■ ARTICLES

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The European Court of Justice and Citizenship of the European Union: New Developments Towards a Truly Fundamental Status

ABSTRACT

In two recent, revolutionary decisions, – Janko Rottmann C-135/08 and Ruiz Zambrano C-34/09 – the European Court of Justice has firmly emancipated the status of citizenship of the Union from the "cross-border" requirement and has inaugurated a new area for the protection of rights closely linked to the core of sovereignty of States, – nationality and residence. This Article examines these two judgments and argues that they take the construction of citizenship towards a federal status. The "genuine enjoyment of the substance of citizenship rights" has emerged as a new legal category that is capable of providing a uniform and general protection and entails the affirmation of a core of rights of a supranational nature. This new development raises questions as to whether the ECJ's expansionist reading of citizenship constitutes a legitimate exercise of judicial power and as to what will be the relationship between citizenship and EU fundamental rights. We conclude by exploring the potential of the judgments analyzed in terms of placing Union citizenship at the center of the emergence of a constitutional patriotism in Europe.

I. INTRODUCTION. JANKO ROTTMANN AND RUIZ ZAMBRANO: TWO MEN, ONE DESTINY?

In two judgments recently issued, the Court of Justice of the European Union (ECJ hereinafter) has been confronted with fundamental questions regarding the loss and acquisition of European citizenship, its structural functioning and the rights attached to it. Without any risk of falling into legal sensationalism we can state that these two judgments have profound transforming consequences for the constitutional development of the status of the citizenship of the Union, and

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bear the seed for a generation of case law that promises to offer a new progressive approach to the current limitations and shortcomings that characterize the status[1].

Janko Rottmann, an Austrian national who subsequently acquired German nationality, lost his (Austrian) nationality of origin by operation of national law, which – faithful to the spirit of the obsolete Convention on the reduction of cases of multiple nationality[2] – favored this result. Nonetheless, soon after these developments, the German authorities learnt that Mr. Rottmann had been involved in criminal proceedings, a fact that he had not mentioned during the procedure leading to the acquisition of nationality. This was regarded as fraud under German law, entailing the revocation of the previous concession of nationality. The question before the European Court of Justice aimed at discerning whether the withdrawal of German nationality due to fraud would be in accordance with EU law in a case where the person concerned would thereby become stateless, and therefore be deprived also of the citizenship of the Union. Even though the European Court of Justice found the reasons adduced by German authorities to be a permitted justification for the withdrawal of nationality under international law and the principle of proportionality, it positively engaged in narrowing the margin of appreciation of Member States in dealing with matters related to loss (and arguably) the acquisition of nationality, confirming that such a situation falls "by reason of its nature and its consequences" within the ambit of European law[3].

Mr. *Ruiz Zambrano* is a Colombian national, father of two children of Belgian nationality born during his irregular stay in that Member State, whose asylum and subsequent residence applications were repeatedly rejected by Belgian authorities. The denial of a right of residence and of a work permit to Mr. Ruiz Zambrano, and the non-recognition of unemployment benefits for him, led the referring court to question the compatibility of such national regulation with the rights that EU law grants to the children of the applicant, who are citizens of the European Union. The Court, disregarding the strong objections related to the purely internal character of the situation, declared the need under EU law to grant a residence and work permit for ascendants of minor European citizens in the State whose nationality they possess in order to safeguard "the genuine enjoyment of the *substance of the rights* conferred by virtue of their status as citizens of the Union"[4].

The two Grand Chamber judgments have their origin in very distant factual situations that give rise to very different legal problems and are addressed by the Court with different resources. However, some superficial similarities rapidly

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1 For the general structure and content of European citizenship: Stephan Kadelbach, *Union Citizenship* in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (A. von Bogdandy & J. Bast eds., 2010).

2 ETS 043. On recent trends and the relationship of this instrument with the citizenship of the Union see: Etienne Pataut, *Citoyenneté de l'Union européenne et nationalité étatique*, 46 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 617, 622 (2010); Gerard-René de Groot & Maarten P. Vink, *Loss of Citizenship. Trends and Regulations in Europe*, EUDO COMPARATIVE CITIZENSHIP ANALYSIS, October 2010, ¶ 6, available at SSRN: http://ssrn.com/abstract=1694701.

3 Case C- 135/08, Rottmann, 2010, not yet reported, ¶ 42.

4 Case C-34/09, Ruiz Zambrano, 2011, not yet reported, ¶ 42. Emphasis by the authors.

bring an attentive reader to engage in an exercise of correlation: both are Grand Chamber cases decided purely on the basis of the citizenship of the Union and both are solved by reference to the Treaties without mediation of secondary law. On a deeper note, both represent a radical deviation from the previous reasoning of the Court which had always required – even if flexibly regarded – a cross-border element that would entail a link between Union citizens and a Member State other than their State of nationality[5]. By relinquishing the need for a cross-border element, the two decisions contribute to the elevation of the status of the citizenship of the Union to something closer to a real "fundamental status"[6]. This far-reaching development has complex implications for the overall constitutional conception of the relationship of the Union and the individuals under its jurisdiction, since it paradoxically avoids any formal recourse to the traditional jurisprudential approach to fundamental rights, of which no mention is to be found in the grounds of neither of the judgments in the cases *Rottmann* and *Ruiz Zambrano*.

The reasoning of the Court in *Rottmann*, but even more in *Ruiz Zambrano*, is laconic, extraordinarily brief, simple and meaningful, recalling the style of the most important constitutional cases of the early times. This concise resolution cannot hide the complexity and perplexity that envelope the pronouncements, which condemn the interpreter – as is usual in EU law – to read between the lines and to deduce the implications not only from the elements of reasoning explicitly declared, but from what has not been expressly written by the Court and by drawing on the Advocate General's more detailed opinion.

Assuming the role of the interpreter, if we draw a straight line linking the pronouncement of the Court in the *Janko Rottman* case with the *Ruiz Zambrano* judgment, the projections announced are revolutionary for the structural and material evolution of the status of Union citizenship. The clarification of the limitations imposed by EU law on the competences of Member States in the definition of State nationality and the abandonment of the cross-border element in cases where the new "substance" of citizenship rights are affected, are two developments that strongly impact on the configuration of the citizenship of the Union as it has been traditionally understood. What exactly the new "substance" of citizenship entails, remains a most intriguing question that will be subject to new developments in the near future[7].

Just one month after the landmark judgment in *Ruiz Zambrano,* the ECJ has further elaborated the new "substance" concept in its subsequent ruling in the *McCarthy* case[8]. These systematic developments denote a deliberate attempt by the Court at delineating the contours of this fundamental legal status. Indeed, until now, jurisprudential developments in the field of the citizenship of the

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5 *E.g.* Case C-85/96, Martínez Sala, 1998, E.C.R. I-2591; Case C-274/96, Bickel and Franz, 1998 E.C.R. I-7637; Case C-224/98, D'Hoop, 2002 E.C.R. I-6191; Case C-60/00, Carpenter, 2002 E.C.R. I-6279; Case C-353/06, Grunkin Paul, 2008, E.C.R. I-7639.

6 The Court has repeatedly declared that citizenship of the European Union is "destined to become the fundamental status of nationals of the Member States", Case C-184/99, Grzelczyk, 2001 E.C.R. I-6193, ¶31.

7 In light of pending cases such as cases C-40/11 Yoshikazu Iida and C-256/11 Dereci.

8 C-434/09, McCarthy, 2011, not yet reported.

Union, even if progressive, had been criticized by some authors for lacking a "clear line and a coherent concept of what it is to be a European citizen"[9].

The purpose of this paper is the joint consideration of these recent judgments in order to shed some light on their meaning and to assess their implication for the status of Union citizenship. We argue that the two judgments advance the construction of the citizenship of the Union towards an (at least quasi-)federal status, independent of any cross-border or economic rationale. Inevitably, this raises important issues with regard to the legitimacy of the ECJ in defining this vital element in the constitutional evolution of the Union. Finally, the question arises as to the potential of this development as a judicial gateway to overcome the limitations in the applicability of fundamental rights in the European Union and its meaning as the potential basis for a European constitutional (rights) patriotism.

II. RECASTING THE STRUCTURE AND FUNCTIONING OF THE CITIZENSHIP OF THE EUROPEAN UNION

a. The EU Model of Supranational Citizenship: Structure and Limitations

The status of the citizenship of the Union appeared for the first time in the Treaty of Maastricht[10], contemporaneously to the significant terminological mutation that eliminated the concept "economic" from the name of the original international organization (European Economic Community) and that created a second and overarching framework for integration – the European Union – that finally absorbed and superseded the more functional conception of the Community[11]. Significantly, the supranational citizenship status – even when its regulation and core meaning were to be found in the Treaty of the European Community (TEC hereinafter)[12] – was always proclaimed with regard to the Union[13].

The original conception of the citizenship of the Union was destined to be politically charged but modest in terms of legal content[14]. Indeed the introduction of EU citizenship is to be understood in the framework of the political battle to overcome the disaffection of the European population that perceived the integration process as something technocratic, distant and merely focused on economic development[15]. But the legal foundations of the new status were strictly

9 Samantha Besson & André Utzinger, *Introduction: Future Challenges of European Citizenship – Facing a Wide-Open Pandora's Box*, 13 Eur. L. J. 573.

10 *1992 O.J. (C 191).*

11 After the Reform of the Treaty of Lisbon. *See* Article 1 Treaty of the European Union 2010 O.J. (C 83) 13.

12 Part II Treaty on the Functioning of the European Union (TFEU), 2010 O.J. (C 83) 47.

13 Elisa Pérez Vera, *Citoyenneté de l'Union européenne, nationalité et condition des étrangers*, 261 Recueil des cours de l'Academie de Droit International 243, 331 (1996).

14 For an account of the early appreciations of the added value of European citizenship *see* Dora Kostakopoulou, *European Union Citizenship: Writing the Future*, 13 Eur. L. J. 623, 624 (2007).

15 On the process leading to the introduction of the citizenship of the Union *see* e.g. Elisa Pérez Vera, *supra* note 12; Diego J. Liñán Nogueras, *La ciudadanía de la Unión Europea* El Derecho

designed in order to deprive it from any significant – or at least threatening in terms of sovereignty – legal meaning[16].

In the first place, – as is usual in the early stages of federal integration processes[17] – the mode of acquisition was left completely in hands of the Member States, since the citizenship of the Union is only acquired through the acquisition of the nationality of one of its Member States[18]. This approach was reinforced by two developments destined to insulate the competence of States over the acquisition of the citizenship status: a declaration stating that "the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned"[19] and the modification introduced in the Treaty following the prescriptions of the Edinburgh Declaration to ensure the Danish ratification of the Maastricht Treaty stating that "[c]itizenship of the Union shall complement and not replace national citizenship"[20].

In the second place, the rights attached to the new status were limited to the preexisting rights already granted by Community law plus some very limited rights concerning the relationship of citizens with EU institutions such as the right to vote in European elections or to contact the European Ombudsman. The central and most important citizenship right – the right to move and reside freely in the Member States – was made "subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect"[21], taking the significant turn of making a "constitutional right" dependent upon the qualifications

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COMUNITARIO EUROPEO Y SU APLICACIÓN JUDICIAL (G. C. Rodríguez Iglesias & D. J. Liñán Nogueras, cords., 1993).

16 Article 20 TFUE reads as follows "1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:
(a) the right to move and reside freely within the territory of the Member States; …"
Art. 21 TFUE: "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 the Treaties and by the measures adopted to give them effect."

17 For a comparison with the U.S., Germany and Switzerland, *see* Christoph Schönberger, UNIONSBÜRGER –EUROPAS FÖDERALES BÜRGERRECHT IN VERGLEICHENDER SICHT, (Mohr Siebeck, 2006); Gerard-René de Groot, *The Relationship between Nationality legislation of the Member States of the European Union and European citizenship* in EUROPEAN CITIZENSHIP: AN INSTITUTIONAL CHALLENGE (M. La Torre ed., 1998) at 115.

18 Massimo Condinanzi, Alessandra Lang & Bruno Nascimbene, CITIZENSHIP OF THE UNION AND FREE MOVEMENT OF PERSONS (Nijhoff 2008) at 6.

19 Declaration nº 2 on nationality of a Member State, annexed by the Member States to the final act of the Treaty on the European Union, 1992 O. J. (C 191) 98.

20 Modification introduced by the Treaty of Amsterdam, *1997 O. J. (C 340) to implement the compromise reached through the Edinburgh decision 1992 O. J. (C 348) 1.* On the impact of the Amsterdam Treaty in the concept of European citizenship *see* Dora Kostakopoulou, *European Citizenship and Immigration after Amsterdam: Silences, Openings, Paradoxes*, 24 JOURNAL OF ETHNIC AND MIGRATION STUDIES 639 (1998); Carlos Closa, *EU Citizenship at the 1996 IGC*, in DUAL NATIONALITY, SOCIAL RIGHTS AND FEDERAL CITIZENSHIP IN THE US AND IN EUROPE: THE REINVENTION OF CITIZENSHIP, 293 (R. Hansen & P. Weil, eds., 2002).

21 Ex-Art. 18 TCE; Art. 21 TFEU.

established by secondary legislation[22]. Even though the effects of such conditionality have increasingly been minimized by the Court of Justice[23], the persistence of these qualifications in the subsequent versions of the Treaty has lead to considerable legal uncertainty as to their practical implications[24].

A consideration of European citizenship strictly based on a narrow reading of the provisions of the Treaty that contain its explicit regulation would produce an impression of simplicity of the legal regime and impact in terms of individual rights. But major complexities arise when we consider that the status of citizenship of the Union has been built upon a well-developed and pre-established regime of rights granted by EU law to nationals of the Member States[25]. A first and fundamental remark points to the differentiation between rights that are proclaimed directly with regard to the Union, and those rights that are designed to be asserted with regard to Member States. This dichotomy was conceptualized by Elisa Pérez Vera who properly distinguished between "droits qui s'exercent à l'interieur des Etats members" and "droits dont l'exercise concerne directement les institutions communautaires"[26].

This differentiation is of paramount importance, since the right of free movement and residence – buttressed by the principle of equal treatment – constitutes by far the most relevant component of the bundle of rights conferred by the status of citizenship of the Union. Not in vain, the first category of rights that have historically engrossed the legal status of the nationals of the Member States is the set of rights activated by "cross-border" activities, linked to the exercise of the fundamental freedoms that predate the existence of the citizenship of the Union. They are, principally, the right to enter a foreign territory, the right to settle in residence, the right to engage in economic activities of different natures (active and passive) and the right to be treated without discrimination on grounds of nationality within the material scope of EU law[27]. Free movement rights

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22 In this sense *see* Dimitri Kochenov, *Ius Tractum of many faces: European citizenship and the difficult relationship between status and rights*, 15 COLUM. J. EUR. L 169, 194 (2009).

