



WORKING PAPER N. 5-2018

A Critical Perspective on Associate EU Citizenship after Brexit

*Martijn van den Brink and Dimitry Kochenov**

Abstract

UK nationals will lose their EU citizenship status as a result of the Brexit referendum. To prevent this, several commentators, including the European Parliament Brexit negotiator, Guy Verhofstadt, proposed the grant of associate EU citizenship to UK nationals to safeguard their rights as EU citizens after Brexit. We make the case against associate EU citizenship, dismissing it on three grounds. First, it violates the letter and the spirit of EU law: the Treaties make the enjoyment of EU citizenship status contingent on the possession of a Member State nationality and require the Union to respect the rule of law as well as the constitutional traditions of the Member States. Second, it violates core EU values amounting to a tool for the EU to pre-empt vital democratic choices at the national level, thus undermining the established division of powers between the Union and the Member States as well as the *effet utile* of Article 50 TEU. Third, it is against the EU's interests, as associate EU citizenship fails to respect reciprocity in EU relations with third countries and undermines the coherence of the edifice of EU constitutionalism. Besides being legally unsound the idea of associate EU citizenship thus fails on normative and on pragmatic grounds.

* Max Planck Institute, Göttingen and Faculty of Law, University of Groningen respectively. This contribution draws in part on Professor Kochenov's testimony on the issue of associate EU citizenship at the Rights and Liberties Committee of the European Parliament in February 2018.

1. Introduction

The outcome of the UK referendum on continued membership of the EU and the subsequent decision of the UK government to trigger Article 50 TEU and to take the path towards Brexit has produced considerable uncertainty for EU citizens resident within the UK, as well as UK nationals living in the EU. While their future legal position will depend on the outcomes of the negotiations between the UK and the EU, few doubt that Brexit will result in a significant loss of rights on both sides, but especially a significant erosion of the rights of UK citizens.¹ The EU citizenship *acquis* will not apply in the UK and UK nationals will lose their EU citizenship altogether; so much seems clear. The Treaties have established a clear link between the nationality of a Member State and EU citizenship, Article 20 TFEU stipulating that '[e]very person holding the nationality of a Member State shall be a citizen of the Union'. Hence, all UK nationals who are EU citizens² and enjoy EU citizenship rights³ will lose EU citizenship, unless they possess any other EU nationality, like the majority of the population of Northern Ireland, for instance, whose rights in the EU are guaranteed through the citizenship of the Republic of Ireland. Queues in front of the consulates and embassies of EU nations appeared immediately upon the announcement of the referendum result. British applications for Irish citizenship rose almost twenty times; for Swedish citizenship, they more than tripled.⁴ Ordinary Britons understood immediately that Brexit means a severe degradation of their rights.

¹ Dimitry Kochenov, 'EU Citizenship and Withdrawals from the Union: How Inevitable Is the Radical Downgrading of Rights?' in Carlos Closa (ed) *Secession from a Member State and Withdrawal from the Union* (Cambridge University Press, 2017).

² Not all Member State nationals are EU citizens, as has been tacitly confirmed in *Kaur* in deviation from the academic doctrine of the day: Case C-192/99 *Kaur* [2001] ECR I-1252. Cf. Richard Plender, 'An Incipient Form of European Citizenship' in Francis Jacobs (ed.), *EU Law and the Individual* (Amsterdam: North Holland, 1976).

³ Not all do, as is clear from the Annexes to the Act of Accession of the UK to the Communities, depriving Manxmen and Channel Islanders of EU free movement rights: 1972 Act of Accession, Protocol No. 3, Mar. 27, 1972, 1972 O.J. (L 73) 164. Cf. K.R. Simmonds, 'The British Islands and the Community: I—Jersey' (1969) 6 CMLRev. 156; K.R. Simmonds, 'The British Islands and the Community: II—The Isle of Man' (1970) 7 CMLRev. 454; K.R. Simmonds, 'The British Islands and the Community: III—Guernsey' (1971) 8 CMLRev. 475.

⁴ E.g. Lynne Kelleher, 'Record Number of UK Inhabitants Apply to Become Irish Citizens Ahead of Brexit', *The Sunday Times*, 8 April 2018 <<https://www.thetimes.co.uk/article/record-number-of-uk-inhabitants-apply-to-become-irish-citizens-ahead-of-brex-it-gvkhrgv83>> (last visited: 07-05-2018); TT/The Local, 'More Brits Want Swedish Citizenship Since Brexit: Report' 26 November 2017 <<https://www.thelocal.se/20171126/more-brits-want-swedish-citizenship-since-brex-it-report>> (last visited: 07-05-2018); Pamela Duncan and Jon Henley, 'Brexit Vote Creates Surge in EU Citizenship Applications', 13

To prevent UK citizens from losing EU citizenship and the rights associated therewith, several commentators have floated the idea of an associate citizenship for UK nationals to safeguard their rights as EU citizens after Brexit. The main political proponent of this idea is Guy Verhofstadt, the EP Brexit negotiator, who favours an arrangement that allows for the continuation of EU citizenship rights, such as the possibility to participate in the European elections and free movement, ‘for those citizens who on an individual basis are requesting it’.⁵ A select group of scholars has supported such or similar ideas. Dora Kostakopoulou, most prominently, has argued in favour of the introduction of ‘a special EU protected citizen status’ in the pages of the *Journal of Common Market Studies*.⁶ The proposed status seeks to ensure that ‘EU citizenship remains a *special* status for EU citizens living in the UK and UK nationals living in other Member States following Brexit’.⁷ Next to politicians and academics, also the judges of the Court of Justice are now involved in the debate on associate citizenship, following a recent reference by the Amsterdam District court on whether the withdrawal of the UK from the EU results in the automatic loss of EU citizenship of UK nationals and the rights they derive from that status.⁸

This analysis is in part a response to Guy Verhofstadt and Dora Kostakopoulou, who, independently of each other, offered the most elaborate cases in favour of EU associate citizenship thus far. We offer the case against moving in this direction. We shall argue that besides misrepresenting the core foundations of EU citizenship as it currently stands, these proposals offer a deeply unattractive prospect of what EU citizenship should become. Similarly, expecting too much of the Court of Justice in this context would equally be a mistake. Unlike Gareth Davies’ intuitions that the Court has all the ingredients at hand for a new *Van Gend en Loos*-like revolution by decoupling, in one *coup de grace* the nationalities of the Member States from the citizenship of the Union and overwhelmingly altering the

October 2017 <<https://www.theguardian.com/politics/2017/oct/13/brexit-vote-creates-surge-in-eu-citizenship-applications>> (last visited: 07-05-2018).

