

# Citizens of elsewhere, everywhere and . . . nowhere? Rethinking Union citizenship in light of Brexit

STEPHEN COUTTS

*School of Law, University College Cork*

## Abstract

*This article seeks to determine the extent to which the communitarian form of life expressed in the Brexit vote is compatible with Union citizenship. It is argued that, amongst other things, Brexit expressed a desire for a communitarian form of life, broadly speaking. Union citizenship is presented as a constitutionalised transnational status embodying values of integration and autonomy and displaying certain cosmopolitan features. Union citizenship thus conceived poses problems for a communitarian political community as expressed in Brexit. The conclusion reflects on broader global trends in citizenship and on possible avenues for the future direction of Union citizenship.*

**Keywords:** Union citizenship; communitarianism; Brexit; immigration; cosmopolitanism; citizenship; integration; autonomy; transnational

The issue of citizens' rights is to form one of the three pillars of the Brexit withdrawal agreement. Without a doubt, it is one of the more difficult and sensitive issues to be dealt with during the Article 50 negotiations, and one with real human significance. At the current stage in the negotiations it would appear that some form of 'settled status' will be available to the 3 million non-UK EU nationals resident in the UK and the 1.3 million UK nationals resident in the remaining 27 Member States. However, as with the withdrawal agreement more generally, contentious institutional questions, including above all the role of the Court of Justice of the EU in policing the withdrawal agreement and the situation of such 'legacy citizens', remain to be resolved.<sup>1</sup>

The purpose of this article is not to address the precise situation and possible solutions for individuals that might be advanced and eventually adopted during the Article 50 negotiations.<sup>2</sup> Its purpose is to take a somewhat broader perspective and to view Union citizenship, its past development and its current shape through the prism of Brexit; to use Brexit and the underlying political and quasi-philosophical fault-lines it reveals to reflect on the nature of Union citizenship and whether it is or can be made

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1 Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 16–18 March 2018 (Coloured Version).

2 For a recent proposal in this regard see Dora Kostakopoulou, 'Scala Civium: Citizenship Templates Post-Brexit and the European Union's Duty to Protect EU Citizens' (2018) 56 *Journal of Common Market Studies* 856. For an overview of one of the earlier British proposals, see Stephanie Reynolds, 'Explainer: UK's Offer to EU Citizens Living in the UK' (*The Liverpool View*, 12 July 2017) <<https://livrepository.liverpool.ac.uk/3008428/>>.

compatible with certain forms of national social life. The argument is that Brexit reflects in part a desire for a particular form of social life, communitarian and rooted with a socially constituted individual at its heart. This traditional, if not nostalgic view of the community, has been undermined and hollowed out in recent years. Moreover, another figure has arisen in the popular imagination and is presented as the antithesis of the rooted individual that emerges from this communitarian-styled community; the rootless cosmopolitan. Union citizenship can be said to both represent and contribute towards both of these developments – the hollowing of national citizenship on the one hand and the rise of the cosmopolitan as a threatening alternative on the other. Thus the article presents the manner in which Union citizenship can be said to epitomise at least some of the concerns at play in Brexit. These negative consequences of Brexit and in particular the characterisation (if not caricaturisation) of EU citizenship as a ‘bad’ cosmopolitan citizenship flow from its overly transnational and market-based character.

The paper shall proceed in the following steps. Firstly, I will outline the political–philosophical view of society and the individual that appears to be revealed in Brexit, namely communitarianism, arguing that Brexit constituted, amongst other things, a rejection of cosmopolitanism or at least an expression of a communitarian preference. Secondly, I will outline the manner in which Union citizenship can be conceived as having cosmopolitan features, addressing the core characteristics of Union citizenship. It is important here to point out that Union citizenship differs from cosmopolitan citizenship, but nonetheless does display some cosmopolitan features. In the third and fourth sections I will argue that Union citizenship played into the Brexit debate and ultimately the Brexit vote. Section three will address the perception that Union citizenship undermined key elements of the solidaristic national community. Section four will argue that the incompatibility between Union citizenship and the forms of life epitomised in a closed solidaristic community is not only of a political or practical kind but also of a conceptual kind, with the rootless, cosmopolitan, rights-bearing and unencumbered Union citizen presented as the antithesis of the rooted, encumbered, socially constituted citizen located in a bounded national community. Brexit in a sense therefore constitutes the most acute manifestation of a broader phenomenon of national retrenchment in the face of globalising tendencies, in the field of citizenship and community as much as in other dimensions of social and economic life. It will be argued that within citizenship today there are two parallel developments; the hollowing of national citizenship and the rise of the cosmopolitan citizen, both of which played a background role in Brexit. Union citizenship can be said to be both the expression of, and have contributed to, these developments. A conclusion will locate this analysis in current global trends in citizenship underlining the questions that Brexit poses for Union citizenship today.

Union citizenship is a largely judicial construction, developed over time by a supranational court in the absence of significant popular demand.<sup>3</sup> As signs of a political

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3 See Michael Dougan, ‘The Bubble that Burst: Exploring the Legitimacy of the Case Law on the Free Movement of Union Citizens’ in Maurice Adams et al (eds), *Judging Europe’s Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart 2013). Although we should be mindful of the interaction between the legislature and the judiciary in the construction of Union citizenship as pointed out in Niamh Nic Shuibhne, ‘The Third Age of EU Citizenship’ in Phil Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2012).

backlash emerge, and the Court of Justice adjusts its jurisprudence accordingly,<sup>4</sup> it is necessary to connect the legal and judicial construction of Union citizenship with political realities and reflect on its relationship with broader socio-political trends in the Union. This article therefore adopts a socio-legal approach in a broader sense, attempting to analyse the relationship between a particular legal construction and the form of life it represents and a particular socio-political phenomenon, namely Brexit.

### A citizen of somewhere: Brexit and the communitarian ideal

Brexit means many things to many people and is the result of a myriad of different social, economic and political forces. Above all it is perhaps a result of a deep and pervasive insecurity understood in its broadest sense. Foremost is surely the economic dislocation in the new international political economy of growing inequality, reduced economic security and an undermining of the traditional welfare state, all of which have been radically exacerbated by the recent economic crisis and the subsequent politics of austerity it introduced.<sup>5</sup> The result is an increasing feeling of insecurity amongst citizens and downgrading of the status of modern Marshallian social citizenship.<sup>6</sup> This trend must also be placed in the context of a worldwide crisis in representative democracy. Peter Mair in a prophetic essay, published posthumously in 2013, noted the increasing distance between political elites and in particular their institutional form – the political party – and the public at large.<sup>7</sup> The rejection of the political establishment in the Brexit referendum can plausibly be linked to this broader, longer-term political trend, and indeed within this there is a special role for the EU in this hollowing-out of political space.<sup>8</sup> Finally, from the historical perspective of European integration, it should be noted that the UK has always been a somewhat reluctant partner in the EU. Its reasons for joining the Union have always been pragmatic and rather transactional in nature, a characteristic contributing towards the absence of British citizens' identification with and support for the European project.<sup>9</sup>

There are therefore no doubt many social, economic, historical and political causes of Brexit. There is another reason for Brexit, on which this article will focus. Brexit also perhaps represented an appeal for a return to a particular, more traditional form of social life of stable social structures and closer bonds of community, a form of life that is threatened intensely by the forces of economic and social dislocation that have been

4 Daniel Thym, 'Introduction: The Judicial Deconstruction of Union Citizenship' in Daniel Thym (ed), *Questioning EU Citizenship: Judges and the Limits of Free Movement and Solidarity in the EU* (Hart 2017). Indeed, for a specific example, see Charlotte O'Brien, 'The ECJ Sacrifices EU Citizenship in Vain: *Commission v United Kingdom*' (2017) 51 *Common Market Law Review* 209, analysing a judgment delivered immediately prior to Brexit in which '[t]he ECJ . . . played politics and lost' (at 1).

