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Commonality, not diversity: a legitimate Union citizenship towards a more legitimate EU

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I. Legitimacy in the EU

The question of how to foster greater legitimacy in the European Union (EU) has been an issue underlying the development of the supranational entity from its very beginnings. This is now well-recognised as a significant challenge for the EU.¹ However, more pertinent to the present discussion than examining its failings in this respect are the steps that have been taken towards overcoming these struggles. Whilst most of the solutions evident from the outset are identified as being solely for the purposes of ameliorating European legitimacy,² this paper explores another potential source of legitimation. The concept of Union citizenship, introduced by the Treaty of Maastricht in 1993,³ is argued to be an underappreciated potential solution to the EU's problems of legitimacy.

To understand why Union citizenship is relevant in the quest for greater European legitimacy, there must be clarity as to the Union's failings regarding its legitimacy to begin with. This includes the failings of the concept of Union citizenship itself, as it is by no means a perfect solution in its current form. An underlying discourse has been identified throughout the development of citizenship when considering the problems faced by the EU in terms of its legitimacy. This not only demonstrates why Union citizenship has been brought into the equation, but also provides a starting point for discussion.

¹ See Marcus Horeth, 'No way out for the beast? The unsolved legitimacy problem of European governance' (1999) 6 *Journal of European Public Policy* 249 and Andrew Moravcsik, 'Reassessing legitimacy in the European Union' (2002) 40 *JCMS* 603 for an initial indication of these issues.

² Examples include the increased involvement of national parliaments, such as the yellow/orange card subsidiarity warning mechanism (for further see Federico Fabbrini and Katarzyna Granat, "'YELLOW CARD, BUT NO FOUL': THE ROLE OF THE NATIONAL PARLIAMENTS UNDER THE SUBSIDIARITY PROTOCOL AND THE COMMISSION PROPOSAL FOR AN EU REGULATION ON THE RIGHT TO STRIKE' (2013) 50 *Common Market Law Review* 115) and the gradual increased role of the European Parliament especially after the Lisbon Treaty. These are mostly political and attend to the EU's democratic deficit, however, rather than being legal resolutions to the problems.

³ Treaty of Maastricht on the European Union [1992] OJ C191/01.

There are several themes identified in order to improve EU legitimacy. These are evident in both the specific concept of citizenship as well as the broader notion. The problems stem from tension between the Union as an entity of political institutions and its individual citizens, who are from 28 different Member States. As it is currently structured, the Union must find a balance between liberalism and communitarianism. Democratically, this would be the most suitable solution to the legitimacy problems because democracy and legitimacy as political concepts are the basis of accountability for citizens under a governing authority. The EU must be accountable to its constituent EU citizens to create solidarity between these disparate individuals, and this can differ significantly depending on which stance the EU adopts when exercising their competences.

To positively alter the perceived legitimacy of the Union, views held by its citizens of it must be changed. This will then increase the Union's accountability. Both liberal and communitarian decision-making in democratic terms should consider these views, and the vehicle for this is Union citizenship. Citizens currently lack a common sense of solidarity within their somewhat artificially constructed community of previously separate Member State nationals. Overcoming this, it will be argued, is the key to greater EU legitimacy as well as the key to the struggles faced by Union citizenship as a concept in its own right. Whilst it is argued that Union citizenship is an untapped source of potential for improving EU legitimacy, it itself suffers from grave inconsistencies and its own legitimacy problems. These too are recognised, and are to be resolved.

Therefore, it is not diversity that must be promoted, but rather commonality. Union citizenship has failed to generate a common identity because citizens did not affiliate themselves with the status, and consequently, the Union. Irrespective of the problems faced by the European manifestation of citizenship, the general idea in and of itself should be more highly regarded. There is one element in particular that will be uncovered to be the driving factor behind this analysis, and this is strengthened when exercised via the citizenship provisions. A commitment to human rights standards has been

central to the EU for some time, culminating in the future accession to the European Convention on Human Rights (ECHR),⁴ and the Charter of Fundamental Rights of the EU⁵ becoming of equal status to the Treaty.⁶ Human rights' relationship with citizenship has grown in the case law of the Court of Justice of the EU (CJEU),⁷ and because it is an underlying commonality shared by all individuals regardless of citizenship, it should help form a basis of constitutional patriotism. This will be the theory determining how EU legitimacy can be better fostered in the current state of affairs.

In section II, this paper will explain further why Union citizenship is relevant in the context of legitimacy in the EU. It will begin by noting the irony in utilising citizenship in the EU to begin with, given it is flawed itself especially in comparison to nation state citizenship when considering its efforts towards legitimacy. Because society and community are the crux of the Union, the common identity of its citizens must be ameliorated for perspectives on the EU to change. Whilst diversity is inherent in a community made up of individual citizens from 28 Member States, there is much to say for acknowledging, but not overly emphasising the differences.⁸ Instead, commonality via Union citizenship will play a significant role in reconnecting these separate individuals. Of particular importance is how greater focus on Union citizenship rights can improve participation and representation.

In section III, having understood why Union citizenship is relevant, the discussion will turn to how Union citizenship will improve participation and representation. It will look to the theory of constitutional patriotism championed by Jürgen Habermas.⁸ Union citizenship itself is far from perfect. This directly challenges its usefulness as a resolution to the legitimacy crisis. However, a

⁴ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended).

⁵ Charter of Fundamental Rights of the European Union 83/02 [2010] OJ C-83/389.

⁶ Article 6, Consolidated Version of the Treaty on European Union [2008] OJ C115/13 (TEU).

