Questioning EU Citizenship

Judges and the Limits of Free Movement and Solidarity in the EU

Edited by
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• HART •
PUBLISHING
OXFORD AND PORTLAND, OREGON
2017

Hart Publishing
An imprint of Bloomsbury Publishing Plc

Hart Publishing Ltd
Kemp House
Chawley Park
Cumnor Hill
Oxford OX2 9PH
UK

Bloomsbury Publishing Plc
50 Bedford Square
London
WC1B 3DP
UK

www.hartpub.co.uk
www.bloomsbury.com

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786
USA

www.isbs.com

First published 2017

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library.

ISBN: HB: 978-1-50991-468-5
ePDF: 978-1-50991-465-4
ePub: 978-1-50991-466-1

Library of Congress Cataloging-in-Publication Data

Names: Thym, Daniel, editor.

Title: Questioning EU citizenship : judges and the limits of free movement and solidarity in the EU / edited by Daniel Thym.

Description: Oxford ; Portland, Oregon : Hart Publishing, an imprint of Bloomsbury Publishing Plc, 2017. | Series: Modern studies in European law | Includes bibliographical references and index.

Identifiers: LCCN 2017038515 (print) | LCCN 2017039066 (ebook) | ISBN 9781509914661 (Epub) | ISBN 9781509914685 (hardback : alk. paper)

Subjects: LCSH: Citizenship—European Union countries. | Freedom of movement—European Union countries.

Classification: LCC KJE5124 (ebook) | LCC KJE5124 .Q47 2017 (print) | DDC 342.2408/3—dc23

LC record available at https://lccn.loc.gov/2017038515

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by TJ International Ltd, Padstow, Cornwall

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Introduction: The Judicial Deconstruction of Union Citizenship

DANIEL THYM

I. POLITICAL, LEGAL AND CONCEPTUAL CONTESTATION

SUPRANATIONAL CITIZENSHIP is politically contested, the object of prominent court rulings and has given rise to intense academic debate. The contributions to this volume scrutinise these contestations with a special emphasis on the position of the Court of Justice (ECJ) whose more restrictive recent judgments indicate that something fundamental may have changed. Analysing the contents and context of the case law, which have been the subject of numerous academic contributions, this book will broaden its outlook to political, social and normative factors that can influence the evolution of citizens' rights, including the Brexit referendum and broader debates about immigration. Doing so will embed institutional practices into an analytical framework highlighting links between European Union (EU) citizenship and the ongoing crisis of the European project and examining dynamics which may help rationalise the continuous reconfiguration of citizens' rights.

Citizens' rights are contested from different sides. First, it is questioned *politically* in several Member States mainly due to its alleged effect on the welfare state. Without doubt, free movement had been discussed on earlier occasions, including by academic commentators. It was controversial during the original Treaty negotiations and caused debate about so-called posted workers in the 1990s,[1] but the intensity of the discussion increased after the 2004 EU enlargement to eastern and central Europe. After initial debate in, among others, France and Italy,[2] storm clouds have gathered in recent years. The question of welfare benefits became one of the hottest political topics in the public debate prior to the

[1] See the historic study by S Goedings, *Labor Migration in an Integrating Europe* (The Hague, SDU Uitgevers, 2005) chs 3–5; and P Davies, 'Posted Workers' (1997) 34 *CML Rev* 571.

[2] *cf* C Barnard, 'Unravelling the Services Directive' (2008) 45 *CML Rev* 323, 325–31; and H O'Nions, 'Roma Expulsions and Discrimination' (2011) 13 *European Journal of Migration and Law* 361.

Brexit referendum.[3] But it was and is not only the British who are sceptical. The German coalition government also promised to 'reduce incentives for migration into the social protection systems'[4] and proceeded with the adoption of restrictive laws,[5] while the Visegrád countries take the opposite stance and promise strong support for a 'cornerstone of EU integration'.[6] Moreover, the debate about free movement tends to be overshadowed by wider debates about migration and asylum, not least as a result of ongoing migratory pressures in the Mediterranean region which culminated in the crisis of the Common European Asylum System during the 2015/16 period.

Second, Union citizenship is challenged *legally* in a number of judgments which put a preliminary end to years of debate about access to social benefits by citizens who are not economically active. The theme is not new: it had been at the heart of many landmark rulings which defined the Court's early citizenship case law. Cases like *Martínez Sala*, *Grzelczyk*, *Förster* or *Vatsouras* are well known among experts in EU law.[7] More recently, *Brey*, *Dano*, *Alimanovic* and *Commission v the UK* effectively reversed this trend. They will be analysed in the second part of this volume. But it's not only the social benefits judgments which are contested legally. Analysing the case law, another common thread stands out: the immigration status of family members from third states took centre stage in prominent rulings such as *Baumbast*, *Carpenter*, *Metock*, *Ruiz Zambrano*, *Dereci* and *Rendón Marín*.[8] By considering such immigration issues this volume will broaden its analysis to the linkage between Union citizenship and immigration policy which plays a prominent role in many contemporary debates about the EU. This linkage will be at centre of the contributions to the third part.

