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EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously?

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European citizenship offers great potential for the protection of fundamental rights. Due to the relation between EU citizenship and EU fundamental rights, the Court's seeming willingness in Ruiz Zambrano to protect the substance of EU citizenship rights could potentially have an immense impact on the EU fundamental rights architecture. However, considering the Dereçi case, it is questionable if the Court takes EU citizenship rights seriously. Instead of contributing to the safeguarding of fundamental rights, the Dereçi approach will have worrisome effects for the protection of fundamental rights in the EU.

This article examines the relation between EU citizenship and EU fundamental rights and argues that if the Court is truly willing to protect the substance of EU citizenship rights, it has to overturn its decision in Dereçi and to include fundamental rights in the doctrine established by Ruiz Zambrano. After it has been outlined why such an approach would, in contrast to the Court's argument in Dereçi, be completely in line with Ruiz Zambrano, the potential effects of such an approach will be presented.

1 INTRODUCTION

The recent EU citizenship decisions of the Court of Justice of the European Union (hereinafter 'ECJ' of 'the Court') have resulted in a great amount of scholarly literature, not only about the specific cases but also about the impact of these cases on other areas, such as nationality law[1] or family reunification.[2] Less obvious, but definitely not less relevant, is the potential impact of these cases on the EU fundamental rights architecture. Analysing this potential impact, which to my knowledge has not been extensively done so far, is the central aim of this article.

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1 H.U. Jessurun d'Oliveira, 'Court of Justice of the European Union: Decision of 2 March 2010, Case C-135/08, Decoupling Nationality and Union Citizenship? The Consequences of the Judgment on Member State Autonomy – The European Court of Justice's Avant-Gardism in Nationality Matters', *European Constitutional Law Review* 1 (2011): 138.

2 P. van Elsuwege & D. Kochenov, 'On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights', *European Journal of Migration and Law* 4 (2011): 443.

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This article argues that EU citizenship might profoundly change the EU fundamental rights architecture. This is as a result of the groundbreaking judgments of the ECJ in *Rottmann*,[3] *Ruiz Zambrano*,[4] and *McCarthy*,[5] which have drastic implications for the purely internal situation doctrine.[6] It is submitted that these cases might fundamentally expand the scope of EU fundamental rights. So far, the ECJ has only been willing to apply EU fundamental rights to Member States when implementing EU law[7] or to national measures that fall within the scope of Union law.[8] The ECJ has not been willing to apply EU fundamental rights to cases missing a link with EU law.[9] A consistent application of *Ruiz Zambrano* might change this. However, when analysing the recently delivered *Dereçi* case,[10] the ECJ's willingness to be consistent is in question.

If the ECJ builds its future case law on the arguments used in *Dereçi*, EU citizenship will again have little substantive meaning. Instead of contributing to the safeguard of fundamental rights, the *Dereçi* approach will have worrisome effects for the protection of fundamental rights in the EU. It is submitted that this case is based on erroneous arguments of the Court and the Advocate General (AG) and that, if the ECJ takes EU citizenship rights seriously, it should reconsider its decision in upcoming cases.

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3 Case C-135/08, *Janko Rottman v. Freistaat Bayern*, Judgment of 2 Mar. 2010, not yet reported.

4 Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, Judgment of 8 Mar. 2011, not yet reported.

5 Case C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department*, Judgment of 5 May 2011, not yet reported.

6 From the 1970s, the ECJ has in a long line of cases established and developed the purely internal situation doctrine. In brief, this doctrine means that any case that is wholly internal to the Member State, thus in which a cross-border element is lacking, falls outside the scope of Union law. For a critical analysis of the purely internal situation rule, see, e.g., A. Trifonydou, *Reverse Discrimination in EC Law* (Alphen aan den Rijn: Kluwer, 2009); A. Tryfonidou, 'Purely Internal Situations and Reverse Discrimination in a Citizen's Europe: Time to "Reverse" Reverse Discrimination?', in *Issues in Social Policy: A New Agenda*, ed. P.G. Xuereb (Valetta: Progress Press, 2009), 11. See also D. Hanf, '"Reverse Discrimination" in EU Law: Constitutional Aberration, Constitutional Necessity, or Judicial Choice', *Maastricht Journal of European and Comparative Law* 2 (2011): 29.

7 Joined Cases 201 and 202/85, *Marthe Klensch and Others v. Secrétaired'État à l'Agriculture et à la Viticulture* [1986] ECR 3477, para. 8; Case 5/88, *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609, para. 19.

8 Case C-260/89, *Elliniki Radiophonia Tiléorassi AE v. Dimotiki Etairia Pliroforissis* [1991] ECR I-2925, para. 42; Case C-159/90, *The Society for the Protection of Unborn Children Ireland Ltd. v. Stephen Grogan and Others* [1991] ECR I-4685, para. 31.

9 For a good example, see *Grogan*, in which the ECJ held that the link between the students distributing the information and the abortion clinics was too tenuous. As a consequence, the situation was not covered by the provisions on the freedom to provide services. Since the facts, thus, lay outside the scope of Art. 59 EEC (now Art. 56 TFEU), and, therefore, outside the scope of Union law, the defendants could not rely on EU fundamental rights. Case C-159/90, *The Society for the Protection of Unborn Children Ireland Ltd. v. Stephen Grogan and Others* (n. 8), paras 24–27 and 31.

10 Case C-256/11, *Murat Dereçi and Others v. Bundesministerium für Inneres*, Judgment of 15 Nov. 2011, not yet reported.