⁷ It has developed from initially in the case of C-260/89 *ERT* [1991] I-02925 and other examples such as in citizenship (C-200/02 *Zhu and Chen* [2004] ECR I-9925; C-148/02 *Garcia Avello* [2003] ECR I-11613) to its formal acknowledgment in Art 6 TEU today.

⁸ Jürgen Habermas, *Between Facts and Norms* (MIT Press 1996)

trend towards constitutionalising rights in the EU has been emerging, thus the role of the fundamental and human rights discourse is to re-substantiate Union citizenship in this context. The greater regard for human rights bolsters citizenship by providing a clear constitutional concept to which citizens can develop an allegiance. By developing a sense of constitutional patriotism, Union citizenship concurrently promotes and legitimises the entity that confers this status upon the individuals. It should also overcome its own problems in this manner: those of the struggle between liberalism and communitarianism.

The paper will conclude by acknowledging that whilst the struggle for legitimacy generates challenges for European citizenship, utilising and emphasising rights should, as a means to developing constitutional patriotism, substantiate Union citizenship and hence legitimise the EU. The current form of citizenship is not satisfactory for this objective, but the potential is strongly supported. As a universal concept – rather unlike the EU as an entity and the nature of a citizenship regime – there is greater focus on the common characteristics by means of rights. To establish “community” in the true sense of the word, the analysis escapes orthodoxy for the purposes of encouraging a more democratic and legitimate European Union. The citizenship-human rights dichotomy should provide an answer suitable in this respect. Highlighting its *sui generis* nature and supporting constitutional patriotism in lieu should do this.

II. Union citizenship in the context of legitimacy

It is not often that the resolution of EU legitimacy is connected to the introduction of the European concept of citizenship. Union citizenship must be explained in the context of its own existence outside the European sphere. Several elements can be identified as inherent components of citizenship on a nation state level. Interestingly, in the European context there have been some significant disparities in the understanding of these component parts. The most prominent has been the ability of citizenship to establish a common identity within an identified closed community. With European society at the

heart of the Union it would only serve to better its legitimacy if this element was strongly present. The other elements are political and legal expressions: democracy, justice and rights.⁹

The common identity component of citizenship is significant for various reasons related to the EU's and Union citizenship's legitimacy. Firstly, diversity (especially in the EU) is intrinsic. To bring together individuals from 28 very established different backgrounds into a single united community one must embrace this diversity. This situation is directly comparable to the endeavour that Schuman set out to achieve after his Declaration in 1950 in proposing the creation of the (then) European Economic Community (EEC).¹⁰ The analysis will contextualise and compare the similarities at the heart of both these landmark events in the Union's development. This comparison uncovers one reason behind linking legitimacy in the EU to Union citizenship. At their core, the objectives are the same. This renders tackling the issue on a micro-level through citizenship more manageable.

Whilst impossible to ignore the fundamental diversity of the EU, room must be made to consider other interpretations of the Union's characteristics in order not to be blinded by this dominant – though not necessarily exclusive – feature. Emphasis must shift to a more common characteristic, or risk alienating Member State individuals even more by outwardly highlighting differences rather than similarities. In the same way that the EU initially began to foster legitimacy, the advantages that a common Union citizenship identity brings need to be emphasised at the outset. For the EEC, these

⁹ Democracy and justice embody a varied number of inconclusive definitions. For this analysis, the definition of democracy considered is from Robert Dahl, *Democracy and its Critics* (Yale University Press 1989) 120 which focuses on democracy's ability to demarcate scope, authority, inclusion and boundaries and its representative nature. Given the various forms it can take (not restricted to the liberal or deliberative (communitarian) theories), this framework is most suitable. The definition of justice adopted is Fraser's predominantly in Nancy Fraser, *Scales of Justice: Re-imagining Political Space in a Globalizing World* (Columbia University Press 2009). This flexible approach places justice on a sliding scale to best appreciate the different forms it can take for the individual. Additionally, Fraser's theory has been chosen because of her appreciation of an 'abnormal' form of justice, see Nancy Fraser, 'Abnormal justice' (2008) 34 *Critical Inquiry* 393. Rejecting territorial boundaries and instead accepting the post-Westphalian construct of society, abnormal justice is reflective of justice's inability to achieve a consensus within communities nowadays given the diversity of opinions that may or may not be relevant. Finally, rights refer primarily to its legal definition, with the theorisation of types of rights not relevant for this discussion.

¹⁰ Robert Schuman, *Schuman Declaration* (9 May 1950)

were its financial gains. Union citizenship, however, is a more social and political concept than economic. Relating oneself to tangible financial interests is often easier than empathising with collective social sentiments. Therefore, whilst it is important not to focus exclusively on diversity, Union citizenship fought an uphill battle early on in convincing others of its own worth and legitimacy given it provided very little financial gain.

To legitimise Union citizenship and be accepted by its constituent European subjects, citizens must be aware and wholly convinced of its concrete advantages. It is entirely plausible that the introduction of this concept has the potential to change the face of European legitimacy despite an admittedly less than stellar start. The potential of Union citizenship is hindered by its own existence in terms of the unalterable structure of the Union itself. Despite supporting Union citizenship as an answer to parts of the Union's legitimacy problems, the evident flaws in its development cannot be ignored, but equally cannot be misunderstood. A different perspective bridges the gap between the EU's failing legitimacy and Union citizenship's own failures. The political aspects of citizenship (democracy and justice) that foster solidarity concurrently intensify common identity. Justice will be better achieved as the EU becomes more legitimate. This will be wholly achieved when it is truly democratic. Furthermore, a sense of justice is lacking because the EU is not yet legitimate nor democratic.¹¹ Fraser notes that 'conviction...turns a collection of individuals into fellow subjects of justice' citing 'co-belonging to the same bounded political community'¹² as a factor.

