light of the Union’s recent humbled reaction to the crises, as embodied in the Commission’s five scenarios for the future of Europe, such a response could accord with the scenario whereby the Union is limited to a single market.¹⁰⁷ In this scenario, the paradigm for freedom of movement would regress back to economic activity—a condition that the minimalist scholars may argue should never have been breached. However, I would argue that when evocative language such as ‘citizenship’ is used, it creates expectations in individuals that such a status can indeed be fundamental, holistic, and existential beyond the functionality of an internal market. Therefore, despite its current substance falling far short of the paradigmatic central cases of citizenship of nation states, to regress back from this language explicitly could expose the entire endeavour as the cynical exercise in public relations that Weiler warned it might be. The European Union, and the concept of citizenship by which individuals are the subjects and objects of its constitutional order, finds itself on a precipice. It can either retreat back to enhanced intergovernmentalism in accordance with the International Law paradigm, or it can take a leap of faith into further

¹⁰⁶ This recognises the historical origins and etymology of the word ‘citizenship’ as connected to ‘city’, the place of one’s residence, and a place in which any individual in theory may integrate themselves regardless of whether they have been born there or not. The reconnection of the status to place will be considered tentatively in Section IV below.

¹⁰⁷ COM(2017)2025, *Future of Europe: Reflections and Scenarios for the EU27 by 2025*, White Paper, available at https://ec.europa.eu/commission/sites/beta-political/files/white_paper_on_the_future_of_europe_en.pdf.

supranational constitutional innovation. By choosing to give substance to the status of citizenship, and most importantly to empower individuals to shape this substance, the European Union could provide these people with the existential choice to constitute themselves into a new form of polity.

The proposal for citizenship of the European Union to become an autonomous status would inevitably have to form part of a new constitutional settlement for Europe. Although, as Closa notes, Article 25 TFEU envisages the addition of new rights through the political processes currently mandated by the Treaties, the proposal here goes far beyond such a piecemeal process of reform. Instead it would necessitate a holistic reimagining of the status. The normative foundations for such a constitutional moment are broadly aligned with Mark Dawson and Floris de Witte's argument for a new constitution for the EU. Their conceptual starting point is a commitment to self-determination because this 'offers a richer framework than the concept of democracy ... as it is able to articulate the importance of the citizens' actual capacity to *affect* the economic, social and moral texture of society'.¹⁰⁸ Breaking down the concept of self-determination further, this may be regarded through an existentialist lens. It means facilitating the means by which individuals can construct their life-plans and thus determine their selves within the immutable constraints imposed by their facticity. To this end, Dawson and de Witte's proposals to provide a framework that enables the space for political contestation over substantive policy goals with resultant institutional reform and a legal order that facilitates rather than stifles such discourse are desirable. However, the crucial missing part of Dawson and de Witte's jigsaw is the creation of this collective self which would be empowered to determine its destiny. They discuss reforms to enable the European Parliament to be 'a forum for the citizen *qua* European'.¹⁰⁹ However, this '*qua*'—a capacity for individuals to act *as* citizens of Europe—is assumed to pre-exist. This is because such an incipient class of Europeans who have chosen to rely upon the rights and status that they have been passively granted by the Treaties is evident. Yet this collective does not have the means to represent itself independently in the constitution and polity-building process that Dawson and de Witte envisage. Therefore, I would advocate that any new constitutional settlement for Europe must be predicated first upon enabling the incipient subjects of this constitutional order to shape their political destiny through the creation of a status that enables them to exercise *pouvoir constituant*.¹¹⁰

Indeed, the fact that the pre-existing status of citizenship of the Union has only ever been supplemental to the pre-existing status of nationality of the Member States means that the creation of such a constitution for Europe could avoid the classic

¹⁰⁸ M Dawson and F de Witte, 'From Balance to Conflict: A New Constitution for the EU' (2016) 22(2) *European Law Journal* 204, p 205.

¹⁰⁹ *Ibid*, p 216.