Section 2 of this article will give an analysis of the *Rottmann*, *Ruiz Zambrano*, *McCarthy*, and *Dereçi* cases. Section 3 examines the relation between EU citizenship and EU fundamental rights and analyses what consequences a consistent interpretation of *Ruiz Zambrano* and *McCarthy* should have on the application of EU fundamental rights as being EU citizenship rights. Hereafter, the relation between *Dereçi* and EU fundamental rights will be examined (section 4). The article ends with a discussion of the potential implications of a revision of *Dereçi* on the application of EU fundamental rights (section 5).

2 *ROTTMANN*, *RUIZ ZAMBRANO*, *MCCARTHY*, AND *DEREÇI*

Although EU citizenship initially did not seem to add anything substantially new,[11] it is now obvious that the incorporation of EU citizenship in the Treaty was 'followed by a glorious march of European citizenship from a "meaningless addition" to the Treaties to one of the key concepts of EC law'.[12] The ECJ is predominantly responsible for 'giving meaning, specificity, and value to [citizenship], thereby establishing new institutional norms which will impact on and modify national legal cultures'.[13]

Despite the ECJ's initial unwillingness to give any serious effect to EU citizenship,[14] the Court in *Martínez Sala*[15] put 'flesh on the bones of European Union citizenship'[16] by recognizing that EU citizenship has extended the personal scope of the Treaty provisions.[17] This recognition made a clarification of the material scope necessary to set up a new delimitation between EU and national laws. However, the ECJ failed in developing a 'just, convincing and logically justifiable test that would (…) enable any citizen to know for sure (…) which level of the law is to apply to her in each particular situation and why'.[18]

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11 T. Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: between Past and Future*, 1st edn (Manchester: Manchester University Press, 2001), 66.

12 D. Kochenov, '*Ius Tractum* of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights', *Columbia Journal of European Law* 2 (2009): 173.

13 D. Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change', *The Modern Law Review* 2 (2005): 263.

14 Kochenov, 2009 (n. 12), 210; Kostakopoulou (n. 13). For some cases that give evidence of this, see Case C-348/96, *Criminal Proceedings against Donatella Calfa* [1999] ECR I-11; C-193/94, *Criminal Proceedings against Sofia Skanavi and Konstantin Chryssanthakopoulos* [1996] ECR I-929.

15 Case C-85/96, *María Martínez Sala v. Freistaat Bayern* [1998] ECR I-2691.

16 S. O'Leary, 'Putting Flesh on the Bones of European Union Citizenship', *European Law Review* 1 (1999): 68.

17 Case C-85/96, *María Martínez Sala v. Freistaat Bayern* [1998] ECR I-2691, para. 61; Eleanor Spaventa, 'Seeing the Wood despite the Trees? On the Scope of Union Citizenship and Its Constitutional Effects', *Common Market Law Review* 1 (2008): 13.

18 D. Kochenov, 'Citizenship without Respect: The EU's Troubled Equality Ideal', *Jean Monnet Working Papers* 8 (2010), <http://centers.law.nyu.edu/jeanmonnet/papers/10/100801.html>, 19 Jan. 2011, 41.

For many years, the ECJ held to the requirement of a cross-border element in order to fall within the material scope of EU law. While doing this, the ECJ stretched the notion of a cross-border element to its outer limits,[19] as a result of which any kind of transboundary reference seemed to be sufficient in order to fall within the material scope of EU law.[20] Relying on the fact that one's former wife is an EU citizen,[21] as well as on future consequences,[22] made the ECJ decide that the situation fell within the material scope, making its demarcation 'a game of chance'.[23]

The Court made a clear attempt to delineate the material scope of EU law in the *Rottmann* case.[24] In this case, the question had arisen whether it was contrary to EU law to withdraw the nationality of a German national, which had been acquired by naturalization, as a result of which that person, since he could not recover his Austrian nationality, would also lose his EU citizenship.[25] A number of governments submitted, as did the Commission, that the situation was a purely internal one, as a result of which EU law would not be applicable.[26] The ECJ firmly rejected this argument by stating that:

> it is clear that the situation of a citizen of the Union who, (…), is faced with a decision withdrawing his naturalisation, (…), and placing him, (…), in a position capable of causing him to lose the status conferred by Article [20 TFEU] and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law.[27]

For examining the effects of EU citizenship on the application on EU fundamental rights, it is important to know whether besides citizenship as status, the ECJ is also willing to protect citizenship as rights.[28] In other words, must

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19 *Ibid.*, 42.

20 A. Epiney, 'The Scope of Article 12 EC: Some Remarks on the Influence of European Citizenship', *European Law Journal* 5 (2007): 616.

21 Case C-403/03, *Egon Schempp v. Finanzamt München V* [2005] ECR I-6421; Spaventa (n. 17), 21.

22 Case C-148/02, *Carlos Garcia Avello v. Belgian State* [2003] ECR I-11613; Spaventa (n. 17), 28.

23 Kochenov, 'Citizenship without Respect: The EU's Troubled Equality Ideal' (n. 18), 45.

24 Case C-135/08, *Janko Rottman v. Freistaat Bayern* (n. 3). For an analysis of this case, see D. Kochenov, 'Case C-135/08 *Janko Rottmann v. Freistaat Bayern*, Judgment of the Court (Grand Chamber of 2 Mar. 2010', CMLRev 6 (2010); D. Kochenov, 'Two Sovereign States vs. a Human Being: ECJ as a Guardian of Arbitrariness in Citizenship Matters', in *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?, EUI Robert Schumann Centre for Advanced Studies Paper*, ed. J. Shaw (2010).

25 Case C-135/08, *Janko Rottman v. Freistaat Bayern* (n. 3), para. 35.

26 *Ibid.*, para. 38. See also Kochenov, 'Case C-135/08 *Janko Rottmann v. Freistaat Bayern*, Judgment of the Court (Grand Chamber of 2 Mar. 2010' (n. 24), 1838.

