

# Introduction: Future Challenges of European Citizenship—Facing a Wide-Open Pandora's Box

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## I Introduction

This special issue arose from a conference at the University of Fribourg in May 2006 on the future challenges of European Union citizenship (hereafter EU or Union citizenship).<sup>1</sup> Object of a burgeoning literature in the past decade,<sup>2</sup> the topic of Union

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<sup>2</sup> Among the major contributions in the period between 1992 and 2000, one may mention in particular J.H. Carens, 'Aliens and Citizens: The Case for Open Borders', in R. Beiner (ed.), *Theorizing Citizenship* (SUNY Press, 1995); C. Closa, 'The Concept of Citizenship in the Treaty on European Union', (1992) 29 *Common Market Law Review* 1137; G. Delanty, *Citizenship in a Global Age: Society, Culture, Politics* (Open University Press, 2000); M. Everson, 'The Legacy of the Market Citizen', in J. Shaw and G. More (eds), *New Legal Dynamics of European Union* (Clarendon, 1995); J. Habermas, 'Staatsbürgerschaft und nationale Identität', in J. Habermas, *Faktizität und Geltung* (Suhrkamp, 1992); J. Habermas, 'Der europäische Nationalstaat—Zu Vergangenheit und Zukunft von Souveränität und Staatsbürgerschaft', in J. Habermas, *Die Einbeziehung des Anderen* (Suhrkamp, 1996); H. U. Jessurun d'Oliveira, 'European Citizenship: Its Meaning, its Potential', in R. Dehousse (ed.), *Europe After Maastricht: An Ever Closer Union?* (Beck, 1994); D. Kostakopoulou, 'Towards a Theory of Constructive Citizenship in Europe', (1996) 4 *The Journal of Political Philosophy* 337; W. Kymlicka and W. Norman, 'Return of the Citizen: A Survey of Recent Work on Citizenship Theory', (1994) 104 *Ethics* 352; P. B. Lehning and A. Weale (eds), *Citizenship, Democracy and Justice in the New Europe* (Routledge, 1997); P. Magnette, *La Citoyenneté européenne: Droits, politiques, institutions* (Editions de l'Université de Bruxelles, 1999); U. K. Preuss, 'Problems of a Concept of European Citizenship', (1995) 1 *European Law Journal* 267; U. K. Preuss, 'Citizenship in the European Union: A Paradigm for Transnational Democracy?', in D. Archibugi, D. Held and M. Köhler (eds), *Re-imagining Political Community: Studies in Cosmopolitan Democracy* (Stanford University Press, 1998); J. Shaw, 'The Interpretation of European Union Citizenship', (1998) 61 *The Modern Law Review* 293; M. La Torre (ed.), *European Citizenship: An Institutional Challenge* (Kluwer, 1998); J. H. H. Weiler, 'Does Europe Need a Constitution? Reflections on Demos, Telos, and the German Maastricht Decision', (1995) 1 *European Law Journal* 219; J. H. H. Weiler, 'To Be a European Citizen: Eros and Civilization', in J. H. H. Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?', and Other Essays on European Integration* (Cambridge University Press,

citizenship has been sidelined in the past few years by the enlargement process and the constitutional debate in Europe.<sup>3</sup> This apparent academic neglect does not reflect the legal, social and political reality, however, given the crucial development of EU citizenship rights in the legislation and case-law since 2002 and the decisive impact of European enlargement and constitutional discourse on the understanding of identity and solidarity in Europe. These changes and the new questions they raise provided the impetus for the present collection of articles.

First introduced by the Maastricht Treaty, and subsequently revised by the Amsterdam Treaty, EU citizenship long remained an empty promise.<sup>4</sup> Even if it did not offer much in terms of new rights at first, EU citizenship has now become a key element of the rising European polity. Recently, indeed, and thanks primarily to the European Court of Justice's (ECJ) case-law and its codification in Directive 2004/38/EC on the rights of movement and residence of EU citizens and their family,<sup>5</sup> things have started to change. European citizenship is slowly becoming a direct source of rights outside the economic context, and some of these rights have even gradually been extended to third country nationals (TCNs) legally residing in the EU, thus leading to greater social and potentially political inclusion.

This evolution raises a number of questions, however, which are still to a large extent left open. Clearly, the ECJ's path-breaking case-law has confirmed that EU citizenship could hold its promises<sup>6</sup> and contains the 'normative surplus' scholars had previously announced it had.<sup>7</sup> Nevertheless, these recent developments have lacked a clear line and a coherent concept of what it is to be a European citizen. Moreover, by developing some aspects of EU citizenship and neglecting others,<sup>8</sup> the ECJ's incremental approach has made choices which are largely irreversible and is therefore reducing the initial potential load of what Follesdal once called the 'beast of burden' of EU citizenship.<sup>9</sup> Finally, the eminently judicial development of EU citizenship raises difficult questions

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1999); J. H. H. Weiler, U. Haltern and F. Mayer, 'European Democracy and Its Critics—Five Uneasy Pieces', *Jean Monnet Working Papers* 1/95 (1995); A. Wiener, 'Making Sense of the New Geography of Citizenship: Fragmented Citizenship in the European Union', (1997) 26 *Theory and Society* 529.

<sup>3</sup> Of course, there are a few important exceptions since 2000, for instance R. Bellamy and A. Warleigh (eds), *Citizenship and Governance in the European Union* (Continuum, 2001); R. Bellamy, D. Castiglione and J. Shaw (eds), *Making European Citizens: Civic Inclusion in a Transnational Context* (Palgrave, 2006); S. Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press, 2004), pp. 229–255; R. W. Davis, 'Citizenship of the Union . . . Rights for All?', (2002) 27 *European Law Review* 121; A. Follesdal, 'Union Citizenship: Unpacking the Beast of Burden', (2001) 20 *Law and Philosophy* 313; U. Haltern, 'Das Janusgesicht der Unionsbürgerschaft', (2005) 11 *Swiss Political Science Review* 87; S. Kadelbach, 'Union Citizenship', *Jean Monnet Working Paper* 9/03 (2003); D. Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change', (2005) 68 *Modern Law Review* 233; J. D. Mather, 'The Court of Justice and the Union Citizen', (2005) 11 *European Law Journal* 722; N. Reich, 'Union Citizenship—Metaphor or Source of Rights?', (2001) 7 *European Law Journal* 4.

<sup>4</sup> See, e.g., Jessurun d'Oliveira, *op. cit.* note 2 *supra*; H. U. Jessurun d'Oliveira, 'Union Citizenship: Pie in the Sky?', in A. Rosas and E. Antola (eds), *A Citizens' Europe: In Search of a New Order* (Sage, 1995).

<sup>5</sup> Directive 2004/38/EC 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.

<sup>6</sup> See Kostakopoulou in this issue, p. 623.

<sup>7</sup> See, e.g., Follesdal, *op. cit.* note 3 *supra*; Kostakopoulou, *op. cit.* note 3 *supra*; S. Weatherill, *Cases & Materials on EU Law* (Oxford University Press, 7th edn, 2006), pp. 477–499; Weiler, 'To be a European Citizen', *op. cit.* note 2 *supra*.

<sup>8</sup> For instance, Case C-60/00, *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279, whose reasoning remains contested, could have been decided without reference to EU citizenship.

<sup>9</sup> Follesdal, *op. cit.* note 3 *supra*.

of legitimacy, especially with respect to Member States' competences, and of practical appropriation and conscientisation by EU citizens themselves.<sup>10</sup> As a result, the questions EU citizens are now facing are more pressing and deeper than they have ever been. All this sharpens the initial risk inherent to Union citizenship: that it might after all be seen as a misnomer, an empty shell whose denomination gave rise to expectations it could not hold.