An important distinction to maintain is that the majority of the criticism is the fault of the current European structure for citizenship, rather than citizenship itself. In its current form, Union citizenship has failed to foster legitimacy. However, the constituent elements of citizenship – common identity,

¹¹ See Brigitte Boyce, 'The Democratic Deficit of the European Community' (1993) 46 *Parliamentary Affairs* 458 and Teija Tiilikainen, 'The Problem of Democracy in the European Union' in Esko Antola and Allan Rosas (eds), *A Citizen's Europe: In Search of a New Order* (Sage 1995) for a fuller discussion of the EU's democratic deficit.

¹² Nancy Fraser, 'Who counts? Dilemmas of justice in a postwestphalian world' (2010) 41 *Antipode* 281, 288.

democracy, justice and rights – have been proven to promote legitimacy in other contexts. Legitimate governing authorities that have established citizenship with relative success are those of national Member States, analysed by considering the extent of the acceptance of nationality.¹³ The framework of an ideal citizenship regime establishes a sense of hegemony, which is necessary for imparting legitimacy to a political democratic authority's power over a community.¹⁴ Unfortunately, the two political elements, democracy and justice, are weak in Union citizenship. Citizens must participate in society so as to encourage better representation as it is this which ultimately betters democracy. The concepts themselves find expression through their benefactors. However, there must first be opportunity for the citizens to express their democratic views on justice, and the EU's multi-tiered supranational governance presents difficulties in maximising the chances for individuals in this respect.

The more reliable protection provided by the Treaty in terms of Union citizenship is that of the rights conferred under Art 20-21 TFEU. This is ameliorated through the added element of a fundamental human rights discourse. Union citizenship is the culmination of the endeavours that link common identity and rights to unite the EU community. It can be a neutral status that Member State individuals and nationals can ascribe themselves to alongside their existing nationalities. Nationality has been validated due to its richer and longer history¹⁵ which proves difficult for Union citizenship's legitimacy as it may be seen as too neutral at times. It must embody more for its status than what it is currently legally ascribed as: 'additional'.¹⁶ The importance, however, is that Union citizenship may be a supplementary status legally but when invoked can be interpreted to achieve a certain outcome. The outcome is the creation of a common identity, solidarity and eventually legitimacy. As Habermas

¹³ It is not the aim of this paper to discuss the specific individual circumstances behind whether one connects personally to a national identity, however.

¹⁴ Antonio Gramsci, *Selections from the prison notebooks* (Quintin Hoare and Geoffrey Nowell Smith tr, Lawrence and Wishart 1971)

¹⁵ See in support of this, David Miller, *On Nationality* (Clarendon Press 1995) and David Miller, *Citizenship and National Identity* (Polity Press 2000).

¹⁶ Article 20, Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47 (TFEU).

remarks, 'the co-originality of liberty rights and the rights of citizens is essential' for legitimization.¹⁷ Rights are understood as the medium used for political self-determination, and this importantly underlies the paper's argument of constitutional patriotism through rights and subsequently improved EU legitimacy.

The relationship between common identity and Union citizenship will uncover that identity is a substrate of citizenship. In the EU, this substrate is used as a tool to manipulate the understanding of Union citizenship for its citizens. This manifests itself, for example, in the extensive case law that has been criticised for its lack of coherent development and relative unpredictability.¹⁸ Because Union citizenship is created by the Treaties and is 'parasitic'¹⁹ upon nationalities of the individual Member States, it is different from national citizenship. This does not insinuate inferiority, but has ascertained an inherent secondary nature. The clear separation between the embodiment of a common European identity and the isolated concept of Union citizenship is obvious. However, this gap is bridged through Union citizenship's emphasis on rights rather than nationality's emphasis on national identity for the simple reason that there is more commonality in rights, and too much diversity in nationality.

The evident divide between the creation of a common identity and the concept of Union citizenship itself is the reason behind the community lacking a collective connection. This lacuna raises many other issues and missing elements pertaining to the citizenship regime in the EU, particularly the lack of political democracy and justice from the framework that the EU structure established it in. The

¹⁷ In Jürgen Habermas, *The Postnational Constellation : Political Essays* (MIT Press 2001), he refers to this legitimization as 'Western' (118). Note that for the purposes of this analysis it excludes voting rights under Article 22 TFEU.

¹⁸ Since 1998 in C-85/96 *Martinez Sala* [1998] ECR I-2691 when the first substantive Union citizenship case emerged, there has been disparity in the evolution of the scope of Art 21 TFEU. Compare for example, C-209/03 *Bidar* [2005] ECR I-2119 with C-158/07 *Förster* [2008] I-08507 where in the latter case, the claimant was denied social benefits for not being sufficiently integrated to the Member State in question. Also relevant is C-406/04 *De Cuyper* [2006] ECR I-6947 and C-456/02 *Trojani* [2004] I-07573, where in the former the right to social assistance was denied whilst the latter allowed it on shaky grounds. Most pertinently, however, see the recent saga after C-34/09 *Zambrano* [2011] ECR I-1177 where it proceeded to widen significantly the scope of Art 21 TFEU, then retreat by means of narrow interpretation of the wording in C-434/09 *McCarthy* [2011] I-03375 and C-256/11 *Dereci* [2011] I-11315. The current position is still unclear to date.

¹⁹ Jo Shaw, 'The interpretation of European Union citizenship' (1998) 61 *Modern Law Review* 293.

struggles facing Union citizenship come to a head in this respect, undermining its usefulness as a solution for legitimacy in the EU. There are tensions and contradictions inherent if links between Union citizenship and the EU's legitimacy are not evident. A clear direction and clear objectives are thus crucial.