27 *Janko Rottman v. Freistaat Bayern* (n. 3), para. 42 (emphasis added).

28 For a profound study on the relation between citizenship as status and as rights, see L. Bosniak, 'Citizenship Denationalised', *Indiana Journal of Global Legal Studies* 2 (2000): 456–470. See also Kochenov, 2009 (n. 12).

'the status conferred by Article [20 TFEU] *and* the rights attaching thereto'[29] be read cumulatively or disjunctively. Instinctively, it feels that a disjunctive reading is the only possibility. It would be strange if an individual in a purely internal situation would be able to rely on European law if its status as an EU citizen is at stake, while this would not be possible if one of its citizenship rights is infringed.

In *Ruiz Zambrano*,[30] the ECJ indeed confirmed that *Rottmann* has to be read disjunctively. In that case, Mr Ruiz Zambrano, a Columbian national, claimed that, since his two children, who have Belgian nationality and, as a consequence, are EU citizens, are dependent on him, he has a (derived) right of residence. All governments that submitted observations argued that EU law was not applicable, since it was a purely internal situation.[31] The ECJ rejected these submissions by referring to *Rottmann*, paragraph 42 and by stating that 'Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'.[32] Since the refusal to grant a residence permit to Mr Ruiz Zambrano would force his children, who are EU citizens, to leave EU territory, this would deprive the children of the genuine enjoyment of the substance of their citizens' rights.[33] The Court, thus, fully confirmed *Rottmann*, although the use of the word 'genuine' seems to indicate that 'the intensity of the Member States' interference' is important.[34] A serious infringement of the rights of an EU citizen, thus, falls by its nature and its consequences within the ambit of EU law.

The *McCarthy* case,[35] recently delivered by the ECJ, might cast some doubts on how to read *Rottmann* and *Ruiz Zambrano*. In this case, the ECJ, while interpreting the preliminary questions in the light of Article 21 TFEU, first of all reiterated its notorious argument on purely internal situations.[36] Hereafter, the Court refers to *Ruiz Zambrano* and repeats that 'Article 20 TFEU precludes national measures which have the effect of depriving Union citizens of the

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29 Case C-135/08, *Janko Rottman v. Freistaat Bayern* (n. 3), para. 42 (emphasis added).

30 Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)* (n. 4). For an analysis of this case, see K. Hailbronner & D. Thym, 'Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de lemploi (ONEm)*, Judgment of the Court of Justice (Grand Chamber) of 8 Mar. 2011', *Common Market Law Review* 4 (2011). For a rejoinder to this case note, see M.A. Olivas & D. Kochenov, 'Case C-34/09 Ruiz Zambrano: A Respectful Rejoinder', <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1989900>, 24 Jan. 2012.

31 Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)* (n. 4), para. 37.

32 *Ibid.*, para. 42.

33 *Ibid.*, paras 43–44.

34 D. Kochenov, 'A Real European Citizenship; a New Jurisdiction Test; a Novel Chapter in the Development of the Union in Europe', *Columbia Journal of European* Law 1 (2012).

35 Case C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department* (n. 5).

36 *Ibid.*, para. 45.

genuine enjoyment of the substance of the rights conferred by virtue of that status'.[37] Since there is no indication 'that the national measure at issue in the main proceedings has the effect of depriving her of the genuine enjoyment of the substance of the rights',[38] the ECJ comes to the conclusion that 'Mrs McCarthy has no factor linking it with any of the situations governed by European Union law and the situation is confined in all relevant respects within a single Member State'.[39]

Roughly said, there are two ways of interpreting the case. The first is that under influence of the somewhat conservative Opinion of AG Kokott,[40] the ECJ departed from *Rottmann* and *Ruiz Zambrano* and readopted its line of reasoning as regards purely internal situations.[41] This interpretation is not convincing. Since *McCarthy* was delivered by an ordinary Chamber, while *Rottmann* and *Ruiz Zambrano* were decided on by the Grand Chamber, *McCarthy* cannot set aside *Rottmann* and *Ruiz Zambrano*. More importantly, if the ECJ really was determined to assert once again that Union citizenship 'was not intended to extend the scope *ratione materiae* of the Treaty to internal situations which have no link with Community law',[42] it would have refrained from referring to paragraph 42 of *Ruiz Zambrano*.[43] Since the ECJ is apparently still of the opinion that 'Article 20 TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union',[44] it is clear that *McCarthy* endorses *Rottmann* and *Ruiz Zambrano*.

By its cross-border argument, the ECJ merely wanted to clarify, in case the infringement of EU citizens' rights is not intense enough, that citizens can still fall within the scope of Union law when a transboundary element is present.[45] It

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37 *Ibid.*, para. 47.

38 *Ibid.*, para. 49.

39 *Ibid.*, para. 55.

40 Opinion of Advocate General Kokott in Case C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department*, not yet reported.

41 For articles supporting this view, see Hailbronner & Thym (n. 30), 1268–1270; A.P. van der Mei, S.C.G. van den Boogaert & G.R. de Groot, 'De Arresten Ruiz Zambrano en McCarthy: Het Hof van Justitie en het Effectieve Genot van EU-Burgerschapsrechten', *Nederlands Tijdschrift voor Europees Recht* 6 (2010): 188–200.

42 Joined Cases C-64 &65/96, *Land Nordrhein-Westfalen v. Kari Uecker and Vera Jacquet v. Land Nordrhein-Westfalen* [1997] ECR I-3171, para. 23; Case C-148/02, *Carlos Garcia Avello v. Belgian State* (n. 22), para. 26; Case C-499/06, *Halina Nerkowska v. Zakład Ubezpieczeń Społecznych Oddział w Koszalinie* [2008] ECR I-03993, para. 25.

43 Case C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department* (n. 5), para. 47.

44 Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)* (n. 4), para. 42.