⁵ The Guardian, ‘European Parliament Brexit Chief: “Let Britons Keep Free Movement”’ <<https://www.theguardian.com/politics/2017/mar/10/let-britons-keep-freedom-of-movement-says-eus-brexit-negotiator>> (last visited: 06-05-2018).

⁶ Dora Kostakopoulou, ‘*Scala Civium*: Citizenship Templates Post-Brexit and the European Union’s Duty to Protect EU Citizens: Citizenship Templates Post-Brexit’ [2018] JCMS.

⁷ *Ibid.*, 10.

⁸ Rechtbank Amsterdam, zaak C/13/640244 / KG ZA 17-1327. For the official Dutch text, visit <<https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2018:605>>. For an English translation, <<https://waitingfortax.com/2018/02/13/decision-of-the-district-court-in-amsterdam/>>. Last visited: 06-05-2018.

constitutional *status quo* in the EU,⁹ we see little room for far-reaching activism on this matter, should the basic values of the EU as expressed in Articles 2 TEU and 4(2) TEU be safeguarded.¹⁰ Should the Court wish to remain convincing,¹¹ and respect the Treaties, including core principles of EU law, such as the EU's promise of respect for the constitutional traditions of the Member States, and the values of democracy and the Rule of Law, the Court is not left with much room for manoeuvre.

Having clarified the mechanics of associate EU citizenship as proposed in section 2, we reject it in the three sections that follow. We do this based on the law in force, as well as on normative and pragmatic grounds. So section 3 argues that associate EU citizenship does not logically flow from the present state of EU citizenship. Under the current configuration of EU citizenship this status is 'additional' to the nationalities of the Member States and enjoying it without a Member State nationality is impossible. Viewed from the normative side (section 4), Brexit, a free majoritarian decision to secede from the EU taken by one of Europe's oldest democracies in compliance with its internal procedures and conventions, should mean the discontinuation of EU citizenship. Associate EU citizenship, amounting to undermining the very possibility of leaving the Union guaranteed in Article 50 TEU, is thus normatively impermissible as it pre-empts a crucial constitutional option expressly authorised in the legal system and locks Member State populations perpetually to the EU while expressly ignoring their will. Every nation can democratically decide which rights could trump others and enjoy higher value in the context of its constitutionalism. Leaving an international integration project and allowing the perceived local interest to trump the supranational right of non-discrimination on the basis of nationality (in just one example) is thus a purely legitimate choice, however much Guy Verhofstadt, Dora Kostakopoulou, and the present authors dislike it.¹² The EU should not colonise the UK constitutional space through the back door by claiming the UK population to itself. Indeed, the Union has never

⁹ Gareth Davies, 'The State of Play on Citizens' Rights and Brexit'

<<https://europeanlawblog.eu/2018/02/06/the-state-of-play-on-citizens-rights-and-brexit/>> (last visited: 06-05-2018). For the 'real' story behind *Van Gend en Loos*, see Antoine Vauchez, 'The Transnational Politics of Judicialization. *Van Gend en Loos* and the Making of EU Polity' (2010) 16 ELJ 1.

¹⁰ Werner Schröder (ed.), *Strengthening the Rule of Law in Europe* (Hart Publishing, 2016); András Jakab and Dimitry Kochenov (eds.), *The Enforcement of EU Law and Values* (Oxford, 2017).

¹¹ Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification' (2010) 4 *Law and Ethics of Human Rights* 1938.

¹² JHH Weiler, 'In Defence of the *Status Quo*: Europe's Constitutional *Sonderweg*' in JHH Weiler and Marlene Wind (eds), *European Constitutionalism Beyond the State* (Cambridge University Press 2003).

received such a mandate from the *Herren der Verträge*. Besides, as we will show, the different accounts of associate EU citizenship are also remarkably silent about the difficulties for processes of democratic decision-making within the EU itself. Viewed from the pragmatic side (section 5), the EP Brexit negotiator failed to notice that these proposals undermine the EU's own negotiating position and, as a consequence, potentially the rights of EU citizens in the post-Brexit UK. Any future agreement between the EU and the UK on the rights of citizens should be based on reciprocity.¹³

Ours, to be clear, is no argument against EU citizenship as such. Courts, commentators, and individual citizens alike rightly recognise the legal and political significance of this status, granting those in the possession of it the ability to move to and settle in other Member States without all the burdens that usually come with taking up residence in another country, packaged together with the prohibition of discrimination on the basis of nationality and strong political rights at the municipal and EU level.¹⁴ It goes without saying, therefore, that a future UK–EU agreement that offers substantial legal protections to mobile citizens of both entities will be a welcome development. Whatever the EU offers to UK nationals, however, it should not be EU citizenship as such. The ‘fundamental status of the nationals of the Member States’ ought not to be extended to citizens of a country who have collectively expressed a desire not to take part in – and in fact oppose – the core components of the European project. That desire, however regrettable, is absolutely not illegal and is entirely up to a Member State to express, even if it is unfortunately antithetical to the ideals of EU citizenship, including the promise of non-discrimination on the basis on nationality which, as Will Kymlicka has recognised, serves as the ‘tamer of the nation-state’.¹⁵ Rather than serving the values the EU holds dear, associate EU citizenship risks undermining them by going against the letter and the spirit of EU law, as well as undermining Union's interests, which informs our objections against the idea.

2. Associate EU citizenship templates

¹³ That does not foreclose individual UK–Member State agreements on free movement of persons (UK–The Netherlands, or UK–France, say, but not UK–Lithuania): Kochenov (n 1).

