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The EU citizenship and the US: a comparative perspective

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Ai miei genitori,
per avermi fatto capire
cosa vuol dire essere grata.

«Tieni un capo del filo,
con l'altro capo in mano
io correrò nel mondo.
E se dovessi perdermi
tu, mammina mia, tira».

(Margaret Mazzantini, *Venuto al Mondo*)

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INTRODUCTION

The notion of citizenship circumscribes the belonging of a person to a state and, moreover, the citizen is entitled to a series of rights and duties that derive from this status.

The roots of the concept of citizenship dates back to the classical times, in particular, it was born with the Greek *polis* and the Roman *civitas*[1]. Nevertheless, this notion eclipsed throughout the Middle Ages, but it was revived during the French Revolution, where the modern concept of citizenship was born. In facts, the term "*citoyen"* was introduced for the first time[2], replacing the idea of subjection[3].

In the European Union (EU) legal framework, citizenship was introduced in 1992 with the Treaty of Maastricht and it is now provided under Article 20 of the Treaty on the Functioning of the European Union (TFEU)[4], which grants Union citizenship to all Member States nationals. Moreover, the rights of citizens are now contained in Articles 21 TFEU[5] *et seq.* and some of their political rights are also regulated under the Charter of Fundamental Rights of the European Union (CFR). In the present legislative framework, the role of secondary law is of remarkable importance for the protection of citizens' rights. In this respect, the Directive 2004/38/EC[6], also called the Citizenship Directive, is the most significant piece of legislation, disciplining some valuable rights, such as the right of residence.

[1] In the Hellenic period, children born by free and citizen parents automatically acquired citizenship and they were enabled to exercise political rights. In Roman times, the term *civilitas* indicated the belonging of an individual to a *civitas.* Children became Roman citizens if their parents were citizens, by adoption or by collective will. For further information, see G. ERREDE, "Il mito dell'appartenenza. *Politeia* greca e *Civitas* Romana a confronto", *Materialismo Storico*, Volume 6, No 1, 2019, pp. 165-217

[2] See Article 3, Déclaration de Droits de l'Homme et du Citoyen, 26 August 1789

[3] On this point, see TRECCANI ENCICLOPEDIA ON LINE, "Cittadinanza", available at https://www.treccani.it/enciclopedia/cittadinanza/, accessed on 23th September 2020

[4] See Article 20 Treaty on the Functioning of the European Union (TFEU)

[5] See Article 21 Treaty on the Functioning of the European Union (TFEU)

[6] See *Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC,* 29 April 2004, *in Official Journal of the European Union,* L 158, 30 April 2004

The jurisprudence of the Court of Justice of the European Union (CJEU) gave concrete expression to the notion of EU citizenship and to some of its correlated principles. In particular, the Court has ruled on several issues, such as the relationship between EU citizenship and Member State nationality and the enjoyment of rights by mobile and static citizens.

Despite the wideness of the EU regulatory outline, citizenship and its derived rights may be impaired or not fully exercised by their beneficiaries for various reasons. In a legal perspective, they can be undermined by the quasi-federal character of EU citizenship, as the regulation of some important aspects of these rights is put back on the hands of national legislators. Moreover, democratic Union citizenship and the EU apparatus as a whole can also be challenged in time of crises, as it is occurring right now in the European space.

US citizenship was mentioned for the first time in 1789, precisely in Article 1 of the US Constitution[7], which exhorted the Congress to establish a uniform rule on naturalization. This rule was set by the 1790 Naturalization Act[8], according to which, all free whites were American citizens. The basic rule on citizenship, which is still valid today, was then prescribed under the Citizenship Clause of the Fourteenth Amendment[9], stating that all the persons born or naturalized in the US were American citizens. The acquis of rights and duties of US citizens presents a more fragmented legislative scenario than the EU one. However, the majority of them are enshrined in US Congress official acts and reassured by the US Supreme Court's case-law.

The challenges of American citizenship are slightly different than the ones present in the EU legal background, considering their dissimilar evolutions and diverse external factors, that shape citizenship. Since US citizenship is fully federal, the enjoyment of citizenship rights is prevalently a competence of states, so, sometimes the protection of such rights is not guaranteed in an equal and uniform way in the US territory. Furthermore, immigration policies and citizenship reforms can

[7] See Article 1, US Constitution, 17 September 1787
[8] See Naturalization Act of 1790, 26 March 1790
[9] See Fourteenth Amendment to the Constitution, 9 July 1868

drastically change from one administration to another. In facts, the repercussions of this governmental influence can be deadly for citizenship and its rights, because, in the worst cases, they can lead to a derating of the concept of citizenship, fueled by discriminatory intents and racial hatred.

The present dissertation, which consists of four chapters, aims at developing an analysis of the complex notion of citizenship in all its facets. In particular, I will compare EU citizenship with the US one, stressing on their legislative frameworks and their judicial developments. The study is centered on their different evolutions and their analogies in order to discover to what extent Union citizenship can be considered federal, taking American citizenship as a yardstick. Although the comparative component of the study is high, the legal issues will be critically examined through the lenses and tools of EU law, enhancing strengths and weaknesses of Union citizenship.

The intent of the first chapter is to explain what citizenship means in EU law. For this reason, the discussion concentrates on the analysis of the relevant legislation, which comprehends both EU primary and secondary law and the CJEU's case-law.

In order to understand the current meaning of citizenship in the two legal systems in point, a brief excursus on their two evolutions will be made. In relation to the EU legal scenario, particular attention will be given to the situation prior to the Maastricht Treaty. This specific historical time was characterized by the presence of an incipient form of citizenship, or rather *"market citizenship",* strictly connected to the economic dimension of the three European Communities[10]. Moreover, the political process, which led to Maastricht, will be examined with the purpose of understanding the roots of EU citizenship. I will refer to the evolution of Union citizenship in legal terms, stressing on the modification of such notion under the letter of the Treaties and in light of the CJEU's judgements, which establish its derivative character. Regarding the evolution of US citizenship, the focus will regard the comparison between pre and post-colonial times with a small

[10] The three European Communities were: the European Coal and Steel (ECSC), the European Atomic Energic Community (EAEC) and the European Economic Community (EEC).

digression on the contested status of the then most vulnerable ones, such as Indians, slaves, blacks and Puerto Ricans. It is surprising how these discriminations still persist today.

After the discussion on the evolution of the two citizenships and the explanation of their meaning nowadays, my research will focus on the citizens' acquis of rights, stressing on its legislative and judicial developments. In the EU, the role of the CJEU was fundamental, because it dealt with such rights, with their enjoyment, establishing cornerstone principles. In particular, the Court analyzed whether static citizens were entitled to trigger EU law provisions on citizenship and on its acquired rights. Furthermore, some remarks on the rights granted to US citizens will be made, since the juridical assessment of citizenship rights is a fundamental component of the present work.

The second chapter will refer to the notion of citizenship in a more detailed manner. I will also adopt a stronger comparative approach because the ultimate purpose of the discussion is to discover in what aspects EU citizenship can be considered federal. What a better way to answer these questions than by comparing this citizenship with the federal one for antonomasia, i.e. American citizenship?

In order to understand what are the federal implications of EU citizenship, I will firstly introduce the general outlining of federal citizenship, referring, in particular, to the US dual citizenship, where citizens are both US and state citizens, likewise in the EU: citizens are EU and Member State citizens. Then, the controversial interrogative of what is the European Union will be addressed. I will attempt to respond to this very difficult question by critically reporting the scholars' theories on the matter, stressing on the fact that the *sui generis* character of the Union reflects the uncertainties of the notion of citizenship itself. The difficulty in defining EU citizenship goes hand in hand with the problems of building a supranational identity, for this reason, the American national identity will serve as a counterbalance, because it is well rooted and present since the very beginning of US history.

After having exposed the general picture, my research will concern on the impact of the quasi-federalism of the EU on the enjoyment of certain citizens' rights. In

particular, the analysis will focus on the freedom of movement, political rights and the right to health care in light of the recent outbreak of the pandemic. Herein, the comparison with the American legal system is necessary because it represents the most evident manifestation of how federalism can either accentuate or hinder the enjoyment of such rights.

Citizenship also intersects with immigration and this will be the focus of the third chapter. In particular, citizenship not only crosses the path of immigration, but it is part of immigration, since the majority of immigrants aims at naturalization, which is easier to obtain in the US than in Europe, this is one of the reasons why the American Dream is a recurring and popular expression nowadays.

The clarification of this connection will be realized in the following way. Firstly, I will refer to the legislative framework on the matter, stressing on the different treatment between EU citizens and third-country nationals in the field of labor mobility. In this respect, meanwhile EU citizens are free to move and work in another Member State, as stated in the Treaties, more stringent requirement are provided for third-country nationals willing to work in the EU, whose rights are mainly regulated under EU secondary law. Moreover, immigration policies in EU legal order are specifically addressed to individuals from third countries, not to Union citizens.

More precisely, I will deeply analyze the patterns of high-skilled migration flows within the EU and US territory through a social insight. The reason of this digression lies in the fact that the role of citizenship can result crucial in these fields. In facts, immigrants can be declassified in the host state's workplaces, only because they are citizens of another state. In other words, high-qualified immigrants have low-skilled jobs in the state of residence.

Back to the legal analysis, the right to family reunification will be taken into consideration, because it is strictly connected to the right of residence. Secondary EU law provides for the right to family reunification, moreover, it is unquestionable that the CJEU's jurisprudence has shaped the exercise of this right, focusing, in particular, on its relationship with freedom of movement. Concerning family reunification in the US, after a brief overview of the different laws on the matter, I

will concentrate on the impact of *Trump* administration on its enjoyment. Furthermore, *Trump* immigration policy will be the object of another point, which is the use of citizenship as a discriminatory means, obstructing the realization of the American Dream, which is profoundly different in comparison to the European Dream, that corresponds to the Union itself.

Finally, in the last chapter, the current challenges of citizenship in the two legal orders will be examined. In relation to the EU scenario, the notion of citizenship may transform along with the evolution of society. For this reason, it is worth to mention the subsequent changes of such concept after the spread of Eurosceptic tendencies and Brexit. Since US citizenship is not facing any crises, similar to the aforementioned European ones, I decided to critically analyze the meaning of racial citizenship, comparing the historical perspective to the situation today.

CHAPTER I

A COMPARATIVE OVERVIEW OF THE CITIZEN STATUS IN THE EU AND IN THE US

SUMMARY:1. Preliminary remarks - 2. The evolution of EU citizenship in the pre-Maastricht scenario - 2.1 Road to Maastricht: the stages of the political process - 3. The derivative nature of Union citizenship and Article 20 TFEU - 3.1 The evolution of citizenship according to CJEU's case law - 4. Rights linked to EU citizen status - 4.1 The prohibition of discrimination on grounds of nationality - 4.2 Freedom of movement, labor mobility and right of residence - 4.3 Political rights and the *Delvigne* case - 5. The fundamental thesis of US citizenship - 6. Brief history of US citizenship - 6.1 The colonial period and the Declaration of Independence - 6.2 Native Americans, slaves and free blacks - 7. The Fourteenth Amendment Citizenship Clause - 7.1 The status of Puerto Ricans - 8. Rights of US citizens - 8.1 Freedom of movement and right to work - 8.2 Political rights - 8.3 Duties and benefits - 9. First appraisal

1. Preliminary remarks

In the present dissertation, I will analyze the foundation of citizenship in two legal orders: the EU and the US, stressing on their analogies, differences and common evolutions. In particular, my study will focus on the EU's *sui generis* character, which is clearly reflected in the nature of its citizenship, in reference to the US, as the federal system par excellence. In this regard, the theories on the federal character of the Union have been numerous, but the EU remains a conceptual dilemma, even if its supranational character is evident. It is undeniable that the EU citizenship presents some federal characteristics, suffice it to say that it is dual, as it comprehends both the nationality of a Member State and the European citizenship, resembling the state and federal citizenship, regulated under the US legal order. My objective is to discover how the federalist features of the European citizenship contribute to enhance its supranational dimension and what are the impacts of federalism on the notion of citizenship, especially in the field of citizens' rights. For this purpose, I will adopt the perspective of the EU law scholar. Moreover, such analysis was also made through a study and research experience at a law firm in Washington DC[11].

[11] The main area of expertise of the law firm is immigration. For further information on the law firm, see https://oliverzhanglaw.com/, accessed on 4th September 2020

The aim of this chapter is to analyze the communalities and discrepancies of citizenships in the legal orders in point. In order to do so, I will begin with an historical overview that led the reach of both citizenships, focusing on the political background before the Treaty of Maastricht (1992) for the European case, meanwhile, I will concentrate on the colonial period and the road to independence and its further developments in terms of citizenship in the Northern American scenario.

In relation to Union citizenship, another evolution will be analyzed, which corresponds to the legislative and jurisprudential processes that shaped citizenship, stressing on its derivative nature. In particular, the evolution of Union citizenship certainly differed from the US one, because it involved EU Member States and their sovereignty. Member States were reluctant to give up portion of their sovereignty to the Union and, as a consequence, this mistrust toward Union reflected some fears, because States were afraid that EU citizenship would have replaced the national one. Moreover, whereas EU citizenship is universal, because all Member States nationals are citizens of the Union, the same could not be stated in the early US history, where minorities, such as blacks, slaves, Indians and Puerto Ricans were not American citizens. Those differences will also be taken into consideration and compared afterwards.

Finally, the main part of this chapter concerns citizens' rights because they are the most evident component of their status and represent how citizenship can manifest itself in everyday life. In particular, my critical overview will concentrate on the freedom of movement and political rights, in the sense of participatory democracy. The analysis will comprehend legislative elements and principles extrapolated from case-law. Freedom of movement, in terms of workers' mobility and right to reside is well developed in the EU and the US as well. Nevertheless, the legal framework of participatory democracy instruments is more complete in the EU scenario than in the US. In facts, the Union wants to enhance cooperation between its institutions and citizens, by allowing a direct form of dialogue between the two.

2. The evolution of EU citizenship in the pre-Maastricht scenario

The establishment of Union citizenship represents a turning point in the history of EU. The analysis of the historical scenario, which led to the genesis of a common

citizenship for all the Member States, is fundamental to understand its impact on the EU and on our everyday lives.

In 1992, the Treaty of Maastricht formally introduced the Union citizenship. The meaningfulness of this choice lied in the fact that it could grant autonomous rights to citizens. So, the Treaty of Maastricht was considered a focal point in the European integration process because it overcame the idea of the Union as a merely economic organization. In particular, the Treaty of Maastricht not only introduced the European Union, putting together the three European Communities[12], but also superseded their economic-centered dimension, establishing a stronger idea of cooperation between States in different fields, such as foreign policy, security and internal justice[13].

However, an incipient form of European citizenship could be found before 1992. In facts, in the 1970s, the ideology of European integration based on citizenship, the so-called "*Le citoyen à la une de l'Europe"*[14], was discussed for the first time.

In the pre-Maastricht scenario, the Treaty establishing the European Economic Community (EEC Treaty) already provided for the free movement of persons, which is also the most important right connected to the modern concept of Union citizenship**.** In particular, the EEC Treaty guaranteed the freedom of movement of workers (Articles 48[15] *et seq.*) and the freedom of establishment (Articles 52[16] *et*

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[12] See *Supra* Note no 10

[13] On this point, see F. WEISS, C. KAPUA, *European Union: Internal Market Law,* Cambridge University Press, Cambridge, 2014, p. 93 and A. TIZZANO, "Cronache Comunitarie: Appunti sul Trattato di Maastricht: Struttura e Natura Dell'Unione Europea", *Il Foro Italiano,* Volume 118, No 6, 1995, pp. 210-211

[14] Cfr. A. LHOEST, "Le citoyen à la une de l'Europe", *Revue du Marchè Commun Et de L'Union Européenne,* 1975, p. 431

[15] See Article 48 EEC Treaty, then Article 39 TEU (Maastricht version). This provision after the Lisbon Treaty is now contained in Article 45 of the Treaty of the Functioning of the European Union (TFEU): *"1. Freedom of movement for workers shall be secured within the Community. 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. 3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:(a) to accept offers of employment actually made; (b) to move freely within the territory of Member States for this purpose; (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action; (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission 4. The provisions of this article shall not apply to employment in the public service."*

[16] See Article 52 EEC Treaty, then Article 43 TEU (Maastricht Version). This provision after the Lisbon Treaty is now contained in Article 49 of the Treaty of Functioning of the European Union

seq.), which were classified as *"fundamental freedoms*[17]*".* In this context, the Court of Justice of the European Communities (CJEC) paved way to the creation of a *de facto* European citizenship, identifying the principal features of the Community legal order. In facts, in *Van Gend en Loos,* the Court held: *«Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect*[18]*».* In this sense, the Court's judgement was considered a milestone in EU law history, because citizens of a Member State could invoke their rights deriving from the Community Treaties against national courts. Moreover, as a consequence of the direct applicability of market freedoms, the "*market citizen*"[19] was born. Although the *"market citizenship"* contributed in a remarkable way to the creation of Union citizenship, rights and freedoms recognized to the citizens remained linked to the economic sphere. However, after 1963, the pure economic dimension of this incipient form of citizenship gradually started to vanish. In this sense, *Lionello Levi-Sandri*, the Commission's Vice-President in 1968, stated: *«the free movement of economically active persons represents something more important and more exacting than the free movement of a factor of production. It represents rather an incipient form- still embryonic and imperfect- of European citizenship*[20]*».* A little step forward in superseding the *"market citizenship"* occurred with the enactment of Regulation 1612/1968[21], which promoted the respect of certain kinds of rights, such as fiscal advantages and

(TFEU)*: "Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital."*

[17] See F. WOLLENSCHLÄGER, "A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration", *European Law Journal*, Volume 17, Issue 1, 2011, p. 4

[18] Cfr. CJEC, case C-26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*,5 February 1963, ECLI:EU:C:1963:1, part II, point B

[19] See F. WOLLENSCHLÄGER, *op. cit.*, p. 4

[20] *Ibid.*, p. 32, quoting L. Levi-Sandri speech in *EC-Bulletin 11/1968*

[21] See *Regulation No 1612/68 on freedom of movement for workers within the Community*, 15 October 1968, *in Official Journal of the European Union*, L 257, 19 October 1968, now replaced by *Regulation No 492/2011 on freedom of movement for workers within the Union,* 5 April 2011, *in Official Journal of the European Union,* L 141, 27 May 2011

access to education, not only to mobile workers, but also to their families[22]. Furthermore, the introduction of freedom of movement of students in the 1980s paved way to the achievement of Union citizenship in 1992.

Considering the previous assertations, to what extent can we talk about a Community citizenship before Maastricht? The incipient form of citizenship could be regarded as a common *de jure* citizenship only for some practical characteristics. In facts, it could not be considered a formal citizenship since it was not expressly provided by the law. Although, some scholars could not even think about a Community citizenship, because, in their opinion, it could only be limited to a Country's territory[23].

The emergence of citizenship could be denoted by other historical events. Firstly, there was an important discussion regarding the attribution of new and further rights to the Community citizens[24]. Secondly, the first election of the European Parliament by direct suffrage in 1979 contributed to shape the political side of Community citizenship[25]. Moreover, although its intergovernmental dimension, the 1985 Schengen Accord contributed to the evolution of European citizenship, because it drastically favored the freedom of movement. In facts, the signatory States committed to abolish all customs duties and controls and agreed to create a common custom policy between Member States and third countries by the end of 1990. In Fontainebleau, in 1986, the *Adonnino Committee* was established. It was a special Committee for the so-called *"Europe of Citizens"*[26], but its report was not included in the 1986 Single European Act[27]. The report enlisted both short-term and long-

[22] On this point, see F. WEISS, C. KAUPA, *op. cit.*, p. 93

[23] On this point, see J.B. BIERBACH, *Frontiers of Equality in the Development of EU and US Citizenship*, T. M. C. Asser Press, The Hague, 2017, p. 261

[24] The issue was also analyzed by Mario Scelba in the *"Granting special rights on the citizenship of the community"* report, which was discussed in front of the Parliament in 1977. See P. MINDUS, *European Citizenship after Brexit: Freedom of Movement and Rights of Residence*, Palgrave Macmillan, London, 2017, p. 9

[25] For further information, see J. SHAW, *The Transformation of Citizenship in the European Union: Electoral Rights and the Restructuring of Political Space*, Cambridge University Press, 2007, pp. 101-108

[26] Van Middelaar distinguished: "The Europe of States", which was the "Europe of the princes", the "Europe of Offices", the one of the civil servants and the "Europe of Citizens" in contrast with the "Europe of States", which was only a "Europe of lawyers" and did not directly reflect the idea of citizenship. See J. B. BIERBACH, *op. cit.*, p. 215

[27] On this point, see C. MORVIDUCCI, *I diritti dei cittadini europei*, G. Giappichelli Editore, Torino, 2017, p. 6

term objectives in the interest of citizens, such as granting them special rights and the promotion of initiatives in the field of health and education[28].

Regarding the features of the pre-Maastricht quasi-citizenship, some commentators individuated three elements that were needed to achieve a form of supranational citizenship. It was important to identify who was the European citizen, what were his rights, and which was the material scope. These questions must be answered in accordance with the laws of the time. In particular, the supranational citizenship was guaranteed according to the national laws, the rights were protected in transnational situations and the material scope could be determined on a case by case basis[29].

However, the issue concerning the personal scope was more complex because it was not expressly mentioned in the EEC Treaty. To this extent, the personal scope could be determined in three different ways, one of them is still used nowadays. The first solution consisted in the determination of the scope *rationae personae* made by all Member States. Following the second approach, the CJEC was capable of defining the personal scope in a limited number of situations, such as in case of the denial of guaranteeing the rights enshrined in Community provisions as a result of compulsory acquisition of a Member State's nationality. For example, the Court intervened in the *Airola* case. The CJEC declared that the compulsory acquisition of second nationality in accordance with national laws could not be used as a means to create gender discriminations in any workplace[30]. The third and last method, which is the only one applicable nowadays, regarded the decision of the citizenship personal scope made by States individually. In particular, concerning the aforementioned "*market citizenship*", it was crucial to define who was the worker in order to guarantee the exercise of the free movement rights[31]. In this sense, Advocate General *Lagrange* in *Hoekstra* declared that the notion of worker must

[28] See EUROPEAN COMMUNITIES COMMISSION, *Report from the ad-hoc Committee on a People's, in Bulletin of the European Communities, Supplement 7/85*, 1985

[29] On this point, see D. KOCHENOV, R. PLENDER, "EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text", *European Law Review*, Volume 37, 2012, pp. 378-379

[30] See CJEC, Case C-21/74, *Jeanne Airola v Commission of the European Communities*, 20 February 1975, ECLI:EU:C:1975:24, par. 10

[31] On this point, see D. KOCHENOV, "Ius Tractum of Many Faces: European Citizenship and Relationship between Status and Rights", *Columbia Journal of European Law*, Volume 15, 2009, pp. 186-190

be determined by Member States, stating that: *« National systems of legislation, as we have seen, subsist and it is quite simply to these systems that we must refer to know which are the persons "assimilated" to a wage-earner in respect of social security: members of the professions, craftsmen, etc*[32]*»*.

2.1 Road to Maastricht: the stages of the political process

Beyond the political stages analyzed above, there were other important institutional and political elements that led to the Treaty of Maastricht. In contrast to the idea of an economic-oriented Europe, the concept of a political citizenship started to take hold in the 1974 summit in Paris, in this sense, a common citizenship was considered necessary in order to create a European identity. During this event, various proposals were advanced, such as granting political rights, no border controls and a common immigration policy. To this extent, it is worth to mention the *Tindesman* Report to the European Council[33], where the idea of a *"Europe of Citizens"* was included in an official act for the first time, before the *Adonnino Committee* in 1986[34]. After the presentation of the report, the Commission analyzed the issue of special rights. The attribution of special rights was problematic, because it created an unequal treatment between residents of the same Member State since an individual could benefit from the rights of both the home and the host State, eluding the principle of naturalization, according to which, the naturalized individual lost the nationality of its country of origin[35].

The year 1990 marked a turning point in the path to the establishment of Union citizenship, because the economic repercussions of the pre-Maastricht citizenship definitely disappeared. In this sense, Directive 93/96/EEC[36] regarding the students'

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[32] Cfr. Opinion of Mr. Advocate General Lagrange delivered on 10 December 1963, *Mrs M.K.H. Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten (Administration of the Industrial Board for Retail Trades and Businesses)*, 10 December 1963, p. 192

[33] See EUROPEAN COMMUNITIES COMMISSION, *Report of Mr Leo Tindesman, Prime Minister of Belgium, to the European Council, in Bulletin of the European Communities, Supplement 1/76*, 29 December 1975

[34] See J. B. BIERBACH, *op. cit.*, pp. 303-304

[35] See *Supra* Note no 24

[36] See *Directive 93/96/EEC on the right of residence for students*, 29 October 1993, *in Official Journal of the European Union, L 317, 18 December 1993*

residence right, Directive 90/365/EEC[37] about the right of residence of employees and self-employed people who have ceased their occupational activity and Directive 90/364/EEC[38] on the right of residence were of fundamental importance. Those acts, especially the last two, caused a shift in freedom of movement and residence rights, because an individual could freely move from a Member State to another for any reasons, not only for economic activities or purposes. Furthermore, whosoever wanted to exercise his right to freely move and reside, needed to have sufficient economic resources and a health insurance[39].

The final call for a Community citizenship before Maastricht occurred in 1990, during the European Council meeting in Dublin. To this extent, Spain made a significative contribution to its achievement, enhancing the need of a citizenship status, which attributed political rights, not only economic benefits. In facts, Spain could have obtained a considerable advantage through a common citizenship due to the great number of Spanish immigrants all over Europe[40].

Besides Denmark and the United Kingdom were against EU citizenship, it was finally established on 7 February 1992 with the signature of the Treaty of Maastricht, which took effects on 1 November 1993. Denmark disagreed with the idea of a common citizenship because it was afraid of losing its national citizenship as a consequence of the direct applicability of European law provisions. Furthermore, Danish people also voted against it in a referendum. In the end, two reasons persuaded Danish government to ratify the Treaty: the derivative nature of European citizenship[41] and the obtaining of the European Ombudsman[42]. Meanwhile, the United Kingdom decided to agree with Union citizenship and to not adopt the common currency[43].

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[37] See *Directive 90/365/EEC on the right of residence for employees and self-employed persons who have ceased their occupational activity*, 28 June 1990, *in Official Journal of the European Union*, L 180, 13 July 1990

[38] See *Directive 90/364/EEC on the right of residence*, 28 June 1990, *in Official Journal of the European Union*, L 180, 13 July 1990

[39] See C. MORVIDUCCI, op. cit., pp. 6-7

[40] See J. B. BIERBACH, *op. cit.*, pp. 318-321

[41] See *Infra* paragraph 1.3

[42] See *Infra* paragraph 1.4.3

[43] See J. B. BIERBACH, *op. cit.*, pp. 316-317

As discussed above, after a long and tortuous road, the European citizenship was introduced by Article 8 TEU, stating: *«1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. 2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby*[44]*».*

The previous overview demonstrated that European citizenship was not an easy task. The process was long and characterized by small, but important steps. In particular, the literature was divided. On the one hand, some scholars believed in the existence of a will to establish a common citizenship, untied from the economic sphere. On the other hand, other academics thought that an incipient form of citizenship existed before Maastricht, which was linked to the economic freedoms. The political process that led to Maastricht was intricate as well, but it was fundamental to achieve the Maastricht's new idea of cooperation and what we can now call European citizenship. Some States, even after Maastricht, were still skeptical about the Union citizenship, but its derivative nature convinced them.

3. The derivative nature of Union citizenship and Article 20 TFEU

As briefly introduced in the previous paragraph, Article 8 TEU[45] underlined the derivative nature of European citizenship, because an individual who is a citizen of a Member State, is a European citizen. In this sense, the nationality of a Member State is the only necessary precondition to Union citizenship. Member States are entitled to regulate on the acquisition and loss of nationality and anyone, who loses nationality of a Member State, cannot retain European citizenship. Other elements, such as the actual and habitual residence of the individual, are not relevant, unless national rules provide otherwise. The fragmented and diverse legislation on nationality among Member States caused conflicts and created disparities, which can still be found in today's society[46], in facts, the need of harmonization emerged.

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[44] Cfr. Article 8 TEU (Maastricht version). This provision, after the Treaty of Lisbon is now contained in Article 20 Treaty on the Functioning of the European Union (TFEU)

[45] See *Ibid.*

[46] For example, the Italian law on citizenship *(Legge N. 91/1992)* strengthened the principle of ius sanguinis. This created a different treatment between Italians abroad and foreigners who wanted to become Italian citizens. See on this point, A. BARAGGIA, "La cittadinanza 'composita' in alcune esperienze europee. Spunti di riflessione per il caso italiano", *Federalismi.it,* Volume 18, 2017, pp. 20-25. See also, INTERNAZIONALE, "Ius soli, ius sanguinis, ius culturae: tutto sulla riforma della cittadinanza", 2017, available at https://www.internazionale.it/notizie/annalisa-camilli/2017/10/20/riforma-cittadinanza-da-sapere, accessed on 17th July 2020 and

Despite the European Convention on Nationality[47], signed in 1997 by the Council of Europe, regulates the matter, there are still some disparities among States, because it was not ratified by all of them[48]. Nevertheless, some academics are still nowadays against a project of harmonization on the matter, as this would undermine the spirit of European citizenship: pluralism[49]. However, regardless of the lack of harmonization, the CJEU, after several and diverse judgements, has now affirmed that domestic rules on nationality must not be in contrast with EU law[50]. In this regard, Advocate General *Poiares Maduro* stated in *Rottman*: *«In other words, it is not that the acquisition and loss of nationality (and, consequently, of Union citizenship) are in themselves governed by Community law, but the conditions for the acquisition and loss of nationality must be compatible with the Community rules and respect the rights of the European citizen[51]».*

The derivative nature was also clearly outlined in Section A of the 1992 Edinburgh Agreement[52], which stated: *«The provisions of Part Two of the Treaty establishing the European Community relating to citizenship of the Union give nationals of the Member States additional rights and protection as specified in that Part. They do not in any way take the place of national citizenship. The question whether an individual possesses the nationality of a Member State will be settled solely by reference to the national law of the Member State concerned[53]».*

L'UNIVERSITÀ PER L'EUROPA: VERSO L'UNIONE POLITICA, "La Cittadinanza tra diritto internazionale, diritto dell'Unione Europea e diritto nazionale, di PIETRO GARGIULO", 2013, available at http://www.universita-per-europa.eu/la-cittadinanza-tra-diritto-internazionale-diritto-dellunione-europea-e-diritto-nazionale-di-pietro-gargiulo/ , accessed on 17th July 2020. In this viewpoint, another example regarded and regards the so-called second generations. For further information, see https://www.secondegenerazioni.it/, accessed on 17th July 2020

[47] See COUNCIL OF EUROPE, *European Convention on Nationality*, Strasbourg, 6 November 1997

[48] On this point, see P. MINDUS, *op. cit.*, p. 16

[49] On this point, see D. KOCHENOV, J. LINDEBOOM, "Pluralism Through Its Denial: The Success of EU Citizenship", *University of Groningen Faculty of Law Research Paper Series,* No 1, 2018, pp. 15-16

[50] See CJEU, Case C-135/08, *Janko Rottman v Freistaat Bayern,* ECLI:EU:C:2010:104, 5 March 2010. See *Infra* paragraph 1.3.1.

[51] Cfr. Opinion of Mr Advocate General Poiares Maduro delivered on 30 September 2009, *Janko Rottman v Freistaat Bayern,* 30 September 2009, point 23

[52] The Agreement was reached after the 1992 referendum in Denmark.

[53] Cfr. Section A of Denmark and the Treaty on the European Union**,** *Official Journal C 348, 31/12/1992*

Regarding the nature of Union citizenship, *Triggiani* attempted to explain why it was derivative. In particular, he underlined the supranational dimension of EU, as an international organization. According to his approach, Union citizenship depended on the national one, because the whole EU legal order was based on both Treaty provisions and States' sovereignty[54].

The characterization of the nature of Union citizenship has evolved over time. According to the letter of the European Treaties, the complementary dimension of citizenship became additional afterwards. So, meanwhile the term derivative underlined the fact that EU citizenship originated from nationality of a Member State and could not exist without it, the further descriptions of citizenship as complementary and additional stressed on the fact that EU citizenship was just added to nationality and was not meant to substitute it. Furthermore, it could be delineated an autonomous European citizenship, formulated by scholars.

The complementary nature of citizenship was introduced by the Treaty of Amsterdam in 1997. In facts, Article 17 EEC Treaty updated the notion of European citizenship provided by Article 8 TEU[55], by adding: *«Citizenship of the Union shall complement and not replace national citizenship[56]»*. The introduction of this article was significant because it clarified the nexus between Union and national citizenship, which appeared vague and blurred from the letter of Treaty of Maastricht. Moreover, the Treaty broadened the citizens' catalogue of rights, introducing the right to address EU institutions in any of the Union languages (Article 21 EEC Treaty[57]) and the right of access to the documents of the Parliament, the Council and the Commission (Article 255 EEC Treaty[58]). Moreover, in 1998, the European Commission founded a service with the sole scope of informing individuals of their benefits, rights, privileges, duties as European

[54] See E. TRIGGIANI, "La cittadinanza europea per la 'utopia' sovranazionale", *Studi sull'integrazione europea,* No 3, 2006, p. 449

[55] *Supra* note no 44

[56] Cfr. Article 17 EEC Treaty (Amsterdam Version).This provision after the Treaty of Lisbon is now contained in Article 20 Treaty on the Functioning of the European Union (TFEU)

[57] See Article 21 EEC Treaty (Amsterdam Version). This provision after the Treaty of Lisbon is now contained in Article 24 Treaty on the Functioning of the European Union (TFEU)

[58] See Article 255 EEC Treaty (Amsterdam Version). This provision after the Treaty of Lisbon is now contained in Article 15(3) Treaty on the Functioning of the European Union (TFEU)

citizens. In 2005 *Europe Direct,* which is the current information service, was launched[59].

Finally, The Treaty of Lisbon in 2007 introduced the notion of additional citizenship. In particular, Article 9 TEU[60] and Article 20 TFEU[61] replaced the word *"complementary"* by *"additional".* In relation to the impact of the novelty in the citizenship status and in the general EU legal order, the literature was divided between those who believed that the dictate of Article 20 TFEU[62] did not change the nature of the citizenship itself and those who considered the additionality matter as a springboard to the achievement of an autonomous citizenship. Regarding the theories on autonomy, the additional character was interpreted as a means to acquire EU citizenship. Although nationality of a Member State was necessary to acquire Union citizenship, the latter was autonomous, because it was regulated by the core of EU law provisions, not by national ones. In this sense, it was considered a "*parallel citizenship*"[63]. In particular, *Triggiani* delineated a secondary citizenship, underling the different geneses of the two citizenships. Meanwhile EU citizenship

[59] See M. C. MARCHETTI, "Cittadinanza europea e cittadinanza nazionale. Luci e ombre di un rapporto difficile", *SocietàMutamentoPolitica,* Volume 7, No 13, 2016, p. 142. See also, I. N. MILITARU, "Citizenship of the European Union under the Treaty of Lisbon", *Juridical Tribune*, Volume 1, Issue 1, 2011, p. 73

[60] See Article 9 Treaty on European Union (TEU): *"In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship."*

[61] See *Supra* Note no 4. Full article*: "1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship. 2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:*

(a) the right to move and reside freely within the territory of the Member States;

(b)the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;

(c)the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;

(d)the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder."

[62] See *Supra* Note no 4

[63] See C. MORVIDUCCI, *op. cit.*, pp. 24-25

was founded on the relationship between citizens, Member States and the Union, the national citizenship solely regarded the connection between citizens and State[64].