45 This is clearly laid down in para. 56 of *McCarthy*, which reads as follows: 'It follows that Article 21 TFEU is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment

must, therefore, be concluded that the Court was of the opinion that the rights of Mrs McCarthy were not sufficiently infringed, although the distinction which the ECJ made between *Ruiz Zambrano* and *McCarthy*[46] was artificial at the least,[47] and that, since there was no cross-border element, Article 21 was not applicable. Consequently, a sufficiently serious infringement of an EU citizen's right will after *McCarthy* still fall by its nature and its consequences within the scope of Union law.

As will be discussed below, this '"substance of rights" doctrine'[48] could have an immense impact on the protection of fundamental rights. However, considering the *Dereçi* case, it is doubtful whether the Court is willing to use the potential that *Ruiz Zambrano* and *McCarthy* offer. While narrowly interpreting *Ruiz Zambrano*, the ECJ held that:

> the criterion relating to the denial of the genuine enjoyment of the substance of the rights conferred by virtue of European Union citizen status refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole.[49]

The Court set the threshold to fulfil the criteria of the deprivation of the genuine enjoyment of the substance of the rights at such a high level that it is necessary to realize that the impact of EU citizenship on EU fundamental rights will remain limited if the Court will stick to this interpretation. This is especially true since the Court seems to follow AG Mengozzi's View, which, based on *Ruiz Zambrano* and *McCarthy*, states that '"the substance of the rights attaching to the status of European Union citizen" (…) does not include the right to respect for family life enshrined in Article 7 of the Charter of Fundamental Rights of the European Union and in Article 8(1) of the ECHR'.[50] At the outset, it must, with due respect for the learned AG, be noted that arguing that *Ruiz Zambrano* and *McCarthy* make it impossible to include fundamental rights in the substance of rights doctrine is simply incorrect. In addition, the ECJ's limited interpretation of the substance of EU citizenship rights is not in line with *Ruiz Zambrano* and *McCarthy*. Section 4 will discuss why this is the case and why it is for that reason still interesting to analyse the potential impact of EU citizenship on the scope of EU fundamental rights. First of all, however, it is necessary to analyse the relation between EU citizenship and EU fundamental rights.

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of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States'.

46 Case C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department* (n. 5), para. 50.

47 For a convincing analysis of the similarities between the two cases, see Kochenov, 2012 (n. 34).

48 Hailbronner & Thym (n. 30), 1256.

49 Case C-256/11, *Murat Dereçi and Others v. Bundesministerium für Inneres* (n. 10), para. 66.

50 View of Advocate General Mengozzi in Case C-256/11, *Murat Dereçi and Others v. Bundesministerium für Inneres*, not yet reported, para. 37.

3 THE RELATION BETWEEN EU CITIZENSHIP AND EU FUNDAMENTAL RIGHTS

The rights of Article 20 TFEU have been incorporated in the Charter and are therefore part of EU fundamental rights.[51] However, the question that needs to be answered is whether all EU fundamental rights are EU citizenship rights. A positive answer would have the result that the infringement of an EU citizen's European fundamental right could bring the situation by its nature and its consequences within the scope of Union law. A European citizen would then be able to rely on EU fundamental rights against the state in a purely internal situation.[52] This would imply a significant extension of the EU fundamental right's scope, since the ECJ so far has limited the application of EU fundamental rights to Member States when implementing Union law[53] or to situations falling within the scope of Union law.[54]

That fundamental rights are part of citizenship rights is not as obvious as it seems. Despite some attempts of the Member States to include fundamental rights among citizenship rights,[55] fundamental rights were not included in the list of citizenship rights in the Treaty of Maastricht.[56] This is the reason that O'Leary has argued that for EU citizenship to become important, it is necessary to establish a link between EU citizenship and fundamental rights.[57] However, the Treaty of Maastricht and subsequent Treaty revisions always stated that '[c]itizens of the Union shall enjoy the rights conferred by this Treaty',[58] thus removing the apparent exhaustive character of the list of citizenship rights

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51 Chapter V of the Charter is about citizens' rights.

52 In addition, Hailbronner and Thym (n. 30), 1258, in their case note on *Ruiz Zambrano* consider this as a possibility. See also H. van Eijken & S.A. de Vries, 'Case Comment: A New Route into the Promised Land? Being a European Citizen after Ruiz Zambrano', *European Law Review* 5 (2011): 718.

53 Joined Cases 201 and 202/85, *Marthe Klensch and Others v. Secrétaire d'État à l'Agriculture et à la Viticulture* (n. 7), para. 8; Case 5/88, *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft* (n. 7), para. 19.

54 Case C-260/89, *Elliniki Radiophonia Tiléorassi AE v. Dimotiki Etairia Pliroforissis* (n. 8), para. 42; Case C-159/90, *The Society for the Protection of Unborn Children Ireland Ltd. v. Stephen Grogan and Others* (n. 8), para. 31; Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich* (n. 8), para. 75.

55 The Spanish memorandum to the IGC argued that there should be a relation between EU citizenship and fundamental rights. C. Closa, 'The Concept of Citizenship in the Treaty on European Union', *European Law Review* 6 (1992): 1156. In addition, the European Parliament in its report on citizenship argued that 'it is inconceivable to base citizenship on anything other than the expansion of fundamental rights and freedoms in addition to their recognition and protection'. European Parliament, 'Bindi Report on Union Citizenship', Doc. A 3-0139/91, 23 May 1991.

56 S. O'Leary, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship*, 1st edn (London: Kluwer Law International, 1996), 292.

57 S. O'Leary, 'The Relation between Community Citizenship and the Protection of Fundamental Rights in Community Law', *Common Market Law Review* 2 (1995): 540.

