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Individual Rights, Interstate Equality, State Autonomy: European Horizontal Citizenship and its (Lonely) Playground in Trans-Atlantic Perspective

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Abstract

Federalism splits citizenship. It breaks it into different levels of affiliation, entitlement, participation. This has happened to citizenship in both the US and the EU. However, the split in the EU has generated a distinctive horizontal citizenship, far-reaching and encompassing, which has taken a way of its own in comparison to US federal citizenship. Early comparative thoughts on US and EU citizenship at times convey a sense that horizontal citizenship, in the context of federalism, is something preliminary and incomplete, while the culmination of federal citizenship is vertical. In this optic, EU horizontal citizenship is an insufficient achievement. It is either a mere function of the market, as emancipation from market logics requires vertical engagement; a confirmation of the democratic deficit, as EU citizens have reduced influence on EU level decisions; or the result of judicial enthusiasm prevailing over the political dialogue that only could shape true vertical citizenship. This chapter proposes to develop an alternative account of EU horizontal citizenship. It argues that while EU citizenship as it stands does not necessarily prelude to a vertical one, its horizontal bias is not a symptom of malaise. On the contrary, horizontal citizenship revitalizes national citizenship by re-articulating it and brings about a right to belong across Member States which transforms the prospects of belonging as citizens in the EU.

Introduction

Federalism splits citizenship. It breaks it into different levels of affiliation, entitlement, participation.¹ It distinguishes horizontal dimensions of citizenship –that is rights against, and a status of belonging in and across, the several states- from vertical ones –that is rights against, and a status of belonging in, the federal/supranational polity at large.² This has happened to citizenship in both the US and the EU. However, the split in the EU has generated a distinctive horizontal citizenship, far-reaching and encompassing, which has taken a way of its own in comparison to US federal citizenship.

Early comparative thoughts on US and EU citizenship at times convey a sense that horizontal citizenship, in the context of federalism, is something preliminary and incomplete,³ while the culmination of federal citizenship is vertical.⁴ In this optic, EU horizontal citizenship is an

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¹ See Peter H Schuck, 'Citizenship in Federal Systems' (2000) 48 A J Comp L 197, 197 (on features of a federation that affect citizenship meaning).

² See Cristoph Schönberger, 'European Citizenship as Federal Citizenship-Some Citizenship Lessons of Comparative Federalism' (2007) 19 Rev Eur D Pub 62, 79.

³ See Schönberger, 'European Citizenship as Federal Citizenship' (n 2), 68-71 and 79; Schuck (n 1) 199-200 (dismissing EU citizenship as weak and concerned with economic rather than political rights).

⁴ See Schönberger, 'European Citizenship as Federal Citizenship' (n 2) 79.

insufficient achievement. It is either a mere function of the market, as emancipation from market logics requires vertical engagement;⁵ a confirmation of the democratic deficit, as EU citizens have reduced influence on EU level decisions;⁶ or the result of judicial enthusiasm prevailing over the political dialogue that only could shape true vertical citizenship.⁷

This chapter proposes to develop an alternative account of EU horizontal citizenship. It argues that while EU citizenship as it stands does not necessarily prelude to a vertical one, its horizontal bias is not a symptom of malaise. On the contrary, horizontal citizenship brings new impetus to the prospects of belonging in the EU. In the folds of European citizenship's judicial evolution from a mobile citizenship, to a cross-border one to, most recently, a citizenship that entails a hard core of rights even in its static and internal dimension, horizontal citizenship lays the seeds of a right to belong across Member States, which revitalizes national citizenship by re-articulating it.

Unravelling the misunderstood potential of EU horizontal citizenship yields a novel perspective on the meaning of citizenship beyond nationality and on the political content of European citizenship. This in turn may help reframe questions on citizens' affiliation and participation that times of EU 'existential uncertainty' have made pressing.⁸

To develop its quest, the chapter relies on a trans-Atlantic comparative perspective. The coming of age of European supranational citizenship allows returning to the subject of early studies of US and EU federal citizenship with a 'grown-up' understanding of relevant problems.⁹ In particular, the chapter traces in the US and EU judicial and scholarly discourse on citizenship echoes of principles of individual rights, interstate equality, and state autonomy. Focal tensions form in both the US and the EU, and in federal systems more in general, around these three principles, which embody, respectively, the competing interests of individuals, of state subunits, and of the federation at large. The three principles are also critical to mapping the split between vertical and

⁵ But see Niamh Nic Shuibne, 'The Resilience of EU Market Citizenship' (2010) 47 CML Rev 1597, 1619 (suggesting that there is room within the market paradigm to accommodate further citizenship developments).

⁶ See Joseph H H Weiler, 'Van Gend en Loos: the Individual as Subject and Object and the Dilemma of European Legitimacy' (2014) 12 I Con 94, 101 ('there is simply no moment in the civic calendar of Europe when the citizen can influence directly the outcome of any policy choice facing the Community and Union').

⁷ For a critical view on accusation of activism in citizenship case-law see Michael Dougan, 'The Bubble that Burst: Exploring the Legitimacy of the Case Law on the Free Movement of Union Citizens' in Maurice Adams, Henry De Waele, Johan Meeusen, Gert Straetmans (eds), *Judging Europe's Judges: the Legitimacy of the Case Law of the European Court of Justice* (2013).

⁸ The expression belongs to Niamh Nic Shuibne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice* (OUP 2013), 44.

⁹ A central concern in early comparisons was mobility of the economically inactive. See e.g. Schönberger, 'European Citizenship as Federal Citizenship' (n 2); Anne Pieter van der Mei, 'Freedom of Movement for Indigents: A Comparative Analysis of American Constitutional Law and European Community Law' (2002) 19 Ariz J Int & Comp L 803. The issue today is rather how to emancipate federal citizenship from movement. Comparative works on EU and US citizenship have included, among others, Gerald Neuman, 'Fédéralisme et citoyenneté aux États-Unis et dans l'Union européenne' (2003) 21 Critique Internationale 151; Cristoph Schönberger, *Unionsbürger: Europas Föderales Bürgerrecht in Vergleichender Sicht* (Mohr Siebeck 2006); Michael S. Greve, Michael Zoller (eds), *Citizenship in America and Europe-Beyond the Nation State?* (AEI 2009); Thomas Fischer, 'European 'Citizenship: in its Own Right and in Comparison with the United States', (2002-03) 5 Cambridge Yb Eur Studies 357; Francesca Strumia, 'Citizenship and Free Movement: European and American Features of a Judicial Formula for Increased Comity' (2006) 12 Col J Eur L 714; Patrick Weil, Randall Hansen (eds), *Reinventing Citizenship: Dual Citizenship, Social Rights, and Federal Citizenship in Europe and the United States* (Berghahn 2000).

horizontal citizenship dimensions, and the overall reach of federal citizenship: federal citizenship provides a vehicle to protect individual rights against the states; interstate equality lays the constitutional ground for federal citizenship to implement its mandate of common belonging; and state autonomy works as a limit to the rights of federal citizenship.

The citizenship tale weaved around these three principles in the US and the EU resonates up to a point. The harmony breaks when one considers the reach of interstate equality notions in each polity. It is from there that EU horizontal citizenship begins to take its own course.

Part I traces correspondences in the US and EU citizenship discourse developed around notions of individual rights, interstate equality and state autonomy. Part II points at the different reach of notions of interstate equality in the US and the EU and illustrates the resulting peculiarities of European federal citizenship. Part III elaborates on the notion of European horizontal citizenship. Part IV reflects on the implications of this notion for questions of post-national affiliation and political participation in the EU.

Part I Federalism and the Discourse of Citizenship in the US and the EU - Act I

Individual rights protections, interstate equality guarantees and state autonomy safeguards have a distinctive place in both US and EU federal architecture, and in both polities the reach of relevant protections and the balance between competing interests they involve are at the center of everlasting constitutional debates.

In the US, individual rights find their constitutional source in the first eight amendments to the Constitution of 1787 (the ‘Bill of Rights’). The role of the federal government in protecting these rights against state action has been one of the hottest dilemmas of US constitutional law, addressed once again by the Supreme Court in a 2010 case.¹⁰ Concerns for interstate equality, and neighboring ideas of comity, have inspired, to different extents, the interpretation of commerce clause, article IV privileges and immunities and equal protection.¹¹ State autonomy is ‘itself a federal constitutional value’¹² in the US, where it inspires, among others, the prohibition of federal ‘commandeering’, and the doctrine of state immunity.¹³

The EU’s role in respect of fundamental individual rights is succinctly summed up in article 6 of the Treaty on European Union (TEU). The provision glosses over an ever-lasting debate on the scope of EU’s competence in protecting fundamental rights and of surviving Member States’

¹⁰ *McDonald v City of Chicago*, 130 S Ct 3020 (2010). For an overview of the judicial history of the bill of rights incorporation, see *ibid* para. 3028-3032. On the federal government’s role in protecting individual rights, see Laurence H Tribe, *American Constitutional Law* vol. 1 (Foundation 2000), 1293. Also see Rebecca Zietlow, ‘Belonging, Protection and Equality: The Neglected Citizenship Clause and the Limits of Federalism’ (2000) *U Pittsburgh L Rev* 181, 292-293.