23 See Michael Dougan, *The Constitutional Dimension to the Case Law on Union Citizenship*, 31 EUR. L. REV. 613.

24 The Court has repeatedly confirmed that the economic conditions of residence remain in place. But these limitations have to be applied with due regard to the general principles of EU law and to the principle of proportionality (Case C-456/02, Trojani, 2004 E.C.R. I-7573 at paras. 32 and 33), which can considerably relativize their practical implications. See, Ferdinand Wollenschläger, *A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration*, 17 EUR. L. J. 1 (2011) 18. Since the entry into force of Directive 2004/38, these conditions and limitations apply only until the acquisition of the right of permanent residence. The interaction of the conditions and limitations applicable to previous periods of residence in order to achieve permanent residence under Directive 2004/38 has been recently clarified: (Judgements of 21 July 2011, Case 325/09, Dias and of 7 October 2010 in Case C-162/09 Lassal, not yet reported).

25 Characterized as "embryonic Forms of Union Citizenship", Francis G. Jacobs, *Citizenship of the European Union – A Legal Analysis,* 13 EUR. L. J. 591, 592 (2007).

26 "Rights which are exercised within the Member States" and "rights whose exercise directly concern Community institutions " (Translation by the authors), Elisa Pérez Vera, *Citoyenneté de l'Union européenne, nationalité et condition des étrangers*, 261 RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL 243 (1996).

27 To be found today in Title IV of Part III of the Treaty, that regulates the free movement of workers, the freedom of establishment and the provision of services.

– even if soon emancipated from the traditional approach of public international law through the denial of any reciprocity requirements[28] and through the characterization of the European legal order as an order that creates rights not only for States but also for their citizens[29] – still retain some reminiscences of a regulation with an inter-state focus. Indeed, free movement rights and the prohibition of discrimination on grounds of nationality are still influenced by an inter-state perspective[30]. Therefore, the protection of European Law – in the realm of free movement and the equal treatment principle – has traditionally been triggered when a cross-border element was to be found, inasmuch as the rights ensured were usually rights to be asserted against a State other than the State of nationality.

The creation of a citizenship of the Union did not entail a sudden departure from this approach. Indeed, Art. 20 TFEU expressly links the status of Union citizenship with the already existing *acquis* stating that "citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties." Moreover, all the components traditionally framed under the conceptual umbrella of "free movement rights" have been wholly absorbed by Article 21 TFEU. This apparently simple legal operation bears with it important complexities that mostly emanate from the tension between the inter-state approach to the status and rights to be granted to "nationals of the Member States" and the creation and development of a citizenship that is supranational in nature.

The tension between the coexisting rights of cross-border exercise and those of federal nature is thus interiorized and, at the heart of the material content of European citizenship a paradoxical situation emerges: whereas the new status aims at creating an overarching concept destined to give rise to a uniform status, the core content of that status is a right of international nature based upon an inter-state or cross-border rationale, which introduces a profound division among movers and non-movers[31]. This paradox seems to be recurrent in the European integration process: also in the framework of the internal market, defined as an area without internal borders, borders still matter since they determine the possibility to eschew the wholly internal rule[32].

This design of citizenship demonstrates its conception as an instrument of membership in a federal system under construction where, due to current balance in the allocation of competences, the horizontal component of citizenship – based in equal treatment – has been for a long time the central element[33].

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28 Delphine Dero, LA RECIPROCITE ET LE DROIT DES COMMUNAUTES ET DE L'UNION EUROPEENNES, (Bruylant, 2006).

29 Case 26/62, Van Gend en Loos, 1963 E.C.R. 12.

30 Massimo Condinanzi, Alessandra Lang & Bruno Nascimbene, CITIZENSHIP OF THE UNION AND FREE MOVEMENT OF PERSONS (Nijhoff 2008) at 8.

31 For an account of the literature on the resulting phenomenon of reverse discrimination see infra n. 75.

32 Miguel Poiares Maduro, *The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination*, in THE FUTURE OF REMEDIES IN EUROPE, 117 (C. Kilpatrick, T. Novitz & P. Skidmore, eds. 2000) at 126.

33 Rooting the horizontal preponderance in the design of EU citizenship with a federal conception, Paul Magnette, CITIZENSHIP: THE HISTORY OF AN IDEA, 177 (European Consortium for Political Research 2005).

Nonetheless, the petrified conception of the citizenship of the Union focused in this preliminary stage has had as a consequence that the entire conception of the citizenship of the Union has been strongly influenced by the pre-existing structure of rights of free movement. Placed at the core of the citizenship of the Union, the cross-border connection intrinsic to free movement rights seems to have contaminated the general understanding of the new status, leading to a confusion of the part with the whole.

The seminal design of the citizenship of the Union that we have just described has already been the subject of a first saga of innovative case law, which decoupled the right to move and reside freely within the territory of the Member States from the conditions and limitations provided for in secondary law – mostly in Directive 2004/38/EC[34] –, by finding in the citizenship provisions of the Treaty a directly effective right of free movement and residence[35]. According to the ECJ, Union citizenship is destined to be the fundamental status of nationals of the Member States[36], thus evoking its idealist *raison d'être* as a means to foster the identification of citizens with the EU and with the potential to create what has so often been bemoaned as lacking in the EU: a European demos[37]. Understood as such, Union Citizenship has been interpreted by the ECJ in conjunction with the powerful principle of prohibition of discrimination on the grounds of nationality, extending the mandate of equal treatment to spheres subjected to the exclusive competence of States in cases with (sometimes potential) cross-border implications[38], even giving rise to a social content for European citizenship and stipulating a (limited) duty to solidarity[39]. Nonetheless, despite all these far-reaching developments, as one commentator has rightly put it, until recently, a major part of the rights attached to the status of Union citizenship could be

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34 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 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 O.J. (L 158) 77.

35 *E.g.* Cases C-413/99, Baumbast and R, 2002 E.C.R. I-7091; C-85/96, Martinez Sala, 1998 E.C.R. I-2691; C-200/02, Zhu and Chen, 2004 E.C.R. I-9925 See Michael Dougan, *The Constitutional Dimension to the Case Law on Union Citizenship*, 31 Eur. L. Rev. 613; Christiaan Timmermans, *Martínez Sala and Baumbast revisited;* Jo Shaw, *A View of the Citizenship Classics: Martínez Sala and Subsequent Cases on Citizenship of the Union;* Augustín José Menéndez, *European Citizenship after Martínez Sala and Baumbast: Has European Law Become More Human but Less Social?*; Carlos Closa Montero *Martínez Sala and Baumbast: an institutionalist analysis,* in The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty (M. Poiares Maduro & L. Azoulai eds., 2010).

36 Case C-184/99, Grzelczyk, 2001 E.C.R. I-6193, since then the ECJ has constantly repeated this formula.

37 *See e.g*. recent decision of the German Constitutional Court on Lisbon Treaty (VerfGE 123, 267) as well as earlier one on the Maastricht Treaty (BVerfGE 89, 155), also Dieter Grimm, *Does Europe Need A Constitution?*, 1 Eur. L. J. 282 (1995), critical Jürgen Habermas, *Remarks on Dieter Grimm's* Does Europe Need A Constitution?, 1 Eur. L. J. 303 (1995), J. H. H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, 1 Eur. L. J 219 (1995).

38 Cases C--148/02, Garcia Avello, 2003 E.C.R. I-11613; C-224/02, Pusa, 2004 E.C.R. I-5763; C-403/03, Schempp , 2005 E.C.R. I-6421; C-353/06, Grunkin and Paul, 2008, E.C.R. I-07639.

39 Cases C-209/03, Bidar, 2005, E.C.R. I-2119; C-184/99, Grzelczyk, 2001, E.C.R. I-6193; C-138/02, Collins, 2004, E.C.R. I-02703; C-456/02, Trojani, 2004, E.C.R I-07573.

reconducted to the dynamics of the general principle of non-discrimination on grounds of nationality[40].

All in all, this structural design, because of its cross-border servitude and its derivative nature, has for a long time curtailed the potentialities of the citizenship of the Union to become a truly federal citizenship. Moreover, the state monopoly on determination of status and the need of cross-border connections to trigger the protective elements of European citizenship have continuously led to dysfunctions attentively addressed and criticized by the doctrine[41]. The judgments in the cases *Ruiz Zambrano* and *Rottmann* constitute in this sense a new challenge to the attempts to restrict European citizenship to the narrow version laid down in secondary law, pointing for the first time at the existence of an essential and uniform core, immune not only to secondary law constraints but also to inter-state connotations.

b. The growing limits to the monopoly of States over the determination of loss (and acquisition?) of European citizenship

The absolute power over the definition of the community of European citizens through the exclusivity of the competence to determine the beneficiaries of state nationality is progressively being eroded. The possibility to introduce limitations on the basis of European law was announced in the *Micheletti* case[42], and gave rise to a lively doctrinal debate about what these limitations might be[43]. The judgment in the *Rottmann* case has given a response to some of these anxieties, formulating a general proviso that can potentially subject any Member States'

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40 Dominik Düsterhaus, *Union Citizenship after Ruiz Zambrano or hoy many Rights are there in a Status?* Conference Paper presented at the I UAM International Conference on EU Law: Recent Trends in the Case Law of the European Court of Justice of the European Union (2008-2011), Faculty of Law, 14th and 15th of July, 2011

41 E.g. Dimitri Kochenov, *Ius Tractum of many faces: European citizenship and the difficult relationship between status and rights*, 15 Colum. J. Eur. L 169 (2009); Willem Maas, *Unrespected, Unequal, Hollow? Contingent Citizenship and Reversible Rights in the European Union,* 15 Colum. J. Eur. L. 265.

42 Case C-369/90, Micheletti and others, 1992, E.C.R. I-4239. In this case, the Spanish administration denied the granting of a residence card for European citizens to Mr. Micheletti, who held Argentinean and Italian nationality. The ECJ rejected the Spanish argument that tried to limit the effects of Italian nationality, applying the criterion of the "genuine link" as enshrined in the Spanish Civil Code. The Court declared that "Under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality. However, it is not permissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty" ¶10.

43 *E.g.* Gerard-René De Groot, *Towards a European Nationality,* 3 Electron. J. Comp. Law., 1 (2004); Gerard-René de Groot, *The Relationship between Nationality legislation of the Member States of the European Union and European citizenship* in European Citizenship: an Institutional Challenge (M. La Torre ed., 1998); Stephen Hall, *Loss of Union Citizenship in Breach of Fundamental Rights*, 21 Eur. L. Rev. 129, (1996); Síofra O'Leary, The evolving concept of Community Citizenship (Kluwer, 1996) at 57 *et seq.*; Pilar Juárez Pérez, Nacionalidad Estatal y Ciudadanía Europea, (Marcial Pons, 1998).

decision leading to the deprivation of nationality (and arguably also its granting) to the limitations imposed by the Treaty and general principles of EU law.

This development would be no more than a repetition and application of the already well-known formula – 'in situations covered by European Union law, the national rules concerned must have due regard to the latter'[44] – already applied to the realm of nationality in the *Micheletti* case, were it not for the fact that this time this reasoning is not linked with the exercise of free movement in order to indicate that we are in a situation that is 'covered by EU law'[45]. Even if, adopting a narrow reading of the case, one would be inclined to consider that the situation in *Rottmann* was of cross-border nature, the development that followed with the *Ruiz Zambrano* case entitles us to conclude that the existence of a cross-border element has been rendered superficial, at least, when possession of EU citizenship or its essential content is threatened.

The superseding of the need for trans-boundary connections – which will be commented upon in depth in the next section – limits for example Member States' free disposal over the determination of the beneficiaries of European citizenship, regardless of any functional approach with reference to the promotion of an internal market conception of free movement rights. Withdrawal of nationality will have, in *any case*, to be compatible with EU law, including general principles like the proportionality principle and fundamental rights[46], under the monitoring of the ECJ[47]. Citizenship of the Union hence takes another step towards a complete decoupling from any previous market citizenship connotations, asserting that it is in itself worthy of protection at the supranational level. As one author eloquently puts it, Article 20 TFEU has been construed "as conferring a directly applicable right to be a Citizen of the Union"[48].

Most problematic is the application of this reasoning to the acquisition of nationality of a Member State of the EU in absence of any other element that would bring the situation under the realm of EU law. A conservative reading would emphasize the result achieved by the *Kaur* judgment[49] and its restatement by the ECJ in the *Rottmann* case[50]. Deprivation of national citizenship will be a

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44 Cases C-274/96, Bickel and Franz, 1998 E.C.R. I-7637, ¶17; C-148/02, Garcia Avello, 2003, E.C.R. I-11613, ¶25; C-403/03, Schempp, 2005, E.C.R. I-6421, ¶19; C-145/04, Spain v United Kingdom, 2006, E.C.R. I-7917, ¶78.

45 Koen Lenaerts, *Federalism and the Rule of Law: Perspectives from the European Court of Justice Fordham International Law Journal*, 33 FORDHAM INT'L L.J. 1338 (2010).

46 For the discussion on fundamental rights see Part IV of the present work.

47 For an early consideration of this possibility *see*: Stephen Hall, *Loss of Union Citizenship in Breach of Fundamental Rights*, 21 EUR. L. REV. 129, (1996).

48 Dominik Düsterhaus, *supra* note 40.

49 Case C-192/99, Manjit Kaur, 2001 E.C.R. I-01237. In this case the Court confirmed that the definition of who is a national of the United Kingdom is to be made by reference to the Declaration annexed by this Member State to the Treaty of the European Union, even if such declaration leaves British Overseas Citizens outside the definition of British citizens for EU purposes. After stating the relevance of the Declaration in order to determine British nationality for EU purposes, the Court declared in ¶25 of its judgment that "adoption of that declaration did not have the effect of depriving any person who did not satisfy the definition of a national of the United Kingdom of rights to which that person might be entitled under Community law. The consequence was rather that such rights never arose in the first place for such a person".