58 Treaty of Maastricht, Art. 8 EU; Treaty of Amsterdam, Art. 17 EC; and Treaty of Nice, Art. 17 EC.

explicitly mentioned in the Treaty. The Treaty of Lisbon set this out more clearly due to the incorporation of the words *inter alia* in Article 20(2) TFEU.

Recognizing EU fundamental rights as EU citizenship rights would be a logical consequence. It is impossible to deny that EU citizenship and fundamental rights are strongly connected with each other.[59] Since in general one of the main objectives of establishing the status of citizenship is the protection of (fundamental) rights against abridgement by the state,[60] recognizing fundamental rights as EU citizenship rights would certainly give more meaning to European citizenship. Such an approach would also perfectly fit with the upgraded position of EU fundamental rights realized by the Treaty of Lisbon.

Not applying EU fundamental rights in purely internal situations would, as AG Sharpston set out in her Opinion on *Ruiz Zambrano*, also create some bizarre situations. Followed by a very clarifying example, she submits that:

> [i]t would be paradoxical (to say the least) if a citizen of the Union could rely on fundamental rights under EU law when exercising an economic right to free movement as a worker, or when national law comes within the scope of the Treaty (…) or when invoking EU secondary legislation (…), but could not do so when merely 'residing' in that Member State.[61]

Although the ECJ had the possibility of dealing with this issue in *Ruiz Zambrano*, it avoided doing so. The referring court asked whether Articles 18, 20, and 21 TFEU, read in conjunction with Articles 21, 24, and 34 of the Charter, should be interpreted as giving Mr Ruiz Zambrano a right of residence.[62] Although fundamental rights appeared to be the 'leitmotif running through all three questions',[63] the ECJ held that the refusal to grant Mr Ruiz Zambrano a work permit would infringe the right of residence of his children.[64] This would deprive the children of 'the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union',[65] as a result of which the national measures were prohibited. Even though the ECJ did not discuss the issue of fundamental rights, this should not be interpreted as a repudiation of the ideas of AG Sharpston. The ECJ simply had the possibility of

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[59] See, e.g., Council Decision 2007/252/EC of 19 Apr. 2007 establishing for the period 2007–2013 the specific programme 'Fundamental rights and citizenship' as part of the General Programme 'Fundamental Rights and Justice', which has as its objective the promotion of 'the development of a European society based on respect for fundamental rights'.

[60] O'Leary, 1995 (n. 57), 520.

[61] Opinion of Advocate General Sharpston in Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, not yet reported, para. 84.

[62] Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)* (n. 4), para. 35.

[63] Opinion of Advocate General Sharpston in Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)* (n. 61), para. 53.

[64] Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)* (n. 4), para. 43.

[65] *Ibid*., para. 42.

deciding the case without entering the delicate area of EU fundamental rights. In other cases, the ECJ has already applied EU fundamental rights as EU citizenship rights. Very recently, in *Josep Peñarroja Fa*, the ECJ stated explicitly that the national legislation at issue in that case should comply 'with the requirements of EU law concerning the effective protection of the fundamental rights conferred on EU citizens'.[66]

Since the ECJ in *Ruiz Zambrano* and *McCarthy* determined that a deprivation of EU citizens of the genuine enjoyment of their citizenship rights would fall within the scope of EU law, a logical consequence of the words used in *Josep Peñarroja Fa* would be to include fundamental rights in the substance of EU citizenship rights. This should have the result that EU fundamental rights can be relied on in purely internal situations by EU citizens vis-à-vis Member States, since the infringement of EU citizen's rights falls by its nature and its consequences within the ambit of EU law.

4 *DEREÇI* AND FUNDAMENTAL RIGHTS

This obvious relation between EU fundamental rights and EU citizenship was completely denied in the *Dereçi* case. The ECJ limited the substance of rights doctrine to cases in which an EU citizen was forced to leave EU territory. The reason for this decision remains unclear but seems to be based on the unfounded argument that the substance of rights doctrine was never intended to protect EU citizens from anything other than expulsion from the Union. Only the wording 'genuine enjoyment of the substance of the rights', as chosen by the ECJ in *Ruiz Zambrano*, implies that the Court intended to protect EU citizens against more than just the expulsion from EU territory. More importantly, while it is true that *McCarthy* seems to narrow down the Court's approach in *Ruiz Zambrano*, neither *Ruiz Zambrano* nor *McCarthy* ever determined that relying on respect for family life, or any other fundamental right, is insufficient to fall within the scope of EU law in the absence of a cross-border element. Both cases only consider the expulsion of a Union citizen from EU territory to be an example of the deprivation of an EU citizen's substance of rights[67] and not, as the Court in *Dereçi* decided, the only instance in which the genuine enjoyment of the substance of the rights is denied.[68]

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[66] Joined Cases C-372/09 and C-373/09, *Josep Peñarroja Fa*, Judgment of 17 Mar. 2011, not yet reported, para. 62.

[67] Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)* (n. 4), paras 42–44; Case C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department* (n. 5), paras 49–53.

[68] Case C-256/11, *Murat Dereçi and Others v. BundesministeriumfürInneres* (n. 10), para. 66.

Of course, the ECJ may decide to limit the substance of rights doctrine to merely protect EU citizens from expulsion from EU territory. However, this is completely in conflict with its decision in *Ruiz Zambrano* and the relation between EU fundamental rights and EU citizenship. Since the ECJ only seems to base this decision on the false argument that the substance of rights doctrine never implied more than a protection against expulsion,[69] the question is which other reasons the Court has had for its decision. Perhaps the judges were guided by AG Mengozzi's View and his argument that *Ruiz Zambrano* and *McCarthy* demonstrate that respect for family life, as well as other fundamental rights, were from the outset excluded from the substance of EU citizenship rights. Although, as already said above, the substance of rights doctrine did not exclude any area, it is interesting to further analyse the AG's fundamental rights argument.