¹¹ US Constitution, Article IV para 2, Article I para 8 and Amendment XIV, para 1. On the meaning of these provisions in terms of interstate equality, see Tribe, *American Constitutional Law* (n 10), 1270 and 1021-1024; Jonathan Varat, ‘State “Citizenship” and Interstate Equality’ (1981) 48 *U Chicago L Rev* 487; Jide Nzelibe, ‘Free Movement: A Federalist Reinterpretation’ (1999) 49 *Am U L Rev* 433, 445.

¹² Jonathan Varat, ‘Economic Integration and Interregional Migration in the United States Federal System’ in Mark Tushnet (ed), *Comparative Constitutional Federalism – Europe and America* (Greenwood Press 1990), 21.

¹³ US Constitution, Amendments X and XI. On the prohibition against commandeering, see *New York v US*, 505 US 144 (1995); *Printz v US*, 521 US 98 (1997). Also see Tribe, *American Constitutional Law* (n 10), 860-920.

power to test EU action against the fundamental rights enshrined in their constitutions.¹⁴ Even beyond this debate and its textual sources, a preoccupation for the individual and his rights is at the very heart of the ultimate principles of federalism in the EU, supremacy and direct effect.¹⁵ Ideas of interstate equality inform the principle of non-discrimination on the basis of nationality in matters within the scope of EU law.¹⁶ Non-discrimination is also conducive to the ‘ever-closer union’ goal stated in art. 1 TEU. State autonomy inspires the obligation to respect the Member States equality, the national identities inherent in their political and constitutional structures, and their essential State functions.¹⁷ Operating principles of conferral and subsidiarity also reflect concern for state autonomy.¹⁸

In both the US and the EU, questions of individual rights, interstate equality and state autonomy also inform the judicial and scholarly discourse surrounding, respectively, federal and supranational citizenship. This discourse finds its main textual basis, in the US, in the privileges and immunities clause of article IV of the Constitution,¹⁹ as well as in the XIV amendment citizenship clause,²⁰ including the privileges and immunities clause therein; and in the EU, in articles 20– 24 TFEU, article 9 TEU and in the Citizenship Directive.²¹ The content of these provisions in terms of individual rights, their demands in terms of interstate equality, and the limits state autonomy poses to their enforcement have long troubled courts and scholars on both sides of the Atlantic.

I.A. The Discourse of Citizenship and Federalism in the US

Discourses of citizenship and individual rights cross paths, in the US, in the context of debates on the role of the XIV amendment privileges and immunities clause in grounding federal protection of fundamental rights against the states. The 1872 Slaughterhouse case dismissed the role of the

¹⁴ For an overview of this debate see Gráinne de Búrca, ‘The Evolution of EU Human Rights Law’ in Paul Craig, Gráinne de Búrca (eds), *The Evolution of EU Law* (OUP 2011); also see case C-34/09 *Gerardo Ruiz Zambrano v Office national de l’emploi (ONEm)* [2011] ECR I-01177, Opinion of AG Sharpston, paras 152-173.

¹⁵ See Bruno de Witte, ‘Direct Effect, Primacy, and the Nature of the Legal Order’ in Craig, de Búrca (eds), *The Evolution of EU Law* (n 14), 436-37.

¹⁶ Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU), art 18. On the link between internal market rules and broader integration ambitions, see Nic Shuibne, *The Coherence of EU Free Movement Law* (n 8), 43.

¹⁷ Consolidated Version of the Treaty on European Union [2010] OJ C83/1 (TEU), art 4 para 2. Also see de Witte (n 15), 436-37 (art. 4 TEU represents an implicit limit to the primacy of EU law).

¹⁸ See TEU art. 5.

¹⁹ US Constitution, Article IV, para 2 (‘the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states’).

²⁰ US Constitution Amendment XIV, para 1 (‘All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States [...]’).

²¹ Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of the citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77 (Citizenship Directive). In addition to these textual sources, Denmark adopted a unilateral declaration on European citizenship at the time of introduction of relevant provisions in the Treaty of Maastricht, highlighting the distinction between European citizenship and national citizenship, see [1992] OJ C 348/4; a Declaration on Nationality was also annexed to the Treaty of Maastricht to clarify that for purposes of relevant references in the Treaties, the question of whether a person is a national of a Member State is to be settled on the sole basis of the nationality law of the relevant Member State; see Treaty on European Union [1992] OJ C 191/1 (Declaration n. 2).

clause in this respect.²² While this case has attracted strong criticism and has been the object of revisionist interpretations,²³ the Supreme Court has taken the alternative route of relying on the due process clause of the XIV amendment to apply the bill of rights against the states.²⁴ This judicial choice has never silenced the debate on whether federal citizenship, in the intention of the framers of the XIV amendment and in the structure of the Constitution, is meant to be a vehicle for protection of fundamental rights.²⁵

One fundamental right federal citizenship certainly entails in the US is the right to interstate travel. Citizenship hovers in the court reasoning in several right to travel cases.²⁶ Even if holdings in these cases are often grounded in provisions other than the two constitutional citizenship clauses,²⁷ concurring and dissenting opinions highlight the citizenship link.²⁸ The right to travel, whose effective protection requires, among others, equal treatment of travelling citizens in the state of arrival, makes explicit what remains implied in the privileges and immunities clause of article IV: the close connection that binds in a federal system citizenship doctrine and interstate equality doctrine. In the words of Peter Schuck,

‘The right to travel from subunit to subunit or the right [...] to enjoy equal treatment in other subunits pertain to or are implied by the distinctive relationships among citizens of federations.’²⁹

This connection is grounded in part in the non-discrimination component of the privileges and immunities clause of article IV. As the Supreme Court clarified in *Paul v. Virginia*:

‘It was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other States. [...] It inhibits discriminating legislation against them by other States.’³⁰

Such non-discrimination content is common also to the XIV amendment privileges and immunities clause.³¹ The intertwining of citizenship, right to travel and non-discrimination doctrines concurs to substantiate a comprehensive notion of interstate equality, that is, an idea of equal citizenship and shared belonging across the several states consistent with the federal promise of one people’s

²² *Slaughter House cases* 83 US 36 (1872) (the privileges and immunities clause of the XIV amendment protects only those rights ‘which owe their existence to the Federal Government, its National character, its constitution, its laws’). Also see Tribe (n 10), 1297-1311.

²³ See David S Bogen, ‘Slaughter-House Five: Views of the Case’ (2003-2004) 55 Hastings L J 333. For an incorporationist re-interpretation, see Kevin C Newsom, ‘Setting Incorporationism Straight: A Re-Interpretation of the Slaughter-House Cases’ (2000) 109 Yale L J 643.

²⁴ See *McDonald* (n 10), 3028-3032.

²⁵ See e.g. *McDonald* (n 10) (Justice Thomas concurring), 3077; Zietlow (n 10), 283; Tribe, *American Constitutional Law* (n 12), 1299-1302.

²⁶ See e.g. *Crandall v Nevada*, 73 US 35 (1867), para 49; *Saenz v Roe*, 526 US 489 (1999).

²⁷ See e.g. *Edwards v California* 314 US 160 (1941) (commerce clause); *Shapiro v Thompson* 394 US 618 (1969) (equal protection).

²⁸ See Francesca Strumia, *Supranational Citizenship and the Challenge of Diversity-Immigrants, Citizens and Member States in the EU* (Martinus Nijhoff 2013), 82-88; Strumia, ‘Citizenship and Free Movement’ (n 9), 736-38.

²⁹ Schuck (n1), 216.

³⁰ *Paul v Virginia*, 75 US 168 (1868), para 180. Also see Tribe, *American Constitutional Law* (n 10), 1256-57.

³¹ See *McDonald* (n 10) (Justice Thomas concurring), 3068.

‘self-rule and shared rule’.³² Several commentators have pointed to the role of the privileges and immunities clause of article IV in fostering political and social cohesion.³³ ‘It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this’, so continued, for instance, the *Paul v. Virginia* passage already quoted above.³⁴

Interstate comity, and the idea of federal citizenship that goes with it, find a limit however in concerns for state autonomy. While the citizens’ right to interstate travel demands a measure of equal treatment across the states, state autonomy interests justify distinctions based on residence.