¹¹⁰ For the theoretical puzzles concerning the concept of constituent power in relation to European integration, see M Fichera, 'Discursive Constituent Power and European Integration', available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3013137, the literature cited therein, and the forthcoming monograph building thereupon.

legitimacy dilemma posed by Hannah Arendt: '[T]hose who get together to constitute a new government are themselves unconstitutional, that is, they have no authority to do what they have set out to achieve'.¹¹¹ In this sense, the fact that the citizenship of the European Union as a status of political subjecthood pre-exists means that it may be used as a vessel for the legitimacy of the new constitutional project. The crucial feature is that the pre-existing status of nationality upon which the genesis and development of EU citizenship depends would not be extinguished by the emancipation of the latter from the former. The creation of an autonomous citizenry of Europe can also be seen to reconcile the dichotomy that Bellamy proposes between the 'choice' and the 'civic' accounts of political belonging. Bellamy outlines that 'the choice account involves the importance of our being able to choose which political community we belong to ... legitimacy depends on its [political authority] being freely chosen by those subject to it'.¹¹² By contrast, 'the civic account for ensuring the legitimacy of the political authority applies even to those who have not moved or chosen but rather acquired citizenship through birth. This account rests on the political authority being under the free and equal democratic control of those subject to it'.¹¹³ Bellamy argues that 'the choice and civic accounts are not incompatible, rather the choice account is parasitic on the civic account',¹¹⁴ because individuals either retain their civic obligations in their home Member State after moving or acquire the obligations of their host Member States. However, providing the capacity for individuals to choose to become European citizens would turn this relationship upon its head—the civic account of obligations that individuals are subject to regardless of their individual choice on a case-to-case basis would be predicated upon an initial choice to adhere to a particular vision of a polity and the consequent construction thereof. In contrast to the philosophically anarchist choice accounts, individuals would not be free to eschew by emigrating away from the territory of the state the obligations, status, and identity that are imposed upon them by the facticity of their nationality. This original choice account would make the hitherto metaphorical notion of a social contract, which is used to retrospectively justify the imposition of political obligations, a reality for the prospective construction of a political community.

In practical terms, it is envisaged that such a choice to become a European citizen would form the initial stage of a European-wide process of constitutional consultation. This may take the form of a pan-European referendum as envisaged by Joseph Weiler already in 1998.¹¹⁵ Alternatively, it may take the form of a representative constitutional convention or assembly. However, the representative deficiency of the intergovernmental conference on the draft Treaty establishing a Constitution for Europe must be avoided in constructing such a convention. The prevarication over whether the 2005 settlement represented a 'Constitution' or retained the international

¹¹¹ H Arendt, *On Revolution* (Viking Press, 1963), pp 183–84.

¹¹² See note 97 above, p 562.

¹¹³ *Ibid*, p 564.

¹¹⁴ *Ibid*.

¹¹⁵ See note 25 above.

law character of ‘Treaty’ must also be avoided. It is suggested that the initial ‘electorate’ for such a decision would have to be all of those individuals who currently hold the status of citizen of the European Union by virtue of being a national of a Member State. This would be necessary to ensure the continuity whereby the legitimacy of the new status, manifested in the form of popular democratic consensus, would be a logical continuation underpinned by the legitimacy of the old status, manifested in the form of state consent to a Treaty under international law.

Although those who have exercised their free movement rights may be the most amenable to the emancipation of EU citizenship, such exercise of rights should not be a necessary condition for making the self-determinative choice to retain EU citizenship as this would constitute a form of inequality. The ideal case of the prototype European citizen would be the individual who has constructed an identity and shared solidarity as ‘European’ beyond the material benefits that they receive from the rights flowing from this status. However, it would be expected that certain individuals would choose to attain the status for such instrumental reasons without feeling any such attachment to the new polity. Although this phenomenon cannot be prevented if we are committed to providing a free choice to all present EU citizens, it can be mitigated through the construction of citizenship duties, such as direct taxation of income which may be used to construct financial assistance mechanisms as considered below. As Weiler observes,¹¹⁶ these demands that the new polity asks of its members would be crucial in guaranteeing the bare minimum of solidarity to sustain a community orientated towards the flourishing of all of its members as a collective rather than citizenship being a mere instrumental status used only to secure individual preferences.