The AG based its reason for excluding the respect for family life from falling within the substance of rights doctrine on Article 6(1) TEU and Article 51(2) of the Charter. Both provisions are intended to prevent the Charter from extending or changing the field of application of Union law or the competences of the EU. However, it is in the present context not the Charter but EU citizenship that has changed the field of application of Union law. Since EU fundamental rights could always be applied in situations falling within the scope of Union law, they would still be applicable if EU citizenship extends the scope of EU law. Nevertheless, it is true that the Charter does not seem to intend making EU fundamental rights applicable in the Member States. Some of the Member States have evidently tried to restrain the impact of the Charter.[70] The scope of the Charter is limited by its Article 51(1), which states that it is applicable 'to the Member States only when they are implementing Union law'. The latter, nevertheless, is not entirely unambiguous as a consequence of the explanations relating to Article 51 of the Charter, which state that the Charter 'is only binding on the Member States when they act in the scope of Union law'.[71] The question thus is if the ECJ will interpret the scope of the Charter along the lines of Article 51(1) or the explanations relating to this provision.

In the *Ivanna Scattolon* case,[72] the Court had the possibility of dealing with this question. One of the questions raised in this case was whether Ms Scattolon could rely on Articles 46, 47, and 52(3) of the Charter against the Italian State. One of the questions thus asked of the ECJ was whether the Charter can be

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69 *Ibid.*, 64–66.

70 G. de Búrca, 'The Drafting of the European Union Charter of Fundamental Rights', ELR 2 (2001): 126.

71 Explanations relating to the Charter of Fundamental Rights [2007] OJ C 303/02.

72 Case C-108/10, *Ivana Scattolon v. Ministero dell'Università e della Ricerca*, Judgment of 6 Sep. 2011, not yet reported.

applied to the Member States when acting within the scope of Union law. In his Opinion, AG Bot firmly answered this question in the affirmative, since he sees the explanations relating to the Charter as evidence that the Member States did not intend to limit the scope of the Charter.[73] Considering de Búrca's analysis of the drafting process of the Charter,[74] this argument of the learned AG is not entirely convincing. His second argument that a strict interpretation of Article 51 of the Charter is not desirable, as this would lead to a dual system of fundamental rights protection in the EU,[75] on the contrary is definitely more persuasive. However, since the ECJ, in contrast to AG Bot,[76] found that Mrs Scattolon could protect her rights by relying on Directive 77/187,[77] it did not consider it necessary to deal with the Charter.[78]

Whether the ECJ would otherwise have followed the Opinion of AG Bot remains to be seen, as the Court in *Dereçi* held that 'the provisions of the Charter are, according to Article 51(1) thereof, addressed to the Member States only when they are implementing European Union law'.[79] For a definite answer on how the Court will interpret the scope of the Charter, the *Yoshikazu Iida* case has to be awaited, since the referring court asked the ECJ whether 'the Charter [is] applicable pursuant to the second alternative of the first sentence of Article 51(1) of the Charter, in accordance with the ERT case-law',[80] thus whether the Charter is also applicable to situations falling within the scope of Union law. If this is the case, the Charter can be applied in relation with the substance of rights doctrine. However, even if the Court will hold on to a narrow interpretation, the limited scope of the Charter will only complicate, and not necessarily prevent, the application of EU fundamental rights to EU citizens in purely internal situations.

The reason for this is that almost all Charter rights have been recognized as general principles of EU law. Those fundamental rights recognized as general principles have always been applicable to cases falling within the scope of EU law. The question thus is if a narrow Charter scope narrows down the scope of those general principles.[81] AG Bot's concerns in his Opinion on the *Ivanna*

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[73] Opinion of Advocate General Bot in Case C-108/10, *Ivana Scattolon v. Ministero dell'Università e della Ricerca*, paras 117–119.

[74] de Búrca (n. 70).

[75] Opinion of Advocate General Bot in Case C-108/10, *Ivana Scattolon v. Ministero dell'Università e della Ricerca* (n. 73), para. 120.

[76] *Ibid.*, para. 103.

[77] Case C-108/10, *Ivana Scattolon v. Ministero dell'Università e della Ricerca* (n. 72), para. 83.

[78] *Ibid.*, para. 84.

[79] Case C-256/11, *Murat Dereçi and Others v. Bundesministerium für Inneres* (n. 10), para. 71.

[80] Case C-40/11, *Yoshikazu Iida v. City of Ulm* (pending).

[81] For a similar question, see Editorial Comments, 'The Scope of Application of the General Principles of Union Law: An Ever Expanding Union?', *Common Market Law Review* 6 (2010): 1595.

Scattolon case about the dual system of fundamental rights protection indicates that this is not, according to him, necessarily the case.[82] The *Yoshikazu Iida* case might also clarify the impact of the Charter on the scope of general principles, since the referring court asked whether '"unwritten" EU fundamental rights (…) can be fully applied even if the Charter is not applicable in the specific case'.[83]

The argument of AG Mengozzi that the Charter prevents the inclusion of EU fundamental rights in the substance of rights doctrine is thus not entirely convincing. If the Charter indeed does not limit the scope of the general principles, there is, apart from an unwilling Court, nothing that obstructs the inclusion of EU fundamental rights in the substance of rights doctrine. Based on the *Dereçi* case, it indeed appears that the ECJ is determined to limit the effects of the substance of rights doctrine. Using *Dereçi* as a precedent for further cases will not only deprive European citizenship from almost all substantive meaning but will also have worrisome effects for the protection of fundamental rights. The protection of the right of family life might best exemplify this.