Third, the *normative* concept underlying Union citizenship is being scrutinised as a result of the alleged change of direction in the Court's case law and the sense of crisis within which the EU has been engulfed in recent years.[9] The contributions to this volume will show that the normative infrastructure of supranational citizenship is bound to remain unstable. It is defined by an inbuilt tension between the national and the European level[10] and does not reside on a clear-cut normative

[3] See the contribution by Stephanie Reynolds, chapter 4 in this volume.

[4] See CDU/CSU/SPD, Deutschlands Zukunft gestalten, Koalitionsvertrag 18. Legislaturperiode, December 2013, 108.

[5] See the chapter by Stephanie Reynolds, chapter 4 in this volume.

[6] *cf* Joint Statement of the Visegrád countries, Council doc 17395/13 of 4 December 2013.

[7] For an analytical overview, see M Dougan, 'The Bubble that Burst: Exploring the Legitimacy of the Case Law on the Free Movement of Union Citizens' in M Adams et al (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Oxford, Hart Publishing, 2013).

[8] See D Thym, 'Family as Link. Explaining the Judicial Change of Direction on Residence Rights of Family Members from Third States' in H Verschueren (ed), *Residence, Employment and Social Rights of Mobile Persons: On How EU Law Defines Where They Belong* (Antwerp, Intersentia, 2016).

[9] See Editorial Comments, 'The Critical Turn in EU Legal Studies' (2015) 52 *CML Rev* 881; and L Azoulai, 'Solitude, désoeuvrement et conscience critique' (2015) *Politiques européennes* 82, 82–86.

[10] See R Bauböck, 'Why European Citizenship? Normative Approaches to Supranational Union' (2007) 8 *Theoretical Inquiries in Law* 453.

justification.[11] It also reflects the wider uncertainty about how to relate European integration to the rest of the world, especially insofar as questions of immigration are concerned.[12] This book cannot resolve these controversies, but it can help elucidate the role of the law and of its patron, the ECJ, in these processes. Union citizenship arguably embodies the historic mission of 'ever closer union'[13] and it is, therefore, a perfect angle to examine wider trends defining the crisis of the European project at this juncture.

II. DECONSTRUCTING SUPRANATIONAL CITIZENSHIP

By establishing the 'citizenship' of the Union, the Treaty of Maastricht introduced a concept which had often served as a projection sphere for political visions of a good life and a just society. It is the aspirational openness of the citizenship concept that explains why it has long steered the call for wider social and political inclusion.[14] It served as a normative anchor in debates about the abolition of serfdom and slavery, the gradual extension of the right to vote and the construction of the welfare state.[15] More recently, women, ethnic minorities or gays and lesbians have fought for emancipation by invoking 'citizenship'.[16] That is not to say that there is a uniform citizenship concept: its meaning remains theoretically contested and politically disputed.[17] All I say is that rules on citizenship can serve, like human rights norms, as channels to feed normative arguments into legal debates.[18] The inherent openness of the citizenship concept supports progressive change by means of dynamic interpretation.

It is the aspirational openness of the citizenship concept that explains the relevance of norms and ideas in the formation of the citizenship concept, which,

[11] See the contributions to L Azoulai et al (eds), *Constructing the Person* (Oxford, Hart Publishing, 2016); and F de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford, Oxford University Press, 2015).

[12] See D Kostakopoulou, 'EU Citizenship: Writing the Future' (2007) 13 *European Law Journal* (*ELJ*) 623.

[13] Recital 1 of the preamble of the original EEC Treaty of 1957, the present Treaty on the Functioning of the European Union and the Charter of Fundamental Rights.

[14] *cf* R Dahrendorf, 'Citizenship and Beyond' (1974) 41 *Social Research* 673; and S Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton, NJ, Princeton University Press, 2006) ch 6.

[15] For Europe, see P Magnette, *Citizenship. The History of an Idea* (Oxford, ECPR Press, 2005) chs 4, 5; and for the US, J Shklar, *American Citizenship* (Harvard, MA, Harvard University Press, 1991).

[16] See S Strasser, 'Rethinking Citizenship' in B Halsaa et al (eds), *Remaking Citizenship in Multicultural Europe* (Basingstoke, Palgrave, 2012).

[17] See L Bosniak, 'Citizenship Denationalized' (2000) 7 *Indiana Journal of Global Legal Studies* 447, 450–53; and S Benhabib, 'Claiming Rights Across Borders' (2009) 103 *American Political Science Review* 691, 697–99.