In seeking greater EU legitimacy, solidarity must be encouraged between EU citizens as a foundation for perceiving that there is a democratic European society. This concurrently promotes common European identity. This sense of justice substantiates a European citizen's being in the community, Douglas-Scott notes that considering justice holistically renders it more than an empty notion.²⁰ This paper has argued that these components are fundamental to a citizenship regime, alongside rights. Rights find themselves as the primary tool for legitimacy because it is most easily altered and varied, as compared to common identity, democracy and justice which require other elements to inform their positions. The goals for Union citizenship are identical to the goals for the Union. They are simply expressed in a more focused setting thus allowing targeted solutions to the wider crisis.

One specific resolution to the EU legitimacy crisis is to place greater emphasis on participation through citizenship so that democracy and justice become the focus of the issues needing to be considered. Whilst it is understood that the flaws of common identity stem from citizenship status not being integrated enough to the rights element of citizenship, democracy and justice are instead ameliorated through a more representative regime, involving citizens by participation. This fosters a greater sentiment of solidarity, founding the establishment of a united European community. Classifying the two sides from which the problems of legitimacy should be tackled, the task itself seems less daunting. It is recognisably more difficult to reconfigure society's perception of democracy and justice than to either add or take away certain rights.

²⁰ Sionadh Douglas-Scott, 'The Problem of Justice in the EU: Values, Pluralism, and Critical Legal Justice' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012)

Liberalism and communitarianism is an underlying tension of the Union. More specifically, it pertains to the competing perspectives of the individual citizens themselves. These struggles are as a direct result of the differing views of EU citizens, and provide another connection between Union citizenship and the Union itself. Citizenship aims to be a representative concept at its core. Without legitimacy, a supranational entity like the EU must strike a balance between liberalism and communitarianism to successfully reconfigure valid perceptions of it in society. This is to be done through interpretations by the Court of the effect of Union citizenship provisions, which has seen bouts of individually beneficial protective judicial activism intermingled with adoption of a harsh 'Community' stance more akin to protecting the interest of the EU itself.²¹ Swinging between liberal and communitarian democratic representation does not lend well to it being a solution to the legitimacy crisis. The inconsistency, however, is reflective of the EU's hesitance to express a concrete opinion for fear of treading too far past boundaries of MS autonomy, but equally grappling with the troublesome position of having to provide legitimacy to the concept of Union citizenship by substantiating its content through rights.

It is too arduous too conclusively determine whether the EU should be more liberal or more communitarian, especially considering the legally uncertain position of the EU in relation to its supranational nature and relationship with national Member States. This section rather situates Union citizenship in the wider context of EU legitimacy, and examines how they are linked. The parallels between the cores of both notions are identical, thus substantiating the choice to consider one as a solution to the other. Additionally, whilst recognising grave flaws (on a political level particularly), the potential for utilising and considering Union citizenship for this objective still remains. Union citizenship can foster a collective identity but to encourage this, its rights element has to be emphasised. It is the universality of human rights and the common provisions under Art 20-21 TFEU

²¹ Compare, for example, the liberal interpretation of Art 21 TFEU and Art 18 TFEU for students in *Bidar* (n18) with the strict adherence to the Directive 2004/38 in *Förster*.

which provide a common basis for individuals to affiliate with. This is as opposed to the affiliation created by individual nationalities. Habermas' constitutional patriotism supports this theory, and with the added element of human rights, it should truly expand the collective universality of benefits under citizenship.

III. Habermas' constitutional patriotism and human rights

Having situated Union citizenship in the context of legitimising the EU, several hypotheses have emerged. The EU's and Union citizenship's legitimacy issues have been conflated in consideration because of their similarities. This is particularly when they are viewed as repeated situations in different contexts. Union citizenship's own crisis manifested itself in a more focused setting; this can be directly attributed to the wider legitimacy crisis faced by the EU. Cyclically, it has been argued the changes necessary for Union citizenship's improved perceived worth will eventually permeate more widely in the context of improving the position of EU legitimacy in the minds of its constituent citizens. These are underpinned by substantiation of the citizenship status not only by its provisions under Art 20-21 TFEU but in the expansion of these benefits due to the increased role of fundamental human rights in the Court's discourse, which has not been limited solely to citizenship.²² Union citizenship is believed to have emerged with the policy objective of providing a status that would better citizens' existence within the Union, thus its failings requiring resolving before this objective can be successfully realised.

The assumptions are as follows. The EU has long struggled with its legitimacy and the creation of Union citizenship was one way to resolve this. It would be able to reach the core of the constituency of the Union, namely the individuals who make up the substance of it and to whom the Union is created for the benefit of. However, due the lacklustre beginnings of Union citizenship itself

²² It was particularly relevant in cases involving family reunification as Article 8 ECHR has featured prominently in these situations. See *Garcia Avello* (n7), *Zhu and Chen* (n7) and *Zambrano* (n18).

frequently criticised for being too 'cosmetic' in nature,²³ attention began to shift to the struggles emerging from the citizenship concept. Significantly, legitimacy issues in the EU generally were still at large. The crisis worsened; not only did it manifest in the EU generally but it then became problematic on a micro-level for concepts emerging out of the entity.