Given the complexity of the questions raised by the development of EU citizenship and their intimate connection with issues of individual and collective identity, the main gist of this collection of articles is to combine approaches from different disciplines such as law, politics and philosophy. Besides producing a more complete answer to a difficult question, the interdisciplinary dimension of the present issue of the journal may also contribute to bridge discourses which very often talk at cross-purposes. The five contributions that follow fall into two distinct albeit complementary groups. The first group of articles by Jacobs, Epiney and Kostakopoulou discuss recent legal developments and identify future trends in EU citizenship's legal regime. While both Jacobs and Epiney focus on jurisprudential developments—Jacobs provides in this respect an extremely useful summary of the main cases in an annex—Kostakopoulou focuses on the conceptual and theoretical challenges raised by the legal evolution and construction of EU citizenship. The second group of studies by Magnette and Cheneval address the political and philosophical implications of the development of a European citizenship and identity. What all contributions have in common is their overall more cautious and sceptical view about how EU citizenship should be conceived and how, despite uncontested progress, there are important pitfalls to avoid in the future, be they related to the future application of Article 12 EC and the four freedoms, or to the increasing difficulties in promoting the inclusion of the European political franchise or greater mutual recognition and solidarity among EU citizens.

The purpose of the present introduction is to set the stage for the different contributions in the issue. It will restate basic current features of EU citizenship (section II), unpack the difficulties that lie at its core and which have also been at the origin of its impressive jurisprudential and legislative development over the past few years (section III) and, finally, identify the future challenges that await EU citizenship, before offering a normative account of 'European citizenship' *lato sensu* (section IV).

## II EU Citizenship in a Nutshell

The concept and regime of EU citizenship was introduced by the Treaty on European Union in 1992. It was included in Part Two of the Treaty establishing the European Community (EC) in Articles 8–8e. Shortly thereafter, EU citizenship was slightly revised by the Amsterdam Treaty and Articles 8–8e EC were renumbered as Articles 17–21. One of the main innovations of the Amsterdam Treaty was the emphasis in Article 17(2) that EU citizenship complements and does not replace national citizenship.

In 2000, the European Charter of Fundamental Rights reiterated the Treaty's EU citizenship rights by adding a few new rights, splitting some rights in two and extending the scope *ratione personae* of most rights except political rights, in order to encompass TCNs legally residing in the EU (Articles 41–45 of the Charter).<sup>11</sup> Most recently, EU

<sup>10</sup> See P. Magnette, *Au nom des peuples: Le malentendu constitutionnel européen* (Cerf, 2006), Introduction.

<sup>11</sup> See Davis, *op. cit.* note 3 *supra*.

citizenship rights were recapitulated in Article I-10 of the Treaty establishing a Constitution for Europe (TCE), and the section of the Charter dealing with citizenship rights was made binding in the Constitutional Treaty. Parallel to these developments in primary law, EU citizenship rights have been further concretised in secondary law.<sup>12</sup> They have, however, also been expanded in an unexpected fashion by the ECJ's case-law in recent years.<sup>13</sup> Some of these jurisprudential results have actually been codified in Directive 2004/38/EC, whose transposition period has just ended.

According to Article 17(1) EC, 'every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship'. So, two points should be emphasised here. First, EU citizenship *depends* on Member State nationality. As such, only a person holding the nationality of a European Member State can become an EU citizen. This means that there are currently 27 ways of becoming an EU citizen. Second, and it is a consequence of the derivative nature of EU citizenship, it *does not replace* national citizenship. EU citizenship should not therefore be confused with a state-like pan-European form of citizenship nor be understood as giving rise to a European nationality. It is conceptually decoupled from nationality and as a matter of fact from any form of European nationalism.<sup>14</sup>

Article 17(2) EC identifies EU citizenship with a legal relationship between the Union and Member State nationals to which are attached specific rights and duties. These correspond to the rights and duties which are already guaranteed by the Treaty and secondary legislation. As such, Articles 18–21 EC can be equated to a standstill clause that prevents the erosion of the *acquis communautaire*. It also follows, however, that EU citizenship is evolutionary and can expand to new rights together with the expansion of the scope of the EC Treaty. The list of rights attached to EU citizenship in Articles 18–21 EC mostly recapitulates pre-existing rights and is not exhaustive. It is moreover quite piecemeal; it does not match lists of national citizenship rights and is particularly thin in terms of political rights. The citizenship rights expressly protected are the right of free movement and residence within the territory of any Member State; the right to vote and stand as a candidate at municipal elections and in elections to the European Parliament in the Member State in which the citizen resides; the right to diplomatic and consular protection by any Member State's authorities in third countries; and the right to petition to the European Parliament and to apply to the European Ombudsman. Additional rights are scattered over the Treaty, such as, for instance, the right of access to documents guaranteed by Article 255 EC.

According to Article 18 EC, EU citizenship rights are guaranteed within the limits set by the treaties and secondary law. For instance, the right of free movement and residence is mostly an economic migrant's right guaranteed within the limits of Articles 39, 43 and 49 EC.

### III Three Productive Tensions

For a long time, the predominant thrust of EU citizenship provisions had been to exert a potential rather than an immediate impact. The intense jurisprudential activities of

<sup>12</sup> Directive 90/365/EEC, Directive 90/366/EEC, and Directive 90/364/EEC. Please note that all these directives have now been abrogated and replaced by Directive 2004/38/EC.

<sup>13</sup> See Jacobs in this issue, p. 591.

<sup>14</sup> See S. Besson and A. Utzinger, 'European Citizenship Across Borders', in A. Epiney, M. Haag and A. Heinemann (eds), *Challenging Boundaries: Festschrift für Roland Bieber* (Schulthess, 2007).

recent years have, however, belied many of those doubts. Very early on, there was widespread concern over three main issues: the *rights-based* nature of EU citizenship, the *material scope of the rights* protected by EU citizenship and, finally, the *personal scope of the rights* protected by EU citizenship. Interestingly, these three areas of concern have also become with time a drive in the development of EU citizenship. The ECJ has made a virtue of the necessity to address them constructively in its case-law since 2002. This productive tension is well captured by Kostakopoulou who argues in her constructivist account that the importance of EU citizenship lies not so much in what it 'is', but in what it 'should or might be'.<sup>15</sup>

### A The Rights-Based Nature of EU Citizenship

Since its inception, EU citizenship has been criticised for being passive and rights-oriented as opposed to active and duties-oriented. Article 17(2) EC mentions rights and duties attached to EU citizenship, but the Treaty only entails rights.

According to the critique, duties are necessary to give rise to real political membership and allegiance. Some authors mention among other things duties to pay taxes, but also military service duties.<sup>16</sup> Others argue that we need to see EU citizenship more as an active status and as a basis for democratic participation to fight for our rights, and thus as the status and process in which citizens can derive rights rather than the result of that process, i.e. the rights themselves.<sup>17</sup> A connected albeit distinct opposition is that between legal or formal citizenship, based on rights, on the one hand, and political or substantive citizenship, based on a status from which these rights derive, on the other. We will come back to the political dimension of EU citizenship later on in this introduction.

Besides the ambiguity of the close connection between EU citizenship and rights *tout court*, the relationship between citizenship rights and other EC law rights such as fundamental freedoms and EU fundamental rights also reveals certain difficulties. Even though they overlap to a certain extent, these three categories of rights in EC law abide by different rules and are not treated the same in EC legal reasoning. These difficulties are currently vanishing, however, due to the growing convergence between these three categories of rights in EC law.