‘Some distinctions between residents and non-residents merely reflect the fact that this is a nation composed of individual states.’³⁵

As residence equals state citizenship in the US,³⁶ distinctions based on residence are at first sight in direct conflict with those privileges and immunities of citizens in the several states to which all citizens are entitled within the frame of the clause of article IV. Qualifying state autonomy interests, which work thus as a legitimate limit to interstate citizenship, include for instance interests in choosing the destination of local taxpayers’ money and interests in protecting the quality of state bodies of professionals. The former have justified distinctions between residents and non-residents for purposes of students’ college tuition,³⁷ and more recently limitations to out-of-staters’ rights to access a state’s public records.³⁸ The latter have justified licensing and other restrictions for out-of-state professionals.³⁹

Individual states’ interests thus complete the US tale of citizenship and federalism that questions citizenship’s role as a vehicle of individual rights, details citizenship’s demand for interstate equality and admits to citizenship limits in the interest of state autonomy.

I.B. The Discourse of Citizenship and Federalism in the EU

The EU tale resonates with the US one at several points. To begin, EU citizenship is at the center of constitutional quandaries concerning EU protection of fundamental rights, comparable to some extent to the US ones. Debating the role of EU citizenship as a vehicle for individual rights

³² The expression belongs to Daniel Elazar ‘From Statism to Federalism: a Paradigm Shift’ (1995) 25 *Publius* 5, 5. On interstate equality and comity, see Strumia, ‘Citizenship and Free Movement’ (n 9).

³³ See Tribe, *American Constitutional Law* (n 10), 1250-51; Varat, ‘State “Citizenship”’ (n 11), 511 and 518-519; Bryan Wildenthal, ‘State Parochialism, the Right to Travel, and the Privileges and Immunities Clause of Article IV’ (1988-89) 41 *Stan L Rev* 1557, 1595; Nzelibe (n 11); John M Gonzalez, ‘The Interstate Privileges and Immunities: Fundamental Rights or Federalism?’, (1985-86) 15 *Cap U L Rev* 493.

³⁴ *Paul v Virginia* (n 30), para 180.

³⁵ *Baldwin v Montana Fish and Game Commission*, 436 US 371 (1978), para 383.

³⁶ US Constitution, Amendment XIV.

³⁷ Strumia, ‘Citizenship and Free Movement’ (n 9), 741-42.

³⁸ *McBurney v Young* 1709 US (2013), para 1716 (upholding access restriction to state residents as, among others, state taxpayers ‘foot the bill of recordkeeping’).

³⁹ See e.g. *Dent v West Virginia* 129 US 114 (1889); *Lowrie v Goldenhersh* 716 F2d 401 (7th Circuit 1983); also see Strumia, ‘Citizenship and Free Movement’ (n 9), 744-46.

protection has been, for a long time, an Advocates' General affair. AG Jacobs first raised the issue in 1992:

'a Community national [...] is entitled to assume that wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values [...]. In other words, he is entitled to say "*civis europeus sum*" and to invoke that status to oppose any violation of his fundamental rights'.⁴⁰

The dawn of Treaty-based European citizenship in the same year anticipated the supranational metamorphosis of the status of those 'Community nationals' Jacobs referred to. Two decades later, AG Sharpston recently rephrased the issue in *Ruiz Zambrano*:

'is Union citizenship merely the non-economic version of the same generic kind of free movement rights as have long existed for the economically active and for persons of independent means? Or does it mean something more radical: true citizenship, carrying with it a uniform set of rights and obligations in a Union under the rule of law in which respect for fundamental rights must necessarily play an integral part?'⁴¹

The court holding in *Ruiz Zambrano*, pointing to a substance of European citizenship rights which requires protection even in situations with no cross-border links,⁴² has brought novel ground to the thesis that European citizenship entails a core of fundamental rights.⁴³

The nature of these rights at the core of EU citizenship remains nebulous, except for one, of course, the right to move and reside throughout the Member States.⁴⁴ As the right to interstate travel for US citizenship, free movement is at the heart of EU citizenship and its doctrine. As is well known, the advent of Treaty-based European citizenship has given a novel constitutional justification to the pre-existing right of selected economic actors, and a powerful tool to the European Court of Justice to extend the reach and transform the rationale of the free movement doctrine.⁴⁵

The exercise of free movement rights on the part of EU citizens triggers the prohibition of discrimination on the basis of nationality.⁴⁶ The European Court of Justice's interpretation of this

⁴⁰ Case C-168/91 *Christos Konstantinidis v Stadt Altensteig - Standesamt and Landratsamt Calw - Ordnungsamt* [1991] ECR I-01191, Opinion of AG Jacobs, para 46.

⁴¹ Case C-34/09 (n 16), opinion of AG Sharpston, para 3.

⁴² Case C-34/09 (n 16).

⁴³ See Robert Schütze, 'Three Bills of Rights for the European Union' (2011) 30 Yb Eur L 131, 140-141; also see Koen Lenaerts, 'Civis Europeus Sum: from the Cross-Border Link to the Status of Citizen of the Union' (2011) 3 FMW-Online Journal on Free Movement of Workers within the European Union 6, 14-15 (proposing a post-*Ruiz Zambrano* adaptation of AG Jacobs famous passage in *Konstantinidis*).

⁴⁴ TFEU, art. 21.

⁴⁵ See e.g. case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-07091; case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-06193; case C-456/02 *Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS)* [2004] ECR I-07573. On European citizenship's contribution to free movement law see Nic Shuibne, 'The Resilience' (n 5), 1612-1613; Jo Shaw 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism' in Craig, de Búrca (eds), *The Evolution of EU Law* (n 14), 649 (citizenship brought a 'human development angle' to free movement law).

⁴⁶ Art. 18 TFEU. See e.g. case C-148/02 *Carlos Garcia Avello v Belgian State* [2003] ECR I-11613, Opinion of AG Jacobs, para 61 ('introduction of Union citizenship [...] clarifies applicability of the principle of non-discrimination to all situations falling within the sphere of Community law'). Actually, the CJEU test for attracting a European

prohibition in *Cowan* resonates with the US Supreme Court description of the privileges and immunities clause of article IV in *Paul v. Virginia*:

‘by prohibiting any discrimination on grounds of nationality [...] the Treaty requires that persons in a situation governed by Community law be placed on a completely equal footing with nationals of the Member State’.⁴⁷

As in the US thus, EU citizens’ freedom to move requires a guarantee of interstate equal treatment, which in the judicial and scholarly discourse on citizenship becomes entangled with notions of comity. Even if ‘one peoplehood’ is both utopia and an inadequate mantra in the EU,⁴⁸ AG Poiares Maduro has underlined, for instance, how European citizenship must encourage the Member States to think ‘in the wider context of the society of peoples of the Union’.⁴⁹ European citizenship, in other words, brings about a notion of belonging beyond the Member States’ national communities,⁵⁰ which seals a pact of interstate equality akin to the one surrounding citizenship discourse in the US. Paraphrasing AG Jarabo Colomer’s thought in *Petersen*,⁵¹ the same notion of belonging that informs Justice Cardozo’s famous idea that the US Constitution ‘was framed upon the theory that the people of the several states must sink or swim together’, breaks the ties with a single Member State in Europe, and weaves a connection in a wider sphere.⁵²

This EU citizenship-sponsored inter-state connection finds a limit, as it happens in the US, in the Member States retained autonomy interests: ‘The exercise of the right of residence of citizens of the Union can be subordinated to the legitimate interests of the Member States’.⁵³ State autonomy interests justifying limitations to the rights inherent to supranational citizenship differ in part from US ones. In the EU, free movement was originally an economic right reserved to migrant intra-Community workers.⁵⁴ The advent of European citizenship has gradually led to a reconfiguration of this right as a generalized right of citizens, whether economically active or not.⁵⁵ At this point, a legitimate Member State interest was recognized in avoiding indigent migrant European citizens

citizen’s situation within the sphere of Community law is not the actual exercise of physical movement, but rather a looser connection to an experience of movement that may qualify the relevant situation as cross-border. See below, text to note 107.

⁴⁷ Case 186/87 *Ian William Cowan v Trésor public* [1989] ECR 195, para 10.

⁴⁸ Kalypso Nicolaïdis, ‘The Idea of European Democracy’ in Julie Dickinson, Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP 2012), 274.

⁴⁹ Case C-499/06 *Halina Nerkowska v Zakład Ubezpieczeń Społecznych Oddział w Koszalinie* [2008] ECR I-03993, Opinion of AG Poiares Maduro, para 23.

⁵⁰ See Kochenov, ‘Rounding Up the Circle’ (n 6) (Member States have accepted this new dimension of belonging, as evidenced by fast track procedures in their nationality laws for EU citizens).