[18] For academic practice, see D Thym, 'Frontiers of EU Citizenship' in D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge, Cambridge University Press, 2017); and, generally, M Kumm, 'The Idea of Socratic Contestation and the Right to Justification' (2010) 4 *Law & Ethics of Human Rights* 141, 144–52.

in the specific context of the EU, are defined by the institutional setting and the practice of different actors.[19] A sound legal-doctrinal exegesis is necessary, but our analysis should strive further and embrace broader constitutional explorations precisely because citizens' rights convey normative values and express basic choices of societies, which can change over time.[20] The conceptual openness of Union citizenship was one factor facilitating progressive interpretation by the ECJ, although such outcome was and is no foregone conclusion. The broader social and political context may similarly support restrictive tendencies, thematic shifts or judicial changes of direction.[21] Dead ends, standstill and decline are conceptually as likely as further expansion.[22] The different chapters in this book will show that the case law discloses such reorientation and that political actors and social practices can have an impact on legal change.

Against this backdrop, the title to this introduction employs the term 'deconstruction' not as a normative bias that supranational citizenship is bound to fail or that the alleged judicial retrenchment should be criticised. Rather, it uses the 'deconstruction' metaphor as an investigative device to encourage an examination of the legal, political and social practices and forces which may influence the outcome of legal disputes. In that respect, our terminology accepts the basic message of postmodern deconstruction theory in the tradition of Jacques Derrida which aimed to show the synthesised character of Western values and concepts.[23] The same can be said about the overall title of this volume on 'questioning EU citizenship'. To scrutinise citizens' rights is much more than a simple exercise of legal interpretation: it relates the legal and normative reconfiguration of citizenship to the broader state of the EU at this critical juncture.

A brief overview of the evolution of Union citizenship demonstrates that this dynamic potential is nothing new. When it was introduced by the Treaty of Maastricht, the initial reaction was temperate. Early comments criticised the rules for not adding much substance. Citizenship was perceived to be essentially a label attached to free movement and direct elections to the European Parliament. Commentators highlighted the 'weakness'[24] of its legal framework and castigated

[19] See D Kostakopoulou, 'Ideas, Norms and European Citizenship' (2005) 68 *MLR* 233; and the conclusion to this volume.

[20] *cf* RM Cover, 'Foreword: *Nomos* and Narrative' (1983) 97 *Harvard Law Review* 4, 11–44; and A von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch' (2010) 16 *ELJ* 95, 98–100.

[21] See J Shaw and N Miller, 'When Legal Worlds Collide: An Exploration of What Happens when EU Free Movement Law meets UK Immigration Law' (2013) 38 *EL Rev* 137; and D Kostakopoulou, 'Co-Creating European Union Citizenship' (2012/13) 15 *Cambridge Yearbook of European Legal Studies* 255, 259–66.

[22] *cf* J Ferguson, 'Decomposing Modernity' in J Ferguson (ed), *Global Shadows: Africa in the Neoliberal World Order* (Durham, NC, Duke University Press, 2006).

[23] *cf* J Derrida, *De la grammatologie* (Paris, Éditions de Minuit, 1967); and, on law, J Derrida, 'Force of Law' in D Cornell et al (eds), *Deconstruction and the Possibility of Justice* (Abingdon, Routledge, 1992).

[24] See S O'Leary, *The Evolving Concept of Community Citizenship* (The Hague, Kluwer, 1996) 304–07.

the new status as a misnomer bound to remain an 'empty gesture', a sort of 'cynical public relations exercise' on the part of the High Contracting Parties.[25] It is well known that the situation changed in the late 1990s when the Court started interpreting citizens' rights,[26] reflecting the earlier experience with the free movement of workers and other persons which had been interpreted generously by the EU legislature and the ECJ ever since the 1970s.[27]

In one of its first prominent judgments on citizenship, the ECJ arguably hinted at the forward-looking potential when it stated that Union citizenship 'is *destined to be* the fundamental status'.[28] This prospective dynamism did not come as a surprise. In contrast to the more hesitant observers, some commentators had predicted early on that the new status would not permanently remain an empty normative shell.[29] They expected the citizenship label to have a transformative impact. Ever since, citizenship judgments have constituted one of the most ambitious and tantalising lines of the ECJ case law, which was discussed in numerous academic articles. In doing so, commentators often described the evolution in a transformative manner from the (old) 'market citizenship' towards (new) 'real, social or political citizenship' including access to social benefits, voting rights and the free movement for people other than workers.[30] On this basis, the more recent cases were received with disappointment.[31] The assumption behind such academic descriptions is that the evolution of citizens' rights should present a process of gradual but steady advance.