Some fundamental freedoms, at least when they belong to individuals, have become EU citizenship rights as with the right to free movement and residence of Article 18 EC, and this intimate connection has since then been deepened by the ECJ's case-law.

<sup>15</sup> See Kostakopoulou in this issue, p. 623 and Kostakopoulou, *op. cit.* note 3 *supra*.

<sup>16</sup> See, e.g., A. J. Menéndez, 'Taxing Europe: Two Cases for a European Power to Tax', (2004) 10 *Columbia Journal of European Law* 297; M.-J. Garot, 'European Citizenship and European Integration', *Thinking Outside the Box Editorial Series*, Paper 9/2003 (2003); Reich, *op. cit.* note 3 *supra*, at 20–23; J. Shaw, 'Citizenship of the Union: Towards Post-national Membership', *Jean Monnet Working Paper* 6/97 (1997); Weiler, 'To be a European Citizen', *op. cit.* note 2 *supra*, pp. 354–356. In more general terms, full citizenship pertains not only to rights but also to duties, see, e.g., R. Rubio-Marín, *Immigration as a Democratic Challenge: Citizenship and Inclusion in Germany and the United States* (Cambridge University Press, 2000), p. 46.

<sup>17</sup> This line of argument borrows inspiration from Hannah Arendt's famous dictum 'the right to have rights' (H. Arendt, *The Origins of Totalitarianism* (Harcourt, Brace & Co, 1951), pp. 294 *et seq.*). See also C. Lefort, *Democracy and Political Theory* (Polity Press, 1998), p. 37. In connection with Union citizenship, see, e.g., R. Bellamy, 'The "Right to Have Rights": Citizenship Practice and the Political Constitution of the EU', in Bellamy and Warleigh, *op. cit.* note 3 *supra*, pp. 41–70; Benhabib, *op. cit.* note 3 *supra*, pp. 49–69; Kostakopoulou, *op. cit.* note 2 *supra*, at 339.



Moreover, citizenship rights together with other fundamental freedoms have, since 2000, become an essential part of EU fundamental rights, since they constitute one of the main categories of fundamental rights in the Charter. Various difficulties stem from this convergence. To start with, it places inherently exclusive citizenship rights among universal fundamental rights *per se*. This tension may be perceived by reference to the right-holders of the Charter's citizenship rights, who paradoxically are all physical persons legally residing in the EU and not only EU citizens, with the exception of political rights so far.<sup>18</sup> Of course, the tension is not new and is well known in European Member States. It is, however, less tenable in the EU, where national exclusive barriers have already been opened, thus allowing EU citizens to benefit from previously exclusive national rights in other Member States than theirs.<sup>19</sup> The development of EU citizenship rights *qua* fundamental rights should therefore lead to a greater material and personal inclusion of EU citizenship. Of course, the most legitimate means of realising that inclusion remains to be ascertained, as we will see below.<sup>20</sup>

At the same time, the development of EU citizenship rights as fundamental rights also reveals the increasing identification of fundamental freedoms with fundamental rights. This renders the potential competition and conflicts between fundamental freedoms and fundamental rights, that have been acknowledged in the ECJ's case-law,<sup>21</sup> more explicit. Fundamental rights are now at least placed on the same level as fundamental freedoms rather than below them, often reinforcing the latter,<sup>22</sup> but also sometimes justifying restrictions to the latter.<sup>23</sup> What this means is that citizenship rights may also be restricted by reference to other fundamental rights in case of conflict of rights. Thus, citizenship rights have benefited from being coupled with fundamental rights, and the non-discrimination principle in particular, in order to emancipate from market-citizenship rights. However, EU fundamental rights might also benefit from their connection to EU citizenship to emancipate from the economic context and the inherent limitations this places on EU fundamental rights.<sup>24</sup>

### *B The Material Scope of EU Citizenship Rights*

Another common critique raised from the beginning against EU citizenship pertains to the type of rights protected by EU citizenship. The mainly market-oriented dimension of EU citizenship has been a constant concern in European scholarship. In principle, indeed, citizenship amounts to membership of a political community. As we have just

<sup>18</sup> See Davis, *op. cit.* note 3 *supra*.

<sup>19</sup> See S. Besson, 'The European Union *qua* Agent of Global Justice', unpublished manuscript, on file with authors; K. Nicolaïdis and J. Lacroix, 'Order and Justice Beyond the Nation-State: Europe's Competing Paradigms', in R. Foot, J. L. Gaddis and A. Hurrell (eds), *Order and Justice in International Relations* (Oxford University Press, 2003), pp. 143–146; Benhabib, *op. cit.* note 3 *supra*, pp. 129–169.

<sup>20</sup> See, e.g., Davis, *op. cit.* note 3 *supra* on the difficulties raised by the inclusiveness of citizenship rights in the Charter.

<sup>21</sup> See Case C-112/00, *Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-5659; Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Stadt Bonn* [2004] ECR I-9609.

<sup>22</sup> See Case C-368/95, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689.

<sup>23</sup> See *Schmidberger*, note 21 *supra*.

<sup>24</sup> See S. Besson, 'The European Union and Human Rights: Towards a New Kind of Post-National Human Rights Institution', (2006) 6 *Human Rights Law Review* 323; P. Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question', (2002) 39 *Common Market Law Review* 945, at 969–973.

seen, however, most EU citizenship rights are rights attached to economic migrants and rights which can be limited on the same grounds as economic basic freedoms, thus excluding many non-economically active Member State nationals residing in the EU and turning them into second-class citizens.

In order to develop a meaningful political citizenship however, broader institutional reforms would have to be introduced. For the time being, therefore, hopes have been placed in the protection of social and welfare rights, and hence in the development of an EU *social citizenship*, which is the first step towards political citizenship.<sup>25</sup> This transition from economic to social citizenship has already taken place to a large extent. Over the past ten years, indeed, the ECJ, on the impulse of different General Advocates including Jacobs,<sup>26</sup> has developed the social elements of EU citizenship, thus making it a *source of rights of its own* for all those using their right to free movement in the EU.<sup>27</sup> As Jacobs explains in this issue, this evolution has taken place primarily through the combined reading of EU citizenship and anti-discrimination provisions, and in particular of Article 18 EC's freedom of movement and residence and Article 12 EC's prohibition of discrimination on grounds of nationality. Through this mutual connection, the case-law finally expanded EU citizenship by making it the fundamental status from which citizens may directly derive individual rights, while also providing at the same time a more universal scope for the protection against discrimination in EC law. Until recently, for Article 12 EC to apply, one needed to show that the issue at stake fell into the scope of application of the Treaty. This implied falling into both the scope *ratione materiae* and *ratione personae* of EC law. While the former covered any subject addressed by EC law, the latter required some involvement in an economic activity as a worker, independent or service provider.<sup>28</sup>

EU citizenship has managed, in other words, to extend the scope of Article 12 EC *ratione personae* and *ratione materiae* and at the same time to emancipate itself gradually from its market-oriented background. Nowadays, all EU citizens, (i) legally residing in another Member State than theirs and (ii) whose situation shows a (even minimal) transnational connection are entitled to the same rights as nationals of that state without discrimination, provided (iii) those national rights affect (even indirectly) their right to free movement and residence.

<sup>25</sup> On the different types of citizenship rights, see T. H. Marshall, *Citizenship and Social Class* (Pluto, 1992), p. 8. In the context of Union citizenship, see Shaw, *op. cit.* note 2 *supra*, at 299–302; Kostakopoulou in this issue, p. 623.