50 The Court refers to Kaur in ¶49 of Rottmann in order to differentiate both situations.

"situation covered by EU law" since this person would already have enjoyed the citizenship of the Union, but this would not be the case with regard to the acquisition of citizenship. Notwithstanding the fact that this is the most plausible reading, some arguments can be advanced to defend an interpretation that would extend the consequences of *Rottmann* also for the *acquisition* of European citizenship. The wording of the judgment provides a justification, since it expressly determines that the principles enunciated by the Court would also be applicable to the reacquisition of nationality in Austria[51]. In the past, some authors have argued in this way from the viewpoint of the principle of loyal cooperation, considering that it imposes some limitations on the discretion of Member States in granting their own nationality[52]. Moreover, the forward-looking reasoning that impregnates the judgment in the *Ruiz Zambrano* case also casts some light in this respect, since the Court seems to have adopted a programmatic stance that looks more to the potential enjoyment of the rights attached to EU citizenship than to the past exercise of those rights. An arbitrary regulation of access to nationality, contrary to fundamental rights provisions, penalizing the exercise of EU rights of free movement by third country nationals[53], or disregarding the interaction of the legal regimes, could arguably be considered as a situation falling within the realm of Union law.

The development of a common migration policy – based upon the principles of integration and equitable treatment[54] – would also be in favor of a progressive application of European outer limits to the exclusive competence of states in the area of acquisition of citizenship. Indeed, European law has started to affect the competences of the Member States strongly in immigration and integration matters, setting out fundamental principles and other legal constraints of the national margin of appreciation. This development leaves the absolute isolation of naturalization from the influence of EU law in a delicate position, as the

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51 Some authors point at the application of these limitations also to the acquisition of nationality: Dimitri Kochenov, *Case C-135-/08, Janko Rottmann v. Freistaat Bayern, Judgement of the Court (Grand Chamber) of 2 March 2010*, 47 COMMON MKT. L. REV. 1831 (2010); Gerard-René de Groot & Anja Seling, *The Consequences of the Rottmann Judgment on Member State Autonomy – The European Court of Justice's Avant-Gardism in Nationality Matters,* 7 EUR. CONSITITUT. LAW. REV. 150 (2011).

52 Gerard-René de Groot, *The Relationship between Nationality legislation of the Member States of the European Union and European citizenship* in EUROPEAN CITIZENSHIP: AN INSTITUTIONAL CHALLENGE (M. La Torre ed., 1998) 115, at 123.

53 Indeed, an incipient structure of free movement rights is progressively emerging for certain categories of third country nationals. Sara Iglesias Sánchez, *Free Movement of Third Country Nationals in the European Union? Main Features, Deficiencies and Challenges of the New Mobility Rights in the Area of Freedom, Security and Justice,* 15 EUR. L. J. 791 (2009); Anna Kochenov, *What Intra-Community Mobility for Third-Country Workers?*, 6 EUR. L. REV. 913 (2008). The exercise of this newly acquired right can nonetheless hinder the naturalization possibilities of third country nationals, since periods of residence in other Member States are not taken into account or even interrupt the legal periods required in order to be eligible for nationality. Pointing at this problem see: Francesca Strumia, *European Citizenship: Mobile Nationals, Immobile Aliens, and Random Europeans*, in CITIZENSHIP IN AMERICA AND EUROPE. BEYOND THE NATION-STATE (M. S. Greve & M. Zöller eds., 2009). See also Sara Iglesias Sánchez, LA LIBRE CIRCULACION DE LOS EXTRANJEROS EN LA UNION EUROPEA (Reus, 2010).

54 These principles emanate from Article 79 TFEU.

missing link between a common migration policy and a growingly fundamental status of citizenship of the Union.

c. Overcoming the need for a transboundary element: the emancipation of the citizenship of the Union from the framework of the fundamental freedoms

In the *Ruiz Zambrano* case, the ECJ was confronted with the question of whether a national of a Member State who had not left his home Member State (Belgium), had a right in virtue of EU law to reside in the territory of the Member State of which he was a national. In its usual recasting of the question posed by the referring Court, the ECJ nonetheless avoids a direct answer, and adopts a functional approach towards the residence right of third country nationals who are parents of EU citizen children. Without offering any explicit formulation with regard to a residence right accorded by EU law to its own citizens, the Court focuses on the situation of the ascendants and the rights that they might derive in order not to deprive the EU citizen children of the "genuine enjoyment of the substance of the rights conferred by virtue their status as citizens of the Union"[55]. This functional approach towards the rights of ascendants cannot hide the real meaning and implications of the judgment with regard to the re-conceptualization of the right of residence as a right of federal or supranational nature for European citizens. Indeed, if the lack of residence rights for parents of EU citizen children endangers the genuine enjoyment of the substance of the rights conferred by the citizenship of the Union because it will result in the children having to *leave the territory of the Union*[56], it is presupposed that this status entails a right to *stay* – i.e. a right of residence[57]. This conclusion also designates the Union as the area of reference for the enjoyment of a right considered to be fundamental with regard to the territorial community, fostering its federal perception and accompanying the transmutation of the right of free movement into a fundamental right[58]. Indeed, if the Charter has elevated free movement to the range of a fundamental right comparable to the right of free movement internationally and constitutionally proclaimed[59], a similar evolution cannot be discarded with regard to the right of residence in the Union as a whole.

Undoubtedly, the consequences of the *Ruiz Zambrano* judgment are most significant when considered against the background of the traditional attitude of the Court with regard to the so-called purely internal situations, traditionally defined as situations all of whose elements were to be situated inside one of the

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55 Case C-34/09, Ruiz Zambrano, 2011, not yet reported ¶ 42.

56 *Ibid.* ¶ 44.

57 Sara Iglesias Sánchez, *El asunto Ruiz Zambrano: una nueva aproximación del Tribunal de Justicia de la Unión Europea a la ciudadanía de la Unión*, 24 Revista General de Derecho Europeo (Iustel) *Revista General de Derecho Europeo* 1 (2011).

58 The right of free movement within the Union is enumerated in Article 45 of the Charter of Fundamental Rights of the European Union.

59 In this sense, Sara Iglesias Sánchez, La libre circulacion de los extranjeros en la Union Europea (Reus, 2010).

Member States[60]. The Court of Justice overcomes the limitations of this doctrine by re-conceptualizing the notion of "purely internal"[61] – comprising not only "cross-border" situations but all those in which State action is suitable to impinge upon EU conferred rights –, recently confirmed by the judgment in the McCarthy case[62]. Indeed, the constitutional evolution of European integration has progressively blurred the identification of purely internal situations with situations that lack cross-border connections, since there is a sphere that is "by reason of its nature and its consequences, within the ambit of European Union law"[63]. Notwithstanding this development, the Court does not relinquish the concept of "purely internal situation"[64], and tries to keep its validity, even if the term *internal* is an ill-advised adjective outside the realm of situations strictly governed by free-movement provisions.

Be that as it may, the abandonment of the cross-border servitude of European citizenship is definitely confirmed by the definition of an unwritten core of fundamental protection to be safeguarded universally against the Union and the States. The central development in *Zambrano* and *Rottmann* rests in the delimitation of an essential core of protection, non-expressly worded in the Treaty, which is independent from the trans-frontier conception of free movement. It is in this regard that *Ruiz Zambrano* confirms the development more modestly hinted at in *Rottmann* and establishes a considerable departure from previous case-law[65].

In this sense, it is noteworthy that the Court does not consider – as the Opinion of the Advocate General seems to do[66] -, the right of free movement and residence of Article 21 TFEU as the basis for a federal right of residence in the Union, and therefore, also in relation to the state of nationality. In this sense, the Court avoids elaborating explicitly on the "substance" of citizenship rights, and does not engage – as Advocate General Sharpston does – in the construction of the right of residence in the territory of the state in which one is a national as a right intrinsic to the status of Union citizenship[67]. This is, of course, a deliberate position, in view of the Opinion of Advocate General Kokott of November 2010 in *McCarthy*, which openly confronted the concept of the right of residence advocated

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60 E.g. Joined Cases C-95/99 to C-98/99 and C-180/99, Khalil and Others, 2001 E.C.R. I-7413, ¶69; Case C-127/08, Metock and Others, 2008 E.C.R. I-6241 ¶77.

61 E.g. Cases C-148/02, García Avello, 2003 E.C.R. I-11613 and C-403/03, Schempp 2005, E.C.R. I-6421. For an eloquent account of this evolution, see the Opinion of AG Sharpston in Ruiz Zambrano ¶¶90 and ff.

62 "[T]he situation of a Union citizen who, like Mrs McCarthy, has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation", Case C-434/09, McCarthy, not yet reported ¶ 46.

63 Case C-135/08, Rottmann, not yet reported ¶ 42.

64 As it is highlighted not only in the McCarthy case, but also in Case C-391/09, Runevič-Vardyn and Wardyn, ¶58, not yet reported.

65 Kay Hailbronner & Daniel Thym, *Note to Case C-34/09, Ruiz Zambrano, Judgment of the Court (Grand Chamber) of 8 March 2011, not yet reported,* Common Mkt. L. Rev (forthcoming).

66 "[I]t would be artificial not openly to recognize that (…) Article 21 TFEU contains a separate right to reside that is independent of the right of free movement" Case C-34/09, Ruiz Zambrano, 2011, not yet reported (Opinion) ¶100.

67 Case C-34/09, Ruiz Zambrano, 2011, not yet reported ¶¶ 91 to 97.

by AG Sharpston, but conceded the possibility of the Court reviewing its case law[68]. With this momentous discussion opened, the judgment in *Ruiz Zambrano* avoids a declaration of the right of residence *in the Union* as a corollary to European citizenship, embracing the less committed argument of considering such right a mere instrument for enabling the potential enjoyment of other citizenship rights, such as free movement or voting rights, in the future, in a *Dassonville* kind-of-argument[69].

Be that as it may, the practical – although not the doctrinal – consequences of the judgment of the Court in the *Ruiz Zambrano* case are equivalent whether we take the right of residence in the Member State of nationality as a substantial component of European citizenship, or whether we consider it necessary in order to guarantee the future enjoyment of the substance of other citizenship rights. Despite the elusive wording of the judgment, to the question expressly posed of whether provisions related to Union citizenship "confer a right of residence upon a citizen of the Union in the territory of the Member State of which that citizen is a national[70]" the answer – as it emanates from *Ruiz Zambrano* – is an unqualified *yes*[71].

The effect or potential effect of this "genuine enjoyment of the substance of the citizenship rights" as the triggering factor for the protection of EU citizenship displaces the inter-state orientation of the doctrine of the cross-border connection. This development fosters the emancipation of the citizenship of the Union from an implicitly assumed cross-border nature of the whole status, and lays the foundations for a renewed category of "federal rights" – accorded by the Union to all its citizens irrespective of their place of residence and their previous migratory history and representing a general federal protection to be uniformly asserted against Union institutions and the States –, adding to the already "federal political rights" or rights of contact to EU institutions. As we have already commented with regard to the *Rottmann* case, the new realm of protection offers ultimate safeguards of membership through the imposition of limitations on state discretion in nationality matters. The *Ruiz Zambrano* case inaugurates another sphere of elemental protection also intrinsically bound up with the concept of membership, the right to reside in the *territory of the Union*[72].

This conclusion could be somewhat tarnished by a narrow reading of the reasoning of the Court in the *McCarthy* case where the Court further narrowed down the potential scope of the "substance" of the rights conferred by citizenship when it refused to grant a derived right to residence to the husband of a British (and Irish) citizen in the UK based on Union citizenship[73]. In its reasoning, the

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68 *Ibid.* ¶¶42 and 46.

69 Case 8/74, Dassonville, 1974, E.C.R. 837.

70 Case C-34/09, Ruiz Zambrano, 2011, not yet reported ¶ 35, which reproduces the questions posed by the Brussels Employment Tribunal.

71 Iglesias, *supra* note 57.

72 The expression "territory of the Union" is used by the Court, Case C-34/09, Ruiz Zambrano, 2011, not yet reported ¶ 44.

73 Mrs McCarthy was born and always lived in the U.K., therefore, she never exercised free movement rights granted by EU law. Nonetheless, she possessed Irish and UK nationality. After

Court explicitly rejects the relevance of European legislation and of EU free movement rights as the foundation of the right of residence in the State of nationality and relies for this conclusion on the obligations that emanate from Human Rights Treaties which establish the right of entry into the territory of the State of nationality, and the prohibition of expulsion of own nationals[74]. Therefore, the European directive, and also Article 21 of the Treaty –concludes the Court – "cannot apply to a Union citizen who enjoys an unconditional right of residence due to the fact that he resides in the Member State of which he is a national"[75]. Nonetheless, the particular circumstances of the *McCarthy* case reinstate the validity of the conclusions derived from *Ruiz Zambrano*. Indeed, in the *McCarthy* case, the right of the European citizen to reside in his state of nationality was not imminently endangered, nor were other rights emanating from the citizenship of the EU as the spouse could remain in the UK without her husband. EU law was relied upon solely in order to benefit from some advantages provided for by a secondary legislative act in order to acquire an indirect right for the third country national spouse[76].

McCarthy makes it clear that the foundation of the right to reside in the Member State of nationality is not EU law, but in cases where such right is seriously threatened, it intrinsically affects the potential enjoyment of EU citizenship rights, and therefore it could be regarded as a situation that "by reason of its nature and its consequences" falls within the ambit of EU law. The refusal of the Court to use Article 21 TFEU in order to declare a general and uniform right of residence in the Union does not hinder the conclusion that, when the effective possibility of being physically present in the Union and thus to enjoy the rights attached to its citizenship effectively, is endangered, Union law might come to rescue, imposing external limitations on the behavior of Member States.

This emergent protection of a federal (or supranational) nature can be deemed compatible with the regulatory autonomy of Member States, since it is still exceptional, instrumental and subsidiary. Exceptional, for it comes to rescue the citizen only in cases where the *genuine enjoyment* of the substance of rights

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marrying a third country national with no residence rights in the UK, Mrs McCarthy and her husband applied for a residence permit under EU law. Even though the right of residence of Mrs McCarthy in the UK was not put in question, it was in her interest to claim an EU based residence right, since this would make applicable EU provisions on free movement to her husband, enabling him to acquire a right of residence in the UK. The Supreme Court of the United Kingdom posed the ECJ the question of whether a dual national can be considered "beneficiary" of secondary law regarding free movement of persons. The ECJ rejected this possibility, and also stated that Article 21 TFEU itself cannot be applicable either to nationals of the Member States in order to base a right of residence in their country of nationality.

74 Very significantly, in its preliminary observation, the Court recalls that it has held that "a principle of international law, reaffirmed in Article 3 of Protocol No 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (…) that European Union law cannot be assumed to disregard in the context of relations between Member States, precludes a Member State from refusing its own nationals the right to enter its territory and remain there for any reason; that principle also precludes that Member States from expelling its own nationals from its territory or refusing their right to reside in that territory or making such right conditional" Case C-34/09, Ruiz Zambrano, 2011, not yet reported ¶ 29.