⁵¹ Case C-228/07, *Jörn Petersen v Landesgeschäftsstelle des Arbeitsmarktservice Niederösterreich* [2008] ECR I-6989, Opinion of AG Jarabo Colomer, para 31.

⁵² *Baldwin v GAF Seelig, Inc.* 294 US 522 (1935), para 523.

⁵³ *Baumbast* (n 45), para 90.

⁵⁴ TFEU, article 45. For a definition of free movement as a fundamental right for workers and their families, aimed at improving their living and working conditions, see case 152/82 *Sandro Forcheri and his wife Marisa Forcheri, née Marino, v Belgian State and asbl Institut Supérieur de Sciences Humaines Appliquées - Ecole Ouvrière Supérieure* [1983] ECR 02323, para 11.

⁵⁵ See e.g. *Trojani* (n 45); also see Strumia, ‘Citizenship and Free Movement’ (n 9), 726-27.

becoming a burden on their welfare systems.⁵⁶ This interest justifies both limitations to European citizens' right to reside⁵⁷ and additional conditions before they can receive social benefits in host Member States, despite the guarantee of equal treatment.⁵⁸ These limitations and conditions are specific to the citizens' right to move, while migrant workers are subject to their own rules.⁵⁹

The Member States' retained power to decide on nationality,⁶⁰ and thus on access to European citizenship,⁶¹ is also formally a tribute to state autonomy, in that it protects a Member State's interest in defining its own community.⁶² However it has been observed how such power has become *de facto* an illusory autonomy.⁶³

In spite of different nuances, up to this point tales of citizenship and federalism seem to resonate across the Atlantic. The music, however, is destined to change. The first strident notes appear if one focuses on the reach of notions of interstate equality that federal, or supranational, citizenship, respectively, call for. It is here that EU citizenship begins to go its own way.

PART II Federalism and the Discourse of Citizenship in the US and the EU – Act II

II.A The US Right to Travel and the Reach of Interstate Equality

The target of protections available to travelling citizens in the US is the state of arrival. This depends in part on the thrust of the privileges and immunities clause of article IV, as Justice Thomas's words in *McDonald v City of Chicago* clarify:

‘By virtue of a person’s citizenship in a particular State, he was guaranteed whatever rights and liberties that State’s constitution and laws made available. Article IV, par. 2, vested citizens of each State with an additional right: the assurance that they would be afforded

⁵⁶ See e.g. case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] ECR I-9925, Opinion of AG Tizzano, para 77.

⁵⁷ See *Baumbast* (n 47), paras 90-91; more recently, case C-86/12 *Adzo Domenyo Alokpa and Others v Ministre du Travail, de l'Emploi et de l'Immigration*, 10 October 2013, [not yet published] paras 30-31 (the right of two Luxembourg-born French-national European citizen children to reside in Luxembourg after birth with their third country national mother care-taker depends on whether they satisfy financial resources requirements in secondary legislation). Also see Citizenship Directive (n 21), art 7.

⁵⁸ Citizenship Directive (n 21), art. 24(2); also see *Nerkowska* (n 49), Opinion of AG Poiares Maduro, para 22.

⁵⁹ See Parliament and Council Regulation 492/2011 of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L 141/1.

⁶⁰ But see Dimitry Kochenov, ‘Case C-135/08, *Janko Rottmann v. Freistaat Bayern*, Judgment of the Court (Grand Chamber) of 2 March 2010, not yet reported’ (note) (2010) 47 CML Rev 1831 (after Rottmann there are no reserved domains in EU law).

⁶¹ See TFEU, art 20. Also see case C-192/99 *The Queen v Secretary of State for the Home Department, ex parte: Manjit Kaur* [2001] ECR I-01237 (to determine whether a person is a UK national for purposes of Community law, one has to rely on the unilateral declarations submitted by the United Kingdom government in this respect).

⁶² See case C-135/08 *Janko Rottmann v Freistaat Bayern* [2010] ECR I-01449, Opinion of AG Poiares Maduro, para 17.

⁶³ Member States are constrained by EU Law in the exercise of relevant powers; *Rottmann* (n 62). For an analysis and critique of retained Member States' power in administering nationality, see Strumia, *Supranational Citizenship* (n 28), 266-273; also see Gareth Davies, ‘Any Place I Hang my Hat?’, or: Residence is the New Nationality’, [2005] 11 ELJ 43, 55 (arguing that nationalities have been abolished within the scope of EU law); Kochenov, ‘Rounding Up the Circle’ (n 6), 20-22.

the “privileges and immunities” of citizenship in any of the several States in the Union *to which they might travel*’.⁶⁴

Right to travel doctrine also confirms this focus. The Supreme Court, in *Saenz v. Roe*, distinguished three right to travel prongs. The right to travel

‘protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State’.⁶⁵

The court interprets the first component as the right not to be directly impaired in entering or leaving any State.⁶⁶ The second and third component rather aim at protection from discrimination. The privileges and immunities clause of article IV protects temporary visitors in this sense, while the privileges and immunities clause of article XIV protects new residents.⁶⁷ In all three prongs, in any case, protection seems centered on the second State, the one a citizen enters or leaves, passes through or takes up residence in, as a result of travel.

Components of the right to travel have also been linked, in other cases, to the commerce clause and equal protection clause.⁶⁸ In particular, the equal protection branch of the doctrine involves a ‘penalty’ rationale, according to which any law which penalizes interstate travel violates the constitutional right.⁶⁹ This could probably apply to penalties imposed on travel by laws in the state of origin, however the focus of relevant cases has been on laws and arrangements in the state of arrival.⁷⁰

This focus on the destination of travel qualifies the content of US citizenship in terms of interstate equality. The demand for interstate equality that federal citizenship carries with it is forward-looking, to any state a US citizen may choose as a new place of residence (and thus of state citizenship), of occupation, or just of visit. The status and the rights of the leaving citizen in his state of origin do not warrant much attention. This is different in the case of European citizenship.

II.B The Scope of EU Citizens’ Free Movement and the Double Reach of Interstate Equality

‘It is settled case law that the opportunities offered by the Treaty in relation to freedom of movement cannot be fully effective if a national of a Member State can be deterred from availing himself of them by obstacles placed in the way of his stay in the host Member State by legislation in his state of origin penalizing the mere fact that he has used them’⁷¹

⁶⁴ *McDonald* (n 10) (Justice Thomas concurring), 3066 (emphasis added).

⁶⁵ *Saenz* (n 26), para 500.

⁶⁶ *Ibid* paras 500-501. Also see *Crandall* (n 26).

⁶⁷ *Saenz* (n 26), paras 501-502.

⁶⁸ See *Edwards* (n 27); *Shapiro* (n 27); also see Strumia, ‘Citizenship and Free Movement’ (n 9), 727-735.

⁶⁹ *Ibid*, 731-732.

⁷⁰ See e.g. *Shapiro* (n 27); *Attorney General of New York v Soto-Lopez* 476 US 898 (1986).

⁷¹ *Nerkowska* (n 49), Opinion of AG Poiares Maduro, para 18.

‘Citizens of the Union should not be deprived of rights they could otherwise exercise or benefit from just because they have exercised their freedom to move’⁷²

The words of AG Poiares Maduro, and of Jo Shaw, respectively, highlight how the exercise of free movement triggers protections both from discrimination and burdens imposed on migrant citizens in their Member State of origin, and from discrimination in their destination Member State.⁷³ The combination of citizenship and free movement creates a protective net aimed more in general at ensuring that ‘cross-border situations are not treated less favourably than national situations’.⁷⁴ This focus on cross-border situations has nuanced the relation between citizenship and free movement in the case-law of the CJEU. On the one hand, it is the cross-border nature of a citizen’s situation that brings it within the scope of EU law, regardless of whether actual physical movement has occurred.⁷⁵ On the other hand, to cover a range of cross-border situations as broad as that embraced in case-law, the same right to free movement has had to be molded.⁷⁶ As a result the Treaty-based right of EU citizens to move and reside in any Member State, and the related non-discrimination guarantees, have broken in judicial hands into a puzzle of rights and protections arguably more complex than that drawn by the *Saenz* court in respect of the US right to travel. In addition to the right to enter and leave any Member State, including the Member State of origin,⁷⁷ EU citizens’ freedom to move entails at least four components: the right to receive equal treatment with nationals in the host Member State; the right to export rights from the Member State of origin to a host Member State; the right not to be burdened in the Member State of origin for having exercised free movement nor to be discriminated there in respect of citizens who have not moved; and a broader right to be protected in one’s situation of cross-border citizenship.⁷⁸ The first component is well-known and extensively represented in the case law of the Court.⁷⁹ A sample of the second component can be found in cases on the exportability of social security benefits from the Member State of nationality to the one of residence.⁸⁰ The third component finds expression in the case-law on the retention of civic recognition benefits regardless of residence,⁸¹ and on the

⁷² Shaw, ‘Citizenship: Contrasting Dynamics’ (n 45), 655.