As said before, the varied case-law scenario introduced the principle that national laws on citizenship could not violate EU law provisions. In this sense, the fact that the acquisition and loss of citizenship must be in accordance with EU law did not affect the States' competence to rule on such matters. In relation to the latest principle, it is worth to mention the *Lissabon-Urteil*[65] judgement by the German Constitutional Federal Court in 2009. The ruling established that the Act Approving the Treaty of Lisbon was not in contrast with German Basic Law, which enclosed the supreme principles. In particular, the German Constitutional Federal Court established the so-called "*Identitätskontrolle",* which can be translated as identity clause. It reflected all the norms regarding the German State sovereignty, including the acquisition and loss of German citizenship. Those provisions could not be invalidated by the process of European integration[66]. To this extent, the Court held: *«The so-called eternity guarantee even prevents a constitution-amending legislature from disposing of the identity of the free constitutional order. The Basic Law thus not only presumes sovereign statehood for Germany but guarantees it*[67]*.»* As can be deduced from the *Lissabon-Urteil*, through national laws, Member States can slightly shape EU citizenship and principles, sometimes creating divergencies[68]. Nevertheless, this judgement has often caused scholarly debate. In particular, *Kochenov* stated: *«the BVerfG again engaged in political moralism*

[64] See E. TRIGGIANI, *op. cit.*, p. 455

[65] See BUNDESVERFASSUNGSGERICHT, *Judgement of the Second Senate of 30 June 2009,* 2 BvE 2/08, 30 June 2009

[66]On this point, see P. MINDUS, *op. cit.*, p. 15 and A. ANZON DEMMING, "Principio democratico e controllo di costituzionalità sull'integrazione europea nella 'sentenza Lissabon' del Tribunale costituzionale federale tedesco", *Giurisprudenza Costituzionale*, Volume 54, Issue 6, 2009, p. 5219

[67] Cfr. *Supra* No 65, par. 216

[68] For example, citizens of the Faroe Islands are Danish, but not European citizens, because Denmark declared that they were not citizens in the light of Community objectives. Moreover, Great Britain enacted the 1981 Nationality Act, distinguishing British citizens and British citizens for the Community purposes. See on this point, P. MINDUS, *op. cit.,* p. 16 and G. R. DE GROOT, "Towards a European Nationality Law", *Electronic Journal of Comparative Law*, Volume 8, No 3, 2004. See also Opinion of Mr Advocate General Tesauro delivered on 30 January 1992, *Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria*, 30 January 1992, point 7

disguised as legal argument, mistakenly embracing the presumption of mono-cultural citizenship[69]*.»*

However, Article 20(1) TFEU[70] determines who is the Union citizen and provides for its additional character, which has been extensively analyzed above. The great relevance of the aforementioned article can be found in its second part, which deals with the rights, automatically granted to EU citizens. In particular, the right to freely move and reside in another Member State represents the most important one. The other rights can be summarized as follows: active and passive electoral rights in both European and local elections, the right to diplomatic or consular protection in third Countries and the right to access to the European institutions. EU citizens cannot be illegitimately deprived of their rights. Moreover, the scope of the second part of the Article describes what is the effective privilege of being citizens, as *«citizens have an array of right that non-citizens do not enjoy*[71]*»*. Regarding the classification of citizens' rights, there are numerous doctrines in social and legal theory. In particular, it is worth to mention *T.H. Marshall,* who divided citizenship rights in civil, political and social. However, this theory is obsolete because the rights included in Marshall's tripartition should not be related to *"status civitatis"*, but to *"status personae"*[72].

In a nutshell, the character of Union citizenship is clearly outlined by the letter of the Treaties. Article 20 TFEU[73] provides for the current notion of EU citizenship. In particular, a strong interconnection between nationality of a Member State and EU citizenship can be found, because an individual cannot be a European citizen without being a Member State national, moreover, the Union citizenship is an extra citizenship, it is not a replacement of the national one. Nevertheless, the Court

[69] Cfr. D. KOCHENOV, "Citizenship without Respect: The EU's Troubled Equality Ideal", *Jean Monnet Working Paper (NYU Law School),* No 8, 2010, p. 63
[70] See *Supra* Note no 4
[71] Cfr. E. D. H. OLSEN, "European Citizenship: Mixing National State and Federalist Features with a Cosmopolitan Twist", *Perspectives on European Politics and Society*, Volume 14, Issue 4, 2013, p. 508
[72] On this point, see D. KOCHENOV, *Citizenship*, The MIT Press, Cambridge, MA, 2019, pp. 122-152 and N. REICH, "Union Citizenship- Metaphor or Source of Rights?", European Law Journal, Volume 7, Issue 1, 2001, p. 8
[73] See *Supra* Note no 4

intervened several times in order to shed light on the difficult relationship between the two citizenships, which was often misunderstood by States.

3.1 The evolution of citizenship according to CJEU's case-law

As mentioned before, the character of Union citizenship is not enshrined in the Treaties, but it has evolved over time through the judgements of the CJEU. In particular, the CJEU's jurisprudence filled EU citizenship with content, by establishing principles, which are now considered cornerstones.

In particular, the first principle, extrapolated from the intricate case-law, concerns the prohibition for Member States to legislate on nationality in a way that does not comply with EU law. In this sense, in the 1992 *Micheletti* case, the Court stated: *«under international law, it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality*[74]*»*. In this respect, although states were obliged to take European law into account, some scholars thought that it might be possibly violated by domestic laws on nationality, regarding both acquisition and loss of nationality[75]. Moreover, this view was corroborated by the lack of harmonization in this area[76]. The same principle was reiterated in the *Kaur* case in 2001. In this regard, the Court stated that national citizenship laws could be challenged only if contrary to the Union purposes, so, in the present case, the Court deemed that the 1981 British Nationality Act was compatible with EU law[77]. After these judgements, the literature was divided. On the one hand, *De Groot*, for example, believed that States did not have total discretion in field of nationality[78]. On the other hand, academics, such as *Jessurun D'Oliveira*, thought that national legislators had exclusive competence on

[74] Cfr. CJEU, Case C-369/90, *Mario Vicente Micheletti and Others v Delegación del Gobierno en Cantabria*, ECLI:EU:C:1992:295, 7 July 1992, point 10
[75] See G. R. DE GROOT, *op. cit.*
[76] See *Supra* paragraph 1.3
[77] See CJEU, Case C-192/99, *The Queen v Secretary of State for the Home Department, ex parte: Manjit Kaur, intervener: Justice,* 20 February 2001, ECLI:EU:C:2001:106, points 22-25
[78] On this point, see G. R. DE GROOT, *op. cit.*

the matter[79]. In 2010, the issue was definitively closed by the CJEU with *Rottman*, endorsing the former opinion[80].

Along *Micheletti's* path, through *Zhu and Chen* in 2004 the Court held: *«it is not permissible for a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty[81].»*

As demonstrated by the previous table of cases, Member States had exclusive competence regarding the acquisition and loss of citizenship. However, the issue was very complex, because an individual, whose nationality had been withdrawn according to domestic laws, could be deprived of his EU citizenship. Since EU citizenship was a fundamental status, laws on the loss of citizenship could conceivably conflict with Article 20 TFEU[82]. *Rottman* represented a landmark judgement, as it broke the connection between national citizenship and statehood sovereignty, departing from the previous jurisprudence. The Court, for the first time, deemed that acquisition and loss of nationality are not purely internal situations, because *«it is clear that the situation of a citizen of the Union who, like the applicant in the main proceedings, is faced with a decision withdrawing his naturalisation, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article 17 EC and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law[83]».* So, it was possible to revoke the nationality of an individual, but, its withdrawal must pass the proportionality test[84], in particular, national authorities must balance the interests

[79] On this point, see H. U. JESSURUN D'OLIVEIRA, *Union Citizenship and Beyond, European University Institute Working Papers*, No 15, 2018, p. 7

[80] See D. KOCHENOV, "The Present and the Future of EU Citizenship: A Bird's Eye View of the Legal Debate", *Jean Monnet Working Paper (NYU Law School)*, No 2, 2012, p. 22

[81] Cfr. CJEU, Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department*, 19 October 2004, ECLI:EU:C:2004:639, point 39

[82] See Supra note no 4

[83] Cfr. *Supra* Note no 50, point 42

[84] *«A decision withdrawing naturalisation because of deception corresponds to a reason relating to the public interest. In this regard, it is legitimate for a Member State to wish to protect the special*

involved, such as the repercussions on the Country itself and the consequence for the individual deriving from the loss of EU citizenship. Furthermore, the proportionality test was introduced to limit Member States' competence, even if national courts were entitled to decide if it was proportionate[85]. In the case in question, such revocation was considered fair by national judges, because *Rottman* had acquired German nationality fraudulently in the first place[86].

The judgement has been criticized by those who believed in the project of a federal citizenship[87]. According to them, since federal citizenship is totally autonomous and independent, Mr. Rottman should not have been deprived of his status as an EU citizen after the German nationality withdrawal. However, the failure of federalism should not be judged negatively, as *Rottman* has prevented the recent spread of nationalist tendencies from gaining ground[88].

An interesting view regarding the possible repercussions of *Rottman* in the current EU scenario concerns its usage as a possible means to save the United Kingdom from Brexit. Nevertheless, this opinion cannot be accepted. Firstly, the circumstances are different. In facts, British people are not entitled to challenge the deprivation of EU citizenship, because the UK is no longer a Member State, meanwhile Germany was one. Secondly, the departure from the EU is expressly regulated under Article 50 TEU[89]. Assuming this, *Rottman* cannot be interpreted as

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relationship of solidarity and good faith between it and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality». Cfr. *Ibid.*, point 51

[85] On this point, see H. VAN HEIJKEN, "European Citizenship and the Competence of Member States to Grant and to Withdraw the Nationality of their Nationals Case C-135/08: Janko Rottman v Freistaat Bayern, Judgment of the Court of Justice of the EU (Grand Chamber) of 2 March 2010", *Merkourios Utrecht Journal of International and European Law*, Volume 27, No 72, 2010, pp. 67-68, R. PALLADINO, "Cittadinanza europea, perdita della cittadinanza nazionale e 'due regard' per il Diritto dell' Unione Europea", *Federalismi.it*, Volume 20, 2019, pp. 8-9, C. MORVIDUCCI, *op. cit.*, p. 45, G. R. DE GROOT, N. C. LUK, "Two Years of CJEU Jurisprudence on Citizenship", *German Law Journal*, Volume 15, Issue 5, 2014, pp. 827-828, D. SARMIENTO, "EU Competence and the attribution of Nationality in Member States", *Investment Migration Working Papers*, No 2, 2019, pp. 18-19 and E. F. ISIN, M. SAWARD, *Enacting European Citizenship*, Cambridge University Press, Cambridge, 2013, pp. 126-127

[86] See *Supra* note no 50, points 57-58

[87] See *Infra* paragraph 2.2

[88] On this point, see NEL MERITO, "Dopo Rottman: quale futuro per la Cittadinanza Europea?", 2010, available at http://www.nelmerito.com/index.php?option=com_content&task=view&id=1252, accessed on 23rd April 2020.

[89] See Article 50 Treaty on the European Union (TEU)*: "1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirement 2. A Member State*

an instrument to elude Treaties provisions. Finally, the theory is not applicable because an individual can be effectively deprived of his Union citizenship, if the revocation of Member State nationality was considered proportionate by domestic courts[90].

The objective of *Rottman* regarding the broadening of the power of the Union in matters falling within the competence of Member States seemed to be reiterated in the 2001 *Ruiz Zambrano* case about the right to not be expelled from the EU. In this respect, following the *Rottman*'s approach, the Court did not consider domestic laws regarding residents as purely internal situation. They fell within the scope of the EU whenever they could conceivably limit the rights of Union citizens[91]. In this regard, *Kochenov* wisely stated: *«EU citizenship has thus acquired a life of its own[92]»*. The real revolution, however, consisted in an extensive interpretation of the cross-border element in order to give priority to Union citizenship and the protection of its rights. In *McCarthy[93]* and *Dereci[94]* the Court also underlined the importance of Union citizenship in light of the exercise of rights. Nevertheless, the Court in *McCarthy* stepped back from *Ruiz Zambrano*, limiting recourse to

which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament. 3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period. 4. For the purposes of paragraphs 2 and 3, the member of the European Council *or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.5. If a State which has withdrawn from the Union asks to re-join, its request shall be subject to the procedure referred to in Article 49."*

[90] On this point, see EUROPEAN LAW BLOG, "Union Citizenship- Still Europeans' destiny after Brexit?", 2016, available at https://europeanlawblog.eu/2016/07/07/union-citizenship-still-europeans-destiny-after-brexit/, accessed on 15th June 2020

[91] See CJEU, Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm),* 8 March 2011, ECLI:EU:C:2011:124, points 42-43

[92] Cfr. D. KOCHENOV, "The Right to Have What Rights? EU Citizenship in Need of Clarification", *European Law Journal,* Volume 19, 2013, p. 508

[93] See CJEU, Case C-434/09, *Shirley McCarthy v Secretary of State for the Home Department,* 5 May 2011, ECLI:EU:C:2011:277. It will be analyzed in paragraph 3.3.1

[94] See CJEU, Case C-256/11, *Murat Dereci and Others v Bundesministerium für Inneres,* 15 November 2011, ECLI:EU:C:2011:734. See *Infra* 3.4.1

European law on a case-by-case basis, not to all the situations where citizenship was involved[95].

Back to the issue of the loss of nationality, it is worth to mention the recent 2019 *Tjebbes* case. Whereas Mr. *Rottman*'s nationality was revoked because of a crime he had committed, *Tjebbes* dealt with the deprivation of citizenship under the law, in particular, a Dutch law providing for the loss of nationality for dual citizens, who have continuously lived for ten years outside the EU territory[96]. In this case, the Grand Chamber of the Court repeated the principle, according to which Member States could promulgate laws concerning the loss of nationality, having due regard to EU law[97]. Nevertheless, the Court deemed that the matter fell within the EU scope. Therefore, such laws had to fulfill two criteria: the *"genuine link"* and the proportionality test[98], which also took into account personal interests of the individual and of his family[99]. Commentators discussed if the *"genuine link"* with EU citizenship was an adequate parameter for determining the loss of nationality. However, scholars' opinions on the case were conflicting. On the one hand, *Kochenov* harshly criticized the case, arguing that the proportionality test was pointless because such laws could already be considered morally questionable in principle. He also condemned the Court for permitting an indirect infringement of citizenship fundamental status and allowing discriminations based on dual nationality. Moreover, he accused the court of declassifying EU citizenship, disguising this choice by invoking the principle of separation of powers between EU and States[100]. *Coutts*, instead, thought that the judgement was paradoxical:

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[95] On this point, see C. MORVIDUCCI, *op. cit.*, pp. 52-53, D. KOCHENOV, *op. cit.*, 2013, pp. 507-512, and D. GALLO, "Développements récents en matière de citoyenneté européenne et regroupement familial", *Revue du droit de l'Union européenne*, Volume 1, 2012, pp. 103-113

[96] For an analysis about loss of nationality in EU Member States, see G. R. DE GROOT, M. P. VINK, "Best Practices in Involuntary Loss of Nationality in the EU", *CEPS Paper in Liberty and Security in Europe*, No 73, 2014

[97] See CJEU, Case C-221/17, *M.G. Tjebbes and Others v Minister van Buitenlandse Zaken*, 12 March 2019, ECLI:EU:C:2019:189, point 30

[98] See Opinion of Mr Advocate General Mengozzi delivered on 12 July 2018, *M.G. Tjebbes and Others v Minister van Buitenlandse Zaken*, 12 July 2018, point 82

[99] See *Supra* note No 97, point 44

[100] On this point, see D. KOCHENOV, "The Tjebbes Fail", *European Papers*, Volume 4, No 1, 2019, pp. 321-326. For an analysis of *Tjebbes* in the post-Brexit era, see L. MARIN, "La Perdita della Cittadinanza ai tempi della Brexit: la sentenza Tjebbes", *Quaderni Costituzionali*, Booklet 2, 2019, pp. 468-469

broadminded in allowing the inference of the EU in nationality laws, by establishing procedural requisites, however, traditionalist in protecting the States' *"reserved domain"* on acquisition and loss of nationality[101], in facts, *«Member States remain the ultimate gatekeepers to access to and exit from EU citizenship[102]».*

Considering the general framework of CJEU's case-law reported above, the Court has followed a quite coherent reasoning in its various judgements. Nevertheless, in my opinion, the climax of the process of European integration was achieved by overcoming the cross-border element theory. In this respect, the Court established that the so-called purely internal situations also fell within the scope of EU law, in the sense that exercising the freedom of movement was no longer necessary to trigger EU law. Static citizens could invoke their rights as well. Furthermore, in a Europeanist vision, it is more than fair to question national laws that could jeopardize the status of EU citizenship, one of our greatest achievements and the very essence of the Union.

4. Rights linked to EU citizen status

As anticipated *supra,* the EU citizen status is also an autonomous source of rights. Those are protected under EU primary and secondary law and they can also be extrapolated from CJEU's case-law. Nevertheless, jurisprudential derived rights can be problematic because they question EU legal certainty. It is indeed difficult to determine what are the real citizens' rights beyond the *ex lege* ones.

Regarding the classification of citizenship rights, it should be pointed out that the general prohibition of discrimination on grounds of nationality (Article 18 TFEU)[103] constitutes the glue between all rights deriving from citizenship status. Other rights are indicated in Article 20(2) TFEU[104]: right to move and reside freely

[101] On this point, see EUROPEAN LAW BLOG, "Bold and Thoughtful: The Court of Justice intervenes in nationality law Case C-221/17 Tjebbes", 2019, available at https://europeanlawblog.eu/2019/03/25/bold-and-thoughtful-the-court-of-justice-intervenes-in-nationality-law-case-c-221-17-tjebbes/, accessed on 23rd April 2020

[102] Cfr. H. VAN EIJKEN, "Tjebbes in Wonderland: On European Citizenship, Nationality and Fundamental Rights: ECJ 12 March 2019, Case C-221/17, M.G. Tjebbes and others v Minister van Buitenlandse Zaken, ECLI:EU:C:2019:189", *European Constitutional Review,* Volume 15, Issue 4, 2019, p. 721

[103] See Article 18 Treaty on the Functioning of the European Union (TFEU)

[104] See *Supra* Note no 4

within the EU territory (Article 21 TFEU)[105], active and passive electoral rights in both European and municipal election (Article 22 TFEU)[106], right to diplomatic or consular protection in third countries (Article 23 TFEU)[107] and the rights connected to EU institutions, such as Citizen's Initiative, right to petition the European Parliament and the Ombudsman, the right to write to EU institution in any of the official languages (Article 24 TFEU)[108]. Furthermore, there are other citizenship rights, which are included in the Nice Charter. Herein, it is worth to mention: the right to good administration (Article 41)[109] and the right of access to documents (Article 42)[110]. In particular, the Charter contains such rights, as a *"unicum"*, proclaiming their indivisibility, or rather universalism, in the sense that citizens can assert them beyond the national territory[111]. Since the catalogue of rights in EU primary law is not satisfactory, other citizenship rights are included in secondary law, especially in the Citizenship Directive 2004/38/EC[112]. The Citizenship Directive regulates: the right of entry and of exit, the right of residence and of permanent residence, the right to equal treatment, the rights of citizens' family members, protection against expulsion. Moreover, according to the Directive, Member States can restrict citizens' rights on grounds of public policy, public security and public health.

Before dealing with the role played by the Court in matters of rights, it must be underlined that the CJEU in *Grzelczyk* stated*: «Union citizenship is destined* to be the fundamental status of nationals of the Member States[113]». Thus, the EU citizenship status includes the set of rights analyzed above.

Concerning the relationship between citizenship rights and fundamental rights, the European legislator tends to separate them. In this sense, the respect of fundamental rights is contained in the TEU[114]. Despite their different place in the Treaties,

[105] See *Supra* Note no 5
[106] See Article 22 Treaty on the Functioning of the European Union (TFEU)
[107] See Article 23 Treaty on the Functioning of the European Union (TFEU)
[108] See Article 24 Treaty on the Functioning of the European Union (TFEU)
[109] See Article 41 Charter of Fundamental Rights of the European Union *(CFR)*
[110] See Article 42 Charter of Fundamental Rights of the European Union (CFR)
[111] On this point, see E. TRIGGIANI, *op. cit.*, pp. 465-466
[112] See *Supra* Note no 6
[113] Cfr. CJEU, Case C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve,* 20 September 2001, ECLI:EU:C:2001:458, point 31
[114] See Article 6 Treaty on the European Union (TEU)

citizenship and fundamental rights often meet before the CJEU, as happened in *Ruiz Zambrano* with the «*genuine enjoyment of the substance of rights conferred by virtue of the status of citizenship of the Union*[115] ». An interesting proposal for the incorporation of fundamental rights in that *"substance of rights"* regards the extensive interpretation of the *"inter alia clause"* in Article 20(2) TFUE[116] in order to include fundamental rights in the citizens' catalogue of rights[117]. This theory does not have an overall consensus. In this sense Advocate General *Mengozzi* in *Dereci* stated that this doctrine of incorporation was not always applicable[118]. On the one hand, since the very beginning, the Court has always attempted to interpret freedoms in light of human rights, departing from the economic-oriented scenario, as, for example, happened in *Van Gend en Loos*. Meanwhile, in other cases, such as *McCarthy,* the Court did not refer to fundamental rights. So, in my opinion, a full convergence between the two branches of rights is not possible before the Court, because the CJEU has been unpredictable and variable on the matter. Nevertheless, such incorporation was also thought to be possibly dangerous in terms of social integration and for the safeguarding of national cultural identities rights[119].

Regarding the role of EU institutions in the protection of both fundamental and citizenship rights, the Commission has also underlined the importance of fundamental rights, stating that *«decisive steps have been taken towards a Europe of fundamental rights*[120]*»,* in this sense, the Nice Charter was one. Another demonstration of the necessary interconnection between fundamental and citizenship rights concerned the Rights, Equality and Citizenship Programme from

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[115] Cfr. *Supra* note no 91, points 42-44

[116] See *Supra* Note no 4

[117] On this point, see K. KALAITZAKI, "EU Citizenship as a Means of Empowerment for Fundamental Rights during the Financial Crisis", *European Papers,* Volume 3, No 3, pp. 1152-1154, 2018

[118] See Opinion of Mr Advocate General Mengozzi delivered on 29 September 2011, *Murat Dereci and Others v Bundesministerium für Inneres,* 29 September 2011, points 38-39

[119] On this point, see S. IGLESIAS SÁNCHEZ, "Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison?", *European Law Journal,* Volume 20, Issue 4, 2014, pp. 465-476, C. RAUCEA, "Fundamental Rights: The Missing Pieces of EU Citizenship?", *German Law Journal,* Volume 14, Issue 10, 2013, p. 2024 and M. P. GRANGER, *Revisiting the Foundation of European Union Citizenship: Making It Relevant to All European Union Citizens, European Policy Brief,* BEUCITIZEN, Barriers Towards EU Citizenship, December 2016, p. 11

[120] Cfr. EUROPEAN COMMISSION, *Putting the Charter of Fundamental Rights into Practice,* 19 October 19, COM (2010) 573 Final, p. 1

2014 to 2020, established by the Parliament and the Council, aiming at promoting, above all, citizens' information on their rights[121]. Moreover, the Commission 2017 EU Citizenship Report[122] set a plan of action for raising awareness concerning citizens' rights, considering than more than two thirds of the population would like to know more about their rights[123]. In line with the objectives indicated in the above-mentioned act, in 2019 the Commission produced a report on investors citizenship and residence schemes[124].

Concerning duties, although their correlation with rights is undeniable, they often fall outside the status of citizenship. In particular, *«it is suggested that liberation from duty-oriented thinking- rather than attempting to connect citizenship with duties- is what corresponds to the creation of citizenship based on respect[125]»*. According to Article 20(2) TFEU[126], *«citizens shall […] be subject to the duties provided for in the Treaties»[127]*. However, Treaties do not mention citizenship duties. Regardless of the lack of duties and the wide set of rights, citizens do have responsibilities, for example, they cannot take their status for granted by not caring of their travel documents[128].

Notwithstanding EU citizens' rights are granted by EU primary and secondary law, the Union constantly calls on States for action in order to safeguard the respect of such rights at a local level. In particular, national courts must guarantee the actual respect of such rights since EU law has direct effects. Considering that nationality

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[121] See *Regulation No 1381/2013 establishing a rights, equality and citizenship programme for the period 2014 to 2020*, 17 December 2013, *in Official Journal of the European Union*, L 354, 28 December 2013

[122] See EUROPEAN COMMISSION, *EU Citizenship Report 2017: Strengthening Citizens' Rights in a Union of Democratic Change,* Luxemburg: Publication Office of the European Union, 2017

[123] See EUROPEAN COMMISSION, *Standard Eurobarometer 88 "European Citizenship" Report*, Standard Eurobarometer 88 – Wave EB86.2 – TNS opinion & social, 2017, pp. 48-52

[124] See EUROPEAN COMMISSION, *Report from The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions Investor Citizenship and Residence Schemes in the European Union,* 23 January 2019, COM (2019) 12 Final

[125] Cfr. D. KOCHENOV, "EU Citizenship Without Duties", *European Law Journal*, Volume 20, Issue 4, 2014, p. 486. For a critical view on Kochenov's argument, see R. BELLAMY, "A Duty-free Europe? What's wrong with Kochenov's Account of EU Citizenship Rights", European Law Journal, Volume 21, Issue 4, 2015, pp. 558-565

[126] See *Supra* Note no 4

[127] Cfr. *Ibid.*

[128] See *Supra* Note no 121, p. 11

and EU citizenship are interrelated and connected, States have to protect their citizens, avoiding every conceivable infringement of EU law[129].

4.1 The prohibition of discrimination on grounds of nationality

Article 18 TFEU[130] forbids any kind of based-nationality discrimination, able to trigger the provisions of the Treaties. As said in the previous paragraph, the non-discrimination rule is the glue that holds together all the citizens' rights, because these rights aim at guaranteeing equality between EU citizens, regardless of their nationality. Moreover, Article 19 TFEU[131] is a blank cheque, which allows the EU to enact rules against discriminations based on other grounds[132]. Nevertheless, the principle of non-discrimination is a general principle of EU law, it does not arise from citizenship, but from the evolution of the European integration and of the four fundamental freedoms.

In order to understand the applicability of the principle of non-discrimination, we have to consider who are the people involved in a dispute, which is violating Article 18 TFEU[133]. In 2001 in *Grzelczyk* the Court deemed that the prohibition applied only within EU borders[134]. However, diverse situations and different implications can be found, depending on whether the persons involved are foreigners, nationals or EU citizens. In the present dissertation, I will only analyze the case of Union

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[129] For example, in relation to the EU citizenship for sale, the Parliament *«calls on Malta to bring its current citizenship scheme into line with the EU's values»* Cfr. EUROPEAN PARLIAMENT, *Resolution on EU Citizenship for sale*, 2013/2995 (RSP), 16 January 2014, point 12. Regarding the situation of citizenship for sale in Malta, see S. CARRERA, "How much does EU citizenship costs? The Maltese citizenship-for-sale affair: a breakthrough for sincere cooperation in citizenship of the Union?", *CEPS Paper in Liberty and Security in Europe*, Volume 64, 2014 and B. ANDERSON, I. SHUTES, S. WALKER, *Report on the rights and obligations of citizens and non-citizens in selected countries: Principles of eligibility underpinning access to state territory, citizenship and welfare*, BEUCITIZEN, Barriers Towards EU Citizenship, 31 July 2014, pp. 32-33

[130] See *Supra* Note no 103

[131] See Article 19 Treaty on the Functioning of the European Union (TFEU)

[132] For examples of enacted rules, see *Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services*, 13 December 2004, *in Official Journal of the European Union*, L 373, 21 December 2004, *Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation*, 5 July 2006, *in Official Journal of the European Union*, L 204, 26 July 2006, *Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*, 29 June 2000, *in Official Journal of the European Union*, L 180, 19 July 2000 and *Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation*, 27 November 2000, *in Official Journal of the European Union*, L 303, 2 December 2000

[133] See *Supra* Note no 103

[134] See *Supra* Note no 113

citizens, who can be divided in two categories: *"dynamic"* and *"static"*. Dynamic citizens can trigger EU law very easily, meanwhile, static ones need a link with the host State, which must be assured by the Court. Since the norm has a residual character, the material scope is very important, because, in case there is another suitable provision, the non-discrimination principle has to be invoked as *extrema ratio.* In particular, the *rationae materiae* identification is important, because different rules can be applied to economically active citizens, especially in the field of free movement. On the one hand, workers, or rather economically active citizens, always enjoy the right of equal treatment. On the other hand, students usually have a right to equality, unless they become an unreasonable burden for the host State[135]. However, the usage of secondary law norm as a parameter, it is anything but convenient. The Court sometimes extensively interpreted notions, such as the one of worker, with the sole purpose of avoiding discrimination[136]. The *Bidar*[137] case is also emblematic, because the Court granted a social aid to a citizen, which was determined by a domestic provision, because its refusal would have been a violation of the principle of non-discrimination, so it fell within the scope of EU. Therefore, the Court only carried out a substantive review of the national rule[138].

The principle of non-discrimination presents vague and uncertain boundaries. In my view, some of its features, such as its residual character and the link with secondary law, prevent the full application of this principle, which is one of the most important, if not the most. In spite of this, the Court has done an impeccable job in preventing even the slightest possibility of a breach of this principle.

4.2 Freedom of movement, labor mobility and right of residence

Article 21 TFEU[139] provides for the right to freely move and reside within the EU territory. It is the most important right and constitutes the core of citizenship rights.

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[135] See *Supra* Note no 6, Article 24

[136] See CJEU, Joined Cases C-22/08 and Case C-23/08, *Athanasios Vatsouras (C-22/08) and Josif Koupatantze (C-23/08) v Arbeitsgemeinschaft (ARGE) Nürnberg 900*, 4 June 2009, ECLI:EU:C:2009:344

[137] See CJEU, Case C-209/03, *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills*, 15 March 2005, ECLI:EU:C:2005:169

[138] On this point, see E. TRIGGIANI (ed.), *Le nuove frontiere della cittadinanza europea*, Cacucci Editore, Bari, 2011, pp. 92-96

[139] See *Supra* Note no 5

It is strictly connected to the principle of non-discrimination under Article 18 TFEU[140] in the sense that free circulation must be exercised without any nationality-based discriminations. Provisions on freedom of movement, non-discrimination and EU citizenship form the status of citizen. The importance and influence of this freedom in the internal market can be found in the provisions legitimizing the Council and Parliament to adopt further measures by ordinary legislative procedure, and if these are not enough, they allow the Council to adopt measures on social security and social protection by special legislative procedure. In such a case, the Council must first consult the Parliament[141]. Freedom of movement is considered *«the anchor of Union citizenship[142]»*. A great advantage of freedom of movement is the absence of internal frontiers, as stated under Article 26 TFEU[143]. Finally, Article 45 TFEU[144] provides for the freedom of movement for jobseekers and workers, their right of residence in the host State and the right to remain there after the termination of the employment. There is an overall positive public opinion about mobility in the EU, in 2018, 68% of the population considered the Schengen area as one of the most important accomplishment of the Union and three out of five citizens travelled within Schengen area borders[145].

The Citizenship Directive plays a huge role in the regulation of the freedom of movement, since it disciplines its various aspects. In this respect, it provides for the right of entry and of exit, that are, the foundations of the freedom of movement. Citizens are free to exit a State, carrying a valid passport or an identity card[146]. The Court has condemned domestic provisions, which undermined the freedom of movement, by hindering the right of exit, especially for employees and self-employed[147]. An individual, who left his home State, can freely reenter it. The right

[140] See *Supra* Note no 103
[141] See *Supra* Note no 5
[142] Cfr. M. P GRANGER, *op. cit.*, p. 1
[143] See Article 26 Treaty Function of the European Union (TFEU)
[144] See Article 45 Treaty Function of the European Union (TFEU)
[145] See EUROPEAN COMMISSION, *Special Eurobarometer 474 – June- July 2018 "European Perceptions of the Schengen Area" Report,* Special Eurobarometer 474 – Wave EB89.3 – Kantar Public, December 2018
[146] See *Supra* Note no 6, Article 4
[147] See CJEU, Case C-415/93, *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations*

to return to the home State is fundamental for the exercise of the freedom of movement, because its hypothetical absence could lead to a reluctance on the part of citizens to exit their state, as they would be intimidated by the fact that they cannot return to it[148]. Furthermore, the only requisite needed by the citizen, who wants to enter another Member State, is the possession of a valid passport or identity card[149]. Identity documents are shown with the sole purpose of identification, they cannot be used as a means to obstacle the entry of an individual, since citizens are not obliged to give any information regarding the reasons why they are travelling[150].

The Citizenship Directive also regulates the right of residence, distinguishing the right of residence for maximum three months, more than three months and permanent residence. Regarding the right of residence until three months, there are not any conditions, the only requisite needed in order to exercise it is the possession of a passport or an identity card[151]. The host State is not obliged to guarantee any social assistance or benefits to the citizen during the first three months of residence[152]. Concerning the right to reside for more than three months, Article 7 of the Directive provides for different regimes, depending whether the individual is a worker, a student, a jobseeker or a family member of a citizen[153]. Meanwhile there are not any conditions for workers, both self-employed or employees, those, who are economically inactive, such as students or jobseekers, must have sufficient economic resources and a health insurance, because they cannot be an unreasonable burden for the host State. Permanent residence, instead, can be acquired by those, who have continuously lived in the host State for more than five years[154]. The lack of economic conditions in order to be permanents residents is justified by the length of their stay in the host Country. Moreover, Article 24 of the Directive provides for

européennes de football (UEFA) v Jean-Marc Bosman, 15 December 1995, ECLI:EU:C:1995:463, point 96

[148] See CJEU, Case C-291/05, *Minister voor Vreemdelingenzaken en Integratie v R. N. G. Eind*, 11 December 2007, ECLI:EU:C:2007:771, point 35

[149] See *Supra* Note no 6, Article 5

[150] See CJEU, Case C-378/97, *Criminal proceedings against Florus Ariël Wijsenbeek*, 21 September 1999, ECLI:EU:C:1999:439, point 43

[151] See *Supra* Note no 6, Article 6

[152] See *Ibid.*, Article 24(2)

[153] See *Ibid.*, Article 7

[154] See *Ibid.*, Article 16

the right to equal treatment, according to which, the host State cannot discriminate residents, who are nationals of another Member State. Nonetheless, the right to equal treatment is derogated in the following circumstances: states are not obliged to grant social assistance for the first three months of residence and to concede students loans before they become permanent residents[155]. Some provisions of the Directive are not very clear, such as the unreasonable burden. This could lead to several problems and discrepancies among Member States. In facts, they could interpret the dictate of the Directive in order to limit the access to social aids to some categories of individuals. Issues about the interpretation of certain rules have been analyzed by the CJEU various times, for this reason. the jurisprudence on the matter is wide[156]. For example, in *Dano*[157] and *Alimanovic*[158], the Court stated the importance of a strict reliance to the letter of the Directive. In facts, in *Dano*, the State could refuse social benefits to an unemployed individual, who did not fulfill the requisites of the Directive, and it should not be considered as a violation of the right to equal treatment, because economically active persons are actually better protected under the Directive. The same reasoning was adopted in *Alimanovic*, a case, where social benefits were not granted to a person, who was a jobseeker according to the directive, but wrongly retained the status of a worker[159]. Both cases were mentioned in a 2017 Commission Report on progresses toward an effective citizenship[160]. Another important case was *Bajratari*[161]. The Court considered

[155] See *Ibid.,* Article 24

[156] On this point, see S. SEUBERT , F. VAN WAARDEN *Being a Citizen in Europe: Insights and Lessons from the Open Conference, Zagreb 2015, Conference papers at mid-term and final conference*, BEUCITIZEN, Barriers Towards EU Citizenship, 31 October 2015, p. 107

[157] See CJEU, Case C-333/13, *Elisabeta Dano and Florin Dano v Jobcenter Leipzig*, 11 November 2014, ECLI:EU:C:2014:2358

[158] See CJEU, Case C-67/14, *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others*, 15 September 2015, ECLI:EU:C2015:597. The case is also mentioned in a Commission report regarding progresses toward EU effective citizenship.

[159] On this point, see D. CARTER, M. JESSE, "The 'Dano Evolution': Assessing Legal Integration and Access to Social Benefits for EU Citizens", *European Papers*, Volume 3, No 3, 2018, pp. 1192-1196 and EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (FRA), *Making EU Citizens' Right a Reality: National Courts Enforcing Freedom of Movement and Related Rights*, Luxemburg: Publication Office of the European Union, 2018, p. 40

[160] See EUROPEAN COMMISSION, *Report from The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions Under Article 25 TFEU on progress towards effective EU citizenship 2013-2016*, 24 January 2017, COM (2017) 32 Final, p. 6

[161] See CJEU, Case C-93/18, *Ermira Bajratari v Secretary of State for the Home Department*, 2 October 2019, ECLI:EU:C:2019:809

resources deriving from unlawful employment as sufficient resources. However, it should be pointed out that the unlawful activity was working without a valid work permit, it was not criminal. In this sense, the Court considered that the activity was not in contrast with public policy[162]. Regarding the social benefits that could be granted in relation to the exercise of the right of free movement, some commentators classified social solidarity as *"parallel"* to EU citizenship. In this respect, citizenship is not a requisite to access social assistance, since residents can be beneficiaries of social aids and the conditions to exclude an individual are purely economic. *Kochenov* has criticized the fact that residence depends on the financial status of citizens, because it degrades the EU citizenship itself, which is far from being a universal right[163].

Freedom of movement and residence can be restricted on grounds of public policy, public security and public health[164]. A cross-border element is required in order to challenge EU law and, therein, the principle of free movement and residence. Moreover, there is a wide case-law on the matter. Generally speaking, the Court tended to interpret the cross-border element in a restrictive way[165].

The same right to freely move and reside in another Member State is also guaranteed to family members. The notion of family members, who are entitled to the same rights of EU citizens, is prescribed under Article 2 of the Citizenship Directive[166]. Furthermore, Article 3 of the Directive asserts that States must facilitate the entry of those, who are not considered family member under the letter of this Directive but are economically dependent on the EU citizen and of the citizen's partner[167]. However, family members' rights can be restricted or revoked in case of abuse of rights or fraud[168]. The interpretation of the notion of family under

[162] On this point, see EUROPEAN LAW BLOG, "Case C-93/18 Bajratari – Unlawful Employment and the Right to Free Movement", 2019, available at https://europeanlawblog.eu/2019/10/07/case-c-93-18-bajratari-unlawful-employment-and-the-right-to-free-movement/, accessed on 23rd April 2020

[163] See D. KOCHENOV, *op. cit.*, 2009, p. 195 and D. KOCHENOV, *op. cit.*, 2012, pp. 31-32

[164] See *Supra* Note no 6, Article 27

[165] On this point, see C. MORVIDUCCI, *op. cit.*, pp. 144-157

[166] See *Supra* Note no 6, Article 2

[167] See *Ibid.*, Article 3

[168] See *Ibid.*, Article 35

the letter of the directive caused some troubles to the Member States. In particular, in *Metock*, the Court deemed that an Irish law indirectly violated the freedom of movement, because, according to the law, the same rights of citizens could be granted only to family members, who were lawfully resident in another Member State. So, the Court thought that this implementation of the Directive undermined the right to free movement. In facts, it held: *«the 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, even if his family members are not already lawfully resident in the territory of another Member State*[169]*»*. The Court invited states to prioritize the rights of non-EU family members rather than national immigration laws, because different parameters among Member States could have been discriminatory and contrary to the Treaty freedoms. The judgement caused a general discontent, because states were not willing to apply it, for example, this occurred in Denmark and in the UK. Here lies the problematic nature of secondary law, since the interpretation by states can lead to violations, albeit indiscriminate, of primary law[170].