¹⁴ Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017).

¹⁵ Will Kymlicka, ‘Liberal Nationalism and Cosmopolitan Justice’ in Seyla Benhabib and Robert Post (eds), *Another Cosmopolitanism* (Oxford University Press 2006) 133.

There exists a whole array of proposals on post-Brexit rights for EU citizens, so it is necessary to clarify what associate EU citizenship means. The idea of associate EU citizenship is to be distinguished from the extension of certain rights we usually associate with EU citizenship to third-country nationals, based on an international agreement between the EU and a third party. For example, EEA, Swiss and Turkish nationals, while enjoying some of the rights enjoyed by EU citizens, are not associate EU citizens.¹⁶ Associate EU citizenship stands out in two important respects. First, associate EU citizenship is a status under EU constitutional law. Not rooted in an international agreement between the EU and a third country, it is external to the third country's legal system, whose nationals the EU claims to be its own – albeit 'associate' – citizens. Second, associate citizens enjoy the whole array of EU citizenship rights without, however, possessing a nationality of any Member State or necessarily residing in the Union, unlike, for instance EU permanent resident third country nationals, who, although residing in the EU for years and benefiting from EU-level rights,¹⁷ are not included in the scope of the new status.

Following the debate on Guy Verhofstadt's draft report on 'possible evolutions of and adjustments to the current institutional set-up of the European Union',¹⁸ MEP Charles Goerens tabled an amendment that summarises the idea of associate EU citizenship well. He advocated

to insert in the Treaties a European associate citizenship for those who feel and wish to be part of the European project but are nationals of a former Member State [and offer] these associate citizens the rights of freedom of movement and to reside on its territory as well as being represented in the Parliament through a vote in the European elections on the European lists.¹⁹

¹⁶ Dimitry Kochenov and Martijn van den Brink, 'Pretending There Is No Union: Non-Derivative *Quasi*-Citizenship Rights of Third-Country Nationals in the EU' in Daniel Thym and Margarite Zoetewij-Turhan (eds), *Rights of Third-Country Nationals under EU Association Agreements: Degrees of Free Movement and Citizenship* (Brill Nijhoff 2015).

¹⁷ Diego Acosta Arcarazo, *The Long Term Residence Status as a Subsidiary Form of EU Citizenship* (Brill-Nijhoff, 2011).

¹⁸ European Parliament Report on possible evolutions of and adjustments to the current institutional set-up of the European Union of 20 December 2016 (2014/2248(INI)).

¹⁹ Amendment 882 by Charles Goerens on the Draft Report by Guy Verhofstadt on Possible evolutions of and adjustments to the current institutional set-up of the European Union (2014/2248(INI)). For the list of amendments, see <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-592.348+02+DOC+PDF+V0//EN&language=FR>> (last visited: 05-06-2018).

If that proposal were to become reality, associate EU citizens would enjoy the rights of EU citizenship as a matter of Treaty law.

Goerens decided to withdraw his proposed amendments,²⁰ following assurances by Verhofstadt that he would immediately take up these proposals in the negotiations with the UK, saying that these could not await Treaty amendment.²¹ Leading legal experts like Jean-Claude Piris immediately rejected the idea that EU citizenship could be extended to UK nationals without an amendment of the Treaties,²² a realisation that may have influenced the decision of the European Parliament to adopt a more modest position, taking note

that many citizens in the United Kingdom have expressed strong opposition to losing the rights they currently enjoy pursuant to Article 20 TFEU [and proposing] that the EU-27 examine how to mitigate this within the limits of Union primary law whilst fully respecting the principles of reciprocity, equity, symmetry and non-discrimination.²³

Privately, however, Verhofstadt still appears to support forming a European electorate of those willing to affect the governance of a Union in defiance of the majoritarian democratic constitutional outcome in their former Member States, speaking in favour of ‘an arrangement in which [EU citizenship] can continue for those citizens who on an individual basis are requesting it’.²⁴

The idea of associate EU citizenship has also garnered support among academics. Most prominently, Dora Kostakopoulou has sought to defend a status that prevents ‘both EU citizens resident in the UK and UK nationals resident in the EU [from] being transformed

²⁰ European Parliament, Minutes of the Extraordinary Meeting of 8 December 2016 (AFCO_PV(2016)1208_1), available at <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-599.854%2b01%2bDOC%2bPDF%2bV0%2f%2fEN>> (last visited: 06-05-2018).

²¹ Guy Verhofstadt makes this promise while the MEPs are voting on the motions on his draft report. For the link to this debate, <<http://web.ep.streamovations.be/index.php/event/stream/161208-0900-committee-afco>>. He makes the statement at 11:10:30.

²² In statements he made to the Guardian: <<https://www.theguardian.com/uk-news/2016/dec/12/eu-citizenship-deal-for-british-nationals-has-no-chance-say-experts>> last visited: 06-05-2018.

²³ European Parliament, Draft Motion for a Resolution to wind up the debate on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union of 29-03-2017 (B8-0000/2017).

²⁴ The Guardian, ‘European Parliament Brexit Chief: “Let Britons Keep Free Movement”’ <<https://www.theguardian.com/politics/2017/mar/10/let-britons-keep-freedom-of-movement-says-eus-brexit-negotiator>> (last visited: 06-05-2018).

overnight from rightful subjects to mere objects of political negotiations between the EU and the UK'.²⁵ That ambition, it should be clear from the outset, is an impossibility, because such negotiations cannot be avoided if she regards it as 'the duty of the European Union' to realise some form of continued EU citizenship status that provides a safety net for 'both EU citizens resident in the UK and UK nationals resident in the EU'.²⁶ Kostakopoulou's proposal thus both attempts to pre-empt the negotiations and directly depends on their outcome. If individual citizens should not be the object of negotiations, she should demand – along the lines proposed by Verhofstadt and Goerens – that the EU safeguard unconditionally the rights of UK nationals living within remaining Member States, and hope that the UK is equally generous.