The safeguards that the ECJ tried to offer in *Dereçi*, relying on Article 8 ECHR,[84] are simply not adequate. The European Court of Human Rights (hereinafter 'ECtHR') has always narrowly interpreted the right of family life.[85] Although the ECtHR has stressed the importance of the children's interests when balancing between the need to ensure an effective immigration policy and the individual's rights,[86] this by no means guarantees that the ECtHR will consider the deportation of an asylum seeker, who is married to a European national and whose children were born in Europe, as an interference with the right of family life. In *Darren Omoregie*, the ECtHR held that the birth of a child 'could not of itself give rise to [an] entitlement' to stay.[87] It is thus by no means sure that Mr Dereçi can rely on the right of family life as interpreted by Article 8 ECHR. The situation is even worse for the other applicants in the *Dereçi* case who are married to a European national but who do not have children. After all, the ECtHR often decided that since the family can build a new life elsewhere, the ECtHR will not consider the refusal to grant a residence permit as a violation of Article 8 ECHR.[88]

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82 Opinion of Advocate General Bot in Case C-108/10, *Ivana Scattolon v. Ministero dell'Università e della Ricerca* (n. 73), para. 120.

83 Case C-40/11, *Yoshikazu Iida v. City of Ulm* (n. 80).

84 Case C-256/11, *Murat Dereçi and Others v. Bundesministerium für Inneres* (n. 10), para. 72.

85 van Elsuwege & Kochenov (n. 2), 462.

86 Application No. 55597/09, *Nunez v. Norway*, 28 Jun. 2009.

87 Application No. 265/07, *Darren Omoregie and Others v. Norway*, 31 Jul. 2008, para. 66.

88 Application No. 21702/93, *Ahmut v. the Netherlands,* 28 Nov. 1996, para. 71; van Elsuwege & Kochenov (n. 2), 464.

Had a transboundary situation been present, the applicants would have had the possibility of relying on the right of family life, which is among the fundamental rights protected in EU law. The ECJ has interpreted the right of family life in a different,[89] less restrictive manner. The ECJ does not take the possibility of building a new life elsewhere into account. In *Metock*, the ECJ held that '[t]he refusal of the host Member State to grant rights of entry and residence to the family members of a Union citizen is such as to discourage that citizen from moving to or residing in that Member State'.[90] In *MRAX*, the Court, moreover, decided that due to the importance of the protection of family life:

> it is in any event (…) prohibited to send back a third country national married to a national of a Member State where he is able to prove his identity and the conjugal ties and there is no evidence to establish that he represents a risk to the requirements of public policy, public security or public health.[91]

This is also the case if the third country national entered the territory of the Member State unlawfully.[92] So, in the case of a cross-border situation, it would have been likely that the applicants would have had the possibility of staying. However, due to excessive formalism, the ECJ maintains the 'paradoxical' situation that it is possible to rely on EU fundamental rights 'when exercising an economic right to free movement as a worker, or when national law comes within the scope of the Treaty (…) or when invoking EU secondary legislation (…), but [not] when merely "residing" in that Member State'.[93]

Limiting the substance of rights doctrine is thus worrisome for the protection of EU fundamental rights. Taking EU citizenship rights more seriously might have the completely opposite effect. Although it is unlikely that the ECJ will overturn its decision, the possibility, especially due to problematic arguments of the Court and AG Mengozzi, should not be excluded. If the ECJ is still determined to protect the genuine enjoyment of EU citizenship rights, it will sooner or later have to override the *Dereçi* case. The question that thus needs to be answered is the potential impact such a revision might have on the EU fundamental rights architecture.

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89 Opinion of Advocate General Sharpston in Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)* (n. 61), para. 56.

90 Case C-127/08, *Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform* [2008] ECR I-6241, para. 64.

91 Case C-459/99, *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v. Belgian State* [2002] ECR I-6591, para. 61.

92 *Ibid.*, para. 80.

93 Opinion of Advocate General Sharpston in Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)* (n. 61), para. 84.

5 THE IMPLICATIONS OF THE INCLUSION OF EU FUNDAMENTAL RIGHTS IN THE SUBSTANCE OF RIGHTS DOCTRINE

An extension of the scope of EU law by means of EU citizenship would extend the field of application of EU fundamental rights. Situations that were previously not covered by EU fundamental rights, the purely internal situations,[94] would then fall within the field of application of EU fundamental rights. Where it has always been possible to rely on EU fundamental rights only if there was a relation with another aspect of EU law, an inclusion of fundamental rights into the substance of rights doctrine would create the possibility for EU citizens to rely on EU fundamental rights in any case; the infringement of EU citizen's fundamental rights falls then by its nature and its consequences within the ambit of EU law. AG Sharpston is right when she submits that '[t]he desire to promote appropriate protection of fundamental rights must not lead to usurpation of competence'.[95] To meet these objections, EU fundamental rights should only be applied complementary to national fundamental rights.[96] Only when the protection of fundamental rights is not sufficiently guaranteed under national law will it then be possible to rely on EU fundamental rights. An option would be that EU fundamental rights would only guarantee a minimum protection of fundamental rights. Member States could then be allowed to go beyond the minimal protection.

A reference to the United States shows that even the effects of such an approach should not be underestimated. Although the US Bill of Rights was initially only applicable to the federal level,[97] the US Supreme Court over the years has applied the Bill of Rights to the states by making use of the due process clause in the Fourteenth Amendment, which was directed towards the states.[98] In *Gitlow v. New York*,[99] the Supreme Court held that the due process

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[94] See, for such a situation, Case C-159/90, *The Society for the Protection of Unborn Children Ireland Ltd. v. Stephen Grogan and Others* (n. 8).

[95] Opinion of Advocate General Sharpston in Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)* (n. 61), para. 162.