75 *Ibid.* ¶ 34.

76 Case C- 135/08, Rottmann, 2010, not yet reported (Opinion of AG Kokott) ¶¶ 20 and 21.

is seriously threatened. On the other hand, the emphasis in the notion of *genuine enjoyment* makes the "federal protection" highly instrumental, recalling the already traditional *effect utile* kind of reasoning: the supranational protection of residence and membership has not been construed upon a federal discourse from which to derive the right not to be deprived of the possibility to enjoy the Union, as a redefined area of freedom, security and justice. Protection will only be triggered when the "substance of citizenship rights" is endangered. The protection offered by EU law is also subsidiary: it only enters the picture when the protection that Member States ought to offer fails[77].

In any case, the foundation and source of membership (nationality) and residence is not EU law (in contrast with article 21, which lays the foundation to the right of residence in *other Member States*). The foundation of these rights is rooted in national law and in the obligations of states under international law. But through this new case-law, their ultimate protection becomes federalized. The Court elevates the European legal order to the status of last resort, protector and supreme guardian of membership, offering the ultimate safeguard to the elements that most strongly link the individual with the political community – nationality and residence. After *McCarthy,* the federalization of Article 21 TFEU as the source of a general right of residence in the Union as a whole – which could still be advocated under the judgment in the *Ruiz Zambrano* case – can be ruled out. Nonetheless, a "supranationally protected right of residence" has emerged, even if not rooted in Article 21, but in the "genuine enjoyment of the substance of citizenship rights" doctrine.

This outcome lives up to the particular nature of European citizenship. Indeed, the results in *Ruiz Zambrano* and *Rottmann* transform the status of nationality itself[78], since they promote a conception of the relationship between nationality and citizenship of the Union not founded in terms of hierarchy, preeminence or competition[79]. Indeed, both judgments reveal the symbiotic relationship between state nationality and the citizenship of the Union, enlarging the scope of protection awarded by the citizenship of the Union by reinforcing the bond of nationality in making its protection more robust.

d. Ending with reverse discrimination?

One of the most striking particularities of the status of European citizens is the phenomenon of reverse discrimination, inherited from the cross-border rationale that has traditionally accompanied the exercise of most EU-granted rights[80]. This situation usually arises with regard to those EU rights that go beyond

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77 Iglesias, *supra* note 57.

78 Pointing at the transformative potential of European citizenship on State nationality: Samantha Besson and André Utzinger, *Towards European Citizenship*, 39 JOURNAL OF SOCIAL PHILOSOPHY 185 (2008).

79 In this sense Dora Kostakopoulou, *supra* note 14.

80 The literature on this topic is very large. *See e.g.* E. Cannizaro, *Producing 'reverse discrimination' through the exercise of EC competences*, 7 YEARBOOK OF EUROPEAN LAW 29 (1997); G. Gaja, *Les discriminations à rebours: un revirement souhaitable*, in MÉLANGES EN HOMAGE À MICHEL WAELBROECK, (Bruylant, 1999); O. Due & C. Gulmann, *Restrictions à la libre circulation intracommunautaire*

the imperative of inter-state equal treatment – which entails the prohibition of discrimination on grounds of nationality – in order to remove obstacles or foster free movement (this would be the case of the family reunification regime for EU citizens created by secondary law)[81]. Reverse discrimination is also prone to occur where a Member State organizes itself in a federal structure and national equal treatment provisions fail to provide a uniform protection to all its citizens[82]. In these situations, the status awarded by the Union crosses the boundaries of national treatment, going beyond what States provide for their own citizens, but offering protection only to those able to provide a link with EU law, traditionally, through cross-border elements. The existence of reverse discrimination is proof of the persistence of the inter-state foundation of the system, which to a great extent still focuses on nationals of the Member States in their quality of movers obliterating their status of citizens of the supranational entity in so far as they remain *static*[83]. This position, reminiscent of international law, evokes a similarly counterintuitive phenomenon where, in their international practice, state negotiators sometimes prefer most favored nation clauses rather than national treatment clauses, assuming that the treatment given to the own citizens is not always the best possible. As is the case with reverse discrimination, this unfavorable outcome emanates from a disloyal (or at least suspicious) position of the state towards its own citizens, where it aims to pursue certain policies that diverge negatively from what is mandated at EU level with regard to nationals of other States[84]. This is manifestly the case with regard to EU family migration rights.

The creation of a supranational citizenship status strongly conflicts with this fragmentation produced by European law, but European law has traditionally not been able to offer a solution, tied up in the system of allocation of competences between the Union and the Member States. Even after the creation of the citizenship of the Union, exhibiting a scrupulous respect for the responsibility of States towards their own nationals, the Court of Justice has repeated in its case law that it is for the legal orders of the Member States to put an end to these odd situations. Based upon the premise that all constitutional legal orders contain a prohibition of discrimination, the situation should be self-adjusting, inasmuch as the national constitutional provisions would oblige Member States to transfer the rights awarded to *movers* under EU law, to *non-movers*. Nonetheless, this result has not always been produced, leading to a fragmentation in the material content

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et situations purement internes, in UNE COMMUNAUTÉ DE DROIT- FESTSCHRIFT FÜR GIL CARLOS RODRÍGUEZ IGLESIAS (E. Colneric, Puissochet & Ruiz-Jarabo Colomer, eds. 2003); M. Poiares Maduro, *The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination*, in THE FUTURE OF REMEDIES IN EUROPE, 117 (C. Kilpatrick, T. Novitz & P. Skidmore, eds. 2000).

81 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 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 O.J. (L 158) 77.

82 Case C-212/06, Government of the French Community and Walloon Government, 2008 E.C.R. I-1683.

83 For a critic in this sense, Patricia Conlan, *Citizenship of the Union: the fundamental status of those enjoying free movement?*, 7 ERA FORUM, 345.

84 In this sense, M. Poiares Maduro, *The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination*, in THE FUTURE OF REMEDIES IN EUROPE 127 (C. Kilpatrick, T. Novitz & P. Skidmore, eds. 2000).

of the status of citizenship of the Union that has constantly led to doctrinal criticism and to proposals to overcome this situation through a jurisprudentially progressive interpretation of European citizenship[85].

Accordingly, this apparent dysfunction has been successfully guarded by the ECJ for almost two decades, where EU law has been raised in vain in order to claim protection against the state of nationality in situations that – had a cross-border element existed – would have received strong protection[86]. Punctual erosions of this structural limitation occurred in cases where only potential cross-border impact was identified, sometimes even independently from physical movement[87]. These developments progressively raised questions as to the importance of the cross-border element, sometimes "accidental, peripheral or remote"[88], as the determining factor in order to situate an individual under the protection of the EU citizenship status held irrespective of movement.

The application of the wholly internal rule would have given rise to a situation of reverse discrimination in the *Ruiz Zambrano* case in the area of family life. Conceptually linked to the cases of reverse discrimination affecting the right of family unity[89], the reverse discrimination in this situation is – unusually – of jurisprudential and not of statutory origin, since it emanates from an EU derivative right recognized by the Court of Justice in the *Chen* case: In this case, the ECJ regarded the baby *Chen* – born in Northern Ireland and hence by Irish ius soli an Irish citizen – as exercising her freedom of movement under EU law immediately after birth and hence granted her mother, a third-country national, a derived right to residence. Consequently, the non-extension of similar rights for the ascendants of static European citizens entailed a paradigmatic case of reverse discrimination of particular relevance, since it strongly affected fundamental rights and therefore created significant tensions within the internal migration systems of EU Member States, who have placed the highest priority on the fight against undocumented migration, conspicuously disregarding the exigencies of the principle of equality embedded in their constitutional systems[90].

In this sense, it is highly relevant that the constitutional machinery had functioned this time: as Advocate General Sharpston notes in her opinion, the Belgian Conseil d'État and the Cour Constitutionnelle had ruled shortly before the judgment in *Zambrano* that the application of a reversely discriminatory

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85 For this discussion, see: Nic Shuibhne, *Free movement of persons and the wholly internal rule: Time to move on?*, 39 COMMON MKT. L. REV 731 (2002); Eleanor Spaventa, *Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects,* 45 COMMON MKT. L. REV LAW 13 (2008); Alina Tryfonidou, REVERSE DISCRIMINATION IN EC, (Kluwer, 2009).

86 *E.g.* Cases 175/78, Saunders, 1979 E.C.R. 1129; 35/82, Morson and Jhanjan*,* 1982 E.C.R. 3723; 298/84, Iorio*,* 1986 E.C.R. 247; C-332/90, Steen*,* 1992 E.C.R. I-341; C-64/96, Uecker and Jacquet, 1997, E.C.R. I-3171.

87 Cases C-60/00, Carpenter, 2002 E.C.R. I-6279; C-148/02, Garcia Avello, 2003 E.C.R. I-11613; C-224/98*,* D'Hoop, 2002 E.C.R. I-6191; C-370/90, Surinder Singh, 2002 E.C.R. I-4265; C-200/02, Zhu and Chen, 2004 E.C.R. I-9925; C-353/06, Grunkin and Paul, 2008 E.C.R. I-7639.

88 In terms of AG Sharpston, Case C-34/09, Ruiz Zambrano, 2011, not yet reported (Opinion)¶3.

89 Produced by the general application of the family reunification rights inserted in Directive 38/2004.

90 As an example of this problematic situation in Spain, see Sara Iglesias Sánchez, *La regularización de la situación administrativa de los padres de menores españoles en situación irregular,* 25 REVISTA DE DERECHO MIGRATORIO Y EXTRANJERÍA 35 (2010).

treatment of Belgian citizens had violated the principle of equality embedded in the national constitutional order[91]. After these developments, the Court could have relied – as the Commission and the Member States urged[92] – on the national developments and referred back to the national courts as a purely internal situation. This seems, however, not to have played a major role, and shows that the primary intention of the Court was not to offer a general framework to address reverse discrimination at European level[93]. The Court does not adopt the innovative solution proposed by Advocate General Sharpston, advocating for the prohibition of reverse discrimination in those cases affecting fundamental rights, where municipal law would not offer an equivalent level of protection[94].

Indeed, the developments of *Ruiz Zambrano* cannot be regarded as a general defeat of the situations of reverse discrimination, since the abolition of the cross-border requirement does not extend beyond the genuine enjoyment of the substance of citizenship rights. In this sense, the survival of the cross-border link as the triggering element of the protection of Article 21 TFEU has been reinstated by the Court immediately after *Ruiz Zambrano*[95].

But even if the Court does not attempt to abolish reverse discrimination altogether, it defines a fundamental area of protection where this discrimination cannot arise anymore. Indeed, the only way for the European legal order to end this phenomenon of reverse discrimination – independently from the constitutional solutions that the Member States might adopt – is to elevate the rights to the status of federal rights. This is what has been achieved by the Court in *Rottmann* – elevating the protection against arbitrary deprivation of citizenship to the federal level- and in *Ruiz Zambrano*, elevating the right of residence – as physical presence – to the category of federal right (and extending therefore a privilege that was previously only enjoyed by *movers* under the *Chen* jurisprudence[96]).

e. The genuine enjoyment of the substance of European citizenship rights

In order to trigger the protective effect of the new case law of the European Court of Justice, it is necessary to delimit the substance of EU citizenship rights, and to identify a potential threat to their genuine enjoyment. If both elements are present, even in the absence of a cross-border element, Article 20 TFEU – the general foundation for European citizenship – will provide the ultimate protection to the nationals of the Member States.

For this purposes, the recent *McCarthy* judgment significantly contributes to the crystallization of a fundamental distinction among the rights awarded by EU law to its citizens[97]. Shortly after the far-reaching pronouncements in *Rottmann* and *Ruiz Zambrano*, the Court has engaged in a deliberate exercise of explanation,

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91 Conseil d'État, arrêt 193.348 of 15 May 2009 and arrêt 196.294 of 22 September of 2009; Cour Constitutionnelle, arrêt 174/2009 of 3 November 2009.
92 Case C-34/09, Ruiz Zambrano, 2011, not yet reported (Opinion) ¶91.
93 Iglesias, *supra* note 57.
94 ¶144 Opinion Advocate General Sharpston in the Ruiz Zambrano case.
95 Case C-391/09, Runevič-Vardyn and Wardyn, 2011 not yet reported, ¶58.
96 Case C-200/02 Zhu and Chen, 2004 E.C.R. I-9925.
97 Case C-434/09 McCarthy, 2011 ECR not yet reported.

which has managed – within a convenient time frame – to dissipate the fears of Member States, and to curtail visionary readings that could expand the implications of these two landmark decisions[98]. The Court anticipates possible reactions and even rejections of its doctrine, strictly delineating the perimeter of the "substance" of the European citizenship.

Rights merely awarded by legislative instruments – as is the right to be accompanied by family members when exercising free movement – are left outside the substantial realm of European citizenship and will still be subjected to the constraints to the cross-border dynamic. Therefore, the Court provides an initial basis on which to distinguish between those rights which are constitutionally protected – the rights of citizenship enumerated by Article 20 of the TFEU and confirmed in their fundamental nature by the EU Charter – and other rights enjoyed by EU citizens under secondary law. In this sense, the new doctrine of the Court still allows that the most important legislative instrument destined to regulate the rights of EU citizens – Directive 2004/38- be restrained in its applicability to cross border situations. Severing the constitutional content of European citizenship from its main legislative development cuts loose the problematic issue of family reunification under the provisions of the Directive from the federal dynamic of *Ruiz Zambrano*. This distinction makes it still possible to maintain a broad area of reverse discrimination, and refrains from the pretensions of establishing the citizenship of the Union as a uniformly enjoyable status. But this decision has to be understood closely in line with the political context. The particularly controversial case law in this area[99], and the resistance showed at the level of the Council of Ministers by the Member States in response to the judgment in the *Metock* case[100], did not make it the most suitable case to engage in jurisprudential developments. The Court might have chosen to be deferent in this particular field in order to reinforce the already revolutionary finding of EU law as the ultimate guardian of effective membership. But this approach is not unproblematic, since it raises doubts as to whether fundamental rights can be understood to constitute this "substance" of the rights of citizenship. The result achieved in the McCarthy case, which disregards any consideration of the fundamental right to family life, points at a negative response in this sense[101].

Notwithstanding the need to ascertain the content of this "substance" in future case-law, the triggering element of the new doctrine superseding the cross-border link to the State is the functional element of the "genuine enjoyment". This is precisely what distinguishes the outcomes in *Ruiz Zambrano* and *McCarthy*, as expressly noted by the Court[102].