It is crucial, when looking at the proposals above, to recognise that all of the rights currently enjoyed by EU citizens and UK nationals can be secured through negotiations. In their joint report on the progress during the 1st phase of the negotiations, the EU and UK stated that they will 'provide reciprocal protection for Union and UK citizens, to enable the effective exercise of rights derived from Union law and based on past life choices, where those citizens have exercised free movement rights by the specified date'.²⁷ That was to be expected, as Gareth Davies has explained, because 'even fervent Brexiteers had always maintained that [the UK] had no desire to throw out Union citizens already living in the country, and so very quickly the two sides could agree on a guiding principle: a freezing of the status quo'.²⁸ The freezing of rights, and the application of strict reciprocity, however, also implies that UK nationals will be deprived of further free movement rights. As Article 32 of the Draft Withdrawal Agreement by the EU proposes,

In respect of United Kingdom nationals and their family members, the rights provided for by this Part shall not include further free movement to the territory of another Member State, the

²⁵ Kostakopoulou (n 6) 13.

²⁶ Ibid 12–13.

²⁷ Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union of 8 December 2017, available at <https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf> (last visited: 06-05-2018).

²⁸ Davies (n 9).

right of establishment in the territory of another Member State, or the right to provide services on the territory of another Member State or to persons established in other Member States.²⁹

A more extensive agreement, however, could also allow UK citizens to benefit from free movement in the sense of Article 20 TFEU. Former beneficiaries of EU citizenship law could enjoy entitlements similar to, or even more extensive than, those enjoyed by third country nationals under agreements the EU has concluded with other states.³⁰ If that is the ambition, as Kostakopoulou sometimes indicates it is,³¹ it is neither evident why we should object to UK and EU citizens being turned into the objects of negotiations, nor why associate EU citizenship is needed.

While Kostakopoulou's ambitions appear to be rather modest when she proposes to protect the residence rights of UK nationals within the EU and EU citizens within the UK, a closer reading of her argument demonstrates that also she supports the idea of creating an associate EU citizenship. Her argument is that it is the EU's duty to realise 'some form of continued EU citizenship status' and to prevent 'the unilateral erasure of [UK nationals'] citizenship status by a transient and slim majority in the United Kingdom'.³² Thereby, it should seek to 'maintain the legal effects of Union citizenship and ensure that the existing European Union citizenship space would not contract'.³³ Such ambitions are realisable only if Kostakopoulou embraces the idea of associate EU citizenship.

Kostakopoulou's account differs from the ideas floated by Verhofstadt and Goerens in at least one important respect. Kostakopoulou only wants EU citizenship to remain a special status for UK nationals living in one of the EU Member States,³⁴ while the latter have not attached such a residence-condition to their proposal for associate citizenship. In that sense, Dawson and Augenstein's account of associate EU citizenship more closely

²⁹ Article 32 of the Draft Withdrawal 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 28 February 2018. For the full text, < https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement.pdf> (last visited: 06-05-2018).

³⁰ Agreement on the European Economic Area [1994] OJ L1/3; Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons [2002] OJ L114/6.

³¹ At one point, Kostakopoulou suggests she seeks to realise the protection of free movement as guaranteed by the Citizenship Directive. An international agreement can perfectly achieve this aim. Kostakopoulou (n 6) 10.

³² Ibid 12–13.

³³ Ibid 11.

³⁴ Ibid 10.

approximates that of the two MEPs and is more ambitious than Kostakopoulou's. They wonder why the EU should deprive of EU citizenship those UK citizens that wish to retain their status as Union citizen, without making such an associate form of citizenship for UK nationals conditional upon their presence within an EU Member State on the date the UK withdraws from the EU. They argue that 'the future EU citizenship of UK nationals is not a domestic matter but an issue – perhaps *the* issue – for the Union as a whole to determine'.³⁵ They believe that EU citizenship needs to be transformed, so that the withdrawal of EU citizenship is made more complicated. That is, 'while the decision to *grant* Union citizenship may still rest with the Member States, via Member State nationality, the decision to *withdraw* it would rest with the individual EU citizen'.³⁶ It follows, hence, that the associate citizenship status must protect not just those resident within another EU Member State, but all UK nationals, *de facto* removing from the realm of the political a huge chunk of EU law, posing great obstacles to the very possibility of withdrawing from the Union.

3. The black-letter law arguments to oppose associate EU citizenship

There should be no doubt that EU associate citizenship accounts foresee a radical restructuring of EU citizenship and that the aspiration of associate EU citizenship does not logically flow from the present state of EU citizenship. Kostakopoulou, and Dawson and Augenstein, however, take different positions. Invoking the *Grzelczyk* decision, in which the Court of Justice declared that EU citizenship 'is destined to be the *fundamental status* of nationals of the Member States',³⁷ Dawson and Augenstein rightly wonder 'how fundamental European citizenship really is' if all UK citizens will be stripped of their EU citizenship following Brexit.³⁸ The reply to this, of course, is that EU citizenship has never been fundamental in this sense. The Court's understanding of EU citizenship has always been hard to square with the 'text, teleology and legislative history' of the Treaties,³⁹ which

³⁵ Mark Dawson and Daniel Augenstein, 'After Brexit: Time for a further Decoupling of European and National Citizenship?' < <https://verfassungsblog.de/brexit-decoupling-european-national-citizenship/>> (last visited: 06-05-2018).

³⁶ *Ibid.*

³⁷ Case C-184/99, *Grzelczyk*, ECLI:EU:C:2001:458, para 31; Case C-34/09 *Ruiz Zambrano*, ECLI:EU:C:2011:124, para 41 (emphasis added).

³⁸ Dawson and Augenstein (n 35). See also: Kostakopoulou (n 6) 12.

³⁹ JHH Weiler, 'Epilogue: Judging the Judges – Apology and Critique' in Maurice Adams and others (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart 2013) 248;

confirms that EU citizenship is contingent on and, Article 20 TFEU says, ‘additional to’ Member State nationality in terms of its acquisition, continued enjoyment, and loss. It is crystal clear that EU citizenship was never meant to question a collective democratic decision by nationals of one of the Member States to set aside this status.