5 See generally Wolfgang Streeck, *How will Capitalism End?* (Verso 2016). For a discussion specifically in the context of Brexit, see Colin Crouch, 'Globalization, Nationalism and the Changing Axes of Political Identity' in William Outhwaite (ed), *Brexit: A Sociological Response* (Anthem Press 2017).

6 Bryan S Turner, 'We Are All Denizens Now: On the Erosion of Citizenship' (2016) 20 *Citizenship Studies* 679.

7 Peter Mair, *Ruling the Void: The Hollowing of Western Democracy* (Verso 2013). See also recent elections in the USA, Austria, the Netherlands and France.

8 *Ibid* ch 4.

9 Brigid Laffan, 'The Politics of Identity and Political Order in Europe' (1996) 34 *Journal of Common Market Studies* 81, 87; Michael A Wilkinson, 'The Brexit Referendum and the Crisis of "Extreme Centrist"' (2016) 17 *German Law Journal* 131, 135; and Thomas Risse, *A Community of Europeans? Transnational Identities and Public Spheres* (Cornell University Press 2010) 83–5. Risse notes the failure of British political elites to incorporate any European element into the British national identity, a absence of Europeanisation that is almost unique in the Union.

unleashed by globalisation and recent decades of a liberal political economy and one with which, rightly or wrongly, the EU has tended to find itself associated.<sup>10</sup> In reaction to Brexit, a number of sociologists situated Brexit in the context of globalisation and the financialisation of the UK economy and the significant economic and social disruption this has entailed. Brexit was, in their view, a reaction to this trend, which had generated a degree of frustration and alienation amongst significant sections of the population who had failed to benefit from these economic transformations.<sup>11</sup> Social and cultural transformations also figured in this general sense of alienation and frustration, and reasons to do with immigration as well as economic well-being ranked as the most important reasons leave voters cited as motivating their choice.<sup>12</sup> It is important to note that it is the perception of immigration and the threat it poses to the social fabric that is important rather than the reality. Thus, how the manner is presented by political elites and by the media is perhaps as important as the empirical reality of migration and attendant frustrations. Above all Brexit is presented as a rejection of a new national narrative fashioned by political elites over the past 20 years of a global, cosmopolitan Britain at home with economic globalisation abroad and multiculturalism at home. As put by Calhoun:

Brexit was manifestly a vote against multiculturalism and for English nationalism. A large part of the British population felt as though their country was slipping away from them . . . [this] also reflected globalisation, immigration, international conflict and perhaps above all economic transformation. And the Brexit vote made clear that the cosmopolitan elites who shaped the new Britain failed to generate a new narrative, a new national self-understanding to make sense of the changes and membership in the transformed country.<sup>13</sup>

In philosophical terms Brexit could be said to be a reaffirmation of a rooted or closed community in which the individual is embedded in social structures that form and give meaning to his or her life. This is a gradually changing community, whose norms and values arise organically over time, reflecting a form of Burkean conservatism.<sup>14</sup> There is a solidity and sociality to this form of life that is linked to a tightly woven and rooted community giving rise to national and intergenerational solidarity. Values are transmitted and evolve over time in a quasi-organic fashion establishing social links and a collective sense amongst the community at large.<sup>15</sup>

This vision of Britain, while not radically nationalist in a narrow, ethnic and rigidly exclusionary sense, is nationalist in the broader, liberal sense<sup>16</sup> depicted by Anderson<sup>17</sup> and advocated by Miller.<sup>18</sup> This is the nation as ‘an imagined community’<sup>19</sup> in which

10 See Craig Calhoun, ‘Populism, Nationalism and Brexit’ in Outhwaite (ed) (n 5); and Gerard Delanty, ‘A Divided Nation in a Divided Europe: Emerging Cleavages and the Crisis of European Integration’ in *ibid*.

11 See Outhwaite (n 5) and, in particular, contributions by Craig Calhoun, Colin Crouch and Gerard Delanty.

12 Harold D Clarke, Matthew Goodwin and Paul Whiteley, ‘Why Britain Voted for Brexit: An Individual-level Analysis of the 2016 Referendum Vote’ (2017) 70 *Parliamentary Affairs* 439.

13 Calhoun (n 10) 60.

14 Edmund Burke, *Reflections on the Revolution in France* (1790).

15 This is not unrelated to Durkheim’s concept of organic solidarity: see Emile Durkheim, *The Division of Labour in Society*, George Simpson (tr) (The Free Press 1933).

16 For an account of liberal nationalism in the context of the EU, see Elke Cloots, *National Identity in EU Law* (Oxford University Press 2015) ch 4.

17 Benedict Anderson, *Imagined Communities* (2nd edn, Verso 2006).

18 David Miller, *On Nationality* (Clarendon 1995).

19 Anderson (n 17).

members feel a natural affinity with other members and with the community as a whole and who are bonded by certain core, shared characteristics which are moreover *known* to be shared by other members, hence giving rise to an interpersonal sense of reflexive identity.<sup>20</sup> Together these shared characteristics and collective, reflexive identity constitute a shared normative, social universe for these individuals, generating a sense of identity-security and interpersonal bonds that can in turn provide the foundations for interpersonal trust<sup>21</sup> allowing the creation of a political community and a community of solidarity.

Two aspects of this form of community need to be highlighted to understand the impact of Union citizenship on Brexit; its bounded nature and its link with solidaristic communities on which the modern welfare state has been founded. Firstly, such communities are generally conceived as being necessarily bounded and limited to insiders, with a clear distinction being drawn between insiders and outsiders.<sup>22</sup> Trust implies a sense of identification with others, which in turn is generally based on ongoing interactions and/or a sense of shared characteristics.<sup>23</sup> Identity – a we-feeling – is necessarily juxtaposed to alterity – the others.