<sup>26</sup> See Advocate General Jacobs in Case C-168/91, *Konstantinidis v Stadt Altensteig Standesamt* [1993] ECR I-1191: 'In my opinion, a Community national who goes to another Member State as a worker or self-employed person under Articles 48, 52 or 59 of the Treaty is entitled not just to pursue his trade or profession and to enjoy the same living and working conditions as nationals of the host State; he is in addition entitled to assume that . . . 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 in order to oppose any violation of his fundamental rights'.

<sup>27</sup> See, e.g., Cases C-85/96, *Martinez Sala v Freistaat Bayern* [1998] ECR I-2691; C-184/99, *Grzelczyk v Centre Public d'Aide Sociale d'Ottignes-Louvain-la-Neuve* [2001] ECR I-6193; C-413/99, *Baumbast v Secretary of State for the Home Department* [2002] ECR I-7091; C-60/00, *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279. See also the decisions C-138/02, *Collins v Secretary of State for Work and Pensions* [2004] ECR I-2703; C-456/02, *Trojani v Centre publique d'aide sociale de Bruxelles* [2004] ECR I-7573; C-200/02, *Zhu and Chen v Secretary of State for the Home Department* [2004] ECR I-9925; C-209/03, *R (Dany Bidar) v London Borough of Ealing and Secretary of State for Education and Skills* [2005] ECR I-2119; C-403/03, *Schempp v Finanzamt München V* [2005] ECR I-6421.

<sup>28</sup> Contra Jacobs in this issue, who argues that Article 12 EC and the EC Treaty as a whole already offered, in an embryonic form, everything needed for the case-law to achieve what it has achieved to date.

Once EU citizenship has emancipated from a market-based membership into social citizenship, one may wonder whether and how it could be turned into a full-blown *political citizenship*.<sup>29</sup> This is a question Kostakopoulou, Magnette and Cheneval address in their contributions and to which we will turn later on.

### C The Personal Scope of EU Citizenship Rights

A third tension pertains to the right-bearers of EU citizenship. There has indeed been constant concern over the status of TCNs in the EU and the possibility of developing a residence-based as opposed to a nationality-based conception of EU citizenship that would make EU citizenship and hence European democracy more inclusive. TCNs residing legally in the EU are not generally vested with social and political rights in the EU, with the exception of a few European countries. The fact that non-national European citizens are granted national social rights as well as local political rights, however, makes it difficult to justify why other non-Europeans residing in a Member State could not benefit from the same rights; they are just as affected, maybe even more by the laws of the Member State in which they reside.

Things are gradually changing in this respect, however. TCNs' *social* rights are expanding, even though they are not followed yet by an extension of EU citizenship's *political* rights. These improvements do not, however, follow a coherent pattern that pays sufficient heed to the complex nature of EU citizenship. There are two solutions one may think of at this stage.

The least incisive solution might be to extend EU citizenship rights to TCNs residing in the EU without granting them full EU citizenship.<sup>30</sup> This is actually taking place with respect to *social* rights in recent EU case-law and legislation. Thus, the ECJ's recent case-law has granted quasi-citizenship rights to TCNs when they are family members of an EU citizen.<sup>31</sup> This extension of the personal scope of citizenship rights to TCNs may be grounded in Article 12 EC and the prohibition of discrimination on grounds of nationality.<sup>32</sup> Moreover, one may refer to the extension of the scope of application *ratione personae* of some EU citizenship rights guaranteed in the Charter, with the exception so far of political rights however (Articles 41–45 of the Charter). The same trend may also be noted in the recent harmonisation of residence rights in the EU (Directive 2003/109/EC).<sup>33</sup> Finally, this approach actually corresponds to a recent tendency emerging in more and more Member States which grants certain social and political rights to foreign residents without, however, granting them full citizenship.<sup>34</sup>

<sup>29</sup> Note that the connection between social and political rights is closer in the case of EU citizenship than national citizenship. This is due to the way in which the ECJ's case-law has derived most EU social rights from EU citizenship, whereas citizenship rights are traditionally political in national law.

<sup>30</sup> See, e.g., L. Dobson, 'Constituting which Good and whose Rights?', *The Federal Trust Online Paper* 16/03 (2003).

<sup>31</sup> See, e.g., cases *Carpenter*, *Baumbast* and *Zhu and Chen*, note 27 *supra*.

<sup>32</sup> See Eeckhout, *op. cit.* note 24 *supra*; Besson, *op. cit.* note 24 *supra*.

<sup>33</sup> Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, [2004] OJ L16/44.

<sup>34</sup> See, e.g., Benhabib, *op. cit.* note 3 *supra*, pp. 153–163; A. Connolly, S. Day and J. Shaw, 'The Contested Case of EU Electoral Rights', in Bellamy, Castiglione and Shaw, *op. cit.* note 3 *supra*; S. Day and J. Shaw, 'European Union Electoral Rights and the Political Participation of Migrants in Host Politics', (2002) 8 *International Journal of Population Geography* 183; J. Shaw, 'Alien Suffrage in the European Union', (2003) 12 *The Good Society* 29; J. Shaw, 'A Strong Europe is a Social Europe', *The Federal Trust Online Paper* 5/03 (2003).



The difficulty with this approach is that it risks diluting the idea of political membership and the exclusivity of rights that is in principle inherent to citizenship.<sup>35</sup> Moreover, it risks merging citizens' rights with universal human rights, on the one hand, and creates second-class political members, on the other. Finally, there is still a large amount of indeterminacy as to the exact criteria of this extension of citizenship rights to TCNs. One may mention minimal knowledge of the local language, five years of residence, a permanent job, etc. What all these elements have in common, however, is that they match traditional conditions for the acquisition of nationality in European Member States and hence go further than what is usually required of other Member States' nationals who benefit from EU citizenship rights in another Member State than theirs.

A more radical solution might be to redefine EU citizenship as based on residence and not on nationality. This may be done *top-down* by changing the conditions of acquisition of EU citizenship.<sup>36</sup> This approach would, however, clearly be rejected by Member States who fear for their national prerogatives.<sup>37</sup> It would in fact undermine the whole project of a post-national citizenship that does not aim at replicating a unitary national citizenship at the EU level, but on the contrary is based on the transnational integration of national citizenships.<sup>38</sup> An alternative solution might therefore be to leave the conditions of acquisition of EU citizenship untouched, but to encourage Member States to facilitate the naturalisation of TCNs residing on their territory.<sup>39</sup> This would present the advantage of preserving the coherence of EU citizenship and the inherently exclusive nature of citizenship *per se*, while also extending the EU franchise on grounds of residence from grass roots and *bottom-up*, rather than from the EU down to the national level. This approach actually corresponds to a recent tendency emerging in more and more Member States which grants national citizenship on grounds of long-term residence and integration in the country, and no longer only on grounds of nationality whether it is acquired by heredity (*jus sanguinis*) or place of birth (*jus soli*).<sup>40</sup> Moreover, this conception corresponds to the idea of a transnational

<sup>35</sup> See Davis, *op. cit.* note 3 *supra*.

<sup>36</sup> See, e.g., H. Staples, *The Legal Status of Third Country Nationals Resident in the European Union* (Kluwer, 1999), p. 355; R. Rubio-Marin, 'Equal Citizenship and the Difference that Residence Makes', in La Torre, *op. cit.* note 2 *supra*, p. 223.

<sup>37</sup> See, e.g., C. Closa, 'Citizenship of the Union and Nationality of the Member States', (1995) 32 *Common Market Law Review* 487; A. Evans and H. U. Jessurun d'Oliveira, 'Nationality and Citizenship', in A. Cassese, A. Clapham and J. H. H. Weiler (eds), *Human Rights and the European Community: Methods of Protection* (Nomos, 1991); A. Castro Oliveira, 'The Position of Resident Third-Country Nationals: Is it too Early to Grant them Union Citizenship?', in La Torre, *op. cit.* note 2 *supra*.

