Essays on Autonomy, Legality and Pluralism in European law

Lindeboom, Justin

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7. Pluralism Through its Denial: The Success of EU Citizenship

with Dimitry Kochenov

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I. Introduction

International law is clear that who is a citizen is for the states to decide – they can even sometimes refuse recognition to other states' statuses, which are legally obtained. The resulting reality – which is in line with the very essence of statehood, where sovereignty over people and place implies the ability to reign over the 'instrument and object of closure'[1] – creates an astonishing multiplicity of legal-political approaches to citizenship. This reflects the diverging ideas of the *demos*, the society, which every state in the world views itself the custodian of, cutting ruthless lines of separation between the 'ins' and the 'outs' within and outside of every state. Rogers Brubaker's is probably the best definition of citizenship to date, since it demonstrates how citizenship helps to erect such necessarily arbitrary boundaries – should you disagree with the state's rationale about someone's exclusion for a minute – while also locking the *demos* within: it is the 'preservation' of the *demos* that is often cited as a rationale behind not extending citizenship to all the members of the society. Millions are 'here' physically and, legally, not quite 'here' at the same time. When each state decides, an astonishing plurality is necessarily the outcome. Under the international law, we thus witness, largely, a pluralism as anything goes (II.).

The creation of regional organizations extending core citizenship rights – especially those of residence, work and non-discrimination on the basis of nationality, with the EU supplying the main example – altered the situation profoundly. As a result, in the EU, pluralism is essentially presented to us as a crucial federal denominator: courts decide, in an ephemeral dialogue, over the ever-fluid vertical boundary of competence (III.). Citizenship plays a most

[1] W.R. Brubaker, *Citizenship and Nationhood in France and Germany* (Harvard University Press 1992) 34.

atypical role here, however. On the face of it, EU citizenship is derived from the nationalities of the Member States and thus obeys 'anything goes' pluralism of the international sphere. In practice, however, not much is left, in essence, of the absolute status of exclusion on which the entitlement to be recognized as a full part of the *demos*, thus underlying each European democracy, is actually based. EU citizenship and the internal market, in tandem, have cracked open the container-societies of the states in Europe offering unlimited access to crucial rights based on a status of EU citizenship which is not vetted locally and comes from 'outwith'. Better still: non-recognition of 'foreign' statuses is prohibited by law at least since *Micheletti*. The importance of state sovereignty in the most essential areas of the sphere of national citizenship in Europe has thus largely vanished into thin air (IV.).

Precisely since this is the case and since EU citizenship is now so powerful in practice, there will be no change in EU citizenship's acquisition by derivation. The claiming of sovereignty in nationality matters is the crucial aspect of statehood, which none of the Member States will be willing to give up, the reality of the irrelevance of such sovereignty, at the national level, notwithstanding. EU citizenship is bound to be pluralist in nature, thus, precisely for the most anti-pluralist reasons behind the mythology of *demos* and sovereignist claims in the Union where key rights are distributed supranationally (V.).

This *status quo* is only to be applauded: pluralist multiplicity behind access to the EU citizenship status is worth preserving: following *Rottmann* and *Micheletti* it is more structured than the international 'anything goes' variant. Yet, it is starkly opposed to the monist totalitarian thinking behind citizenship as a monopoly of defining the *demos* by the authority based on the reasons of expediency and ideology of the day, drawing random boundaries of exclusion which are extremely difficult to penetrate. The desire to preserve the national competences in this field is precisely what makes EU citizenship so fluid, appealing and powerful, flying squarely in the face of petty nationalism and absurd local exceptionalism. Pluralism in access to EU citizenship is here to stay.

II. Pluralism as 'Anything Goes'

What is crucial about citizenship is that, mostly due to its importance in relation to the legal status of every individual, it is generally viewed as a key element of state sovereignty. As a consequence, international law allows states themselves to clarify who their citizens are. The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws is

unequivocally clear on this issue: 'it is for each state to determine under its own law who are its nationals'.[2] Thus, nationality can only be conferred by national law – international law as it stands today can only hypothetically influence such State decisions.[3] It certainly cannot separately confer nationality on individuals, even if it theoretically guides states on what is and what is not acceptable. Since the famous *dicta* of the Permanent Court of International Justice (PCIJ) in the cases of *Tunis and Morocco Nationality Decrees* and *Polish Nationality*, where the PCIJ opined that in the future the role played by international law in the sphere of conferral of citizenship rights might increase through new treaty obligations,[4] the reality of national dominance in the citizenship domain has scarcely been altered. All attempts to regulate citizenship issues globally at the international level have been far from successful.[5]

If public international law has acquired any hypothetical role in nationality regulation, it is not in the context of the rules on conferral of nationality, but rather in the context of the recognition of nationality by other states. The 1930 Hague Convention indeed left open the possibility that a state's ascription of nationality need not be recognised by other states if it is inconsistent with international conventions, international custom, and general principles of law.[6] Following the International Court of Justice (ICJ) decision in *Nottebohm* case, states are not obligated to recognise for the purposes of diplomatic protection the nationality conferred on an individual by another state in cases where there is a perception that there no 'genuine link' between the conferring state and the individual where the legality of such conferral is not

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[2] Art. 1 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, L.N. Doc. C 24 M. 13.1931.V. See also Art. 2: 'Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State'.

[3] See in this regard Advisory Opinion of the Inter-American Court of Human Rights, *Re Amendments to the Naturalization Provisions of the Constitution of Costa Rica* [1984] OC-4/84. But already in 1923 the PCIJ vaguely said that 'generally speaking' nationality regulation remains within the jurisdiction of states, but this principle is subject to future treaty obligations; PCIJ, *Acquisition of Polish Nationality* [1923] PCIJ Ser. B., No. 7, 16.

[4] PCIJ, *Tunis and Morocco Nationality Decrees* [1923] PCIJ Ser. B., No. 4, 24; PCIJ, *Acquisition of Polish Nationality* [1923] PCIJ Ser. B., No. 7, 16.

[5] The picture is somewhat different once only regional integration is considered, with plenty successful examples of the distribution of what could be characterized as key citizenship rights – including residence, work, and non-discrimination – in the European Union, ECOWAS, the Eurasian Economic Union, the Gulf Cooperation Countries, among Latin American Countries and elsewhere in the world. This does not affect the core principle still holding at the international level.

[6] Art. 1 1930 Hague Convention.

in dispute.[7] Sometimes uncritically hailed as settled law,[8] the *Nottebohm* judgment should however be read *cum grano salis*, as the ICJ's *dictum* on the requirement of nationality being a 'a genuine connection of experience, interests and sentiments, together with the existence of reciprocal rights and duties' withdraws attention from the actual *ratio decidendi* of the case, which indicates that the judgment's basis is actually rooted in the doctrine of abuse of rights, specifically tailored to the particular facts of the case.[9] Moreover, state practice and *opinio iuris* reveal hardly any suggestion that there must be a genuine link between nationality-conferring state and individual for a nationality to be recognised outside the context of diplomatic protection.[10] Outside bizarre examples such as overt discrimination,[11] and en-masse extraterritorial naturalisations in passportisation schemes,[12] international law simply offers no concrete standards for the acquisition and recognition of citizenship. Rather, while there indeed seems a rudimentary 'international law of citizenship' in development,[13] international regulation of the recognition of nationality is infused with a functional approach, focusing on

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[7] ICJ *Nottebohm (Liechtenstein v Guatemala)* (1955) ICJ Reports 4. The citizenship of Lichtenstein held by Mr. Nottebohm, who was also a German national, was not recognised by Guatemala, the latter state treating Mr. Nottebohm as a German citizen. The ICJ agreed with such a restrictive vision, ruling that nationality is a 'legal bond having as its basis a social fact of attachment, a genuine connection of experience, interests and sentiments, together with the existence of reciprocal rights and duties'. On the *Nottebohm* case see the literature recommended in A. Bleckmann, 'The Personal Jurisdiction of the European Community' (1980) 17 *Common Market Law Review* 467, 477 and fn. 16. For a representative list of international documents regulating citizenship status and the obligations of citizens see K. Rubinstein and D. Adler, 'International Citizenship: The Future of Nationality in a Globalized World' (2000) 7 *Indiana Journal of Global Legal Studies* 519, 525 and fn. 32.