Considering the freedom of movement of workers, some relevant guarantees are ensured by Regulation No 492/11[171], such as the equal treatment of workers. However, according to the Regulation, language skills can be requested by the employer in relation to the specific vacancies[172]. This may look like an indirect discrimination and, therefore, a limitation of the freedom of movement, but linguistic requirements are fundamental in determined professions, so, it is justified on grounds of public policy or public security. For example, mobile care workers

[169] Cfr. CJEU, Case C-127/08, *Blaise Baheten Metock and Others v Minister for Justice, Equality and Law Reform,* 25 July 2008, ECLI:EU:C:2008:449, point 64

[170] On this point, see A. LANSBERGEN, "Metock, Implementation of the Citizenship Rights Directive and lessons for EU Citizenship", *Journal of Social Welfare and Family Law*, Volume 31, Issue 3, 2009, pp. 285-297, pp. 290-295

[171] See *Regulation No 492/2011 on freedom of movement for workers within the Union,* 5 April 2011, *in Official Journal of the European Union,* L 141, 27 May 2011

[172] See *Ibid.* Article 3

need to speak the language of the host State, because they are in contact with patients[173].

The EU fully supports intra-mobility in the territory of the Union. In this respect, in 2014, the Parliament and Council enacted a Directive concerning posted workers[174] with the aim to prevent both work abuses and undeclared work.

On the relationship between the right to move freely and theories of a completely autonomous EU citizenship from the national one, freedom of movement represents one of the concerns. In facts, the derivative character of EU citizenship could cease only in the case of freedom of movement without any kind of limitations. So, the EU regime on the matter is not appropriate, because, especially residence depends on external factors, such as wealth or public security. The aim of this desired form of citizenship is also to eliminate some of the negative repercussion of the derivative nature of Union citizenship. For example, regarding residence rights, EU citizenship can be triggered by those, who have exercised their freedom of movement, because a cross-border situation is needed to this end[175].

Concerning freedom of movement and residence after Brexit, it can be freely exercised until 31 December 2020. Afterwards, persons, who are already residing in the United Kingdom can apply for residence until 30 June 2021. There are two statuses: pre-settled and settled residence, the latter will be acquired after five years[176].

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[173] On this point, see S. DE VRIES, E. IORATTI , E. PULICE, *Research paper (cross-task analysis): "The practical linguistic barriers faced by economically active EU citizens",* BEUCITIZEN, Barriers Towards EU Citizenship, 29 April 2017, pp. 59-60

[174] See *Directive 2018/957/EU amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of service,* 28 June 2018, *in Official Journal of the European Union,* L 173, 9 July 2018

[175] On this point, see J. LEPOUTRE, "A Dysfunctional Eurozenship? The question of free movement", *EUI Working Paper RSCAS*, Volume 24, 2019, p. 20 and R. BAUBÖCK, "The Three Levels of Citizenship within the European Union", *German Law Journal*, Volume 15, No 5, 2014, p. 758

[176] On this point, see CAMERA.it, "La Brexit e i negoziati sul futuro parteranariato tra l'UE e il Regno Unito", 2020, available at https://www.camera.it/temiap/documentazione/temi/pdf/1105600.pdf?_1585218079190, accessed on 25th July 2020

In my opinion, freedom of movement is the most important right linked to EU citizenship and we should never take it for granted. In this regard, Covid-19 has raised a new problem, because it put strain on the freedom of movement, since all the non-essential travels were forbidden.

4.3 Political rights and the *Delvigne* case

EU citizenship can be considered both a legal and political status. The former entitles individuals to enjoy civil and social rights, the latter, instead, guarantees the participation of citizens at a political level. On the one hand, the EU is based on a representative democracy. According to Article 10 TEU[177], citizens choose their representatives to the European Parliament, shaping in an indirect manner the European decision-making process. The same principle applies at local level for the elections of national parliaments[178]. The importance that citizens have in the political life of EU is underlined by the aforementioned Article at paragraph 3, which states: *«Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen[179]»*. On the other hand, democracy is participatory. In this respect, the climax of the participation of citizen is reached through the Citizens' Initiative, according to which, at least one million of citizens can submit a proposal to the European Commission for a legislative act[180]. The direct participation of the EU citizen in the decision-making process is not considered fundamental, nevertheless, the Citizens' Initiative wants to establish an even closer connection between citizens and institutions. Moreover, both Regulation 211/2011[181] and Regulation 2019/788[182] govern the matter in which this initiative is to be exercised. After the collection of signatures and the submission of the initiative to the Commission, this one analyzes it, only if it meets the requirements of at least one million of signatures. The

[177] See Article 10 Treaty on the European Union (TEU)
[178] For further information on voting rights, see *Infra* paragraph 2.5.1
[179] Cfr. *Supra* Note no 177
[180] See Article 11 Treaty on the European Union (TEU)
[181] See *Regulation No 211/2011 on the citizens' initiative,* 16 February 2011, *in Official Journal of the European Union*, L 65, 11 March 2011. Valid for initiatives prior to 1 January 2020
[182] See *Regulation No 788/2019 on the European Citizens' Initiative*, 17 April 2019, *in Official Journal of the European Union*, L 130, 17 May 2019

Commission, afterwards, decides whether the initiative can be accepted, the Commission's decision must be motivated and communicated to the signatories. If the Commission's feedback is positive, it goes to the Parliament, but not necessarily a successful initiative turns into a legislative proposal. The recent case *Puppinck and Others v Commission*[183] is emblematic in this sense. Mr *Puppinck* and the other organizers appealed the previous judgement of the European tribunal[184] and asked the CJEU to annul the Commission Communication[185], which refused to transform the *"One of us"* initiative into a legislative proposal. The Court stated that the Commission is totally free to decide whether a successful initiative should go further. However, this decision questions the rationale of citizens' initiative itself. Advocate General *Bobek* has clarified the nature of the initiative, stressing the importance of the creation of public debate, in facts, beyond the outcome, it represents a privileged channel for citizens, as it allows dialogue between individuals and institutions[186]. In facts, *«The ECI can be considered an important tool for the democratization of Europe to try to bridge the gap between institutions and European citizens*[187]*»*. Although the Court's decision and Advocate General *Bobek*'s opinion are, for sure, not in contrast with the law, commentators have argued that they are disrespectful of EU participatory democracy. In this way, citizens are not allowed to start the legislative process because of the Commission reluctance. So, the Citizens' Initiative is not a real right of initiative[188].

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183 See CJEU, Case C-418/18 P, *Patrick Grégor Puppinck and Others v Republic of Poland, European Commission, European Parliament, Council of the European Union, European Citizens' Initiative One of Us,* , 19 December 2019, ECLI:EU:C:2019:1113

184 See GENERAL COURT, Case T- 561/14, *European Citizens' Initiative One of Us v European Commission,* , 23 April 2018, ECLI:EU: T:2018:210

185 See EUROPEAN COMMISSION, *Communication from the Commission on the European Citizens' Initiative "One of Us",* 28 May 2014, COM (2014) 355 Final

186 See Opinion of Mr Advocate General Bobek delivered on 29 July 2019, *Puppinck and Others v. European Commission,* 29 July 2019

187 Cfr. S. SEUBERT, F. VAN WAARDEN *op. cit.,* p. 144

188 On this point, see EUROPEAN LAW BLOG, "Advocate General Bobek on One of us – Legal Clarity vs Political Debate", 2019, available at https://europeanlawblog.eu/2019/09/09/advocate-general-bobek-on-one-of-us-legal-clarity-vs-political-debate/, accessed on 27th May 2020, EUROPEAN LAW BLOG, "The European Citizens' Initiative: no real right of initiative but at least more significant than a petition to the Parliament?", 2020, available at https://europeanlawblog.eu/2020/02/05/the-european-citizens-initiative-no-real-right-of-initiative-but-at-least-more-significant-than-a-petition-to-the-parliament/, accessed on 27th May 2020 and EUROPEAN CENTRE FOR LAW AND JUSTICE, "Advocate General Opinion on One of Us:

Besides electoral rights and the Citizens' initiative, that are accessible only by citizens, Article 24 TFEU[189] disciplines other political rights enjoyed by residents, not only citizens. Firstly, the right to petition the Parliament is the archetype of the idea of participatory democracy. Article 227 TFEU[190] provides for the requisites needed in order to address a petition to the Parliament. The petition must regard both a field of activity of the Union and something, which affects, directly or indirectly, the persons presenting it. The process regarding the admissibility of the petition is more or less the same of the one regarding the citizen's initiative. In facts, it is examined by the Committee of Petitions, which controls if the petition respects the requisites needed. In the case the petition is not admissible, the Committee must give notice to the persons involved by a reasoned communication, which is challengeable. After the examination of the petitions, the Committee can request the Parliament President to send an opinion to anyone who can intervene on the subject matter of the petition, such as other EU institutions or national authorities. Although the right to petition represents a tool of direct democracy, poor results discourage its use[191]. Moreover, article 24 TFEU[192] disciplines the right to apply to the Ombudsman, that must be read in conjunction with Article 228 TFEU[193], which describes the role of the Ombudsman and how to refer to it. In facts, citizens can report complaints to the Ombudsman regarding the maladministration of EU institutions or other bodies. The role of the Ombudsman lies in making inquiries on the matters of complaints unless they are under legal proceedings, because it is an independent body and its activity must not be in contrast with the judiciary. If the Ombudsman finds out that there is an effective problem in the administration, he must refer to the institution accused, which can respond within three months. Other Ombudsman's duties are the submission of a report to the Parliament and the institutions involved and the communication of the inquiries results to the complaint author. The Ombudsman annually submits a report to the Parliament concerning its

Disappoint but not Surprising", 2019, available at https://eclj.org/eugenics/eu/advocate-generals-opinion-on-one-of-us-disappointing-but-not-surprising, accessed on 28th July 2020

[189] See *Supra* Note no 98

[190] See Article 227 Treaty on the Functioning of the European Union (TFEU)

[191] On this point, see C. MORVIDUCCI, op. cit., pp. 92-96

[192] See *Supra* Note no 108

[193] See Article 228 Treaty on the Functioning of the European Union (TFEU)

activity[194]. The Ombudsman can also initiate an inquiry *ex officio.* Its activity is unquestionable and cannot be challenged. According to scholars, the strength of the Ombudsman lies in its contribution to democracy. Moreover, its complex nature, because it is not an institution, enhances its credibility[195]. Furthermore, the European Tribunal in *Associazioni delle cantine sociali venete* reminded that the Ombudsman cannot be considered an institution in light of the Treaties provisions[196]. The last right enshrined in Article 24 TFEU[197] regards the right to address the EU institutions in any of the Union official languages.

Back to the political dimension of citizenship, it should be pointed out that citizenship comes from the Greek *polis* and the Roman *civitas*, where citizens were an active part of the political life of cities at the time, which could be considered as the modern States[198]. However, to what extent is it possible to talk about an EU political citizenship? *Delvigne*[199] represents a case where political citizenship can be found. The case regarded a French citizen who was deprived of his voting rights for the European Parliament elections under a national law, because he had committed homicide, he asked the Court whether this decision conflicted with Article 39[200] and 49 CFR[201]. The former Article regarded the right to vote and be elected in European Parliament, the latter, instead, was about the principle of proportionality and legality of criminal offences and penalties. The Court considered the matter within the scope of EU law, so Article 51(1)[202] CFR applies. The article states that the Charter can be invoked only in cases of EU law implementation by Member States. The Court established that the matter fell within the scope of EU law, because the Parliament was elected by direct and universal

[194] See *Decision of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (94/262/ECSC, EC, Euratom)*
[195] On this point, see T. BINDER, F. VAN WAARDEN, M. INGLESE, *The European Ombudsman: democratic empowerment or democratic deficit*?, *Report "Experiences with the European Ombudsman",* BEUCITIZEN, Barriers Towards EU Citizenship, 10 April 2017, pp. 46-48
[196] See GENERAL COURT, Case T-103/99, *Associazione delle cantine sociali venete v European Ombudsman and European Parliament,* 22 May 2000, ECLI:EU:T:2000:135, point 46
[197] See *Supra* Note no 108
[198] On this point, see E. TRIGGIANI, *op. cit.*, 2006, p. 439
[199] See CJEU, Case C-650/13, *Thierry Delvigne v Commune de Lesparre Médoc and Préfet de la Gironde,* 6 October 2015 ECLI:EU:C:2015:648
[200] See Article 39 Charter of Fundamental Rights of the European Union (CFR)
[201] See Article 49 Charter of Fundamental Rights of the European Union (CFR)
[202] See Article 51 Charter of Fundamental Rights of the European Union (CFR)

suffrage. Here lies the revolutionary novelty of the judgement in the link with the universal suffrage. However, national laws on the deprivation of electoral rights for felonies were deemed proportionate. For the first time, the Court recognized the autonomy of voting rights, giving Union citizenship a political dimension where the individual, as in the classic examples of *polis* and *civitas,* can participate to the EU political life. This judgement is fundamental in the constitutional asset of the EU because it has enriched it by transforming voting rights in subjective rights, which can be exercised by both static and dynamic citizens[203].

Even though the political dimension of citizenship has been considered underdeveloped or at least developing, in my opinion, the catalogue of political rights attributed to citizens, either mobile or not, is overall wide. Step by step, the EU is trying to be as close as possible to citizens in order to allow them to participate to the political life. The post-*Delvigne* subjectivity of voting rights represents a remarkable two-folded achievement: for the EU law in terms of constitutional system and for us, as EU citizens.

5. The fundamental thesis of US citizenship

Considering the previous overview on the EU citizen status, I will focus on the American experience in the following paragraphs. I have chosen to compare the two legal orders, because Union citizenship has a contested nature and, for certain aspects, it can be considered federal, as some scholars have argued[204].

Regarding their evolutions, the Union citizenship was an accomplishment of a major project: superseding the economic dimension of the Communities and

[203] On this point, see H. VAN EIJKEN, J. W. VAN ROSSEM, "Prisoner disenfranchisement and the right to vote in elections to the European Parliament: Universal suffrage key to unlocking political citizenship?: Court of Justice of the European Union Case C-650/13, request for a preliminary ruling from the tribunal d'instance de Bordeaux, made by decision of 7 November 2013, in the proceedings in Thierry Delvigne v. Commune de Lesparre-Médoc and Préfet de la Gironde, 6 October 2015, ECLI:EU:C:2015:648", *European Constitutional Law Review*, Volume 12, Issue 1, 2016, pp. 123-128, N. LAZZERINI, "Brevi considerazioni sulla prima sentenza della Corte di Giustizia in tema di 'disenfranchisement'", *Osservatoriosullefonti.it*, Booklet 3, 2015, pp. 3-4 and EUROPEAN LAW BLOG, "Case C-650/13 Delvigne – A Political Citizenship?", 2015, available at https://europeanlawblog.eu/2015/10/21/case-c-65015-delvigne-a-political-citizens_hip/, accessed on 10th June 2020

[204] On this point, see *Infra* 2.2.1

realizing better cooperation among States through the Treaty of Maastricht. The US citizenship, instead, was born for another purpose: independence. In facts, it was also conceived to create a national identity with the aim of eliminating all the ties with the British Empire for good. Nowadays the two citizenship are different, because US citizenship is not derivative. Nevertheless, a derivative citizenship could be found in the archetypes of some federal States, such as the US and Germany. In particular, Switzerland still uses this kind of citizenship, which derives from the citizenship of the Canton[205]. On the contrary, the current state and federal citizenship are independent, while being a national of a Member state is a precondition to be a Union citizen. Moreover, the derivative character of EU citizenship has been the object of scholarly and jurisprudential debates. Another difference consists in the fact that all citizens of a Member State were European citizens, meanwhile, in the US history, some ethnic groups, such as blacks, Indians, Puerto Ricans and also other minorities, like slaves, were excluded from American citizenship. The situation changed after the Fourteenth Amendment[206], which established birth-right citizenship.

Finally, in the field of rights, both legal orders present quite similar scenarios. In relation to the rights analyzed in this dissertation, freedom of movement is recognized as the core of citizenship rights in both the EU and US, in facts, it is well-protected and guaranteed, especially in relation to the free movement of workers and the right to reside freely. In my opinion, political rights, especially participatory democracy tools, are better protected under EU law, because in the US such matters are regulated under state laws, so the legal framework is fragmentated and it can easily lead to a restriction of these rights. In particular, the EU established these direct democracy instruments to be as close as possible to citizens. Furthermore, duties for EU citizens are not expressly mentioned under the law, US citizens, instead, have duties, however, EU citizens have some responsibilities toward the Union.

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[205] See R. BAUBÖCK, *op. cit.,* 2014, p. 757. For a comparative analysis between the EU and Switzerland, see M. FERRÌN, F. CHENEVAL, *Report on "Switzerland: A future model for the European Union? Similarities and differences",* BEUCITIZEN, Barriers Towards EU Citizenship, 2016

[206] See *Supra* Note no 9

6. Brief history of US citizenship

The struggle for independence in the US started when English arrived in the so-called New World, establishing a colonial empire. Since that, the road, not to citizenship, but to independence was tortuous and full of disputes with the English governors, one of the many examples was the Boston Tea Party in 1173, where the legendary statement: *"No taxation without representation"* was pronounced for the first time. At the very beginning of colonialism, the idea of naturalization or detonization started to take hold, especially within foreigners' settlers, for these ones, naturalization was needed in order to become subjects to the British empire and have rights, such as rights on lands. After the Independence War, finally, in 1776 the Declaration of Independence[207] was promulgated, where newly born Americans contested the British practice of hindering foreigners' naturalizations.

So, immigrations laws and naturalization became some of the biggest concerns of the brand-new government. However, at the time of the nascent independent America, citizenship was linked to the word allegiance, allegiance from Britain, which was eliminated through the reach of independence. Citizenship was acquired by consent, which was not an expressed consent, but the sole residence meant the will to be an American citizen. In the 1777 Articles of Confederation, the word citizen appeared for the first time[208]. For this reason, it was considered as the first thing resembling modern US citizenship. Some privileges and immunities were attached to this embryonic form of citizenship, such as the right to property and the right to address the Court for property matters. In the Articles of Confederation, citizenship referred to state law and the citizenship rights were granted to state citizens, even if the proper definition of state citizen was not given. In almost every State, except Massachusetts, persons who wanted to acquire citizenship must pass a test on republican values, which is, somehow, similar to the current naturalization test and interview[209]. 1789 was a turning point in the US citizenship history, because

[207] See Declaration of Independence, 4 July 1776

[208] See Article 4 Articles of Confederation, 15 November 1777

[209] For further information on the naturalization test and interview, see: US CITIZENSHIP AND IMMIGRATION SERVICES, "The Naturalization Interview and Test", 2020, available at https://www.uscis.gov/citizenship/learn-about-citizenship/the-naturalization-interview-and-test, accessed on 30th July 2020

the 1789 US Constitution claimed the emergence of a uniform rule of naturalization[210]. Moreover, in the same year, the Bill of Rights[211] introduced fundamental rights. With the Privileges and Immunities Clause[212], rights were granted to citizens in every state, even if the rule referred only to free whites. However, the protection of these rights was not guaranteed equally in all states. The Naturalization Act of 1790[213] established a uniform rule to acquire citizenship for all the persons in the US, it applied, again, only to free whites[214].

Courts discussed the nature of this dual citizenship and the dilemma was which citizenship was acquired first by the citizen. In this respect, the Court stated that the federal citizenship entitled the citizen to the state one. Furthermore, in 1861 the Confederate Constitution[215] was ratified, it resembled the US Constitution[216], however, it focused on states' rights, especially dealt with slaves and their impossibility to acquire citizenship. Slavery ended in 1868 with the Thirteen Amendment[217], even if it did not permit former slaves to enjoy the whole catalogue of rights reserved to citizens[218].

Finally, in 1868, the Fourteenth Amendment of the Constitution[219] introduced the Citizenship Clause, which established federal citizenship. In this respect, everyone born or naturalized in the US was a citizen of the US, regardless of his place of residence. The above-mentioned Amendment was of remarkable importance because it started the enfranchisement of blacks, even if Southern states were reluctant on the matter. The Fifteenth Amendment[220], which established the non-discrimination principle on grounds of race for voting rights, was ratified, in 1870.

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[210] See *Supra* Note no 7
[211] See Bill of Rights, 25 September 1789
[212] See Privileges and Immunities Clause, Article 4, Section 2, US Constitution, 17 September 1787
[213] See *Supra* Note no 8
[214] On this point, see J. B. BIERBACH, *op. cit.*, pp. 69-99
[215] See Confederate States Constitution, 11 March 1861
[216] See US Constitution, 17 September 1787
[217] See Thirteen Amendment to the Constitution, 31 January 1865
[218] On this point, see NATIONAL CONSTITUTION CENTER, "On this day the Confederate Constitution is approved", 2020, available at https://constitutioncenter.org/blog/looking-back-at-the-confederate-constitution, accessed on 31st July 2020
[219] See *Supra* Note no 9
[220] See Fifteenth Amendment to the Constitution, 3 February 1870

Race has been always an issue in the development of US citizenship, for example Chinese people were excluded from immigration[221]. Nonetheless, a great achievement was reached though the judgement *Wong Kim Ark*[222], where the rule of *ius soli* was extended to all the persons born in the US, independently from their racial or ethnic origins. US citizenship was also extended to Puerto Ricans[223] and Native Americans[224]. Another important step toward the elimination of racial segregation was the 1964 Civil Rights Act[225], which banned discrimination based on race in both private and public services sectors. In 1952 the Immigration and Nationality Act[226] abolished racial requirements for immigration or naturalization, which was amended in 2001 by the USA PATRIOT Act[227], stating that terrorists could not be suitable for naturalization. Regarding the most recent immigration history, the *Obama* administration, considering that the DREAM Act[228] did not pass, created the Deferred Action for Childhood Arrivals Program (DACA), which postponed deportation for immigrants brought to America as minors[229]. Lastly, the *Trump* administration seemed to step back with the travel ban[230], which prohibited nationals of specific country, such as Iran, Yemen, Syria to travel to the States.

US citizenship history is certainly fragmented and tortuous. However, it is very clear that immigration, race, ethnicity has been and still are issues in the country, in facts, they represent problems that are not solved yet. Nonetheless, it is undeniable that America was and is a nation of immigrants.

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[221] See Chinese Exclusion Act, 6 May 1882

[222] See US SUPREME COURT, *United States v. Wong Kim Ark*, 28 March 1898

[223] See Jones-Shafroth Act, 2 March 1917

[224] See Indian Citizenship Act, 2 June 1924

[225] See Civil Rights Act, first outlined in 1870, amended in 1957, 1960 and 1964

[226] See Immigration and Nationality Act, 25 April 1952

[227] See USA PATRIOT Act, 26 October 2001

[228] See Development, Relief and Education for Alien Minors Act, known as the DREAM Act, first introduced in the Senate in August 2001 (did not pass)

[229] On this point, see FACTCHECK.ORG, "The Facts on DACA", 2018, available at https://www.factcheck.org/2018/01/the-facts-on-daca/, accessed on 31st July 2020

[230] See Muslim Ban, Executive Order No 13769, 27 January 2017, Protecting the Nation from Terrorist Entry into the United States, Executive Order No 137680, 6 March 2017 and Protecting the Nation from Terrorist Entry into the United States, Presidential Proclamation No 9723, 10 April 2018

6.1 The colonial period and the Declaration of Independence

When English arrived in the US, they brought with them their ideas of citizenship and allegiance, acquired by birth. Regarding English citizenship laws, citizenship could be acquired by naturalization, conquest or denization[231]. Meanwhile naturalized people enjoyed the status of English citizens, individuals became subjects of the Crown through the conquest method. Besides those domestic laws, in 1740 the first relevant legislation for colonies was enacted. In facts, individuals born outside England could become citizens after seven continuous years of residence in one of the colonies, however, the concept of allegiance to the kingdom was still present and well-respected. Naturalization occurred in the same ways in the colonies, too. Nevertheless, Americans could not take any decisions regarding citizenship, only England was competent on the matter. Rights acquired in the colonies could be exercised only in those territories and not in England[232].

The situation changed with the Declaration of Independence in 1776[233], when Americans deemed that having fought against Britain for independence was enough in order to acquire citizenship. Needless to say, all the naturalization laws at the time, which slightly differed from state to state, were applicable only to free white citizens. The Constitution[234] called on states to establish a uniform rule for naturalization. Nevertheless, The Privileges and Immunities Clause[235], also known as the Comity Clause, introduced the first vertical element of US citizenship, because a small portion of competence in regulating the ownership of citizenship rights could be devolved to other states authorities. At the time, the state dimension of citizenship was predominant, however, an idea of something bigger started to

[231] Denization was a method to acquire citizenship, granted by the monarch trough letters patent
[232]On this point, see A. H. CARPENTER, "Naturalization in England and American Colonies", *American Historical Review*, Volume 9, No 4, 1904, pp. 290-297
[233] See *Supra* note no 197
[234] See *Supra* note no 7
[235] See *Supra* note no 202

take hold. In the 1790 Naturalization Act[236] introduced the so longed for naturalization uniform rule[237].

In my opinion, a common line can be found in the early American history and in the European one. In facts, in both situations, states were reluctant in giving up a piece of their sovereignty.

6.2 Native Americans, slaves and free blacks

Before the Civil war, Native Americans were immediately left out from the citizenship apparatus, mainly because of previous diatribes with the US government. After the independence, Americans had the power to rule over Indians, which was also evoked in the Articles of Confederation[238]. The main reason why they could not acquire citizenship was their division in tribes, in facts, as members of tribes, they could not fall within US jurisdiction. The exclusion of Native Americans was legally justifiable because the tribes were considered states, so Indians were aliens. They became US citizens in 1924[239].

The status of blacks was more complex because their exclusion from citizenship was linked to prejudice and cultural factors. Regarding slaves, around 1830, Southern States excluded them from every privilege linked to citizenship, whilst Northern States started to attribute them some rights. A justification of such treatment, not accepted neither by all courts nor by all states, lied in the fact that slaves were property. Concerning the free blacks' status, according to the law, they could acquire citizenship by birthright, although they were often considered not eligible for naturalization. Both Southern and Northern States harshly discussed on their status, without reaching a compromise. Moreover, the Congress did not find a solution either, it was an issue also during the Civil War. In the end, the status of free blacks was considered intermediate, because they were not aliens, but they

[236] See *Supra* Note no 8
[237] See J. H. KETTNER, *The Development of American Citizenship, 1608-1870*, The University of North Carolina Press, Chapel Hill, N. C., 2014, pp. 213-231
[238] See Articles of Confederation, 15 November 1777
[239] See *Supra* Note no 224

could not be considered citizens in light of the racist laws in force at the time. Persons with African descents could acquire citizenship after 1870[240].

In my opinion, the issue regarding both the status of Native Americans and people of color represented a dangerous politics in the early US history, whose repercussions can be found today in the modern American society, especially in relation to black people. In 1952 race was not a barrier anymore in order to acquire citizenship[241], but is citizenship enough?

7. The Fourteenth Amendment Citizenship Clause

The Fourteenth Amendment[242] was first thought as a way to replace the *Dred Scott*[243] judgement, which negated the possibility of birthright citizenship for persons with African origins, and as an expedient to the exclusion of Indians' citizenship. However, the Framers did not achieve any of those purposes, because the Amendment only established birthright citizenship[244].

In 1868, the US Congress adopted the Fourteenth Amendment[245], which enshrined the Citizenship Clause at Section 1. Section 1 states: *«All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws*[246]*»*.

From the first sentence of the clause, it can be noted that US citizenship is exactly the opposite of EU citizenship. Meanwhile EU citizenship depends on the

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[240] On this point, see J. H. KETTNER, *op. cit.*, pp. 300-319
[241] See *Supra* Note no 226
[242] See *Supra* Note no 9
[243] See US SUPREME COURT, *Dred Scott v. Sandford*, 6 March 1857
[244] On this point, see R. M. SMITH, "Birthright Citizenship and the Fourteenth Amendment in 1868 and 2008", *Journal of Constitutional Law*, Volume 11, Issue 5, 2009, p. 1329
[245] See *Supra* Note no 9
[246] Cfr. *Ibid.*, Section 1

nationality of a Member State, US Citizenship does not entail state citizenship. The other clauses that can be found in Section 1 of the Fourteenth Amendment are: the Privileges or Immunity Clause, which guarantees rights to citizens, then both the Due Process Clause and the Equality Clause apply to individuals, they do not need to be citizens[247].

However, it was only after the *Wong Kim Ark*[248] judgement that birthright citizenship applied to legal aliens' children, in facts, the fate of undocumented aliens' children was not even mentioned by the Court. The issue of the undocumented aliens remained unsolved. Today, the approach is a strict reliance to Citizenship Clause, which grant citizenship to all the people born in America, whether their parents are legal or illegal immigrants[249].

Citizenship Clause represented a fundamental step in US history, because it eliminated racial or ethnic discrimination in the acquisition of citizenship. Moreover, in my opinion, birthright citizenship is one of the strengths of the US, because it contributes to American multiculturalism and multiethnicity.

1.5.1 The status of Puerto Ricans

According to the doctrine of incorporation, Puerto Ricans were not US citizens, because they were born outside the US soil, in an uncorporated territory. However, in 1900 the Foraker Act[250] established that Puerto Ricans were thus obliged to respect federal laws, but they kept the status of Puerto Rico citizens. The doctrine of incorporation was formulated by Justice *White* in *Downes v. Bidwell*[251]. According to this doctrine, Puerto Rico did not have the same constitutional status of the United States, because it was unincorporated. So, Puerto Rico was not US territory in the sense of Citizenship Clause. The doctrine of incorporation camouflaged the desire to not recognize Puerto Ricans as US citizens, because they

[247] On this point, see J. B. BIERBACH, *op. cit.*, pp. 156-157 and R. A. EPSTEIN, *The Classical Liberal Constitution: The Uncertain Quest for Limited Government*, Harvard University Press, Cambridge, MA, 2014, p. 545
[248] See *Supra* Note no 222
[249] On this point, see R. M. SMITH, *op. cit.*, pp. 1331-1334
[250] See Foraker Act, 12 April 1900
[251] See US SUPREME COURT, *Downes v. Bidwell*, 27 May 1901

were considered first of all inferior and, as Hispanics, could have disfigured the Anglo-Saxon component of America. In 1917 with the Jones-Shafroth Act[252], Puerto Ricans became US citizens. Even after 1917, discussions on Puerto Ricans status continued, due to different interpretations of the word "United States" in light of the Constitution[253]. In the end, *ius soli*, as codified in 1866, entitled Puerto Ricans to be American citizens, because Puerto Rico fell within the US jurisdiction[254].

To conclude, the case of Puerto Rico was complex, too. The situation reflected the racial segregation policies of the time. In fact, also for the Puerto Ricans, like for the Native Americans and the negroes, any loopholes were sought with the purpose of not affecting the *"purity"* of American citizenship.

8. Rights of US citizens

The rights of US citizens are provided under the Constitution[255] or may be incorporated by courts. However, American citizens enjoy a wide set of rights, that are considered fundamental and political rights. Beyond voting rights, the most important rights are the right to travel and to employment.

Regarding the right to have privileges and immunities, the two Clauses must be examined. On the one hand, the Privileges and Immunities Clause of Article 4[256], also known as the Comity Clause, allows citizens of a state to enjoy the same privileges and immunities in all the states. On the other hand, The Privileges or Immunities Clause of the Fourteenth Amendment[257], prohibits states to obstacle the protection of privileges and immunities of US citizens. However, which are these privileges and immunities? Justice *Bushrod Washington* in *Corfied v. Coryell*[258] included in the privileges and immunities all the fundamental rights enjoyable by citizens. The rights of the Clauses can be deemed unenumerated according to the

[252] See *Supra* Note no 223
[253] See *Supra* Note no 216
[254] On this point, see L. M. PEREZ, "Citizenship Denied: The Insular Cases and the Fourteenth Amendment", *Virginia Law Review*, Volume 94, 2008, pp. 1029-1060
[255] See *Supra* Note no 216
[256] See *Supra* Note no 208
[257] See *Supra* Note no 9
[258] See US SUPREME COURT, *Corfied v. Coryell*, 1823

given interpretation of the text. Furthermore, the Nine[259] and Tenth Amendment[260] also refer to unenumerated rights[261].

Moreover, US citizens enjoy the right to citizenship, established by the Citizenship Clause, which introduced the *ius soli* rule. Citizens cannot be arbitrarily deprived of their status. Nonetheless, citizenship can be lost by expatriation, which indicates the renounce from the citizen himself, because revocation of citizenship by the State seem to be prohibited under the Clause. The intent to give up US citizenship can be shown through *facta concludentia*, such as running for public office or joining the military service in another State under specific circumstances, acquiring another Country's citizenship and therefore, deciding to not have dual nationality and acts of treason against the US. Moreover, in 2010, The Terrorist Expatriation Act[262] added engaging in a foreign terrorist activity to the list of the expatriating *facta concludentia.* The issue whether these acts demonstrated the actual will of one's to renounce to his citizenship has been discussed between scholars and in courts as well[263]. Moreover, the State must protect the citizens right to live freely in the sense that the State is not allowed to murder citizens, however, the guarantee of this right seems a paradox to me, because capital punishment is still in force in some American states.

In conclusion, the right to privileges and immunities and the right to citizenship are two general clauses, that can be defined as rights to have rights, as they open the doors to a wide range of guarantees reserved to citizens.

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[259] See Ninth Amendment to the Constitution, 15 December 1791. Full text: *"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."*

[260] See Tenth Amendment to the Constitution, 15 December 1791. Full text: *"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."*

[261] On this point, see R. SOBEL, *Citizenship as a Foundation of Rights: Meaning for America*, Cambridge University Press, Cambridge, 2016, pp. 28-29 and LAW & LIBERTY, "The Unenumerated Rights of the Privileges or Immunities Clause", 2019, available at https://lawliberty.org/the-unenumerated-rights-of-the-privileges-or-immunities-clause/, accessed on 3rd August 2020

[262] See Terrorist Expatriation Act, 5 June 2010

[263] On this point, see A. MACKLIN, "Citizenship Revocation, the Privilege to have rights and the Production of the Alien", *Queen's Law Journal,* Volume 40, Issue 1, 2014, pp. 18-20 and USA GOVERNMENT, *"Renounce or Lose Your US Citizenship",* 2020, available at https://www.usa.gov/renounce-lose-citizenship, accessed on 3rd August 2020

8.1 Freedom of movement and right to work

Freedom of movement has been inherited from American history, as the state was born from the migratory flows of British settlers. The right to move freely includes three rights: the right to leave the country, the right to travel freely and the right to reside in a place different from one's hometown. Furthermore, citizens enjoy the right to enter, leave and reenter the country and the right to freely travel within the US territory from state to state[264]. Freedom of movement can be included in those privileges or immunities reserved to citizens according to the Fourteenth Amendment[265], which leaves open the catalogue of citizens' rights, including this freedom. Regarding the right to travel outside the US, it is not expressly mentioned in the Constitution[266], however, it can be one of the enumerated rights or it can be implemented trough other fundamental rights. However, in *Shachtman*[267] the right to travel abroad was considered a natural right. Nevertheless, we can distinguish between freedom of travel interpreted as one of the liberties of the Fifth Amendment[268], which cannot be infringed without due process of law, and right to travel as incorporated in the First Amendment[269], which can encompass the right to travel only indirectly, since a violation of this right can undermine the freedom of speech, protected by the latter amendment. So, there was a common trend in case-law to recognize the freedom of travel as a fundamental right, so passport denials

[264] For further information on the right to interstate travel, see *Infra* paragraph 2.4.2
[265] See *Supra* Note no 9
[266] See *Supra* Note no 216
[267] See US COURT OF APPEALS DISTRICT OF COLUMBIA CIRCUIT, *Shachtman v. Dulles*, 23 June 1955
[268] See Fifth Amendment to the Constitution, 15 December 1791. Full text: *"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."*
[269] See First Amendment to the Constitution, 15 December 1791. Full text: *"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances*"

occurred in the 1950s were deemed unconstitutional, because contrary to the Fifth Amendment[270], if they could not be justified on grounds of public security[271].