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98 See Part IV d) of this work.

99 Cases C-109/01, Akrich, 2003 E.C.R. I-9607 and C-127/08, Metock, 2008 E.C.R. I-6241.

100 Conclusions of the Council of the European Union of 28 November 2008 on the abuses of the right of free movement, as reaction to the Metock case. Pointing at these risks: Anja Wiesbrock, *The Zambrano case: Relying on Union citizenship rights in internal situations* in EUDO citizenship forum: http://eudo-citizenship.eu/citizenship-news/449-the-zambrano-case-relying-on-union-citizenship-rights-in-internal-situations.

101 On this issue, see part IV of this work.

102 Case C-434/09 McCarthy, 2011 E.C.R. not yet reported ¶ 53.

In this sense, an indirect right of residence in the Member State of nationality emerges in form of quasi-federal right, since state-imposed impediments to physical presence in the territory of any of the Member States will have a potential impact on the enjoyment of other citizenship rights. Therefore, the right to reside in the state of nationality, even if purely functional with regard to the enjoyment of rights, is inseparable from to the status of citizenship of the Union, and is independent of any cross-border element, and also independent of the particular formulation of the right of inter-state residence established in Article 21 TFEU. In conceptual terms, the proclamation of a right of residence in the state of nationality entails a coextensive right to reside in *the Union*, and not only in the *other* Member States. EU law will therefore protect European citizens from such extreme and highly unusual dangers of manifest and gross deprivations of Union membership rights. Other situations, in which citizens of the Union would be placed in a position where they would be forced to leave the Union, could potentially be considered as embraced by this new doctrine[103]. The same holds true for other circumstances that would be equivalent to a legal banishment, such as the withdrawal of state citizenship, as the *Rottmann* case makes clear. Other areas that could be affected by this functional protection could be related to deprivation of liberty by the Member States, pointing at a reformulation of the results achieved in the *Kremzov* case[104].

The isolation of the "substance" of European citizenship from free movement, and therefore, from reverse discrimination, contributes to mitigate the perceived lack of overall constitutional conception in the content and functioning of the individual rights awarded by EU citizenship. At least, these "Article 20 cases" have served to affirm the determination of the Court to take one more step towards the fundamentality of European citizenship, since this status will award the ultimate protection of the most elemental core of membership: the right to be physically present, and the right not to be arbitrarily deprived of legal status.

Additionally, the developments put forward in the *Ruiz Zambrano* case amount to a constitutional declaration of principles, which provides us with one of the first elements around which to start the construction of the relationship of the citizenship of the Union and the common immigration policy[105]. The significant ramifications of the judgment for migration, fearfully voiced by the Member States, at least in the Court's opinion do not outweigh the paramount interest in

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103 We can also imagine the case of a senior or handicapped European citizen dependent on third country family members or take-carers, in the cases that he could not avail himself nor on the public assistance service. Of course, the particular elements of the rights of the children not to be separated from their parents still make the *Ruiz Zambrano* and *Chen* cases of a particular kind. But other possibilities in which the citizenship of the Union might come to rescue a European citizen from a destiny of effective banishment. This would of course depend on the circumstances of the case that will reserve this alternative to very extraordinary cases.

104 "Whilst any deprivation of liberty may impede the person concerned from exercising his right to free movement, the Court has held that a purely hypothetical prospect of exercising that right does not establish a sufficient connection with Community law to justify the application of Community provisions", Case C-299/95, Kremzow, 1997 E.C.R. I-2629 ¶ 16.

105 Here, the Court has been criticized for not taking into account the declared objectives of the common migration policy of fighting against irregular migration.

protecting the *effet utile* of the citizenship of the Union. This is a fundamental constitutional choice that many Member States have not been prepared to make with regard to their own citizens. Insofar, European law has reinforced the status of nationality of the Member States themselves. As the problematic treatment of the deportation of illegal parents of US citizens highlights[106], the fundamental question concerns the rules governing acquisition of nationality. Collateral effects, leading to a tightening of nationality regulations are to be expected. The limitation of federal protection with regard to acquisition of nationality –notwithstanding a broad reading of *Rottmann* – situates outside the powers of the Union the ultimate consequences of this judgment. Here, International Law gains major relevance, for it provides for important limitations to the possible restrictive response of Member States[107].

III. LEGITIMIZING THE ROLE OF THE ECJ IN THE CONSOLIDATION OF A FEDERAL CITIZENSHIP

Ruiz Zambrano, following the path opened by *Rottmann*, is undoubtedly a case widening the scope of application of EU law and of EU judicial review[108]. The extension of the application of EU law in these two cases and their revolutionary potential raise questions of legitimacy. Whether or not one sympathizes with the results in these cases, it is doubtful if the ECJ is the right institution to bring about another revolution of EU law – having regard to the will of Member States and the position other institutions[109] and at a time when the Lisbon Treaty has just been implemented against considerable resistance amongst the citizenry in the Member States and only after a second referendum in Ireland.

Objections targeting the legitimacy of expansionist readings of European law by the ECJ are rarely spelled out in detail, but often undergird doctrinal critiques in specific cases. As far as we can see, the basic concerns are three: 1. the ECJ is taking powers out of the hands of national parliaments and the European legislator, which is considered counter-majoritarian and anti-democratic; 2. the ECJ's expansionism threatens the aim of preserving national identities and cultures contrary to Art. 4. 2 TEU; and 3. the ECJ's reasoning is unpredictable and

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106 For this discussion P. H. Schuck & R. M. Smith, Citizenship Without Consent: Illegal Aliens in the American Polity, (Yale University Press, 1985). On the issue of deportation of illegal parents of US citizens more specifically *see* A. Colvin, *Birthright Citizenship in the United States: Realities of De Facto Deportation and International Comparisons Toward Proposing a Solution,* 53 St. Louis University Law Journal *St. Louis University Law Journal* 219 (2008-2009).

107 Mostly, the Convention for the Reduction of Statelessness, UN A/CONF.9/15, 1961 whose Article 1 establishes the criteria under which "a Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless". Also of relevance is Article 7 of the Convention on the Rights of the Child, 1989, *United Nations Treaty Series,* vol. 1577, p. 3.

108 Alicia Hinarejos, *Extending Citizenship and the Scope of EU Law (Comment on Ruiz Zambrano, C-34/09)*, 70 The Cambridge Law Journal 309 (2011); D. Düsterhaus, *supra* note 40.

109 Henri de Waele, *EU Citizenship: Revisiting its Meaning, Place and Potential*, 12 Eur. J. of Migration and Law 319 (2010) 327.

inconsistent, endangering legal certainty[110]. With regard to the judgment in *Zambrano* more specifically, the ECJ's teleological approach stressing the consequences of the act in question (the deportation of Mr. Ruiz Zambrano) for the enjoyment of (his children's) citizenship rights has been considered inappropriate as it supposedly disregards the Member States' original intentions – thereby infringing upon a classical area of Member State competence that is especially "politically sensitive"[111] – and ignoring both other treaty provisions providing for combating illegal immigration as well as its own prior jurisprudence requiring a "cross-border" element for any application of Union law[112].

These objections should not be taken lightly. They raise valid concerns that have in the past often been ignored over the joy in European unification, in which the ECJ has rightfully earned the title of "motor of European integration". If legal interpretation is to remain different from law-making, it cannot be the task of judges to construct "logical" or "just" regulatory regimes independently of the underlying norms which include provisions on competences in the case of the EU Treaties[113]. Nevertheless, we think that the ECJ's development of Union citizenship in the two cases at hand is both legally sound (1) and politically justifiable (2).

(1) To begin with, the argument from the Member States' original intentions is flawed. As we have mentioned, ideas about what citizenship should include differed strongly: On one hand, citizenship was clearly intended to achieve something big – it was supposed to lay the foundation for a European polity and enhance European legitimacy by changing the economic European Community into a political European Union. Citizenship in fact never was just a bundle of some narrow rights, but part of a greater plan for the political unification of Europe that would transcend the narrower, free-market based approach to integration that had been pursued in the past. By granting a right to move and reside freely independent of economic activity, citizenship for the first time went explicitly and clearly beyond the EU's market rationale[114] as especially the political rights (Art. 18 – 24 TFEU) conferred by citizenship demonstrate. The ECJ's recognition of citizenship as a fundamental status of European law is therefore hardly incorrect.

Furthermore, while the nature of citizenship is heavily contested, the term nevertheless carries heavy normative baggage and possesses a certain meaning in the international discourse. It is regarded as a fundamental status granted by

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110 See e.g. Hailbronner & Thym, *supra* note 65; see also with regard to prior ECJ jurisprudence Kay Hailbronner, Die Unionsbürgerschaft und das Ende rationaler Jurisprudenz durch den. EuGH?, NJW 2185 ff. (2004); Roman Herzog & Lüder Gerken, Stoppt den Europäischen Gerichtshof, F.A.Z. September 9, 2008, http://www.cep.eu/fileadmin/user_upload/Pressemappe/CEP_in_den_Medien/Herzog-EuGH-Webseite.pdf.

111 Hailbronner & Thym, *supra* note 65.

112 Id.

113 See e.g. for such a free-wheeling approach Dimitry Kochenov, *Two Sovereign States vs. Human Being. ECJ as a Guardian of Arbtrariness in Citizenship Matters*, forthcoming in HAS THE EUROPEAN COURT OF JUSTICE CHALLENGED THE MEMBER STATE SOVEREIGNTY IN NATIONALITY LAW? (Jo Shaw ed., 2010), 2.

114 Ferdinand Wollenschläger, *A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration,* EUR. L. J. 17 (2011), 1–34.

virtue of belonging to a political community[115]. While Hannah Arendt's famous assessment of citizenship as the "right to have rights" was developed against the background of the rise of Nazism[116] and seems somewhat out of place with the emergence of the international human rights movement in the 1970s[117], citizenship assumes a prominent place in both political theory and practice, constituting the highest status of political membership and conferring the broadest set of rights. Especially, the right to stay in a country and not to have to fear deportation has been considered as a key feature[118]. This is in line with the ECJ's interpretation of the fundamental nature of citizenship and the important role of the right to residence.

None of this is to deny that Member States are and always were wary of restricting their national room to maneuver too much and hence sought to make the free movement right conditional upon citizens providing their own means of subsistence which they expressed in the treaties (Art. 21 TFEU). But the decoupling of the right to residence from its limitations in EU secondary law has already been established in the ECJ's prior jurisprudence[119] and at least implicitly been accepted by the acknowledgment of the "acquis communautaire" which includes the Court's decisions on the most recent Lisbon Treaty.

This shows that the Member State's intentions were deeply ambiguous[120] which is little surprising in the context of a complex and contested notion like citizenship. Nor should it astonish us that these ambiguities are reflected in the Treaty. As is well known, the actors involved in the drafting of international treaties often choose deliberately abstract and/or vague terms as a means of achieving consensus as their ideas of the precise legal meaning of these terms are strongly diverging. Union citizenship in many ways represents what has been called an "incompletely theorized agreement" (Sunstein[121]), that is an agreement about abstract terms (like freedom of speech, dignity etc.) whose exact content remains subject to disagreement.

What about the accusation that the ECJ is cherry picking, i.e. ignoring other treaty provisions that provide for fighting illegal immigration, such as Art 79 TFEU? While it is correct that these provisions exist, drawing on them in *Ruiz Zambrano* would have seemed somewhat far-fetched as illegal immigration is not so much encouraged by the extension of a derivative right of residence to the Union citizen's parents, but by the automatic acquisition of nationality in the first place. More importantly, denying a right of residence to Mr. and Mrs. Ruiz

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115 See among many LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 2 (2006).

116 HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 267ff. (1968).

117 For details see SAMUEL MOYN, THE LAST UTOPIA (2010).

118 Referencing Michael Walzer LINDA BOSNIAK, *supra* note 115 at 68.

119 See supra p. 10.

120 See also Dora Kostakopoulou*, Ideas, Norms and European Citizenship: Explaining Institutional Change,* Mod. L. Rev 68 (2005), 233-267 for a defense of the ECJ's prior development of citizenship in the light of its inherent ambiguities.

121 CASS SUNSTEIN, ONE CASE AT A TIME 11ff. (2001), see also with regard to national constitutions as 'dilatory formal compromise(s)' already Carl Schmitt, VERFASSUNGSLEHRE (CONSTITUTIONAL THEORY) 28, 32ff. (1928).

Zambrano would result in the *children's* deprivation of a realistic chance to make use of their rights as Union citizens and develop their identity as European citizens. Letting the children bear the costs of their parents' (illegal) actions overstretches the boundaries of the combating-illegal-immigration rationale, as it has similarly been argued with regard to the Chen case[122] or in the United States with regard to illegal immigrants' children's right to education: In *Plyler v. Doe*, Justice Brennan reasoned for the majority that *"Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."*[123].

2. Confronted with an incompletely theorized agreement and a number of conflicting arguments on how to interpret citizenship, we need to find a way of choosing between these arguments. Hence, we have to confront the question if there are good reasons to prefer the ECJ's teleological and expansionist reading of citizenship over other possible narrower understandings of this concept that are more in line with prior case law, truer to the Treaty's text and maybe less threatening to legal certainty?

In answering these questions, we note at the outset that we do not want to defend the Court's lack of legal reasoning unqualifiedly, especially in *Ruiz Zambrano*. While we think the incompletely theorized nature of Union citizenship indeed calls to some extent for a minimalist approach to judicial interpretation which leaves the exact content of the new "substance" doctrine open in order to leave room for political reactions and scholarly debates[124], this does not apply to the lack of judicial reasoning more generally since a sufficient justification of the holding is necessary in order to allow for a meaningful dialogue which goes beyond solving legal riddles; framing this in Cass Sunstein's terminology[125], we think that the Court's minimalism is justifiedly narrow but too shallow: an approach theoretically deeper than the current one would be preferable. While the Opinion of the Advocate General provides some guidance with respect to the judgments, the Court only follows it only in some regards and hence reduces the reader's uncertainty only marginally.

However, we submit that the status of this methodological objection depends heavily on what one makes of the Court's decision. If the decision is seen as radical and illegitimate, the shallowness of the Court's reasoning will be particularly problematic. If on the other hand one views the decision as basically reasonable and appropriate, that shallowness is perhaps vexing, but is much less worrisome. We therefore turn to consider the broader question of the Court's approach in these cases.

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122 We are indebted to former AG Poiares Maduro who pointed this out in his seminar on European Law at Yale Law School, January 2010.