Secondly, membership and the bonds of allegiance that it sustains are key to maintaining the relationship of collective solidarity that underpins national welfare systems for both practical and political reasons. This is solidarity in the ‘communitarian’ sense as outlined by de Witte; solidarity as ‘the normative texture of a society; [it expresses] the moral commitments binding a certain group of people in a certain place in time on a certain territory’.<sup>24</sup> It is ‘both social and relational and speaks to the commitments between citizens who are engaged in the creation, elaboration and reproduction of a certain community that reflects communal norms, values and modes of interaction’.<sup>25</sup> Philosophically, redistribution of wealth is justified by common membership of society and hence some form of common ownership over the goods produced by that society.<sup>26</sup> There are difficulties in extending solidarity towards individuals not forming part of the national community, as constructed by centralised

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20 Miller (n 18) ch 2.

21 For the importance of the notion of trust in the formation of communities, see Roger Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Clarendon Press 1995) 332–8.

22 For the concept of limited membership as a ‘good’ to be distributed, see Michael Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (Basic Books 1984) ch 1. See Miller (n 18) for a defence of moral particularism, i.e. that our moral relations and, in particular, obligations to others differ depending on the nature of our relationships. For an analysis of the bounding of national welfare communities and the process of restructuring that has been taking place in the context of the EU, see Maurizio Ferrera, *The Boundaries of Welfare: European Integration and the New Spatial Politics of Social Protection* (Oxford University Press 2005), who on page 12 notes that ‘[t]he salience of boundaries has always been particularly high in the case of social citizenship, which touches on delicate issues of material redistribution and raises thorny dilemmas of equity, justice and reciprocity’.

23 See Cotterrell (n 21) 326–9.

24 Floris de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press 2015) 125.

25 Ibid.

26 In a Rawlsian sense, see John Rawls, *A Theory of Justice* (Harvard University Press 1971). See also Michael Dougan and Eleanor Spaventa, “‘Wish You Weren’t Here . . .’: New Models of Social Solidarity in the European Union” in Michael Dougan and Eleanor Spaventa (eds), *Social Welfare and EU Law* (Hart 2005) 184–7.

state institutions during the twentieth century.<sup>27</sup> As put by Ferrera, '[b]oundaries are essential for constructing special purpose communities ready to share risk'.<sup>28</sup>

These aspects of the community ideal, epitomised in the reaction to Brexit and the post-Brexit turn in British politics, have been challenged by Union citizenship in a practical manner but also in a broader conceptual sense. For, if Brexit is supposed to be an affirmation of the 'citizen of somewhere', the rooted, bounded citizen, socially constituted and allowing for social and political bonds amongst membership, Union citizenship represents perhaps its antithesis – the cosmopolitan citizen.<sup>29</sup> While there a myriad of reasons for Brexit, some of which were explored above, the remainder of this article will highlight this particular aspect of Brexit; the affirmation of a communitarian ideal in opposition to the EU and perhaps to globalised modernity in general. Brexit, in this view provides us with the opportunity, and indeed necessity, to reflect on the compatibility of the Union and especially Union citizenship with the form of life expressed in this ideal.

### Citizens of elsewhere and everywhere: the cosmopolitan face of Union citizenship

Union citizenship is primarily a transnational citizenship. If citizenship is a status that confers rights upon individuals, the rights that are associated with Union citizenship are generally exercised not against the Union as a whole but rather *vis-à-vis* other Member States. The rights are to equal treatment and free movement. These do not *per se* generate specific substantive rights guaranteed at a Union level. Rather they ensure that rights created under national law are extended to certain categories of non-nationals, primarily Union citizens. They are 'national rights guaranteed by supranational law'.<sup>30</sup> The supranational dimension to Union citizenship, namely citizenship of the Union itself, generating substantive, independent rights exercisable or guaranteed by Union law, while certainly emerging in recent years, remains in an embryonic stage.<sup>31</sup>

The two core transnational rights contained in Union citizenship, namely freedom of movement and non-discrimination, give rise in turn to two separate dimensions of Union citizenship, namely citizenship as a status of integration and citizenship as a status of autonomy. These two dimensions – at times complementary, at times in tension – in turn reflect different elements of Union citizenship.

#### CITIZENS OF ELSEWHERE: UNION CITIZENSHIP AS A STATUS OF INTEGRATION

Union citizenship is best known for being a status of integration.<sup>32</sup> Through the operation of the principle of non-discrimination on the basis of nationality, Union

27 For the difficulties associated with the relationship between migration and the welfare state, see Gary P Freeman, 'Migration and the Political Economy of the Welfare State' (1986) 485 *Annals of the American Academy of Political and Social Science* 51. See also Maurizio Ferrera, 'The Contentious Politics of Hospitality: Intra-EU Mobility and Social Rights' (2016) 22 *European Law Journal* 791, who notes the difficulty of finding a justification for what he terms 'transnational solidarity' (i.e. solidarity extended on an individual basis to individuals not originally forming part of the national community).

28 Ferrera (n 27) 793.

29 Or perhaps the accidental cosmopolitan citizen. See Alexander Somek, 'Europe: Political not Cosmopolitan' (2014) 20 *European Law Journal* 142, 144.

30 Paul Magnette, *La Citoyenneté Européenne* (Editions de l'Université de Bruxelles 1999) ch 1.

31 Although there certainly has been a resurgence in recent years, see the cases of Case C-165/14 *Alfredo Rendon Marin v Administración del Estado* EU:C:2016:675; Case C-304/14 *Secretary of State for the Home Department v CS* EU:C:2016:674; and Case C-133/15 *Chavez-Vilchez et al* EU:C:2017:354.

32 Loïc Azouli, 'La Citoyenneté Européenne, un Statut d'Intégration Sociale' in Gérard Cohen-Jonathan et al (eds), *Chemins d'Europe: Mélanges en l'honneur de Jean Paul Jacqué* (Daloz 2010).

citizenship allows individuals to move to and to integrate within societies of other Member States. The principle of integration interacts with the principle of non-discrimination and equal treatment in a dual sense. On the one hand integration is seen as the goal of the rights of equal treatment found in the Citizenship Directive and in the case law of the Court of Justice. On the other hand, further rights and a greater degree of equal treatment are seen as a reward in some sense for a degree of integration in the host Member State.<sup>33</sup> It is therefore a progressive status with an initial right of residence and (limited) equal treatment providing a seed of integration which in turn feeds back and strengthens the legal position of the individual the longer his or her residence has lasted and the extent to which he or she is integrated.<sup>34</sup> The effect of this, as Kostakopoulou has pointed out, is to render the borders of national communities within the Union more porous and open to others.<sup>35</sup> It challenges the exclusivity of national communities and opens them to nationals of other Member States. Strumia in turn identifies a ‘mutual recognition of belonging’ as lying at the core of Union citizenship.<sup>36</sup> There is a presumption of belonging elsewhere inherent in Union citizenship, a presumption that can become a reality in light of equal treatment and social integration.<sup>37</sup>

#### A CITIZEN OF EVERYWHERE: UNION CITIZENSHIP AS A STATUS OF AUTONOMY

But there is another side to Union citizenship, one that reflects the second part of Union citizenship: free movement. For, if Union citizenship grants rights for individuals to settle and become in a certain sense members of a host society, to become quasi-nationals, it also provides another set of rights; not to settle and make a life within another host society within the EU but rather to move around the Union, to build one’s life across a number of Member States and in a number of places.<sup>38</sup>

In particular, a number of cases of Union citizenship associated with the principle of free movement emphasise the right to move around the Union, to enjoy rights and moreover to carry rights acquired in one Member State to another or back to one’s original Member State. These vested or acquired rights,<sup>39</sup> passportable throughout the Union, reflect a broader overarching right; the right to build one’s life in different Member States and carry that life throughout the Union. Judgments of the Court of

33 See Case C-325/09 *Secretary of State for the Home Department v Maria Dias* EU:C:2011:498, [2011] ECR I-6387, para 64.