[8] See e.g. R. Donner, *The Regulation of Nationality in International Law* (Brill Nijhoff 1994) 62; H.F. van Panhuys, *The Role of Nationality in International Law* (A.W. Sijthoff 1959) 158. See also *Soufraki v United Arab Emirates*, ICSID Case No. ARB/02/7.

[9] R.D. Sloane, 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality' (2009) 50 *Harvard International Law Journal* 1.

[10] Ibid. 29–35. A. Sironi, 'Nationality of Individuals in International Law: A Functional Approach' in S. Forlati and A. Annoni (eds.), *The Changing Role of Nationality in International Law* (Routledge 2013). Notable examples of recent jurisprudence in sharp contrast with the *Nottebohm* dicta include *Feldman v United Mexican States*, ICSID Case No. ARB(AF)/99/1. Even in the context of diplomatic protection, the genuine link theory has questionable validity nowadays; see International Law Commission, *Draft Articles on Diplomatic Protection and Commentaries*, UN Doc. A/61/10; UN GAOR, 61st session, Supp. No. 10, 32–33.

[11] See section IV below.

[12] For an overview, see A. Peters, 'Extraterritorial Naturalizations: Between the Human Right to Nationality, State Sovereignty, and Fair Principles of Jurisdiction' (2010) 53 *German Yearbook of International Law* 623.

[13] P.J. Spiro, 'A New International Law of Citizenship' (2011) 105 *American Journal of International Law* 694.

the objectives of specific international legal regimes[14] and on the protection of individual rights,[15] rather than policing one state – one person fiction, which inspired *Nottebohm*, but could never be observed in practice.[16] *Nottebohm*, in other words, is not any more good law,[17] if it has ever been.[18] This is particularly true of the EU, where the dubious *Nottebohm* logic has expressly been departed from as far back as in the nineties in the *Micheletti* case.[19]

Many of the international legal instruments aimed at regulating citizenship issues engaged in ghost-hunting. Instead of effectively addressing issues of vital importance, such as the imminent need of reduction of statelessness,[20] they concentrated on a Quichotean task of combating double nationality.[21] The relevance of the latter activity is fading extremely fast in today's globalised world, where identities overlap[22] and where the most active part of the population has lived abroad for a considerable amount of time and is likely to hold more than one passport.[23] 'Cosmopolitanism' has clearly lost the formerly exotic appeal of the 19th

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[14] For example the ICSID Convention. See for an overview of relevant case-law A. Sironi, 'Nationality of Individuals in International Law: A Functional Approach' in S. Forlati and A. Annoni (eds.), *The Changing Role of Nationality in International Law* (Routledge 2013).

[15] Ibid. 54.

[16] P.J. Spiro, 'Dual Nationality and the Meaning of Citizenship' (1997) 46 *Emory Law Journal* 1411; P.J. Spiro, *At Home in Two Countries* (NYU Press 2016).

[17] Sironi, 'Nationality of Individuals in International Law' (n. 14).

[18] The absurdity of the *Nottebohm* logic has been explained with abundant clarity already in the dissenting opinions in the same case. See especially the Opinion of Judge Klaestad. See also P.J. Spiro, '*Nottebohm* and "Genuine Link": Anatomy of a Jurisprudential Illusion' (2019) *Investment Migration Council Research Paper* 2019/1.

[19] *Mario Vicente Micheletti and Others v Delegación del Gobierno en Cantabria*, C-369/90, EU:C:1992:295.

[20] Among the instruments addressing this issue *see* Protocol Relating to a Certain Case of Statelessness (1937-1938) 179 LNTS 115 (No. 4138); Special Protocol Concerning Statelessness, League of Nations Document C. 227.M.114.1930.V; 1961 Convention on the Reduction of Statelessness, (1975) 989 UNTS 175 (No. 14458). The document is only ratified by a handful of states. For analysis see J. Chan, 'The Right to a Nationality is a Human Right: The Current Trend towards Recognition' (1991) 12 *Human Rights Law Journal* 1, 2ff, who is critical of the international legal developments in this area.

[21] Council of Europe Convention on Reduction of Cases of Multiple Nationality (1963) ETS 43, entered into force in 1968; Protocol to this Convention (1977) ETS 96.

[22] W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press 1995); K. Rubinstein and D. Adler, 'International Citizenship: The Future of Nationality in a Globalized World' (2000) 7 *Indiana Journal of Global Legal Studies* 519, 524.

[23] On the analysis of the *pro*s and *con*s of dual nationality see D.A. Martin, 'New Rules on Dual Nationality for a Democratizing Globe: Between Rejection and Embrace' (1999) 14 *Georgetown Immigration Law Journal* 1; P.J.

century and has become a daily reality.[24] The times of the reign of the doctrine of insoluble allegiance establishing, in the words of Sir Wiliam Blackstone 'a debt of gratitude which cannot be forfeited, cancelled or altered by any change of time, place or circumstance'[25] and thus making either acquiring a new nationality or changing the original nationality virtually impossible, are long gone – naturalisation and the change of nationality are both legally recognised reality.[26] Agreeing with Chan, 'there seems to be a general consensus that everyone is entitled to change his nationality'.[27] The buying and selling of citizenship is only a symptom of this present social and legal reality,[28] which combines a growing individuals' detachment from the sovereign state with a laissez-faire approach to the citizenship acquisition and recognition in international law.

III. Pluralism as the Federal Balance

As any other federal system, the EU is marked by a continuous struggle for what is perceived as a balance of power between its constituent entities and the supranational core, as well as between the key actors at all the levels both horizontally and vertically.[29] EU law is thus very much about the conflict of laws. There is no 'constitutional pluralism' here – it is a 'clash of legal orders'.[30] Virtually the entire body of the ECJ case law can be read through the lens of

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Spiro, 'Dual Nationality and the Meaning of Citizenship' (1997) 46 *Emory Law Journal* 1411. Cf. L. Bosniak, 'Multiple Nationality and the Postnational Transformation of Citizenship' (2002) 42 *Virginia Journal of International Law* 979.

[24] For discussion see generally K.A. Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (W.W. Norton 2007).

[25] W. Blackstone, *Commentaries on the Laws of England* (London 1884) 117, cited in Rubinstein and Adler, 'International Citizenship' (n. 7) 519, 530. See also Spiro, 'Dual Nationality' (n. 16) 1419–1430.

[26] The legal attitudes towards dual nationality are becoming less hostile world-wide: Spiro, *At Home in Two Countries* (n. 16). Also in the EU the majority of the Member States allow double nationality: D. Kochenov, 'Dual Nationality in the EU: An Argument for Tolerance' (2011) 17 *European Law Journal* 323.

[27] Chan, 'The Right to a Nationality' (n. 20) 8.

[28] A. Shachar and R. Bauböck (eds.), *Should Citizenship be for Sale?* (2014) *EUI Working Papers* RSCAS 2014/01. For a journalistic account of the business of selling citizenship, see A.A. Abrahamian, *The Cosmopolites: The Coming of the Global Citizen* (Columbia Global Reports 2015).

[29] R. Schütze, *From Dual to Cooperative Federalism* (Oxford University Press 2009).