Concerning the right to work, it can also be included in citizens' privileges and immunities in light of their extensive interpretation. The intersection between citizenship and right to employment can be found in the fact that an individual must not demonstrate to be an American citizen in order to work in the US. Identification in work-related subjects can be requested only if the person is suspected to be engaged in criminal activities. The issue of identification arose in 1986, when the Immigration Reform and Control Act[272] requested identification for job purposes. In particular, this provision declassified citizenship rights. Moreover, *E-verify*, the new digital identification database of the Department of Homeland Security, is considered dangerous for citizenship itself, because work becomes a privilege, not accessible to all citizens. So, since the right to employment is fundamental, it should not be limited by identification regimes[273]. Moreover, 1964 Civil Rights Act[274] forbids labor discrimination.

Both right to travel and right to work should be considered fundamental rights of citizens, even if they are not expressly mentioned in the Constitution. In my opinion, travelling and working are a great part of our lives today and their safeguarding should not be separated from the protection of citizenship itself.

8.2 Political rights

Political rights of US citizens include voting rights[275] and running for office. Most of political rights are exclusively reserved to citizens. For example, only a natural born citizen can become President of the United States of America[276] and

[270] See *Supra* Note no 268
[271] On this point, see S. E. STEINBACH, "Constitutional Protection for Freedom of Movement: A time for decision", *Kentucky Law Journal*, Volume 57, Issue 3, 1969, pp. 421-437 and R. M. JOHNSON, "Passport Denial and the Freedom to Travel", *William & Mary Law Review*, Volume 2, Issue 1, 1959, pp. 266-274
[272] See Immigration Reform and Control Act, 6 November 1986
[273] On this point, see R. SOBEL, *op. cit.*, pp. 59-71
[274] See *Supra* Note no 225
[275] For further information on voting rights, see *Infra* paragraph 2.5.2
[276] See Article 2, Section 1, Clause 5, US Constitution, 17 September 1787

Representatives[277] and Senators[278] must be citizens too. Citizenship is also a requirement for voting in national elections[279]. Although the US is a representative democracy, so voting should be enough in order to engage in political participation, there are means of participatory democracy available to citizens. In facts, they have several chances to take part in the American political life, which are codified under the Constitution[280] and the Bill of Rights[281] as citizens' rights. Beyond voting, some of these rights are protesting, petitioning, being a member of a jury[282], joining an electoral campaign as a volunteer, being a party member, submitting an initiative and so on[283]. The use of means of participatory democracy is quite popular in the US. In this respect, a 2018 survey find out that 67% of the population had exercised one or more of the above-mentioned political rights in the previous five years[284].

Being a citizen means being part of a community, so, political rights are more than privileges, because they are a unique opportunity for citizens to participate and decide for democracy, affecting their own future, too.

8.3 Duties and benefits

Differently from the EU scenario, duties of US citizens are explicitly codified, and they are: jury and military duties and the obligation to pay federal taxes. The jury duty means serving on a grand or petit jury. However, in a certain sense, serving on jury might be considered a right and not a duty, because it allows citizens to access to court, but not as parties of the proceedings. Serving in the army is no longer mandatory, because now soldiers are all volunteers. However, it was considered a duty before[285].

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[277] See Article 1, Section 2, Clause 2, US Constitution, 17 September 1787
[278] See Article 1, Section 3, Clause 3, US Constitution, 17 September 1787
[279] See Article 1, Section 2, Clause 1, US Constitution, 17 September 1787
[280] See *Supra* Note no 216
[281] See *Supra* Note no 211
[282] On this point, see *Infra* 1.8.3
[283] On this point, see R. SOBEL, *op. cit.*, p. 26 and LUMEN, "Political Participation: the People Take Action", available at https://courses.lumenlearning.com/americangovernment/chapter/introduction-7/, accessed on 6th August 2020
[284] On this point, see PEW RESEARCH CENTER, "Political Engagement, Knowledge and the Midterms", 2018, available at https://www.pewresearch.org/politics/2018/04/26/10-political-engagement-knowledge-and-the-midterms/, accessed on 6th August 2020
[285] On this point, see R. SOBEL, *op. cit.*, p. 34

Considering that citizenship is, in the first place, a privilege, citizens are entitled to some benefits, such as consular protection abroad, protection from deportation, the transferal of US citizenship to children born in another country and the possibility to sponsor relatives who want to move to the US. The main aim of diplomats abroad is to protect and help their compatriots, so, it strongly connected to the right to travel. In facts, an individual, who exercises his right to travel, can enjoy consular protection. Furthermore, citizens cannot be deported, following a unilateral order by the government. Since *ius soli* is the rule for acquisition of citizenship in the US, children born abroad from American parents are US citizens and they can also be brought back to the States. Finally, foreigners, who are related to US citizens can apply and obtain visas more easily[286].

Citizenship status is polyhedral, because it is a source of rights, privileges, every kind of benefits and advantages, however, its improper use may also create discriminations.

9. First appraisal

The previous analysis demonstrated the *sui generis* nature of EU citizenship, which cannot be summarized as only derivative, this characterization can be easily denoted from its evolution, especially in the presence of *de facto* citizenship, based on the Community's economic sphere, which had been superseded thanks to the political process that led to the Treaty of Maastricht. In facts, Union citizenship represents the accomplishment of a project, of a dream, where all European citizens are equal, defending the same exact rights. It is more than one citizenship, it is two citizenships: the national and the European, both interrelated and strongly connected. In this regard, Advocate General *Poiares Maduro* wisely stated in *Rottman*: *«[T]hat is the miracle of Union citizenship: it strengthens the ties between us and our States (in so far as we are European citizens precisely because we are nationals of our States) and, at the same time, it emancipates us from them (in so far as we are now citizens beyond States)*[287]*»*. Nonetheless, US citizenship represents the achievement of independence from the British Crown. So, it can be

[286] On this point, see R. SOBEL, *op. cit.*, pp. 31-35
[287] Cfr. *Supra* Note no 51, point 23

easily denoted that the two evolution are profoundly different, not only from an historical perspective, but also in terms of ideas and purposes, because Union citizenship was born to enhance cooperation among States, US citizenship was born to recognize Americans as citizen of a new Nation without being subjects of Britain. Regarding the idea of equality between EU citizens, it could not be transposed in the early US experience, because racism was widespread at the time, so significant parts of the population were excluded from citizenship, such as blacks and slaves. In the US history, we can talk of equality only after the enactment of the Citizenship Clause under the Fourteenth amendment[288], which established *ius soli*. Concerning the further developments of citizenship, in my opinion, the states were reluctant to give up their sovereignty in both experiences.

In relation to the nature of EU citizenship under the letter of the Treaties, it is for sure derivative since nationality of a Member State is the only requisite to be an EU citizen. Oppositely, US citizenship is no longer derivative. However, Union citizenship is multifaceted, because it indirectly reflects the complexities and the theoretical issues of the Union itself. In particular, the additional character can be justified by the fact that Union is not a single State, but a collection of them[289], or rather *«a creature of contracting States[290]»*. For this reason, a pure autonomous citizenship cannot be found. The Union is always going to be dependent from its Member States, regardless of the nature of EU citizenship. Finally, the character of citizenship is not relevant for the purposes of this dissertation, because, in my opinion, the wonder of the EU citizenship is the right to equal treatment between nationals of different Member States, but citizens of the Union.

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[288] See *Supra* Note no 9

[289]Some scholars believed that the Union was State, others an international organization. Then, they also discussed about the type of organization of the EU: international, intergovernmental, supranational, federal. On this point, see R. J. GOEBEL, "Supranational? Federal? Intergovernmental? The Governmental Structure of the European Union After the Treaty of Lisbon", *Columbia Journal of European Law,* Volume 20, No 1, 2013, pp. 81-86, F. A. N. J. GOUDAPPEL, E. M. H. HIRSH BALLIN (ed.), *Democracy and The Rule of Law in the European Union: Essays in Honour of Jaap W. de Zwaan,* T. M. C. Asser Press, The Hague, 2016, pp. 81-90 and M. AVBELJ, "Theorizing Sovereignty and European Integration", *Ratio Juris,* Volume 27, No 3, 2014, pp. 349-350

[290] Quoted in D. KOSTAKOPOULOU, "EU Citizenship Enigma Variations, Mushrooming Historical Time and Emancipation", *EUI Working Paper RSCAS,* Volume 24, 2019, p.43

Citizens enjoy a wide acquis of rights in both legal orders. Nonetheless, I want to enhance the importance of freedom of movement. In facts, freedom of movement is the most valuable thing we have as European citizens and it should be defended at all costs. In particular, Covid-19 taught us a lesson. Considering the non-essential travel restrictions[291], labor mobility is at stake and we should never underestimate its worth. Intra-EU labor mobility was designed to fill some gaps in national economies, given the supranational dimension of the Union. In facts, some sectors have been damaged more than others: agriculture or even the health care system itself, due to the lack of care workers in some States, even though the Commission has not imposed any limitation to the free-movement of health professionals and para-medicals[292]. The same considerations on the pandemic can be extended to the case of the US, where the right to travel is fundamental and workers' mobility among states is a common phenomenon, encouraged by the lack of linguistic barriers. Moreover, the right of free movement is constantly attacked by right-wing populist parties, that aim to establish the welfare state model[293].

Being a citizen means also being a member of a community and being able to participate to the political life. In this sense, EU primary law provides for a comprehensive set of rules, that discipline the instruments of participatory democracy to guarantee a dialogue between citizens and the institutions. Those instruments have been criticized for their poor effectiveness. In my opinion, the sole fact that a citizen can trigger the public debate is huge victory for democracy, because citizens have the possibility to be heard. Unfortunately, in the US, such rights can be undermined by federalism, since states regulate them, so their exercise in not uniform among the nation.

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[291] See EUROPEAN COMMISSION, *Communication from the Commission COVID-19 Guidance on the implementation of the temporary restriction on non-essential travel to the EU, on the facilitation of transit arrangements for the repatriation of EU citizens, and on the effects on visa policy, in Official Journal of the European Union,* C 102 I/02, 30 March 2020

[292]See EUROPEAN COMMISSION, *Communication from the Commission Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak, in Official Journal of the European Union,* C 102 I/03, 30 March 2020. On this point, see MIGRATION POLICY INSTUTE, "Under Lockdown Amid COVID-19 Pandemic, Europe Feels the Pinch from Slowed Intra-EU Labor Mobility", 2020, available at https://www.migrationpolicy.org/article/covid19-europe-feels-pinch-slowed-intra-eu-labor-mobility, accessed on 19th May 2020

[293] On this point, see M. FERRERA "The Contentious Politics of Hospitality: Intra EU-Mobility and Social Rights", *European Law Journal,* Volume 22, Issue 6, 2016, pp. 799-800

As anticipated *supra*, Union citizenship has some federal features. Federalism can be a double-edged sword in the protection of rights, in the sense that it can enhance their safeguard or undermine it. In this next chapter, the connection between citizenship and federalism and their repercussions on rights will be critically analyzed.

CHAPTER II

A COMPARATIVE ANALYSIS OF THE CONNECTION BETWEEN FEDERALISM AND CITIZENSHIP IN THE EU AND IN THE US

SUMMARY: 1. Preliminary remarks - 2. The concept of federal citizenship - 2.1 The EU theoretical dilemma - 2.2 The EU federalist model - 2.3 Dual citizenship in the US legal order - 3. Federalism, citizenship, national and supranational identity: diversity in the EU and in the US - 3.1 Social, post-national and nested citizenship in the EU scenario - 3.2 The unresolved aspects of EU citizenship and the theorization of a new model of citizenship to overcome them - 3.3 The creation of a national identity in US history and the Revolutionary War pensions case - 4. Federalism and interstate equality - 4.1 EU citizens' freedom of movement and the right to belong across borders - 4.2 The right to travel freely within the US territory - 5. General remarks on how federalism affects citizens' political rights - 5.1 Voting rights: EU primary law and CJEU's case law - 5.2 The relationship between US federalism, the Election Clause and the *Arizona* cases - 6. The impact of federalism on citizens' access to health care - 6.1. General remarks on the national dimension of EU Member States' health care - 6.2 EU Public Health Governance and its response to Covid-19 outbreak - 6.3 The fragmentation of the US health care system: Medicaid, Affordable Care Act and their repercussions in the era of the pandemic - 7. Concluding remarks

1. Preliminary remarks

Considering the comparative analyses of the citizen status made *supra*, EU citizenship has a derivative character, because it depends on Member State nationality, which is the *"conditio sine qua non"* of European citizenship. This consideration must be kept in mind in order to understand the scope of the present chapter, which aims at exposing a comprehensive view of the role of federalism in the EU scenario with reference to the US legal order and its true federal citizenship. Firstly, I will analyze the analogies between EU and federal citizenship, attempting to give a definition of Union citizenship itself, by reporting a critical overview of the scholarly debate on the matter and of the new approaches, intersecting with the notion of identity, comparing the strong American identity to the blurry European one. In relation to the notion of identity, the issue of diversity in the two contexts will be taken into consideration. Then, I will focus on social rights, which are linked to the EU citizen status. They, in turn, derive from the exercise of free movement and of the right of residence. In particular, they concern the possibility to seek

employment and work in another Member State. Discriminations on the grounds of nationality are not allowed in the field of access to the labor market, working conditions, taxes and social benefits. These rights constitute the so-called social citizenship, which is one of the models of EU citizenship, theorized by academics. Moreover, social rights are also connected with identity. In facts, the reason why an EU supranational identity is difficult to achieve lies in the lack of harmonization in the field of social rights. Oppositely, the American identity is strong and well built, also because social rights were regulated at a federal level in the early US history, as the Revolutionary war pensions case demonstrated.

The second part of the chapter will assume a more comparative perspective since I decided to analyze the exercise of some of EU citizens' rights through federal lens. In particular, the aim is to discover the impact of federalism on the enjoyment of some of the core citizenship rights. The critical overview of the advantages and disadvantages of federalism in the EU and US will focus on the freedom of movement, voting rights and the right to health care, which has been challenged by the recent outbreak of the pandemic. My choice of considering social rights first and, then, political rights lies in the fact that the two groups of rights will be examined in different contexts. On the one hand, I will refer to social rights in the discussion regarding the theory of a social EU citizenship, stressing on the fact that such citizenship has not been realized yet, and this is one of the causes of the difficulty in reaching a full supranational identity. On the other hand, the argument on political rights and the right to health care, which is a social right, will focus on how federalism affects their enjoyment, because, in my opinion, such impact is particularly strong in the regulation of these rights.

The freedom of movement will be examined in relation to interstate equality, in facts, the latter can be influenced by federalism, because the decentralization of levels of government can create discrepancies among EU Member States or US states.

Then, federalism plays a role in the determination of the exercise of voting rights. In this respect, meanwhile national elections in the EU are disciplined domestically, the rules of EU and local elections are provided under EU primary law. In the US

scenario, states have discretion in determining certain aspects of the Congress elections as well.

Finally, my study will regard the right to health care, which is one of the most important social rights, and it has been the object of recent debates worldwide after the spread of Coronavirus. In this regard, federalism is present in the EU, because the management and delivery of health services is regulated nationally. In the US, the fragmentation of the health care system, enhanced after the latest Medicaid reform, is a consequence of the federal system itself.

2. The concept of federal citizenship

Federalism splits sovereignty in two entities: a national and a sub-national one, as a consequence, citizens of a federal nation possess two citizenships. For example, US citizens have both federal and state citizenship. Similarly, EU citizens own two citizenships: the EU and the national one, however, the European Union cannot be considered a federation for all intents and purposes.

In order to understand the meaning of dual nationality in a federal system, the two dimensions of citizenship: vertical and horizontal must be analyzed. On the one hand, the former regards the relationship between national and sub-national bodies, especially in terms of allocation of powers. On the other hand, the latter concerns the division of competences between sub-national units[294]. According to the US Constitution[295], sub-national citizenships must be equal, in facts, discrimination is not admissible.

However, federal citizenship is a kind of multilevel citizenship. In this respect, federal and state bodies create a differentiation on citizenship. On the contrary, this does not happen in other forms of decentralized government, where a kind of regional citizenship cannot be found. Multilevel citizenship must be democratic, allowing citizens to participate to the political life, either directly or indirectly. Furthermore, multilevel citizenship can also be found in plurinationalism. The EU is a typical example of a plurinationalist entity because citizens of several countries

[294] On this point, see P. H. SCHUCK, "Citizenship in a Federal System", *Yale Law School Working Paper*, No 225, 2000, pp. 32-33 and A. GAMPER, "A 'Global Theory of Federalism': The Nature and Challenges of a Federal State", *German Law Journal*, Volume 6, Number 10, 2005, p. 1308

[295] See *Supra* Note no 9

are equally entitled to enjoy the same rights at a supranational level. Although some commentators argue that the Union is a federal entity, the majority of scholars consider EU citizenship as supranational, which is a form of multilevel citizenship. Moreover, the literature distinguishes between federations and confederations, even if an example of confederation cannot be found nowadays. The difference regards the fact that in federations citizens are equally subjected to both federal and state jurisdictions, meanwhile in confederations central authorities do not have direct jurisdiction on citizens. The only existent model of confederation is Bosnia Herzegovina, characterized by a fragile central government. Nonetheless, there are numerous examples of federations, such the US, Germany and Switzerland[296].

In brief, federal citizenship includes two citizenships, so two jurisdictions. In this respect, the interconnection between jurisdiction and citizenship becomes relevant, because it seems that the presence of two citizenships is a direct consequence of the double jurisdiction. Could we still talk about the co-existence of two citizenships in a system where sovereignty, or at least power, is not divided between different entities?

2.1 The EU theoretical dilemma

The governmental nature of the Union constitutes a conceptual dilemma, which has not been solved yet. Academics have discussed those matters for years[297]. Nevertheless, the Union structure itself has evolved over time, reaching an overall supranationalist character. To this extent, the Treaty of Lisbon played a fundamental role, because it led to the gradual disintegration of intergovernmentalism, characterized by a decentralized system where the Member States had more powers, and to the adoption of the current model, which is centralized and prevalently supranational. However, before the Treaty of Lisbon, it is important to mention that in 1964 the Court in *Costa* described the features of the then European Community, as an unprecedent entity, where Member States were

[296] On this point, see A. SHACHAR, R. BAUBÖCK, I. BLOEMRAAD, M. VINK, *The Oxford Handbook of Citizenship,* Oxford University Press, Oxford, 2017, pp. 645-657

[297] On this point, see R. J. GOEBEL, *op. cit.,* B. CRUTCHFIELD GEORGE, P. L. FRANTZ, J. BIRMELE, "The dilemma of the European Union: Balancing the Power of the Supranational EU Against the Sovereignty of Its Independent Member Nations", *Pace International Law Review,* Volume 9, Issue 1, 1997, pp. 111-146 and F. A. N. J. GOUDAPPEL, E. M. H. HIRSH BALLIN (ed.), *op. cit.,* p. 86

obliged to yield part of their sovereignty in favor of the then EEC[298]. At the time, some of the Community institutions, such as the Commission and the Parliament, had a supranational character. Meanwhile, the Council of Ministers was considered an intergovernmental body, because, back then, the unanimity clause was the rule. However, the Council also presented some supranational characteristics because significant laws could be adopted by majority vote. The European Council was deemed intergovernmental, but, as anticipated above, the situation changed after the enactment of the Treaty of Lisbon because all the institutions became more and more supranational. So, the Union and its institutions possess both intergovernmental and supranational features. Moreover, many scholars also used the term federal to depict the supranational character of the Union[299]. In this respect, comparative perspectives often referred to the word federal in relation to the Union. In particular, the federal implications of the EU have been often associated to the Swiss governmental structure. For example, the crumbling of EU intergovernmentalism recalled the dissolution of the Swiss centralized system before the creation of the federal state. Moreover, relevant comparisons could be made in the area of citizenship. Contrary to other federal states, such as the US, in Switzerland you must a be citizen of the city and of the canton in order to acquire Swiss citizenship. This type of multilevel citizenship is very similar to the EU one, where being a citizen of a Member State is a precondition to be a Union citizen. Despite the use of the word federalism in comparative studies, in 1991 *Major*, the UK Prime Minister, voted against any referral to the term federal in connection with the Union[300].

Beyond the governmental structure, the scholarly debate on what is the European Union is still present. Some commentators have argued that the Union cannot be

[298] See CJEC, Case C-6/64, *Flaminio Costa v Enel,* 3 June 1964, ECLI:EU:C:1964:66, p. 593

[299] On this point, see D. KOCHENOV, *EU Citizenship and Federalism: The Role of Rights*, Cambridge University Press, Cambridge, 2017, pp. 6-18 and M. KEATING, "Europe as a Multilevel Federation", *Journal of European Public Policy,* Volume 24, Issue 4, 2017, pp. 615-632

[300] On this point, see F. A. N. J. GOUDAPPEL AND E. M. H. HIRSH BALLIN (ed.), *op. cit.*, p. 86, R. J. GOEBEL, *op. cit.,* p. 83, K. LENAERTS, "Federalism: Essential Concepts in Evolution - the Case of the European Union", *Fordham International Law Journal,* Volume 21, Issue 3, 1997, p. 746, M. FERRÌN, F. CHENEVAL, *op. cit.,* pp. 46-47

considered an international organization according to international rules[301]. Moreover, the EU is neither a State nor a federal State, even though the dream of a federal Union has been theorized for years. The majority of academics believes that the Union is a *sui generis* organization, in particular, some of them referred to the EU as a constitutional federation. However, the EU is neither an international organization, nor a confederation and the federal elements included in its structure are not enough to define the Union as federal. It differs from classical international organizations because it allows citizens to actively take part in the EU political life through means of participatory democracy and because EU primary law has direct effects. To this extent, the EU might seem a collection of States, but it is more than that: it is an organization of citizens[302].

2.2 The EU federalist model

In relation to the federalist theory, the idea of a federal Union was born in 1941, when *Altiero Spinelli*[303] signed the *Ventotene Manifesto*, aiming at the United States of Europe. He also presented the *Spinelli* plan with the purpose of reaching federalism in Europe, furthermore, the plan was of remarkable importance because it led to the issuing of the Single European Act and of the Treaty of Maastricht. The idea of a federalist Union was also included in the 1950 *Schuman* Declaration. However, the European Union nowadays does not have a true federalist character. Powers are exercised not only by EU institutions and national authorities, but there are other international entities and committees that contribute to the EU decision-making process, so the governance is multilayered or multilevel. Nonetheless, the term multilevel governance is not extremely accurate, because governance in the EU does not have a hierarchical character. In other words, the absence of levels can be deduced by the lack of hierarchies. Another topic, which has been discussed, is the multilevel constitutionalism. It aimed at the creation of a unique constitutional

[301] On this point, see F. A. N. J. GOUDAPPEL, E. M. H. HIRSH BALLIN (ed.), *op. cit.*, p. 82, P. RAWORTH., "Too Little, Too Late? Maastricht and the Goal of a European Federation", *Archiv des Völkerrechts,* Volume 32, No 1, 1994, p. 25 and I. PERNICE, "Multilevel Constitutionalism in the European Union", *Walter Hallstein Institut Paper,* No 5, 2002, p. 6

[302] On this point, see I. PERNICE, "Multilevel Constitutionalism in the European Union", *Walter Hallstein Institut Paper,* No 5, 2002, pp. 6-7

[303] He was one the Founding fathers of the Council of Europe and the European Communities. See H.U. JESSURUN D'OLIVEIRA, *op. cit.,* p. 1

system, based on single domestic constitutions of Member states. Needless to say, a European Constitution has never been realized[304].

Moreover, the federalist theory is supported by *Kochenov*, who believes that citizenship is central in the EU federal space, especially in the division of competences. He believed in the EU federalist project, which aimed at guaranteeing citizens' rights across national borders through a federal system. He identifies EU federalism as anthropocentric in the sense that the Union itself and citizenship cannot exist without the people. Nationals of Member States are the "*conditio sine qua non"* of the whole Union structure and of citizenship[305].

In 2009, Advocate General *Trstenjak* intervened in the federalist debate, stating: *«the recognition of federal commitments within the European Community includes the frequently highlighted principle of cooperation among the Member States and their obligations to cooperate in relation to the Community[306]».* In particular, this observation served to support the argument that the Union was not federal from a formal point of view but could be considered a *de facto* federalist system[307]. *Burgess* also shared this view, in facts, he defined *«the EU as a classical example of federalism without a federation[308]».* In this sense, the European Union could not be deemed federal *strictu sensu,* because the Union itself was not a state. However, the coexistence of both federal and confederal features brought the model, adopted by the EU, closer to that of a federal state[309].

Furthermore, other federal elements in the EU legal order were introduced by the Treaty of Lisbon, in particular, the Treaty contributed to the federalization of the Union through the establishment of provisions, which explicitly divided competences between the Union institutions and Member States[310]. Another federal element consisted in the fact that national parliaments could directly participate to

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[304] On this point, see D. KOCHENOV, *op. cit.*, 2017, p. 129 and I. PERNICE, *op. cit.*, 2002, p. 4
[305] On this point, see D. KOCHENOV, *op. cit.*, 2017, pp. 6-18
[306] Cfr. Opinion of Ms. Advocate General Trstenjak delivered on 30 June 2009, *Audiolux SA e.a v Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others*, 30 June 2009, point 72
[307] On this point, see D. KOCHENOV, *op. cit.*, 2017, p. 147
[308] Cfr. M. BURGESS, *Comparative Federalism: Theory and Practice*, Routledge, London and New York, 2006, p. 226
[309] On this point, see *Ibid.*, p. 239
[310] See Articles 4, 5 and 6 of the Treaty on the Functioning of the European Union (TFEU)

the Union political life[311]. Finally, national courts were entitled to guarantee the defense of rights, prescribed under EU primary law[312]. In this respect, The Union created and established EU citizens' rights, meanwhile, national courts were obliged to ensure that those rights were effectively safeguarded. There was a wide CJEU's jurisprudence regarding the extent of the protection that the domestic judiciary must guarantee to citizens. The approach followed by the Court in the 1980s remained confined to the fact that it was the sole responsibility of States to protect their citizens against any impairment of their rights, guaranteed by EU law[313]. Nonetheless, after the 1990s, the Court gradually departed from the previous assumptions, attempting to reach harmonization on the matter[314]. The CJEU, today, uses a case-by-case approach on the field of legal protection, in the sense that sometimes remedies can be exclusively reserved to the Member States, sometimes the Union can interfere on such matters[315].

In terms of social policy, the Union is considered federalist, because its governance operates on various degrees and competences are shared between States, so, different actors in different territories. In particular, federalism is seen as a threat to welfare states, because of social dumping and of its localized character[316].

In a nutshell, the Union is overall a supranational organization and it is never going to be a federal State, regardless of the federal features introduced by the Treaty of Lisbon. The latter was a turning point for the current supranationalism of the Union because Member States gave up an important portion of their sovereignty in favor of the EU. In my opinion, the achievement of a federal Union is still very far away,

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311 See Article 12 of the Treaty on the Functioning of the European Union (TFEU)

312 See Article 19 of the Treaty on the European Union (TEU)

313 See CJEC, Case C-158/80, *Rewe-Handelsgesellschaft Nord mbH et Rewe-Markt Steffen v Hauptzollamt Kie*, 7 July 1981, ECLI:EU:C:1981:163, point 44

314 See CJEC, Joined Cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, 19 November 1991**,** ECLI:EU:C:1991:428 and CJEU, Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, 5 March 1996, ECLI:EU:C:1996:79

315 On this point, see K. LENAERTS, "Federalism and the Rule of Law: Perspectives from the European Court of Justice", *Fordham International Law Journal,* Volume 33, Issue 5, 2011, pp. 1375-1378

316 On this point, see C. E. SCHALL, "Is the Problem of European Citizenship A problem of Social Citizenship? Social Policy, Federalism and Democracy in the EU and in the United States", *Sociological Inquiry*, Volume 82, Number 1, 2012, pp. 128-129

because EU states are too diverse, and, most of all, they are not ready for the United States of Europe.

2.3 Dual citizenship in the US legal order

In order to understand the US dual citizenship mechanism, it is important to clarify the various meanings of the term. On the one hand, it can refer to a person who possesses two nationalities of two different countries, for example an individual who is both an American and an Italian citizen. On the other hand, in federal states, the term is used to define the situation in which a person possesses both federal and state citizenship. In the US scenario, an individual is a US citizen and a citizen of the state of California, for example. Only the latter meaning will be analyzed in this dissertation.

The US Constitution[317] indirectly mentions this kind of citizenship. As indicated in the previous chapter, federal, or rather US citizenship, is requested to run for office as either a Representative[318], a Senator[319] or as President[320]. A reference to state citizenship can be found in the Privileges and Immunities Clause[321]. In facts, citizens must enjoy the same privileges and immunities in all the US states. Finally, the Fourteenth Amendment Citizenship Clause[322] clarifies the meanings of the two types of citizenship, stating that everyone, who was born or naturalized in the States, is both an American citizen and a citizen of the state of residence. In particular, the intent of such clause is to establish the supremacy of federal citizenship over the state one. Beyond the rights granted to persons by federal citizenship, an extensive set of rights are also attributed to individuals by state citizenship. However, the definition of state citizenship is still uncertain. In this respect, the only legislative

[317] See *Supra* note no 216
[318] See *Supra* note no 277
[319] See *Supra* note no 278
[320] See *Supra* note no 276
[321] See *Supra* note no 208
[322] See *Supra* note no 9

reference is the aforementioned Citizenship Clause[323], which establishes that state citizenship is residence-based[324].

Regarding the US historical background, in the period prior to the Civil War the landmark judgement *Dred Scott*[325] must be mentioned. In this ruling, the Supreme Court did not recognize American citizenship to free blacks but allowed states to decide whether free blacks could be state citizens. Nonetheless, in relation to the latter judgement, the two opinions of Justice *Taney* and Justice *Curtis* presented two diverging views on the meaning of federal and state citizenship and their correlation. In particular, Justice *Taney* pointed out the importance of a federal standard in the field of American citizenship. The issue was relevant to the above-mentioned case, as it justified why black people could not be US citizens in accordance with federal laws. Moreover, Justice *Taney* overcame the traditional dual citizenship concept, enounced in the *Slaughter-Houses*[326] cases. In facts, he believed that the two citizenships were independent and autonomous, and he disagreed with the statement that US citizens were also consequentially of the state of residence, for the mere fact of being American citizens in the first place. A completely different view regarding federal and state citizenship was offered by Justice *Curtis*. While *Taney* relied on the federal dimension, *Curtis* referred to state citizenship as a condition to acquire federal citizenship. *Curtis'* opinion had some repercussions on the legal debate. In facts, according to him, the citizens' rights could be no longer enjoyed after the loss of citizenship[327].

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[323] See *Ibid.*

[324] On this point, see CENTER FOR THE STUDY OF FEDERALISM, "Dual Citizenship", 2006, available at https://encyclopedia.federalism.org/index.php/Dual_Citizenship, accessed on 10th August 2020 and P. H. SCHUCK, *op. cit.*, pp. 44-45

[325] See *Supra* Note no 243

[326] See US SUPREME COURT, *The Butchers' Benevolent Association of New Orleans v. the Crescent City Live-Stock Landing and Slaughter-House Company. Paul Esteben, L. Ruch, J. P. Rouede, W. Maylie, S. Firmberg, B. Beaubay, William Fagan, J. D. Broderick, N. Seibel, M. Lannes, J. Gitzinger, J. P. Aycock, D. Verges, THE Live-Stock Dealres' and Butchers' Association of New Orleans, and Charles Cavaroc v. the State of Louisiana, ex rel. S. Belden, Attorney-General. The Butchers' Benevolent Association of New Orleans v. the Crescent City Live-Stock Landing and Slaughter-House Company,* 14 April 1873

[327] On this point, see D. J. MANN, K. PURNHAGEN, "The nature of Union Citizenship between Autonomy and Dependency on Member State Citizenship: A Comparative Analysis of the Rottman Ruling, or: How to Avoid a European Dred Scott Decision?", *Amsterdam Centre for European Law and Governance Working Paper Series,* No 9, 2011, pp. 34-39 and THE NEW YORK TIMES, "State Citizenship Has Roots in American History", 2017, available at

The nature of US citizenship, likewise the European one, has been discussed a lot among scholars and jurisprudence. However, American citizenship is strictly federal in the sense that citizens possess both national and sub-national citizenship. Oppositely to the relation between EU citizenship and Member State nationality, federal and state citizenship are not interconnected, because the former does not have a purely derivative character. In facts, the withdrawal of state citizenship does not determine the loss of federal citizenship and vice versa.

3. Federalism, citizenship, national and supranational identity: diversity in the EU and in the US

The main questions, that will be answered in the present paragraph, regard the fact if we can talk about citizenship and identity outside the national dimension. In this respect, the European Union provides a case in point. The analysis of the EU citizenship in all its aspect and purposes is one of the most important objects of this dissertation, in facts, its nature and the acquis of rights have been extensively discussed in the previous chapter. For this reason, herein, I will prevalently focus on the question of identity both in the EU and in the US. In particular, I will interpret the notion of identity as sense of belonging to the Union and not to the Member States in the EU case and as American nationals and not as state citizens in the US context. I will stress on the problem of building a supranational identity in the EU. In this sense, Article 4 TEU[328], which obliges the Union and its institutions to respect national identities, can be considered an element capable of hindering the reach of a common identity and of a common sense of belonging. However, what constitutes Member States' national identities is not very clear. The CJEU has been vague on the matter, giving an extensive interpretation, encompassing almost everything in the notion of national identity[329]. As briefly anticipated above, I decided to analyze social rights before political ones, because I will refer to social

https://www.nytimes.com/roomfordebate/2014/06/24/is-state-citizenship-the-answer-to-immigration-reform/state-citizenship-has-roots-in-american-history, accessed on 10th August 2020

[328] See Article 4 Treaty on the European Union (TEU)

[329] On this point, see V. F. PERJU, "Identity Federalism in EU and the United States", *Vanderbilt Journal of Transnational Law*, Volume 53, No 1, 2020, p. 267

rights only in light of the supranational identity issue[330], not in relation to the role of federalism on rights.

Concerning identity, an important distinction between the EU and the US lies in diversity. The diversity issue is a substantial difference between the two realities, because, in the EU context, different countries with diverse languages and cultures coexist, rendering the creation of a supranational identity more difficult. Diversity in the EU scenario is also seen as a strength of the Union itself. To this extent, the EU's motto states: *"United in Diversity",* which means that the Union's task is superseding all the existent contrasts between Member States. Since the very beginning, EU citizenship was thought with the purpose of increasing the sense of belonging to the Union in order to build an EU supranational identity. In facts, some scholars enhance the role of EU citizenship, because it contributes to the creation of a unicum of shared values and principles, which accompany and can eventually overcome the single identities of Member States[331]. Nonetheless, *«national and European identities can coexist so long as they are not mutually exclusionary[332]».* Although the coexistence of both national and supranational identities in the Union is possible, the problem concerns the fact that individuals tend to identify themselves as citizen of the Member States rather than as EU citizens, generally preferring national identity over the European one. In facts, in 2018, 89% of the Eurobarometer respondents stated that they felt closer to their town or village, enhancing the local dimension, 93% considered themselves more committed to their State and the lowest percentage: 56% felt connected to the EU in the terms of identity. In order to corroborate the fact that persons deem themselves primarily as nationals of their country and then as EU citizens, it must be mentioned that, in

[330] The argument on the difficulty in building a supranational identity is centered on the aspect of social rights, without considering that the rights of political participation are the most evident and most complete manifestation of citizenship.
[331] On this point, see V. PEREZ-DIAZ, "La Cité Européenne", *Critique Internationale,* 1998, pp. 104-105 , K. A. CURTIS, "Inclusive Versus Exclusive: A Cross-National Comparison of the Effects of Subnational, National and Supranational Identity", *European Union Politics,* Volume 15, Issue 4, 2014, p. 525, R. BELLAMY, "Evaluating Union Citizenship: Belonging, Rights and Participation Within the EU", *Citizenship Studies*, Volume 12, Issue 6, 2008, pp. 597-601 and P. C. JIMÈMEZ LOBEIRA, "EU Citizenship and Political Identity: The Demos and Telos Problems", *European Law Journal*, Volume 18, Number 4, 2012, p. 506
[332] Cfr. V. F. PERJU, *op. cit.,* p. 218

2018, the 55% of the respondents stated so[333]. Meanwhile in the United States, the theme of diversity is present in different terms because it is represented by the multi-ethnicity and multiculturalism of the country.

Identity interconnects with citizenship because it is more than just an independent source of rights. The notion of identity is included in that of citizenship because a citizen must feel like a member of a community. So, the features of citizenship are rights and identity. Moreover, citizenship and its characteristics must be linked to a portion of territory, which can correspond to a region, a country or even an international or supranational organization, such as the EU. As stated *supra*, identity is often used in relation to the national context. In those terms, identity is what distinguishes a citizen of a specific country from that of another state[334].