This volume takes seriously the normative argument behind calls for progressive expansion, but concentrates on rationalising, nonetheless, why the institutional

[25] *cf* JHH Weiler, 'European Citizenship and Human Rights' in JA Winter et al (eds), *Reforming the Treaty on European Union: The Legal Debate* (The Hague, TMC Asser, 1996) 57, 68, 73.

[26] For an overview, see Kostakopoulou, 'EU Citizenship. Writing the Future' (n 12); and D Kochenov, 'The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate' (2013) 62 *ICLQ* 97.

[27] See S Kadelbach, 'Union Citizenship' in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law*, 2nd edn (Oxford, Hart Publishing, 2009) 445–48.

[28] ECJ, C-184/99, *Grzelczyk*, EU:C:2001:458, para 31 (emphasis added), which in French, the working language of the Court, read '*a vocation à être*'; the English language version of later judgments employ the formulation 'is intended to be'.

[29] See J Shaw, 'Citizenship of the Union: Towards Post-National Membership?' in *Collected Courses of the Academy of European Law, Vol VI-1—European Community Law* (The Hague, Kluwer Law International, 1998) 278–96; and C Tomuschat, 'Staatsbürgerschaft—Unionsbürgerschaft—Weltbürgerschaft' in J Drexl et al (eds), *Europäische Demokratie* (Baden-Baden, Nomos, 1999) 75.

[30] By way of example, see D Kochenov, 'The Citizenship Paradigm' (2012/13) 15 *Cambridge Yearbook of European Legal Studies* 197; J Shaw, 'Citizenship. Contrasting Dynamics at the Interface of Integration and Constitutionalism' in P Craig and G de Búrca (eds), *The Evolution of EU Law*, 2nd edn (Oxford, Oxford University Press, 2011); E Spaventa, 'Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects' (2008) 45 *CML Rev* 13, 14–30; and A Tryfonidou, *Reverse Discrimination in EC Law* (The Hague, Kluwer Law International, 2009) ch 4.

[31] N Nic Shuibhne, 'Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship' (2015) 52 *CML Rev* 889; S Giubboni, 'Free Movement of Persons and European Solidarity: A Melancholic Eulogy' in H Verschueren (ed), *Residence, Employment and Social Rights of Mobile Persons. On How EU Law Defines Where They Belong* (Antwerp, Intersentia, 2016) 78–88; and A Farahat, 'Solidarität und Inklusion' (2016) *Die Öffentliche Verwaltung* 45.

practice is moving in a different direction. It is not conceived of as a counterbalance to seemingly restrictive tendencies,[32] but tries to explain analytically how such constraints unfold and which factors might help explain this development. In doing so, it will focus both on the legal small print and wider political debates. Two contextual factors will be taken up in many contributions: the implications of the Brexit referendum or the nexus between Union citizenship and immigration law on the status of third-country nationals, which defined controversial citizenship cases even before the mass migration of refugees from the Middle East and Africa tested the resolve of the European project during 2015/16.

III. THE TRADITION OF 'INTEGRATION THROUGH LAW'

In the EU, the inherent volatility of the citizenship concept is reinforced by the traditional method of 'integration through law' which influenced the making of Union citizenship. In the EU, the law has often been employed as an instrument for change,[33] reflecting the dynamic vision of the overarching Treaty objective of 'ever closer union'. The belief in the effectiveness of the legally driven modification of social and economic realities was strengthened in the 1990s by the success of the single market programme.[34] In retrospect, the quarter century between the Single European Act and the entry into force of the Treaty of Lisbon appears as a period of almost continuous Treaty changes, which reached its climax in the effort to foster the steady advance towards some sort of political union through a legally binding Charter of Fundamental Rights and the (failed) project of a Constitutional Treaty.[35] The introduction of Union citizenship was an integral part of these endeavours.

When the Treaty of Maastricht introduced the new status it arguably built upon the tradition of 'integration through law' with a view to moving towards the political dream of building some sort of federal Europe, which had always been

[32] For a different approach see the recent contribution by D Kochenov, 'On Tiles and Pillars: EU Citizenship as a Federal Denominator' in D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge, Cambridge University Press, 2017).

[33] See the classic account by M Cappelletti, M Seccombe and JHH Weiler (eds), *Integration Through Law*, Vol I-1 (Berlin, De Gruyter, 1986); *Europe and the American Federal Experience. Volume 1: Methods, Tools and Institutions* and the more recent, critical assessment by JHH Weiler, 'Deciphering the Political and Legal DNA of European Integration' in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford, Oxford University Press, 2012) 149–56.

[34] See R van Gestel and H-W Micklitz, 'Revitalizing Doctrinal Legal Research in Europe' (2011) EUI Working Papers LAW No 2011/05, 11–2.