34 See Azoulai (n 32) and Ségolène Barbou des Places, ‘The Integrated Person in EU Law’ in Loïc Azoulai, Ségolène Barbou des Places and Etienne Pataut (eds), *Constructing the Person in EU Law: Rights, Roles, Identities* (Hart 2016).

35 Dora Kostakopoulou, ‘Ideas, Norms and European Citizenship: Explaining Institutional Change’ 68 *Modern Law Review* 233.

36 Francesca Strumia, *Supranational Citizenship and the Challenge of Diversity: Immigrants, Citizens and Member States in the EU* (Martinus Nijhoff 2013) (see in particular ch 6).

37 Indeed, the Court of Justice has found recently that the logical end point of Union citizenship is precisely full integration into the national community and the acquisition of home state nationality, in which case one is no longer elsewhere. See Case C-165/16 *Toufik Lounes v Secretary of State for the Home Department* EU:C:2017:862. Union citizenship thus in a sense supersedes itself.

38 See Gareth Davies, ‘“Any Place I Hang my Hat?” or: Residence is the New Nationality’ (2005) 11 *European Law Journal* 43

39 Jan-Jaap Kuipers, ‘Cartesio and Grunkin Paul: Mutual Recognition as a Vested Rights Theory Based on Party Autonomy in Private Law’ 2 *European Journal of Legal Studies* 66.

Justice in relation to family reunification<sup>40</sup> and in relation to civil status, in particular the right to carry one's name,<sup>41</sup> throughout the Union clearly reflect this logic, allowing individuals who have acquired certain rights (to family reunification or to have one's name recognised in a particular format) in one Member State to be recognised in other Member States, including one's home Member State. In legislation, Regulation 883/2004/EU on the coordination of social security<sup>42</sup> also reflects this image of a citizen on the move, carrying with him or her the rights, here financial, acquired in particular Member States.

Union citizenship is in this sense 'a bundle of options within a physically broadened and functionally more differentiated space'.<sup>43</sup> The individual is thus an individual characterised by choice and autonomy and is provided with a series of life opportunities across a broader geographic space. It is not the individual who settles and builds a life among a particular defined community, integrating within that community, adopting its norms and forming ties towards other individuals within that space. Rather it is the free, liberal and autonomous individual moving around, independent from societal ties.

The result of the two dimensions of this transnational citizenship is to render Union citizenship into something quite unique in the world today; a form of post-national<sup>44</sup> citizenship displaying certain cosmopolitan features.<sup>45</sup> Union citizenship is post-national in the sense that it is explicitly not tied to any pre-political forms of (national) identification, be they in political, cultural or ethnic terms. In fact, the rejection of a substantial or thick supranational dimension to Union citizenship is precisely a rejection of a refounding of national citizenship at a Union level and an acknowledgment perhaps that a federal 'people' as such does not exist at a Union level. Rather what is at stake in Union citizenship is the right of individuals to move beyond their home state, to enjoy a constitutionally protected status of quasi-insider in *other* states, namely a right to belong 'elsewhere'.<sup>46</sup> However, the cosmopolitan characteristics of Union citizenship are broader and reflect not just individuals who wish to make their lives in another society, but who wish to make their lives across different societies and perhaps in none and to have that choice recognised by states and other authorities: that is to belong everywhere<sup>47</sup> – to exist within a broader multiplicity of political communities and to a certain extent to belong to all of them and to none.

40 For example, Case C-291/05 *Minister voor Vreemdelingenzaken en Integratie v R N G Eind* EU:C:2007:771, [2007] ECR I-10719. See most recently Case C-673/16 *Coman and Others v Inspectoratul General pentru Imigrări and Others* EU:C:2018:385 on the recognition of a same-sex marriage in one Member State (Belgium) in another (Romania).

41 Case C-148/02 *Carlos Garcia Avello v Belgian State* EU:C:2003:539, [2003] ECR I-11613.

42 Regulation 883/2004 on the coordination of social security systems [2004] OJ L 166/1.

43 Ulrich Preuß, 'Problems of a Concept of European Citizenship' (1995) 1 *European Law Journal* 267, 280.

44 See Yasemin Soysal, *Limits of Citizenship: Migrants and Postnational Membership* (University of Chicago Press 1994) and Christian Joppke, 'The Inevitable Lightening of Citizenship' (2010) 51 *European Journal of Sociology* 9. See also Linda Bosniak, 'Citizenship Denationalized' (1999–2000) 7 *Indiana Global Legal Studies* 447, 457 ff, characterising EU citizenship as possibly denationalised but with some reservations.

45 A fact that, as Kamminga points out, is conceptually incompatible with cosmopolitanism properly conceived, see Menno Kamminga, 'Cosmopolitan Europe? Cosmopolitan Justice against EU-centredness' (2017) 10 *Ethics and Global Politics* 1. Although see Kok-Chor Tan, 'Nationalism and Cosmopolitanism' in David Held and Garrett Wallace Brown (eds), *The Cosmopolitan Reader* (Polity Press 2010) for an account of a form of nationalism and cosmopolitanism that may be compatible.

46 See also Strumia (n 36) who speaks of the mutual recognition of belonging that lies at the heart of Union citizenship.

47 In the terminology of Tan (n 45). See Jeremy Waldron, 'What is Cosmopolitan?' in Held and Wallace Brown (n 45) (eds) for an account of cosmopolitanism as a legal concept by building on the Kantian notion of cosmopolitan right.



It is important to point out that, while Union citizenship displays features of cosmopolitan citizenship, it is not itself a form of cosmopolitan citizenship. Cosmopolitan citizenship entails a particular normative ideal, founded on a principle of liberal equality amongst individuals operating at a global level.<sup>48</sup> The cosmopolitan citizen therefore represents an ideal of the individual existing in a global political or normative society.<sup>49</sup> Two distinctions between this and Union citizenship can be identified. Firstly, while Union citizenship does contain free movement and equal treatment at its heart, these are a consequence of its origins in a transnational, constitutionalised market.<sup>50</sup> Thus, while Union citizenship displays features of cosmopolitan citizenship, these are merely incidental to its transnational market origins rather than any cosmopolitan ideal of a global society. Secondly, in addition to being an outgrowth of the internal market, Union citizenship has been used as a vehicle for the construction of a specifically European identity<sup>51</sup> and carries with it its own boundaries and exclusions. At best, Union citizenship represents a status with certain features of cosmopolitan citizenship that nonetheless remains bounded in space and as a community.