123 *Plyler v. Doe*, 457 U.S. 202 (1982).

124 Daniel Sarmiento has recently spelled out how the ECJ uses judicial "silence" to enhance cooperation both with the other branches and the national courts, thereby enabling and encouraging the much cherished constitutional pluralism of the European Union, i.e. the dialogue between national courts and the ECJ with no clear hierarchical structure of one Supreme Court (Daniel Sarmiento, *The Silent Lamb and the Deaf Wolves*, in CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND (Avbelj & Komárek eds., 2011) (forthcoming).

125 CASS SUNSTEIN, *supra* note 121.

The answer to the question of what interpretative method is appropriate in a given case is a classical lawyerly answer: It depends. Indeed, it depends on a number of factors if a more constrained textualist or a more open teleological/ purposive approach is warranted. We have to take into account the legal culture and traditions within which the Court is operating: Is teleological interpretation generally accepted in this system or is it foreign to it? We should also consider the features of the political systems, for example: Is the political system working efficiently or is it riddled with corruption and fails to deliver basic services[126] so that the court is the only institution to provide remedies in this situation? Has the relevant legal text been framed in a way that suggests a high degree of agreement between the actors involved in its drafting? And most importantly: What are the facts of the case in question; in what context does the legal problem arise?

To begin with, teleological interpretation has a long history in the ECJ's case law[127]: All the key doctrines of European law that today mark it as different from any other international law, such as direct effect and supremacy, are based on a teleological interpretation of the treaties (see e.g. van Gend en Loos, Costa v. Enel, Dassonville, Francovich[128] etc.). In the light of this long history of teleological interpretation, the opponents of this method that has created so many widely applauded results and significantly contributed to European integration bear the burden of showing that this method is now or in the cases discussed here no longer appropriate. We believe that such an argument cannot ultimately be convincingly made, even though there exist some strong argumentative candidates to the contrary: As the EU Treaties have become increasingly hard to change, any interpretation of treaty provisions by the ECJ is almost carved in stone since there is little chance that the "masters of the treaty", i.e. the Member States, can react to an unwelcome interpretation by changing the text[129]. This could suggest that the ECJ should perhaps exercise caution and restraint in its jurisprudence. Furthermore, an interpretation of citizenship as a "federal right" comes suspiciously close to an understanding of the EU as a federal state – a vision that has been rejected in the referenda on the Constitutional Treaty 2004 in France and the Netherlands. And finally, some critics point to the politically sensitive issues in question in the two cases[130]: *Rottmann* explicitly touches on the question of who belongs to a given political community, which, it is argued, should properly be left to that community to decide. *Ruiz Zambrano* similarly concerns the question of what rights membership of such a community confers

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126 This is the basis for a leading defense of the Indian Supreme Court's expansionist approach since the late 1970s – see S.P. SATHE, JUDICIAL ACTIVISM IN INDIA 249-311 (2002). I am grateful to James Fowkes for drawing this argument to my attention.

127 Nial Fennelly, *Legal interpretation at the European Court of Justice,* FORDHAM INT'L L. J. (1997) 656-79.

128 Case 26/62, van Gend en Loos, 1963 E.C.R. 1; Case 6-64, Costa v. Enel, 1964, ECR 585; Case 8-74, Procurer du Roi v Dassonville, 1974, E.C.R. 837; Cases C-6 and 9/90, Francovich and Bonifaci v Republic of Italy, 1991, E.C.R. I- 5375.

129 For more see Karen J. Alter, *Who Are the "Masters of the Treaty"?: European Governments and the European Court of Justice*, INTERNATIONAL ORGANIZATION (1998) VOL. 52, ISSUE 1, 121-147.

130 Kay Hailbronner & Daniel Thym, *supra* note 65.

(since Union citizenship is only attached to Member State citizenship) and furthermore what rights those persons enjoy who do not belong to that community – similarly delicate issues.

A closer examination of these arguments, however, reveals them to be less cogent than they seem at first. The argument from the rejection of the Constitutional Treaty is unconvincing for two reasons. First, the two referenda should not be mistaken for the general opinion of the European public on the Constitutional Treaty. While they must be taken seriously as an expression of public opinion on the Treaty and not be denounced as results of political manipulation etc., we similarly shouldn't discard the overwhelming support for the Treaty in the national parliaments as mere expressions of political elites. Secondly, while the Member States abandoned express references to constitutional forms in the Lisbon Treaty, they preserved the substance of the Constitutional Treaty and both the form and substance of the community acquis to which Union citizenship belongs. They even sought to strengthen Union citizenship in its federal political dimension by introducing the right of a citizens' initiative in Art. 11 (4) TEU (the right to require the Commission to propose draft legislation on specific issues[131].)

The Treaty's immobility, on the other hand, makes an ambiguous argument as it could also suggest a reason for the ECJ to be activist: As the current economic crisis increases the necessity for European cooperation and solidarity as a matter of functional logic, the legitimacy problem of the Union becomes even more severe as protests in many Member States against the recent bail-outs have demonstrated. Another Treaty revision and a strengthening of the federal status of the Union being hard to realize, the development of federal rights could constitute part of a strategy to enhance allegiance to the Union and European solidarity – a task other actors are either politically unwilling (the Member States) or unable (the Commission) to take up (see the later discussion in Part IV of this issue).

The last argument which seeks to deprive the ECJ of jurisdiction in questions concerning citizenship, based on the idea that every national community has a right to determine its own members and their rights, suggests a very specific idea of political community that is hard to reconcile with the liberal ideal of equal and free individuals. Showing that states or even "peoples" can freely decide whether or not to exclude others from membership in their community who permanently live within their boundaries is difficult as a matter of justice. Liberal theories of justice traditionally work within the theoretical framework of one community like Rawls'[132] and consequently ignore the question[133] or have real trouble justifying exclusion and denial of membership (e.g. Bruce Ackerman[134]). With their starting point being the idea of individuals in an equal position who

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131 See the Regulation (EU) 211/2011 spelling out the details of the new citizens' initiative.

132 JOHN RAWLS, A THEORY OF JUSTICE (Rev. Ed. ,1999).

133 For a critique see e.g. Robert W. Glover, *Eyes Wide Shut – The Curious Silence of The Law of Peoples on Questions of Immigration and Citizenship*, paper presented at 2009 ISA Annual Convention, http://jmu.academia.edu/RobertGlover/Papers/108673/Eyes_Wide_Shut_The_Curious_Silence_of_The_Law_of_Peoples_on_Questions_of_Immigration_and_Citizenship.

134 BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE, 69ff. (1980).

agree on common terms for a society, it is hard to argue for the exclusion of others from membership of this community based merely on the fact that 'they came later'. While it is easier from a more communitarian perspective to justify the exclusion of aliens in the first place, excluding those from political membership who have already been admitted to the territory and accept the terms and conditions of the pre-existing order[135], for example by paying taxes and generally obeying the rules of that state. "No taxation without representation" in this context implies a realistic right to political membership that is not dependent on potentially arbitrary democratic decision-making[136].

One of the classical justifications of judicial review consists therefore in the protection of the democratic process and the rights of those who do not have sufficient political power to protect themselves[137]. With parliamentary democracy in the Member States relying on parties to represent the interests of different groups of citizens, non-citizen immigrants such as Mr. Ruiz Zambrano classically do not have access to these political channels to push their own interests into the political arena[138]. This holds also true for his children Diego and Jessica. While they are Union citizens, hence part of a majority, the rights they claim are nevertheless relevant only to an extremely small group of people who have third-country relatives. Furthermore, Diego and Jessica are children and hence *necessarily have to* rely on their parents to realize their right to residence for them and, being *children*, they are part of another disempowered group in the political process. In the light of these considerations, the ECJ's different outcome in McCarthy also makes sense as the concerned Union Citizen here is a grown-up enjoying full political rights. With regard to *Janko Rottmann*, the case for the ECJ's engagement is even stronger: After the decision of the German administrative agencies to revoke his German citizenship, Mr. *Rottmann* would – at least for a certain time – have become stateless and hence become part of the probably most paradigmatic group of minorities in need of protection.

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135 See e.g. MICHAEL WALZER, SPHERES OF JUSTICE – A DEFENSE OF PLURALISM AND EQUALITY 31ff. (1983).

136 See e.g. the problems with naturalization in Switzerland which used to depend on the result of a vote with the local municipality in some places which has been declared unconstitutional by the Swiss Supreme Court, BGE 129 I 232 and BGE 129 I 217 (Switzerland). For further details see Felix Uhlmann, *Switzerland: Naturalization Process Presents Conflict between Democracy and the Rule of Law*, 2 INT'L J. CONST. L. 716 (2004), 716-723.

137 American scholar JOHN HART ELY (DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW [1980]) based his theory of judicial review on this argument, drawing on the world's most famous footnote in constitutional law, footnote 4 in the Supreme Court case of Carolene Products where Justice Stone considered whether a higher degree of judicial scrutiny might be appropriate in cases where "*prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry" (United States v. Carolene Products Co.,* 304 U.S. 144, 152 n4 (1938).

138 Research demonstrates that attempts to liberalize citizenship regimes on the national level of Member States will, as a rule, only be successful if right-wing movements do not choose to mobilize against it. Once they do, they can usually mobilize such broad public support that the reform either fails or is significantly watered down, see MARC MORJE HOWARD, THE POLITICS OF CITIZENSHIP IN EUROPE (2009).

This logic not only represents wishful scholarly thinking, but has been accepted and implemented by political processes in the past. The unrestrained disposition of nations over minorities and their rights had been challenged early on with the developments in Europe at the beginning of the 20th century when the protection of minorities became an international question and international instruments were designed to cope with it. The protection of minority rights constituted one of the few areas where the Permanent Court of International Justice (the precursor to the ICJ under the League of Nations) was granted jurisdiction[139]. The prevention of statelessness especially became a matter of international concern and the subject of many treaties, perhaps most famously the UN Charter of Human Rights, Art. 15 of which states that *"(1) Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."* Similarly in the US context, the argument has often been made that federal courts are better able to provide for an effective protection of minorities than state courts, and the development of criminal rights by the federal courts suggests that there is at least some truth in this statement.[140] Based on the assumption that we aim for a maximum of independence for such minority-protecting judicial bodies from the political forces within a country, there is furthermore something to be said in favor of the ECJ taking those decisions as opposed to national (constitutional or supreme) courts that are to a greater (France) or lesser (Germany) degree dependent on the political forces in their countries. Even more importantly, the ECJ with its longstanding record of discrimination cases seems especially qualified to address the question of minority rights, as its traditional focus on discrimination has heightened its sensitivity with regard to concerns and violations of the rights of minorities.

This, of course, will not suffice to convince someone who thinks that the protection of minority rights is less important than the protection of pre-existing communities and their sovereign discretion to decide on questions of memberships and the rights attached to that status. As we have argued above, however, this is at least for a liberal a tricky position to defend. But even the skeptic has to admit that the ECJ's findings in *Rottmann* and *Ruiz Zambrano* hardly present particularly radical steps in terms of their outcome: As we have mentioned, the ECJ had already granted a right to residence to a Union citizen child in a Member State' other than its own in the Chen case and in *Zambrano* now merely abandons the requirement to move to a Member State other than the child's own. If Jessica and Diego *Ruiz Zambrano* had traveled to Germany and their father had found work there that would have enabled him to support them, they would have been able to claim a right to residence on the basis of *Chen*. Furthermore, the decision leaves EU and national legislatures room for maneuver – the situation in *Ruiz*

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139 Manley O. Hudson, *Permanent Court of International Justice,* 35 HARV. L. REV. 245 (1921-1922).

140 See the views summarized by Akhil R. *Amar, Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229, 1231-32. (1994); see also the countervailing views he considers at 1233-49. For further reading see Dahl with reference to the general tendency of the Supreme Court to protect minority rights and XX.) The narrative of the Warren Court's major criminal rights decisions has been recently retold by SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION, 230-48 (2010).

Zambrano could only arise because Belgian authorities had not deported the family beforehand,[141] and as a result of Belgian rules on naturalization that may be changed by the national legislature (as a result of the *Chen* case the Irish Constitution was amended[142]). With regard to *Janko Rottmann*, the ECJ stipulated a very low degree of scrutiny with the stipulation of the proportionality requirement and moreover referred the final decision back to the national court. Hence, the two judgments are hardly as intrusive upon Member States competences as they might seem at first glance.

This leads us back to our starting point: We have seen that the ECJ's interpretation in *Rottmann* and *Ruiz Zambrano,* although not above criticism, are reasonable examples of judicial interpretation of the incompletely theorized and ambiguous concept of Union citizenship. The ECJ's choice of a teleological interpretation of citizenship continues a longstanding tradition of legal reasoning by the ECJ and can be justified as a means to effectively protect minority rights where a strong conception of judicial review has traditionally been recognized as legitimate.

IV. FUNDAMENTAL RIGHTS AND FEDERAL CITIZENSHIP

Once we have analyzed some possible arguments for the progressive stance of the ECJ in recent citizenship cases, one important question remains to be answered which regards the implications of this new doctrine for fundamental rights. Indeed, when the legal discussion revolves around citizenship, minorities and federal courts, the role of fundamental rights is central. In this regard, it is striking that in the two far-reaching judgments in *Ruiz Zambrano* and *Rottmann* the Court remains absolutely silent.

The protection of fundamental rights and the emergence of the status of the citizenship of the Union are two phenomena intrinsically bound due to the fact that both developments situate the individual at the center of the integration process[143]. Nonetheless, the interaction between the two legal doctrines that govern the functioning of fundamental rights and the citizenship provisions of the Treaty has not been made explicit. As Shaw puts it, the concept of the citizenship of the Union "sits comfortably within the 'old' constitutional norms of the constitutionalised legal order based on the Treaties as interpreted by the Court of Justice, it has not yet emerged as the basis for effective and coherent political action in the context of the various processes of constitution-building (Charters,

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141 Art. 6-8 of the 'Return' Directive 2008/115/EC (O.J. 2008, L 348/98) even now stipulates such a duty for national authorities.

142 For details Siobhan Mullaly*, Citizenship and Family Life in Ireland: Asking the Question Who Belongs*, 25 LEGAL STUDIES 578 – 601 (2005).

143 This is highlighted by the Preamble of the Charter of Fundamental Rights, that states that "It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice". In this sense, see Manuel Núñez Encabo, CONSTITUCION EUROPEA Y DERECHO DE CIUDADANÍA (Universidad Complutense de Madrid, 2005).