[30] G. Davies, 'Constitutional Disagreement in Europe and the Search for Legal Pluralism' in M. Avbelj and J. Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012) 269–283.

the resolution of competence disputes – and this fully applies to citizenship matters.[31] Naturally, the 'European' perspective on all such disputes is not the only one, as it co-exists with the '"national constitutional order" heresy'.[32] That is, a large number of national perspectives, using completely different means to explain the existing reality where EU law prevails over national law.[33] Notwithstanding the constant 'constitutional conversation'[34] in Europe involving all kinds of actors from the *Herren der Verträge* to the courts at all levels,[35] such national perspectives approach the *status quo* in different terms, compared with what the EU itself does (accompanied by sympathetic national scholarship).[36]

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[31] D. Kochenov, 'On Tiles and Pillars: EU Citizenship as a Federal Denominator' in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017); C. Schönberger, 'European Citizenship as Federal Citizenship – Some Citizenship Lessons of Comparative Federalism' (2007) 19 *European Review of Public Law* 63.

[32] P. Allott, *The Health of Nations: Society and Law beyond the State* (Cambridge University Press 2002) 216.

[33] For analysis of the 'national' perspectives see e.g. A. Albi and P. Van Elsuwege, 'The EU Constitution, National Constitutions, and Sovereignty: An Assessment of a "European Constitutional Order"' (2004) 29 *European Law Review* 745.

[34] See B. de Witte, 'The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty-Revision Process' in P. Beaumont, C. Lyons and N. Walker (eds.), *Convergence and Divergence in European Public Law* (Hart Publishing 2002) 39.

[35] See, generally, A.-M. Slaughter, A. Stone Sweet and J.H.H. Weiler (eds.), *The European Court and National Courts – Doctrine and Jurisprudence* (Hart Publishing 1998); G. Martinico, 'A Matter of Coherence in the Multilevel System: Are the "Lions" Still "under the Throne"?' (2008) *Jean Monnet Working Paper* (NYU) No. 16/08.

[36] This approach is in line with (or even part of) a broader picture involving the national constitutional orders' refusal to be humbly subjected to international law. For analysis see e.g. A. Peters, 'Supremacy Lost: International Law Meets Domestic Constitutional Law' (2009) 3 *Vienna Online Journal of International Constitutional Law* 170. The European legal order has joined the same trend, gradually testing the international legal norms and principles against its own, frequently refusing to be automatically subjected to international law: D. Kochenov, 'EU Law without the Rule of Law' (2014) 34 *Yearbook of European Law* 74; P. Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue' (2015) 38 *Fordham International Law Journal* 955. Cf., e.g. *Micheletti*, C-369/90, EU:C:1992:295; *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, C-402/05 P and C-415/05 P, EU:C:2008:461; Opinion 2/13, EU:C:2014:2454. See also 'Why EU Law Claims Supremacy', Chapter 2.

The existence of two views on the same story is evident upon reading *Solange* (I[37] and II[38]), *Maastricht*,[39] or *Lisbon Treaty*[40] decisions of the *Bundesverfassungsgericht*, or decision K-18/04[41] of the Polish *Trybunał Konstytucyjny*, among numerous others. Similarly, from the perspective of EU law there exists no genuine possibility for constitutional pluralism, as the ECJ maintains EU law's unconditional supremacy even up to the point where a higher level of human rights protection must surrender, be it at national[42] or European level.[43] On both levels, therefore, constitutional narratives severely constrain the possibility for legal institutions to

[37] BVerfGE 37, 271 (1974) (*Solange I*).

[38] BVerfGE 73, 378 (1986) (*Solange II*).

[39] BVerfGE 89, 155 (1993) (*Maastricht*). For analysis see e.g. J.H.H. Weiler, 'The State "*über alles*": *Demos*, *Telos* and the German Maastricht Decision' in O. Due, M. Lutter and J. Schwarze (eds.), *Festschrift für Ulrich Everling*, vol. 2 (Nomos 1995) 1651; M. Herdegen, '*Maastricht* Decision and the German Constitutional Court: Constitutional Restraints from an "Ever Closer Union"' (1994) 31 *Common Market Law Review* 235.

[40] BVerfGE 63, 2267 (2009) (*Lisbon*). For analysis see e.g. D. Thym, 'In the Name of Sovereign Statehood: A Critical Introduction to the *Lisbon* Judgment of the German Constitutional Court' (2009) 46 *Common Market Law Review* 1795; C. Wohlfahrt, 'The *Lisbon* Case: A Critical Summary' (2009) 10 *German Law Journal* 1277; A. Steinbach, 'The *Lisbon* Judgment of the German Federal Constitutional Court – New Guidance on the Limits of European Integration?' (2010) 11 *German Law Journal* 367.

[41] Case K 18/04 of 11 May 2005, OTK Z.U. 2005/5A, esp. para. 6.4. For a critical discussion see e.g. D. Chalmers, 'Editorial: Constitutional Modesty' (2005) 30 *European Law Review* 460; D. Kochenov, *EU Enlargement and the Failure of Conditionality* (Kluwer Law International 2008) 235–237.

[42] *Stefano Melloni v Ministerio Fiscal*, C-399/11, EU:C:2013:107.

[43] Opinion 2/13, EU:C:2014:2454. For an analysis of the tension between 'constitutionality' and 'pluralism' in the context of the EU legal order, see D. Halberstam, '"It's the Autonomy, Stupid!" A Modest Defence of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) 16 *German Law Journal* 105; and 'Why EU Law Claims Supremacy', Chapter 2. For the theoretical foundations of EU law's claim of autonomy, see also 'Legality and Autonomy of EU Law: You'd Better Believe It', Chapter 3. See also G. Palombella, 'Beyond Legality – Before Democracy: Rule of Law Caveats of the EU Two-Level System' in C. Closa and D. Kochenov (ed.), *Reinforcing the Rule of Law Oversight in the EU* (Cambridge University Press 2016).

acknowledge constitutional pluralism,[44] being captured in their 'internal points of view'.[45] Recognising that pluralism is inherent in the current European legal space, its heterarchical nature[46] is prone to conflict, the underlying presumption being that law is a system of rules and that *someone* should have the ultimate say.[47]

Agreeing with Robert Schütze, such 'normative ambivalence surrounding supremacy and sovereignty can better be viewed as part of the parcel of the European Union's *federal* nature';[48] it is clear at this point that the problem of hierarchy in Europe gets resolved at different levels of law with the use of *different* reasoning. While every law student knows that EU law claims to be supreme,[49] for a German constitutionalist there is no question about the fact that '*Grundgesetz* remains the supreme law in the land also in the age of the Lisbon Treaty'.[50] Consequently 'since one of the conventional attributes of constitutional law is that it is the highest source of law within its jurisdiction, EU law is hardly constitutional in most [member] states'.[51] This situation is in no way peculiar to the EU, however: such conflict is woven right into the fabric of every real federation. Pluralism, from this perspective, is perhaps not so different from plurality after all.[52] The only unquestionable given here is the persistency of the clash between the two legal orders, as well as the fact that the whole system proves its

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[44] M. Avbelj, 'Symposium: Four Visions of Constitutional Pluralism (Conference Report)' (2008) 2 *European Journal of Legal Studies* 325: 'Miguel Poiares Maduro: Well, judges never talk about constitutional pluralism and in part that is inherent in the theories of constitutional pluralism itself. The actors that operate in the system are expected to adopt the internal perspective of that system. They have to remain faithful to the narrative that results from that internal perspective even if the narrative can be shaped and adapted to fit an external context of pluralism'. As to whether they actually *believe* in either constitutional pluralism or 'the narrative of the internal perspective', or neither, and whether that would matter at all, see also 'Autonomy and Legality of EU Law', Chapter 2.