As mentioned above, one of the major threats of building a common identity is diversity, which is very present in the EU scenario. Nonetheless, it is undeniable that a certain amount of diversity can also be found inside the intra-US borders, since one state differs from one other. Federalism is capable of shaping identity, but its role in overcoming the differences between states is discussed, in facts, it often enhances them. However, it is largely believed that those dissimilarities, accentuated or not by federalism, do not affect the solidity of the common national identity. In facts, *«while there are obvious differences between states, these differences might not be of the kind that translate into different identities*[335]*».* Moreover, there is a scholarly debate regarding whether US citizens identify themselves not only with the nation as a whole, but also with the state. On the one hand, some of the supporters of the "*One nation"*[336] theory believe that Americans have a strong national identity, regardless of their state of residence, for this reason, they can easily move from one state to another. In this viewpoint, the function of federalism is not relevant, because there is a strong national identity recognized by

[333] See EUROPEAN COMMISSION, *Standard Eurobarometer 89 "European Citizenship" Report*, Standard Eurobarometer 89 - Wave EB89.1 - Kantar Public Brussels on behalf of TNS opinion & social, 2018, p. 5, p. 35

[334] On this point, see P. B. LENHING, "European Citizenship: Towards a European Identity?", *Law and Philosophy*, 2001, pp. 242-243 and V. F. PERJU, *op. cit.*, p. 216

[335] Cfr. V. F. PERJU, *op. cit.*, p. 225

[336] Cfr. E. A. YOUNG, "The Volk of New Jersey? State Identity, Distinctiveness, and Political Culture in the American Federal System", unpublished manuscript, 2015, p. 4

citizens, which is not affected by state citizenship or state identity. On the other hand, *Young* attempts to prove state attitudes, especially in the public sector, which are capable of weakening the *"One nation"* theory, stressing on the fact that citizens actually feel very attached to their state of residence and this can have repercussions on the national identity itself[337].

Regarding the possibility of a supranational identity in the EU, it must be pointed out that the notion itself refers to the citizens' allegiance to the Union as a whole and not to the single Member States. There is not an overall consensus concerning what constitutes such identity. Supranational identity is usually evoked by citizens of Member States and not by third-country nationals. However, this is not the only plausible interpretation because it also regards the interaction between national entities and EU Committees, or it can refer to the absence of national governmental coordination. Moreover, the character of the supranational identity reflects the one of EU citizenship. To this extent, supranational identity is derivative, or rather additional to the national one, in the sense that the former does not substitute the latter. Furthermore, a sense of supranational identity is capable of reaching citizens in a close way because it is easier for people to speak up and be heard by supranational bodies, like the EU institutions in this case. There are various theories regarding the connection between national and supranational identity. In this respect, localists speak about identity at a regional or local level, nationalists refer to a whole nation and, finally, Europeans, who defines identity in an EU-centered perspective[338].

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[337] On this point, see E. A. YOUNG, "What Can Europe Tell Us About the Future of American Federalism", *Arizona State Law Journal*, Volume 49, 2017, p. 1124, M. FEELEY E. RUBIN, *Federalism: Political Identity and Tragic Compromise*, The University of Michigan Press, Ann Arbor, MI, 2011, p. 26 and E. A. YOUNG, *op. cit.*, 2015, pp. 88-98

[338] On this point, see J. TRONDAL, "Beyond the EU membership-non-membership dichotomy? Supranational identities among national EU decision-makers", *Journal of European Public Policy*, 2002, pp. 469-484, A. SCHLENKER, "*Cosmopolitan Europeans or Partisans of Fortress Europe? Supranational identity Patterns in the EU", Global Society*, Volume 27, Issue 1, pp. 25-51, G. M. ZAPRYANOVA, L. SURZKHO-HARNED, "The effect of supranational identity on cultural values in Europe", European Political Science Review, Volume 8, Issue 4, 2016, p. 548 and M. HALLER, R. RESSLER, "National and European Identity: A Study of their Meaning and Interrelationships", *Revue française de sociologie,* Volume 47, No 4, 2006, p. 824

In sum, identity is a complex concept both in the EU and in the US legal order. In particular, the struggle for a common identity is more of a European problem, because the Union is composed by diverse countries, so it is easier for citizens to feel more attached to their own countries than to a supranational entity, in which, unfortunately, they do not recognize themselves to the fullest. In the US, the issue of identity is less enhanced, because differences between states can be easily superseded. However, the problematical dichotomy of state and national identity is still present and gives troubles to those who believe in the supremacy of federal citizenship over the state one. In my opinion, we, as EU citizens, must take care of the problem of building a supranational identity, because it is our duty to make sure that everyone understand the remarkable importance of the Union. So, the realization of a Union of common values and shared principle is the first step in order to make persons aware of the strength and the positive influence of the EU.

3.1 Social, post-national and nested citizenship in the EU scenario

The concept of EU social citizenship is extremely important, because it allows citizens to enjoy a wide catalogue of rights, benefits and advantages, such as social aids, student loans, etc. Furthermore, it is the result of the path of European integration. Social citizenship favors identity, contributing to the creation of a common core of principles and values. Nonetheless, the social dimension of EU citizenship represents a current issue that influences the difficulty in reaching a supranational identity, because social policies are not well developed at a supranational level, beyond the national borders. As discussed *supra*, surveys have shown that European citizens feel more attached to their own home-state than to the Union[339] and this constitutes a problem for social citizenship, identity and even democracy. Recalling the tripartition of citizenship formulated by *Marshall*[340], social rights belong to the range of rights guaranteed by citizenship, together with civic and political rights. Nevertheless, the set of social rights granted by EU citizenship is not as wide as it may appear, because the power of Member States in ensuring such rights is very pervasive. To this extent, social aids and benefits are

[339] See *Supra* Note no 333
[340] See *Supra* Note no 72

prevalently regulated nationally since there is no harmonization on the matter. In particular, an example of social policy provided by the EU is European Employment Strategy, which was born in 1997 and it is now included in the 2020 European Growth Strategy[341]. Through these initiatives, the Union gives Member States recommendations and objectives to fulfill in the social work-related areas, but States have wide discretion in their realization. Moreover, the Directive 2006/54/EC[342] must be mentioned, because it prohibits any kind of gender discrimination in employment or work, specifically concerning equal payment and equal amount of work, which must be measured in reference to comparable situations. In addition, the CJEU tried to reach a uniform regime of social rights in the EU territory, guaranteeing them and equal treatment to both economically active and inactive individuals, as ruled in *Martinez Sala*[343] and in *Ruiz Zambrano*[344]. However, the social dimension of citizenship contributes to shape others feature of EU citizenship itself, such as identity and solidarity, which aim at creating a common idea of belonging to the EU community. In this respect, the strong presence of welfare systems at a national level has hindered for several years the realization of EU social policies, which are relatively recent. Furthermore, it is not correct to talk about an EU supranational welfare state, because competences are still prevalently attributed to Member States, since the social field has not been harmonized yet[345].

Regarding the so-called model of post-national citizenship, academics believe that that ideal citizenship must possesses four characteristics. It must provide for rights and duties at a formal level and it must lead to the construction of an identity and to the increase of citizens' participation at a substantive level. This model nonetheless can be better realized, referring to a supranational or international

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341 See EUROPEAN COMMISSION, *Communication from the Commission Europe 2020 A Strategy for smart, sustainable and inclusive growth,* 3 March 2010, COM (2010) 2020

342 See *Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation,* 5 July 2006, *in Official Journal of the European Union*, L 204, 26 July 2006

343 See CJEU, Case C-85/96, *María Martínez Sala v Freistaat Bayern,* 12 May 1998, ECLI:EU:C:1998:217

344 See *Supra* note no 91

345 On this point, see R. BAUBÖCK (ed.), *Debating European Citizenship,* Springer, Berlin, Heidelberg, 2019, p. 267, S. GIUBBONI, "European Citizenship and Social Rights in Times of Crisis", *German Law Journal,* Volume 15, Issue 5, 2014, p. 942 and C. E. SCHALL, *op. cit.*, pp. 123-131

order, beyond the national space, as it occurs in the EU case. In relation to term post-national, this refers to a kind of citizenship, which has to possess requirements that differ from those of nationality. In particular, post-national citizenship's features must depart from the confined territory of a state and must present several identities, not a common one[346]. This theory is corroborated by the dictate of Article 4 TEU[347], which establishes that the Union must respect national identities. On the one hand, EU citizenship cannot be considered purely post-national, because it is created by nationality, so it depends on it. In facts, it has a derivative character[348]. On the other hand, since the EU is a *sui generis* organization, EU citizenship cannot resemble Member States nationality because of the lack of a national territorial space and, most of all, because of the Union's particular structure and functioning. The concept of EU post-national citizenship presents some challenges. Firstly, as anticipated above in regard to social citizenship, the lack of an EU uniform social policy and a welfare state can be considered an obstacle to democracy and to the accomplishment of a perfect citizenship. Regarding the above-mentioned four aspects of the ideal citizenship, an issue, that could have been encountered, regards rights, because their protection must be guaranteed to citizens, regardless of their nationality. At the beginning, this may be looked like a difficulty, however, EU law provides for a comprehensive catalogue of citizens' rights, so, this is not a problem anymore and it must not be taken into account. In particular, the concept of post-national citizenship mainly refers to human and civil rights, which are, of course, guaranteed by EU law, nonetheless, the situation is more complex in terms of social rights, because of the lack of harmonization in the social field. In relation to duties, *strictu sensu* national duties cannot be found at a European level, but EU citizens have responsibilities toward the Union, which go beyond the mere national dimension[349]. Participation to the Union's political life is also regulated at a supranational level through instruments of participatory democracy, which are political rights, such as the Citizens' Initiative and the right to apply to the

[346] On this point, see S. IVIC, "European Citizenship as a Mental Construct: Reconstruction of Postnational Model of Citizenship", *European Review*, Volume 20, Issue 3, 2012, p. 419
[347] See *Supra* Note no 328
[348] See *Supra* paragraph 1.3
[349] For the scholarly debate on EU citizens' duties, see *Supra* note no 125

Ombudsman. Identity must also be considered independent from nationality, even though a common identity is quite difficult to realize, because EU citizens recognize themselves first as nationals of their home-state and, only afterwards, as citizens of the Union. In particular, new forms of citizenship are arising, which aim at enhancing its substantive dimension, stressing on identity and participation and avoiding that citizenship can only be linked to a set of rights or duties. Although EU citizenship is well developed from the formal point of view, its substantial dimension is lacking, leading to some critical issues[350].

The concept of nested citizenship is typical of federal systems. Considering that the EU is not a pure federal state, this may not seem the most appropriate kind of citizenship for the Union. It is composed of a series of intertwined citizenships, which depend on each other, but are sources of different rights and duties. Moreover, those citizenships must be collectively taken into account, not singularly. Reading nested citizenship through federal lens, it comprehends a local, a national and a supranational citizenship. The two citizenships: the national and the European one can actually be found, moreover, this kind of dual citizenship is enshrined in Article 20 TFEU[351], which describes the derivative nature of EU citizenship. In *Bauböck*'s opinion, who theorized the three types of citizenship, the local one is residence-based, the national one is acquired by birth-right or by blood and the EU supranational one is derivative in nature and linked to the freedom of movement. However, nested citizenship is not evolving into a pure federal citizenship. In this respect, there has been an extraordinary evolution in the area of social rights, which are regulated at different levels, between diverse entities. Members States are certainly part of this mixture of overlapping authorities, but they are not the only protagonists[352].

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[350] On this point, see G. DELANTY, "Models of Citizenship: Defining European Identity and Citizenship", *Citizenship Studies*, Volume 1, No 3, 1997, pp. 291-296 and T. FAIST, "Social Citizenship in the European Union: Nested Membership", *Journal of Common Market Studies*, Volume 30, No 1, 2001, p. 46

[351] See *Supra* Note no 4

[352] On this point, see E. DELANEY, L. BARANI, "The Promotion of 'SYMMETRICAL' European Citizenship: A Federal Perspective", *Journal of European Integration*, Volume 25, Issue 2, 2003, p. 98, R. BAUBÖCK, *op. cit.*, 2014, p. 753 and T. FAIST, *op. cit.*, pp. 46-48

EU citizenship cannot be fully embodied in any of the models described *supra.* The issue regarding the nature of such citizenship is still discussed and there is not an overall consensus on the matter. In facts, the EU is neither an internal organization nor a federation and this leads to some criticalities in terms of citizenship, because, for example, social citizenship cannot be fully realized. However, the remarkable importance lies in the relationship and interconnection between EU citizenship and nationality. To this extent, Union citizenship can be deemed autonomous and independent for some purposes, such as the protection of rights, but its derivative character must not be underestimated. Moreover, Union citizenship paved way for a residence-based kind of citizenship, rather than referring only to *ius soli* or to *ius sanguinis*[353].

3.2 The unresolved aspects of EU citizenship and the theorization of a new model of citizenship to overcome them

Relating to the current challenges of EU supranational citizenship, several factors must be taken into consideration. In facts, the sp read of populist and Eurosceptic parties, the presence of more fundamentalist Muslim families, the on-going financial crisis have weakened the supranational dimension of the Union, consequentially affecting citizenship. Since the current situation in Europe is problematic for the most various reasons, theorists have proposed a new model of citizenship, capable of solving the current issues, or at least mitigating them. In facts, they believe that the EU supranational dimension is hindered by the contemporary kind of citizenship, because it does not allow a clear and linear dialogue between Member States and institutions[354].

Another problem regards the lack of sufficient coordination in the area of social welfare. In this sense, the ideal model would be a supranational social citizenship, established at the EU level, where Member States can still prioritize their social national needs, following not just EU guidelines, but also obligations, directly derived from citizenship. In this regard, *Tan* has attempted to theorize a three-level

[353] On this point, see G. DELANTY, *op. cit.*, p. 299

[354] On this point, see E. TAN, "Projecting a New Supranational EU Citizenship for EU Republicanism", *ECPR 2018- Section: European Republicanism, Panel: Being a Citizen of a European Republic – Responsibility and Opportunity*, 2018, pp. 1-2

system, constituted of citizens, States and EU institutions, all of them are included in citizenship itself. So, citizens would have access to a European welfare system, regulated and directed only by the institutions. Moreover, this system would be financed by taxation of citizens at an EU level and taxation of the commercial businesses or enterprises, operating not only in their home state, but also in other states of the Union. In particular, the taxation of citizens would not be direct, but rearranged between States and EU institutions[355].

In my opinion, this new theoretical model of citizenship is extremely interesting and captivating, but at the same time, it is very difficult to realize. As the wide CJEU's case-law demonstrates, Member States are generally reluctant to set aside their power or a portion of their sovereignty in favor of the Union and its institutions. To this extent, it represents a compromise to which states are not willing to give in, since there is a strong influence from European institutions.

3.3 The creation of a national identity in US history and the Revolutionary War pensions case

According to *Habermas*, the US is a significative example in terms of achieving a national identity. He theorizes the so-called constitutional patriotism, which means that national identity is included in the American political life. In this sense, although the US is multi-ethnical and multi-cultural, a common core of values and ideals unites all citizens. According to *Miller*, the major exponent of liberal nationalism, *Habermas'* view is not exhaustive, because national identity must be found in national culture as well. Both theories deal with diversity, which consists of fragmented and multiple identities of both individuals and states[356]. We have seen the doctrines related to the meaning of national identity, but, when did American identity appear for the first time?

As it occurred in the EU context, where national identities conflicted with the Union supranational identity, in US history there were tensions between state and national identities as well. After the 1776 Declaration of Independence[357], citizens only felt

[355] On this point, *Ibid.*, pp. 8-9
[356] On this point, see S. SONG, "What Does it Mean to Be an American?", *Daedalus, Journal of the American Academy of Arts & Sciences*, 2009, pp. 31-36
[357] See *Supra* note no 207

attached to their state, consequentially, a national identity could not be found at the time. Nonetheless, an important step toward the creation of a US identity was the institution of a national social program: the so-called Revolutionary War pensions. This program, however, was problematic and controversial. In particular, there were some uncertainties regarding the recipients of these pensions and the authority of the Nation in charge of granting them. Finally, specific pensions were conceded first to impecunious soldiers and then to all veterans, only if they have fought in the Revolutionary war, respectively in 1818 and in 1832[358]. In particular, the case in point could be associated to the problem of building a national identity, because this issue reflected the controversies upon the term "*citizen-soldier*". Although the notion of "*citizen-soldier*" was considered the perfect one, US national militia was fundamental, not only in terms of national identity, but also for the creation of the country itself. Pensions were granted to those who have contributed to the birth of the nation and to the building of a national identity, by fighting in the Revolutionary war. In this way, the civic and patriotic value of such soldiers was recognized and recompensed. As it can be deduced from the previous assertions, the Revolutionary War pensions case helped the formation of a national identity, attributing the responsibility for social policy no longer to the states, but to the nation[359].

In regard to the comparative analysis in terms of identity made above, some considerations should be made. In particular, the shift from a local social citizenship to an either national or supranational one early occurred in the US, meanwhile such transferal failed, and it is still not present in the EU scenario. In my opinion, there are two reasons why this phenomenon took place in Europe. Firstly, Member States did not want the Union's interference in those fields, because this would have meant ceasing another part of their sovereignty. Secondly, the strong diversity of Member States hindered the creation of a uniform policy on the matter, that if it is realized, precisely because of this diversity, it could turn into something counterproductive. However, how tortuous and long is the way to the achievement of an EU social citizenship?

[358] On this point, see C. E. SCHALL, op. cit., pp. 133-134
[359] On this point, see *Ibid.*, pp. 134-135

4. Federalism and interstate equality

The notion of interstate equality intertwines with federalism in relation to horizontal citizenship. In facts, in federal states two kinds of citizenship can be observed: vertical and horizontal. The former implies the invocation of rights or status against the federal or EU institutions, if we refer to Union citizenship. Horizontal citizenship, instead, consists in the fact that rights can be appealed against states. Nonetheless, horizontal citizenship is quite weak in federal systems, meanwhile the vertical one is the typical federal citizenship. In particular, interstate equality must be analyzed in light of federal citizenship, because it paves way to the creation of a constitutional basis for a common sense of identity[360].

In the EU legal context, the concept of interstate equality is mainly protected under Article 18 TFEU[361], which generally prohibits discrimination on grounds of nationality. Interstate equality must be guaranteed especially to dynamic citizens, who have exercised the freedom of movement. Since the character of rights linked to EU citizenship is discussed, the only exception is represented by the right to move freely. In facts, this is the primary right attributed to citizens, although it was born as an economic freedom, today it is more than that, because it constitutes the basis for the enjoyment of other citizenship rights[362]. Moreover, Article 45 TFEU[363] provides for the freedom of movement of workers, establishing a non-discrimination rule based on nationality. Secondary law on the protection of the principle of equality among Member States is wide, in particular, it establishes rules of non-discrimination based on race or gender[364]. Equal treatment of workers is enshrined in Regulation No 492/11[365]. It is important to point out that Directive

[360] On this point, see D. KOCHENOV, *op. cit.*, 2017, pp. 615-617
[361] See *Supra* Note no 103
[362] On this point, see D. KOCHENOV, *op. cit.*, 2017, p. 623
[363] See *Supra* Note no 144
[364] For examples on secondary legislation on those matters, see *Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin*, 29 June 2000, *in Official Journal of the European Union*, L 180, 19 July 2000, *Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services*, 13 December 2004, *in Official Journal of the European Union*, L 373, 21 December 2004, and *Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation*, 5 July 2006, *in Official Journal of the European Union*, L 204, 26 July 2006
[365] See *Supra* Note no 171

2014/54/EU[366] provides for the creation of equality bodies at a national level, which aim at protecting and realizing the equal treatment of workers and their families[367]. Those national bodies have discovered that in some work-places nationality-based discriminations are still present and they found some criticalities in implementing the objectives of the above-mentioned Directive. For example, discriminatory rules based on nationality were included in Belgian law. In facts, access to several public services were reserved only to Belgian nationals. According to EU law, this criterion was admissible if justified on grounds of public interests. However, in 2015 the Belgian equality body deemed that the case in point constituted a discrimination, because the exception of the public interest could not always be taken into account[368]. Another example where nationality-based discrimination is justified because of public interest can be found in Italian law. In facts, managerial positions in public administration are held only by Italian citizens. Indeed, EU citizens do not have access to those vacancies, because these positions regard the direct or indirect exercise of public authority or are related to the protection of the national interest[369]. There is a legislative parameter to determine which employment positions are only accessible by Italians[370]. Meanwhile the first provision is perfectly in compliance with EU law, the second provision is not compatible with Article 45(4) TFEU[371], because the catalogue of professional positions reserved to Italian citizens is too broad[372].

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[366] See *Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers*, 16 April 2014, *in Official Journal of the European Union*, L 128, 30 April 2014

[367] See *Ibid.*, Article 4

[368] On this point, see EQUINET: EUROPEAN NETWORK OF EQUALITY BODIES, *Equality Bodies and Freedom of Movement: An Equinet Discussion Paper,* 2015, p. 12

[369] See Decreto Legislativo 30 Marzo 2001, no 165, *"Norme Generali sull' Ordinamento del Lavoro alle Dipendenze dell'Amministrazione Pubblica", Gazzetta Ufficiale della Repubblica Italiana,* no 106, 9 May 2001. Full text of Article 38(1): *"I cittadini degli Stati membri dell'Unione europea possono accedere ai posti di lavoro presso le amministrazioni pubbliche che non implicano esercizio diretto o indiretto di pubblici poteri, ovvero non attengono alla tutela dell'interesse nazionale."*

[370] See Article 1 Decreto del Presidente del Consiglio dei Ministri 7 Febbraio 1994, no 174, *"Regolamento recante norme sull'accesso dei cittadini degli Stati membri dell'Unione europea ai posti di lavoro presso le amministrazioni pubbliche", Gazzetta Ufficiale della Repubblica Italiana,* no 61, 15 March 1994

[371] See *Supra* Note no 144. Full text of Article 45(4): *"The provisions of this Article shall not apply to employment in the public service."*

[372] On this point, see A. ARENA, "Il Requisito della Cittadinanza Italiana nell' Accesso ai Concorsi Pubblici: Brevi Spunti di Riforma alla Luce della Recente Giurisprudenza", *Quaderni di SIDI BLOG,* Volumes 4/5, 2017-2018, p. 481

In the US legal order, a form of interstate equality can be found in the Commerce Clause[373], according to which, the interstate commerce can be regulated by the US Congress. In attempting to put into practice such equality, American citizens are free to exercise their right to interstate travel[374], so they can move from one state to another without any restrictions. In particular, interstate equality consists of the rules on citizenship, the right to interstate travel and prohibitions of discrimination. Interstate equality is guaranteed, for example, through provisions that prohibit conceding advantages regarding access to benefits or public services to residents of a State. This aspect is explicitly regulated under the Privileges and Immunities Clause[375]. Furthermore, interstate equality also refers to all citizens, who just want to travel within the US territory, but do not want to establish themselves in another state, by residing there[376]. In this respect, in *Doe v. Bolton*[377], the US Supreme Court condemned the State of Georgia for enacting laws, which granted either public or private abortion medical assistance exclusively to Georgian residents. The Supreme Court deemed that the provision was in contrast with the Privileges and Immunities Clause[378].

In a nutshell, interstate equality is a key-concept in both EU and US legal order. In facts, it is directly or indirectly mentioned in EU primary law and in the US Constitution. Moreover, it is usually triggered whenever free circulation is exercised. Although the pureness and importance of such principle seems clearly codified, its respect is not always ensured in practice, as demonstrated by the reports from equality bodies and US Supreme Court's case-law.

4.1 EU citizens' freedom of movement and the right to belong across borders

An individual, who exercises his freedom of movement within the EU, must be protected in multiple ways. To this extent, he must be treated equally, enjoy the same rights in both the home and the host state and, moreover, discriminations

[373] See Article 1, Section 8, Clause 3, US Constitution, 17 September 1787
[374] For further information on the right to interstate travel, see *Infra* paragraph 2.4.2
[375] See *Supra* Note no 208
[376] On this point, see D. KOCHENOV, *op. cit.*, 2017, pp. 620-621 and J. D. VARAT, "State Citizenship and 'Interstate Equality'", *The University of Chicago Law Review,* Volume 48, No 3, 1981, pp. 519
[377] See US SUPREME COURT, *Doe v. Bolton,* 22 January 1973
[378] See *Supra* Note no 208

between static and dynamic citizens are not admissible[379]. In this sense, the guarantee of the right to move and reside freely in another Member State seems to expand, because it includes not only the safeguarding of the right to travel, but also of identity, culture, establishing a common space where diversity is respected and protected[380]. Scholars have discussed on the real nature of this right, which goes beyond the economic and political dimension. For example, *De Witte* defines the freedom of movement as an "*emancipatory force",* since the individual freely decides to leave his country of origin and to reside in another one[381]. Moreover, the exercise of this right is also capable of increasing awareness among citizens, making them more conscious about injustices and discriminations based on nationality that happen or may occur in their countries.

The provisions regarding the freedom of movement and interstate equality entail a right to belong across borders, linked to EU citizenship. In this sense, the right to belong across borders transposes individual rights of the mobile citizens from their home state to the host one. In particular, the right to belong must be interpreted as a mutual recognition right of belonging, in the sense that the this right, for the sole fact of being recognized to the citizen in his home state, must be extended to other Member States, because of supranational citizenship[382]. According to *Strumia*, the right to belong across borders makes the EU a "*demoicratic community"*[383], because the rights of individuals are not anymore confined to national borders but are enjoyable in the whole EU territory. This assumption is valid not only for EU citizens, but also for third-country nationals, who reside in the Union[384].

[379] On this point, see D. KOCHENOV, *op. cit.,* 2017, p. 628
[380] See Opinion of Mr. Advocate General Jacobs delivered on 22 May 2003, *Carlos Garcia Avello v Belgian State*, 22 May 2003, point 72
[381] See R. BAUBÖCK (ed.), *op. cit.*, 2019, p. 93
[382] On this point, see D. KOCHENOV, *op. cit.,* 2017, p. 631 and F. STRUMIA, "Looking for Substance at the Boundaries: European Citizenship and Mutual Recognition of Belonging", *Yearbook of European Law*, Volume 32, No 1, 2013, p. 442
[383] The term demoicracy refers to a community, an organization or an institution, composed of independent people. It derives from the Greek "demoi", which means people and "kratos", which means power.
[384] See F. STRUMIA, "European Citizenship and EU Immigration: A Demoi-cratic Bridge between the Third Country Nationals' Right to Belong and the Member States' Power to Exclude", *European Law Journal*, Volume 22, Issue 4, 2016, p. 441

In my opinion, freedom of movement should be protected as a right of the core EU citizenship. The exercise of such rights is the fuel for the longed-for ideals of equality, common identity, justice, freedom and security. The possibility to travel, to reside in another state should not be underestimated, because, through them, we are able to recognize diversity and defend it, which is fundamental in a *"demoicratic EU",* a polity of polities, united in diversity, where the right to belong across borders is protected.

4.2 The right to travel freely within the US territory

In relation to the historical developments of the right to interstate travel, its roots could be found in the Founders' ideas, who wanted to create a closer federal union, where citizens could move freely. The dimension of the right to travel is not only applicable to individuals, but also the free movement of goods in the US common market is ensured. In 1849, custom duties and taxes on import and export of goods between states were deemed in contrast with the Constitution by the US Supreme Court in the *Passenger Cases*[385]. To this extent, those taxes undermined the right to travel itself, as it was not fully exercisable. As it could be denoted from the wide jurisprudence on the exercise of such right, the level of intra-mobility in the US has always been relevant and considerable since the nineteenth century. Some commentators argued that the gradual erosion of state identities could have been a consequence of this phenomenon. Oppositely, others believed that some individuals actually felt more attached to their state of origin, just because of the fact they have moved elsewhere[386].

Concerning the persons' right to travel, in *Saenz v. Roe* the US Supreme Court stated that the right to travel in the US comprehends other three rights: *«the right to enter and leave another State; the right to be treated as a welcome visitor while temporarily present in another State; and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State[387].»* As mentioned *supra,* the right to travel is not explicitly protected under the

[385] See US SUPREME COURT, *Norris v. Boston,* 1849 and US SUPREME COURT, *Smith v. Turner,* 1849
[386] On this point, see R. SOBEL, *op. cit.,* pp. 74-76 and E. A. YOUNG, *op. cit.,* 2015, pp. 98-99
[387] Cfr. US SUPREME COURT, *Saenz v. Roe,* 17 May 1999, pp. 500-502

Constitution[388]. However, some references to this right and its derived ones can be found in the Privileges and Immunities Clause[389], in the Commerce Clause[390] and the Equality Protection Clause of the Fourteenth Amendment[391].

It is undeniable that the US right to interstate travel represents a remarkable element capable of creating a closer union among American citizens. The same considerations can be made in relation to EU freedom of movement, nonetheless, the accomplishment of a closer union among EU member states seems more difficult to realize. Although the right to move and reside freely in the EU territory is a great achievement, the idea of a cohesive union in terms of identity is still a long way off. In facts, Member States present irreconcilable social, cultural and linguistic differences, which cannot be overcome by the mere exercise of freedom of movement.

4. General remarks on how federalism affects citizens' political rights

Beyond the freedom of movement, political rights also constitute core rights of EU citizenship. In particular, these rights are fundamental in light of the process of European integration, as they ensure a sort of dialogue between Member States and EU institutions. To this extent, through instruments of representative democracy, persons are able to choose who is going to represent them in the European Parliament. Moreover, thanks to the tools of participatory democracy, they can directly report to the institutions.

The relationship between citizenship and voting rights can often be found in the presence of both local and national elections. Moreover, in federal systems, there are some uncertainties upon the residence requirements requested in order to vote. For example, the US Supreme Court declared null and void a law of the state of Tennessee, which stipulated that only residents for at least a year could vote. According to the Court, this time requirement violated the Constitution[392]. A similar

[388] See *Supra* Note no 216
[389] See *Supra* Note no 208
[390] See *Supra* Note no 373
[391] See *Supra* Note no 9
[392] On this point, see M. ROSENFELD, A. SAJÒ (ed.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, Oxford, 2012, p. 533

case occurred in Bulgaria, because an electoral law imposed a requirement of twelve months residence in order to vote and be elected in local elections. Setting residence requirements was not in contrast with EU law, but the duration of this requirement was the problem in the case in point. The Bulgarian law did not pass the proportionality test, because the period of time requested was too long. In facts, it could have hindered the exercise of this kind of political citizenship. Moreover, according to the *Venice Commission*, states were free to establish residence requirements up to a maximum of six months[393].

In the EU, dynamic citizens can vote for local and European elections in their host state, even if they are not citizens, but they just reside there. However, *«the fact that European citizens are granted this right is difficult to see as a step towards full enfranchisement, that is, eligibility to vote and stand as candidates at the national elections in the Member State of residence, which should logically be the ultimate goal of the development of European citizenship[394].»* Despite the impact of such right on citizens' lives is undeniable, non-citizen residents seem to be not even conscious of the existence of such right and also reluctant to implement it. In facts, in 2018, only 54% of the population was aware of the possibility of exercising the rights of active and passive electorate in the municipal polls of the host state[395].

In the US, it is pacific that the right to vote can be exercised in any state, but American legislators and Justices have struggled over the years to reach this guarantee[396]. Moreover, American citizens can always vote for federal elections, even if they have resided outside the US for a determined period of time.

Briefly, the relationship between federalism and political rights basically lies in the two-folded electoral dimension: either national and European or state and federal. In facts, in both systems there are two types of elections: at a local or at a national or supranational level. The greatest achievement is the opportunity for non-citizens to vote in the state of residence, which is applicable both among Member States and US states. It is undeniable that passive electoral rights can be exercised elsewhere,

[393] On this point, see FRA, *op. cit.*, p. 48
[394] Cfr. D. KOCHENOV, *op. cit.*, 2009, p. 201
[395] On this point, see FRA, *op. cit.*, p. 50
[396] On this point, see D. KOCHENOV, *op. cit.*, 2017, p. 281

but the same assumption is not always valid for active electoral rights, because, under certain circumstances, only Member States' nationals can run for office.

5.1 Voting rights: EU primary law and CJEU's case law

Article 22 TFEU[397] provides for the right to vote and stand as a candidate in both municipal and European elections in the state of residence. Since the aforementioned provision explicitly refers to the state of residence, voting rights cannot be appealed against the individual's national state, whenever he has been deprived of those rights. The reasons why voting rights have been extended to residents regard the promotion of freedom of movement and of democracy across borders, in such a way as to facilitate the integration of dynamic citizens in the host states[398].

Article 22(1) TFEU[399] disciplines municipal electoral rights, in particular, discriminations between residents and citizens are prohibited in relation to the exercise of those rights. Derogations are admissible, if resulting from arrangements, adopted by the Council through a special legislative procedure, after the consultation with the Parliament. In EU secondary law, the equal treatment between nationals and residents in municipal elections is regulated under Directive 94/80/EC[400]. Article 22(2) TFEU[401] provides for the right to vote and stand as

[397] See *Supra* Note no 106
[398] On this point, see C. MORVIDUCCI, *op. cit.*, pp. 313- 315
[399] See *Supra* Note no 106. Full text of Article 22(1) TFEU: *"Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State."*
[400] See *Directive 94/80/EC laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals,* 19 December 1994, *in Official Journal of the European Union,* L 368, 31 December 1994
[401] See *Supra* Note no 106. Full text of Article 22(2) TFEU: *"Without prejudice to Article 223(1) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State."*

candidate in European elections, which recalls almost everything established in the field of municipal elections. Concerning EU Parliament electoral rights, Directive 2013/1/EU[402] must be mentioned. The Directive played a fundamental role in practical terms because it smoothened the application filing procedure for the election candidates[403], amending the previous Directive[404]. The two Directives 94/80/EC[405] and 93/109/EC[406] establish that citizens can exercise their right to vote and stand as candidates in both local and European election in their country of residence, by simply presenting a formal declaration. States are free to legislate on such matter in order to prevent that the same citizen exercises those rights twice, in both his home and host state and they can also make sure that the individual still possesses voting rights in national elections, back in his country of origin[407].

A remarkable judgement related to the exercise of EU Parliament voting rights is *Eman and Sevinger*. The case regarded two Dutch nationals, who were not allowed to vote for the EU Parliament elections in 2004, because they resided in Aruba. The Court held that Member States were free to decide the requirements needed for the European Parliament elections, usually based on residence, nonetheless, *«the principle of equal treatment prevents, however, the criteria chosen from resulting in different treatment of nationals who are in comparable situations, unless that difference in treatment is objectively justified[408]»*. In facts, the Court stated that, in the case in point, a differential treatment was not justifiable, since voting rights were granted to people residing in third countries, but not to those residing in Aruba or in the Antilles. Moreover, the Court enhanced the importance of Union

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[402] See *Directive 2013/1/EU amending the Directive 93/109/EC as regards certain detailed arrangements for the exercise of the right to stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals*, 20 December 2011, *in Official Journal of the European Union*, L 26, 26 January 2013

[403] See *Ibid.*, Article 1(2)

[404] See *Directive 93/109/EC laying down detailed arrangements for the exercise of the to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals*, 6 December 1993, *in Official Journal of the European Union*, L 329, 30 December 1993

[405] See *Supra* Note no 400

[406] See *Supra* Note no 404

[407] On this point, see F. FABBRINI, "Voting Rights for Non-Citizens: The European Multilevel and the US Federal Systems Compared", *European Constitutional Law Review*, Volume 7, Issue 3, 2011, p. 400

[408] Cfr. CJEU, Case C-300/04, *M. G. Eman and O. B. Sevinger v College van burgemeester en wethouders van Den Haag*, 12 September 2006, ECLI:EU:C:2006:545, point 61

citizenship, which implied an acquis of rights, that are inseparable from the citizen, wherever he is, even if he resides in another state. A similar reasoning was adopted by the Court in *Spain v. United Kingdom*[409], where the UK could extend the right to vote in Parliament elections to third-country nationals, residing in Gibraltar. In facts, the Court disregarded the argument of Spain, that believed in the existence of a link between EU citizenship and the right to vote, so, only Union citizens were entitled to exercise these rights. However, the Court shared the idea that such rights were rather linked to residence, not to citizenship[410]. The criterion of residence for exercising European voting rights was also encompassed by the public opinion, as the 56% of the respondents to Eurobarometer stated that they would have preferred to vote in the host state[411].

Moreover, voting rights were embodied in the so-called core of citizenship rights, as established by the Court in *Ruiz Zambrano*[412]. In facts, although Member States were free to decide who could vote, individuals' deprivation of such rights must be proportionate, otherwise it would have been an unjustified endangering of the enjoyment of such rights, so in contrast with EU law[413].

A sensitive topic regards the policy of disenfranchisement adopted by some Member States[414]. In this sense, nationals of a State, but residents in another State for a certain number of years[415], are not allowed to vote in national elections both in their home and host State. Disenfranchisement is a dangerous tool and must not be underestimated because it undermines the exercise of voting rights and represents a negative repercussion on freedom of movement. In particular *«citizens*

[409] See CJEU, Case C-145/04, *Kingdom of Spain v United Kingdom of Great Britain and Northern Ireland*, 12 September 2006, ECLI:EU:C:2006:543
[410] On this point, see S. PLATON, "The Right to Participate in the European Elections and the Vertical Division of Competences in the European Union", *European Papers: A Journal of Law and Integration*, Volume 3, no 3, 2018, p. 1255, J. SHAW, *op. cit.*, 2007, p. 186 and J. SHAW, "The Political Representation of Europe's Citizens: Developments: Court of Justice of the European Communities Decisions of 12 September 2006, Case C-145/04, Spain v. United Kingdom, and Case C-300/04, Eman and Sevinger v. College van Burgemeester en Wethouders van Den Haag", *European Constitutional Law Review*, Volume 4, Issue 1, 2008, pp. 179-180
[411] On this point, see EUROPEAN COMMISSION, *Special Eurobarometer 477 - September 2018 "Democracy and elections" Report,* Special Eurobarometer 477 – Wave EB90.1 – Kantar Public, November 2018, p. 6
[412] See *Supra* Note no 91
[413] On this point, see D. KOCHENOV, *op. cit.*, 2017, p. 288
[414] Those States are Denmark, Ireland, Cyprus, Malta and the United Kingdom
[415] The period of time is fifteen years of non-residence in the United Kingdom

should not be disadvantaged as a result of exercising their right to free movement[416]*»*. The Commission intervened by proposing some alternative measures. On the one hand, it wanted to introduce the absentee voting, preferably electronic, if citizens have shown interests in their home state political life. On the other hand, it proposed to increment the enfranchisement and the integration in the host state democratic community[417]. In order to realize the second objective, the "*Let Me Vote*" European Citizens' Initiative[418] has been proposed with the aim of extending national elections to residents. *Wilhelm*, for example, supported the latter initiative, however, he pointed out that the real aim of the Union is to become purely post-national, superseding the notions of second-country and third-country nationals[419]. Furthermore, the public opinion is against disenfranchisement, as demonstrated by a survey made in 2018, where the 74% of the people interviewed stated that it was important to them to keep voting for national elections in their home state, even if they resided somewhere else[420].