Conventions, Treaties and ratification processes) of the 2000s"[144]. At the center of this tension is the constitutionally ambiguous nature of the citizenship of the Union, pregnant with a functional inheritance but called to become a fundamental status. This tension between the "old" conception of European citizenship, and its new constitutional place – with regard to fundamental rights – is at the core of the Advocate General's Opinion in the *Ruiz Zambrano* case, but has been long present in academic and institutional thought, with the Opinion of Advocate General Jacobs in the *Konstadinidis* case being one of its most significant exponents. Here, the challenge is to construe European citizenship not only as the specialized label for those rights categorized under the particular provisions, but as the truly fundamental status that embraces all the elements of the protection that should be awarded by the polity of reference, without turning it into an exclusionary instrument towards non-citizens. The cases studied here offer a new element for this discussion. In the following lines we will address the potential effects of the new citizenship doctrine as an element to overcome the structural limitations of EU fundamental rights and will explore the added value of citizenship as an autonomous protective legal instrument.

a. Union Citizenship and the Structural limitations to fundamental rights protection in the EU

The lack of any mention of fundamental rights as enshrined in the Charter, or in the European Convention of Human Rights (ECHR), is remarkable in *Rottmann* and *Ruiz Zambrano* not only because in both cases fundamental rights considerations are central to a comprehensive approach to the situation, but because both judgments were issued after the entry into force of the Lisbon Treaty, since when the Court of Justice has demonstrated a commitment to use this instrument actively[145].

The lack of a fundamental rights approach to the issue of statelessness in *Rottmann* can ultimately be justified by the problematic conceptualization of the right to nationality as a fundamental right[146]. Most striking is in any case the reasoning of the Court in *Ruiz Zambrano* since, as has been noted by Hailbronner and Thym[147], this is a situation in which the right of family reunification is of paramount importance and has been traditionally used as one of the main arguments in materially related cases. The change in rhetoric is significant precisely in an area where a proactive ECHR case law exists and where the Union itself has asserted a progressive approach towards its citizens and third country

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144 Jo Shaw, *Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism*, EUI Working Papers RSCAS 2010/60 EUDO Citizenship Observatory.

145 E.g. Cases C-92/09 and C-93/09, Volker, 2010; C-279/09, DEB, 2010; C-400/10 PPU McB, not yet reported, C-391/09 Runevič-Vardyn and Wardyn; C-543/09 Deutsche Telekom; C-323/09 Association Belge des Consommateurs Test-Achats.

146 On the problematic consideration of nationality as a human right *see* Stephen Hall, *The European Convention on Nationality and the Right to have Rights*, 24 Eur. L. Rev 586 (1999).

147 *See* Hailbronner & Thym *supra* note 65.

nationals[148]. Indeed, in the national proceedings the claimants relied strongly on the protection offered by the ECHR[149], and the role of fundamental rights was one of the issues to which Advocate General Sharpston paid attention[150]. Moreover, the preliminary reference explicitly asked for an interpretation of certain provisions of the Charter of Fundamental rights[151].

The omission of any reference to fundamental rights is anything but accidental. A plausible explanation for it can be found in the complexity of the scope of application of fundamental rights by the ECJ. The application of EU fundamental rights to the States and their submission to EU judicial review is one of the most controversial issues that affect the constitutional structure of the EU. The jurisprudential doctrine on the protection of fundamental rights within the European Union reflected the need to ensure an equivalent level of protection at the European level, in order to avoid conflicts with constitutional courts that considered rights' protection as one of *their* key tasks[152]. According to the settled case-law, the EU standard of fundamental rights under the monitoring of the ECJ would be applicable in situations of legislative transposition and administrative application: the so-called *agency situations* when Member States implement a Regulation[153] or transpose a Directive[154]. Additionally, Member States must comply with EU fundamental rights when they derogate from fundamental freedoms[155], and even when they engage in the interpretation of EU law: when several readings of an EU provision are possible, Member States have to favor the one that complies with EU fundamental rights[156].

This delicate balance has been inherited by the Charter of Fundamental Rights of the European Union that has for the first time integrated in the EU legal order a formal catalogue containing an enumeration of fundamental rights. The interpretation of Art. 51 of the Charter of Fundamental Rights that limits its application with regard to the Member States "only when implementing Union law" is still object of controversy[157]. Here it suffices to note that this solution

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148 E.g. Cases C-60/00, Carpenter, 2002 E.C.R. I-6279; C-200/02, Chen, 2004 E.C.R. I-9925; C-459/99, MRAX, 2002 E.C.R. I-6591; C-109/01, Akrich, 2003 E.C.R. I-9607; C-540/03, Parliament v Council, 2006 E.C.R. 2006 I-5769.

149 The claimants relied on Article 8 ECHR and on Article 3 protocol 4 ECHR C-34/09, Ruiz Zambrano, 2011 ¶¶ 21 and 31.

150 C-34/09, Ruiz Zambrano, 2011 (Opinion) 151 et seq.

151 C-34/09, Ruiz Zambrano, 2011¶ 35.

152 See e.g. the decisions of the German Constitutional Court, BVerfGE 37, 271 Solange I and BVerfGE 73, 339 Solange II.

153 Case 5/88 Wachauf 1989 E.C.R. 2609; C-2/92 Bostock, 1994 E.C.R. I-955; Case C-351/92 Graff v Hauptzollamt Köln-Rheinau 1994 E.C.R. I-3361; C-15/95, Earl de Kerlast 1995 E.C.R. I-1961.

154 Case C-74/95 and C-129/95, X 1996 E.C.R. I- 6609; Case C-292/97 Karlsson 2000 E.C.R. 2737 and Joined Cases C-20/00 and C-64/00 Booker Aquaculture and Hydro Seafood 2003 E.C.R. I-7411.

155 C-260/89 ERT 1991 E.C.R. I-2925; Case C-368/95 Familiapress 1997 E.C.R. I-3689; Case C-112/00 Schmidberger 2003 E.C.R. I-5659 and Case C-36/02 Omega 2004 E.C.R. I-9609.

156 Cases C-60/00, Carpenter, 2002 E.C.R. I-6279.

157 E.g. Ricardo Alonso García, R., *The General Provisions of the Charter of Fundamental Rights of the European Union,* EUR. L. J. 8, 2002 pp. 492- 514; L. F. M. Besselink, *The Member States, the National Constitutions and the Scope of the Charter*, 8 MAASTRICHT JOURNAL OF

evokes at least the previous praetorian approach of the Court of Justice[158], respecting therefore the sovereign position of States as the primary carriers of the fundamental rights of the individuals under their jurisdiction.

The strictly delimited scope of application of Union fundamental rights is in tension with the emergent dynamic of supranational citizenship rights, whose core protection – since *Rottmann* and *Ruiz Zambrano* – is permanently and universally activated*,* notwithstanding cross-border connections or whatever other links to EU law instruments*.* Having in mind the restrictions of the applicability of the Charter of fundamental rights, to make it applicable to the *Ruiz Zambrano* case would have signaled any internal situation having an impact on the "genuine enjoyment of the substance of Union citizenship" – which remains a highly undetermined notion – as an *implementation* of EU law. The new far-reaching case-law on citizenship associated with the use of the Charter would have pointed at EU citizenship as a concept "likely to pull the Charter in the direction of an ever-expanding field of application"[159]. Therefore, the aseptic design of the scope of application of the Charter might have deterred the ECJ from using it as the anchoring element to enlarge the scope of protection awarded by the citizenship of the Union, even if the citizenship rights are included among its provisions.

In any case, these two cases could have provided for an opportunity to reinstate the value of fundamental rights as general principles of EU law[160]. Indeed, *Rottmann*, implied that with the deprivation of nationality being a situation that "by reason its nature and consequences" fell within the ambit of EU law[161], the Member State in question was bound to respect general principles of EU law in the exercise of its competences[162]. And even if the Court did not explicitly mention fundamental rights, they are comprised under the general principles as

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European and Comparative Law 68 (2001); Piet Eeckhout, *The EU Charter of Fundamental Rights and the Federal Question 39* Common Mkt. L. Rev 945 (2002); Armin Hatje, Title VII, Kapitel VII, *Allgemeine Bestimmungen über die Auslegung und Anwendung der Charter* in EU Kommentar 2320 (J. Schwarze, U. Becker, A. Hatje, J. Schoo, eds., 2009); Clemens Ladenburger, Kapitel VII, *Allgemeine Bestimmungen über die Auslegung und Anwendung der Charter*, in Europäische Grundrechte-Charta 759 (Tettinger &Stern, 2006); Julianne Kokott & Christoph Sobotto, *The Charter of Fundamental Rights of the European Union after Lisbon*, EUI working paper 2010, p. 7, http://cadmus.eui.eu/bitstream/handle/1814/15208/AEL_WP_2010_06.pdf?sequence=3.

158 In situations where Member States were implementing a Regulation or a Directive see: Case 5/88 Wachauf 1989 E.C.R. 2609; C-2/92 Bostock, 1994 E.C.R. I-955; Case C-351/92 Graff v Hauptzollamt Köln-Rheinau 1994 E.C.R. I-3361; C-15/95, Earl de Kerlast 1995 E.C.R. I-1961; Case C-74/95 and C-129/95, X 1996 E.C.R. I- 6609; Case C-292/97 Karlsson 2000 E.C.R. 2737 and Joined Cases C-20/00 and C-64/00 Booker Aquaculture and Hydro Seafood 2003 E.C.R. I-7411. EU fundamental rights have been held also applicable when Member States derogate from EU law: C-260/89 ERT 1991 E.C.R. I-2925; Case C-368/95 Familiapress 1997 E.C.R. I-3689; Case C-112/00 Schmidberger 2003 E.C.R. I-5659 and Case C-36/02 Omega 2004 E.C.R. I-9609. Also, when several readings of an EU provision are possible, Member States have to favour the one that complies with EU fundamental rights: C-60/00, Carpenter 2002 E.C.R. I-6279.

159 P. Eeckhout, *supra* note 157, at 973.

160 D. Düsterhaus *supra* note 40.

161 Case C- 135/08, Rottmann, 2010, not yet reported, ¶ 42.

162 30 to 32 Opinion of Advocate General Maduro in Rottmann. In this sense: Gerard-René De Groot, *Towards a European Nationality law*, 3 Electron. J. Comp. L. 1 (2004).

much as the principle of proportionality[163]. This opens up a gateway to a new, universal application of EU fundamental rights: If the new core of citizenship rights does not require any cross-border element, then the scope of application of EU law is opened up with the possible consequence of a similarly universal applicability of EU fundamental rights.

This possible reasoning, even if not overtly spelled out, is latent in both judgments. Maybe its open articulation in these already far-reaching cases would raise fears, for it would give the impression of being a slippery slope towards a universal fundamental rights jurisdiction applicable to all Union citizens, and hence effecting a significant change in the balance between the powers of Member States and the EU by essentially creating a rights regime in competition with constitutional rights in the individual Member States[164]. The ECJ's cautious reasoning and express avoidance of fundamental rights in the judgment in spite of the AG's invitation to address that subject in the case[165] contributes to an easier reception of the present judgments, but does not close this gate for the future.

b. Union Citizenship as an autonomous instrument for the protection of individual rights

Another plausible argument that some authors have put forward in order to explain the avoidance of a reference to fundamental rights is the assumption that such a reasoning would not have supported the conclusion arrived at by the Court[166]. Even if we subscribed to this interpretation with regard to the facts in *Ruiz Zambrano* – taking a strict position with regard to the non-refoulement elements of the case –, far from considering the avoidance of a fundamental rights reasoning an instrumental detour by the Court, we could turn the critical tone into a positive assessment.

Indeed, under the auspices of Article 8 of the ECHR on the right to family life the European Court of Human rights has supported claims of parents of children that are either citizens or that have long lived in the host state, amounting as a result in a path to regularization[167]. But this case law provides for a strong

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163 Sara Iglesias Sánchez, *Sentencia de 02.03.2010 (Gran Sala), Janko Rottmann / Freistaat Bayern, C-135/08 ¿Hacia una nueva relación entre nacionalidad estatal y la ciudadanía europea?*, 37 REVISTA DE DERECHO COMUNITARIO EUROPEO 933 (2010).

164 The German Constitutional Court's newest formula in the Mangold follow-up case (Honeywell) delineating the scope of its ultra vires review of European institutions including the ECJ requires a "structurally significant shift to the detriment of the Member States in the structure of competences between Member States and the European Union", thus setting the bar for a conflict with the ECJ high (Decision by the Federal Constitutional Court of Germany, Order of 6 July 2010 – 2 BvR 2661/06, quoted from English press release no. 69/2010 of 26 august 2010 [F.R.G.]). Nevertheless, installing a nearly universal rights regime might, at least in the near future, present a serious risk for intervention by the German Constitutional Court.

165 Opinion of AG Sharpston in Ruiz Zambrano ¶¶151 and ff.

166 See Hailbronner and Thym, *supra* note 65.

167 E.g. Rodrigues da Silva, *Hoogkamer v Netherlands* (2007) 44 EHRR 729. On these developments see: Daniel Thym, *Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularise Illegal Stay?*, 57 INT. & COMP. L. Q. 87 (2008).

balancing component, where only the gravity of particular circumstances can outweigh the legitimate interest of States in controlling migration. In this balancing exercise, the fact that the child possesses the nationality of the State from which he would be de facto expelled, forced to join the deported parent, is only an element – even though a central one – to be taken into account from a fundamental rights perspective. This is shown by the judgment of the U.K. Supreme Court (*Tanzania*), issued shortly before the judgment of the ECJ in the Ruiz Zambrano Case[168]. Even if subsequent judgments have arrived at the conclusion that the consequences of applying the reasoning in the *Tanzania* and in the *Ruiz Zambrano* cases are the same, we do not share this thought[169]. Whereas a fundamental rights approach allots a role to the citizenship of the children, a citizenship based approach awards absolute protection, notwithstanding the circumstances of the case, or the possibilities of the family to live reunited in other places. This is a protection that not only goes beyond a fundamental rights mandated minimum standard under the right to family life, but that even exceeds the protection awarded by some States towards their nationals.

Be that as it may, remaining in silence on the issue of fundamental rights, the Court endows a growing conceptual and material independence to the status of the citizenship of the Union as a truly fundamental status which provides for an autonomous and different content, suitable to provide a broader protection and to overcome the limitations of fundamental rights in order to assert the basic foundations of membership – protection against arbitrary deprivation of nationality and of the right of residence in the Union.

c. Utopian? – a constitutional patriotism for the EU after all?