The Court has consistently confirmed this in its case law,⁴⁰ putting direct pressure on the Member States, which triggered the gradual evolution of national citizenship laws, resulting from the requirement to take EU law principles into account when taking decisions on the loss of nationality or the mutual recognition of each other’s citizenship,⁴¹ as exemplified by *Rottmann* and *Micheletti*.⁴² It is important to realise that if EU citizenship were to have an independent life, beyond the nationalities of the Member States, this case law would be unnecessary. Direct and indirect EU pressure on the nationality laws of the Member States can only be explained by the fact that EU citizenship requires Member State nationality.⁴³ Hence, challenging the withdrawal of EU citizenship from UK nationals on legal grounds of EU citizenship is impossible under the current law. The Treaties are crystal-clear in that regard. EU law as it stands today is able to police the status of EU citizenship *solely* through pressure – direct or indirect – on the rules behind the configuration of the nationalities of the Member States on which the possession of the status of EU citizenship is conditioned and is thus absolutely helpless in the face of a third country, like the post-Brexit UK.

A group of UK nationals currently living in the Netherlands clearly disagrees with this assessment, claiming in a case admitted by the District court in Amsterdam that the rights they enjoy under EU law must either be fully respected and protected by the Netherlands following Brexit, or, alternatively, can only be restricted if proportionate.⁴⁴

Dimitry Kochenov and Sir Richard Plender, ‘EU Citizenship: From and Incipient Form to and Incipient Substance’ (2012) 37 ELRev. 369.

⁴⁰ C-135/08, *Rottmann*, EU:C:2010:104, [2010] ECR I-1449; C-369/90, *Micheletti*, EU:C:1992:295, [1992] ECR I-4239, para.10. D. Kochenov, ‘Annotation of Case C-135/08, *Rottmann*’ (2010) 47 *CMLRev.* 1831 (on the *Rottmann – Micheletti* continuity); S. Iglesias Sánchez, ‘¿Hacia una nueva relación entre la nacionalidad estatal y la ciudadanía europea?’ (2010) 37 *Revista de Derecho Comunitario Europeo* 933;

⁴¹ Maciej Szpunar and María Esther Blas López, ‘Some Reflections on Member State Nationality: A Prerequisite of EU Citizenship and an Obstacle to Its Enjoyment’, in Kochenov (ed.) (n 14).

⁴² C-135/08, *Rottmann* (n 40); C-369/90, *Micheletti* (n 40), para.10.

⁴³ On the two types of pressure, see, e.g. Dimitry Kochenov, ‘Rounding up the Circle: The Mutation of Member States’ Nationalities under Pressure from EU Citizenship’ (2010) *EUI Working Paper RSCAS* 2010/23.

⁴⁴ Section 3.1 of the decision of the Amsterdam Rechtbank (n 8).

Convinced that ‘the plaintiffs have credibly demonstrated that the case relates in part to a very real threat and in part to existing infringements of their fundamental rights and freedoms at an individual level’,⁴⁵ the District court decided to refer two preliminary questions to the Court of Justice. It asked, first, if ‘the withdrawal of the United Kingdom from the EU automatically lead[s] to the loss of the EU citizenship of British nationals and thus to the elimination of the rights and freedoms deriving from EU citizenship, if and in so far as the negotiations between the European Council and the United Kingdom are not otherwise agreed’. Secondly, ‘[i]f the answer to the first question is in the negative, should conditions or restrictions be imposed on the maintenance of the rights and freedoms to be derived from EU citizenship’?⁴⁶

Based on the law in force we believe that the CJEU should answer both questions posed to it by the Amsterdam District court in the negative and, more generally, that the idea of associate EU citizenship as such ought to be rejected. Such a negative response would be in line with the relevant Treaty provisions, but also with previous case law. In *Rottmann*, the Court refused to disconnect EU citizenship from the nationalities of the Member States, going against what some commentators think it should have done.⁴⁷ In *Kaur*, moreover, it even moved in the opposite direction compared with what the idea of associate EU citizenship implies, allowing the UK⁴⁸ – and by extension Latvia and Estonia⁴⁹ – to deprive of the rights and protections of EU citizenship certain categories of persons enjoying (quasi-)nationality of these states. Those who perceive of *Kaur* as unjust and resting upon too narrow a reading of Article 20 TFEU, may find it desirable if this trend is reversed in the context of Brexit. However, such a move, while perhaps remedying the arguable deficiencies of *Kaur*, would mean the failure to respect the Treaties, which offer EU

⁴⁵ Section 5.10 of the decision of the Amsterdam Rechtbank (n 8).

⁴⁶ Section 5.27 of the decision of the Amsterdam Rechtbank (n 8).

⁴⁷ C-135/08, *Rottmann* (n 40); Dora Kostakopoulou, ‘European Union Citizenship and Member State Nationality: Updating or Upgrading the Link?’ in Jo Shaw (ed.), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?* (2011) *EUI Working Paper* RSCAS 2011/5; Hans U. Jessurun d’Oliveira, ‘Ontkoppeling van nationaliteit en Unieburgerschap?’ [2010] *Nederlandsch Juristenblad* 785.

⁴⁸ C-192/99, *Kaur* (n 2).

⁴⁹ Dimitry Kochenov and Aleksejs Dimitrovs, ‘EU Citizenship for Latvian Non-Citizens: A Concrete Proposal’ (2015) 38 *Houston Journal of International Law* 1. The revocations of the status of ‘non-citizen’ are strictly monitored due to the ‘existence of mutual rights and obligations’ between the Latvian State and the non-citizens: Latvijas Republikas Satversmes tiesa [Constitutional Court of Latvia] Mar. 7, 2005, Case No. 2004-15-0106 para. 17. Cf. Prit Järve, ‘Sovetskoje nasledije i sovremennaja ètnopolitika stran Baltii’, in Vadim Poleshchuk and Vladimir Stepanov (eds.) *Ètnopolitika stran Baltii* (Moscow: Nauka, 2013).

citizenship solely to ‘every person *holding a nationality* of a Member State’ (emphasis added). If not implemented through Treaty change, the idea of associate EU citizenship is absolutely untenable.