### Citizens of nowhere: Union citizenship in the Brexit debate

Both dimensions of Union citizenship played a part in the Brexit phenomena, at different levels. On the one hand, Union citizenship and Union citizens – and in particular their rights to social services and social assistance – appear within the migration debate which seems to have been a major factor in the ‘No’ result on 23 June 2016.<sup>52</sup> On the other hand, it is argued that Union citizenship also reflects a related but broader opposition to what might be termed ‘rootless cosmopolitanism’, which in a certain sense is epitomised in the philosophy of Union citizenship.<sup>53</sup>

#### THE HOLLOWING-OUT OF NATIONAL CITIZENSHIP: UNION CITIZENSHIP IN THE MIGRATION DEBATE

On a practical but an extremely important level, Union citizenship and the immigration associated with it played an important role in the Brexit debate and the ultimate ‘No’ result on 23 June 2016. While in a certain sense this is a classic migration debate, with the usual concerns regarding social cohesion and welfare tourism, Union citizenship is perhaps particularly problematic from the classic national or communitarian position that appeared to animate much of the anti-immigrant debate in the UK. Union citizenship can be seen as a migration status, and indeed in its integration dimension this is perhaps appropriate. However, if it is a migration status it is one that is remarkably extensive in terms of rights and more legally entrenched than almost any other immigration status.

Firstly, Union citizens enjoy a status that comes close to that of nationals with an extraordinarily broad range of rights. There is a general right to enter visa-free extended to all Union citizens and a basic right of residence, condition-free initially and subsequently subject to limited financial or work-related conditions. Once legally resident Union citizens enjoy extensive rights to equal treatment across all areas that ‘fall within

48 For a general account of cosmopolitanism see Waldron (n 47).

49 See Kok-Chor Tan, ‘Cosmopolitan Citizenship’ in Ayelet Shachar et al (eds), *The Oxford Handbook of Citizenship* (Oxford University Press 2017) for an overview of the different forms of cosmopolitan citizenship.

50 Niamh Ní Shuibhne, ‘The Resilience of EU Market Citizenship’ (2010) 47 *Common Market Law Review* 1597.

51 Willem Maas, *Creating European Citizens* (Rowman & Littlefield 2007).

52 See Clarke et al (n 12).

53 Joppke (n 44).

the scope of the Treaties' a scope that in turn (in a rather circular manner) can be defined in terms of free movement.<sup>54</sup> All workers have rights to social assistance and other social benefits. In the 1990s and early 2000s these rights were extended to non-economically active individuals (subject to certain conditions),<sup>55</sup> obliging Member States to extend a certain degree of solidarity to needy Union citizens from other Member States. This extension of social assistance rights in particular entailed the rendering of boundaries between national communities of solidarity more porous and subject to penetration. Finally, and not unimportantly, these rights are extended to family members, even those who are not already resident in the Union, opening these rights to a potentially much greater group of individuals and opening Union citizenship to accusations of abuse.<sup>56</sup> In more recent years, the Court of Justice has been engaged in a process of reasserting national boundaries in this area, especially in the field of social assistance to economically inactive migrant Union citizens. In a series of cases<sup>57</sup> it has significantly limited the rights enjoyed by the non-economically active to access social benefits, allowing Member States to apply criteria of lawful residence to filter access to social benefits, where lawful residence is defined as residence on the basis of economic activity or self-sufficiency. While this move has certainly been in reaction to the broader political context of resistance and growing public frustration with perceived problems of EU migration,<sup>58</sup> it is evident this late turn in the Court's jurisprudence has not been sufficient to alter the public narrative on Union citizens. In any event, even with the rights of non-economically active Union citizens restricted, the fact remains that the thresholds of economic activity remain low and once exercising an economic activity or even a (relatively low) degree of economic self-sufficiency, Union citizenship offers an impressive status in terms of the range of rights and their constitutional quality.

Member States are obliged to extend a wide range of rights to non-citizens, in this case Union citizens and their families, individuals who are not part of the national community. The result is a certain denationalisation of the rights of citizenship on the one hand and a devalorisation of citizenship as a status on the other hand. Prevented from delimiting the social rights on the basis of nationality early in the history of the Union, Member States increasingly used residency as an alternative criteria on the basis of which to allocate rights to individuals.<sup>59</sup> The result, as pointed out by Davies in the

54 See Case C-209/03 *The Queen (on the application of Dany Bidar) v London Borough v Ealing, Secretary of State for Education and Skills* EU:C:2005:169, [2005] ECR I-2119. Although note that the enjoyment of such rights appears to be conditional on residence in compliance with the conditions contained in the Directive itself, significantly reducing the ability of non-economically active Union citizens to enjoy rights of equal treatment. See, in particular, Case C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* EU:C:2014:2358 and subsequent cases. For an analysis of this turn in the case law see the contributions in Thym (ed) (n 4).

55 Case C-85/96 *Maria Martinez Sala and Freistaat Bayern* EU:C:1998:217, [1998] ECR I-2694; Case C-184/99 *Rudy Grzelezyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* EU:C:2001:458, [2001] ECR I-6193; and *Bidar* (n 54).

56 See Case C-127/08 *Metock v Minister for Justice Equality and Law Reform* EU:C:2008:449, [2008] ECR I-6241.

57 In particular Case C-140/12 *Pensionsversicherungsanstalt v Peter Brey* EU:C:2013:565; *Dano* (n 54); Case C-67/14 *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others* (Opinion of AG Wathelet) EU:C:2015:210; Case C-299/14 *Vestische Arbeit Jobcenter Kreis Recklinghausen v Jovanna Garcia-Nieto and Others* EU:C:2016:114; and Case C-308/14 *Commission v UK* EU:C:2016:436.

58 The judgment in *Commission v UK* (n 57) was delivered *the day before* the referendum on Brexit, a fact leading O'Brien (n 4) 209 to make the apt comment that '[t]he ECJ has played politics and lost'.