[35] *cf* N Walker, 'Legal Theory and the European Union' (2005) 25 *OJLS* 581, 585; and J Hunt and J Shaw, 'Fairy Tale of Luxembourg? Reflections on Law and Legal Scholarship in European Integration' in D Phinnemore and A Warleigh-Lack (eds), *Reflections on European Integration* (Basingstoke, Palgrave, 2009) 94.

understood to include a special status for citizens.[36] This objective had been present ever since the 1970s when heads of state and government promoted further integration through citizens' rights, including free movement for people other than workers and direct elections to the European Parliament,[37] thereby laying the groundwork for the introduction of Union citizenship in the Maastricht Treaty. Clearly, there had never been widespread agreement on the contours of an eventual political union and there was little discussion about the significance of the citizenship label at the time of its introduction,[38] but this did not unmake the normative potential of the new rules.[39] This historic pedigree implies, however, that the interpretation of Treaty rules may reflect the success or failure of the European project more broadly.[40] Contributions to this volume will take up corresponding challenges epitomised by the Brexit referendum.

An underlying reason for the more recent retrogression of Union citizenship may be the inherent limits to what an institutional practice of 'integration though law' can achieve. Treaty changes, new legislation and innovative court judgments alone are not capable of bringing about an enhanced degree of pan-European identity or solidarity: establishing a fundamental status called 'citizenship' or enacting a legally binding charter of fundamental rights are no self-fulfilling prophecies.[41] Legal rules, judgments and academic treatises participate in the constant reconstruction of their meaning, but cannot change them single-handedly; they need to be embedded in social structures and political life.[42] This is not to say that judgments and other legal practices are irrelevant (although some will minimise or deny their significance). Court judgments can be instruments for real-life changes, at least insofar as they relate back to political debates and reflect wider social struggles.[43] That is why several contributions to this volume will connect the analysis of court judgments to broader constitutional trends to political and social practices at national and European level.

[36] For a survey of political visions during the 1930s and 1940s, see D Rabenschlag, *Leitbilder der Unionsbürgerschaft* (Baden-Baden, Nomos, 2009) 28–43; for the 1960s, see A Evans, 'European Citizenship' (1982) 45 *MLR* 497, 499–504.

[37] See A Wiener, *Building Institutions* (Boulder, CO, Westview, 1998) chs 2, 3; and W Maas, *Creating European Citizens* (Lanham, MD, Rowman & Littlefield, 2007) ch 2.

[38] See P Magnette, *La citoyenneté européenne* (Bruxelles, Editions de l'Université de Bruxelles, 1999) ch 5.

[39] *cf* J Habermas, *Zur Verfassung Europas—Ein Essay* (Frankfurt, Suhrkamp, 2011) 63–64.

[40] See the contribution by Daniel Thym, chapter 6 in this volume.

[41] See the pointed critique by U Haltern, 'Pathos and Patina' (2013) 9 *ELJ* 14; and JHH Weiler, 'To Be a European Citizen: Eros and Civilization' in JHH Weiler, *The Constitution of Europe* (Cambridge, Cambridge University Press, 1999).

[42] *cf* C Möllers, 'Pouvoir Constituant—Constitution—Constitutionalisation' in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law*, 2nd edn (Oxford, Hart Publishing, 2009) 175–77; and D Chalmers, 'The Persona of EU Law' in L Azoulai et al (eds), *Constructing the Person* (Oxford, Hart Publishing, 2016).

[43] See M Everson, 'A Citizenship in Movement' (2014) 15 *German Law Journal* (*GLJ*) 965, 966–67.

IV. METHODOLOGY: THE LAW, ITS CONTEXT AND EXPLANATIONS FOR CHANGE

As aforementioned, the ECJ famously declared that Union citizenship was 'destined to be the fundamental status',[44] thereby arguably hinting at an underlying dynamism of the citizenship concept discussed above. More recently, however, it did not follow that route: it seems to have abandoned the forward-looking potential and backtracked on some of its earlier positions, most prominently in cases regarding the transnational access to social benefits. This judicial retrenchment coincides with political challenges for the European project including the success of the Brexit referendum and ongoing debates about immigration. It leaves us with the query of how to rationalise interpretative changes. This volume confronts this question in an attempt to understand the role of the law and its patron, the ECJ, in the reconfiguration of one of the most visible and symbolic areas of Union activities: the free movement of persons.

Our analysis aims to elucidate the factors that define the political, legal and conceptual contestation of Union citizenship by focusing on the evolving case law of the ECJ. This court-centred analysis is justified, since judges have been principal actors over the years, both in terms of advancing citizens' rights and in situations of restrictive closure.[45] In addressing the role of judges, our enquiry will combine specific themes with more general pieces with a view to locating the significance of the law and contextual factors in the practice of evolving supranational citizenship. The contributions to the second and third parts will scrutinise two subject areas in relation to which the case law was particularly controversial in recent years: social benefits and immigration. This double focus is innovative in itself. While the question of social benefits is well established as a theme in academic research on EU citizenship, the interaction between citizens' rights and rules on immigration is not discussed regularly, although the perspective of immigration allows us to connect the study of Union citizenship to the rich and controversial literature on immigration law and policy.