[45] H.L.A. Hart, *The Concept of Law*, 2nd edn (Clarendon Press 1994) 89–90.

[46] See N. Walker, 'Late Sovereignty in the European Union' in N. Walker (ed.), *Sovereignty in Transition* (Hart Publishing 2003) 4; N. Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317.

[47] For a critical analysis of the legal positivist presumptions of legal pluralism, see G. Letsas, 'Harmonic Law' in J. Dickson and P. Eleftheriadis (eds.), *Philosophical Foundations of European Union Law* (Oxford University Press 2012) 95.

[48] R. Schütze, 'On "Federal" Ground: The European Union as an (Inter)National Phenomenon' (2009) 46 *Common Market Law Review* 1069, 1081, emphasis in the original.

[49] A. Simons, *Europäische Union für Dummies* (Wiley/VCH Verlag 2005).

[50] Thym, 'In the Name of Sovereign Statehood' (n. 40) 1802.

[51] Davies, 'Constitutional Disagreement' (n. 30) 3.

[52] Cf. N. MacCormick, 'The *Maastricht*-Utreil: Sovereignty Now' (1995) 1 *European Law Journal* 259.

functionality every day with astonishing consistency – all the rest changes with the narrator. This holds at least within the areas of law which are not constitutionally contested, such as the *acquis* broadly defined. Surprises begin in the area of values and principles, which are perceived of as not lying fully within the realm of the *acquis*.[53]

The good thing is that all the participants in the constant struggle are very well aware of the fragility of the federal balance – this is precisely what makes federations durable. Indeed, 'the principles and structures of classic constitutionalism are open enough, and unobjectionable enough, that complying with them is not a significant policy constraint for the EU and should not raise any structural problems'[54] – and it does not, as long as we are not talking Treaty amendment.

IV. The Transformation of Citizenship in Europe

European citizenship itself, in not repealing but complementing national citizenship as specified in the Treaties (Article 9 TEU and 20 TFEU) and in the Danish Declaration appended to the Maastricht Treaty,[55] is a definitive step in the direction of the legal affirmation of the reality of multiple identities and numerous overlapping allegiances.[56] Instead of the initial idea of belonging to an imagined community[57] and ethnocentrism, citizenship is gradually becoming more and more an issue of individual choice and is no longer overwhelmingly dominated by racial, religious, gender or other considerations.[58] Open discrimination amongst the citizens on ethnic grounds similar to the one that gave rise to the *Korematsu* case of the

[53] D. Kochenov, 'The EU and the Rule of Law: Naiveté or Grand Design?' in M. Adams, A. Meeuse and E. Hirsch Ballin (eds.), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (Cambridge University Press 2017).

[54] Davies, 'Constitutional Disagreement' (n. 30) 15.

[55] The Danish Declaration appended to the Treaty on European Union [1992] OJ C348/01.

[56] Thus clearly a form of dual nationality, since the two statuses are 'autonomous': Opinion of AG Poiares Maduro in *Janko Rottmann v Freistaat Bayern*, C-135/08, EU:C:2009:588; C. Schönberger, 'European Citizenship as Federal Citizenship – Some Citizenship Lessons of Comparative Federalism' (2007) 19 *European Review of Public Law* 63.

[57] B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, 2nd edn (Verso 1991).

[58] See C. Joppke, *Citizenship and Immigration* (Polity Press 2010).

Supreme Court is difficult to imagine in today's (Western) world,[59] just as is exclusion from naturalisation on purely racial or ethnic grounds.[60] Deprivation of citizenship based on ethnicity is simply prohibited by international law.[61] The welcome and predictable result of all these process is a 'citizenship lite: a less totalitarian and more inclusive status.[62]

It can be argued that not only the European Court of Human Rights and the UN Human Rights Committee's jurisprudence, but also the European integration within the EU and the EEA is likely to have the consequences predicted by the PCIJ in its *obiter dictum* in *Tunis and Morocco nationality decrees* case eighty-five years ago. In today's Europe the national sovereign component in the field of nationality regulation is slowly starting to give way, both

[59] *Korematsu v United States* 323 US 214 (1944). The case concerned the internment of all persons of Japanese ethnicity residing in the West Coast of the US in the 'Relocation Centres' on military order during the Second World War. It did not matter whether these persons held US citizenship or not. No matter how exotic the facts of the case might sound today, a number of openly discriminatory policies targeting people of particular ethnic backgrounds or skin colours can be found in the nearest past, let alone in the present. Consider, for instance, the British African Indians' case, when many UK citizens of Indian origin formerly residing in Africa were *de facto* deprived of *all* citizenship rights, including the right to enter their state of citizenship (See, particularly Lord A. Lester of Herne Hill QC, 'East African Asians Versus the United Kingdom: The Inside Story', Lecture of 23 October 2003); the Czech Republic's attempt to deprive large numbers of permanent residents of Roma ethnicity of the possibility to obtain Czech citizenship upon the split of the Czech and Slovak Federation in 1993 (See D. Kochenov, 'EU Influence on the Citizenship Policies of the Candidate Countries: The Case of the Roma Exclusion in the Czech Republic' (2007) 3 *Journal of Contemporary European Research* 124; R. Linde, 'Statelessness and Roma Communities in the Czech Republic: Competing Theories of State Compliance' (2006) 13 *International Journal on Minority and Group Rights* 342); or the deprivation of citizenship of persons of 'foreign' origin in the Baltic States of Latvia and Estonia upon the split of the USSR in 1991 (See D. Kochenov and A. Dimitrovs, 'EU Citizenship for Latvian Non-Citizens: A Concrete Proposal' (2016) 38 *Houston Journal of International Law* 1; D. Kochenov, 'Pre-accession, Naturalization, and "Due Regard to Community Law": The European Union's "Steering" of Citizenship Policies in Candidate Countries during the Fifth Enlargement' (2004) 4 *Romanian Journal of Political Science* 71.

[60] Which used to be regarded as 'normal' in the past: in the US, to give one example, the ability to naturalise directly depended on the skin colour. See e.g. S. Munshi, 'Immigration, Imperialism, and the Legacies of Indian Exclusion' (2016) 28 *Yale Journal of Law and Humanities* 51; D. Sohoni, 'Unsuitable Suitors: Anti-Miscegenation Laws, Naturalisation Laws, and the Construction of Asian Identities' (2007) 41 *Law and Society Review* 587, 602–608.

[61] E.g. Art. 5(1) of the European Convention on Nationality, ETS 166, Strasbourg, 6 December 1997.

[62] C. Joppke, 'The Inevitable Lightening of Citizenship' (2010) 51 *European Journal of Sociology* 37.

directly and indirectly, to an international/supranational approach.[63] The EU is becoming the first polity where citizenship both as a legal status and as a bundle of rights has moved beyond the boundaries of a nation state.[64]

Although branded as purely derivative, EU citizenship has already started altering the essence of the Member State nationalities it is derived from,[65] including the rules of loss and acquisition of such nationalities.[66] Simply put, although the acquisition and the loss of nationality are within the exclusive competence of the Member States,[67] 'in situations covered by European Union law, the national rules concerned must have due regard to the latter'.[68] EU law 'does not compromise the principle of international law […] that the Member States have the power to lay down the conditions for the acquisition and loss of nationality, [… it makes it] amenable to judicial review carried out in the light of European Union law'.[69] There is no paradox here, since the goal-oriented *raison d'être* of the EU,[70] as well as its competences, make full immunity of national areas of regulation to EU law impossible.[71] The exercise of any

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[63] D. Kochenov, 'Member State Natinalities and the Internal Market' in N. Nic Shuibhne and L.W. Gormley (eds.). *From Single Market to Economic Union* (Oxford University Press 2012).