Presuming that the legal question of whether Member State withdrawal necessarily extinguishes EU citizenship does not arise again when this situation is no longer hypothetical, the limitation of the franchise to nationals of the Member States would mean that nationals of the United Kingdom would not be entitled to choose whether to acquire the new status. However, it is suggested that the wholesale extinction of the status of EU citizenship for individuals holding the nationality of a former Member State could be regarded as a learning experience and the incentive for the emancipation of the status to ensure that such a capacity for self-determination regarding political status is not removed from European individuals again. Following the initial (re)creation of European citizenship, it is suggested that those holding the status could decide upon the conditions for third country nationals—including United Kingdom nationals—to acquire citizenship. Conditions analogous to naturalisation requirements for the acquisition of nationality could be established. The most prominent of such would likely be residence in the territory of the European Union. As such, it may be argued that residence truly would become the new primary means of belonging within the new European polity.¹¹⁷

¹¹⁶ Ibid.

¹¹⁷ G Davies, ‘Any Place I Hang My Hat? or: Residence is the New Nationality’ (2005) 11(1) *European Law Journal* 43.

Such a decision should not be seen either as entailing the creation of a federal United States of Europe that would replace the Member State polities, nor as a process of completely replacing the current Treaty based structure of the European Union. Instead, it is envisaged that European citizenship would operate in the same manner as dual-citizenship of current nation states, meaning individuals would retain the citizenship of the state in which they were born. This would in effect lead to the creation of a European polity that is insulated from the national polities and has a horizontal relationship with them as opposed to the current ambiguous supranational hierarchical relationship. Although there is not space to go into detail here, it is also submitted that such a constitutionalisation of a European citizenry could provide some form of solution to the problems of the primacy or supremacy of EU law by defining competences not on the basis of functional policy goals, but on the basis of what individuals are the objects of the legal order. The creation of this constitutional order would then enable the Member States of the European Union to continue their cooperation in a more traditional intergovernmental manner fields of competence, such as the Common Foreign and Security Policy, which may be decided to fall outside of the defined scope of the new European constitution. From this perspective, the proposal for an autonomous citizenry of the Union may be regarded as analogous to the numerous political proposals for a ‘Core Europe’.¹¹⁸ Crucially, however, the constituent subjects and legal objects of this Core Europe would be individuals as opposed to states. And like the state-based Core Europe proposals, the idea would be that those who choose to become European citizens would constitute a vanguard with the choice being left open for individuals to join in the future.

Perhaps the greatest practical impact that such an autonomous form of European citizenship could have in the lives of individuals is the means it would provide to create European level mechanisms of redistribution. Academics can be preoccupied with abstract concepts such as identity, belonging, and solidarity; however, I would submit that for most individuals what is most important is whether institutions can guarantee the resources and welfare that enable them to pursue life plans with autonomy and dignity. In this regard, an autonomous European citizenry and a new constitutional process provides the means to decouple the access to social assistance for mobile citizens from domestic political processes. A situation akin to John Rawls’ ‘original position’¹¹⁹ could be initiated by this constitutional moment, enabling individuals to express their voice in a collective process of will-formation regarding what forms of redistribution might be suitable for European individuals—if indeed any. This could provide the opportunity for radical experimentation with welfare mechanisms liberated from the path dependency which has seen national

¹¹⁸ See, *inter alia*, J-C Piris, *The Future of Europe: Towards a Two-Speed EU?* (Cambridge University Press, 2012); J Habermas, ‘Core Europe to the Rescue: A Conversation with Jürgen Habermas about Brexit and the EU Crisis’ (*Social Europe*, 12 July 2016) <https://www.socialeurope.eu/2016/07/core-europe-to-the-rescue/>; D Seikel, ‘The European Union in Crisis – Is Flexible Integration the Way Forward?’ (*Social Europe*, 22 July 2016) <https://www.socialeurope.eu/2016/07/european-union-crisis-flexible-integration-way-forward/>.