[96] For a similar idea, see Opinion of Advocate General Sharpston in Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)* (n. 61), para. 168. For the idea of 'EU fundamental rights as a floor of protection' and its potential drawbacks, see:Aida Torres Perez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (London: SAGE, 2008), 58–62.

[97] For a convincing analysis of the debate leading to the adoption of the Bill of Rights and the similarities between the Charter and the Bill of Rights, see A. Knook, 'The Court, the Charter, and the Vertical Division of Powers in the European Union', *Common Market Law Review* 2 (2005): 374–376.

[98] The due process clause reads as follows: 'nor shall any State deprive any person of life, liberty, or property, without due process of law'.

[99] *Gitlow v. New York* 268 US 652 (1925). For an excellent overview of the history of the Bill of Rights, the incorporation doctrine, sparked by *Gitlow v. New York*, and the debates surrounding this

clause incorporated the freedom of speech of the First Amendment, making the freedom of speech applicable to the states. Over the years, the Supreme Court has used this so-called incorporation doctrine to also incorporate most other parts of the Bill of Rights into the due process clause.[100] Despite the fact that the US Bill of Rights only guarantees a minimum protection,[101] the Bill of Rights has taken over the role of the state constitutions as the primary defender of fundamental rights.[102] Even a complementary application of EU fundamental rights will thus have a federalizing effect. Since EU fundamental rights have been made visible by means of the Charter, something similar could happen in the EU.[103]

These effects will especially be noticeable in cases in which the Charter protects rights that are absent in national constitutions. Although the Charter 'reaffirms (…) the rights as they result, in particular, from the constitutional traditions (…) common to the Member States',[104] not all constitutional traditions are common,[105] and not all Charter rights can be found in all constitutions.[106] From the perspective of some Member States, the development as portrayed above would, thus, certainly be undesirable. Nevertheless, agreeing with Bosniak, 'from the perspective of (…) human rights, it is indisputably good that the kinds of rights traditionally associated with citizenship are increasingly being guaranteed at the international level because, quite simply, it means that more people are likely to enjoy more protection more of the time'.[107]

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doctrine of incorporation, see S.J. Wermiel, 'Rights in the Modern Era: Applying the Bill of Rights to the States', *William and Mary Bill of Rights Journal* 1 (1992): 121–130.

100 Only four provisions of the Bill of Rights have not been incorporated in the 14th amendment. These are the third amendment on the prohibition of quartering soldiers in peacetime in homes without the owner's consent, the fifth amendment on the right to indictment by a grand jury, the seventh amendment on the right to jury trial in civil cases, and the eight amendment on the prohibition against excessive bail and fines.

101 W.J. Brennan Jr., 'The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights', *New York University Law Review* 4 (1986): 535–544; L.K. Bonham, 'Unenumerated Rights Clauses in State Constitutions', *Texas Law Review* 6 (1985): 1323.

102 R.C. Welsh, 'Reconsidering the Constitutional Relationship between State and Federal Courts: A Critique of Michigan V. Long', *Notre Dame Law Review* (1984): 1118.

103 Even before the Charter gained its binding status, national courts have invoked the Charter in national cases. The visibility of EU fundamental right certainly contributes to the possibility to invoke those in national proceedings. J.B. Liisberg, 'Does the Charter of Fundamental Rights Threaten the Supremacy of Community Law? Article 53 of the Charter: A Fountain of Law or Just an Inkblot?', *Jean Monnet Working Papers* 4 (2001), <http://centers.law.nyu.edu/jeanmonnet/papers/01/010401.html>, 24 Jan. 2011, footnote6 19; R.R. Babayev, 'EU Charter of Fundamental Rights: What Is the Impact of Being Chartered?' *Romanian Journal of European Affairs* 4 (2006): 68.

104 Charter of Fundamental Rights of the European Union, preamble.

105 F. Belvisi, 'The "Common Constitutional Traditions" and the Integration of the EU', *Diritto e Questioni* 6 (2006): 32.

106 F. Ekhardt & D. Kornack, 'Of Unity in Diversity and Inherent Tensions: Interpreting the European Union's New Architecture of Fundamental Rights', *Columbia Journal of European Law* (2010): 92.

107 Bosniak (n. 28), 492.

6 CONCLUSION

The cases the Court will deliver in the next year(s) will most likely determine how resolute the Court is in protecting the rights of European citizens and fundamental rights. If it decides to use *Dereçi* as a precedent for future citizenship case law, this might have worrisome results for the protection of EU fundamental rights. However, if the Court is truly determined to protect the substance of rights of EU citizens, it will have to reverse its decision in *Dereçi* and to build on *Ruiz Zambrano* and *McCarthy*. If the ECJ will do so, this might significantly affect the EU fundamental rights architecture.

If the Court is willing to include EU fundamental rights in the substance of EU citizenship rights, a sufficiently serious infringement of a European citizen's fundamental right will fall by its nature and its consequences within the ambit of Union law. In contrast with AG Mengozzi's arguments, the inclusion of fundamental rights in the substance of rights doctrine does not necessarily conflict with the Charter. In addition, even if the ECJ decides that the scope of the Charter is too limited to apply the Charter in combination with the substance of rights doctrine, the general principles offer the possibility of applying EU fundamental rights in relation with the Court's *Ruiz Zambrano* and *McCarthy* decisions. After all, the scope of the general principles is not necessarily limited by a narrow Charter scope.

The example of the application of the US Bill of Rights has shown that such a possibility might have an immense federalizing effect on the European fundamental rights architecture. As in the United States, the eventual result could be that the federal fundamental rights diminish the importance of fundamental rights enshrined in the state constitutions. However, these potential far-reaching consequences should not obstruct a proper protection of fundamental rights in the EU.