4. The normative reasons to oppose associate EU citizenship

The idea of associate EU citizenship is also to be rejected on normative grounds. This is because its proponents have not thought through the democratic implications of their proposals and, what is even more problematic, they seem extremely hostile towards the idea of democratic decision-making. In addition, they are unwilling to respect the competences of the Member States in the EU.

The Amsterdam District court argued that ‘[i]t is part of the existence of a democratic legal state that, at an individual level, those who belong to a social or political minority are entitled in law to a certain degree of protection against the will of the majority’.⁵⁰ Similar concerns about ‘majoritarian tyranny’ underlie the other proposals for associate EU citizenship. For Kostakopoulou, ‘it is the duty of the European Union to prevent the unilateral erasure of [EU citizenship] by a transient and slim majority in the United Kingdom’⁵¹ and Dawson and Augenstein find it unclear why ‘a decision of the UK government should bind those UK nationals who wish to retain their European citizenship’.⁵²

The minority argument is couched in such extreme terms that, ostensibly, principles of democratic self-government are rejected altogether. As Stephen Coutts has argued convincingly, the idea that the EU

could intervene to “protect” the rights of individuals in the UK that are being dragged from the Union and denied Union citizenship against their will would amount to an argument that the United Kingdom acting under Article 50 TEU is not competent as a democratic political community to bind its own minority.⁵³

⁵⁰ Section 5.8 of the decision of the Amsterdam Rechtbank (n 8).

⁵¹ Kostakopoulou (n 6) 12.

⁵² Dawson and Augenstein (n 35).

⁵³ Stephen Coutts, *Brexit and Citizenship: The Past, Present and Future of Free Movement*, 12 September 2016, available at < <https://delilawblog.wordpress.com/2016/09/12/stephen-coutts-brexit-and-citizenship-the-past-present-and-future-of-free-movement/> > (last visited: 06-05-2018).

By (seemingly) suggesting that political authority is justifiable only when citizens consent to it, they take a remarkably anarchist position, according to which the authority exercised by political institutions over citizens can be justifiable only when there is unanimous consent.⁵⁴ There is no need to engage with that position here, because by taking it, the arguments for associate EU citizenship become self-defeating. It would follow that the UK should never have joined the EU (then EEC) in 1973 in the first place. Not all British citizens consented to membership at that time,⁵⁵ so why should a later decision of the UK government bind those UK nationals who never wished EU citizenship or membership?

Of course, there are reasons for concern if democratic decision-making leads to the more-or-less permanent exclusion of insulated minorities, but the threats posed by majoritarian decision-making are being exaggerated.⁵⁶ The UK and EU have both expressed the intention to offer substantial safeguards to those who exercised free movement rights previously, indicating that there is considerable awareness of the position of those who (in all likelihood) opposed Brexit. Proponents of associate EU citizenship may favour embracing a substantive version of democracy, which privileges substantive outcomes and a respect for individual rights over procedural concerns and majoritarian decision-making. However, while democracy presupposes a set of civil-political rights, if pushed to extremes, the determination to privilege substantive outcomes over procedural issues becomes ‘a flatly antidemocratic justification for guardianship’.⁵⁷

Those who insist on Treaty change before associate EU citizenship can be realised avoid this substantive democracy fallacy,⁵⁸ but that cannot be said for those who seek to oppose the loss of EU citizenship by judicial means. The Amsterdam District Court, envisaging that UK nationals’ loss of EU citizenship may violate the CJEU’s decision in *Rottmann*,⁵⁹ and the possible loss of residence rights by children who currently possess EU

⁵⁴ Margaret Moore, *A Political Theory of Territory* (Oxford University Press 2015) 62.

⁵⁵ In 1975, two years following accession, the UK organised a referendum on continued membership, in which 33% of the voters expressed the desire to leave.

⁵⁶ As so often happens: Mark V. Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press 1999) 159; Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (University of Chicago Press 1997) 76; Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 255; Jeremy Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 *Yale Law Journal* 1246, 1346.

⁵⁷ Robert A. Dahl, *Democracy and Its Critics* (Yale University Press 1991) 163.

⁵⁸ Dawson and Augenstein (n 37).

⁵⁹ Case C-135/08 *Rottmann* (n 40).

citizenship breach the principles established by *Ruiz Zambrano*,⁶⁰ questions ‘the correctness of the interpretation of Article 20 TFEU that the loss of the status of citizen of an EU Member State leads to loss of EU citizenship as well’.⁶¹ In a move ridiculed by earlier commentators as a ‘*Rottmann* on steroids’,⁶² it asked if EU primary law is to be obstructed and democratic decision-making to be paralysed. Ronan McCrea has pointed out the weak merits of the reference elsewhere, in particular seeing that the Treaties specify clearly that EU citizenship is conditional upon Member State nationality.⁶³ More importantly, it would be a grave mistake if the CJEU would intervene and undermine principles of political self-determination, thereby considerably curtailing the significance of national constitutionalism and diminishing the Rule of Law in the EU’s federal framework without, of course, any mandate for doing this.⁶⁴ A decision of Member State nationals to withdraw from the EU in a situation where Union citizenship is of crucial importance and significance in the context of EU law, as virtually all commentators and practitioners agree, cannot amount to anything else but an expression of an unequivocal desire not to be citizens of the Union anymore. The meaning of ‘Brexit is Brexit’ can of course be debated in many fields: Does it imply leaving the customs union? What does it mean for the banking, fisheries and other industries? Crucially, such questions in the sphere of EU citizenship cannot possibly arise since it is precisely the citizenship *of the Union* we are talking about. Not to deprive Article 50 TFEU and the right to national self-determination of any useful effect, the desire to leave the Union and not to be EU citizens should be respected rather than undermined based on a dubious reading of EU citizenship. Associate EU citizenship is to be rejected on that ground.