59 Indeed, the UK's social welfare system was particularly susceptible to disruption by EU law and in particular the (over)constitutionalisation of rights to transnational social assistance in the Union. See Susanne K Schmidt, 'Extending Citizenship Rights and Losing It All: Brexit and the Perils of Over-Constitutionalisation' in Thym (ed) (n 4).

context of the EU, is a replacement of nationality with residence as the basis for allocating rights, including rights to social benefits.<sup>60</sup> Thus thicker social bonds founded on the notion of community bonds, which, as pointed out above, are essential for the political and normative justification for welfare states and social citizenship, are replaced with a temporary and transient criteria for membership and extension of rights and responsibilities between individuals.<sup>61</sup> It is questionable whether mere 'being here' is sufficient to provide the deep bonds of community necessary for the underpinning of national welfare programmes.<sup>62</sup> It can be argued that the Court of Justice (and indeed the legislature) has tried to balance this by introducing the principle of integration, seeking to ensure that, while national communities remain open to Union citizens, extending financial solidarity can be conditioned by that citizen demonstrating some level of belonging with the host Member State.<sup>63</sup> However, this has been difficult to apply in practice and conditioned by the operation of the proportionality principle.<sup>64</sup>

In turn (national) citizenship is devalorised; the range of rights that are distinct to the status of nationals is shrunk significantly, especially in the social realm.<sup>65</sup> Citizenship as a membership status carrying with it some kind set of rights, exclusive to the members of that community, is undermined. Citizenship no longer carries with it significant added value, on top of the status of Union citizen. Firstly, human rights and civil rights, and now social rights and rights to social assistance, have been extended beyond the community of national citizens.<sup>66</sup> There is a strong argument to be made that national citizenship only matters now in the political realm.<sup>67</sup>

However, it is not only the substance of Union citizenship and the rights it is associated with that are important in the impact of Union citizenship on the Brexit debate; it is also the constitutional nature or form of Union citizenship. For Union citizenship is a constitutionally guaranteed status that escapes control of national governments and actors. Migration rights are typically something in the gift of the state and are an area of maximum state discretion.<sup>68</sup> Although arguable, there is no legal right

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60 See Davies (n 38).

61 Davies also points out that this leads to not only 'the absorption of foreigners but the rejection of expatriates', a result he terms 'disastrous'. See *ibid* 53.

62 Dougan and Spaventa (n 26). See also Alexander Somek, 'Solidarity Decomposed: Being and Time in European Citizenship' (2007) 32 *European Law Review* 787.

63 See Barbou des Places (n 34).

64 See again *Bidar* (n 54), although note the jurisprudence has been somewhat inconsistent on this point: see Case C-158/07 *Jacqueline Förster v IB Groep* EU:C:2008:630; and more recently *Dano* (n 54) and subsequent cases.

65 See Joppke (n 44).

66 Leading to the rise of the 'denizen': for an early account, see Tomas Hammar, *Democracy and the Nation State: Aliens, Denizens and Citizens in a World of International Migration* (Ashgate 1990). See also, in the context of the Union, Neil Walker, 'Denizenship and Deterritorialisation in the European Union' in Hans Lindahl (ed), *A Right to Inclusion and Exclusion: Normative Faultlines of the EU's Area of Freedom, Security and Justice* (Hart 2009).

67 Even here there are some developments within Europe whereby political rights are extended to certain categories of non-nationals. See Jo Shaw, *The Transformation of Citizenship in the European Union: Electoral Rights and the Restructuring of Political Space* (Cambridge University Press 2007).

68 A traditional paradigm that is undergoing significant alteration in the field of international law and in particular asylum law. See Alison Kesby, *The Right to Have Rights: Citizenship, Humanity and International Law* (Oxford University Press 2012). In the context of the EU, see Catherine Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2016).

to migrate.<sup>69</sup> An individual's presence and the extent of the rights he or she enjoys in any particular state are something to be determined by that state. Union citizenship escapes this logic and thus escapes control by the Member State. A classic distinction made between citizens – governed by a system of rights and whose status is guaranteed – and foreigners – governed by a system of privileges and existing in a space of state discretion – is eliminated in the context of Union citizenship.<sup>70</sup> Union citizens, simply put, enjoy a rights-based status, constitutionally guaranteed by a supranational legal order that enjoys primacy over national law.

Union citizenship therefore also involves a significant loss of sovereignty on the part of Member States in relation to their immigration policy,<sup>71</sup> a point that could not have been more salient in the context of the Brexit debates (think 'take back control' of both migration and of sovereignty).<sup>72</sup> Moreover, it is a status the rights of which have been substantially fleshed out, not by the legislature (although this has certainly played its part)<sup>73</sup> but by a judicial actor: the Court of Justice. This is not an irrelevant detail in the context of Brexit. Sovereignty has always been a concern of the UK in relation to European developments. However, the nature of that concern has shifted. Gee and Young have described how, in contrast to the initial debate concerning the entry of the UK into the then European Economic Community, which focused on parliamentary sovereignty, discussions of sovereignty in the Brexit debate tended to concern judicial sovereignty (both in relation to the Court of Justice, and it must also be said, the European Court of Human Rights).<sup>74</sup>

### Citizens of nowhere: Union citizenship as a cosmopolitan figure

However, the antipathy between Union citizenship and the communitarian ideal epitomised in Brexit goes further than the role played by Union citizenship as a supercharged status of migration, with all the problems that poses for the coherence of national communities of solidarity and welfare and its denationalising and devalorising impact on national citizenship. There is a deeper conceptual incoherence between the form of life epitomised by Union citizenship and the form of life reflected in the Brexit debate. In contrast to the rooted, socially constructed citizenship, embedded in a community of values and of trust, in which membership has an inherent and constituent value for individuals, Union citizenship can be said to represent a cosmopolitan figure and symbolises the fears and insecurities reflected in the choice of Brexit. This, however, is

69 Outside the scope perhaps of rights enjoyed by recognised refugees under the Geneva Convention. Strong arguments have been made in normative theory regarding a general international right of free movement. See Joseph Carens, 'Aliens and Citizens: The Case for Open Borders' (1987) 49 *The Review of Politics* 251 for the classic statement.

70 For an early illustration of this point in the area of expulsion, see Gérard Lyon-Caen, 'La réserve d'ordre public en matière de libéré d'établissement et de libre circulation' (1966) *Revue Trimestrielle de Droit Européen* 693.

71 Emigration policy in the sense of controlling the exit of individuals from the state is likewise affected by EU law (see Case C-33/07 *Ministerul Administrației și Internelor – Direcția Generală de Pașapoarte București v Gheorghe Jipa* EU:C:2008:396, [2008] ECR I-5157) but is of course much less politically salient (if at all) than immigration policy.

72 Thus 'the entire point of Union migration law is to avoid, so far as possible, executive discretion in the treatment of fellow Union citizens'. See Eleanor Spaventa, 'Earned Citizenship: Understanding Union Citizenship through its Scope' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017) 217–18.

73 Níe Shuibhne (n 3).

74 Graham Gee and Alison Young, 'Regaining Sovereignty? Brexit, the UK and the Common Law' (2016) 22 *European Public Law* 131.

not the positive, idealised version of cosmopolitan citizenship of the stoics, the citizen of the world that is at home and welcome everywhere. Rather it is the denuded, rootless cosmopolitan detached from the national community and, moreover, that undermines the national community;<sup>75</sup> Theresa May's 'citizens of nowhere'. In this caricature, Union citizenship is rootless, instrumental, individualistic and exclusive.