Some concerns arose regarding the fact if UK nationals will continue to vote for municipal and European elections after the official withdrawal from the Union. In relation to this issue, scholars made a proposal, which would allow British people to keep voting, as third-country nationals and to continue to be represented in the European Parliament. In support of this thesis, there were examples of enfranchisement toward third country nationals. Whereas some States allowed non-EU citizens to vote in local elections[421], in the UK, Commonwealth citizens could also vote for European elections. Another theory proposed the establishment of a re-entry clause, according to which Britain would regain its previous membership

[416] Cfr. EUROPEAN COMMISSION, *EU Citizenship Report 2017: Strengthening Citizens' Rights in a Union of Democratic Change,* Luxemburg: Publication Office of the European Union, 2017, p. 20

[417] See EUROPEAN COMMISSION, *Addressing the Consequences of Disenfranchisement of Union Citizens Exercising Their Right to Free Movement,* 29 January 2014, COM (2014) 33 Final

[418] For further information on the "Let Me Vote" European Citizens' Initiative, see ONE EUROPE, "European Citizens' Initiative: Let me Vote!", 2014, available at http://one-europe.net/initiative/european-citizens-initiative-let-me-vote, accessed on 25th August 2020

[419] On this point, see R. BAUBÖCK (ed.), *op. cit.*, 2019, p. 57

[420] On this point, see EUROPEAN COMMISSION, *Special Eurobarometer 477 - September 2018 "Democracy and elections" Report,* Special Eurobarometer 477 – Wave EB90.1 – Kantar Public, November 2018, p. 7

[421] The Countries, which adopted this policy of enfranchisement, were Belgium, Denmark, Estonia, Finland, Hungary, Ireland, Lithuania, Luxembourg, and the Netherlands

status[422]. In my opinion, this view was utopian, however, such clause could only be realized by amending Article 50 TFEU[423]. Although these theories seemed interesting and appealing, the most practical solution could be found in the hypothetical modification of EU secondary law provisions[424].

To sum, electoral rights are part of the core of citizenship rights. In facts, their protection and defense are fundamental for enhancing democracy in the Union. Although the EU primary law and the CJEU's case-law grant the right to vote in both municipal and European elections to residents, those can be disenfranchised, so, they cannot vote in national elections. Academics have discussed the issue for years, but it has not been solved it. The policy of disenfranchisement negatively affects not only voting rights but represents a serious threat to the freedom of movement.

5.2 The relationship between US federalism, the Election Clause and the *Arizona* cases

The Election Clause[425] establishes that states have the power to regulate time, place and manner of congressional elections. The power is primarily attributed to states, but the Congress may ultimately intervene on such matters, so, states do not have exclusive competence. However, both states and the Congress must not violate the Constitution[426] in regulating elections. The provision itself is multi-level, reflecting the interplay between state and federal entities. The Congress has stepped in very few times in history. For example, it established a national election day and requested states to organize congressional districts. However, the Clause cannot be

[422]On this point, see LSE BLOG, "After Brexit the UK should have a democratic right of return", 2018, available at https://blogs.lse.ac.uk/brexit/2018/10/30/after-brexit-the-uk-should-be-able-to-re-enter-the-eu-if-it-wishes-to-do-so/, accessed on 25th August 2020

[423] See *Supra* Note no 89

[424] On this point, see EUROPEAN LAW BLOG, "Part III Mini-Symposium on EU Citizenship in the Shadow of Brexit: The Right of UK nationals to vote in European Parliament elections in the EU-27", 2018, available at https://europeanlawblog.eu/2018/12/19/part-iii-mini-symposium-on-eu-citizenship-in-the-shadow-of-brexit-the-right-of-uk-nationals-to-vote-in-european-parliament-elections-in-the-eu-27/, accessed on 15th June 2020

[425] See Article 1, Section 4, Clause 1, US Constitution, 17 September 1787. Full text*: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."*

[426] See *Supra* Note no 216

read in light of the concept of *"dual sovereignty",* typical of American federalism, which was, nonetheless, overcome after the New Deal[427]. States do not exercise sovereign power in this matter, since the last word always belongs to the Congress, which can *"make or alter such Regulations"*[428] .

The Election Clause[429] was recently brought up in the *Arizona* cases. Firstly, in 2013, in *Arizona Inter Tribal*[430] the Court struck down an Arizona state law, because it required proof of citizenship in order to vote for federal elections, but this was not a requirement under federal laws[431]. The Court stated that, according to the Election Clause[432], Congress had the final say on federal elections, so, a documentary proof was unnecessary, because the aim of the federal law was to smooth the registration procedure. In 2015, In *Arizona IRC*[433], the Court interpreted the Clause as a means for the Congress to exercise its veto power over state laws. It may seem that in both cases the Court enhanced the role of the Congress, but it was not like that. For example, in *Arizona Inter Tribal,* the fact that federal intervention was subjected to state laws could be seen as a protection of state powers[434].

Moreover, the possibility of an intervention by the federal government was also prescribed by the Voting Rights Act of 1965[435]. In facts, the federal government controlled the proper conduct of elections in the states, especially in regard to voters' registration and prevented every possible state measure, aimed at excluding African Americans to the exercise of voting rights. The Act was mainly addressed to Southern states. In facts, the Southern states showed their disagreement with this legislation, as they thought that it represented an illegal intrusion by the federal

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[427] On this point, see NATIONAL CONSTITUTION CENTER, "Elections Clause", available at https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/750, 2019, accessed on 26th August 2020 and F. TOLSON, "Election Law 'Federalism' and the Limits of Antidiscrimination Framework", *William & Mary Law Review,* Volume 59, Issue 5, 2018, p. 2237

[428] Cfr. *Supra* Note no 425

[429] See *Ibid.*

[430] See US SUPREME COURT, *Arizona v. Intertribal Council of Arizona, Inc.,* 17 June 2013

[431] See National Voter Registration Act of 1993, 1 January 1995

[432] See *Supra* Note no 425

[433] See US SUPREME COURT, *Arizona State Legislature v. Arizona Independent Redistricting Commission,* 29 June 2015

[434] On this point, see F. TOLSON, *op. cit.,* pp. 2241-2244

[435] See Voting Rights Act, 6 August 1965

government into the exclusive competence of the states. Furthermore, the Supreme Court also justified this federal intrusion because it aimed at avoiding the states' discriminatory practices. The Act represented a milestone legislation from both a federal and an anti-racial point of view, even though it was temporary and could be extended, only if authorized. It was the result of a long anti-racial policy[436].

The interplay of federal and state laws in election matters is undoubtedly controversial. In facts, the issue is not clear at all and the reasoning of the Supreme Court is also blurry. The Court seemed to emphasize the primacy of federal law and the fundamental role of the Congress; however, the *Arizona* cases could also be considered an attempt to maintain the focus on states. In my opinion, although the power of the Congress in undeniable on such matters, the fact that it has exercised this power on occasion underlines the *de facto* power of states, which is particularly wide in the electoral field as well.

6. The impact of federalism on citizens' access to health care

As pointed out *supra*, federalism consists in a multi-level system, where sovereignty is divided between different levels of government. Generally, the competence to rule on health care is shared within such levels. The shared competence is also thought in order to guarantee the better protection of citizens. To this end, all the levels of governments have the responsibility of providing access to health care. This mechanism appears quite clear in the US, which is a pure federal state. In the European scenario, instead, the situation is more complex, because the right to health care, which is a social right and it is protected under Article 35 CFR[437], is not harmonized at an EU level. Member States regulate the health care management; however, some important aspects, especially regarding public health, are disciplined at a supranational level.

Regarding the EU context, there are two theories in order to understand European integration, which are also applicable in the health care field. On the one hand,

[436] On this point, see CENTER FOR THE STUDY OF FEDERALISM, "Voting Rights Act of 1965", 2019, available at https://encyclopedia.federalism.org/index.php/Voting_Rights_Act_of_1965, accessed on 26th August 2020

[437] See Article 35 Charter of Fundamental Rights of the European Union (CFR)

intergovernmentalism focuses on states as the main protagonists in health care policies. On the other hand, neo-functionalists believe that this policy is mainly shaped by non-state actors. However, none of the above-mentioned theories seemed satisfying to some scholars, who envisaged the Union as a cooperative federation, based on shared rules[438]. In order to understand the competences of Member States and of Union in health, Article 35 CFR[439] must be mentioned. According to the latter provision, citizens' access to health care is regulated by national laws and practices, however, a high level of protection must be guaranteed by EU policies, too. For example, a measure, which safeguards citizens' health across borders, is the free European Health Insurance Card (EHIC), because it ensures medical assistance to all EU citizens while they are abroad. However, the primacy of states on health policy must always be taken in account. To this extent, Article 168(7) TFEU states: *«Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care. The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them[440]».* Moreover, Directive 2011/24/EU[441] disciplines patient mobility and reimbursement, in particular, states may require a prior authorization for non-emergency medical assistance, if justified on overriding grounds of public interest, because, otherwise, it would undermine freedom of movement.

In the US legal order, federalism is always involved in health care policies or reforms since powers are exercised both at a state and at a federal level. In a nutshell, the US health coverage is almost entirely private, Medicare and Medicaid are the only public care systems. The former is provided nationally and ensures

[438] On this point, see H. VOLLAARD, H. VAN DE BOVENKAMP, D. SINDJEBERG MARTINSEN, "The making of a Union Healthcare Union: A Federalist Perspective", *Journal of European Public Policy*, Volume 23, Issue 2, 2016, pp. 158-161

[439] See *Supra* Note no 437. Full article: *"Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities."*

[440] Cfr. Article 168(7) Treaty on the Functioning of the European Union (TFEU)

[441] See *Directive 2011/24/EU on the application of patients' rights in cross-border healthcare,* 9 March 2011, *in Official Journal of the European Union*, L 88, 4 April 2011

medical care to people who are over sixty-five years old and the coverage is based on the income of the interested person. The latter is available at a state level and it is directed to indigent people in particular conditions, such as disabled people. There is a federal contribution to Medicaid, which amounts to about 60% of the expenses. However, the role of federalism can be clearly seen in the Affordable Care Act[442], or Obamacare, enacted in 2010. The Obamacare provided for both public and private universal health insurance, which must be implemented by the States throughout the expansion of Medicaid. The Obamacare is the health care reform, which has been the closest to citizens and their need for medical care in American history. *Trump* administration has restricted its coverage by inviting states to impose new eligibility criteria to access Medicaid[443].

Federalism plays two diverse roles in the legal orders in point. In my opinion, the EU quasi-federal structure improves citizens' access to care, by ensuring an adequate medical care to all EU citizens among Member States. Nevertheless, the US scenario appears more problematic. American federalism is a double-edged sword, because it aims at enlarging citizens' enjoyment of health assistance, but it also determines fragmentation and discrepancies among states, and it can drastically change between different administrations.

6.1. General remarks on the national dimension of EU Member States' health care

The concept of citizenship is interlinked with health care because citizens are beneficiaries of both national welfare systems and EU social policies. In addition, citizens can both enjoy and provide medical services. In relation to national cares, the EU scenario is, of course, varied and patchy since each state is free to organize health care in the most appropriate way according to the national needs. Among EU Member States, there are prevalently two models of health care systems: the *Beveridge* model, which consists of public care financed by general taxation, and the *Bismarck* model, which is financed by social health insurances[444].

[442] See Affordable Care Act, 23 March 2010

[443] On this point, see N. HUBERFELD, "Epilogue: Health Care, Federalism, and Democratic Values", *American Journal of Law & Medicine,* Volume 45, Issue 2-3, 2019, pp. 248-249

[444] On this point, see U. EREL, "Introduction: Transnational Care in Europe - Changing Formations of Citizenship, Family, and Generation", *Social Politics: International Studies in Gender, State &*

Beyond the national dimension of health care, a joint responsibility of the EU and Member States can be deduced from the provisions of the Charter of Fundamental Rights of the European Union and the Treaty on the Functioning of the European Union. In facts, the above-mentioned Article 35 CFR[445] provides for the protection of the right of health care to all EU citizens, but it does not specify neither the competences nor the responsibilities of both Member States and the Union. So, Article 168 TFEU intervenes on this issue. On the hand, it establishes that the management of health and the delivery of medical services is reserved to Member states and the Union must respect their decisions on the matter[446]. On the other hand, the Union is obliged to integrate national health policies in order to guarantee better public health[447]. Moreover, states are required to provide minimum access to health care, basic medical services and essential medications to the population, as stated in International Covenant on Economic, Social and Cultural Rights[448]. In particular, access to care must be assessed according to national needs, so, it is regulated at a domestic level. Briefly, these provisions codify the right to health care for all the EU citizens, which is a primary responsibility of states, but the Union's help is needed and requested[449].

To sum, health care in the European Union is characterized by the actions of Member States. However, almost all the Member States are facing challenges, such as the ageing of the population and the increase of chronicle diseases with less economic resources. Unfortunately, there is not an immediate solution for these problems. In my opinion, a strong cooperation between Member States and the Union can be fundamental in order to mitigate those negative trends.

Society, Volume 19, Issue 1, 2012, p. 4 and EUROPEAN OBSERVATORY ON HEALTH SYSTEMS AND POLICIES, *Financing Health Care in the European Union: Challenges and Policy Responses, Observatory Studies Series, No 17,* WHO Regional Office for Europe, Copenhagen, July 2009, p. 23. For a comparative analysis on EU Member States' health care systems, see C. WENDT, "Mapping European healthcare systems: a comparative analysis of financing, service provision and access to healthcare", *Journal of European Social Policy,* Volume 19, Issue 5, 2009, pp. 432-445

[445] See *Supra* Note no 437

[446] See *Supra* Note no 440

[447] See Article 168(1) Treaty on the Functioning of the European Union (TFEU)

[448] See UNITED NATIONS GENERAL ASSEMBLY, *International Covenant on Economic, Social and Cultural Rights,* Resolution 2200A (XXI), 16 December 1966

[449] On this point, see EXPERT PANEL ON EFFECTIVE WAYS OF INVESTING IN HEALTH (EXPH), *Report on access to Health Services in the European Union,* 3 May 2016, pp. 109-111

6.2 EU Public Health Governance and its response to Covid-19 outbreak

The EU health policy aims at helping states, intervening in national policies in order to ensure better protection and better resources, prioritizing the citizens' interest. The European Commission plays an important role in EU public health, especially through the activity of the European Commission's Directorate for Health and Food Safety (DG SANTÉ). In particular, the latter body must ensure the cooperation among Member States with the aim of realizing the most efficient assistance, by proposing legislation addressed to states or by supporting them economically. In this respect, the aforementioned Directive 2011/24/EU[450] on patients' mobility is an example of legislation, included in EU health policy. Furthermore, a part of the EU health policy concerns health emergencies. The Decision 1082/2013/EU[451] aims at optimizing Member States' responses to health threats, such as pandemics. In particular, the main objective is increasing the readiness of the single states to situations of emergency. The Decision also stresses on the importance of adequate monitoring, early warning and communication between states in order to respond, control and combat the threat in an effective way. Moreover, it also regulates the notions of risk assessment and risk management. The former regards the definition of the risk, derived from the emergency, which must be assessed according to the information collected among Member states. This competence is reserved to the DG SANTÉ, which relies on the European Center for Disease Prevention and Control (ECDC). The latter, instead, deals with the actual response to the health threat in order to repress the emergency, such as treatments and vaccines. Risk management is realized on a national level. Nonetheless, there is a European body: the Health Security Committee (HSC), constituted of Members States' Ministers of Health, which also takes care of the risk management[452].

[450] See *Supra* Note no 441

[451] See *Decision No 1082/2013/EU on serious cross-border threats to health and repealing Decision No 2119/98/EC,* 22 October 2013, *in Official Journal of the European Union, L* 293, 5 November 2013

[452] On this point, see EUROPEAN COMMISSION, "EU Health Policy Explained", 2019, available at https://ec.europa.eu/health/policies/overview_en, accessed on 29th August 2020, EUROPEAN COMMISSION, "Crises Preparedness and Response", 2018, available at https://ec.europa.eu/health/preparedness_response/overview_en, accessed on 29th August 2020 and RECONNECT, "Framing Public Health Expectations in the EU amid the COVID-19 pandemic",

Covid-19 is one of the greatest health crises occurred in the world history. The number of mortality rates is enormous. More than 800.000 people have died worldwide, more than 200.000 in Europe and more than 400.000 in America[453]. The Union is trying with all its strengths to respond in the best way possible to this terrible crisis, which has shocked the whole world. The first measures adopted by the Union regarded the non-essential travel restrictions in the EU territory from 17 March to 30 June 2020[454], moreover, the freedom of movement of workers, with the exception of health professionals and paramedics, was restricted as well[455]. There are still travel restrictions in relation to some specific third countries[456]. Since the beginning of the spread of the pandemic in Europe, the Union has also stressed on the concept of coordination between Member States and between Member States and the Union. Concerning the coordination among Member States, presidents *Von der Leyen* and *Michel* in their *Joint Roadmap toward lifting Covid-19 containment measures* have called on States to coordinate with other Member States, respecting solidarity between each other and putting always public health first[457]. Solidarity between Member States is also a key-principle of the Union, which must be ensured

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2020, available at https://reconnect-europe.eu/blog/framing-public-health-expectations-in-the-eu-amid-the-covid-19-pandemic/, accessed on 19th May 2020

[453] On this point, see MINISTERO DELLA SALUTE, "Covid-19-Situazione nel mondo", 2020, available at http://www.salute.gov.it/portale/nuovocoronavirus/dettaglioContenutiNuovoCoronavirus.jsp?lingua=italiano&id=5338&area=nuovoCoronavirus&menu=vuoto, accessed on 29th August 2020

[454] See Supra *Note* no 291, EUROPEAN COMMISSION, *Communication from the Commission the European Parliament, the European Council and the Council on the assessment of the application of the temporary restriction on non-essential travel to the EU,* 8 April 2020, COM (2020) 148 final, EUROPEAN COMMISSION, *Communication from the Commission the European Parliament, the European Council and the Council on the second assessment of the application of the temporary restriction on non-essential travel to the EU,* 8 May 2020, COM (2020) 222 final and EUROPEAN COMMISSION, *Communication from the Commission the European Parliament, the European Council and the Council on the third assessment of the application of the temporary restriction on non-essential travel to the EU,* 11 June 2020, COM (2020) 399 final

[455] See EUROPEAN COMMISSION, *Communication from the Commission Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak, in Official Journal of the European Union,* C 102 I/03, 30 March 2020

[456] For further information on third-countries travel restrictions, see EUROPEAN COUNCIL AND COUNCIL OF THE EUROPEAN UNION, "Lifting of Travel Restrictions: Council reviews the list of third countries", 2020, available at https://www.consilium.europa.eu/en/press/press-releases/2020/08/07/lifting-of-travel-restrictions-council-reviews-the-list-of-third-countries/, accessed on 29th August 2020

[457] EUROPEAN COMMISSION AND COUNCIL (EU), *Joint Roadmap toward lifting Covid-19 containment measures,* 16 April 2020, p. 6. See also EUROPEAN COMMISSION, *Communication from the Commission Guidelines on EU Emergency Assistance on Cross-Border Cooperation in Healthcare related to the COVID-19 crisis, in Official Journal of the European Union,* C 111 I/01, 3 April 2020

through decision-making processes, economic supports, specific plans of actions or programmes. The public opinion is not satisfied with solidarity, because reciprocal assistance or patient mobility has not been ensured. For example, Italy has been visited by Chinese and Cuban health professionals, not by European ones. In relation to the coordination between Member States and the Union, all the institutions are holding meetings or videoconferences with experts and states' representatives, usually with ministries[458].

It seems that the virus has weakened now, but the risk of a relapse remains high, as reported by the ECDC[459]. In this situation of serious crisis, there is a general discontent among EU citizens regarding how both the Union and Member States responded to the emergency. In this regard, recent surveys have demonstrated that 57% of the population is not satisfied with solidarity between Member States, 52% believes that the measure taken by the Union to contain the spread of the pandemic are not sufficiently effective. Nonetheless, the 69% of the respondents agreed that the Union should have more power in dealing with pandemics and similar emergencies[460]. The latest data seem paradoxical to me because the previous ones followed a completely opposite trend. Consequentially, some interesting arguments can be deduced from the reading of those data. Is it the population unsatisfied because the Union has overall limited power in terms of risk management? Can those data be read as a proof of trust toward the Union, not toward Member States, so, contrary to the growing tendency of Euroscepticism? Is it possible to still believe in the Union after the crisis has enhanced the divisions among states? Is the

[458] On this point, see EUROPEAN COUNCIL AND COUNCIL OF THE EUROPEAN UNION, "Covid-19: The EU's response in the field of public health", 2020, available at https://www.consilium.europa.eu/en/policies/coronavirus/covid-19-public-health/, accessed on 29th August 2020 and FOUNDATION ROBERT SCHUMAN, "The European Union and the Coronavirus", 2020, available at https://www.robert-schuman.eu/en/european-issues/0553-the-european-union-and-the-coronavirus, accessed on 29th August 2020

[459] On this point, see EUROPEAN CENTER FOR DISEASE PREVENTION AND CONTROL (ECDC), "Risk Assessment on Covid-19, 10 August 2020", 2020, available at https://www.ecdc.europa.eu/en/current-risk-assessment-novel-coronavirus-situation, accessed on 29th August 2020

[460] On this point, see EUROPEAN PARLIAMENT, *Uncertainty/EU/Hope: Public Opinion in times of Covid-19*, Publication Office of the European Union, Brussels, June 2020

pandemic a possible cause of a future return of nationalism? Unfortunately, these questions cannot be answered on the basis of the collected data.

The Coronavirus undoubtedly has put a strain on EU institutions, on Member States and on ourselves, as EU citizens. So, asking questions, doubting, challenging the EU and national systems is more than legitimate.

6.3 The fragmentation of the US health care system: Medicaid, Affordable Care Act and the repercussions in the era of the pandemic

As mentioned above, US health care system is not uniform across states. The fragmentation is also enhanced by the presence of different public and private insurances. Insurances are prevalently private, the public ones are reserved to vulnerable people, such as indigents, disables, over 65. In particular, Medicare is established at a federal level and it is addressed to the elderly, while Medicaid is ensured at state level with a federal contribution and it is reserved to categories of vulnerable people, especially impecunious. Medicaid is financed by federal, state and municipal taxes. Moreover, there are some guidelines established federally, which must be implemented by the states. Persons, who do not have insurance or who do not fulfill the eligibility criteria for the public ones, can access to ambulatory care, offered by the health-safety net[461].

A turning point in the history of US health care system was characterized by the enactment of the Affordable Care Act[462], or Obamacare, presented during the *Obama* administration in 2010. The Act brought up a lot of innovations, which aimed at ensuring medical care to everyone, pursuing the dream of a universal health coverage. The most important novelty of the reform regarded the expansion of Medicaid, which had exponentially increased the number of people who had access to care. However, some states did not expand Medicaid, as it could not be imposed at a state level[463]. Since states were free to decide on the Medicaid expansion, huge inequalities and discrepancies could be found among states,

[461] On this point, see M. SEZER, F. BAUER, "Introduction to the US health care system", *Crossing Borders - Innovation in the U.S. Health Care System, Schriften zur Gesundheitsökonomie,* Volume 84, 2017, pp. 12-13, p. 17
[462] See Supra *Note* no 442
[463] See US SUPREME COURT, *National Federation of Independent Business v. Sebelius,* 2012

generating the fragmentation of the system and unjust differential treatments[464]. Data demonstrated that the beneficiaries of Medicaid are usually the weakest ones in terms of race, social class or health, in facts, there was a prevalence of blacks and Latinos. Nevertheless, the *Trump* administration followed an opposite trend in the field of health care. In particular, the aim was to get rid of Obamacare. To this end, the American Health Care Act[465] aimed at replacing Obamacare or, at least, discouraging its use. In particular, a penalty tax was prescribed for those states, which had expanded Medicaid. However, in 2017 the Senate did not pass the reform[466].

Covid-19 emergency is also hitting hard on the US with almost 200.000 victims since the pandemic initial outbreak[467]. The fragmentation of health care and the strong decentralized power of state authorities reflected in the heterogenous responses to the pandemic, that differed from state to state. In particular, states' decisions on confinement and lockdowns resembled the single states' approaches to the expansion of Medicaid, established by the Obamacare. In this respect, 87,5% of states, that imposed lockdowns, were the same ones that previously expanded Medicaid in 2010. Moreover, there are also political implications in the states' reactions to the pandemic. Democratic states, like New York, were the first to be hit by the virus and the first to take measures, whereas Republican ones, such as Texas, are now facing the peak of the emergency and coincidentally did not lock their economies down in March[468]. The Coronavirus is simply demonstrating that states are left on their own, making their decisions and following different paths,

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[464]For further information on the status of Medicaid expansion in the US states, see KFF, "Status of State Medicaid Expansion Decisions: Interactive Map", 2020, available at https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/, accessed on 30th August 2020

[465] See American Health Care Act, first introduced in the House of Representative in 2017 (did not pass)

[466] On this point, see M. SEZER, F. BAUER, "Introduction to the US health care system", *Crossing Borders - Innovation in the U.S. Health Care System, Schriften zur Gesundheitsökonomie,* Volume 84, 2017, pp. 20-23 and J. MICHENER, *Fragmented Democracy: Medicaid, Federalism and Unequal Politics*, Cambridge University Press, Cambridge, 2018, p. 10

[467] See KFF, "Covid-19: Coronavirus tracker", 2020, available at https://www.kff.org/coronavirus-covid-19/fact-sheet/coronavirus-tracker/?utm_source=web&utm_medium=trending&utm_campaign=covid-19,accessed on 30th August 2020

[468] On this point, see D. F. KETTL, "States divided: The Implications of American Federalism for Covid-19", *Public Administration Review,* Volume 80, Issue 4, 2020, p. 597

their division is now undoubtedly enhanced, challenging the Equal Protection Clause[469]. However, the only positive notes are the fact that the pandemic increased awareness on the frailty of medical assistance and on the division amid states, as a dangerous consequence of federalism[470].

In light of the previous overview on the American health care system, I agree with *Nathan*'s statement, who defines health as both a right and a commodity[471]. In facts, it is a right that formally must be ensured to everyone, but *de facto* it is more of a privilege, which is accessible and granted differently on the basis of economic resources. In my opinion, it is quite sad that a right that should be universal, it is measured by income, as if health becomes an affordable good.

7. Concluding remarks

In light of the previous analysis, EU citizenship is more similar to the American one than we might expect, because of its double dimension: national and supranational. Meanwhile, it is undeniable that US citizenship is federal, the same cannot be said in relation to Union citizenship. The problem, though, is defining EU citizenship. Theories on these matters are countless and scholars themselves did not reach a consensus, however, considering that the EU is a *sui generis* organization, EU citizenship must be consequentially *sui generis*.

The issue of defining Union citizenship also includes the fact that a social supranational citizenship cannot be found in the EU context. The reason why there is not an EU social citizenship reflects the lack of harmonization in the field of social rights, so, the idea of a European welfare cannot be even considered. In this regard, the US presents a totally different perspective, because social policies at a federal level were established early in the US history: in the nineteenth century with the issuing of the Revolutionary War pensions.

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[469] See *Supra* Note no 9

[470] On this point, see L. A. BLEWETT, M. T. OSTERHOLM, "What's Next for the US Health Care System After Covid-19?", *American Journal of Public Health, Covid-19 Section*, Volume 110, No 9, 2020, p. 1366

[471] See R. P. NATHAN, "Federalism and Health Policy", *Health Affairs,* Volume 24, No 6, 2005, p. 1464

According to some scholars, citizenship includes the notion of identity. Considering the diversity of the European background, the building of a common identity seems utopian to reach, almost a dream. Another obstacle to the reach of this identity is constituted by the fact that Members' state nationals identify themselves primarily as Italians or Spanish and, then, as Europeans. Although US scholars are divided on the notion of American identity, this one is, without any doubts, stronger than the European one, because it is, of course, easier to talk about identity in a national dimension. Despite the US is a multicultural country, diversity is not capable of affecting American identity.

Considering the controversial definition of Union citizenship, I decided to adopt a federalist perspective in the previous chapter. In particular, EU citizenship presents some quasi-federal characteristics that have repercussion on the enjoyment of citizens' rights. Firstly, freedom of movement and interstate equality have a typical federalist character since all Member states must be independent and equal. Secondly, even if municipal and European elections are exercised according to a residence criterion, citizens cannot vote for national elections abroad. In the framework of this dissertation, the fact that national elections are regulated by Member states, which can also turns into policies of disenfranchisement, somehow reflects the regulation of US congressional elections, made at a state level, the Congress can actually intervenes, but it is very rare. Finally, the right to health care, which, unfortunately, reflects federalism and the decentralization of powers, because health care management is mainly regulated by Member States or US states. Federalism in this field contributed to enhance disparities among states and the flaws of medical care systems have bitterly surfaced due to the pandemic.

Another implication of the concept of citizenship can regard immigration, in which, of course, federalism also plays a fundamental role. However, citizenship is intertwined with immigration in the most various fields. This connection will be the object of the next chapter, stressing, in particular, on the role of citizenship in immigration policies and migratory flows, critically analyzing the fact that being a citizen of a determined nation can cause direct or indirect discriminations.

CHAPTER III

CITIZENSHIP AND IMMIGRATION

SUMMARY:1. Preliminary remarks - 2. Intra-EU mobility: the case of EU citizens and third-country nationals - 3. Is citizenship encouraging the development of boundaryless careers in the era of globalization? - 3.1 Brain gain *vs* brain drain in the EU and in the US - 3.2 Eastern -Western Europe migration flows - 4. The link between citizenship and family reunification and its implementation in EU secondary law - 4.1 The right of family reunification in CJEU's case law: *Ruiz Zambrano* and *McCarthy* - 4.2 The "*zero tolerance"* policy and the right to family reunification - 5. *Trump's* travel bans: how citizenship can contribute to *"anti-immigration"* policies - 6. The European dream *vs* the American dream - 7. Concluding remarks

1. Preliminary remarks

The previous chapter deals with the impact of federalism in the two legal orders in point: the EU and the US. The reflection of federalism on citizenship and on the right of citizens is of course more accentuated in Northern America than in the EU, nonetheless, the Union citizenship intertwines with federalism, having effects on the role of rights exercised by citizens themselves.

The aim of the present chapter is to analyze the interconnection between citizenship and immigration. In this sense, the two notions are interdependent. Firstly, immigrants are citizens of their home country and, moreover, they aim at becoming citizens of the host country through naturalization, which is easier in the US than in the EU Member States.

In the first part of the chapter, I will give a critical overview about labor mobility. In particular, I will compare the free movement of EU citizens workers to the immigration policies of third-country nationals, which are subjected to a different treatment under EU law. This differential treatment is present in both low-skilled labor migration and in brain flows as well. In this sense, I will report a social analysis of the phenomenon of high-skilled labor mobility, because, in my opinion, citizenship can be considered fundamental in the determination of this kind of migratory flows, for example in the case of *"deskilling"* of Eastern EU citizens in Western Europe. Both situations of brain drain and brain gain can be found within the EU territory. The US, instead, has always been considered the brain gain country

par excellence, unfortunately, *Trump'*s policy on immigration is slowly turning America into a brain drain nation.

In the second part of the chapter, I will stress on another aspect of immigration, which is the right to family reunification. In particular, the CJEU's jurisprudence has drastically contributed to the shaping of such right and to its correlation with citizenship, thanks to the landmark judgements: *Ruiz Zambrano*[472] and *McCarthy*[473]. Regarding the situation in the US, my study will be centered on the issue of undocumented migrants at the US-Mexico border and on how *Trump* administration has increased family separation through the *"zero-tolerance"* policy.

Finally, the last part will regard the critical issue of citizenship as a means of discrimination, which is well represented in *Trump* travel ban[474]. Furthermore, a final comparison will be made between the two visions of the European and the American dream.

2. Intra-EU mobility: the case of EU citizens and third-country nationals

In a globalized world, the relation between immigrants and citizens can be problematic, in the sense that immigrants can be considered as dual citizens or as citizens of the home state and quasi-citizen or denizen of the host state[475]. In particular, the phenomenon of quasi-citizenship is spreading in Europe, due to the difficulty of naturalization processes, on the contrary, naturalization in the US is quite easy, in facts, in 2018 more than 750 thousand people have acquired American citizenship[476].

Freedom of movement is a right that constitutes the core of citizenship rights. Citizenship plays a role in the exercise of this right because there is a differentiation

[472] See *Supra* Note no 91
[473] See *Supra* Note no 93
[474] See *Supra* Note no 230
[475] On this point, see MIGRATION POLICY INSTITUTE, "Citizenship in a Globalized World", 2006, available at https://www.migrationpolicy.org/article/citizenship-globalized-world, accessed on 23rd April 2020
[476] On this point, see U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *2018 USCIS Statistical Annual Report*, 2018, p. 2

between EU-nationals and third-country nationals. In facts, according to Article 21 TFEU[477] and the Directive 2004/38/EC[478], EU citizens can freely move and reside for the first three months, without any conditions, in another Member State[479]. Third-country nationals usually need a visa to enter the EU territory, even if there are some visa-free countries[480]. Furthermore, EU immigration policy is regulated under Articles 77 TFEU[481] *et seq.* In particular, Article 79 TFEU[482] determines the competences of the Union in the area of immigration, that are: entry and residence criteria, rights of third-country nationals residents, illegal immigration and measures against persons' trafficking, however, the Union «*shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed*[483]».

In the field of immigration, the notion of citizen intertwines with that of worker. On the one hand, employment or economic self-sufficiency is a requirement for EU-nationals in order to reside in another Member State for more than three months. On the other hand, only certain categories of third-country nationals can enjoy the right to access to employment within the EU territory, for example asylum seekers are not entitled to work. Employment, or rather sufficient economic resources, is one of requisites needed by third-country nationals in order to acquire permanent residence[484], however, sometimes non-EU workers can be excluded on other grounds, such as lack of expertise or of a certain amount of incomings. The level of resources needed for a residence permit may vary from state to state, for example in France, the amount of resources must correspond to the minimum wage, in Italy,

[477] See *Supra* Note no 5
[478] See *Supra* Note no 6
[479] On this point, see *Supra* paragraph 1.4.2
[480] See *Regulation No 1806/2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement*, 14 November 2018, *in Official Journal of the European Union*, L 303, 28 November 2018. For further information on this topic, see SCHENGEN VISA INFO, "Who Needs and Who Doesn't Need a Schengen Visa To Travel to Europe?", 2018, available at https://www.schengenvisainfo.com/who-needs-schengen-visa/, accessed on 6th September 2020
[481] See Article 77 Treaty on the Functioning of the European Union (TFEU)
[482] See Article 79 Treaty on the Functioning of the European Union (TFEU)
[483] Cfr. *Ibid.*
[484] See *Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents*, 25 November 2003, *in Official Journal of the European Union*, L 016, 23 January 2004

such resources must be the double of the minimum amount requested in order to be exempted from health-care costs. Moreover, third-country nationals can be subjected to annual entry quotas, that are imposed nationally, for example in Italy, such matters are regulated by the so-called "*Decreti Flussi"*[485]. Non-EU self-employed citizens have to fulfill more stringent criteria, such as sufficient resources and the business activity must not be in contrast with the economic interest of the host state, they can also be subjected to conditions, regarding language and income for living expenses. Nevertheless, there is also a different regime in matter of social rights, in facts, third-country nationals are generally excluded from the access to social benefits[486].

In terms of immigrants' integration, unfortunately, there is not an EU common policy, however, there are some instruments, that must be implemented by Member States, so, integration is regulated at a national level[487]. An example of an instruments used by the Union is the *Asylum, Migration and Integration Fund* (AMIF). AMIF is a financial instrument, established for the period 2014-2020, that has allocated about 3 billion euros and one of its objectives is the promotion of third-country nationals' integration. The greatest part of the amount will be used for shared management, while the remaining will be distributed for direct management and specific actions[488].