The various proposals for associate citizenship are also remarkably quiet about processes of democratic decision-making within the EU itself. First, associate EU citizens will not enjoy voting rights in national elections, by virtue of the mere fact that they do not enjoy the nationality of a Member State.⁶⁵ Hence, associate EU citizens will be excluded

⁶⁰ *Ruiz Zambrano* (n 37).

⁶¹ Section 5.25 of the decision of the Amsterdam Rechtbank (n 8).

⁶² Carlos Closa, ‘Troubled Membership: Dealing with Secession from a Member State and Withdrawal from the Union’ (2014) *EUI Working Paper* RSCAS 2014/91.

⁶³ Ronan McCrea, ‘Brexit EU Citizenship Rights of UK Nationals and the Court of Justice’, available at <<https://ukconstitutionallaw.org/2018/02/08/ronan-mccrea-brexit-eu-citizenship-rights-of-uk-nationals-and-the-court-of-justice/>> (last visited: 06-05-2018).

⁶⁴ Robert Schütze, *From Dual to Cooperative Federalism* (Oxford University Press, 2011).

⁶⁵ Federico Fabbrini, ‘The Political Side of EU Citizenship in the Context of EU Federalism’ in Kochenov (ed.) (n 14).

from the EU's indirect channels of political participation, through national elections and the Council. In addition, if all UK nationals, including those resident within the UK, could acquire associate EU citizenship status, it seems exceptionally difficult to guarantee their right to vote in elections to the European Parliament. And what would be the point of such a vote, if the law produced by EU institutions will obviously not apply in a third country, such as the UK? Finally, EU citizens' inclusion in local elections was never uncontroversial, as the decisions by the German Constitutional Court to declare unconstitutional foreigners' inclusion by Schleswig-Holstein and Hamburg in municipal elections demonstrates.⁶⁶ The German constitution was amended subsequently so as to comply with the Maastricht Treaty and allow EU citizens to vote and stand in local elections.⁶⁷ Now, imagine that the CJEU concurs with the applicants in the case recently referred by the Amsterdam District Court and decides that EU citizenship rights cannot be withdrawn from individuals who possessed EU citizenship previously. Such a decision is likely to be constitutionally problematic in countries like Germany and demonstrates the risks of thinking too lightly about safeguarding EU citizenship rights for UK nationals without a consideration of the possible democratic implications. There is thus a strong normative case to be made against associate EU citizenship in the name of EU values of democracy and the Rule of Law, significantly weakening the position held by the proponents of the introduction of such a status.

5. The pragmatic reasons to oppose associate EU citizenships

Finally, the creation of associate EU citizenship must also be opposed on the ground that it runs counter to the EU's own interests. It fails to respect reciprocity in future relations with the UK, potentially undermining the interests of EU citizens. In addition, it makes the prospect of withdrawal for other countries more attractive and fails to secure fairness in relation with other third-country nationals.

The EU's primary responsibility is towards its own citizens, who could bear the negative consequences of the introduction of associate EU citizenship. As things stand now, UK citizens will be deprived of their EU citizenship status following Brexit, including

⁶⁶ German Constitutional Court, *Ausländerwahlrecht I*, 83, 37.

⁶⁷ Christoph Grabenwarter, 'National Constitutional Law Relating to the European Union' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law*, 2nd ed. (Hart Publishing, 2009) 117.

important rights, most crucially the right to move and reside freely around the territory of the EU,⁶⁸ but also the right to vote and stand as a candidate in elections to the European Parliament and at municipal level.⁶⁹ The reason is that the EU seeks to safeguard reciprocity in its future relations with the UK, the key mode of international cooperation:⁷⁰ both parties strive to ‘provide reciprocal protection for Union and UK citizens, to enable the effective exercise of rights derived from Union law’. The EU should hold firm on the demand of reciprocity during negotiations in order to incentivise the UK to offer a favourable free movement regime for EU citizens.

Hence the question, posed by Dawson and Augenstein, of why the EU should deprive of EU citizenship those UK citizens that wish to retain their status as Union citizen,⁷¹ has a straightforward answer. If all nationals of a former Member State could acquire associate EU citizenship and enjoy the full set of rights if they wish, the EU would be deprived of a powerful tool to force the UK to offer a similarly beneficial regime for EU citizens. A reciprocal regime is also what fairness requires, as otherwise the nationals of remaining EU Member States could legitimately wonder why UK citizens may be conferred more substantive rights than they enjoy under UK law. Given the importance of reciprocity, the issue of UK nationals’ rights following Brexit should not be removed from the political agenda by judicial means. Would the applicants’ arguments referred to by the Amsterdam District Court succeed and the CJEU decide that EU citizenship (rights) cannot be withdrawn, the EU will find it more difficult to pressure the UK in accepting a fair free movement regime that is beneficial to both sides.

The counter-argument offered by Kostakopoulou is that UK nationals and EU citizens should not be the object of political negotiations.⁷² That, however, is not nearly as self-evident as she would want to make us believe. If the Trump administration revokes the visa-waiver programme for EU citizens, or excludes certain Eastern European Member States from its scope, we think it is desirable that the European Parliament threatens to suspend the programme in order to pressure the US administration to review its decision.

⁶⁸ Art. 32, Draft Withdrawal Agreement (n 31).

⁶⁹ Art. 20(2)(b) TFEU.

⁷⁰ Philip Allott, ‘The European Community is Not the True European Community’ (1991) 100 *Yale Law Journal* 2485.

⁷¹ Dawson and Augenstein (n 37).

⁷² Kostakopoulou (n 6) 13.

Indeed, this is what EU law requires.⁷³ And if the majority of the Swiss population in a referendum decides that free movement with the EU should be limited, threatening thereby to violate its agreement with the EU, we also think normally that the EU can reconsider its position towards Swiss nationals and terminate their rights.⁷⁴ The EU makes these issues of political discussion with the purpose of protecting its own citizens, which should be its primary ambition. In the same way, the EU should primarily be concerned with the rights of its own citizens in Brexit negotiations.