¹¹⁹ The analogy is, of course, imperfect as the ‘veil of ignorance’ would be impossible to replicate in reality. See note 100 above.

welfare systems become outmoded. For example, Phillipe Van Parijs' arguments for a universal basic income, to be paid to all European citizens, could be a potential model.¹²⁰

In this regard, the proposal for an autonomous European citizenship could benefit people from all strata of society. The potential uncoupling of the legal rights to move to and establish oneself in another state from employment, education status, or sufficient financial means could alleviate the inequality of EU citizens on the basis of socioeconomic status. Furthermore, the emancipation of EU citizenship could address the current situation in which individuals can fall through the cracks of welfare entitlement in their host and home Member States due to the current paradigm of welfare 'coordination'.¹²¹ The potential creation of direct financial assistance through an autonomous European welfare system could provide a safety net for individuals in the pursuit of their life plans across Europe. Importantly, the financial reserves that such individuals would draw upon would not be those generated through the thick historical social solidarity that underpins national welfare systems. These mechanisms have been a political arena for resistance against the claims of mobile EU citizens who are perceived not to have contributed to this common good. Instead, the reserves would be generated by those individuals who have chosen to contribute financially to a European welfare system on the basis of the solidarity of common values and experiences that inform the free choice to become a European citizen. This could address the academic criticisms regarding the perceived lacuna of the 'regression era', and provide the material means to fulfil the legal promise of Article 20 TFEU to allow individuals to move and reside *freely* across the territory of the European Union. Crucially, however, if we are to retain our commitment to the self-determination of the incipient citizenry of Europe, this collective should be free to determine the mechanisms itself through democratic deliberation, or indeed to choose not to create any such means of financial assistance.

The gravest practical challenge to the proposal for an autonomous European citizenry constituting a new European constitutional polity is the question of territory, and accommodating the rights and obligations of national and European citizens within this territory. Meticulous deliberation would be required to determine aspects such as whether European citizens should pay taxes to the state of residence or to the European budget. However, I would submit that it is not impossible to disentangle these obligations, for example through companies being incorporated as European companies for the purpose of income tax, whereas taxes on real-estate and residence would be under the control of the state of residence. A radical idea for how to solve the territory problem would see the territory of the new European polity being physically constituted by a network of European cities. Such a proposal would see the concept of 'citizenship' resituated ontologically within the concept of 'city'.

The everyday life practices and experiences of individuals are congruent in European cities across nations. Although many more cultural and sociological features

¹²⁰ P Van Parijs and Y Vanderborght, *Basic Income: A Radical Proposal for a Free Society and a Sane Economy* (Harvard University Press, 2017).

¹²¹ See note 61 above.

contribute to solidarity and common identity, it is tentatively submitted that this similarity of life practice may be generative of the cultivation of shared values between individuals in these urban centres. It is suggested that the solidarity that is founded upon such shared values may be sufficient to sustain an autonomous European society within these cities.¹²² The political and legal governance of such a society would thus constitute a form of network polity. Such a proposal for both a radical devolution of governance to the local level and the radical expansion of communitarian belonging to the European level would overhaul the Westphalian model of state sovereignty within demarcated borders. However, I would submit that such a reformulation of political and social belonging in Europe would more accurately reflect the current cleavages of identity and values between, *inter alia*, generations and regions in the modern world.

Finally, the choice of the means of implementation is crucial. One may delineate three means by which an autonomous status of EU citizenship may be (re)constructed from the current regime. The first and most radical method would be the ‘constitutive leap of faith’ whereby every present EU citizen would be given the choice whether they wish to be citizens of Europe or not. This initial collective self-determination would set into motion the constituent process of constructing a European polity. The advantage of a dramatic break from the inertia that the European project faces would also entail the significant disadvantage in practice of the wholesale loss of legal status and rights that would face every individual who did not choose the status. In terms of practicability, it is also difficult to envisage a situation in which the Member States of the European Union acting either as the ‘Masters of the Treaty’ or within the institution of the European Council would mandate such a process. If such a process were to be initiated in revolutionary opposition to the current predominant constitutional actors within the European order, then one would be faced with the crisis of legitimacy delineated by Hannah Arendt and alluded to above.