<sup>38</sup> See, e.g., S. Besson, 'Deliberative Democracy in the European Union: Towards the Deterritorialization of Democracy', in S. Besson and J. L. Martí (eds), *Deliberative Democracy and its Discontents: National and Post-National Challenges* (Ashgate, 2006).

<sup>39</sup> Most radically, the claim has been made that a certain period of permanent residence should automatically and unconditionally lead to full national citizenship; see Rubio-Marin, *op. cit.* note 36 *supra*, p. 223, and Rubio-Marin, *op. cit.* note 16 *supra*.

<sup>40</sup> A convergence between nationality laws in Europe can be observed. Roughly speaking, as regards birthright principles, *jus soli* systems tend to apply more restrictive measures whereas *jus sanguinis* systems have incorporated principles of *jus soli*. Moreover, as Western European states have turned into countries of immigration, naturalisation on grounds of long-term residence has been facilitated. See P. Weil, 'Access to Citizenship: A Comparison of Twenty-Five Nationality Laws', in T. A. Aleinikoff and D. Klusmeyer (eds), *Citizenship Today: Global Perspectives and Practices* (Carnegie Endowment for International Peace, 2001); A. Shachar, 'Children of a Lesser State: Sustaining Global Inequality through Citizenship Laws', *Jean Monnet Working Paper* 2/03 (2003), p. 27. On the processes of naturalisation, see

European citizenship that relies on national citizenships to create a functional and multi-layered framework of political cooperation.<sup>41</sup>

True, one may still fear the drawback of *territoriality* in the proposed model for extending EU citizens' social and political rights to TCNs. Residence is indeed anchored even deeper in territorial bounds than nationality. It is, of course, a default and pragmatic solution, like nationality once was, adopted to make sure most of those affected by decisions are included in the democratic decision-making process.<sup>42</sup> Nowadays, however, the increasing deterritorialisation of law-making processes in Europe, and the normative or quasi-normative impact on individuals residing outside the territorial forum where those law-making processes occur, requires deterritorialising democratic processes and hence looking for more functional connections among peoples in Europe and beyond Europe.<sup>43</sup> The resilience of territoriality is therefore an issue that needs to be addressed within the context of the institutionalisation of new forms of *demos*-cracy in Europe.<sup>44</sup>

#### IV Further Challenges

Whether one considers EU citizenship has kept its promises or not, the genie cannot be put back in the bottle. As we have just seen, EU citizenship is gradually emancipating *ratione materiae* from a purely legalistic and market-based conception of citizenship into a social and political citizenship, on the one hand, and *ratione personae* from a state-like exclusive form of membership to include non-nationals from European Member States, on the other.

Of course, numerous difficult questions remain open. Here is not the place to develop answers to these questions at any length, but merely to point to a few indicative answers. The various contributions in this issue each take up some of these issues. These different concerns may be grouped along two different lines: questions pertaining to EU citizenship and questions pertaining to national citizenship. This is a largely artificial distinction since EU citizenship cannot develop without national citizenship

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also Benhabib, *op. cit.* note 3 *supra*, pp. 156 *et seq.*; W. R. Brubaker, 'Citizenship and Naturalization: Policies and Politics', in W. R. Brubaker (ed.), *Immigration and the Politics of Citizenship in Europe and North America* (University Press of America, 1989); J. Handoll, 'The Status of Third-Country Nationals Residing on a Long-Term Basis', in P. de Bruycker (ed.), *The Emergence of a European Immigration Policy* (Bruylant, 2003) p. 274; Shachar, *op. cit.*, pp. 17–21.

<sup>41</sup> See, e.g., Besson, *op. cit.* note 38 *supra*; J. Bohman, 'From *Demos* to *Demos*: Democracy across Borders', (2005) 18 *Ratio Juris* 293; J. Bohman, 'Institutional Reform and Democratic Legitimacy: Deliberative Democracy and Transnational Constitutionalism', in Besson and Marti, *op. cit.* note 38 *supra*; K. Nicolaïdis, 'We, the Peoples of Europe . . .', (2004) 83 *Foreign Affairs* 97; J. Painter, 'Multi-level Citizenship, Identity and Regions in Contemporary Europe', in J. Anderson (ed.), *Transnational Democracy: Political Spaces and Border Crossings* (Routledge, 2002); J. H. H. Weiler, 'The European Court of Justice: Beyond "Beyond Doctrine" or the Legitimacy Crisis of European Constitutionalism', in A.-M. Slaughter, A. Stone Sweet and J. H. H. Weiler (eds), *The European Court and National Courts—Doctrine and Jurisprudence: Legal Change in Its Social Context* (Hart, 1998), p. 386. Regarding the concept of multi-level governance in Europe more generally, see, e.g., G. Marks, L. Hooghe and K. Blank, 'European Integration from the 1980s: State-Centric v. Multi-Level Governance', (1996) 34 *Journal of Common Market Studies* 341; L. Hooghe and G. Marks, *Multi-Level Governance and European Integration* (Rowman & Littlefield, 2001); F. W. Scharpf, *Regieren in Europa: Effektiv und demokratisch* (Campus, 1999); I. Bache and M. V. Flinders (eds), *Multi-Level Governance* (Oxford University Press, 2004).

<sup>42</sup> See Besson, *op. cit.* note 38 *supra*; Benhabib, *op. cit.* note 3 *supra*, pp. 25–48.

<sup>43</sup> See Besson, *op. cit.* note 38 *supra*. See also Shachar, *op. cit.* note 40 *supra*, p. 29 on this *jus connexionis*.

<sup>44</sup> See, e.g., Besson, *op. cit.* note 38 *supra*.

and, as we shall argue, EU citizenship should be understood as a transnational European citizenship rather than as a monolithic supranational citizenship. The division between these two groups of issues serves a clarifying and pedagogical purpose, however, hopefully revealing how much the evolution of EU citizenship is dialectical; it started by being influenced by national paradigms of citizenship, but is now affecting national citizenship in return, despite Member States' attempts to seal off this influence by making EU citizenship entirely dependent on national citizenship (Article 17(2) EC).

## A The Scope of EU Citizenship

### a) Territorial Scope

A first area of concern pertains to the territorial scope of EU citizenship and more particularly to its *migration-dependent* nature. The rise of EU citizenship rights depends indeed on the existence of a cross-border element; EU citizens may only benefit from their rights when they have used their freedom of movement.

This requirement of a transnational element raises the risk of reverse discrimination of nationals of a Member State who are not protected against discrimination by their own Member State on grounds of EU citizenship.<sup>45</sup> Of course, physical migration *stricto sensu* is no longer required by the case-law, since EU citizens and partners may benefit from EU citizenship rights without having moved from one Member State to the next, provided their situation is qualified by some minimal transnational dimension.<sup>46</sup> EU citizenship remains, however, primarily an ensemble of rights one may claim against EU institutions and Member States other than one's own. It was not meant, at least at first, to increase EU citizens' rights against their own Member State, just as EU fundamental rights are not meant to increase EU citizens' fundamental rights against national authorities in their own Member State.<sup>47</sup>

The problem with reverse discrimination, however, is that it contradicts the understanding of EU citizenship *qua* fundamental status of Member State nationals.<sup>48</sup> There is no reason, once more lenient conditions are granted to non-national EU citizens (e.g. due to mutual recognition requirements) not to extend these conditions to nationals.