[64] See L. Bosniak, 'Citizenship Denationalized' (2000) 7 *Indiana Journal of Global Legal Studies* 447, for the best analysis available so far of the theoretical approaches to citizenship outside the framework of a state.

[65] Art. 9 TEU; Art. 20 TFEU.

[66] Cf. M. Szpunar and M.E. Blas López, 'Some Reflections on Member State Nationality: A Prerequisite of EU Citizenship and Obstacle to Its Enjoyment' in Kochenov (ed.), *EU Citizenship and Federalism* (n. 31); D. Kochenov, 'Member State Natinalities' (n. 63).

[67] E.g. Opinion of AG Poiares Maduro in *Rottmann*, C-135/08, EU:C:2009:588, para. 17: 'la détermination des conditions d'acquisition et de perte de la nationalité, – et donc de la citoyenneté de l'Union –, relève de la compétence exclusive des États membres' (also see the references cited therein). In practice, the EU took direct part in the framing of state nationality laws on several occasions, all during the pre-accession process, when dealing with the Member States-to-be. For analysis see D. Kochenov, 'Pre-accession, Naturalization, and "Due Regard to Community Law"' (n. 59).

[68] *Janko Rottman v Freistaat Bayern*, C-135/08, EU:C:2010:104, paras. 41–45; *Micheletti*, C-369/90, EU:C:1992:295, para. 10; *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, C-200/02, EU:C:2004:639, para. 37.

[69] *Rottman*, C-135/08, EU:C:2010:104, para. 48.

[70] On the search for a new *raison d'être* for the EU, see G. de Búrca, 'Europe's *raison d'être*' in D. Kochenov and F. Amtenbrink (eds.), *The European Union's Shaping of the International Legal Order* (Cambridge University Press 2013).

[71] E.g. K. Lenaerts, 'Interlocking Legal Orders in the European Union and Comparative Law' (2003) 52 *International and Comparative Law Quarterly* 873. For the analysis of, specifically, the EU citizenship field, see

national competence ought to comply with EU law, which characterises the shift from dual to co-operative federalism in which sovereignty is pooled and no reserved domains of Member State competences exist.[72]

The very existence of the internal market[73] amplified by the notion of EU citizenship makes the retention of the pre-existing modes of regulation of such *de jure* extra-*acquis*[74] issues as the conferral and withdrawal of EU citizenship by the Member States clearly unsustainable. Internal market and EU citizenship work together to transform the nationality policies of the Member States, not by empowering the Union to act in the field of the conferral of nationalities by the Member States, but simply by bringing a profound change to the whole meaning of the Member States' nationalities in contemporary Europe.[75] This evolution is the key to the understanding of the dynamic development of the legal essence of EU citizenship of the near future, as it affects access to supranational status. The line which could be drawn between the legal concepts of Member State nationality and EU citizenship is thus becoming ever more flexible and contested.[76]

Eight Member States, including Germany, Italy, Romania and others differentiate between EU citizens and third-country nationals in their naturalization procedures.[77] These differences are not minor at all. In Italy, for example, the length of minimal legal residence in order to qualify for naturalization is drastically different for the two categories in question: while EU citizens naturalize in four years, third-country nationals have to wait six years longer.[78] The number of Member States to introduce such differences as well as the reach of the differences

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Szpunar and Blas López, 'Some Reflections on Member State Nationality' (n. 66); D. Kochenov, 'Annotation of Case C-135/08, *Janko Rottmann v Freistaat Bayern*' (2010) 47 *Common Market Law Review* 1831, 1838.

[72] See Schütze, *From Dual to Cooperative Federalism* (n. 29).

[73] Art. 26(2) TFEU.

[74] On the concept of the *acquis* see C. Delcourt, 'The *Acquis Communautaire*: Has the Concept Had its Day?' (2001) 38 *Common Market Law Review* 829.

[75] This change is also reflected in the preliminary questions submitted by the Member States' courts to the ECJ. See e.g. the questions submitted in *Rottman*, C-135/08, EU:C:2010:104, concerning the legality under EU law of a situation where a person becomes stateless and is thus deprived of EU citizenship following a fraudulent naturalisation in one of the Member States. The EU legal dimension is discovered in issues which only ten years ago would have been regarded as pertaining exclusively to the field of competences of the Member States.

[76] Szpunar and Blas López, 'Some Reflections on Member State Nationality' (n. 66).

[77] See Figure 1 appended to this contribution.

[78] Art. 9 1992 Citizenship Act (Legge N. 91/1992); G. Zincone and M. Basili, 'Country Report: Italy' (EUI EUDO Citizenship Observatory RSCAS 2009) 13.

themselves is likely to proliferate, amplifying the importance of EU citizenship, which is now capable of providing the holder with easy access to the nationalities of other EU Member States even at the formal level of the naturalization procedure, not only by providing a virtually unlimited access to residence,[79] and thus infinitely simplifying the fulfillment of any standard naturalization requirements as well.[80] Ultimately, the establishment of diverging naturalization requirements for EU citizens and third-country nationals means that a distinction is made between the acquisition of EU citizenship (necessarily coupled with a Member State's nationality) and the mere acquisition of another Member State nationality by those already in possession of EU citizenship. This is a fundamental development, bound to have far-reaching consequences for the legal essence of both legal statuses in question.

The situation of EU citizens and third-country nationals in any Member State is categorically different.[81] Naturalization in the Member State of residence is already less important by far for EU citizens than for the third-country nationals. This is true because a number of key rights formerly associated with state nationality are granted to EU citizens directly by the EU legal order. Among these are virtually unconditional rights of entry, residence, taking up employment and, crucially, non-discrimination on the basis of nationality.[82] In this context it is evident that little is left of the Member States' nationalities in the EU. An oft-cited phrase coined by Davies attributes to Article 18 of the Treaty on the Functioning of the European Union (TFEU) the abolition of the nationalities of the Member

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[79] To say nothing of the access to the majority of rights which were previously associated with nationality.

[80] Consequently, those Member States' nationals who naturalise in their new Member State of residence automatically fall within the scope of EU law even when they lost their previous Member State's nationality, 'by reason of its nature and its consequences': *Rottman*, C-135/08, EU:C:2010:104, para. 42.

[81] The EU and the Member States announced on a number of occasions that this difference is bound to be reduced, the third-country nationals gradually coming to be treated as EU citizens. However, as Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2004] OJ L16/44 overwhelmingly demonstrates the differences are there to stay. For the assessment of the legal position of the third-country nationals in the EU see e.g. D. Kochenov and M. van den Brink, 'Pretending There is No Union: Non-Derivative Quasi-Citizenship Rights of Third-Country Nationals in the EU' (2015) *EUI Working Paper* LAW 2015/07; D. Acosta Arcarazo, *The Long-Term Residence Status as a Subsidiary Form of EU Citizenship* (Brill Nijhoff, 2011); I. Ward, 'Law and the Other Europeans' (1997) 35 *Journal of Common Market Studies* 79.

[82] For a critical analysis see D. Kochenov, '*Ius Tractum* of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights' (2009) 15 *Columbia Journal of European Law* 169, 206 (and the literature cited therein).