⁷³ On discrimination in the Member State of origin see case C-224/02 *Heikki Antero Pusa v Osuuspankkien Keskinäinen Vakuutusyhtiö* [2004] ECR I-05763, para 20 (‘national legislation which places certain of its nationals at a disadvantage simply because they have exercised their freedom to move and reside in another Member State amounts to inequality of treatment, contrary to the principles underpinning the status of citizens of the Union, that is the guarantee of the same treatment in law in the exercise of the citizen’s freedom to move’)

⁷⁴ Joined cases C-158/04 and C-159/04 *Alfa Vita Vassilopoulos AE (C-158/04) and Carrefour Marinopoulos AE (C-159/04) v Elliniko Dimosio and Nomarchiaki Aftodioikisi Ioanninon* [2006] I-08135, Opinion of AG Poiares Maduro, paras 40-41.

⁷⁵ See Dimitry Kochenov, ‘A Real European Citizenship: A New Jurisdiction Test: A Novel Chapter in the Development of the Union in Europe’ [2011] 18 Col J Eur L 55, 70.

⁷⁶ On the effect of citizenship on free movement, see Nic Shuibne, ‘The Resilience’ (n 5), 1612-13.

⁷⁷ See case C-33/07 *Ministerul Administrației și Internelor – Direcția Generală de Pașapoarte București v Gheorghe Jipa* [2008] ECR I-05157, para 18.

⁷⁸ For a more detailed articulation of these components, see Francesca Strumia, ‘Looking for Substance at the Boundaries: European Citizenship and Mutual Recognition of Belonging’ (2013) 32 Yb Eur L 432, 443-447.

⁷⁹ See for all case C-85/96 *María Martínez Sala v Freistaat Bayern* [1998] ECR I-02691.

⁸⁰ See e.g. case C-503/09 *Lucy Stewart v Secretary of State for Work and Pensions* [2011] ECR I-06497.

⁸¹ See *Nerkowska* (n 49); *Tas-Hagen* (n 58), para 58; see Dougan (n 7), 134-35 (search for a ‘real link’ accommodates these three strands of case-law).

right not to suffer fiscal or other burdens in the Member State of origin for having moved.⁸² The fourth component emerges, for instance, from case-law on the right of European citizens, who are connected by either nationality or residence to more than one Member State, to have their name spelled in a consistent way across Member States,⁸³ and in a way respectful of their identity.⁸⁴ The cross-border nature of European citizenship has also found protection, most recently, in the recognition of the right of a migrant EU citizen to continue the family life he has created or strengthened in a host Member State, when going back to the Member State of origin.⁸⁵

The Janus-faced character of EU citizens' free movement, forward-looking, to any disadvantages in a host State, but also backward-oriented, to address any penalties in the State of origin, reflects a concern for cross-border situations *per se*, unequalled in the US doctrine. EU interstate equality takes on a distinctive connotation, functional to the establishment of a transnational space of freedom,⁸⁶ which, according to AG Jacobs is

‘not based on the hypothesis of a single move from one Member State to another, to be followed by integration into the latter. The intention is rather to allow free, and possibly repeated or even continuous, movement within a single area of freedom, security and justice, in which both cultural diversity and freedom from discrimination are ensured.’⁸⁷

⁸² See e.g. *Pusa* (n 73), Opinion of AG Jacobs; case C-406/04 *Gérald De Cuyper v Office national de l'emploi* [2006] ECR I-06947. Also see Dimitry Kochenov, ‘Free Movement and Participation in the Parliamentary Elections in the Member State of Nationality: an Ignored Link?’ [2009] 16 Maastricht J Eur and Comp L 197, 223 (suggesting that denial of expatriate voting in national elections represents a burden on EU citizens who exercise free movement); Francis J Jacobs, ‘Citizenship of the European Union: a Legal Analysis’ (2007) 13 ELJ 591, 608-609.

⁸³ See e.g. *Garcia Avello* (n 46) (name spelling rights in the situation of a dual national); case C-353/06 *Stefan Grunkin and Dorothee Regina Paul* [2008] ECR I-07639 (name spelling rights in the situation of a national of a Member State born and resident in another Member State). Also see Anastasia Iliopoulou Penot, ‘The Transnational Character of Union Citizenship’ in Michael Dougan, Niamh Nic Shuibne, Eleanor Spaventa (eds), *Empowerment and Disempowerment of the European Citizen* (Hart 2012), 19-20 (*Grunkin Paul* and *Garcia Avello* express the need to contextualize identity claims in a ‘society of societies’ and on the background of a changing conception of Member States, which are no longer ‘bounded worlds’); Strumia ‘Looking for Substance’ (n 78), 14-15.

⁸⁴ While the CJEU has found in *Garcia Avello* and *Grunkin Paul* that a Member State’s refusal to recognize a surname as spelled according to the rules of another Member State would have resulted into a breach of the EU law rights of relevant European citizens, in other cases where national rules on name spelling reflected delicate constitutional and national identity concerns, the court has taken a more cautious approach. See e.g. case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshaupmann von Wien* [2010] ECR I-13693 (the Member State of nationality of a EU citizen may refuse on public policy grounds to recognize the citizen’s surname as spelled in the Member State where such EU citizen has been adopted, where the latter spelling includes a title of nobility which is prohibited under constitutional rules in the first Member State); also see case C-391/09 *Malgozata Runevic-Vardyn, Lukasz Pawel Wardyn* [2010] ECR I-03787 (the interest of a Lithuanian national European citizen belonging to a Polish minority and of a Polish national in their private and family life, protected through having their names spelled according to Polish rules rather than according to Lithuanian rules, must be balanced against a Member State’s interest in protecting elements of its national identity). The CJEU’s balancing approach to protection of EU citizenship rights in this domain stops short of the position of the UN Human Rights Committee, which has more readily protected the name rights of national minority members as components of their right to privacy. See *Raihan v Latvia*, Communication 1621/2007, Human Rights Committee Views adopted on 28 October 2010.

⁸⁵ Case C-456/12 *O. v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B*, 12 March 2014 [not yet published].

⁸⁶ TEU, art. 3 (2).

⁸⁷ *Garcia Avello* (n 46), Opinion of AG Jacobs, para 72.

II.C EU Citizens' Right to Belong Across Borders

This novel perspective on interstate equality offers an angle to reconsider state autonomy constraints and the nature of citizens' individual rights in the EU context. This time, it is a note that at first sight would seem strident with the US which, in light of the different connotation of EU interstate equality, begins to strike some consonant cords.

The US Supreme Court in *Saenz v. Roe* points to a peculiar aspect of US states' autonomy (or lack thereof) and of US citizens' rights:

‘citizens of the United States, whether rich or poor, have the right to choose to be citizens of the State wherein they reside. The states however do not have any rights to select their citizens’.⁸⁸

Formal rules, at first sight, point to a different scenario, in this respect, on the EU side. Here it is rather the Member States, on paper, which select national citizens through their own nationality laws, while EU citizens may choose to move and reside, but cannot properly choose to become national citizens in a host Member State, if not by complying with relevant naturalization requirements.⁸⁹

The reality of supranational citizenship, and of its demands in terms of interstate equality, has gradually tempered the bite of these formal rules however, so that a restated version of the Supreme Court words could resonate today in the EU. ‘Member States are losing their autonomy in selecting national citizens, while EU citizens can choose to belong to an interstate community that encompasses both their Member State of origin and that of residence’.⁹⁰

With regard to the Member States, it has already been suggested above that their autonomy in matters of nationality is fading.⁹¹ Further, the reach of EU interstate equality results into a double constraint on their autonomy: both the requirement that they treat newly arriving EU citizens on an equal basis with nationals and the requirement that they do not penalize leaving citizens reduce their room to play with residence rules, and ultimately constrain their regulatory freedom.

As to the citizens' right to choose, while the derivative character of European citizenship precludes an outright choice of nationality in a host Member State, European citizenship brings along the right to stretch one's own dimension of belonging, by claiming individual rights against Member States not only as a national, but also as a resident, as a visitor, as a returnee or as a long-distance member. The core of European citizens' individual rights, that genuine substance that cannot be interfered with,⁹² may be as yet undefined. One thing is clear, though: European citizenship has shaped an individual right to belong across Member States' borders, and simultaneously in the Member State of nationality, in that of residence, and possibly in other ones of transit or visit. This

⁸⁸ *Saenz* (n 26), para 510.