A core difference thus exists between interstate relations within the EU, on the one hand, and between EU Member States (and the Union as a whole) and third countries on the other. Philip Allott treats this as a distinction between ‘democracy’ and ‘diplomacy’ in international relations. ‘Democracy’ implies that collective actions take, as much as possible, the interests of all affected into account. By contrast, ‘diplomacy’, in Allott’s terms, implies acting in the interests of one’s own citizens, at the expense of others, if need be.⁷⁵ The application of reciprocal measures is limited within the EU, as the prohibition of adopting retaliatory measures indicates.⁷⁶ However, following Brexit, UK–EU relations move from the realm of ‘democracy’ to that of ‘diplomacy’, where different considerations apply. Therefore, we disagree with Kostakopoulou, Verhofstadt and the claimants in front of the Amsterdam District court, who use citizenship logic to argue that EU–UK relations should not be affected by Brexit. Instead, the EU should safeguard reciprocity in its future relations with the UK, in the interests of its own citizens.

Those favouring the retention of EU citizenship (rights) often invoke the argument of acquired rights. Kostakopoulou, for example, argues that because EU citizenship creates a ‘direct bond between the EU legal order and individuals’, it would contravene legal principles as well as accepted norms ‘if a Union citizen found himself/herself stripped of all his/her rights overnight, totally unprotected in the territory of the host Member State’.⁷⁷ Similarly, the Amsterdam District Court reasons that, because the EU Treaties directly create rights for individuals, the implications of withdrawal must be answered under EU

⁷³ For example, European Parliament resolution of 2 March 2017 on obligations of the Commission in the field of visa reciprocity in accordance with Article 1(4) of Regulation (EC) No 539/2001 (2016/2986(RSP)).

⁷⁴ For example, European Parliament resolution of 9 September 2015 on EEA-Switzerland: Obstacles with regard to the full implementation of the internal market (2015/2061(INI)).

⁷⁵ Allott (n 68).

⁷⁶ Laurence W. Gormley, ‘Infringement Proceedings’, in Jakab and Kochenov (eds) (n 10)

⁷⁷ Kostakopoulou (n 6) 12.

law, not the Vienna Treaty Convention.⁷⁸ Following the CJEU's jurisprudence on acquired rights, according to which rights cannot be withdrawn if citizens had legitimate expectations they would be protected,⁷⁹ it thinks 'it cannot be ruled out that the rights and freedoms that UK citizens living in another EU country derived from Article 20 TFEU should be regarded as acquired rights'.⁸⁰

We reject this argument on three different grounds. First, in its most extreme form, it promotes the idea that withdrawal should be altogether impossible. If, as Kostakopoulou argues, rights acquired directly under EU law cannot be altered or withdrawn, Member States are basically denied the possibility to withdraw from the EU's legal regime. Therefore, contrary to her assessment that stripping Union citizens of their rights overnight would contravene the principle of the full effectiveness of EU law,⁸¹ we argue that its effectiveness is realised only if withdrawal under Article 50 TFEU remains possible and EU citizenship and the rights attached thereto are lost, per Article 20 TFEU, for the nationals of the withdrawing state. Second, such expansive definitions of the principle of acquired rights place an undesirable straightjacket on politics. Governing the EU will become a sheer impossibility if political authorities' room for reconsidering past decisions becomes subject to such rigid constraints. Finally, if the principle of acquired rights extends not to EU law as a whole, but only to matters of EU citizenship, withdrawal may actually become a more attractive idea for other countries in the future. Retaining all the rights of EU citizenship, EU membership can be set aside at a much lower cost. Member State nationals would enjoy the fruits of EU citizenship irrespective of whether they accept the burdens of EU membership.

This is not to say that it would be desirable if UK nationals were be stripped of all their rights, but that will not happen of course. The policy documents expressing the shared intentions of the UK and EU, which we referred to above, indicate that both parties want to offer substantial safeguards to those who have exercised free movement rights. In addition, bearing in mind the EU's extensive legislation on third-country nationals, it could not even deprive UK nationals of all their rights. What we do argue, however, is that there seems

⁷⁸ Vienna Convention on the Law of Treaties, concluded at Vienna on 23 May 1969.

⁷⁹ The Amsterdam District Court referred, among others, to Case C-376/02, *Goed Wonen*, ECLI:EU:C:2005:251, para 32.

⁸⁰ Section 5.16 of the decision of the Amsterdam Rechtbank (n 8).

⁸¹ Kostakopoulou (n 6) 12.

little reason to think that UK nationals ought to enjoy better treatment than other third-country nationals who may be longing for EU citizenship, certainly not those UK nationals who are not even resident in the EU. Those with no connection to any of the Member States, such as UK citizens resident within the UK, would come to enjoy better rights than the many long-term residents that did not enjoy a Member State nationality previously. The long-term exclusion of minorities from national and thus EU citizenship is a violation of democratic justice; the same cannot be said immediately of UK nationals losing their EU citizenship.

6. Conclusion

Seeking to protect that part of the UK citizenry that will be deprived of EU citizenship against their will, if the Treaty text is followed and EU citizenship is treated as a contingent status, additional to Member State nationality, the intentions of those supporting the introduction of associate EU citizenship are easy enough to understand. However, commendable as this may seem, and whatever our disagreements with those supporting Brexit, the appropriate response is not to ignore the Treaties and offer UK nationals EU citizenship in defiance of Article 20 TFEU. Likewise, worries about the loss of rights by UK citizens, which they – and we as EU lawyers – cherish are warranted, but we should neither exaggerate the implications of Brexit, suggesting that everything will be lost, nor in our efforts to seek remedies wholly dismiss democratic values and disregard the EU's wider interests. Rather than defying clear Treaty provisions, or taking extreme positions, possibly with all sorts of unwanted implications, we believe that a more fruitful starting position accepts that EU citizenship is terminated for the nationals of a withdrawing state. From there, we can start engaging in a debate on what the future position of these people should be. We believe there should be a Treaty between the EU and the UK that offers substantial free movement rights to EU and UK citizens alike. That would accomplish much of what the proponents of associate EU citizenship seek to accomplish, without requiring the adoption of the untenable positions we have tried to dismiss in this article.