Union citizenship in this sense is seen as a *disembedded* citizenship; it is rootless. It is not founded in any particular community at a supranational level and, moreover, deliberately seeks to avoid integration or assimilation in any national community, be it the home national community or the host national community. It is liberal and individualistic. It is the individual of autonomous choice, who is self-constituting and who is capable of making use of the myriad of opportunities offered by Union citizenship throughout the Union. Note, for example, the use made by the Garcia Avello family not to seek equal treatment with Belgian children in Belgium, but rather to seek *different* treatment to avoid national regulations and national norms in relation to naming; to seek some form of special and individualised treatment on the basis of their transnational life.<sup>76</sup> Interestingly, the Belgian government argued that equal treatment was necessary in such a case to *ensure* integration: an argument that was rejected by the Court of Justice, which preferred to privilege the choice made by the Garcia Avello parents in how they wished their children's names to be registered. See also the attempt made by Ms Sayn-Wittgenstein to avoid national constitutional norms relating to the use of noble titles in Austria, seeking to ensure both the use of her chosen name and the pursuit of her cross-border business.<sup>77</sup>

It should be pointed out that there is a countervailing tendency in the jurisprudence of the Court of Justice to stress the social integration dimension of Union citizenship explored in the previous section. It is certainly true that these two aspects of Union citizenship are at times in tension with an emphasis on personal freedom and autonomy that is resistance to the locking-in of individuals in any particular national communities. More recent cases have seen an attempt by the court to reconcile these two dimensions; allowing the mutual recognition of acquired rights but only after an initial period of 'genuine residence' in the state in which those rights are acquired.<sup>78</sup> The concern is to avoid forum-shopping, with individuals moving briefly to other Member States to acquire rights and insisting they be recognised upon their return to their home Member States.

However, these very cases – whereby individuals sought to acquire rights in other Member States in the absence of integration – point to the second and perhaps more troubling aspect of Union citizenship that is to some extent built into its DNA and one that displaces any attempt to build a sense of community, let alone political community attached to it; its instrumental quality. Union citizenship, having developed from the internal market and the market freedoms associated with it, has, since its inception, been accused of being a 'market citizenship', one in which individuals were seen merely as factors of production (and also consumption) to be put in the service of the construction

75 Caricatured by Waldron (n 47).

76 *Garcia Avello* (n 41).

77 Case C-208/09 *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* EU:C:2010:806, [2010] ECR I-13693. While Ms Sayn-Wittgenstein's attempt was ultimately unsuccessful, it did bring core constitutional values of the Austrian Republic within the purview of EU law and subject it to a process of justification and proportionality. For more recent jurisprudence on this issue and an attempt by the Court of Justice to balance the individual right of autonomy with the (national) public interest, see Case C-541/15 *Mireea Florian Freitag* EU:C:2017:432.

78 See in particular Case C-456/12 *O v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B* EU:C:2014:135, paras 51–6 and more recently *Coman* (n 40) para 40.

of the internal market. Union citizenship is still a status that is conditioned<sup>79</sup> primarily by economic activity and, moreover, its benefits are offered to those who are willing to move and make use of the economic opportunities offered by Brexit. In another, more subjective sense, Union citizenship is seen as instrumental: the holders of Union citizenship as a status may not necessarily see it as inherently valuable as a form of membership in a political community but rather see it simply as a bundle of rights to be used to advance private interests.

And, indeed, the interests promoted and protected by Union citizenship are precisely that: private and individual. The Union citizen is an inherently individualist character and the rights he or she deploys – to work, to study to participate as a service provider or consumer – are all related, if no longer to the market, certainly to the private sphere. Union citizenship is a status which enables its users to advance personal life plans, only now across the Union and the various possibilities it offers. It is a private and rights-based citizenship.<sup>80</sup> By contrast, it is not a political or public citizenship, seeking to link individuals to a broader group which can collectively exercise power. The identity and political dimensions of Union citizenship are notoriously underdeveloped from a sociological, institutional and legal point of view.

Finally, not only is the Union citizen a rootless, individualist character – in the words of Everson ‘instrumental’ and ‘instrumentalised’<sup>81</sup> – intensely private and mostly devoid of a public dimension, but Union citizenship is a status that is instrumental and useful for a distinctly privileged section of society. The benefits accruing from Union citizenship (and indeed European integration more generally) are perceived and to a certain extent in fact tend to flow towards more advantaged sections of society; the educated, the mobile, the wealthy and those with social and economic capital. This is true for EU law more generally but is perhaps best epitomised in its individual status – Union citizenship. Fligstein has demonstrated that the social groups who benefitted most from European integration, economically, politically, culturally and socially have been those groups with the linguistic, economic and social capital to make use of the integration dynamic.<sup>82</sup> On the other hand, lower socio-economic groups have not seen the same benefit from

79 Or, in a recent rather euphemistic phrase of AG Cruz-Villalón, ‘regulated’, see Case C-308/14 *Commission v UK* (Opinion of AG Cruz Villalón) EU:C:2015:666, para 71.

80 Leading Joppke to characterise it as ‘Roman to the core’. See Joppke (n 44) 161. Citing Pocock’s analysis of the dual roots of citizenship in Roman and Greek conceptions of citizenship and their subsequent genealogy. See J G A Pocock, ‘The Ideal of Citizenship since Classical Times’ in Ronald Beiner (ed), *Theorizing Citizenship* (State University of New York 1995).

81 Michelle Everson, ‘The Legacy of the Market Citizen’ in Jo Shaw and Gillian More (eds), *New Legal Dynamics of European Union* (Clarendon Press 1995) 85 ff; and more recently Michelle Everson, ‘A Very Cosmopolitan Citizenship: But Who Pays the Price?’ in Michael Dougan, Niamh Níc Shuibhne and Eleanor Spaventa (eds), *Empowerment and Disempowerment of the European Citizen* (Hart 2012).

82 Neil Fligstein, *Euroclash: The EU, European Identity and the Future of Europe* (Oxford University Press 2008). Although, as de Witte points, out this doesn’t capture the full picture and in fact some more points of political contestation have arisen around precisely the less advantaged in society seeking to avail themselves of various social supports: see Floris de Witte, ‘Emancipation through EU Law’ in Azoulai et al (n 34).

European integration and in fact in certain cases have seen their relative position deteriorate generating a backlash against the European project.<sup>83</sup>

### Conclusion

Aside from being a seismic event in the history of the EU and in the recent history of the UK, Brexit is an event with many complex endogenous and exogenous causes. The purpose of this paper is not to identify all of these causes or to draw some direct causal links between particular events, processes or institutions and the vote on 23 June 2016. It does not intend in any sense to ‘explain Brexit’. Rather it is an attempt to address the question of the manner in which the figure of the Union citizen and Union citizenship as a legal construct can be located within the Brexit debate and the underlying socio-political context within which Brexit took place. Ultimately, it is to question whether the social life reflected in the choice for Brexit is compatible with Union citizenship as it is currently constructed. Within the Brexit process there appears to be a call for a return to or a reassertion of a way of life that is rooted in the community, that is bounded and one that is associated with clear social ties that underpin a solidaristic and normatively coherent community. Union citizenship, in its operation and in the form of life it projects, appears to be at least in tension with or to ask questions of that communitarian form of social life. It operates on national communities to open them up to (certain categories of) outsiders, effacing the distinction between nationals and non-nationals and in the process undermining the links that underpin solidaristic communities, denationalising membership and devalorising national citizenship. Moreover, it can be made to represent a contrary ideal or even antithesis of the rooted, communitarian citizenship that the Brexit vote reflects. A certain view (perhaps caricature) of Union citizenship is that of the rootless cosmopolitan – the infamous ‘citizen of nowhere’ – individual, individualist, pursuing private interests and shunning or even undermining the public sphere; the extreme liberal, valuing autonomy, choice, personal interests and actively repudiating values of community.<sup>84</sup>