Examining the evolution of the case law on social benefits and the interaction with immigration policy requires the contributors to take problems of legal interpretation seriously. The normative surplus of the citizenship concept discussed earlier can be contrasted with the rather sober Treaty language, which had always combined aspirational rules, such as the general right to free movement for all citizens, with restrictive formulations emphasising limits and conditions.[46] Doctrinal incongruity extends to the legislative prescriptions in the Citizenship

[44] *Grzelczyk* (n 28) para 31.

[45] For a broader analysis not limited to Union citizenship and free movement, see the contributions to Adams et al (n 7).

[46] See the double reference to individual rights and 'limitations' and 'conditions' in Art 21 TFEU; for an inherent ambiguity in the ECJ's reasoning, see U Šadl, '*Ruiz Zambrano* as an Illustration of How the Court of Justice of the European Union Constructs its Legal Arguments' (2013) 9 *European Constitutional Law Review* 205, 221–24.

Directive 2004/38/EC on the basis of which the Court delivered its recent controversial rulings.[47] At the same time, textual indecision is one reason why doctrinal hermeneutics alone cannot resolve legal disputes. Contributors will have to consider, instead, contextual factors influencing the case law, in the case of social benefits as in relation to immigration. Doctrinal openness implies that citizens' rights allow, like many constitutional norms, for interpretative metamorphoses.[48] It is this openness and corresponding fluctuations of the case law which are at the centre of this book.

The objective of rationalising legal change will take centre stage in the first part and in the conclusion. Contributors will discuss factors shaping the reconfiguration of supranational citizenship at a more abstract level of analysis. In doing so, they will apply mixed methods in order to shed light on diverse factors and on the complex dynamics which can influence the interpretative evolution of legal rules. While some chapters will apply a contextually embedded legal analysis, others will adopt an extralegal standpoint. A common focal point of many contributions will be the significance of social practices and political discourses. Susanne K Schmidt and Francesca Strumia will scrutinise the impact of the political process and of wider discourses more generally, including in the run-up to the Brexit referendum. Their focus on political contestation overlaps with Daniel Thym's constitutional analysis of broader trends, while Niamh Nic Shuibhne traces the ambivalent role of constitutional arguments on, among other things, the Charter of Fundamental Rights in the evolving case law.

Ettore Recchi's sociological analysis will highlight the significance of citizenship practices and their impact on identificatory patterns on the basis of empirical data. Like Recchi, Urška Šadl and Suvi Sankari employ an innovative dataset with court judgments and Advocates General opinions to test the factors that might explain the outcome of citizenship cases. Dimitry Kochenov complements the multidisciplinary approach in the first part with a normative investigation to demonstrate that the contours and outcome of more recent cases epitomise what the author perceives as the vacant ethical foundations of EU citizenship. Kochenov's theoretical orientation is shared by Karin de Vries and Clíodhna Murphy who connect the debate on Union citizenship to debates about the legal status of immigrants more generally. These diverse perspectives will be brought together in a generic argument of how to explain the evolution of the case law in the concluding contribution to this volume by Dora Kostakopoulou and Daniel Thym.

[47] See the contribution by Ferdinand Wollenschläger, chapter 9 in this volume; and K Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42 *CML Rev* 1245, 1247–65.

[48] See A von Bogdandy and I Venzke, 'Beyond Dispute: International Judicial Institutions as Lawmakers' (2011) 12 *GLJ* 979, 984–93; and A Stone Sweet, 'The European Court of Justice' in P Craig and G de Búrca (eds), *The Evolution of EU Law*, 2nd edn (Oxford, Oxford University Press, 2011) 126–28.

V. OUTLINE OF THE BOOK

The argument in this book unfolds in three stages, combining a more general survey of factors which may help explain judicial change with two thematic focuses on equal treatment and the perspective of immigration law. The first shot is fired by Susanne K Schmidt, who argues that detailed prescriptions in earlier citizenship case law led to an 'over-constitutionalisation', leaving little room for political contest and choice. In her view, this curtailed the opportunities to influence the integration process and stretched the legitimacy of judicial decision-making. Mirroring the experience of court-centred constitutionalism in the US, she maintains that granting rights without political backing runs the risk of promoting a 'hollow hope'. Her thesis is of immediate appeal, as it presents itself as a factor among others which might help explain the outcome of the Brexit referendum, notwithstanding the historical contingency of the British case.