States.[83] Legally speaking, currently it is not Member State nationality, but EU citizenship, which provides Europeans with the most considerable array of rights, so long as, by virtue of this status, rights in twenty-eight states instead of only one are extended and any discrimination on the basis of nationality is prohibited. EU citizenship's crucial role in contributing to the real value of the personal legal status of individuals is aptly illustrated not only by the fact that the objective value of nationalities of the Member States far exceeds that of any other state,[84] but also, more sadly, by UK citizenship's vast loss of value that Brexit will bring about, reducing its quality by more than a third.[85]

Successful development of the internal market is bound to diminish the legal effects of particular Member States' nationalities even further, contributing to the levelling away of the particularities among the Member State nationalities, however important and far-reaching these are proclaimed to be in the national constitutions. These developments, which are supported by the ECJ case-law on citizenship, are bound to have three main consequences. The first is the widening of the gap between EU citizens and third-country nationals in the EU even further. The second is the obvious need to adapt the Member States' nationalities to the new reality, constructing legal statuses more aware of their limitations. The diminution in importance of the nationalities of the Member States as legally meaningful statuses naturally reaffirms the rise of EU citizenship to the most prominent position in regulating the rights of EU citizens. The third aspect is democratic. Here the EU law clearly undermining the idea of the national self-government of European peoples, without, however, offering anything in return besides

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[83] G Davies, '"Any Place I Hang My Hat?" or: Residence is the New Nationality' (2005) 11 *European Law Journal* 1, 43, 55. A. Evans 'Nationality Law and European Integration' (1991) 16 *European Law Review* 190, 195, put it slightly differently: 'possession of the nationality of one Member State rather than that of another loses all real significance'.

[84] See D. Kochenov and J. Lindeboom (eds.), *Kälin and Kochenov's Quality of Nationality Index* (Hart Publishing 2019), which aims to provide an objective measurement of the quality of nationalities, based on the welfare and opportunities that a nationality offers within the conferring state as well as the freedom to travel and settle in other countries. For an introduction to the quantitative approach to nationalities, see also D. Kochenov and J. Lindeboom, 'Empirical Assessment of the Quality of Nationalities: The Quality of Nationality Index' (2017) 4 *European Journal of Comparative Law and Governance* 314.

[85] D. Kochenov, 'EU Citizenship and Withdrawals from the Union: How Inevitable Is the Radical Downgrading of Rights?' in C. Closa (ed.) *Secession from a Member State and Withdrawal from the Union* (Cambridge University Press 2017).

the talk of 'governance', which is of course, as Allott reminded us, essentially a denial of self-government, through the recourse to the 'apolitical'.[86]

Having successfully questioned the idea of a national political *demos* through EU citizenship, non-discrimination on the basis of nationality, and free movement, the EU appears to have a different 'people' in mind, as compared with the national constitutions, when it speaks of the 'peoples of the Member States'. The democracy, offered supranationally to both legal visions of each national *demos* is profoundly questionable, as its underlying rationales – *pace* Article 2 TEU – necessarily deviate from what the national constitutional systems proclaim.[87] These cannot be easily to change, since the rationales behind the supranational legal system are far removed from the EU democratic processes,[88] guarded by the ever-detailed primary law and a Court, which is faithful to this text for the lack of any better stepping stones.[89] National democracies are thus not only powerless in determining who is the actual recipient of the grace of the state, i.e., who is a *de facto* citizen, thus unable to outline the boundary of the actual *demos*. It would equally be a pretense that they control the fundamental principled modalities of own law, i.e. who the law is to serve and why: the EU Treaty logic, not open for discussion, takes care of this – a worrying reality in a Union where justice is not 'Europe's signifier'.[90]

It has taken the Member States a long time to awaken to the realization of this state of affairs. The outrage created by the decision of Malta, following Cyprus, Austria, and, earlier, Ireland, to offer its nationality and thus also EU citizenship for investment of roughly the price of a Porsche 918 Spyder[91] is telling in this respect, although it is remarkable that it took yet another citizenship-by-investment scheme for so many to realise the full consequences of EU citizenship for the transformation of Member States' nationalities – arguably in line with a

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[86] P. Allott, 'European Governance and the Re-branding of Democracy' (2002) 27 *European Law Review* 60.

[87] P. Caro de Sousa, 'Quest for the Holy Grail' (2014) 20 *European Law Journal* 499; G. Peebles, '"A Very Eden of the Innate Rights of Man"? A Marxist Look at the European Union Treaties and Case Law' (1997) 22 *Law and Social Inquiry* 581.

[88] G. Davies, 'Social Legitimacy and Purposive Power: The End, the Means and the Consent of the People' in D. Kochenov, G. de Búrca and A. Williams (eds.), *Europe's Justice Deficit?* (Hart Publishing 2015). Cf. A. Somek, 'Europe: Political, Not Cosmopolitan' (2014) 20 *European Law Journal* 142.

[89] A. Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (2009) 29 *Oxford Journal of Legal Studies* 549.

[90] S. Roy, 'Justice as Europe's Signifier' in Kochenov, de Búrca and Williams (eds.) *Europe's Justice Deficit?* (n. 88).

[91] J. Dzankic, 'The Maltese Falcon, Or: My Porsche for a Passport!' in Shachar and Bauböck (eds.), *Should Citizenship be for Sale?* (n. 28) 17.

global trend of the reduction in the importance of nationality as such, as opposed to 'personhood',[92] 'residence'[93] and other emerging categories which is really behind the citizenship for investment developments.[94] To pretend that EU citizens are not, potentially at least, quasi-nationals of any of the Member States where they choose to reside, would be to close one's eyes to the current level of evolution of EU law, which should be applauded, we argue, rather than bemoaned. Going against national exceptionalism at the core of the framing of any citizenship by deploying directly effective superior law against it, thus empowering countless individuals is splendid news, however bitter this pill is for the essential element of statehood, which is the sovereignty of who is the 'people'. Once this, necessarily random, determination, is legally questioned, there are repercussion for the national democracy, however, as we have seen.

The consequences of all these developments and, particularly, of differentiating between EU citizens and third-country nationals for the purposes of naturalization, are far-reaching indeed. Once EU citizenship – a *ius tractum* status rooted in the possession of a nationality of one of the Member States[95] – starts to also affect the rules of access to nationality, in addition to the rights formerly exclusively associated with this very nationality, thus taking over – colonizing – the status it has been derived from. Given that the essential thinking behind statehood necessarily relies on an ultimately random drawing of boundaries of belonging – however many justifications philosophers give us to explain who is and who is not worthy of the precious prize of the state's love – it would clearly be too much to expect the states to give up their powers in the conferral of the status of nationality through 'Europeanisation' or harmonization. In fact, should this happen this would amount to cancelling the idea of France, the idea of Germany and all the other states all together: an infinitely high price to pay. As a result, even though the good old France or Germany does not in fact exist in the contemporary EU as the determinant of who the *demos* is and who is entitled to rights in the national territory, this reality will not translate into law anytime soon: national citizenship regulation is bound to remain as diverse as ever, precisely because citizenship is thinning and contested more

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[92] L. Bosniak, 'Persons and Citizens in Constitutional Thought' (2010) 8 *International Journal of Constitutional Law* 9.

[93] Davies, '"Any Place I Hang My Hat?"' (n. 83).

[94] P.J. Spiro, 'Cash for Passports and the End of Citizenship', in Shachar and Bauböck (eds.), *Should Citizenship be for Sale?* (n. 28) 179. Cf. K. Surak, 'Global Citizenship 2.0 – The Growth of Citizenship by Investment Programmes' (2016) *Investment Migration Council Working Paper* No. 2016/3.

[95] Art. 20 TFEU. Kochenov, '*Ius Tractum* of Many Faces' (n. 82) 181.

intensely than ever before.[96] This has far reaching implications for legal pluralism in this area: pluralism in citizenship matters – at least at the level of access to the status – will endure for the most anti-pluralist reasons: the Member States interest in keeping the façade of control. We are speaking of an interest, which is *existential*, which is determining the very survival of the state in the context of the ever closer Union, rather than a mere fancy. Countless individuals will benefit from this pluralist approach to citizenship.

V. Pluralism as a Self-perpetuating Value in EU Citizenship Law

Precisely because EU citizenship is ultimately impossible alone, in separation from the nationalities of the Member States,[97] the power of the Member States in the area of citizenship law is severely weakened, since while each one of them taken separately can have an illusion that it controls access to EU citizenship, taken together they do not, as long as the naturalisation regimes are not harmonized – and these will never be, if the conclusions of the previous section are correct.