⁸⁹ But see Kochenov, ‘Rounding Up the Circle’ (n 6) (Member States control on their nationalities has become illusory); also see Francesca Strumia, ‘European Citizenship: Mobile Nationals, Immobile Aliens and Random Europeans’ in Greve, Zoller (n 9).

⁹⁰ See Strumia, *Supranational Citizenship* (n 28), 268-273.

⁹¹ Text to n 63.

⁹² *Ruiz Zambrano* (n 14).

implies that for most individual rights citizens have in European Member States, European citizenship provides a portable version, protected across borders.

III. EU Horizontal Citizenship

The picture that one takes home from this comparative journey through the European version of federal citizenship, its content in terms of individual rights, its demands in terms of interstate equality, and the constraints it faces from Member States' autonomies, is one of a plump horizontal citizenship.

US horizontal citizenship has become, after the adoption of the XIV amendment, a mandate of vertical national citizenship. The XIV amendment has shifted the source of belonging in the United States at the federal level, thereby also prompting a judicial mark of disapproval on state practices that disadvantaged newcomers in comparison to long term state citizens.⁹³ The Supreme Court has linked the horizontal protection of rights of the newly arrived in a state to their federal political capacity, 'that newly arrived citizens "have two political capacities, one state and one federal"' adds special force to their claim that they have the same rights as others who share their citizenship'.⁹⁴

While US horizontal citizenship thus evolves in a complementary relation to vertical national citizenship, EU horizontal citizenship remains rather lonely in the constellation of supranational belonging. No palpable vertical citizenship has evolved to flank it.⁹⁵ From one perspective, this prevalence of EU citizenship's horizontal rights may point to the EU democratic deficit,⁹⁶ or to excess of judicial zeal.⁹⁷

From a different view, EU citizens' horizontal rights across the Member States, those portable rights that substantiate interstate equality Europe-style, subvert the reach of nationality and thus the prospects of belonging in the EU.⁹⁸ As a result of EU citizenship, nationals of an EU Member State continue to belong to their Member State of nationality even when, in their capacity of European citizens, they begin to partake of belonging in a different Member State of transit or permanent residence through the guarantee of non-discrimination. While travel to take up

⁹³ See Peter Spiro, 'The Citizenship Dilemma' (1998-99) 51 *Stan L Rev* 597, 618-19; but see Strumia, 'Citizenship and Free Movement' (n 9) (US states are allowed to use residence distinctions in a number of instances). To put this in further historical perspective, see James Kettner, 'The Development of American Citizenship in the Revolutionary Era: the Idea of Volitional Allegiance', (1974) 18 *Am J Legal Hist* 208, 242 (on the early irrelevance of distinctions between American citizenship and state citizenship).

⁹⁴ *Saenz* (n 26), para 504, quoting *US Term Limits v Thornton* 514 US 779 (1995).

⁹⁵ EU vertical citizenship is limited to voting rights in the European Parliament and access rights to European institutions. European citizens' initiatives (see art. 11(4) TEU and art. 24(1) TFEU) are promising in this sense, however with only a handful open initiatives registered with the Commission, they remain at present a marginal resource.

⁹⁶ For a restatement of the EU democratic deficit, see Weiler (n 6), 100-101.

⁹⁷ For a critical view on the Court's recent citizenship case-law see Elise Muir, Mark Dawson, Bruno de Witte, 'Introduction: the European Court of Justice as a political actor' in *Judicial Activism at the European Court of Justice* (Edward Elgar 2013), 3; Daniel Thym, 'Towards Real Citizenship? The Judicial Construction of Union Citizenship and its Limits' in Adams, De Waele, Meeusen, Straetmans (n 7), 172-173.

⁹⁸ See Nicolaïdis, 'The Idea of European Democracy' (n 48), 268 (on an ideal of 'horizontality' that deserves normative status).

residence in a new state sanctions, in the US, the cessation of former state citizenship, the rights of European citizenship stretch national citizenships across national borders.⁹⁹ Like the clocks of Salvador Dalí, national citizenships melt and blend in a supranational status of enduring and mutual belonging in several Member States.¹⁰⁰ This extension of national belonging opens up an enlarged space of membership in Europe.¹⁰¹ Even before getting to the social, political, identitarian prospects of European citizenship, it is this horizontal reaction that it triggers among European nationalities that speaks to the nature of supranational citizenship and of the bonds it entails.

Supranational citizenship preserves the belongingness that is inherent in nationhood,¹⁰² only it brings some *levitas* to it. If European horizontal citizenship thus does lighten national citizenship,¹⁰³ this does not mean that it is emptying it of weight. Lightness, in a world in which special fibers and virtual realities have come to compete with hard matter, is not synonymous with emptiness. European horizontal citizenship is rather changing the texture of national citizenship into a lighter-fiber version that can be stretched across borders and into a broader European space.

This horizontal extension of national citizenships may never yield a real vertical supranational citizenship. However, through its imperceptible, but continuous, constitutional entrenchment of a dimension of belonging across the Member States, EU citizenship is producing a shift in the EU comparable to some extent to that produced in the US by the XIV amendment.¹⁰⁴

Other than for US citizenship with the XIV amendment, the shift does not happen at once in the EU. The path leading to it has been unravelling through a number of subsequent evolutions in the doctrine of European citizenship, and in its relation to free movement and to cross-border situations. European citizenship had initially an existential link to free movement: the CJEU resorted to European citizenship to fill gaps in the protection of economically active intra-Community migrants,¹⁰⁵ and as a tool to stretch the scope of the freedom to move, and bring under its umbrella the non-economically active.¹⁰⁶ This initial connection to free movement blew life into the doctrine of European citizenship. Free movement was, in a way, the trailer that towed incipient European citizenship from the harbor of the Treaties into the open waters of its judicial

⁹⁹ One implication is that citizens' free movement cannot equal expatriation. Horizontal EU citizenship requires an effort to distinguish rights based on residence, which may be legitimately withdrawn upon the exercise of free movement, from rights pertaining to a EU citizen's supranational belonging which are not affected by movement. See in partial contrast Davies (n 63), 56 and 53.

¹⁰⁰ On supranational citizenship as mutual recognition of belonging, see Strumia, *Supranational Citizenship* (n 28), 278-316; Strumia 'Looking for Substance' (n 78). Also see Kalypso Nicolaïdis, Gregory Shaffer, 'Transnational Mutual Recognition Regimes: Governance without Global Government' (2005) 68 *Law and Contemporary Problems* 267, 272 (referring to a new social contract whereby EU citizens can rely on the passport of home policies and regulations to choose among different national polities).

¹⁰¹ See Gianluigi Palombella, 'Whose Europe? After the Constitution: a Goal-Based Citizenship' [2005] 3 *Intl J Const L* 357, 371.

¹⁰² Joseph H Weiler, 'Bread and Circus: The State of European Union' [1998] 4 *Colum J Eur L* 223, 238.

¹⁰³ See Christian Joppke, 'The Inevitable Lightening of Citizenship' [2010] 51 *European Journal of Sociology* 9, 12 (suggesting that citizenship in the West is lightening as, among others, its "identity is thin and procedural, incapable of sharply setting apart one nation-state society from other such societies").

¹⁰⁴ See Davies (n 63), 55 (the future for Europe may be a model of fluid communities that looks rather American).

¹⁰⁵ See e.g. *Baumbast* (n 45); Sala (n 79).

¹⁰⁶ See e.g. *Trojani* (n 45); also see Lenaerts, (n 43), 17 (EU citizenship as a 'fifth freedom' for the non-economically active).

life. In the course of such judicial life, however, the link to free movement has gradually thinned. To attract a European citizen's situation within the sphere of EU law, the court has taken to look for a cross-border situation of some sort, rather than for the concrete exercise of physical movement.¹⁰⁷ A rather loose application of this cross-border test has resulted into the expansion of EU law's scope both *ratione materiae* and *personae*.¹⁰⁸ It has also had two further side effects. First, it has yielded the distinctive European issue of reverse discrimination of purely internal situations.¹⁰⁹ And second it has reduced 'static' European citizenship to a misleading category, or an unfortunate label, that attaches not to settled citizens as opposed to migrants, but to the fuzzier class of those who cannot claim an albeit tenuous connection to a reality beyond borders, whether through a relative, a marriage, an occasional trip.¹¹⁰

Resulting uncertainties and incoherence surrounding European citizenship set the stage for the over-ruling of the cross-border requirement with *Rottmann* and *Ruiz Zambrano*.¹¹¹ Both the situation of Mr. Rottmann, a naturalized German about to lose his German, European (and any) citizenship for fraud,¹¹² and that of Mr. Ruiz Zambrano, a Colombian father of two Belgian-born European citizen children trying to regularize his residence status in Belgium,¹¹³ were arguably purely internal. However, the CJEU found that Mr. Rottmann's situation fell 'by its nature and consequences within the scope of EU law';¹¹⁴ while that of Mr. Ruiz Zambrano revolved around the protection of the genuine enjoyment of the substance of his children's rights as European citizens, guaranteed by article 20 TFEU.¹¹⁵

¹⁰⁷ See *Zambrano* (n 14), Opinion of AG Sharpston, para 75-77 ('there are [...] citizenship cases in which the element of true movement is either barely discernable or frankly non-existent'). No real movement had occurred for instance in *Garcia Avello* (n 46); *Grunkin-Paul* (n 83); case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] ECR I-09925; also see Kochenov, 'A Real European Citizenship' (n 79), 69-72.