As illustrated above, access to the labor market is certainly different between EU citizens and third-country nationals. Furthermore, some disparities can also be

[485] See Decreto del Presidente del Consiglio dei Ministri, 12 Marzo 2019, *"Programmazione transitoria dei flussi d'ingresso dei lavoratori non comunitari nel territorio dello Stato per l'anno 2019", in Gazzetta Ufficiale della Repubblica Italiana*, no 84, 9 April 2019

[486] On this point, see B. ANDERSON, I. SHUTES, S. WALKER, *Mobility and Citizenship in Europe: from the worker-citizen to inclusive Union citizenship, Policy scenarios and recommendations from bEUcitizen, a research project on the barriers to realise and exercise citizenship rights by European Union citizens*, BEUCITIZEN, Barriers Towards EU Citizenship, December 2016, pp. 2-3 and EUROPEAN COMMISSION, *Intra-EU Mobility of Third-country nationals,* European Migration Network, July 2013, pp.23, 37-40

[487] On this point, see P. G. VAN WOLLEGHEM, *The EU's Policy on Integration of Migrants: A Case of Soft-Europeanization?*, Palgrave Macmillan, London, 2019, p. 190

[488] On this point, see EUROPEAN COMMISSION, "Asylum Migration and Integration Fund (AMIF)", 2016, available at https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders/asylum-migration-integration-fund_en, accessed on 6th September 2020

found in the field of high-qualified employment, which is regulated under the Directive 2009/50/EC[489].

3. Is citizenship encouraging the development of boundaryless careers in the era of globalization?

Globalization has played a fundamental role in the increase of migratory flows, especially in the Western countries, there are more and more foreigners high-skilled workers, that contribute to the enrichment of national societies. Generally, states prefer temporary high-skilled workers because countries are reluctant to see the potential of future citizens, but they are only interested in filling the gaps of the labor market. This usually occurs in the EU, where naturalization is more difficult to achieve. Meanwhile, in the US, citizenship may encourage the migration of professionals, because America, in the past, has encompassed the *"talent for citizenship exchange"* policy, where citizenship was considered a prize for foreigners high-skilled workers, smoothening the naturalization processes for these individuals. Such policies have actually helped the development of economies, such as it occurred in Canada and Australia[490].

Regarding the EU legislative framework, conditions of entry and residence for non-EU citizens high-qualified workers are regulated under Directive 2009/50/EC[491]. Those workers, who are also called *"EU Blue Card holders"*, need to fulfill national criteria in order to be admitted to the host state, such as health insurance, high technical skills, valid visa or residence permit, moreover, they do not have to be a danger for public order, public security or public health[492].

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[489] See *Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment,* 25 May 2009, *in Official Journal of European Union,* L 155, 18 June 2009

[490] On this point, see M. POHLMANN, J. YANGA, J. LEE (ed.), *Citizenship and Migration in the Era of Globalization: The Flow of Migrants and the Perception of Citizenship in Asia and Europe,* Springer, Berlin, Heidelberg, 2013, p. 61, P. T. LENARD, "Injustice and high-skilled 'temporary' labor migration", *Grup de Recerca Interdisciplinari en Immigraciò Working Paper Series*, No 19, 2014, p. 4 and A. SCHACHAR, "The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes", *New York University Law Review,* Volume 81, Issue 1, 2006, pp. 164-165

[491] See *Supra* Note no 489

[492] On this point, see EUROPEAN COMMISSION, *Intra-EU Mobility of Third-country nationals,* European Migration Network, July 2013, p. 25

Regarding EU citizens who want to work in the US, those are not expressly advantaged under the law, but there are instruments that facilitate the entry of EU nationals. For example, tourists or jobseekers do not need a visa for periods up to three months. Nevertheless, even the high-qualified skilled labor migration is at stake now, because of the latest administration. In particular, the *"Buy American and Hire America"* executive order[493] gives priority to Americans in the field of high-qualified employment[494].

Aside from the new trends in the US, it is undeniable that the migration of high-qualified workers is a spreading phenomenon worldwide, especially because of globalization. However, according to the World Bank's data, some consider it as *"brain drain",* which is negative for the sending countries, others, instead, see such migration flows as *"brain circulation",* which can be deemed as an added valued for both sending and receiving countries[495].

3.1 Brain gain *vs* brain drain in the EU and in the US

The market labor for high-qualified workers has become more competitive over the years. However, both EU member states and the US did not adopt specific measures regarding these matters, but they keep relying on the system of residence and work permits. A feature of high-skilled migration is the presence of brain gain and brain drain scenarios[496]. In particular, *«brain drain is the loss suffered by a region as a result of the emigration of a (highly) qualified person, while brain gain is when a country benefits as a consequence of immigration of a highly qualified person[497].»*

The two terms brain drain and brain gain have been widely discussed among high-skilled labor migration scholars. The term brain drain was used for the first time in

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[493] See Buy American and Hire American, Executive Order No 14788, 18 April 2017

[494] On this point, see A. WEINAR, A. KLEKOWSKI VON KOPPENFELS, *High Skilled Migration Between Settlement and Mobility: IMISCOE Short Reader*, Springer, Cham, Switzerland, 2020, pp.84-85 and THE ATLANTIC, "The US system for 'Skilled' Migrants is Broken", 2019, available at https://www.theatlantic.com/international/archive/2019/05/us-visa-system-skilled-migrants/589615/, accessed on 6th September 2020

[495] On this point, see A. SCHACHAR, *op. cit.,* p. 205

[496] On this point, see M. POHLMANN, J. YANGA, J. LEE (ed.), *op. cit.,* p. 61

[497] Cfr. ASSEMBLY OF EUROPEAN REGIONS, "Brain Drain vs Brain Gain", 2020, available at https://aer.eu/brain-drain/#:~:text=Brain%20drain%20is%20the%20loss,of%20a%20highly%20qualified%20person, accessed on 6th September 2020

relation to the 1960s migration flows of British scientists to the US, as it implied high-qualified persons leaving their home state in order to seek employment in another country. Brain gain was the opposite phenomenon, so, governments have attempted to limit brain drain by promoting the return of high-skilled workers[498].

In the EU territory, students' mobility, which has particularly increased over the last years thanks to the *Erasmus* program, is an interesting phenomenon and so, it is worth to mention. Although students are not workers, both brain drain and brain gain patterns can be found within the Union borders, so we can talk of "*brain exchange".* In more specific terms, sending countries face a brain drain whether their citizens decide to work in the host state, where they studied, but receiving states are actually considered brain gain countries. So, students contribute to high-skilled workers' migration because statics demonstrated that individuals, who have studied abroad, are more likely to access employment in another state[499].

The US is considered the brain gain country par excellence, as demonstrates the high presence of immigrants working in the tech hubs, such as the Silicon Valley. Nonetheless, *Trump* administration also affected immigrants working in the high techs sector, leading to the creation of brain drain patterns. In particular, the "*Muslim Ban"* executive order[500] endangered the technology industry, because it banned travel from seven Muslim-majority countries, including Iran. Many Iranians worked in high tech and there were also a great number of Iranians students in American universities. Moreover, the ban could cause general fear, because foreigners may be held back from coming to the US for academic or professional purposes, as worried of the current immigration policies[501].

The brain drain and brain gain phenomenon is complex and mutable in both the EU and the US. In particular, their perspectives can change due to administration,

[498] On this point, see M. POHLMANN, J. YANGA, J. LEE (ed.), p. 62 and A. WEINAR, A. KLEKOWSKI VON KOPPENFELS, p. 44

[499] On this point, see M. GÉRARD, A. SANNA, "Students' Mobility at a glance: Efficiency and Fairness When Brain Drain and Brain Gain Are at Stake", *Journal of International Mobility,* Volume 1, No 5, 2017, pp. 44-49, 55-56

[500] See Muslim Ban, Executive Order No 13769, 27 January 2017

[501] On this point, see THE ATLANTIC, "How Trump's Immigration Rules Will Hurt the U.S. Tech Sector", 2017, available at https://www.theatlantic.com/technology/archive/2017/02/how-trumps-immigration-rules-will-hurt-the-us-tech-sector/515202/, accessed on 6th September 2020

however, those patterns are undoubtedly enhanced in the nowadays globalized world. Moreover, the post EU-enlargement migrations from Eastern to Western Europe increased the numbers of immigrants in Europe, enriching the constellation of high-qualified employment migration, contributing to brain circulation.

3.2 Eastern-Western Europe migration flows

After the fall of the Berlin wall, Eastern Europe countries began to depopulate. For example, Bulgaria lost about 21% of its population, Hungary about 10%. Nowadays, in those countries, populist parties are taking hold, sharing Eurosceptic visions among people. Unfortunately, the prospects for democracy, hoped for after the fall of the Berlin Wall, and the economic growth, expected after the 2004 EU enlargement, have not been realized. Those countries are facing an unprecedented demographic crisis, also due to the 2008 Great Recession. According to the 2012 International Monetary Fund's data, migration flows from Eastern Europe often involved young graduates, who preferred Germany as a destination. Germany, in facts, is a typical example of a brain gain country[502].

Nevertheless, a common concern regarding the post EU-enlargement migration is the so-called migrants' "*deskilling*". Thus, highly educated immigrants are often low-paid, and, most of the times, they are employed in poorly qualified jobs. The latter phenomenon could be explained as a consequence of the fact that the immigrants' academic and professional skills developed in the home country may not be suitable for the host country. Furthermore, another reason could be language barriers, which may prevent immigrants from working in high-qualified positions, because they are not fluent in the language of the host country. In relation to the migration flows from the Eastern Europe to the UK, *Campos* believes that the reason why immigrants have low-skilled jobs lies in the fact that they take them without hesitation, because they know they are temporary. In this respect, they only

[502] On this point see CORRIERE DELLA SERA, "Europa dell'Est e Migrazioni: Partono i Giovani Restano i Nazionalisti", 2017, available at https://www.corriere.it/esteri/17_ottobre_22/male-oscurodell-europa-mezzopartono-giovanirestano-nazionalisti-ca56bfb0-b697-11e7-9989-18155f38f5a5.shtml, accessed on 6th September 2020

want to come to the UK to improve English language and then, they want to come back to their respective countries of origin[503].

Mobility is a growing phenomenon worldwide, because of globalization. The factors that drive people to move are diverse, from economic to political factors. In my opinion, brain drain is certainly negative for sending countries, such as Eastern Europe states and the Mediterranean ones. However, seeing the bigger picture, brain drain leads to the brain gain of receiving countries. So, in the EU context, we can generally talk of brain gain, because the brain circulation within the EU territory is a source of enrichment for the Union itself.

4. The link between citizenship and family reunification and its implementation in EU secondary law

The right to family reunification is of remarkable importance within the EU legislative framework, especially in terms of the exercise of freedom of movement. The Treaty of Maastricht with the introduction of Union citizenship aimed at realizing cooperation among states, superseding the purely economic dimension of the European Communities[504]. So, EU citizenship contributed to the broadening of the family reunification *rationae personae*, in the sense that the right could be exercised by not economically active EU citizens[505].

EU primary is not homogenous on the exercise on such rights, in particular, it depends whether the person, who is legally resident in the EU, is an EU citizen or a third-country national. On the one hand, the right to family reunification for Union citizens is regulated under the freedom of movement provisions. On the other hand, Article 79(2)(a) TFEU[506] states that the European Parliament and the Council,

[503] On this point, see B. GLORIUS, I. GRABOWSKA-LUSINSKA, A. KUVIK, *Mobility in Transition: Migration Patterns After the EU Enlargement,* Amsterdam University Press, Amsterdam, 2013, pp. 133, 147-148 and LSE BLOG, "European Migrants are Mostly High-Skilled, Even If Temporarily Taking Up Low-Skilled Jobs", 2018, available at https://blogs.lse.ac.uk/politicsandpolicy/high-skilled-migrants-in-the-uk/, accessed on 6th September 2020

[504] On this point, see *Supra* paragraph 1.2

[505]On this point, see P. VAN ELSUWEGE, D. KOCHENOV, "On the Limits of Judicial Intervention, EU Citizenship and Family Reunification Rights", *European Journal of Migration and Law*, Volume 13, 2011, p. 443

[506] See *Supra* Note no 482

through ordinary legislative procedure, can adopt measures regarding the entry and residence of third-country nationals, also for family reunification purposes[507].

In light of the previous provisions, the Family Reunification Directive[508] was adopted. Nonetheless, this Directive was not applicable to the EU citizens' family members, so, the Citizenship Directive[509] filled this gap, extending its personal scope to them. The Family Reunification Directive applies to third-country nationals, who have lawfully resided in the territory of the host state for at least one year and have reasonable prospects of obtaining permanent residence, moreover, it is always applicable, even if the third-country nationals have moved from one Member state to another. Member States set the sponsor's and his family members' conditions needed in order to exercise the right of family reunification, that must be authorized by the State if all the criteria have been satisfied. Moreover, according to Article 7(2)[510], Member States can also oblige third-country nationals to comply with domestic integration measures. The issue of integration measures was the most debated one. Some States imposed such measures as conditions of admissibility, for example family members were obliged to take and pass language and host state's cultural tests. Other countries, instead, only required them to sign up for language courses. In particular, such measures must be proportionate and must respect the principle of subsidiarity in order to ensure a better integration of the family members[511]. Nevertheless, *«the low-level binding character of the Directive leaves Member States much discretion and in some Member States the results has even been lowering the standards when applying "may" provisions of the Directive on certain requirements for the exercise of the right to family reunification in a too broad or excessive way[512]»*. Regarding the family reunification rights of EU citizens, these originated from the core of citizenship rights, such as the right to

[507] On this point, see D. KOCHENOV, *op. cit.*, 2017, p. 446

[508]See *Directive 2003/86/EC on the right to family reunification*, 22 September 2003, *in Official Journal of the European Union*, L 251, 3 October 2003

[509] See *Supra* Note no 6

[510] See *Supra* Note no 508, Article 7

[511] See EUROPEAN COMMISSION, *Green Paper on the right to family reunification of third-country nationals living in the European Union (Directive 2003/86/EC)*, 15 November 2011, COM (2011) 735 Final, p. 4

[512] Cfr. EUROPEAN COMMISSION, *Report from the Commission to the European Parliament and the Council on the application of Directive 2003/86/EC on the right to family reunification*, 8 October 2008, COM (2008) 610 Final, p. 14

move freely and reside within the EU territory. According to the letter of Article 3(1) of the Citizenship Directive[513], the directive applies to EU citizens and their family members, that have exercised the freedom of movement, leaving their home state, so, it cannot be extended to static citizens. Consequentially, static citizens are subjected to national laws and this may lead to reverse discriminations if domestic provisions are less advantageous than EU law[514].

Overall, the regulation of the right to family reunification appears fragmented because there is no harmonization on the matter. However, the CJEU's jurisprudence gave content to such right and limited the states' discretion in these matters.

4.1 The right to family reunification in CJEU's case law: *Ruiz Zambrano* and *McCarthy*

The Court has intervened several times in the field of family reunification, establishing principles that are considered cornerstones in relation to its exercise and to its correlation with EU citizenship.

The first case, which will be analyzed in light of this dissertation, is *Ruiz Zambrano*[515]. Mr. and Mrs. *Zambrano* were two Colombian nationals, residing in Belgium. Their application for asylum first and then for residence and work permit were denied by Belgian authorities. In the meantime, they had two children, born in Belgium, so Belgian citizen under national law and consequentially EU citizens. Afterwards, the *Zambranos* claimed to the *Tribunal du Travail* that they were entitled to a direct right of residence, as parents of two Union citizens. However, the two children were static citizens, so the issue regarded whether EU law provisions on citizenship could be triggered in "*purely internal situations".* More specifically, the CJEU had to answer if the right of residence in the home state depended on the exercise of the freedom of movement or it could be considered autonomous. The *Zambranos'* situation reflected that of many migrants in the EU,

[513] See *Supra* Note no 6, Article 3
[514] On this point, see D. KOCHENOV, *op. cit.*, 2017, pp. 447-449 and V. DI COMITE, "Ricongiungimento Familiare e Diritto di Soggiorno dei Familiari di Cittadini dell'Unione alla Luce del Superiore Interesse del Minore", *Studi Sull' Integrazione Europea,* Volume 13, 2018, p. 168
[515] See *Supra* Note no 91

who worked and resided within the Union, but they were not authorized. In the end, the CJEU recognized the *Zambranos'* right of residence, even if derived from static citizens, because otherwise the children would not have been able to genuinely enjoy the substance of citizenship rights[516]. So, the Court confirmed the existence of the EU children's right of residence in their home state, which can be also enjoyed by their parents, even if they were non-EU nationals. The case was particularly relevant, because residing in the EU meant not only staying physically within the Union territory, but also having an array of rights, such as the access to social welfare. Following the reasoning of the Court, EU is citizenship is seen as autonomous from the national one, because its rights can be directly invoked by individuals. Moreover, the Court wanted to underline that national states must not endanger the enjoyment of such rights. In facts, on the one hand it expanded the scope of EU law to the so-called purely internal situations, on the other hand, it excludes the *"reserved domain"* of states in some fields, such as the exercise of the right to family reunification. Thus, it was no longer important to have exercised the freedom of movement in order to invoke EU citizenship rights and this view was also shared by Advocate General *Sharpston[517]*. In facts, the great innovation of the judgement lied in the fact that the *Zambrano's* affair fell within the scope of EU law, even if the cross-border element was not present. However, after the judgement some doubts arose, for example, the Court was unclear about what could cause a deprivation of the genuine enjoyment of the substance of citizenship rights. In this respect, the judgement was not very successful, because the notion of *"genuine enjoyment of the substance of citizenship rights*" was often restrictively interpreted, including only special and rare circumstances, where EU citizens could not actually take care of themselves without third-country nationals family members, however, the reasoning was not limited to blood relationships, but it applied to all keepers[518].

[516] See *Ibid.*, point 42

[517] See Opinion of Ms. Advocate General Sharpston delivered on 30 September 2010, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)*, 30 September 2010, point 100

[518] On this point, see F. STRUMIA, *op. cit.*, 2013, p. 435, P. VAN ELSUWEGE, D. KOCHENOV, "On the Limits of Judicial Intervention, EU Citizenship and Family Reunification Rights", *European Journal of Migration and Law*, Volume 13, pp. 443-466, 2011, p. 444, C. O'BRIEN, "Hand-to-Mouth" Citizenship: Decision Time for the UK Supreme Court on the Substance of Zambrano Right, EU Citizenship and Equal Treatment, *Journal of Social Welfare and Family Law*, Volume 28, Issue 2, 2016, p. 228, GLOBALCIT, "A Comment on the Ruiz Zambrano Judgement: A Genuine

In 2011, a year after *Zambrano*, the Court faced another time the issue regarding the substance of EU citizenship rights in the *McCarthy*[519] case. The case concerned a dual UK and Irish citizen, who had never exercised the freedom of movement. However, she was not economically active, and she claimed the right of residence for her and her husband: a third-country national. The CJEU stated that the case did not fall within the scope of EU law. In facts, the Court argued that there were not any possible risks of deprivation of the genuine enjoyment of the substance of citizenship rights[520]. Moreover, differently from the *Zambrano* case, there was no further risk of deportation[521].

The Court also held that the fact that *Mrs. McCarthy* was a dual citizen was not relevant for the purposes of EU law in the field of citizenship, in facts, she was not treated differently from static UK citizens[522]. In this respect Advocate General *Kokott* stated: *«where a Union citizen is a national of two Member States of the European Union but has always lived in only one of those two States, she cannot claim a right of residence under Directive 2004/38/EC in that State*[523]*»*.

The CJEU did not follow the *Zambrano's* reasoning, arguing that there must be a risk of deportation of the EU citizen in order to apply it, which was not the case in *McCarthy*. Although the two cases were certainly different, the main issue was the same. The question was whether the rights deriving from EU citizenship, so the right of residence and therefore also the right to family reunification with third-country nationals, could be invoked without having exercised the freedom of movement in the Union territory. Overall, the Court reconfirmed the principles

European Integration", 2011, available at https://globalcit.eu/a-comment-on-the-ruiz-zambrano-judgment-a-genuine-european-integration/, accessed on 7th September 2020, D. GALLO, "La Corte di Giustizia rompe il vaso di Pandora della cittadinanza europea. Corte di giustizia dell'Unione europea, grande sezione, sent. 8 marzo 2011, causa C-34/09", *Giornale di Diritto Amministrativo,* Volume 18, Booklet 1, 2012, pp. 42-44, C. RAUCEA, "Quo Vadis? La Libera Circolazione Come Chiave Di Volta Del Godimento Reale ed Effettivo dei Diritti del Cittadino dell'Unione", *I Quaderni Europei, Scienze Giuridiche,* No 62, 2014, p. 8 and T. RICHARDS, "Zambrano, McCarthy and Dereci: Reading the Leaves of EU Citizenship Jurisprudence", *Judicial Review,* Volume 17, Issue 5, 2012, p. 280, D. KOCHENOV, *op. cit.*, p. 45

[519] See *Supra* Note no 93

[520] See *Ibid.*, point 49

[521] On this point, see F. STRUMIA, *op. cit.*, 2013, p. 436

[522] See *Supra* Note no 93, points 37-38

[523] Cfr. Opinion of Ms. Advocate General Kokott delivered on 25 November 2010, *Shirley McCarthy v Secretary of State for the Home Department*,25 November 2010, point 61

established in both *Zambrano* and *Rottman*[524], however, the *Zambrano's* reasoning was interpreted restrictively, and it was not extended to the case in point, so, it was considered not only exceptional, but also residual to the cross-border element theory. In the *McCarthy's* judgement, the Court seemed to step back, because it recalled the cross-border element theory, which was superseded in *Zambrano*[525].

An approach similar to the *McCarthy's* one was used by the Court in *Dereci*[526]. The latter case comprehended various denials of residence permits requests of third-country nationals family members of Austrian citizens. Moreover, they did not exercise the freedom of movement. The CJEU held: *«the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have the nationality of a Member State to be able to reside with him in the territory of the Union, is not sufficient in itself to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted*[527]*»*. The Court underlined that the right to family life did not fell itself with the scope of EU law without the exercise of the freedom of movement or the deprivation of the genuine enjoyment of the substance of citizenship rights[528]. Finally, the CJEU clarified in what consisted the deprivation of the genuine enjoyment of the substance of citizenship rights, stating that it corresponded to a situation in which the EU citizen is forced to leave the Union territory, as it would have occurred in *Zambrano* if the Court had ruled otherwise. Moreover, the Court affirmed that national courts must verify the actual deprivation of these rights on a case by case basis[529].

In 2018, the Court applied the *Zambrano* criterion in *K.A. and Others*[530]. In particular, the Court stated that not considering the request of family reunification

[524] See *Supra* Note no 50
[525] On this point, see D. GALLO, "La Corte di giustizia rompe il vaso di Pandora della cittadinanza europea. Corte di giustizia dell'Unione europea, grande sezione, sent. 8 marzo 2011, causa C-34/09", *Giornale di Diritto Amministrativo,* Volume 18, Booklet 1, 2012, pp. 41-42, 46
[526] See *Supra* Note no 94
[527] See *Ibid.,* point 68
[528] On this point, see N. N. SHUIBHNE, "(Some of) The Kids are All right", *Common Market Law Review,* Volume 49, 2012, p. 358, T. RICHARDS, *op. cit.,* p. 283 and C. RAUCEA, *op. cit.,* 2014, p. 13
[529] See *Supra* Note no 94, point 66
[530] See CJEU, Case C-82/16, *K.A. and Others v Belgische Staat,* ECLI:EU:C:2018:308, 8 May 2018

between a Union citizen and a third-country national exclusively because of an entry ban was in contrast with EU law. Such refusal could have led EU citizens to leave the EU territory, so it would have been a deprivation of the genuine enjoyment of the substance of citizenship rights and the exercise of the freedom of movement was not relevant. The case was important in order to understand the application of the previous case-law, in the sense that the deprivation of the genuine enjoyment of the substance of citizenship rights must be assessed on a case by case basis. In particular, the Court gave some guidelines to Member States in order to verify such deprivation. Firstly, it must be considered if the Union citizen is an adult or a minor, in facts, the *Zambrano* criterion was more likely to apply in the case of infants. Furthermore, the age, the emotional affection to the parents and their economic dependence must be taken into account[531].

The principles that can be extrapolated from the CJEU's jurisprudence in point regard the fact that Articles 20[532] and 21 TFEU[533] can be triggered only if there is a cross-border element or if there is a deprivation of the genuine enjoyment of the substance of citizenship rights. Purely internal situations usually do not fall within the scope of EU law and reverse discriminations can occur and are allowed under EU primary law. However, some uncertainties still remain. In particular, the definition of deprivation of genuine enjoyment of the substance of citizenship rights is unclear, moreover, the other doubt concerns whether domestic courts are obliged to make sure that such deprivation has actually happened[534].

4.2 The "*zero tolerance"* policy and the right to family reunification

Since the 1960s, the US allowed the entry of a high number of family-based immigrants and of their family members. Overall, US immigration laws and

[531] On this point, see EUROPEAN LAW BLOG, "KA and Others-The Zambrano Story Continues", 2018, available at https://europeanlawblog.eu/2018/05/22/k-a-and-others-the-zambrano-story-continues/, accessed on 10th June 2020
[532] See *Supra* Note no 4
[533] See *Supra* Note no 5
[534] On this point, see T. RICHARDS, *op. cit.*, pp. 284-285

policies promoted family reunification, attempting to keep families together as much as possible[535].

The first act at this regard was the Immigration and Nationality Act of 1965[536]. It guaranteed family reunification and facilitated the entry of high qualified migrant workers. This act is still in force and provides for the possibility of US citizens to sponsor family members. In 1986, President *Reagan* signed a law, which gave US citizenship status to a great number of undocumented migrants, who were then able to reunite with their American citizens family members[537]. The 1990 Immigration Act[538] protected certain categories of immigrants from deportation to a country at war or affected by natural calamities or any other emergency situations. In the 1990s and in the early 2000s, other laws were enacted in order to counter unauthorized migration, undermining the right to family reunification[539]. During *Obama'*s presidency, the right to family reunification was at the core of immigration policies. In fact, the aim of the DREAM Act[540] was to avoid deportation for all the illegal migrants arrived in the US as children, the Act did not pass, so *Obama* initiated the DACA program with the same purpose. *Trump* attempted to end DACA, however, the Supreme Court in 2020 ruled that Trump could not end the program due to poor motivations[541]. In facts, DACA recipients can continue to stay in the US without the threat of deportation, but the renewals are on hold[542].

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[535] On this point, see Z. GUBERNSKAYA, J. DREBY, "US Immigration Policy and the Case for Family Unity", Journal on Migration and Human Security, Volume 5, No 2, 2017, p. 417

[536] See Immigration and Nationality Act of 1965, 30 June 1968

[537] See *Supra* Note no 272

[538] See Immigration Act of 1990, 29 November 1990

[539] See Illegal Immigration Reform and Immigrant Responsibility Act, 1 April 1997 and The Enhanced Border Security and Visa Reform Act, 14 May 2002

[540] See *Supra* Note no 228

[541] See US SUPREME COURT, *Opinion delivered on 18 June 2020, Case: Department of Homeland Security et Al. v. Regents of the University of California et Al.,* 18 June 2020

[542] On this point, see GEORGETOWN LAW BLOG, "A Primer on Family Reunification/Chain Migration", 2018, available at https://www.law.georgetown.edu/immigration-law-journal/online/a-primer-on-family-reunification-chain-migration/, accessed on 21st September 2020, PEW RESEARCH CENTER, "How Immigration Laws and Rules Have Changed Trough History", 2015, available at https://www.pewresearch.org/fact-tank/2015/09/30/how-u-s-immigration-laws-and-rules-have-changed-through-history/, accessed on 21st September 2021, MIGRATION POLICY INSTITUTE, "Dream Act/Deferred Action", 2017, available at https://www.migrationpolicy.org/topics/dream-actdeferred-action, accessed on 21st September 2020 and CNN POLITICS, "What the Supreme Court's Ruling Means For DACA Participants and Immigrants", 2020, available at https://edition.cnn.com/2020/06/18/politics/daca-supreme-court-explainer/index.html, accessed on 21st September 2020

However, throughout the years, the number of undocumented migrants has risen because of immigration policies, nowadays, about 16.7 million people have at least one undocumented relative in their family unity. The great majority of unauthorized migrants is now permanently residing in the US territory and they are perfectly integrated in the American society. President *Trump* made very clear its intentions regarding immigration policies, which consisted in a quite restrictive approach. In particular, he announced that both undocumented migrants and those with criminal records could have been easily deported. For this reason, family separation is occurring more and more often in the latest years. The current number of visas issued for family-based immigrants has been restricted, moreover, not all family members can exercise the right to family reunification, because the admission to enter the US is now subjected to certain conditions, which refer to the degree of kinship and to the country of origin[543].

Prior to the *Trump* Administration, President *Obama* attempted to keep families together at the US-Mexico border. In facts, he established the Family Detention Centers, where both parents and children were held together in custody. Nonetheless, these Family Detentions Centers were not considered appropriate to guarantee the right to family reunification, so, the "*Alternatives to Detention"* program was meant to replace the aforementioned centers. Since the very beginning, the *Trump* administration was contrary to *Obama's* "*Alternatives to Detention"* program, in facts, President *Trump* faced the issue of family separation in a totally different way. In this respect, in 2018, a memorandum, imposing zero tolerance for undocumented migrants along the US-Mexico border, was issued by the Attorney General, *Jeff Sessions*[544]. The aim of the memorandum, which was addressed to federal prosecutors, was to imprison all the unauthorized migrants, attempting to cross the US borders. This has inevitably led to family separation because children and their parents were in different detention facilities or alternatively, they were immediately deported, moreover, children were also mistreated in those centers. This extremely restrictive police had huge repercussions

[543] On this point, see Z. GUBERNSKAYA, J. DREBY, *op. cit.*, pp.418, 421-422
[544] See Memorandum for federal prosecutors along the Southwest border, Zero-Tolerance for Offenses Under 8 U.S.C. § 1325(a), 6 April 2018

on immigration and the right to family reunification. In particular, almost 3000 children were separated from their families. In June 2018, President *Trump* signed an executive order[545] with the purpose of ending family separation at the Southwest border. Few days after the executive order, the US District Court for the Southern District of California in *Ms. L. v U.S. Immigration and Customs Enforcement (ICE) et al.*[546] ordered the *Trump* administration to stop family separation of undocumented migrants and to reunite all the families that were split up[547].

Briefly, the *Trump* administration's focus on fighting illegal immigration, especially in the Southwest border has led to some collateral effects, such as undermining the right to family reunification. However, this is only a small part of *Trump's "anti-immigration"* policies, that also included the infamous travel bans.

5. *Trump's* travel bans: how citizenship can contribute to *"anti-immigration"* policies

As illustrated above, the notion of citizenship can lead to discriminatory practices and, consequentially, to *"anti-immigration"* policies, such as the ones carried out by the *Trump* administration. In this sense, *Trump's* travel bans were considered as a «*license to discriminate, disguised as a "national security measure"*[548]».

In January 2017, President *Trump* signed the *Muslim Ban*[549], which was addressed to seven Muslim-majority countries[550], prohibiting their citizens to travel to and from the US. Moreover, the ban suspended the whole refugee system for 120 days and the Syrian refugee system for an undetermined period of time. Furthermore, the

[545] See Affording Congress an Opportunity to Address Family Separation, Executive Order No 13841, 20 June 2018

[546] See US DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA. *Ms. L. v U.S. Immigration and Customs Enforcement (ICE) et al.,* 26 June 2018

[547] On this point, see D. RAMKHELAWAN, "The Separation of Migrant Families at the Border Under the Trump's Administration Zero-Tolerance Policy: A Critical Analysis of the Mistreatment of Immigrant Children Held in U.S. Custody", *Child and Family Law Journal*, Volume 7, Issue 1, 2019, pp. 152, 159-164 and THE GUARDIAN, "3,121 Desperate Journeys: Exposing a Week of Chaos Under Trump's zero tolerance", 2018, available at https://www.theguardian.com/us-news/ng-interactive/2018/oct/14/donald-trump-zero-tolerance-policy-special-investigation-immigrant-journeys, accessed on 10th September 2020

[548] Cfr. AMNESTY INTERNATIONAL UK, "A Licence To Discriminate: Trump's Travel & Refugee Ban", 2020, available at https://www.amnesty.org.uk/licence-discriminate-trumps-muslim-refugee-ban, accessed on 11th September 2020

[549] See *Supra* Note no 500

[550] The countries were: Iraq, Iran, Libya, Somalia, Sudan, Syria, Yemen

refugee claims based on religious persecutions were considered first than the others. However, the ban was general, so, controls at ports and airports were organized locally. Commentators argued that the ban was not actually a national security measure. Firstly, the fear of terrorism was not justified, since Saudi Arabia, which was the home country of the majority of terrorists of the Twin Towers attack, was not included. In relation to the ban, there are some lawsuits in federal courts across the country, which are currently pending, and they challenge the validity of the ban itself. For example, in *Durweesh v. Trump*[551], the plaintiff claims that the ban could not have been applied because it is in contrast with the Due Process and Equal Protection Clauses[552]. In *Sarsour v. Trump*[553], a Palestinian-American activist sues President *Trump*, in particular, she calls the ban a *"Muslim Exclusion Order"*, which violates the religious freedom, enshrined in the First Amendment[554] and the Fifth Amendment Equal Protection Clause[555]. At a state level, the enforcement of the order was blocked trough a temporary restraining order (TRO). In particular, a federal judge in Seattle has issued an injunction to block the order in the whole nation, which was upheld by a three-judge panel. On this matter, the Ninth Circuit Court of Appeals disagreed with the practice of not enforcing the order, moreover, it invited President *Trump* to write a new order with the purpose of replacing the previous one[556]. Nevertheless, the appeal is still pending[557].

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[551] See US DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, *Darweesh v Trump,* filed on 28 January 2017, currently pending

[552] See *Supra* Note no 9

[553] See US DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, *Sarsour v Trump,* filed on 30 January 2017, currently pending

[554] See *Supra* Note no 269

[555] See *Supra* Note no 268

[556] See US COURT OF APPEALS FOR THE NINTH CIRCUIT, *State of Washington v Trump,* filed on 30 January 2017, currently pending

[557] On this point, see THE GUARDIAN, "Is this a Muslim Ban? Trump Executive Order Explained", 2017, available at https://www.theguardian.com/us-news/2017/jan/28/trump-immigration-ban-syria-muslims-reaction-lawsuits, accessed on 11th September 2020, G. ROMEO, "Don't Ask Why: L'Immigrazione nell' Era (Caotica) di Trump", *Quaderni di SIDI BLOG,* Volumes 4/5, 2017-2018, pp. 91-93, DEMOCRACY NOW, "Sarsour v Trump: Palestinian-American Activist Sues the President to Overturn Muslim Ban", 2017, available at https://www.democracynow.org/2017/1/31/sarsour_v_trump_palestinian_american_activist, accessed on 11th September 2020, THE ATLANTIC, "Trump Concedes Defeat on Travel Bans- For Now", 2017, available at https://www.theatlantic.com/politics/archive/2017/02/trump-ninth-circuit-defeat/517095/, accessed on 11th September 2020, and POLITICO, "Feds Urge Seattle Judge to Hold Off on Further Trump Travel Ban Litigation", 2017, available at

On 6 March 2017, Trump replaced the previous order with executive order no 13780[558]. The new order excluded Iraq from the original list, it prohibited the entry of citizens of Yemen, Libya, Sudan, Somalia, Syria and Iran for 90 days and it also forbid the entry of all refugees for 120 days. In September 2017, the presidential proclamation no 9645[559] added Chad, North Korea and Venezuela to the list and removed Sudan[560]. The latest version of the ban, also called "*Travel Ban 3.0*", was challenged in federal courts, because, according to the plaintiffs' claims, it violated the Immigration and Nationality Act[561] and the Establishment Clause[562]. The US District Court for the District of Hawaii issued a preliminary injunction, which was partially upheld on appeal by the Ninth Circuit Court of Appeals. The latter ruled that the injunction was valid with the exception of foreigners, who had a relationship with a US person or entity. Finally, the approach adopted by the Supreme Court[563] was totally different because it ruled that the latest version of the ban was not in contrast with the Immigration and Nationality Act[564]. Chad was removed from the list of the countries in April 2018 with the presidential proclamation no 9723[565]. On 31 January 2020, *Trump* issued the presidential proclamation no 9984[566], which prevented nationals of Eritrea, Nigeria, Sudan, Kyrgyzstan, Myanmar and Tanzania to obtain visas. In June 2020, the Fourth Circuit Court of Appeals ordered the dismissal of all the legal challenge against the travel ban, because the US Supreme Court had stated that it was constitutional and appropriate to ensure national security[567].

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https://www.politico.com/blogs/under-the-radar/2017/02/trump-travel-ban-court-case-234963, accessed on 11th September 2020

[558] See Protecting the Nation from Terrorist Entry into the United States, Executive Order No 13780, 6 March 2017

[559] See Protecting the Nation from Terrorist Entry into the United States, Presidential Proclamation No 9645, 24 September 2017

[560] The countries were: Myanmar, Eritrea, Kyrgyzstan, Nigeria, Sudan, Tanzania

[561] See *Supra* Note no 226

[562] See *Supra* Note no 269

[563] See US SUPREME COURT, *Trump v. Hawaii*, 26 June 2018

[564] See *Supra* Note no 226

[565] See Protecting the Nation from Terrorist Entry into the United States, Presidential Proclamation No 9723, 10 April 2018

[566] See Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus and Other Appropriate Measures to Address This Risk, Presidential Proclamation No 9984, 31 January 2020

[567] On this point, see CNN POLITICS, "Everything You Need to Know About the Travel Ban: A Timeline", 2018, available at https://edition.cnn.com/2018/06/26/politics/timeline-travel-

In a nutshell, *Trump*'s policy on immigration seems quite restrictive. In particular, he used citizenship as a means to discriminate in order to prevent the entry of nationals of certain countries and their visa issuance. The travel ban's saga presents a complex legal scenario, in facts, President *Trump* has been sued several times, because activists considered the ban discriminatory and even racist. In the end, the Supreme Court ruled that the ban was constitutional.