Huge disparities between the citizenship laws of all the Member States[98] all lead to the multiplication of the routes to acquisition of the same status of European citizenship which, as has been demonstrated above, has effectively overtaken the majority of the main attributes of nationality from the national level. In a borderless Union the current approach means that more than twenty-seven ways of acquiring the same status applicable in all the Member States are in existence.[99] In the light of federalism's potential to enhance human rights,[100] the discrepancy

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[96] Bosniak, 'Persons and Citizens' (n. 92).

[97] Arguments to make this possible have been made by academics and EU organs alike. See, e.g., most recently, European Economic and Social Committee, 'Opinion on a More Inclusive Citizenship Open to Immigrants (own-initiative opinion)' (Rapporteur P. Castaños, SOC/479, 16 October, 2013): 'The Committee proposes that, in future, when the EU undertakes a new report of the Treaty (TFEU), it amends Article 20 so that third-country nationals who have stable, long-term resident status can also become EU citizens' (para. 1.11).

[98] For detailed country-by-country information see the documents available on the web-page of the EUDO project: <http://eudo-citizenship.eu/>.

[99] Kochenov, '*Ius Tractum* of Many Faces' (n. 82) 182–186.

[100] E.g. S.F. Kreimer, 'Lines in the Sand: The Importance of Borders in American Federalism' (2002) 150 *University of Pennsylvania Law Review* 973, 980–984; S.F. Kreimer, 'Federalism and Freedom' (2001) *Annals AAPSS* No. 574, 66; M.W. McConnell, 'Review: Federalism: Evaluating the Founders' Design' (1987) 54 *University of Chicago Law Review* 1484, 1494. Applied to the context of the EU, see D. Kochenov, 'On Options

between nationality legislation in different Member States is highly beneficial for those willing to acquire a Member State nationality and, consequently, EU citizenship. Informed third-country nationals are free to choose the Member State where the access to nationality is framed in the most permissive terms,[101] in order to move to their 'dream Member State' later, in their capacity as EU citizens. The main status they are likely to benefit from, in any event, will be EU citizenship, not the particular Member State's nationality *per se*.[102]

Consequently, the Member States are unable to make a coherent claim to be able to control the access of non-nationals to their territories: no matter how they frame their citizenship laws, the mere existence of the internal market has already destroyed any direct logical connection between the territory of a particular Member State and the 'people' of that Member State. The conceptual contradiction between the nationality policies of the Member States and the main EU citizenship rights is clear. While the Member States grant nationality to those presumed to be connected with their territory or populace, on the assumption that the nationals would keep such connections, EU citizenship follows an opposing rationale, aiming at encouraging people to move, to benefit from the opportunities that the internal market has to offer and to think beyond their Member States. Consequently, third-country nationals naturalising in a particular Member State can do this for two reasons: either to stay in the Member State or to leave immediately, benefiting from the main right of EU citizenship, which is still, controversially of course, free movement.[103] Currently, the Member States seem to pretend that the latter choice is not an option, since all the naturalisation policies are built on the assumption that a

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of Citizens and Moral Choices of States: Gays and European Federalism' (2009) 33 *Fordham International Law Journal* 156.

[101] This is exactly what happened in the *Chen* case, where a Chinese mother came to Belfast in order to give birth to little Catherine in defiance of the Chinese one-child policy. The girl acquired Irish nationality by birth and immediately fell within the scope of EU law as an EU citizen falling within the scope *ratione materiae* of EU law, since the birth actually took place in the UK, creating a cross-border situation: *Zhu and Chen*, C-200/02, EU:C:2004:639. For a contextual history of the *Chen* case based on interviews with all lawyers and the referring Adjudicator involved, see 'Breaking Chinese Law – Making European One: The Story of *Chen*, Or: Two Winners, Two Losers, Two Truths', Chapter 8.

[102] For a personal experience, pointing out the dubious premises of 'repressive liberalism' underlying the policies of cultural 'integration', see D. Kochenov, '*Mevrouw de Jong Gaat Eten*: Naturalisation Biases Tested in Practice' in D. Acosta Arcarazo and A. Wiesbrock (eds.), *Global Migration: Old Assumptions, New Dynamics* (Praeger 2015) 161.

[103] S. Iglesias Sánchez, 'A Citizenship Right to Stay? The Right Not to Move in a Union Based on Free Movement' in Kochenov (ed.), *EU Citizenship and Federalism* (n. 31).

new citizen will *stay* in the Member State, which provides justification for the linguistic, cultural and other tests the new comers are asked to pass before EU citizenship and the local nationality is conferred on them. Once the EU dimension is taken into account, however, the illusory world in which the Member States are still living crumbles in a second: why would you ask of an applicant for naturalisation to be proficient in Estonian, a language which virtually no-one speaks in the EU (and the world), if it is known that the main right that naturalisation confers stemming from EU law is to *leave* Estonia and to benefit from EU citizenship rights in a greater Europe by becoming a fully accepted and protected by law member of a *demos* of a different Member State where hardly anything 'Estonian' will help? In the words of Advocate General Poiares Maduro,

> 'Tel est le miracle de la citoyenneté de l'Union: elle renforce les liens qui nous unissent à nos États (dans la mesure où nous sommes des citoyens européens précisément parce que nous sommes des nationaux de nos États) et, en même temps, elle nous en émancipe (dans la mesure où nous sommes à présent des citoyens au-delà de nos États)'.[104]

Naturalisation data coming from different countries proves that, unlike states, ordinary people are less prone to living in deeply ideological dream worlds and understand the current *status quo* pretty well. In one example, the number of applications for recognition of Polish citizenship increased almost five-fold upon Poland's accession to the EU,[105] indicating that 'Polish accession to the EU had an effect on the interest in the Polish citizenship among diaspora members',[106] or, to put it differently, the interest of the diaspora members in EU citizenship status – since this is the only fundamental addition to Polish nationality to have made it so overwhelmingly attractive on 1 May 2004. Similarly in Italy, the number of marriages involving Romanian citizens decreased substantially after Romania's accession to the EU, demonstrating that it was not Italian nationality as such, but the status of EU citizenship

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[104] Opinion of AG Poiares Maduro in *Rottmann*, C-135/08, EU:C:2009:588, para. 23.

[105] A. Górny and D. Pudzianowska, 'Country Report: Poland' (EUI EUDO Citizenship Observatory RSCAS 2009) 8: the number of applications for certification of Polish nationality in 2000 was 765. In 2004 it reached 3807. Applications for certification do not concern acquisitions of Polish citizenship, but about situations whereby people, usually descendants of Polish emigrants, who are entitled to citizenship but are not registered citizens take advantage of this right.

[106] Ibid.

that Romanians were seeking.[107] Speaking of marriages is particularly relevant in this context, since this is the main mode of acquisition of Italian nationality by those who are not given it by birth. Naturalisation by residence in the country only accounts for 1 per cent of naturalisations.[108]

The pluralist reading of access to EU citizenship, which is caused by the lack of EU powers to permit it to decide for itself who its citizens are, is beneficial for both main stake-holders affected. The Member States are happy to pretend that they regulate the issues of access to EU citizenship and state territory while they do not,[109] and the candidates for inclusion benefit from the differences in regulation of the issue of access to EU citizenship status existing between the Member States. Besides the notion of common sense, almost nothing seems to suffer from this arrangement, with the exception of the third-country nationals who frequently change their Member State of residence, or those who have ended up living in a Member State where naturalisation possibilities are restricted. Inherent and deep-rooted nationalism ideologies at the core of the self-understanding of each of the Member States make the anti-pluralist reasons behind the prevailing pluralist approach likely candidates for enduring, if not flourishing, for a very long time, thus *de facto* perpetuating pluralism in this area of law.