In an original argument, Dimitry Kochenov demonstrates how the Court's focus on individual circumstances can result in a conceptual and practical dead-end which contradicts the normative foundations of equal citizenship theories. Kochenov contrasts the emphasis on individual circumstances in the contemporary case law of the Luxembourg court with the wider trend towards personhood as the benchmark for citizenship practices across the world. While distinctions based on legal status give way to widespread equal treatment through a de facto extension of citizens' rights to many categories of foreigners elsewhere, individual circumstances serve, in the hands of the ECJ, as a tool of rationalising the de facto exclusion of persons officially holding the status of Union citizenship. On the basis of a well-articulated commitment to equal citizenship, Kochenov decries this development in the European case law as an expression of inescapable normative individualism imposed on those in need.

Against the backdrop of the Brexit debate, Stephanie Reynolds exposes how the Court failed, in her eyes, to develop a strategy to accommodate the single market and Union citizenship. She demonstrates this by looking at the legality of the safeguard mechanism limiting access to in-work benefits in the erstwhile interim settlement between the British Government and the European Council in the run-up to the Brexit referendum. On the basis of a thorough assessment of a long list of free movement and citizenship judgments, Reynolds shows that, in contrast to conventional wisdom, it is not the doctrinal foundations of the single market which have 'infected' the citizenship case law, but the latter that has inspired a compromise formula—including the personal circumstances benchmark analysed by Kochenov in the previous chapter—which is now being reintegrated into the free movement case law. This runs the danger of undoing earlier innovations on the principled equal treatment of workers in the single market.

The novel emphasis on individual circumstances also plays a prominent part in the chapter by Daniel Thym, who shows that the institutional practice, both by the ECJ and the Commission, fluctuates between two models of how to operationalise

the supranational citizenship concept: one based on residence and the other focusing on social integration. He tests the pertinence of this approach in relation to ongoing disputes about social benefits, political participation and the significance of nationality, as well as migration and collective identities. Thym shows that the move from one model to another is intimately connected to broader constitutional trends, such as the euro crisis, the failure of the Constitutional Treaty and arguments about immigration. He reconstructs more restrictive recent trends as building blocks of an EU that accepts the limits of the federal vision and that moves, instead, towards the acceptance of diversity.

While many contributions concentrate on external factors that may explain judicial change, Urška Šadl and Suvi Sankari pierce the veil of the ECJ as a purportedly uniform institution through a quantitative study of prominent citizenship cases, analysing these in relation to the internal organisation and professional background of both judges and advocates general. Alongside a thorough assessment of the thematic reorientation of the case law, Šadl and Sankari identify a growing significance of chamber judgments and a trend towards following the advocate general more often than previously. They also highlight a fascinating connection between restrictive judgments and a professional background in politics of either the reporting judge or the advocate general. This finding offers empirical evidence for the more theoretical hypotheses put forward in other chapters of the volume that the more restrictive recent twist in the citizenship case law may be explained, in part at least, by the broader political climate.

Ettore Recchi develops the argument brought forward by other contributors that the case law does not always adequately reflect social practices on the ground. He supports his findings using an original dataset on the identification of (im)mobile Union citizens with the European project. He finds, unsurprisingly, that those moving across borders tend to identify more with the EU, although the degree of influence of the corresponding 'transaction thesis' is less pronounced than one might expect. Moreover, the broader theoretical framework of his rich analysis indicates that the nexus between mobility and identification can result in a backlash when the immobile (who also tend to be less well-off economically) associate mobility with the transnational elite and direct their opposition, as a result, at the European project, including transnational movement for economic purposes. In that respect, the desire for EU-level identification associated with supranational free movement may ultimately backfire and thus undermine the overall legitimacy of the European project.

The chapters in the first part on how to explain judicial change conclude with a discourse analysis by Francesca Strumia, who traces how the legal and conceptual ambiguity of Union citizenship can be influenced by changing narratives at national and at European level concerning cross-border movements and the overall set-up of the EU as a supranational policy. She shows to what extent the emergence of hybrid statuses, both in ECJ case law and in domestic immigration laws, can serve as a gateway for broader political debates to influence the evolution

of citizens' rights and migration statuses. Mirroring findings by other contributors, Strumia highlights a combination of factors both exogenous and endogenous to the case law which may explain why institutional practice has become more restrictive in recent years in light of broader political debates.

The contributions to the second part delve into the most pertinent issue that defines the ECJ case law: equal treatment, social benefits and human rights. Ferdinand Wollenschläger explains how the more restrictive recent turn reflects an inbuilt ambiguity of the legal regime on the free movement of those who do not work. While the ECJ may have used this ambiguity to correct the legislature in earlier cases, it has more recently yielded to the prerogative of the political domain to decide controversial issues. This nuanced outlook is based on an interpretation of the case law which assumes that the criterion of economic self-sufficiency requires an assessment of the individual case and does not, therefore, exclude all those who do not work from social benefits indiscriminately. Wollenschläger's argument is a powerful reminder that court judgments do not come out of the blue, but are influenced by the black letter and the doctrinal construction of supranational rules on free movement, even if these rules are ambiguous.