Context is necessary to progress in determining how to best approach a solution to the legitimacy crisis. By tackling the problem at a micro-level first, this analysis will most effectively begin to touch upon problems which are greater at the overarching supranational level. Constitutional patriotism premised in the EU upon fundamental rights through citizenship is the rationale to be adopted here. The effect of doing so is threefold. Firstly, there is a democratic deficit faced by the Union, a longstanding problem which needs resolving.²⁴ By encouraging more participation and representation through citizenship and providing more substance in rights to the individuals, it is believed that this will correct the issue of the Union taking too much from its national Member States, and giving back less in return – addressing the EU's democratic deficit. Secondly, one fundamental element of citizenship is the solidarity created by fostering a sense of community through a common identity. This has been the greatest failure and distinguishing feature of EU citizenship to date because of its premises upon nationality. This missing element is to be cultivated slowly but surely by adopting a stronger fundamental human rights discourse, and henceforth consistently interspersing it into the reasoning of the Court in their judgments. This leads to the third argument; a greater emphasis on this commonality will lead to an increased belief in the strength of the constitution to cultivate to a sense of patriotism and community that is separate from the territorial bonds that currently dominate. This is understood in terms of legitimation through human rights.²⁵

²³ Michael Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship' (2006) 5 *Inter Alia* 77, 78.

²⁴ For more on the democratic deficit, see Boyce and John D. Occhipinti, 'Whither the withering democratic deficit? The impact of the Lisbon Treaty on the Area of Freedom, Security and Justice' [2013] *Cambridge Review of International Affairs* 1.

²⁵ Habermas, *The Postnational Constellation : Political Essays* (n17) 113.

Constitutional patriotism is the most suitable concept to achieve these aims. Habermas' theory is firstly established by rejecting several orthodox notions of democracy and identity that have been historically dominant. This is especially the case in nation states. It is all the more necessary in the EU because it is not a nation state. Habermas particularly denounces the idea of territorial affiliation in terms of its susceptibility to 'manipulative misuse by political elites'.²⁶ He believes that the nation itself should not be placed on such a high pedestal because its emergence is not as "natural" as it is perceived to be. Coercion and capital have been identified as two major factors in the creation of borders, at least in Europe. According to Foucault, war made states, and the acceptance of such grave changes was attributed to shifts in mentality about territory and one's statehood.²⁷

Coercion plays a great role in determining control, and other forms of it have now emerged. This has created distinct rivalries.²⁸ The EU fits under this premise; the coercive power of Article 20 TFEU has certainly unearthed tension against the coercion that created nationality. Coercion is not to be understood solely by reference to undesirable force despite the term itself having negative connotations. Rather, hegemony is more suitable for it is accepted that without this coercion, governing authorities would struggle to impart relevant ideas upon individual, and indeed, manage society at large. As history dictates, nations developed under this guise; the EU and any of its auxiliary concepts would have been considered as interruptions to this normality both politically and legally. This has revealed certain gaps, and the solution is to fill them using constitutional patriotism.

In support of Habermas' rejection of orthodoxy in nation-based concepts, Held argues that national identity was constructed to empower heads of states, legitimising the power these individuals have

²⁶ Jürgen Habermas, 'Citizenship and National Identity: Some Reflections on the Future of Europe' (1992) 12 *Praxis International* 255.

²⁷ Michel Foucault, *Discipline and punish: The birth of the prison* (Random House LLC 1977) as cited in Charles Tilly, *Coercion, capital and European states* (Blackwell Publishing 1990) 67.

²⁸ Tilly (n27) 71.

over their citizens.²⁹ Union citizenship could also have been created with this in mind but simply lacked the impetus to do so. There is a desire to improve at least perception, if not prerogative, of those leading the EU via Union citizenship's emergence.³⁰ It would directly correlate with its greater legitimacy objectives. However, there must be a balance struck between perceived excess in terms of intrusion into national autonomy and greater democratic representation through the citizenship avenues with the same goal. This was the controversy earlier regarding liberalism and communitarianism. The solution going forward, however, finds itself less concerned with this distinction because of its focus instead on universality.

Analysis has centred particularly around the parallel development of one's identity with the nation state on an orthodox (non-EU) level, which is not the situation in the EU. Miller, however, asks a very pertinent question that underpins Habermas' sentiments about nationality's dominance: 'how far is it defensible to regard as a constituent of personal identity our unchosen membership of a historic community?'³¹ Indeed, this is exactly how EU citizenship is perceived given that there is not a choice to be an EU citizen or a national of a Member State – one simply is or is not. Miller rather focuses on nationality being perceived this way. There is a clear presumption of a link between groups of people in society that may not be what is personally desirable nor as Habermas notes, necessarily inherited features. The EU must be considered a *sui generis* project in terms of Union citizenship warranting an alternate perspective that better reflects this unique position. Equally, though, it should not be criticised for lacking 'common ethnic and cultural properties'³² for these are not the only components that make up an individual's identity.

²⁹ David Held, *Democracy and the Global Order : From the Modern State to Cosmopolitan Governance* (Stanford University Press 1995).

³⁰ See Siofra O'Leary, 'Putting flesh on the bones of European Union citizenship' (1999) 24 *European Law Review* 68.

³¹ Miller, *On Nationality* (n15) 42.

³² Habermas, 'Citizenship and National Identity: Some Reflections on the Future of Europe', 258.

The supported alternative from Habermas of constitutional patriotism calls for citizens to rather attach themselves to the political society in which they belong, as opposed to their *jus soli* affiliations. In Calhoun's analysis of the suggestion, he argues it relies on "thin" identity and normative universalism.³³ The idea of thin versus thick identity finds resonance in the EU. The problems faced by Union citizenship in fostering this common identity between such a disparate community of individuals would mean that a thin identity is inevitable. Additionally, it should not be discounted for being "thin" as opposed to "thick" for the mere reason that this characteristic is an inevitable feature of the EU. The supranational framework of the EU where citizenship derives forces this. More importantly, Calhoun citing normative universalism as a fundamental characteristic of constitutional patriotism removes such tight affinity to exclusive nationality, encouraging instead a move towards the idea of foundational fundamental human rights. This is a valid way to promote legitimacy, as it asks to relate oneself to political society as opposed to territory. It is also a way to overlook "thin" identity.