¹⁰⁸ See Dimitry Kochenov, 'The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon?' (2013) 69 ICLQ 97, 119-121; Eleanor Spaventa, 'Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects' (2008) 45 CML Rev 13; on the increasing effects of EU citizenship for third country nationals, see Strumia 'Looking for Substance' (n 78); Thym (n 97), 164-165. On the problems of the cross-border test see Kochenov, 'A Real European Citizenship' (n 79), 70-71 ('borders actually ceased to play any logical role in framing what is to be regarded as cross-border').

¹⁰⁹ See case C-64/96 and C-65/96 *Land Nordrhein-Westfalen v Kari Uecker and Vera Jacquet v Land Nordrhein-Westfalen* [1997] ECR I-03171, para 23; also see Lenaerts, (n 43), 8-12. In support of a new approach to reverse discrimination, not relying on a stretch of the cross-border test, see *Zambrano* (n 14), Opinion of AG Sharpston; Niamh Nic Shuibne, 'Free Movement of Persons and the Wholly Internal Rule: Time to Move On?' [2002] 39 CML Rev 731; Alina Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: an Incongruity in a Citizens' Europe' 2008, 35 Legal Issues of Economic Integration 43.

¹¹⁰ See Lenaerts, (n 43) (originally static persons are those excluded from EU law protection as they are not engaging with intra-Community trade).

¹¹¹ But see Kochenov, 'A Real European Citizenship' (n 79), 94-95 (on the likely coexistence of cross-border test and new test at least for an initial period).

¹¹² *Rottmann* (n 62), para 22-32.

¹¹³ *Zambrano* (n 14), para 14-31.

¹¹⁴ *Rottmann* (n 62), para 42.

¹¹⁵ *Zambrano* (n 14), para 40-44.

The revolutionary potential of these cases for the sorts of EU citizenship has been made clear in academic comments.¹¹⁶ Not only have they opened the door to EU protection of a core of citizenship rights regardless of any cross-border link. By posing EU citizenship as an autonomous jurisdiction criterion to bring a situation within the scope of EU law, they also point at a solution to the problem of reverse discrimination and open the door to a re-evaluation of the dimension of static European citizenship.¹¹⁷

Rottmann and *Ruiz Zambrano* also contribute to set in stone the principle that EU citizens belong to Europe, whether or not they choose to engage with it.¹¹⁸ The cross-border principle that had long oriented European citizenship doctrine undergoes a twist: it is set aside, or at least in the backstage, as a jurisdiction criterion; however it potentially becomes an autonomous belonging rationale that can help clarify the substance of European citizenship. The horizontal right to enjoy a lightened and stretched version of national belonging across several Member States is at the core of European citizenship. This right signals the very way citizens belong supra-nationally in Europe, regardless of their concrete cross-border experiences, and of their nationality. Of course, EU citizenship keeps formally depending on nationality of a Member State. However the room case-law has made to articulate EU citizenship's core may also fit a sound and much needed reflection on the rationale for belonging in Europe, across Member States, as EU citizens.¹¹⁹ Any such rationale would entail, to a certain extent, a vertical projection of horizontal EU citizenship,¹²⁰ thereby sealing the shift in membership dimensions that European citizenship, with its horizontal impetus, began long ago.

Pending such reflection, the evolution of this one-of-a-kind EU horizontal citizenship also invites to revisit, and possibly reframe, two fundamental questions that have threatened EU citizenship's federal promise ever since its inception: the question of its post-national nature, and the one of its political potential. The way in which federalism concretely splits citizenship in the EU ultimately depends on the answer to these questions.

III.B Post-National Citizenship and Political Citizenship in the EU: a Horizontal Perspective

The notion of citizenship-beyond-nationality revolves around the essence of communities bonding around levels of citizenship nested below or hiking above the national one. Are these trans-national communities coalescing around a web of opportunities for cross-border interaction?¹²¹ Or

¹¹⁶ See Lenaerts, (n 43), 12 (post-*Rottmann* the postulate that EU citizenship is destined to be the fundamental status for EU nationals becomes a living truth'); Thym (n 97), 166-167; Kochenov, 'A Real European Citizenship' (n 79), 59.

¹¹⁷ See Kochenov, 'A Real European Citizenship' (n 79), 91-92 (in the new approach what matters is the severity of interference with the legal situation of European citizens).

¹¹⁸ See Dimitry Kochenov, 'The Citizenship Paradigm' (2012-13) 15 *Camb Yb Eur L Studies* 196, 222-225 (proposing EU citizenship as a tool of integration independent of market logics).

¹¹⁹ See Kochenov, 'The Citizenship Paradigm', 214 ('the approach to EU citizenship in the context of the ongoing construction of European unity should necessarily be aspirational, not merely descriptive').

¹²⁰ See Strumia 'Looking for Substance' (n 78) (on extending a rationale of mutual recognition of belonging based on European citizenship to third country nationals).

¹²¹ On the value of transnational interactions for grounding belonging see Strumia, *Supranational Citizenship* (n 28), 219-245.

post-national ones formed around ideas of de-territorialized, cosmopolitan membership?¹²² As federalism layers citizenship, it naturally triggers questions along these lines. In the EU case, questions of citizenship beyond nationality express existential concerns for the resilience of a sense of affiliation, and the feasibility of solidarity and redistribution beyond a national community.¹²³

European citizenship has been hailed as the first concrete experiment of a real post-national citizenship.¹²⁴ Yet, European citizenship, re-interpreted in this chapter as the source of a right to belong simultaneously in multiple Member States, looks at that account with perplexity. This is not a citizenship that replaces the nationality bond with a de-territorialized form of membership. European citizenship's horizontal, trans-national, commitment rather stretches that bond, building a web of malleable European nationalities, whose belonging components become detachable and interchangeable. As a result, the nationality bond changes in texture and thickness, but its value is guarded.¹²⁵ While the early history of US citizenship entails a process of re-nationalization of belonging in the colonies in discontinuity with a rejected form of British subjecthood,¹²⁶ European citizenship is about extrapolating belonging from the cage of a single Member State, and opening it to a broader trans-national dimension. European citizenship thus reconfigures national citizenship rather than replacing it.¹²⁷

The question becomes thus not whether citizenship can exist apart of nationality, but rather what kind of citizenship can exist alongside multiple, intertwined national citizenships. Can affiliations shift in such a scenario, and attach, rather than to each national citizenship, to the supranational one that blends them all? And to what extent can mutuality of national belonging justify and sustain the opening of national schemes of solidarity to supranational interaction?

It seems that comity and community, in the context of a horizontal extension of national citizenship, cannot but rely on the bonds of trust that trans-national belonging engenders both among Member States, and among their nationals.¹²⁸ Nationality may keep being the core of emotional affiliations, common memories, shared languages. Yet belonging in Europe expands in a broader field of exchange and recognition that cuts across nationalities. Member States are compelled to trust other Member States' determinations as to who belongs and who does not, and to act on those determinations in granting rights to residents and to visiting EU citizens on an equal treatment basis. In addition, Member States are required to respect a core of individual rights that

¹²² On the notion of post-national membership see Thomas Alexander Aleinikoff, 'Between National and Post-National Membership in the United States' (1999) 4 Michigan J Race and L 241, 242.

¹²³ On the link between community membership and solidarity, see Davies (n 63), 48. Also see Nic Shuibne, 'The Resilience' (n 5), 1600 (the possibility of citizenship in a non-State polity as a 'perennial question' in the EU)

¹²⁴ See Yasemin Nuhoglu Soysal, *Limits of Citizenship: Migrants and Post-National Membership in Europe* (Univ Chicago Press 1994).

¹²⁵ See *Rottmann* (n 62), Opinion of AG Poiares Maduro, 23 (the 'miracle of European citizenship' is in that it both strengthens the ties with, and emancipates us from our states); also see Dora Kostakopoulou, 'European Citizenship: Writing the Future' (2007) 13 ELJ 623, 633.

¹²⁶ Kettner (n 93), 225 and 241-42.