<sup>45</sup> As to the case-law on reverse discrimination, see, e.g., Case C-175/78, *R v Saunders* [1979] ECR 1129; Joined Cases C-35 and 36/82, *Morson v State of the Netherlands*; *Jhanjan v State of the Netherlands* [1982] ECR 3723; Case C-332/90, *Steen v Deutsche Bundespost* [1992] ECR I-341; Case C-29-35/94, *Criminal proceedings against Aubertin et al* [1995] ECR I-30; Joined Cases C-64 and 65/96, *Uecker and Jacquet v Land Nordrhein-Westfalen* [1997] ECR I-3171; Case C-459/99, *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v Belgian State* [2002] ECR I-6591.

<sup>46</sup> See Epiney in this issue, p. 611. See, e.g., on the extremely tenuous character of the transnational element, Cases *Carpenter* or *Schempp*, note 27 *supra*, and Case C-148/02, *Garcia Avello v Belgian State* [2003] ECR I-11613.

<sup>47</sup> See Besson, *op. cit.* note 24 *supra*.

<sup>48</sup> See, e.g., Advocate General Jacobs in *Konstantinidis*, note 26 *supra*. See more recently, Grzelczyk, note 27 *supra*, para. 31: 'Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for'. And most recently the Preamble of Directive 2004/38/EC: 'Union citizenship should be the fundamental status of nationals of the Member States when they exercise their right of free movement and residence. It is therefore necessary to codify and review the existing Community instruments dealing separately with workers, self-employed persons, as well as students and other inactive persons in order to simplify and strengthen the right of free movement and residence of all Union citizens'.

One may argue, by analogy to the free movement of goods,<sup>49</sup> that discriminating one's nationals, who cannot rely on a transnational element to be vested with EU citizenship rights, may have a negative *impact* on the movement of persons in the EU and should therefore be deemed as contrary to EC law. As Magnette argues, the constitution of Europeans' identity starts with European citizens' mutual recognition on a horizontal level in the European *sympoliteia*.<sup>50</sup> As a result, reverse discriminations become a hindrance to European integration and are profoundly counterproductive. These discriminations require from national authorities, in their vertical relationship to EU citizens, that they treat non-national EU citizens better than, and not equally to, nationals. Hence, reverse discriminations are the very opposite of what is to be expected in an *isopoliteia*. If this negative impact on free movement of people is supported, *harmonisation* might be the solution. Directive 2004/38/EC does not yet forbid reverse discrimination, but one may imagine doing so top-down in the near future.

Finally, one may also argue that reverse discriminations lead Member States to violate their own constitutional principles and, in particular, the constitutional principle of non-discrimination. In being led to treat nationals and non-nationals differently, Member States are forced into a constitutional dilemma between revolt and revolution. In this issue, Cheneval denounces a similar dilemma in the context of constitutional revision in the EU and, in particular, by reference to the democratic referenda organised in certain Member States and not in others.

#### b) *Personal Scope*

A second concern pertains to the *discrimination-dependence* of EU citizenship rights. To date, these rights only apply to cases where there is discrimination on grounds of nationality. The time has come, however, for an emancipation of EU citizenship rights from Article 12 EC and the prohibition of discrimination. This is the only way of making EU citizenship the true foundation of all fundamental rights for EU citizens. If EU citizenship is to become the fundamental status of all Europeans, it is important that the rights it generates are not conditioned on a difference of nationality, on the one hand, and on a nationality-based differential treatment, on the other.

Different arguments may be made in favour of this emancipation. With the gradual erosion of the migration dependence of EU citizenship rights and their plausible extension to sedentary nationals, the dependence of these rights on nationality-based discrimination is losing its justification. Moreover, the four fundamental freedoms, with which EU citizenship rights are converging, can often be deemed as restricted independently of any discrimination. This is something Jacobs argues in this issue and in his Opinion in the *Pusa* case.<sup>51</sup> The ECJ has not officially accepted the disconnection yet, but there are signs of change in the *Schempp* case.<sup>52</sup>

<sup>49</sup> See, e.g., Case C-163/90, *Administration des Douanes et Droits Indirects v Legros and Others* [1992] ECR I-4625; Case C-293/02, *Jersey Produce Marketing Organisation Ltd v States of Jersey and Jersey Potato Export Marketing Board* [2005] ECR I-9543.

<sup>50</sup> See Magnette in this issue, p. 644.

<sup>51</sup> Opinion of Advocate General Jacobs delivered on 20 November 2003, in Case C-224/02, *Pusa v Osuuspanikken Keskinäinen Vakuutusyhtiö* [2004] ECR I-5763.

<sup>52</sup> *Schempp*, note 27 *supra*. See J. Kokott, 'EU Citizenship—citoyens sans frontières?', European Law Lecture, *Durham European Law Institute Online Paper* (2005).

c) *Material Scope*

A third concern relates to EU citizenship rights' material scope, and in particular the extension of citizenship rights, both in general and in the case of political rights, and the justifications for their restrictions.

i) *EU Citizenship Rights in General*

Among the different challenges to the material scope of EU citizenship, one may mention that of the *boundaries of EU citizenship rights*. Article 17(2) EC identifies EU citizenship with a legal relationship between the Union and Member State nationals to which are attached the rights and duties guaranteed in the Treaty and secondary legislation. As such, EU citizenship may be deemed as evolutionary and expands to new rights together with the expansion of the scope of the EC Treaty. In recent years, the ECJ has constantly extended the scope of these rights by adding new rights as its case-law proceeded; these rights are not only those rights based directly on Treaty provisions, but also rights based on a broad interpretation of those provisions or even rights derived from a combination of citizenship with a broad interpretation of the non-discrimination principle.<sup>53</sup> As a result, EU citizenship has slowly become a fundamental status from which flows the right not to be discriminated as a free-moving EU citizen in any of the rights granted by national law, provided these rights affect the right to free movement and residence.<sup>54</sup>

This progressive extension of EU citizens' rights to any national rights without discrimination has met with growing resistance however. One may argue, indeed, by reference to the allocation of competences in the EU, that EU citizenship rights are only those listed in the Treaty including Article 12 EC and no others (Article 17(1) EC). In this sense, the extension of EU citizenship rights to the non-discriminatory exercise of any national rights puts into question the allocation of competences in the EU.<sup>55</sup> Another difficulty lies in the eminently judicial development of those rights, thus raising important questions of legitimacy. This, in turn, has important implications for the future of national sovereignty in Europe. Each national sovereign in the EU may indeed now be understood as enacting legal norms for non-residents currently living outside its territory, but who one day might become its legal subjects. This evolution actually confirms the cooperative approach to European sovereignty, i.e. sovereignty *qua* cooperative exercise of national power aimed at the best protection of the rights of all those potentially affected, whether they are national citizens or not.<sup>56</sup>

These various critiques are presented by Jacobs and Epiney in their contributions to the present issue. Jacobs argues that it might be better to let the Community legislature decide on the extent of financial obligations of Member States, or at least to require the court to first assess the competence of the Community that is relevant in a context before assessing the scope of citizenship rights relied upon. In her essay, Epiney down-plays some of the criticisms made to the breadth of the scope of application of Article 12 EC and formulates a test of application of that provision.

<sup>53</sup> See Jacobs in this issue, p. 591.

<sup>54</sup> See Kokott, *op. cit.* note 52 *supra*. See also Jacobs and Epiney in this issue, pp. 591 and 611, respectively.

<sup>55</sup> See also Jacobs in this issue, p. 591. Contra Epiney in this issue, p. 611.