By arguing that 'Common membership of such a category may be one source of solidarity, but hardly the only one'³⁴ promises that identity is not permanently tied to nationality. Union citizenship should encourage this departure. Acknowledging the universalism that underlies this, a shared human rights element becomes more realistic as a chosen affinity. This has the effect of linking cultivation of a common European identity under Union citizenship with the increasing relevance and references to the Charter as well as the rights enshrined in the ECHR. Where the two ideas had previously developed under the citizenship umbrella of their own accord,³⁵ their paths have crossed so as to allow them to reach the same objective: to improve EU legitimacy. Legitimacy requires a strong belief in the worth of a concept or idea. Therefore, to cultivate EU legitimacy through citizenship, citizens

³³ Craig Calhoun, 'Imagining Solidarity: Cosmopolitanism, Constitutional patriotism, and the Public Sphere' (2002) 14 *Public Culture* 147, 157.

³⁴ *Ibid* 156.

³⁵ There is specific mention of the increased role of fundamental human rights by Art 6 TEU, whilst identity has been less explicit.

must affiliate and believe in the idea of being European. This can be bettered through benefits such as those attained by enjoying strong, substantial rights.

Constitutional patriotism will be the theory adopted and used going forward to explain the future development of citizenship. Whilst there may not be the same direction demonstrated by the citizenship case law, the changes undergone by the Lisbon Treaty especially in the realm of fundamental rights and its political acceptance is what indicates this potential. The aim is not to trace the reality of citizenship in the context of legitimacy, but to provide a theoretical framework for citizenship to develop within for the purposes fostering greater legitimacy. By identifying a strong shared human rights element, chances for citizens to feel united as a community are increased as it provides more for them to affiliate themselves to. These foundations are those which emphasise that which is collectively shared by all, what validates using constitutional patriotism and the argument that individuals can be united through a shared political society.

The novelty of this argument is not in the use of constitutional patriotism. The literature surrounding citizenship has often engaged with the EU in recognising its *sui generis* nature and many have attempted to theorise it as non-orthodox form of citizenship. The idea of constitutional patriotism persists. Notably all suggested theories are in reference to the nation state. It has been described non-exhaustively as post-national,³⁶ neo-national,³⁷ denationalised,³⁸ cosmopolitan³⁹ and transnational.⁴⁰ Whilst it is not the place here to attempt to discount the various theories offered in order to promote constitutional patriotism, a distinction must be made. Constitutional patriotism is not a novel suggestion in the realm of understanding the uniqueness of Union citizenship but it is a logical choice

³⁶ Yasemin Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago 1994).

³⁷ Theodora Kostakopoulou, *The Future Governance of Citizenship* (Cambridge University Press 2008).

³⁸ Saskia Sassen, 'Towards Post-National Citizenship' in Engin F. Isin and Bryan S. Turner (eds), *Handbook of Citizenship Studies* (SAGE 2002).

³⁹ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press 1995).

⁴⁰ Rainer Bauböck, 'Why European Citizenship? Normative Approaches to Supranational Union' (2007) 8 *Theoretical Inquiries in Law* 453.

considering the political features of Union citizenship and the intended outcomes of having such a regime in place, namely a common identity and a legitimate democratic governing authority. The EU is missing both however, hence the analysis' addition of the fundamental rights element. The Lisbon Treaty's consensus to include Art 6 TEU and demonstrate a sound commitment towards improving standards of human rights protection throughout the EU is testament to their desire to become closer to its citizens. The strength of including fundamental human rights is that it is a universally deserved concept thereby eliminating the issues regarding exclusivity, borders and boundaries that are inherent to citizenship rendering it more difficult to square with orthodoxy. Constitutional patriotism is the strongest as a theory of citizenship to allow such fundamental human rights to be suitable in fostering solidarity.

The notion of invoking a rights element in order to substantiate citizenship finds its origins in case law. Sentiments expressed by the CJEU as to the influential (now binding) nature of the expressions of fundamental rights relevant to the EU has been interpreted as indications of their strength.⁴¹ This was corroborated especially in 2004, where despite failings of the Draft Constitution, this particular element still remained in the eventual Lisbon text.⁴² The clear indications of consensus by all the Member States as to this potentially controversial area were promising, suggesting it was not an arbitrary choice to treat it as a means towards legitimacy. It is seen as a very pertinent component having considered the primary stumbling blocks of EU citizenship. Cited as a crucial factor to encourage greater cultivation of the common European identity, it has the effect of legitimising the concept and a further knock-on effect on legitimising the EU.

The EU does not simply promise any rights. In the grander scheme of an operating supranational entity, this would be unpractical. An EU standard of human rights became necessary after the political and social development surrounding the internal market and its borderless community. When the

⁴¹ See examples cited in n22.

⁴² Article 6 TEU.

Union began to regard its constituent parts as being its citizens rather than economic goods, this seemed a logical extension. The Charter, the first EU standard of human rights, emerged as guidance initially that the Court were not bound to follow. Additionally, there were standards set by the ECHR and its European Court of Human Rights (ECtHR), but the EU were not (originally) bound by it. This was irrespective of its Member States being members. However, when the EU slowly began to shift its tone to accept that human rights standards should provide a greater influence on the decisions made by the Court,⁴³ leading now to the Lisbon Treaty,⁴⁴ the argument made in this paper became a worthy one. Therefore, by combining an element of exclusivity in citizenship to a worldly concept with such conviction as fundamental human rights, it can be tailored to the EU context and be most efficiently utilised here.