¹²⁷ In this sense, while residence has grown in importance in Europe, nationality retains its own role. See Davies (n 63), 56 (arguing that residence is the new nationality).

¹²⁸ For reflection on how the principle of mutual recognition relates to trust, confidence building and comity, see Nicolaïdis, Shaffer, 'Transnational Mutual Recognition Regimes' (n 100), 298-99 and 303. Also see Kalypso Nicolaïdis, 'Trusting the Poles? Constructing Europe through Mutual Recognition' (2007) 14 J Eur Pub Pol 682, 683.

European citizenship entails for all those who belong as citizens in the EU. Member States' nationals on their part have to trust nationals of other Member States with whom they share rights, resources and territories as part of their same in-group.¹²⁹ Nationality and residence are no longer the only mantels that vest them in shared rights. European citizenship adds a layer, bringing them to share, regardless of whether they are migrant or sedentary, in a core of rights that belong to all European citizens across their national communities.

Joseph Weiler has observed that Europe's fault has been turning these citizens who share rights into 'self-centered individuals' at the expense of community.¹³⁰ Yet, also from the sharing of rights community may follow. When one citizen enforces his rights, there is potentially a cascade effect on a class of similarly situated citizens.¹³¹ Further, sharing rights creates groups of interests, triggers discourse about those rights and fosters new affiliations.¹³² Eventually the concrete implementation of a system of trans-national citizenship's rights requires several levels of trust, among institutions, and among individuals, and such trust in the context of the mutual recognition of national belongings, is an embryo of community.¹³³

A further issue is whether European citizenship can also engender and maintain a direct connection between government and people, ensuring government's legitimacy while protecting the people's self-rule. The question, in other words, is whether the right to simultaneously belong to multiple national communities has a political soul.

Federalism requires 'a relationship between the people of the Nation and their National Government, with which the States may not interfere'.¹³⁴

'We will take for granted that a large part of what it means to be a citizen of a constitutional republic [...] is the capacity and opportunity to govern oneself-not in the trivial (and self-defeating) sense of license to do whatever one pleases, but in the deeper sense of power and authority to define the overarching ends to which one will be committed and to pursue those ends by any means consistent with regulations reasonably and democratically established.'¹³⁵

Issues of legitimacy and self-rule evoked by words spoken in respect of US citizenship fend at the heart of EU (federal) citizenship's vulnerability. Can this feebly enfranchised citizenship do

¹²⁹ For a hypothesis of how a European in-group may be formed through processes of socialization and acculturation, see Strumia, *Supranational Citizenship* (n 28), 219-247.

¹³⁰ Weiler (n 6), 103.

¹³¹ One can think of the number of preliminary references to the CJEU triggered by the *Ruiz Zambrano* holding. See e.g. case 434/09 *Shirley McCarthy v Secretary of State for the Home Department* [2011] ECR I-3375; case C-256/11 *Murat Dereci and Others v Bundesministerium für Inneres* [2011] ECR I-11315, *Alokpa* (n 57).

¹³² See Mia Caielli, 'Public Interest Litigation as a Form of Popular Legislative Initiative: Participatory Democracy and the Role of Judiciary in the Modern Constitutional State' (International Association of Constitutional Law IX World Congress, Oslo, June 2014) (on public interest litigation as a way of involvement in the democratic process).

¹³³ See Nicolaïdis, Shaffer, 'Transnational Mutual Recognition Regimes' (n 100), 321-322 (on tolerance as a defining feature of mutual recognition).

¹³⁴ *US Term Limits* (n 94) (J Kennedy concurring), 845.

¹³⁵ Laurence H Tribe, 'Saenz sans Prophecy: Does the Privileges or Immunities Revival Portend the Future-or Reveal the Structure of the Present?' (1999-2000) 113 Harv L Rev 110, 111-112.

something to foster popular endorsement and warrant the legitimacy of a Union second-guessed by its people at the trial of economic and financial crisis?¹³⁶

In the case of US citizenship, questions of legitimacy bring back to the post-Revolution era. A major issue at the time was identifying the colonial inhabitants' act of will that would signify their transition from British subjecthood to colonial, and later US, citizenship, thus legitimizing the newly established colonial governments.¹³⁷ The people's endorsement of government institutions in turn may be traced back to the double political capacity, federal and state, that represents an attribute of US citizenship.¹³⁸

The same issues pose unsolved puzzles in the EU, where EU citizens have hardly ever expressed their volition to belong to the Union and their political capacity remains mostly national with some supranational extensions.¹³⁹ The vision of EU citizenship as a horizontal citizenship, grounding the right to simultaneously belong in multiple national communities, may not hold the key to those puzzles, however it does suggest novel nuances for relevant questions.

Can a legitimating relationship between the EU and its people be grounded in the EU's commitment to open up the Member States to its citizens and their rights? And can representation in one of the intertwined national polities work as a proxy for representation in the other ones,¹⁴⁰ thereby grounding a supranational dimension of participation? The hints horizontal citizenship yields, in this respect, are twofold.

First, national *demos* are likely to stay the fundamental referent for government legitimacy in Europe.¹⁴¹ Only their perimeters become more nuanced and flexible, and with them the links of legitimacy. Second, European political horizontal citizenship centers on accountability rather than on deliberation.¹⁴² Through the opening of national political spaces to actual and potential political participants from outside, the structure of delegated power and the length of accountability chains get altered. The people of the Member States remain the ultimate principals, however they do delegate authority not only directly through their franchise, but also indirectly through their part

¹³⁶ See Fabian Amtenbrink, 'Europe in Times of Economic Crisis: Bringing Europe's Citizens Closer to One Another?' in Dougan et al. (n 83) (The crisis splits European citizens into two halves without compassion to one another, those who provide solidarity, and those who expect solidarity).

¹³⁷ Kettner (n 93), 234.

¹³⁸ See *US Term Limits* (n 94) (J Kennedy concurring).

¹³⁹ The list of referendum results rejecting EU Treaties is well known. See Clive Church, David Phinnemore, 'From the Constitutional Treaty to the Treaty of Lisbon' in Michelle Cini, Nieves Pérez-Sólorzano Borragán, *European Union Politics* (OUP 3rd edition 2010). On the political capacity of EU citizens, see Jo Shaw, *The Transformation of Citizenship in the European Union: Electoral Rights and the Restructuring of Political Space* (CUP 2007); Kochenov, 'Free Movement and Participation' (n 82).

¹⁴⁰ See Varat, 'State "Citizenship"' (n 11), 521 (the guarantee of equal treatment as a form of virtual representation in the state where one does not vote).

¹⁴¹ See Nicolaïdis, 'The Idea of European Democracy' (n 98), 254 and 274 (on European 'demoicracy' whose transformative power lies in the determination not to 'do away with nation-state based democracy'); also see Kochenov, 'Rounding Up the Circle' (n 6), 30-32.

¹⁴² See Nicolaïdis, Shaffer, 'Transnational Mutual Recognition Regimes' (n 100), 312-314; Nicolaïdis, 'The Idea of European Democracy' (n 98), 268.

belonging in other national communities throughout Europe.¹⁴³ National governments, and EU institutions by reflection, are accountable to enlarged constituencies that extend beyond the boundaries of national franchise. And each enfranchised national community potentially acts for its own sake and as proxy for a broader European constituency.¹⁴⁴ Horizontal citizenship, in other words, forces us to imagine a scenario of multiple related pools of participation and mechanisms of indirect endorsement, which make political citizenship more complex, but not necessarily less effective.

Conclusion

Federalism, or a version of it, did split citizenship in the EU. The result is a peculiar horizontal creature, which walks along a path comparable to US citizenship up to a point and then takes a turn of its own through its distinctive investment in interstate equality. As a consequence, and in contrast to US citizenship, this EU horizontal citizenship finds itself rather lonely. No equivalent to a XIV amendment is likely to bring a strong vertical citizenship to share its playground. So it is left to play by itself with ideas of individual rights, interstate equality, and state autonomy.

This does not make it a marginal or weak citizenship. On the contrary, its lonely game is transforming little by little the reach of European nationalities, and the overall dimension of belonging in the EU. Understanding the implications of this transformation and nurturing this horizontal creature of European federalism with some vision helps address European citizenship's existential challenges: questions of supranational affiliation, entitlement and participation.

¹⁴³ See Nicolaïdis, Shaffer, 'Transnational Mutual Recognition Regimes' (n 100), 304-306 (describing a system of trans-national governance where the problem of accountability to non-citizens and other indirect participants may be dealt with through forms of increased transparency).

¹⁴⁴ See Weiler, 'Bread and Circus' (n 102), 245 (the Treaties entail a social contract among nationals of the Member States whereby they accept that in various areas of public life decisions will be made with the authority and legitimacy of the outreaching non-organic demos, rather than the inreaching one).