Consequently, it seems that the anti-pluralist proposals for harmonisation of EU citizenship law[110] that would lead to the effective loss by the Member States of the capacity to regulate access to their nationalities alone seem to be misplaced. Such proposals are clearly unacceptable, in principle, to the from the point of view of the citizens-to-be in the context of the values pluralism and potential regulatory competition between jurisdictions brings and also to the Member States themselves, potentially threatening one of last sacred pillars of their statehood remaining: the legal ability to draw the boundaries of the *demos*. The proposals of

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[107] Zincone and Basili, 'Country Report: Italy' (n. 78) 13.

[108] Ibid.

[109] It is evident that even if the EU does not step in, certain co-ordination among the Member States will arise. As early as in 1983 Evans acknowledged that 'harmonisation of the nationality laws of the Member States may ultimately prove necessary': A.C. Evans, 'Nationality Law and the Free Movement of Persons in the EEC: With Special Reference to the British Nationality Act 1981' (1982) 2 *Yearbook of European Law* 173, 189; similarly see C. Blumann, 'La citoyenneté de l'Union européenne (bientôt dix ans): Espoir et désillusion' in V. Epping, H. Fischer and W. Heintschel von Heinegg (eds.), *Brücken Bauen und Begehen: Festschrift für Knut Ipsen zum 65 Geburtstag* (C.H. Beck 2000) 3, 16.

[110] Becker is one of those who recently suggested 'harmonization – or even standardization of national citizenship across the European Union': M.A. Becker, 'Managing Diversity in the European Union: Inclusive European Citizenship and Third-Country Nationals' (2004) 7 *Yale Human Rights and Development Law Journal* 132, 159.

harmonization are not acceptable for the former, since they are likely to lead to stricter regulation on average in the EU-28 compared to that in place in the most liberal Member States.[111] The same with the latter: full harmonization of access to nationality amounts to the elimination of statehood of the component members of the European federalism. It is a shorthand for saying that there will be no more possibility of becoming Estonian or French in a way that fully internalizes the idiosyncrasies of the national founding myth: a clear assault on what the EU was created to cherish and preserve.

Full harmonisation of nationality law is thus in noone's interest and is thus most likely impossible. This being said, it would be going to far to dismiss in principle also all the mid-way solutions incorporating access to EU citizenship via Member State nationalities, in tandem with direct conferral of EU citizenship by the Union: these could take different forms and will result in more pluralism, rather than less: multiplying helpful options while preserving age-old myths.

The value of pluralism as it pertains to the acquisition and recognition of citizenship is thus not just that it conforms to laissez-faire international law. It is rather the moral value of plurality itself, being instrumental to the right of every individual to change his nationality according to his or her wishes. Harmonisation, regardless of the conflict-mitigating criteria that are characterising constitutional pluralist theories and other forms of normative pluralism[112] one may put forward, would destroy the virtues of a pluralist *ius tractum*, precisely because all routes are by themselves inevitably arbitrary – or in the words of Shachar, a birthright lottery.[113]

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[111] In one example, it is unlikely that being appointed a full professor at an institution of higher education would be enough to become a European citizen (exemplifying the Austrian case) once the laws of the twenty-seven Member States are harmonised: Art. 25(1) of the Austrian Nationality Act, FLG No. 311/1985.

[112] On using common general principles and interpretative techniques to avoid conflicts between legal orders and constitutional deadlock, see e.g. Walker, 'The Idea of Constitutional Pluralism' (n. 46); M. Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in N. Walker (ed.), *Sovereignty in Transition* (Hart Publishing 2003); A. Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (Oxford University Press 2009). A Dworkinian proposal to use unwritten principles as conflict rules is put forward by M. Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) 11 *European Law Journal* 262. MacCormick resorts to Kelsenian monism as a basis for constitutional pluralism, N. MacCormick, *Questioning Sovereignty* (Oxford University Press 1999) ch. 7.

[113] A. Shachar, *The Birthright Lottery. Citizenship and Global Inequality* (Harvard University Press 2009). See also D. Kochenov, 'Citizenship for Real: Its Hypocrisy, its Randomness, its Price' in Shachar and Bauböck (eds.), *Should Citizenship be for Sale?* (n. 28) 27–29.

As it must be recalled that the notion of citizenship is ultimately founded on exclusion, only the pluralism of EU citizenship acquisition makes it more inclusive, as well as, ironically, deeply respectful of the underlying exclusionary ideal, underlying the prevailing views of *demos*, democracy and the like, however contested these are in practice in the light of the EU's very existence and the rise of its citizenship to prominence.

VI. Conclusion

The pluralistic nature of the rules of citizenship acquisition is premised in the lack of any clear-cut and well-established regulation by international law, which remains largely hypothetical, basically deferring to states the competence to whatever they want. Even in the context of recognition, the ICJ's judgment in *Nottebohm* and the 'genuine link' rule have apparently not crystalized into customary international law, and are oblivious outside the specific circumstances of the case itself. This is only laudable if one acknowledges that citizenship by definition is based on random exclusion. Privileging any form(s) of exclusion over others that are equally arbitrary would be absurd.

EU citizenship remains to this day an anomaly as the only successful transnational regulation of citizenship. Its derivative nature – one can only become an EU citizen by becoming a citizen of one of the Member States – in conjunction with the plurality of acquisition rules of Member State nationalities entails that there are many roads toward becoming a European citizen, freely up for choice. It is only logical that third-country nationals that aspire EU citizenship opt for the most convenient way of acquiring any of the Member States' nationalities, regardless of whether they are interested in living in or even traveling to the conferring state's territory. The story of how the young Chinese national Man Lavette Chen secured EU citizenship for her little baby Catherine without ever stepping into the country of which Catherine became a national is only one example of how human (and legal) creativity can be used to acquiring the status of EU citizenship.[114]

Calls for harmonisation of citizenship rules should be firmly rejected. Precisely the plurality of national citizenship acquisition rules is what makes the scope of exclusion of EU citizenship somewhat less arbitrary than other statuses. While international law gives states the impression that only they are in full control of their nationality policies, EU citizenship severely

[114] See 'Breaking Chinese Law – Making European One: The Story of *Chen*, Or: Two Winners, Two Losers, Two Truths', Chapter 8.

obstructs this alleged control, for effectively the ties between citizenship and the territory of the conferring state have been destroyed long ago – at least in the EU. Since to accept this however obvious truth at the level of the legal world making, to borrow from Bourdieu, would mean to question the very existence of sovereign European states, harmonization of nationality law will not be soon forthcoming, ensuring flourishing pluralism in this crucially important area of law – albeit for the most non-pluralist reasons.

Figure 1

The table of the Member States applying different naturalization rules to EU citizens and third country nationals

Member State	Differences in naturalization rules
Austria	6 years of residence for EU and EEA nationals / 10 years for 3rd country nationals.
The Czech Republic	3 years of residence for EU and EEA nationals / 5 years for 3rd country nationals
Germany	The general renunciation of the previous nationlity requirement does not apply to EU and Swiss citizens.
Greece	3 years of residence for EU citizens / 7 years for 3rd country nationals.
Italy	4 years of residence for EU citizens / 10 years for 3rd country nationals.
Latvia	The general requirement of the renunciation of the previous nationality does not apply to EU, EEA and Swiss citizens (as well as a handful of other nationalities, such as Australia, Brazil and New Zealand).
Romania	4 years of residence for EU citizens / 8 years for 3rd country nationals.
Slovenia	The obligatory renunciation of the previous citizenship requirement does not apply to EU citizens if their Member State of nationality applies the same approach to Slovenians.