Universal human rights is the foundational premise upon which the EU can unite its citizens in the 28 Member States. This should also influence citizenship by reflecting the growing liberal impulse in the EU. However, structural practicalities render this impossible in many ways and it would appear the solution of choosing the most relevant rights for the EU was a valid compromise.⁴⁵ On the one hand, it represents a clear deference to standards of human rights, which regardless of political affiliations should underlie all governmental structures as a universal commitment to humanity. On the other it fairly balances the reality of the EU with these ideals, by identifying practically what they can reasonably guarantee. However, it has proven somewhat of a double-edged sword in respect of protecting both its institutional integrity and concurrently attempting to fulfil promises to its citizens.

⁴³ This was first seen in *ERT*, where the judgment noted in paragraphs 41-43 that ‘the Community cannot accept measures which are incompatible with observance of the human rights thus recognized and guaranteed...Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights.’ See also Armin Von Bogdandy, ‘The European Union as a human rights organization? Human rights and the core of the European Union’ (2000) 37 Common Market Law Review 1307.

⁴⁴ Article 6 TEU.

⁴⁵ This is in reference to the creation of the EU Charter of Fundamental Rights, which includes some elements of economic rights, such as in Article 16, freedom to conduct a business. It would appear this has been as a result of the EU’s economic foundations and the fundamentality of the internal market.

Critics rightly argue that the expression of fundamental human rights have been sparse and opaque in too many CJEU judgments, thus diminishing its rationality, and consequently its overall legitimacy.⁴⁶

The Charter itself includes some procedural guarantees⁴⁷ to maintain order within the EU's governing structure internally and externally. This impacts the effect that Art 6 TEU has had on shaping the rights component of citizenship. Given the evolution in the Treaties themselves, fundamental rights considerations should play a significantly larger (and indeed more independent) role in the Court's decision-making process. Rights would greatly benefit from a re-conceptualisation in the way they are perceived. In Union citizenship terms, this would mean more consistency in the case law to prove its stronger influence and clarify interpretation of general principles. It is accepted that the solution here is simpler than it seems because guaranteeing certain rights will always be complicated, conditional and somewhat unclear regardless of their context. However, to apply a framework for future development is the most appropriate solution.

IV. Conclusion

It is well understood that the question of the EU's failures in legitimacy amongst its constituent citizens are not dilemmas to be resolved easily, or quickly. This paper does not purport to provide a foolproof solution to the legitimacy crisis. Rather it argues that there has been a consideration overlooked which has strong potential for convincing reasons. These concern self-determinative political legitimation, which a democratic authority possesses but the *sui generis* EU lacks. The pre-existing concept of Union citizenship is cited as a suitable medium to address these disparities.

⁴⁶ Cian C Murphy, 'Using the EU Charter of Fundamental Rights Against Private Parties after Association De Médiation Sociale' (*European Human Rights Law Review*, 2014 forthcoming) <Available at SSRN: <http://ssrn.com/abstract=2400491>> accessed 27 February 2014.

⁴⁷ Charter of Fundamental Rights, Art 51. Recently, C-399/11 *Melloni* judg of 26 Feb 2013, nyr and C-617/10 *Fransson* judg of 26 Feb 2013, nyr have ruled on the safeguarding of interests in regards to standards set by Art 6 TEU and the application of the Charter. Read together, they seem to insinuate the Charter's primacy over national law and bring the influence of fundamental rights even further forward in the Court's decision-making process.

Particularly, there have been elements of Union citizenship, which if capitalised upon, could fill lacunae left by the EU's supranational nature in terms of democratic legitimacy as well as in the substantiating of justice provided by the governing body. These are noted as the Court's increasing engagement with fundamental human rights.

The introduction of Union citizenship has suffered troubles in its own development, which are concurrently separate from the EU's own legitimacy issues as well as being directly linked to it. Union citizenship lacked validity and legitimacy as a direct result of the governing authority it was created under, which did not provide a sufficient democratic or representative framework where its endeavours could be seen in this positive light. However, the objective of this paper has not been to preoccupy oneself with these specific problems, but rather to view citizenship for the characteristics it embodies which are promising towards overcoming the democratic deficit (which lead to the legitimacy crisis) and to view it as the medium for encouraging a working concept of constitutional patriotism.

The EU, and subsequently most of its projects, is always slightly unorthodox because it is neither national nor international – it is supranational. Embracing this idea is to embrace the *sui generis* nature of all the understandings of any political task the Union is faced with. This is especially in regards to Union citizenship. It should be clear that Union citizenship is not a concept that can be understood in orthodox citizenship terms, hence the proliferation of variations on its relevant citizenship theories. It has been argued here that constitutional patriotism finds most poignancy in this regard and that the affiliation of one's identity to the political society they belong to can be best developed with a human rights discourse and rationale.

Because of the political universality of fundamental human rights, it has been identified as the cornerstone of the solution to the EU's legitimacy problems in the context of Union citizenship. Juxtaposed against citizenship's exclusivity, it is the most appropriate counterbalancing factor to foster legitimacy. Whilst by their nature the rights under citizenship and human rights are seemingly opposed, it has been argued that instead of focusing on these differences it is more fruitful to instead emphasise the collective interests of citizens of the Union as a whole. By considering citizenship as the effector of fundamental human rights in the Union alongside human rights having a more legitimising status, the potential for constitutional patriotism to become the norm is realised.