This truly fundamental status, however, is only beginning to be unpacked by the ECJ in *Rottmann* and *Zambrano*. And while confining the two decisions to a narrow reading seems correct for the next years, it ignores the larger promise of the notion of EU citizenship as a potential fundament upon which to construct a more federal Europe. Indeed, the political circumstances currently suggest – in spite of the rocky ratification of the Lisbon Treaty, that the need for (especially economic) cooperation will increase rather than decrease. Even if the European Union requires less public support than most other political entities due to the functional imperatives of economic cooperation as apparent in the financial crisis, it can not do entirely without. Constitutional patriotism, i.e. "the idea that political attachment ought to center on the norms, the values and, more indirectly,

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168 ZH (Tanzania) v Secretary of State for the Home Department, [2011] UKSC 4 ¶30.

169 In a recent judgment the Upper Tribunal of the Immigration and Asylum Chamber of the United Kingdom has declared that "[w]here there are strong public interest reasons to expel a non-national parent, any right of residence for the parent is not an absolute one but is subject to the Community Law principle of proportionality. There is no substantial difference between the human rights based assessment of proportionality of any interference considered by Lady Hale in ZH (Tanzania) and the approach required by Community law", Omotunde (best interests – Zambrano applied – Razgar) Nigeria [2011] UKUT 00247(IAC) We are indebted to Prof. Elspeth Guild for bringing this judgment to our attention.

the procedures of a liberal democratic constitution"[170], has therefore been a popular concept among many EU theoreticians as it promises political coherence and a common identity based on rights.[171] Indeed, many other potential sources for political identification, such as common culture[172] and language[173] or a shared destiny, are lacking in the European case. Many have remarked that with the decline of the Bush Era and the rise of Obama-America the common rejection of supposed war-mongering[174] can no longer be the basis for a distinct European identity any more, if it ever could[175]. And while Europe in many ways does share a common destiny, as the Euro crisis demonstrates, this destiny is not always perceived as shared by its citizens, as protests against the bail-outs or demands that Greece may leave the European Union show. Assuming with Anderson that communities are first of all imagined[176], it does not look good for the European Union.

If Member States continue to increase cooperation with regard to their macro-economic policies in order to stabilize the Euro and get European economies back in gear which seems likely in the light of current talks about a common EU economic government, the need for a sense among citizens of political identification with the EU and solidarity with fellow Member States will increase. In this situation, being subject to and sharing in a common tradition of rights could help creating constitutional patriotism. Constitutional patriotism could provide both a necessary counterweight to the increase in economic talk, which conjures up the unpopular image the EU as cold-hearted and market-driven, and provide a potential way to alleviate public disenchantment with budgetary cuts and bail-outs for other countries. Considering the difficulties of changing the treaties in the future, both Member States' and the EU institutions' room for maneuver to help out in the legitimacy crisis will be limited and the ECJ might need to take the lead in dragging Europe out of another legitimacy crisis.

Union citizenship provides a vehicle to contribute to a rights-based identification of citizens with the EU – either by way of enlarging the new

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170 Jan Werner Mueller, Constitutional Patriotism, Princeton University Press 2007, 1.

171 Among many see Jan Werner Mueller, *supra* note 170, Justine Lacroix, *For a European Constitutional Patriotism*, Political Studies 50, 944–958 (2002), also Francesca Bignami, *Constitutional Patriotism and the Right to Privacy: A Comparison of the European Court of Justice and the European Court of Human Rights, in* New Technologies and Human Rights (Thérèse Murphy ed. 2009).

172 Staffan Zetterholm, *'Why is cultural diversity a political problem?' A discussion of cultural barriers to political integration*, in National Cultures and European Integration. Exploratory Essays on cultural diversity and Common Policies (Staffan Zetterholm ed., 1994), 65-82.

173 Dieter Grimm, *Does Europe Need A Constitution?*, 1 Eur. L. J. 282 (1995).

174 See e.g. Habermas' and Derrida's call for a European identity, partly to be found in the European public's rejection of the Iraq War, published in Liberation and the Frankfurter Allgemeine Zeitung (Juergen Habermas & Jacques Derrida, *February 15, or What Binds Europeans Together – A Plea for a Common Foreign Policy, Beginning from the Core of Europe*, reprinted and translated in Constellations, V. 10, N. 3 (2003), 291ff.

175 Generally skeptical on the interpretation of the anti-Iraq-war demonstrations see e.g. Patrick E. Tyler, *Threats and Responses: A New Power in the Streets*, N.Y.Times, February 17, 2003, more generally Martin Klimke, *From Iraq to Obama: European Perceptions of the U.S. in the 21st Century*, http://www.goethe.de/ins/cz/prj/fas/exp/en7174701.htm.

176 Benedict Anderson, Imagined Communities 5-36 (1991).

category of federal rights that are not dependent upon a cross-border element or by binding citizenship up with the Charter. Both scenarios would open up the possibility for a regime of rights, narrower or broader, that will be available not only to those citizens who work, study or live in Member States other than their own, but to all citizens independent of their place of residence. For the first time, all European citizens might be able to realize, as European citizens, benefits conferred by European integration that go beyond not having to wait at borders or having to change their money when going on vacation in other Member States.

Of course, whether more EU rights would actually be perceived as positive would largely depend on what rights these are and what the ECJ does with them. Developments that simply duplicate rights already protected by national constitutional courts are unlikely to attract much attention. A classical liberal approach to rights, with its emphasis on freedom, may be perceived as yet a further emphasis on economic prerogatives and might in fact have a negative effect on how citizens view the Union. This suggests that the way to enhanced rights-based identification with the Union may lie with social rights[177].

The Charter names multiple socio-economic rights in the Charter, such as the right to housing or to fair and just working conditions that are foreign to many Member State constitutions and whose justiciability is doubtful.[178] Of course, taking a social rights path would not be without risks – it raises many politically highly explosive questions, not least in the light of the long-standing British aversion to such rights on the European level[179]. On the other hand, a genuine ECJ social rights jurisprudence might have considerable attraction to citizens and could provide the long sought-after credibility for the Union, which has so often been described as having a "social deficit" and which saw this concern play a role in the rejection of the Constitutional Treaty in Denmark and France.[180] It would furthermore provide a clear sign of distinction from the US rights culture that has shied away from social rights in the past[181] and help foster a distinct and genuine European rights culture and identity.

This raises the question of what role Union citizenship would play in such a scenario. Would citizenship merely provide the strategic tool, the gateway to a (quasi-)federal European rights regime? Or is there a deeper connection between citizenship and rights and maybe even social rights? As we have pointed out above, most theoretical accounts of citizenship – whether drawing on the T.H.

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177 This path would of course raise questions as to what the ECJ may legitimately do which we ca not address here. For a potential way out of the legitimacy dilemma for the ECJ compare Fritz Scharpf, *Legitimacy in the Multilevel European Polity*, EUR. POL. SCI. REV. (2009), 173-204 who points to current legitimacy deficits with regard to the ECJ's market-liberal approach.

178 See Gráinne De Búrca, *The future of Social Rights Protection in Europe*, in SOCIAL RIGHTS IN EUROPE (Grainne de Búrca & Bruno de Witte & Larissa Ogertschnig 2005).

179 See DANIEL C. VAUGHAN-WHITEHEAD, EU ENLARGEMENT VERSUS SOCIAL EUROPE: THE UNCERTAIN FUTURE OF THE EUROPEAN SOCIAL MODEL 3-35 (2003).

180 Christian Joerges, *Rechtsstaat and Social Europe: How a Classical Tension Resurfaces in the European Integration Process*, COMPARATIVE SOCIOLOGY 9 (2010) 65-85, at 67.

181 The US literature is cited by Frank R. Cross *The Error of Positive Rights* 48 UCLA L. REV 857, 858-60 (2000-01); for a helpful comparative discussion, see David P. Currie *Positive and Negative Constitutional Rights* 53 U. OF CHI. L. REV. 864 (1986)

Marshall[182] or Hannah Arendt[183] – emphasize the importance of rights, whether they be political, classical liberal or social rights, or all of these.

Alexander Bickel once famously remarked, in the US context, that in spite of the fact that citizenship provided the key bond between the individual and the state, it nevertheless "happily (…) play(ed) only the most minimal role in the American constitutional scheme"[184]. From a broader comparative perspective, the emergence of an international human rights regime has called into question the importance of the citizenship concept for rights. On a more normative level, Linda Bosniak has recently pointed out the tensions inherent in the concept of citizenship, invoking notions of equality and universality especially in contemporary political theory, but at the same time relying on the logic of exclusion and alienation.[185] While one of the beauties of the *Ruiz* Zambrano case is that it avoids this tension by granting rights via citizenship that include, not exclude, aliens, the tension described would reappear in full force if the ECJ created a regime of European fundamental rights that would only be applicable to Union citizens.

In spite of this, we do not think that the concept of citizenship should be abandoned as useless or too riddled with tensions to function. First of all, on a practical level, an additional rights regime for Union citizens would not abrogate existing protections in national constitutions or the European Convention and hence not decrease the level of human rights protection in Europe. Furthermore, while citizenship and rights have become increasingly disentangled, citizenship is a concept of political belonging and solidarity between group members which makes it an ideal vehicle for financial redistribution and hence for strengthening social rights (this link was already argued for by T.H. Marshall in his famous account[186]). The ECJ has already opened up this path to financial solidarity with non-nationals in its prior citizenship jurisprudence (see above) and could build on it to develop social rights further. Finally, the anti-discrimination logic inherent in this prior jurisprudence is ill-suited to serve as a tool for exclusion of third party nationals in the long run.

The United States offer some illustration of the point we seek to make here. US constitutional patriotism presents in many ways an ambivalent example for Europeans as its rights culture has mostly been developed independently of the legal concept of citizenship and is associated with civil and political rights rather than social rights. But it does exemplify how the protection of individual rights by the federation rather than individual states can play a key role in the development of a strong federation and the fostering of citizens allegiance to the federation as opposed to individual states. For most if not all of the 19th century, Americans considered themselves as citizens of a state first and as Americans second.[187]

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182 T. H. Marshall, Citizenship and social class and other essays (1950). For a discussion of Marshall's idea of social rights citizenship in the context of modern welfare states and the EU see Jytte Klausen, *Social Rights Advocacy and State Building: T. H. Marshall in the Hands of Social Reformers*, World Politics 47 (1995), 244-267.

183 Hannah Arendt, *Es gibt nur ein einziges Menschenrecht*, Die Wandlung 754, 760 (1949).

184 Alexander Bickel, *Citizenship in the American Constitution*, 15 Ariz. L. Rev. 369 (1973).

185 Linda Bosniak, *supra* note 115, at 1-5.

186 T. H. Marshall, Citizenship and social class and other essays (1950).

187 See e.g. Bruce Ackerman, We the People – Foundations, 105ff. (1993).

When former Confederate States reacted to the emancipation of their former slaves after the Civil War by passing Black Codes that sought to confine blacks to second class citizen status, the framers of the Fourteenth Amendment sought to overcome these obstacles by subjecting states to the control of federal courts and to a set of constitutional rights that had hitherto not been applicable to state action[188]. As it turned out, these moves took a long time to bear fruit, to a good degree due to narrow interpretations of the Fourteenth Amendment adopted by the US Supreme Court.[189] Initially, it emphasized that only few rights pertaining to national citizenship such as the right to travel were protected against state action.[190] While the understanding of the right to travel as a fundamental right of national citizenship strongly evokes the ECJ in *Zambrano*, it was only with the creation of the incorporation doctrine (as AG Sharpston pointed out in referencing the US Supreme Court[191]) that the Fourteenth Amendment developed the necessary teeth to establish a truly federal system of rights protection – based however on the due process clause and hence not textually connected to national citizenship.[192] The Civil Rights movement and the federal enforcement of these rights in famous ways such as Eisenhower's dispatching of the 101st Airborne Division to Little Rock and the implementation of *Brown v Board of Education* by judges of the Federal 5th Circuit propelled these federal rights and their applicability against states and state sovereignty to the forefront of national discourse[193].

Admittedly, it seems hard to assess how important exactly these developments were in creating the modern US federal state, since other important historical factors, most notably the New Deal's nationalizing agenda and the experience of many wars, were also in play. Nevertheless, whatever its exact contribution, the foundation of a common regime of centrally-enforced rights by means of the incorporation doctrine has certainly played a significant role in the formation of a unified America.[194] The American case is obviously in many ways an uncertain guide to European unification given the many factors involved and the different rights at stake[195] – European states have already achieved a high level protection of the classical liberal rights that were central to the US case, and the deficits, as

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188 See e.g. LEON LITWACK, BEEN IN THE STORM SO LONG 366-71 (1979); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, 176-260 (2002); AKHIL REED AMAR, AMERICA'S CONSTITUTION – A BIOGRAPHY esp. 374-80 (2005), AKHIL REED AMAR, THE BILL OF RIGHTS 21-32, 140-62, 211-14, 286-90 (2000); *Barron v. Baltimore*, 32 U.S. 243 (1833).

189 *In Re Slaughterhouse*, 83 U.S. 36 (1872).

190 Id.

191 *Gitlow v. New York*, 268 U.S. 652 (1925).

192 Compare e.g. Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases,* 109 YALE L.J. 643 (2000); Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment,* 61 OHIO ST. L.J. 1051 (2000).

193 See e.g. JACK BASS, UNLIKELY HEROES (1991); MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 291-343 (2006)

194 See e.g. Mauro Cappelletti and David Golay *The Judicial Branch in the Federal and Transnational Union: Its Impact on Integration* in INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE VOL. 1, BK. 2 (Mauro Cappelletti, Monica Seccombe, Joseph Weiler, eds.) 297-306 (1986).

195 For further reading on the comparison between US federalization and the EU see CHRISTOPH SCHÖNBERGER, UNIONSBÜRGER: EUROPAS FÖDERALES BÜRGERRECHT IN VERGLEICHENDER SICHT (2005).

noted, may lie instead in the area of social rights[196]. But as the European Union is not going to become a federal state anytime soon, only a much lower level of common identification with the Union is necessary – and to achieve this, the US case suggests that the creation and enforcement of rights held by citizens as members of that Union can play an important part in the creation of rights-based patriotism.

With such a scenario being for some the possible salvation of Europe, for others its apocalypse, the EU can usually count on the long-term support of European economic actors with or without a regime of social rights. As past developments have shown, however, it cannot always count on its citizens.

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196 Of little conceptual value are comparisons of the ECJ with the ECHR since the ECHR is confined to its rights protecting function and forms no part of a comparable supranational organization with constant features for common decision-making in a broad range of policy areas.