<sup>56</sup> On the concept of 'cooperative sovereignty', see S. Besson, 'Sovereignty in Conflict', (2004) 8 *European Integration online Papers (EIoP)*. A similar approach can be found in P. Maignette, *L'Europe, l'Etat et la démocratie: Le Souverain apprivoisé* (Editions Complexe, 2000), pp. 155–159 and 161–166.



*ii) EU Political Rights*

Another challenge pertaining to the material scope of EU citizenship relates to the latter's *political dimension*. As explained earlier, the ECJ's case-law has allowed for a shift from market citizenship to social citizenship. What remains to be seen is whether EU citizenship can become a full-blown political citizenship.

As we have seen before, EU citizenship rights of a political nature are scarce in the Treaty and the Charter.<sup>57</sup> Moreover, some Member States have been very slow in transposing them into their national constitutional orders. In this respect, the Constitutional Treaty has given birth to important innovations. With its chapter on European democracy, the European initiative and the enhancement of inter-parliamentary co-operation mechanisms, a more active approach to European citizenship has been taken. However, besides the uncertainty that lies on their impact due to the failure of constitutional ratification, these political improvements are quite minor. Moreover, they are dominated by a statist approach to democracy and political legitimacy that implies replicating national structures at the European level.

Accordingly, one may want to think more about how best to develop the political dimension of EU citizenship in ways that match its *sui generis* post-national political organisation.<sup>58</sup> Legal pluralism and the many overlapping law-making processes in Europe need to be matched by a pluralism in legitimacy sources and this has been referred to as European *demoi-cracy*. European *demoi-cracy* is not a distant mirage, as critiques of the European democratic deficit claim it is; on the contrary, once the statist model of European democracy is abandoned, the advantages of existing multi-level deliberative structures at national, transnational and EU levels become evident.<sup>59</sup> As Cheneval emphasises in this issue, semi-direct democratic instruments, like constitutional referenda, have increased in frequency both at EU level and in Member States on European issues. Similarly, democratic inclusion and, in particular, counter-majoritarian mechanisms have increased in Member States as a result of European citizenship.<sup>60</sup> Of course, to make sure that *demoi-cracy* does not remain an empty rhetorical figure, these transnational processes need to be further institutionalised and this is one of the future challenges of European democracy.<sup>61</sup>

This concern for the political re-appropriation of EU citizenship by its citizens also lies at the core of Magnette's contribution in this issue. The judicial development of EU citizenship needs to be matched by a civic conscientisation of the complexity and integrated nature of EU citizenship. This will take time, according to Magnette, and should not be rushed at the risk otherwise of generating counterproductive effects of hostility and resurgence of national identities. In this respect, Kostakopoulou argues for the necessity to extend EU citizenship rights to national elections. There are no

<sup>57</sup> See also Directive 93/109/EC laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, [1993] OJ L329/34.

<sup>58</sup> See Besson, *op. cit.* note 38 *supra*.

<sup>59</sup> *Ibid.*

<sup>60</sup> See S. Besson 'Sovereignty: From Independence to Responsibility. On Asking the Right Question in Switzerland', in T. Cottier (ed.), *Die staatspolitischen Auswirkungen eines EU Beitritts der Schweiz* (vdf, 2007); Besson, *op. cit.* note 56 *supra*; S. Besson, 'La souveraineté coopérative en Europe: Ou comment la Suisse pourrait être à la fois européenne et souveraine', in T. Balmelli (ed.), *La Suisse saisie par l'Union européenne: Thèmes choisis sur le droit et les politiques de l'UE* (Editions interuniversitaires suisse, 2003).

<sup>61</sup> See Besson, *op. cit.* note 38 *supra*; Besson and Utzinger, *op. cit.* note 14 *supra*.

tenable political arguments to differentiate between participation in national and that in municipal elections.<sup>62</sup> Moreover, according to Jacobs, a legal argument in favour of the right to participate in national elections may be made from within grounds of Article 12 EC and the principle of non-discrimination, on the one hand, and on grounds of Article 11 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, on the other.<sup>63</sup>

### iii) *Justified Restrictions to EU Citizenship Rights*

A final concern is that of the *justifications to restrictions* of EU citizenship rights. According to Article 18(1) EC, 'every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect'. This reservation refers in particular to the legitimate interest of Member States to require social and financial coverage before granting the permission to reside legally, in order to protect their public resources. By analogy, these inherent Treaty-based limitations apply to all other EU citizenship rights, which by definition are rights granted by the Treaty and hence are limited according to the Treaty. This has, per se, always been an object of concern since it subjects EU citizenship rights to limitations one may accept in relation to fundamental economic freedoms but not pertaining to other social and political citizenship rights.

The difficulty has increased recently as the ECJ's case-law has become more generous in granting justification to national limitations to EU citizenship rights than it would have, had these rights been invoked as one of the four fundamental freedoms.<sup>64</sup> While it is true the ECJ has started an unprecedented and highly needed development in constantly expanding the material and personal scope of EU citizenship rights, this extension has regrettably been compensated by the elaboration of overbroad justifications for the restrictions to those rights. One may mention, for instance, considerations of 'public expenditure' or the requirement of a 'genuine link', 'a certain degree of financial solidarity' or 'a certain degree of integration in the Member State',<sup>65</sup> which are justifications which have been traditionally outlawed by the four freedoms' legal regime.<sup>66</sup> In fact, this discrepancy between the regime applicable to the right of free movement of EU citizens and that of the four fundamental freedoms is contrary to the *ratio legis* behind Directive 2004/38/EC. Moreover, these justifications are quite vague and leave it to national authorities and courts to determine where to draw the line; this is quite paradoxical given the traditionally strict limitations placed by EC law on national restrictions to EC rights and principles. In this issue, Jacobs and Epiney identify the problem more closely and suggest different ways out.

<sup>62</sup> See Kostakopoulou in this issue, p. 623.

<sup>63</sup> See Jacobs in this issue, p. 591. See, e.g., *Matthews v United Kingdom* (Application No. 24833/94) *Reports of Judgments and Decisions* 1999-I (ECHR).

<sup>64</sup> See *R (Bidar)*, note 27 *supra*, and Kokott, *op. cit.* note 52 *supra*.

<sup>65</sup> See *R (Bidar)* and *Collins*, note 27 *supra*.

<sup>66</sup> On the prohibition of restrictions in view of the four fundamental freedoms, see, e.g., Case C-55/94, *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165; Case C-108/96, *Criminal Proceedings v MacQueen and Others* [2001] ECR I-837; Case C-442/02, *CaixaBank France v Ministère de l'Économie, des Finances et de l'Industrie* [2004] ECR I-8961; Advocate General Jacobs in *Pusa*, note 51 *supra*. See also Kokott, *op. cit.* note 52 *supra*, p. 9. See also Jacobs in this issue, p. 591.