Two phenomena have been witnessed on the global stage in relation to citizenship and membership. On the one hand there is a hollowing-out and an undermining of the traditional role of national citizenship and an evolution in its meaning. Its

83 ‘[T]he stratified nature of intra-EU mobility and transnational practices (involving mostly the highly educated, young and more privileged strata of the population) generates an anti-mobility reaction in the most sedentary part of the citizenry. One of Kuhn’s findings. . . . warns that a legitimacy crisis can also be triggered by unintended backlash effects of a more mobile world’; Ettore Recchi, ‘The Engine of “Europeanness”?’ Free Movement, Social Transnationalism and European Identification’ in Thym (ed) (n 4) 148. For a particularly striking example, see the privileging of economic freedoms over labour rights in Case C-438/05 *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti* EU:C:2007:772, [2007] ECR I-10779 and Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* EU:C:2007:809, [2007] ECR I-11767.

84 There is, of course, a tension between these two processes in which Union citizenship can be said to undermine national citizenship. On the one hand Union citizens are portrayed as welfare tourists, undermining national welfare states and the trust that underpins solidaristic communities; this is typically not an economically privileged individual (as pointed out in passing by de Witte (n 82) 26, fn 36). On the other hand there is the multilingual, mobile, educated and economically privileged transnational citizen of the cosmopolitan ideal. It is submitted that both can and do exist in reality, and the presence of some individuals who make use of welfare systems in host member states certainly does not negate Fligstein’s argument (n 82) that, on balance, European integration and Union citizenship in particular have benefitted particular, more privileged sectors of society. More importantly, however, is the fact that both of these phenomena exist in reality and that both also exist in the imagination and in particular in the popular political imagination displayed in the Brexit debate and vote.

denationalisation has led to a weakening of the link between citizenship and identity and rendered it a more instrumental and functional attribute rather than inherently valuable as a mark of membership and identity. The extension of human rights and, more recently, social rights to non-citizens within particular states reduces the number of exclusive citizenship rights to a core of political rights. Finally, duties – such as they were – are now either non-existent or are imposed on all legal residents. There is a distinct ‘lightening of citizenship’.<sup>85</sup> At the same time, social citizenship, a major achievement of the post-war social settlement as described by Marshall, has been seriously undermined in recent years, leading Turner to declare – and not in a positive manner – that ‘we are all denizens now’.<sup>86</sup> The result is a certain crisis in citizenship, having had its identify function undermined, its rights rendered general and the social inclusion promised by citizenship eroded. People feel a social, economic and identitarian insecurity. Secondly, in contrast has been the elevation of a new figure, an almost mirror image of the national, rooted and communitarian citizenship; the rootless cosmopolitan. Empowered by processes of globalisation and the economic and social opportunities it offers, this figure is educated, privileged and escapes national constraints and frequently national duties, including taxes. It is liberal, private, driven by individual choice and personal interests.

Union citizenship can be said to operate within this narrative and emerges from and contributes to both trends. On the one hand, the significant levels of migration, and the image of the ‘welfare tourist’ swamping local services and undermining social cohesiveness, contribute to the social insecurities reflected in Brexit and are the visible face of the hollowing-out of national citizenship as a meaningful status and the disruption to local communities. On the other hand, the privileged, mobile Union citizen, for whom the Union is his or her playground and who rejects national constraints and bonds of community, tends to both act as a representative figure, opposed to, and to a certain extent undermining, the national communitarian vision of citizenship expressed in the Brexit vote. For better or worse the cosmopolitan features of Union citizenship can be said to undermine this particular view of social life. If Union citizenship can be said to be in some sense an ideal of cosmopolitan citizenship, allowing citizens to be at home elsewhere, as privileged guests in other communities or indeed to be at home everywhere, to be citizens of the world, then Brexit is clearly a rejection of this ideal on the part of the British public, who instead seek a different form of social life, one more rooted and socially constituted.

Citizenship is a multidimensional concept; there is certainly more to Union citizenship than a naked market-driven, transnational citizenship denuded of any social or political dimension. However, it is certainly the case that it is this side of Union citizenship that has been privileged in its construction and, moreover, that is a side of Union citizenship that has contributed to the disruption of national communities. At its heart, as Strumia notes, is a mutual recognition of belonging between political communities that have decided to share their political destinies and foster a closer Union amongst the peoples of Europe. It represents a valuable political ideal that tames the destructive and exclusionary tendencies of classic nationalism and national citizenship.<sup>87</sup> Perhaps counterintuitively more, not less, Union citizenship may be necessary in order to render

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85 Joppke (n 44).

86 Turner (n 6).

87 For the role of the EU in ‘taming the nation-state’, see Will Kymlicka, ‘Liberal Nationalism and Cosmopolitan Justice’ in Seyla Benhabib (ed), *Another Cosmopolitanism* (Oxford University Press 2006) and, specifically in relation to Union citizenship, see Joseph Weiler, ‘To Be a European Citizen: Eros and Civilisation’ in Joseph Weiler (ed), *The Constitution of Europe* (Cambridge University Press 1999).



it more compatible with national citizenship and the values national citizenship represents. Two interconnected strategies spring to mind: firstly, the further development of a supranational dimension to Union citizenship and, in particular, a set of supranational rights;<sup>88</sup> secondly, the development of the non-market or social aspect of Union citizenship. Together they represent the development of a supranational, non-market citizenship. This may appear as something directly opposed to the heretofore dominant picture of Union citizenship as a market-based, transnational status, and indeed it is true that it is, structurally and substantively, its opposite. However, in order to underpin and support the transnational dimensions of Union citizenship and all the virtues that are associated with that status – openness of national communities to others, a choice and greater degree of autonomy for individuals in order to fashion their own concept of the good from a broader set of ‘spheres of justice’ – a social and political Union citizenship needs to be fashioned at a supranational level. The supranational is explicitly envisaged as a complement and support for the transnational. While space precludes any detailed discussion of the future development of Union citizenship, if nothing else is clear from Brexit, it is the need to ask questions about the current state of the Union and of Union citizenship and the manner it can be adapted to respond to the deep concerns reflected in the Brexit vote within the context of an ever closer Union between the peoples of Europe.

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88 In this vein, see, for example, the recent contribution of Daniel Sarmiento and Eleanor Sharpston, ‘European Citizenship and its New Union: Time to Move On?’ in Kochenov (ed) (n 72).