The second method would be an ‘incremental and complementary’ proposal. The current legal form and conditions for acquisition of EU citizenship would remain as defined in Article 20 TFEU. Complementary functions, duties, and rights could then be created in accordance with the Article 25 TFEU process in order to imbue the status with further legal substance. For example, European welfare rights and duties could be established by the Council with the consent of the European Parliament to address the *problematique* perceived by scholars during the ‘regression era’ discussed above. Such a process could also be used to amend or reform the political rights within Article 20(2)(b) TFEU. This incremental substantiation could then be tested in practice, and only after this experience could there be consideration of ‘constitutional’ reform whereby Member States may be persuaded to transfer certain competence and governance functions to the level of a ‘European polity’. Such transfer could be regarded as the ‘constitutional moment’ for the newly autonomous European citizenry, at which point those individuals who hold the status could be

¹²² For further on the construction of a European society, see R Münch, *European Governmentality: The Liberal Drift of Multilevel Governance* (Routledge, 2010).

given the choice whether to retain or to divest themselves of the constituent status. The continuance of the incremental method of European integration would prevent a wholesale loss of the status and rights of EU citizenship for individuals who hypothetically may not choose to acquire the status. However, such a continuation would not represent the leap of faith whereby the future design of the status of citizenship and the consequent constitutional order would be within the control of those who choose to hold the status.

The third-way compromise between these two proposals would be a ‘phasing out’ of the conditions for acquisition of EU citizenship. Under this proposal, those who have passively acquired EU citizenship under the present regime will retain the status. However, a form of ‘sunset clause’ could be established either through the Article 25 TFEU procedure or if necessary through a Treaty reform whereby those born after an established date would no longer automatically acquire EU citizenship. Instead, this new generation of Europeans would be given the opportunity to choose to become citizens of Europe upon reaching adulthood. This would precipitate the opportunity to foster popular legitimacy over an extended period of gestation. The advantage of this approach is that it would prevent the ‘guillotine’ effect of an immediate choice for individuals either to retain or lose their status and rights. However, as opposed to the second proposal above, it would enable a more radical reform of the means of acquisition, moving from the present regime of passive acquisition to the paradigm of active self-determinative choice. Furthermore, it is suggested that this could better retain the ‘duality’ and ‘supranationality’ of the Union’s constitutional order due to the fact that it would be clear to this new generation that their ‘nationality’ functions as their chronologically prior status before a ‘graduation’ to citizenship of Europe. This would prevent the risk of a disruptive separation of the Member State and European constitutional orders and the charge of illegitimacy of the new order. These three proposals are merely suggestions for possible courses of action, which represents the limits of what academics may legitimately propose. If any such emancipation of citizenship of Europe were to occur in practice, the method by which it would proceed would need to be deferred to the choice of the incipient people of Europe.¹²³

V. CONCLUSION: EUROPEAN CITIZENSHIP AS EXISTENTIAL FREEDOM

The analysis of the eras of the development of citizenship of the European Union and different normative positions regarding this has led to the picture of a partial status that finds itself in limbo. On the one hand, the limited nature of the rights it provides to individuals without a means for political self-determination means that its apparent destiny of becoming a fundamental status appears doomed. On the other hand, the experimental way in which the entitlements provided by the status have been expanded *ex post facto* by the judgments of the Court of Justice of the European

¹²³ I thank Rainer Bauböck for the discussion that has informed the proposals outlined in these three paragraphs.

Union may be regarded as undermining the democratic capacity for self-determination of the citizens of the Member States in which mobile Union citizens integrate. A regression by the Court of Justice back from this expansive case law is untenable, however, without creating injustice for those mobile individuals who have come to rely upon the entitlements that have been bestowed upon them by their citizenship of the Union.

The solution proposed in this article, therefore, is to emancipate European citizenry through a radical constitutional process which would enable it to become a fundamental status for those individuals who choose it. To return to the introduction's analogy with the existentialist philosophy of Jean-Paul Sartre, it may be argued that the challenges to traditional conceptions of political communities posed by regional integration within the European Union and beyond has placed the concept of polity in an analogous existential crisis to individuals confronted with the blank slate of their human nature. In the same way that human beings are struck with nausea at the realisation that there is no objective essence that precedes their existence, modernity has shown that there is no objective essence to political belonging of a demos based on a defined identity that transcends the immediate existence of the members of the polity. The current existential crisis of the European Union provides individuals with the opportunity to embrace and exercise this existential freedom in order to construct their own polity and community. Crucially, however, such construction of a fundamental political status of belonging should be pursued *ex ante* through democratic self-determination expressed in a process of constitution founding, rather than being pursued *ex post* through a judicial body's interpretation of a limited set of international treaty rights.