## B The Scope of National Citizenship

The second group of questions pertains to the impact of EU citizenship rights on national citizenship. EU citizenship does not only derive from and complement national citizenship, but it also affects its functioning deeply, and this despite the fact that it does not replace the latter. To borrow Kostakopoulou's words, EU citizenship subverts national citizenship.<sup>67</sup>

### a) Territorial Scope

A first concern is that of the *change of nature of national citizenship in Europe*. National citizenship is indeed evolving with EU citizenship towards an integrated form of post-national citizenship that can provide rights at all the different levels of global governance within, but also outside the national territory. Some rights and interests can no longer be protected by national citizenship only and they need to be complemented by the rights stemming from EU citizenship both at EU level and, even more importantly, in other Member States in Europe.<sup>68</sup>

This does not mean, however, that national citizenship will disappear, but only that it needs to reinvent itself in a complementary relation to other national citizenships in Europe.<sup>69</sup> This is what is meant in the title of this introductory article by the term 'European citizenship' *lato sensu* as opposed to EU citizenship.<sup>70</sup> There are many ways of understanding what this European citizenship could mean.<sup>71</sup> The first approach, held by the early Habermas, argues there is one single European *demos* grouping the many national *demos*.<sup>72</sup> This belies, however, the resilience of national democracy and ignores its benefits in Europe by reproducing a state-like democratic model at the post-national level. The second approach, by contrast, locates true European citizenship in the sum of national *demos* with as many European *demos* as national *demos* and *ethnoi*. Thus, Weiler once argued that EU citizenship can help civilise national citizenship and European nationalisms through the confrontation with the European Other, and the education in tolerance this may instil.<sup>73</sup> Finally, the third approach, that lies in between, does not propound a unique European *demos* but many European *demos* that correspond to the different national *demos* when they deliberate together as Europeans.<sup>74</sup> This approach differs from the second conception, however, because it does not see the interest of this plurality of European *demos* as lying in the preservation of the many national *ethnoi*, but, on the contrary, in that of a transnational *demos*-cracy and deliberative legitimization of deterritorialized law-making processes in Europe.<sup>75</sup> To

<sup>67</sup> See Kostakopoulou in this issue, p. 623.

<sup>68</sup> See, more generally, J. L. Cohen, 'Changing Paradigms of Citizenship and the Exclusiveness of the Demos', (1999) 14 *International Sociology* 245.

<sup>69</sup> See Besson and Utzinger, *op. cit.* note 14 *supra*.

<sup>70</sup> *Ibid.*; Besson, *op. cit.* note 38 *supra*. Note that the concept of 'European citizenship' is already commonly used by reference to Union citizenship in different European languages. An exception is the German 'Unionsbürgerschaft'; the German tradition of political theory ties the *demos* closely to the *ethnos* and cannot therefore think of European citizenship in terms other than national citizenship.

<sup>71</sup> See Besson, *op. cit.* note 38 *supra*.

<sup>72</sup> See J. Habermas, *Zeit der Übergänge: Kleine Politische Schriften IX* (Suhrkamp, 2001) pp. 85–129.

<sup>73</sup> See Weiler, 'To be a European Citizen', *op. cit.* note 2 *supra*, pp. 346–348.

<sup>74</sup> See Besson, *op. cit.* note 38 *supra*; Bohman, 'From Demos to Demoī', *op. cit.* note 41 *supra*; Nicolaïdis, *op. cit.* note 41 *supra*.

<sup>75</sup> See J. Lacroix, *L'Europe en procès: quel patriotisme au-delà des nationalismes?* (Cerf, 2004); J. Lacroix, 'For a European Constitutional Patriotism', (2002) 50 *Political Studies* 944.

quote Nicolaïdis, European democracy is neither a 'Union as democracy' nor a 'Union of democracies', but a Union as *demoi*-cracy.<sup>76</sup>

This pluralist conception of European citizenship is also put forward by Kostakopoulou and Magnette in their contributions in this issue. Both authors regard EU citizenship as more than a supranational addition or complement to national citizenship. It is, on the contrary, understood as a way to reinvent national citizenships together by civilising them and opening them to one another. In this respect, Kostakopoulou accurately refers to EU citizenship as a 'network good'. Both authors leave open the question, however, of how one may further institutionalise this new form of post-national citizenship in Europe. This could be done by relying, for instance, on existing civic fora whether national, transnational or supranational, while opening them to one another through deliberative procedures and distant representation mechanisms.<sup>77</sup>

### b) *Personal Scope*

A second concern pertains to the erosion of *nationality* as a basis for national and EU citizenships. As we have seen before, EU citizenship is conceptually decoupled from nationality at a basic level, since there is no European nationality per se but only national nationalities *qua* basis for national and EU citizenships. Moreover, the EU citizen, who is an alien in other Member States than his, is vested with rights there which are based on residence rather than nationality of that Member State. In this sense, a progressive decoupling of EU citizenship from national nationality, as opposed to national residence, follows logically from this. In turn, EU citizenship might, as a consequence, erode the nationalist paradigm that underlies some political settings in Europe and the connection between national *demoi* and national *ethnoi*.<sup>78</sup> If non-national EU citizens may benefit in another Member State than theirs from rights previously exclusively vested in national citizens, nationality gradually loses its exclusive relationship to national citizenship within each Member State.

In fact, the erosion of nationality is a more global evolution that applies across the board due to increasing migration in Europe and beyond. As a result, residence or domicile is regularly used as a basis for naturalisation in European Member States themselves.<sup>79</sup> In her contribution, Kostakopoulou also refers to this trend in Member States' practice.<sup>80</sup> Of course, as explained before, residence remains a territorialised connection to a polity, whereas the deterritorialisation of law making and the plurality of legal norms overlapping in the same territory call for a more functional and deterritorialised democracy in which non-territorial albeit affected interests may be represented.

### c) *Material Scope*

A final concern pertains to the evolution of the material scope of rights traditionally attached to national citizenship in reaction to the progression of EU citizenship. One may, in particular, mention the fear of *social levelling-down* in Member States; this

<sup>76</sup> See Nicolaïdis, *op. cit.* note 41 *supra*.

<sup>77</sup> See Besson, *op. cit.* note 38 *supra*.

<sup>78</sup> See Besson and Utzinger, *op. cit.* note 14 *supra*.

<sup>79</sup> See note 40 *supra*.

<sup>80</sup> See Kostakopoulou in this issue, p. 623.

might occur in reaction to the increasing number of rights to social benefits recently attached to EU citizenship, and this despite the generous justifications for restrictions to those rights authorised by the ECJ.<sup>81</sup> One may think of threats of reduction of national social benefits or even of expulsions of non-nationals of questionable status such as job seekers, in order to avoid having to grant them the same social benefits as nationals. Although Directive 2004/38/EC improves the situation in the latter perspective (Article 16 *et seq.*), it does not tackle the problem at its root. In this sense, financial solidarity among Europeans may have a perverse price that needs to be pre-empted and addressed before it is too late.

The same may be said with respect to *political* rights. Some Member States have indeed been reluctant in transposing Directive 93/109/EC and EU citizens' political rights at municipal level.<sup>82</sup> One may even fear that important decisions are taken at national level to avoid leaving them to be decided by an open European polity at municipal level where all EU citizens may vote and be eligible. This concern is also addressed by Kostakopoulou and Magnette, who emphasise the importance of the development of solidarity among Europeans.<sup>83</sup> Magnette warns of the risk of backlash in certain Member States were all national political rights to be extended now to EU citizens as well. The right balance between civilising national citizenship, on the one hand, and tending national identities, on the other, needs therefore to be found.

## V Conclusion

As the contributions in this issue show, Pandora's Box now lies wide open.<sup>84</sup> Although the best is certainly yet to come with European citizenship, it is important to track recent changes very closely to make sure the bold promises of European citizenship are held. Or else they will fuel the rampant and rapidly growing European disenchantment.

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<sup>81</sup> See Grzelczyk, Collins, Trojani and R (Bidar), note 27 *supra*.

<sup>82</sup> See, for instance, the decisions of the German *Bundesverfassungsgericht*: BVerfGE 83, 37 (right of non-nationals to vote in Schleswig Holstein), and BVerfGE 83, 60 (right of non-nationals to vote in Hamburg).

<sup>83</sup> See Kostakopoulou and Magnette in this issue, pp. 623 and 664, respectively.

<sup>84</sup> Weiler, 'To be a European Citizen', *op. cit.* note 2 *supra*, p. 333.