While Wollenschläger concentrates on the (il)legality of residence as a precondition for equal treatment, Paul Minderhoud and Sandra Mantu revisit the seminal judgments which lie at the heart of recent political and legal debates about Union citizenship and access to social benefits. They explain why Wollenschläger's focus on (il)legal residence is an important variable, the significance of which the ECJ does not always recognise. This contributes to widespread confusion about the practical implications of important rulings. Most importantly, however, Minderhoud and Mantu emphasise the continued relevance of economic activity as the hallmark of free movement in the single market, which the overarching constitutional concept of Union citizenship could not undo. The strength of their chapter is the emphasis on broader trends, which they then link back to the specific contents of seminal judgments.

Niamh Nic Shuibhne follows a similar path, although she concentrates on an aspect which arguably presents itself as one of the hot topics in years to come: the interface between citizens' rights and the human rights in the Charter of Fundamental Rights. This angle has an intuitive appeal, since both Union citizenship and the Charter are essential and relatively new components of the supranational legal order and lie at the heart of the EU's constitutional self-image. The ECJ has approached both instruments differently in recent years: while the Charter has gained visibility and significance, citizens' rights have been developed reticently in recent practice. In a thorough analysis, Nic Shuibhne demonstrates inconsistencies in the interaction between the two instruments and discusses possible explanations, including the practical predominance of secondary legislation for activating the Charter. For proponents of advancing citizens' rights, the chapter advises that it may be expedient to 'rebrand' free movement cases as human rights cases, thereby building on the dynamism of the latter.

The third part builds on Niamh Nic Shuibhne's broader outlook, however concentrating on a different theme often neglected in debates about Union citizenship: its interaction with immigration rules of those who do not have the nationality of an EU Member State. In doing so, Sara Iglesias Sánchez analyses the relevance of the Charter of Fundamental Rights for third-country nationals, which, at closer inspection, is much more nuanced than the simple distinction between citizens' rights and other human rights in the field of free movement and political participation suggests. On the basis of a profound knowledge of the ECJ's case law, she identifies subtle distinctions with the potential to enhance the legal status of third-country nationals. Iglesias Sánchez navigates skilfully through the often obscure field of application and demonstrates that, in contrast to what one might expect intuitively, the Charter applies to third-country nationals more extensively than to Union citizens due to the broad reach of immigration and asylum legislation adopted at EU level in recent years.

The interplay between Union citizenship and migration law is not limited to human rights. At the same time, the integration benchmark which defines much of the case law on Union citizenship is crucial to the legal status of third-country nationals: the concept of social integration has been a hallmark of policy debates about immigration policy for more than a decade. On this theme, Karin de Vries highlights a fascinating development in legislation and case law on immigration statuses of third-country nationals. She identifies an 'integration exception', which the legislature and courts use to demarcate the (un)equal treatment of third-country nationals. Mirroring the chapter by Kochenov, she criticises the normative direction of these rulings: instead of employing equal treatment as an instrument to foster social integration, the EU legislature and the ECJ have recourse to uneven de facto integration as a justification for limiting equal treatment, thus turning the original vocation of equal citizenship on its head.

Clíodhna Murphy follows a similar line of thought in analysing the case law of the European Court of Human Rights (ECtHR) on residence security and equal treatment for foreigners, which—in another striking parallel to the ECJ's citizenship case law—elevates integration requirements as a precondition for full membership. Normatively, the human rights court in Strasbourg thus rejects a clear-cut equality-based membership paradigm in accordance with the theoretical position of Joseph Carens, which Murphy finds theoretically attractive. The ECtHR, by contrast, embraces qualitative membership criteria put forward by David Miller. Murphy's rich analysis is a strong reminder of the fruitfulness of linking the academic scrutiny of Union citizenship to broader debates about immigration, which define many contemporary policy debates about the EU.

It is trite to say that a legal development is complex and full of unexpected turns and, yet, Union citizenship shows how the identification of such complexity can help us to rationalise legal change. In the conclusion to this volume, Dora Kostakopoulou and Daniel Thym contend that the inherent instability of citizens' rights presents itself as an expression of non-simultaneity when the coexistence of

heterogeneous stages of social, political and economic development direct events in diverse directions. The apparent change in the case law can be rationalised, on the basis of the arguments put forward by the different authors in the previous chapters, as an eruption of the simultaneity of the non-simultaneous. If that is correct, the same contradictions may guide future developments in yet another direction: 'alternate takes' are real. Kostakopoulou and Thym show that they can be observed, notably in the field of fundamental rights. On the basis of the Charter, citizens' rights are being reconstructed in scenarios which often are not limited to situations of cross-border movements.