This paper had two objectives, firstly to situate Union citizenship in a valid context in terms of its ability to ameliorate legitimacy of the Union, and secondly to explain exactly how this can be done, using the human rights discourse to confirm that it is a distinct possibility. This is because of the modern notions of a non-orthodox democratic political society, which have now moved away from the restrictive territorial boundaries to demarcate its authority. Uncovering this novelty will lead to greater common European identity as it aims to move itself closer to its citizens, thereby substantiating the concept of Union citizenship to result in a more legitimate European Union overall. The situation in reality has been demonstrative of less optimism though, it will remain the Court's responsibility and prerogative to effectuate the claims made here.

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Bibliography

Books

- Dahl R, *Democracy and its Critics* (Yale University Press 1989)
- Foucault M, *Discipline and punish: The birth of the prison* (Random House LLC 1977)
- Fraser N, *Scales of Justice: Re-imagining Political Space in a Globalizing World* (Columbia University Press 2009)
- Gramsci A, *Selections from the prison notebooks* (Smith QHaGN tr, Lawrence and Wishart 1971)
- Habermas J, *Between Facts and Norms* (MIT Press 1996)
- , *The Postnational Constellation : Political Essays* (MIT Press 2001)
- Held D, *Democracy and the Global Order : From the Modern State to Cosmopolitan Governance* (Stanford University Press 1995)
- Kostakopoulou T, *The Future Governance of Citizenship* (Cambridge University Press 2008)
- Kymlicka W, *Multicultural Citizenship : A Liberal Theory of Minority Rights* (Clarendon Press 1995)
- Miller D, *On Nationality* (Clarendon Press 1995)
- , *Citizenship and National Identity* (Polity Press 2000)
- Soysal Y, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (University of Chicago 1994)
- Tilly C, *Coercion, capital and European states* (Blackwell Publishing 1990)

Case law

- ERT* C-260/89 [1991] I-02925
- Martinez Sala* C-85/96 [1998] ECR I-2691
- Garcia Avello* C-148/02 [2003] ECR I-11613
- Zhu and Chen* C-200/02 [2004] ECR I-9925
- Trojani* C-456/02 [2004] I-07573
- Bidar* C-209/03 [2005] ECR I-2119
- De Cuyper* C-406/04 [2006] ECR I-6947
- Förster* C-158/07 [2008] I-08507
- Zambrano* C-34/09 [2011] ECR I-1177
- McCarthy* C-434/09 [2011] I-03375
- Fransson* C-617/10 judg of 26 Feb 2013, nyr
- Dereci* C-256/11 [2011] I-11315
- Melloni* C-399/11 judg of 26 Feb 2013, nyr

Contributions to edited books

Douglas-Scott S, 'The Problem of Justice in the EU: Values, Pluralism, and Critical Legal Justice' in Dickson J and Eleftheriadis P (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012)

Sassen S, 'Towards Post-National Citizenship' in Isin EF and Turner BS (eds), *Handbook of Citizenship Studies* (SAGE 2002)

Tiilikainen T, 'The Problem of Democracy in the European Union' in Antola E and Rosas A (eds), *A Citizen's Europe: In Search of a New Order* (Sage 1995)

Journal articles

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

Boyce B, 'The Democratic Deficit of the European Community' (1993) 46 *Parliamentary Affairs* 458

Calhoun C, 'Imagining Solidarity: Cosmopolitanism, Constitutional patriotism, and the Public Sphere' (2002) 14 *Public Culture* 147

Dougan M, 'The Constitutional Dimension to the Case Law on Union Citizenship' (2006) 5 *Inter Alia* 77

Fabbrini F and Granat K, "'YELLOW CARD, BUT NO FOUL": THE ROLE OF THE NATIONAL PARLIAMENTS UNDER THE SUBSIDIARITY PROTOCOL AND THE COMMISSION PROPOSAL FOR AN EU REGULATION ON THE RIGHT TO STRIKE' (2013) 50 *Common Market Law Review* 115

Fraser N, 'Abnormal justice' (2008) 34 *Critical Inquiry* 393

—, 'Who counts? Dilemmas of justice in a postwestphalian world' (2010) 41 *Antipode* 281

Habermas J, 'Citizenship and National Identity: Some Reflections on the Future of Europe' (1992) 12 *Praxis International* 255

Horeth M, 'No way out for the beast? The unsolved legitimacy problem of European governance' (1999) 6 *Journal of European Public Policy* 249

Moravcsik A, 'Reassessing legitimacy in the European Union' (2002) 40 *JCMS* 603

Murphy CC, 'Using the EU Charter of Fundamental Rights Against Private Parties after Association De Médiation Sociale' (*European Human Rights Law Review*, 2014 forthcoming) <Available at SSRN: <http://ssrn.com/abstract=2400491>> accessed 27 February 2014

O'Leary S, 'Putting flesh on the bones of European Union citizenship' (1999) 24 *European Law Review* 68

Occhipinti JD, 'Whither the withering democratic deficit? The impact of the Lisbon Treaty on the Area of Freedom, Security and Justice' [2013] *Cambridge Review of International Affairs* 1

Shaw J, 'The interpretation of European Union citizenship' (1998) 61 *Modern Law Review* 293

Von Bogdandy A, 'The European Union as a human rights organization? Human rights and the core of the European Union' (2000) 37 Common Market Law Review 1307

Legislation

Charter of Fundamental Rights of the European Union 83/02 [2010] OJ C-83/389

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended)

Treaty of Maastricht on the European Union [1992] OJ C191/01

Consolidated Version of the Treaty on European Union [2008] OJ C115/13

Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47

Other

Schuman R, *Schuman Declaration* (9 May 1950)