6. The European dream *vs* the American dream

The European dream represents the first transnational dream, which goes beyond the national borders in order to realize a supranational dimension. The European dream, which was theorized for the first time by the Founding Fathers, is the European Union itself. Parallel to the supranational dream, *Delanty* believed in a cosmopolitan Europe, which superseded the concept of post-national membership[568]. According to *Rifkin,* the dream of cooperation, solidarity and justice, contained in the *Ventotene Manifesto* can be transposed in today's globalized society. In facts, *«the European Dream, with its emphasis on inclusivity, diversity, quality of life, sustainability, deep play, universal human rights and the rights of nature, and peace is increasingly attractive to a generation anxious to be globally connected and at the same time locally embedded[569]».* In details, the new European Dream includes a notion of freedom, which intertwines with connectedness, in the sense that Member States and institutions are linked to each other and must cooperate. Unfortunately, nowadays the European dream risks of being jeopardized, because of the 2008 financial crisis and the 2015 refugee crisis and the recent rise of Euroscepticism all over Europe[570]. However, young people

ban/index.html, accessed on 11th September 2020, HARVARD LAW REVIEW, "Trump v. Hawaii", 2018, available at https://harvardlawreview.org/2018/11/trump-v-hawaii/, ,accessed on 11th September 2020, THE GUARDIAN, "Trump Administration Unveils Expanded Travel Ban", 2020, available at https://www.theguardian.com/us-news/2020/jan/31/travel-ban-trump-countries-announcement, accessed on 11th September 2020 and ABC NEWS, "Court Orders Dismissal of Trump Muslim Travel Ban Challenges", 2020, available at https://abcnews.go.com/US/wireStory/court-orders-dismissal-trump-muslim-travel-ban-challenges-71133851, accessed on 11th September 2020

[568] On this point, see G. DELANTY, "The Cosmopolitan Imagination: Critical Cosmopolitanism and Social Theory", *British Journal of Sociology*, Volume 57, Issue 1, 2006, p. 31. For further information on post-national membership, see *Supra* paragraph 2.3.1

[569] Cfr. J. RIFKIN, *The European Dream*, TarcherPerigee, New York, 2004, p. 374

[570] On this point, see UCL BLOG, "The European Dream: An Alternative?", 2015, available at https://www.ucl.ac.uk/ssees/news/2015/dec/european-dream-alternative, accessed on 13th

are attempting to face and combat the new challenges in order to avoid a decline of the European dream. In this respect, *«what is not in doubt is that Europeans, in particular the younger generation, are struggling to establish a new European Dream they hope will be more compatible with the opportunities and challenges of a globalizing world*[571]*»*.

Nonetheless, the American dream differs from the European one, because it is more centered on wealth, economic growth and independence, as it demonstrated the history of American citizenship itself, which is more than just the evolution of citizenship, but it is the history of independence from the British Crown. Contrary to the European dream which encompasses a cosmopolitan idea, the American dream is confined to the US national territory. Moreover, the American dream stresses on ideals of equality between all citizens, which is not always easy to achieve, suffice to say that there is still a black-white gap in economic mobility. The term American dream was used for the first time in 1931 by *Truslow Adams* and it referred to the hope of a better life and its possible achievement. The American dream is a set of ideals, including freedom, democracy and equality, which are present in the Declaration of Independence[572], according to which all men are created equal and they have the right of life, liberty and the pursuit of happiness. Although the American dream has evolved over time and the majority of commentators think that it is slowly vanishing, the public opinion still believes that the American dream is alive and well[573].

September 2020 and THE GLOBALIST, "The American Dream vs. The European Dream: which dream will ensure a better future for all the world's people?", 2005, available at https://www.theglobalist.com/the-american-dream-vs-the-european-dream/, accessed on 5th June 2020

[571] Cfr. THE GLOBALIST, "An American Looks at Europe: what aspirations do young Europeans have for the future of their continent?", 2005, available at https://www.theglobalist.com/an-american-looks-at-europe/, accessed on 19th May 2020

[572] See *Supra* Note no 207

[573] On this point, see THE GLOBALIST, "The American Dream vs. The European Dream: which dream will ensure a better future for all the world's people?", 2005, available at https://www.theglobalist.com/the-american-dream-vs-the-european-dream/, accessed on 5th June 2020, PEW CHARITABLE TRUSTS, *Pursuing the American Dream: Economic Mobility Across Generations, Economic Mobility Project,* July 2012, p. 27, FORBES, "Can we Save the American Dream?", 2019, available at https://www.forbes.com/sites/heathermcgowan/2019/08/07/can-we-save-the-american-dream/#7197025d3c89, accessed on 5th June 2020, CORPORATE FINANCE INSTITUTE, "American Dream: A Set of Beliefs or Ideals That Guide US Citizens as They Exist on a Daily Basis", 2020, available at

To sum, the two sets of ideals: the European and the American dream are profoundly different. These differences reflect the fact that the EU is a supranational organization, so its dream, which corresponds to the Union itself, has a supranational character, meanwhile the American dream is more territorial and patriotic. Finally, the core ideals are diverse as well. On the one hand, the American dream is economic-centered, because it aimed at the achievement of a richer life. On the other hand, the European dream's beliefs regard ideas of cooperation among states and between states and institutions. In particular, in the EU scenario, this stronger idea of cooperation was realized by the Maastricht Treaty, which also established the Union citizenship.

7. Concluding remarks

The notion of citizenship is fundamental in determining immigration. As illustrated above, the two fields are interrelated. In this respect, we cannot talk about immigration without referring to citizenship. First of all, the immigrant can be a dual citizen, however, if he is not a citizen of the State of residence, its ultimate aim is to acquire that citizenship. Naturalization is not difficult in the US, that is why the American dream has been praised for so long because immigrants had a better future by becoming American citizens.

As it has been mentioned several times, the freedom of movement is the core of EU citizenship rights. In relation to mobility, the fact that EU citizens actually have some advantages in moving and residing in another Member State may appear discriminatory, since the same treatment cannot be applied to third-country nationals. In my opinion, even if it is a *de facto* discrimination, it must not be interpreted negatively. In facts, EU citizens are actually freer to move and reside within the Union territory, because it represents the achievement of something bigger, which corresponds to the supranational dimension of the Union itself and its idea of cooperation between Member States. The supranational character of the Union presents some further advantages. For example, the phenomenon of labor

https://corporatefinanceinstitute.com/resources/knowledge/other/american-dream/, accessed on 13th September 2020 and THE NEW YORK TIMES, "Do you think the American Dream is Real?", 2019, available at https://www.nytimes.com/2019/02/12/learning/do-you-think-the-american-dream-is-real.html, accessed on 13th September 2020

migration, especially in high-qualified employment, does not cause a clear split between brain drain and brain gain patterns. In this sense, we can talk about brain circulation. The migration flows from Eastern to Western Europe can be used as an emblematic example because Eastern countries can be considered brain drain nations, Western countries, instead, can be deemed as brain gain ones. However, if such migration flows occur within the EU territory, we can talk about brain gain, because it favors the development and the enrichment of the Union as a whole. The same reasoning cannot be applied to the case of the US because it is a nation, not a supranational dimension. After the recent *"anti-immigration"* policies, the US is slowly turning into a brain drain country, in particular, the high-tech sector has been very affected from such policies, losing part of its promising staff.

Both the notions of citizenship and immigration are connected with the right to family reunification. In particular, the right to family reunification derives from the citizen status. The role of the CJEU in shaping this right was fundamental. The Court, in *Zambrano*, superseded for the first time the cross-border element theory, stating that EU law can be triggered by static citizens in the case there is a risk of deprivation of the genuine enjoyment of citizenship rights. The Court did not apply the *Zambrano* criterion in the *McCarthy* case and one of the reasons of this choice regarded the fact that, in *Zambrano,* infants were involved, so the interest of the minor was always better protected. In the US, unfortunately, family separation often occurs, especially in reference to the undocumented migrants at the Southwest border. *Trump* administration is a clear example of preferring national security over the enjoyment of the right to family reunification.

The concept of citizenship can also be a means of discrimination. Although the *Trump* travel ban has been misguided as a national security measure, it is an emblematic example of the discriminatory use of citizenship. In this sense, citizens of certain nations could not enter in the US or obtain visas.

Citizenship is also part of the ideals included in the European and American dreams. In different ways, both dreams aim at ensuring a better life to their citizens. Citizenship, in particular, plays a role in guaranteeing a better future, which

corresponds to the achievement of cooperation and solidarity in the EU context, and to economic wealth in the US one.

Citizenship presents a strong connection with immigration. This interrelation can be either positive or negative. On the one hand, it can favor brain flows and the enjoyment of the right to family reunification, which are certainly beneficial. On the other hand, it can be used in order to enforce discriminatory practices, which cause a declassification of the concept of citizenship itself with the sole purpose of realizing governmental moves, not always agreeable.

Nevertheless, citizenship is currently facing dangerous challenges, which are capable of undermining its nature and affecting the enjoyment of its derived rights and immigration. In this respect, the aim of the next chapter is to analyze the reaction of citizenship to such issues. In particular, in this dissertation, Euroscepticism and the Brexit aftermath will be highlighted for the European case. Finally, I will critically examine the problem of racial citizenship in America.

CHAPTER IV

THE CURRENT CITIZENSHIP ISSUES IN THE EU AND US LEGAL ORDERS

SUMMARY:1. Preliminary remarks - 2. Is Euroscepticism affecting EU citizenship? - 2.1 Is social citizenship a possible solution to Euroscepticism? - 3. EU citizenship and Brexit: theories and possible scenario for UK nationals - 3.1 The rights of citizens contained in the EU-UK Withdrawal Agreement - 4. The meaning of racial citizenship in the US nowadays - 5. Concluding remarks

1. Preliminary remarks

As it can be deduced from the study of the previous chapter, it is undeniable that there is a connection between citizenship and immigration, because the former can play a huge role in determining immigration policies. For instance, there is a differentiation between EU citizens and third-country nationals in immigration regimes within the Union territory, meanwhile the US citizenship has recently been involved in anti-immigration policies. Immigration crisis, or rather refugee crisis, is one of the challenges that the EU is facing right now, along with the rise of Euroscepticism, the aftermath of the 2008 Great Recession and of Brexit.

The aim of the present chapter is to examine the impact of such crises on the notion of citizenship. In particular, I chose to analyze the rise of Euroscepticism and of Brexit for the European case and the tormented affair of racial citizenship in America, a problem that originated at the dawn of US citizenship and, unfortunately, it is still present today.

The first part deals with the Eurosceptic tendencies, which are recently spreading all over Europe. The issue will be considered in both legal and theoretical terms. Concerning the legal framework, I will stress on the implementation of the Citizenship Directive[574] in Member States, because it demonstrates how Eurosceptic tendencies can be transposed from the political to the legal debate, negatively affecting the field of citizenship and of its acquis of rights. I will report as an example how Member States regulate the entry of economic inactive citizens.

[574] See *Supra* Note No 6

In theorical terms, the doctrine of social citizenship, as a way to overcome the increase of these trends, will be critically explained.

Secondly, the Brexit case will be taken into consideration. In particular, Brexit correlation with EU citizenship will be analyzed in two different temporal spaces: before and after the EU-UK Withdrawal Agreement[575]. My study of the situation before regards the hypothetical evolution of EU citizenship for UK nationals, clarifying the commentators' theories, such as the doctrine of the autonomy of Union citizenship and the associate EU citizenship. Moreover, I will consider the possible developments of the loss of EU citizenship for British people in light of the previous CJEU's case-law, which did not only establish relevant principles in relation to the withdrawal of citizenship, but it also gave content to the concept of Union citizenship itself. The analysis of the post-scenario will focus on the Agreement, shedding light on the citizens' rights future of both UK nationals residing within the Union territory and EU citizens in Great Britain in order to understand what will be happen on 1 January 2021, when the transition period will be over.

Since the intent of this chapter is to analyze some of the most recent challenges of citizenship, racial citizenship will be examined in relation to the US legal order. In facts, some recent events have highlighted that the problem of racial discrimination persists in today's American society and that the issue of equality between white people and the rest of the ethnic groups is still present with different expressions. In this respect, I will firstly give a brief historical overview, because racial discrimination could be found in the very early US history, since blacks, Indians and Hispanics were not US citizens under the law and this was even confirmed by the Supreme Court. After that, I will elucidate what is racial citizenship today, reporting two very different examples: Puerto Ricans and African Americans. Moreover, few sociological remarks will be made for the case of blacks because they are legally full-fledged US citizens, but actually they can be discriminated in the field of social rights. Such discriminations are considered a facet of racial

[575] See COUNCIL (EU), *Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*, 12 November 2019, in *Official Journal of the European Union*, C 384I, 12 November 2019

citizenship in light of this dissertation. Finally, I will also examine the role of race in the current immigration and citizenship policies.

2. Is Euroscepticism affecting EU citizenship?

Since the 1990s, right wing populist parties are taking hold within the EU territory, spreading ideas of Euroscepticism among people. With the term Euroscepticism, scholars identify *«the idea of contingent or qualified opposition, as well as incorporating outright and unqualified opposition to the process of European integration*[576]*»*. These beliefs were enhanced by the 2008 financial crisis, which contributed to the spread of a general opposition toward the process of European integration. For example, the crisis has hit hard on Italy, where Euroscepticism is gradually growing, even if Italy was one of the founding states of the EU[577].

These negative trends have cast doubt on the efficiency and legitimacy of Union institutions and the same doubts have arisen in the field of EU citizenship. In this sense, the fact that the democracy of EU institution has been questioned had negative repercussions on the concept of democratic citizenship itself[578].

The EU is now in a particular situation because it is facing several crises: the democratic, the financial and the refugee one. Unfortunately, EU citizenship did not and will not come out unscathed from such crises. Herein, it must be clarified if the current challenges of EU citizenship are the result of the hostile Eurosceptic environment or reflect the original limits of citizenship itself, such as the interdependence with the Member States nationalities and with the exercise of the freedom of movement. In particular, the repercussions regard the enjoyment of citizenship rights, because States may actually limit the freedom of movement and the right of residence, affecting the respect of the principles of equal treatment and non-discrimination on the grounds of nationality and they are also reluctant to

[576] Cfr. P. TAGGART, "A Touchstone of Dissent: Euroscepticism in Contemporary Western European Party Systems", *European Journal of Political Research,* 1998, p. 366

[577] On this point, see N. CONTI, V. MEMOLI, "Show the Money First! Recent Public Attitudes Towards the EU in Italy", *Italian Political Science Review/Rivista Italiana di Scienza Politica,* Volume 45, Issue 2, 2015, p. 203, 206

[578] On this point, see N. CONTI, *Party Attitudes Toward EU in the Member States: Parties for Europe, Parties Against Europe*, Routledge, London, 2014, p. 2 and D. CHALMERS, M. JACHTENFUCHS, C. JOERGES (ed.), *The End of the Eurocrats' Dream: Adjusting to European Diversity*, Cambridge University Press, Cambridge, 2016, p. 127

implement the Citizenship Directive[579]. Moreover, austerity measures, imposed after the 2008 crisis, undermine the exercise of citizenship rights. The general atmosphere of distrust, fueled by sovereign policies, can be found in the lacunae inherent to European solidarity, which have manifested themselves through the so-called *"reactionary phase",* present both in national policies and in the CJEU's jurisprudence[580].

In relation to the States' restrictions on the freedom of movement, it must be mentioned that in 2013 the Austrian, German and British governments reported to the EU Commission that the Citizenship Directive[581] could not be applied in their countries and that they wanted to impose sanctions in order to avoid the entry of economic inactive citizens to their states. In light with these beliefs, the number of expulsions increased in the aforementioned countries. Although, according to EU law, expulsions and limitations on entry and residence must be justified on overriding grounds of public interest and must pass the proportionality test, States tended to abuse these instruments. The criticalities of the above-mentioned Directive lied in the fact that it was not capable of limiting the states' discretion on such matters, leaving room for nationalist trends[582].

The current limits of EU citizenship certainly derive from its original flaws, but Euroscepticism is of course contributing to the increase of such problems. In particular, States have great power in regulating the access to welfare of mobile citizens, because the field of social rights in not harmonized at a European level. In this respect, commentators argued that the establishment of an EU social citizenship would be appropriate to counter the phenomenon of Euroscepticism.

2.1 Is social citizenship a possible solution to Euroscepticism?

Ferrera believes that Eurosceptic tendencies are a consequence of the flaws of EU citizenship, in particular of its social dimension[583]. As illustrated above, an EU

[579] See *Supra* Note no 6
[580] On this point, see C. MARGIOTTA, "I nuovi limiti alla cittadinanza europea alla luce delle sue originarie contraddizioni", *Sant'Anna Legal Studies Research Paper,* No 3, 2017, pp. 13-14
[581] See *Supra* Note no 6
[582] On this point, see C. MARGIOTTA, *op. cit.*, pp. 15-17
[583]See R. BAUBÖCK (ed.), *op.cit.*, 2019, p. 287

social citizenship does not exist, because social welfare has not been harmonized and Eurosceptics think that such citizenship will never be achieved[584]. So, these deficiencies of EU citizenship have contributed somehow to the creation of the current atmosphere of mistrust toward the Union and its institutions.

However, the current crises of European democracy, enhanced by Euroscepticism, has inevitably led to a crisis of the EU citizenship itself. In this respect, the diffidence toward the EU apparatus can reflect in skepticism regarding the notion of Union citizenship, because it has supranational features. *Ferrera* proposes solutions in order to overcome the present situation. In particular, he thinks that reaching an EU social citizenship and adding duties to the citizen status can actually mitigate the current threats to the EU. In relation to duties, he believes that civic and financial duties must be added in order to increase persons' awareness on the services offered by the EU, of which they benefit from[585].

In short, the new Eurosceptical trends represent a serious threat to European integration and to Union citizenship, which is one of our biggest achievements, as an autonomous source of rights. In my opinion, *Ferrera's* solution is unrealistic and it could not actually supersede the disruptive mistrust toward the Union. A possible remedy could be enhancing the dialogue between citizens and institutions in order to realize a real Europe of citizens, where individuals would be able to appreciate the role of the Union in their everyday lives. For this purpose, it is important that *«Europeanists stop stigmatizing Eurosceptics and instead decide to show their reasons in the public debate[586]»*. Nevertheless, EU citizenship has also been affected by Brexit.

3. EU citizenship and Brexit: theories and possible scenarios for UK nationals

Article 50 TFEU[587] provides for the States' power to withdraw from the Union.

[584] See T. FAIST, *op. cit.*, 2001, p. 50
[585] See R. BAUBÖCK (ed.), *op.cit.*, 2019, p. 257
[586] Cfr. G. COSTA, "Fatta L'Europa, Come Facciamo gli Europei?", *Aggiornamenti Sociali*, 2013, p. 812
[587] See *Supra* Note no 89

Such decision was made for the first time by the UK with a referendum in June 2016, where 52% of the population voted for in favor of Brexit. The official process of departing from the Union began in March 2017, when the then Prime Minister *May* reported to the EU institution their actual will to leave the Union. The official notice was followed by rounds of negotiations, aimed at arranging the precise conditions of the withdrawal. The EU-UK Withdrawal Agreement[588] entered into force on 31 January 2020 and the UK is now a third country, however, there is currently a transition period, which will last till 31 December 2020. Since the very beginning of the process, the relevance of EU citizenship was central in the negotiations, because the primary interest was protecting the rights of citizens. Moreover, Union citizenship is central for the future of the process of European integration[589].

Many legal concerns about the status of British nationals and their derived rights as EU citizens arose after Brexit. In the Dutch *Brexpats case*[590], a court in Amsterdam wanted to ask the CJEU information on future status of UK nationals, whether they would have become third-country nationals or not. The case regarded British citizens, residing in the Netherlands, who wanted to keep enjoying EU citizenship rights. In 2018, the Amsterdam Court ruled that UK nationals would have continued to be EU citizens. Nonetheless, the Amsterdam Court wondered whether Brexit would automatically lead to the loss of Union citizenship and to the subsequent limitation of citizenship rights[591].

However, these preliminary questions were never addressed to the CJEU. The decision of the Dutch court seemed groundless because there were not any elements in the Treaties that allowed to deduce the preservation of the status of European citizens after the withdrawal, indeed precisely Article 20 TFEU[592] indicated the

[588] See *Supra* Note no 575
[589] On this point, see E. MUIR, N. CAMBIEN, "Introduction, Special Section, EU Citizenship in Times of Brexit", *European Papers,* Volume 3, No 3, 2018, pp. 1289-1290 and M. DICOSOLA, "The right to citizenship in Europe: Brexit as a Stress Test", *in Democrazia e Sicurezza- Democracy and Security Review*, Volume 10, No 1, 2020, p. 45
[590] See RECHTBANK AMSTERDAM, *Brexpats, Decision of 7 February 2017, C*/13/640244 / KG ZA 17-1327, 7 February 2017
[591] On this point, see A. P. VAN DER MEI, "EU Citizenship and Loss of Member State Nationality", *European Papers,* Volume 3, No 3, 2018, pp. 1321, 1326
[592] See *Supra* Note no 4

necessity of being a citizen of a Member State to acquire EU citizenship. In addition, the previous CJEU's jurisprudence seemed to tend toward the hypothesis of a future loss of citizenship following Brexit, even if the *Rottman*[593] and *Tjebbes*[594] cases could not be applied to the loss of citizenship after Brexit, because the circumstances were different. So, Brexit was an involuntary, only in the modality, loss of EU citizenship of UK nationals, which did not turn British into stateless persons and it is not in contrast with public international law. In this respect, Article 50 TFEU[595] constituted another way of losing citizenship, beyond the exceptional cases, in which States decided to revoke nationality[596].

In relation to the future of EU citizenship after Brexit, various proposals have been made by scholars and academics in order to guarantee the best interest of citizens. Firstly, academic argued a creation of a totally independent EU citizenship, untied from Member State nationality, so that British citizens could retain the status of EU citizens. This theory cannot be put into practice, because it would necessitate a modification of the Treaties, since Article 20 TFEU[597] provides for the derivative nature of Union citizenship, so, it cannot be considered singularly without referring to Member States nationality[598].

Secondly, *Verhofstadt* proposed the idea of an associate EU citizenship. This was considered like a brand-new legal status, which was not independent or autonomous, but citizens' rights were. In facts, it did not affect the freedom of movement, the right to work and reside abroad and voting rights for the European Parliament elections, citizen continued to enjoy these rights if they requested them individually. These rights are still guaranteed in the current transition period with the exception of political rights, in facts, the UK cannot take part in the decision-making process and it is no longer represented in any of the EU institutions. However, the theory of EU associate citizenship was controversial, in facts, it was

[593] See *Supra* Note no 50
[594] See *Supra* Note no 97
[595] See *Supra* Note no 89
[596] On this point, see A. P. VAN DER MEI, *op. cit*., 1327 and P. MINDUS, *op. cit.*, pp. 78, 104
[597] See *Supra* Note no 4
[598] On this point, see N. CAMBIEN, "Residence Rights for EU Citizens and their Family Members: Navigating the New Normal", *European Papers*, Volume 3, No 3, 2018, p. 1345

unclear on the beneficiaries of such status, whether it was only directed to UK mobile citizens or also to the static ones. Moreover, part of the literature deemed this kind of citizenship as discriminatory because it created two classes of UK citizens, those with EU citizens' right and those who did not enjoy them[599]. Finally, the idea of an associate citizenship was declined. Nevertheless, *«no matter the shape, Brexit would impact significantly on the citizenship of the Union, in a particularly unhappy way for British nationals living in the Union. The citizenry is predicted to shrink in size, change in composition and some parts of it will be left in potentially vulnerable positions[600]»*.

Since EU citizenship rights are considered acquired rights, those cannot be modified or limited by successive laws once they have been granted to the citizens. Following this reasoning, UK nationals will not be deprived of EU citizenship rights, but these rights cannot be protected by either EU or international law in the post-Brexit scenario. This situation of legal uncertainty, which is unprecedent in the EU history, has led to the registration of various European Citizens' Initiatives on the matter[601]. Nevertheless, it must be pointed out that in the case UK citizens will become ordinary third-country nationals, they will continue to enjoy only the rights of residents, such as the right to petition the Parliament and the Ombudsman and to address the EU institutions in any of the official languages (Article 24 TFEU)[602], the right to access documents (Article 42 CFR)[603] and the right to good

[599] On this point, see N. CAMBIEN, *op. cit.*, p. 1345, THE GUARDIAN, "European Parliament Brexit Chief: 'Let Britons Keep Freedom of Movement'", 2017, available at https://www.theguardian.com/politics/2017/mar/10/let-britons-keep-freedom-of-movement-says-eus-brexit-negotiator, accessed on 18th September 2020, A. P. VAN DER MEI, "EU Citizenship and Loss of Member State Nationality", *European Papers*, Volume 3, No 3, 2018, pp. 1328-1330, M. DICOSOLA, *op. cit.*, p. 44 and THE FOREIGN POLICY INSTITUTE, "Associate EU Citizenship: A Brief Assessment", 2018, available at https://fpc.org.uk/associate-eu-citizenship-a-brief-assessment/, accessed on 18th September 2020

[600] Cfr. P. MINDUS, *op. cit.*, p. 34

[601] On this point, see N. COSTA CABRAL, J. R. GONÇALVES, N. CUHNA RODRIGUES, *After Brexit: Consequences for the European Union*, Palgrave Macmillan, London, 2017, p. 252 and B. MARTILL, U. STAIGER (ed.), *Brexit and Beyond: Rethinking the Futures of Europe*, UCL Press, London, 2018, p. 164. For examples of European Citizens' Initiatives, see EUROPEAN CITIZEN ACTION SERVICE, *Brexit and Loss of EU Citizenship: Cases, Options, Perceptions*, Citizen Brexit Observatory, Brussels, 2017, pp. 11-12

[602] See *Supra* Note no 108

[603] See *Supra* Note no 110

administration (Article 41 CFR)[604]. The Withdrawal Agreement[605] clarified the situation of both EU citizens residing in the UK and British citizens residing in the territory of the Union.

3.1 The rights of citizens contained in the EU-UK Withdrawal Agreement

As indicated *supra,* the protection of citizens' rights has been considered fundamental during the negotiations. In facts, the part regarding citizens' rights was not difficult to negotiate, because everyone was in favor of a *«freezing of the status quo»*[606]. The Withdrawal Agreement explicitly deals with this topic in Part II. The provisions of Part II will have direct effects and UK national courts will continue to address preliminary rulings to the CJEU for eight years after Brexit.

The approach used in the Agreement has been criticized by scholars, especially by *Smismans,* who defined it as a *«cut and paste»* of citizens' rights provisions, enshrined in both EU primary and secondary law[607]. First of all, it must be noted that the personal scope of the provision on citizens' rights covers all the EU citizens, who have exercised their right of residence in the UK before the end of the transition period and the UK nationals, who have exercised their right of residence in any of the Member States before 1 January 2021[608].

In details, Chapter I of the Agreement contains provisions of the Citizenship Directive (2004/38/EC)[609] in relation to the freedom of movement and residence rights, Chapter II recalls the Regulation No 492/2011[610], which disciplines the free movement of workers, Chapter III deals with the recognition of professional qualifications, regulated under Directive 2005/36/EC[611] and Title III includes the

[604] See *Supra* Note no 109
[605] See *Supra* Note no 575
[606] On this point, see EUROPEAN LAW BLOG, "The State of Play on Citizens' Rights and Brexit", 2018, available at https://europeanlawblog.eu/2018/02/06/the-state-of-play-on-citizens-rights-and Brexit/, accessed on 15th June 2020
[607] See S. SMISMANS, "EU Citizens' Rights Post Brexit: Why Direct Effect Beyond the EU is not Enough", *European Constitutional Law Review*, Volume 14, Issue 3, 2018, p. 445
[608] See *Supra* Note no 575, Article 9(a)(b)
[609] See *Supra* Note no 6
[610]See *Supra* Note no 171
[611] See *Directive 2005/36/EC on the recognition of professional qualification*, 7 September 2005, in Official Journal of the European Union, L 255, 30 September 2005

rules of Regulation No 883/2004[612] regarding the coordination of social security systems. In light of the provisions contained in the Agreement, EU citizens residing in the UK will enjoy most of the rights in matter of residence, equal treatment and non-discrimination on grounds of nationality in field of work and access to social rights. Nonetheless, voting rights for the European Parliament elections will no longer be guaranteed to British nationals. Furthermore, the UK will be free to decide on the enfranchisement of EU citizens in local elections and the same principle will be applicable for UK nationals residing in one of the EU Member States[613].

Article 4(1) of the Agreement[614] states that the provisions of EU law contained in the Agreement, that already have directed effects within the EU constitutional space, must have the same legal effects in the UK legal order. Some problems arise concerning the way in which direct effects should be guaranteed, since it is not indicated in the Agreement. In particular, they can be ensured by the inclusion of a rule in the Implementation Bill, which confirms the supranational nature of such rights[615].

Just like Euroscepticism, Brexit is another crisis faced by the EU, which had impacts on the notion of Union citizenship itself. Brexit caused an enormous scholarly debate, because there are still a lot of legal uncertainties and all previous CJEU's case-law has been studied and deeply analyzed in order to understand if it could have been applied to the case of Brexit. Among academics, there are some, who thought that Brexit was useful, because it paved way to a future constitutional reform on citizenship[616]. However, it is valuable the evaluation expressed by

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[612] See *Regulation no 883/2004 on the on the coordination of social security systems*, 29 April 2004, *in Official Journal of the European Union*, L 166, 30 April 2004

[613] On this point, see GLOBALCIT, "Citizens' Rights in the UK-EU Withdrawal Agreement: Ossifying EU Citizenship as A Juridical Status", 2018, available at https://globalcit.eu/citizens-rights-in-the-uk-eu-withdrawal-agreement-ossifying-eu-citizenship-as-a-juridical-status/, accessed on 18th September 2020 and S. SMISMANS, *op. cit.*, pp. 444, 447

[614] See *Supra* Note no 575, Article 4(1): "*The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States. Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law".*

[615] On this point, see S. SMISMANS, *op. cit.*, pp. 457-460

[616] On this point, see L. ORGAD, "A Citizenship Maze: How to Cure A Chronic Disease?", *EUI Working Paper RSCAS*, Volume 24, 2019, p. 42

Kostakopoulou, who stated that «*Brexit has highlighted the mistakes in constructing an equivalence among demagogy, demography (that is, the aggregation of votes) and democracy and in dividing deeply communities and societies at all levels of governance*[617]».

4. The meaning of racial citizenship in the US nowadays

The issue of racial equality has always been crucial in US history. In this respect, blacks or Indians were not even considered American citizens in the first place. The first legislation, which was racial in nature, was the 1790 Naturalization Act[618], which recognized citizenship only to free whites[619]. So, the derived citizenship rights, such as the right to vote, could be exercised only by white people.

Native Americans acquired US citizenship only after 1924[620]. The same could be said in the case of Puerto Ricans, who became American citizen in 1917[621], the situation in this case was more complex, because it also involved issues of territoriality and sovereignty, however, race was one of the main reasons why the US Congress did not want Puerto Ricans to become American citizens[622].

Finally, black persons, who actually could be US citizens with the establishment of the *ius soli* through the Citizenship Clause of the Fourteenth Amendment[623], however, their naturalization was often hindered by state laws, especially in the Southern States Moreover, the peak of racial discrimination was reached through the *Dred Scott*[624] landmark judgement, where the Supreme Court stated that all the people with African descents could never have acquired US citizenship. In 1870, all the African Americans became US citizens[625]. Moreover, other citizenship rights, especially voting rights, were recognized to them through further legislation,

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[617] Cfr. D. KOSTAKOPOULOU, *op. cit.*, p. 45
[618] See *Supra* Note no 8
[619] On this point, see THE NATION, "Trump Has Brought Back 'Conditional Citizenship'", 2019, available at https://www.thenation.com/article/archive/race-trump-citizenship-ilhan-squad/, accessed on 19th September 2020
[620] See *Supra* Note no 224
[621] See *Supra* Note no 223
[622] On this point, see *Supra* paragraph 1.7.1
[623] See *Supra* Note no 9
[624] See *Supra* Note no 243
[625] On this point, see *Supra* paragraph 1.6.2

such as the Fifth Amendment[626], the Civil Rights Act [627] and the Voting Rights Act[628].

Beyond the historical perspective, the current situation of racial equality in the US and its connection with citizenship will be now analyzed. Firstly, it must be pointed out that *Obama'*s presidency constituted a turning point in terms of racial equity, which significantly improved during its administration. However, the most recent policies contributed to increase racial hatred, using citizenship as a means to put such discriminations into practice. All the anti-immigration measures of the *Trump* administration, such as denials of US birth certificates and passports, the promotion of denaturalization campaigns have most affected racial minorities, from black people to Latinos at the Southwest border or immigrants from Muslim-majority countries. In regard to the latter category, the *Trump* Travel Ban[629] underlined the core of *Trump's* immigration policies, where the racial intent could be clearly seen, even if such measures were justified as a means to guarantee national security[630].

Despite nowadays the US Constitution[631] does not provide for any advantages for white people in terms of citizenship and the exercise of its derived rights, there are some discrepancies between legal and social citizenship and most of the times, these disparities are enhanced by race. In this respect, US citizenship is stratified, because there are differences among citizens in terms of political participation and representation and social membership. An eloquent example of this phenomenon is represented by the status of Puerto Ricans. According to *Valle,* Puerto Ricans possess a kind of colonized/racialized citizenship, which is unequal compared to

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[626] See *Supra* Note no 268
[627] See *Supra* Note no 225
[628] See *Supra* Note no 435
[629] See *Supra* Note no 230
[630] On this point, see R. M. SMITH, D. S. KING, "Barack Obama and the future of American Racial politics", *Du Bois Review: Social Science Research on Race,* Volume 6, Issue 1, 2009, p. 26, THE ATLANTIC, "The Fragility of American Citizenship: Some people are learning that their birth or naturalization certificates aren't enough to prove citizenship- a council problem that the Fourteenth Amendment should ideally prevent", 2019, available at https://www.theatlantic.com/ideas/archive/2019/10/fourteenth-amendment-protects-citizenship-politics/599554/, accessed on 30th May 2020 and THE NATION, "Trump Has Brought Back 'Conditional Citizenship'", 2019, available at https://www.thenation.com/article/archive/race-trump-citizenship-ilhan-squad/, accessed on 19th September 2020
[631] See *Supra* Note no 216

US citizenship[632]. The reason of this differential treatment toward Puerto Ricans lies in the fact that Puerto Rico is still an unincorporated territory within the US jurisdiction, in facts, their citizenship is considered a second-class one, because it can be revoked and the rights of citizens are downgraded[633].

A recent study has reported the feelings of Puerto Ricans toward US citizenship and toward their inclusion in the national community. In particular, they thought that the notion of citizenship corresponded to both legal status and rights. Regarding the findings in the field of inclusion of Puerto Ricans in the American society, a common belief is that they felt left out, considered both racially and socially inferior and this was strictly to linked the their particular legal status of citizenship, which is not US citizenship to all intents and purposes[634].

African Americans are now facing the same issues of Puerto Ricans, even if they do not have a second-class citizenship, because they were born in the mainland, so, they are properly US citizens. However, they are often excluded from the acquis of rights of citizens and the respect of the Due Process and Equal Protection Clauses of the Fourteenth Amendment[635] is not always guaranteed to them. In order to fight the inequalities between white and black Americans, various human rights movements, such as *#BlackLivesMatter*[636], are combating for the recognition of full-fledged citizenship, which goes beyond the mere legal status, but it also comprehends its social dimension. In particular, the ultimate aim of these movements is to change the perception of the notion of citizenship in the American society, because, although it is not well acknowledged, race has a huge impact in this definition[637].

In light of recent politics, there is a proposal of ending birthright citizenship by an executive order, which certainly would endanger the critical situation of racial

[632] On this point, see A. J. VALLE, "Race and the Empire State: Puerto Ricans' Unequal US Citizenship", *Sociology of Race and Ethnicity*, Volume 5, Issue 1, 2019, p. 27
[633] On this point, see *Ibid.*, pp. 26, 29
[634] On this point, see *Ibid.*, pp. 30, 32
[635] See *Supra* Note no 9
[636] For further information, see https://blacklivesmatter.com/, accessed on 19th September 2020
[637] On this point, see A. E. VICKERY, "You Exclude Us for So Long and Now You Want Us to Be Patriotic?: African American Teachers Navigating the Quandary of Citizenship", *Theory and Research in Social Education*, Volume 45, Issue 3, 2017, p. 321

minorities in the field of citizenship. Legal experts state that the *Trump's* proposal is unconstitutional because it is in contrast with the Fourteenth Amendment[638], so, the president does not have the power to enact such order, unless a new amendment is made or the Supreme Court gives a different interpretation of the Citizenship Clause[639]. There is a high probability that this issue will be addressed to the Supreme Court. The Supreme Court has always extensively interpreted the clause in order to avoid every possible withdrawal of citizenship. For example, the landmark judgement *Wong Kim Ark*[640] must be mentioned because it is the first case in which US citizenship is recognized to children born in the US territory by foreign parents. Nevertheless, there is a possibility that the Court would agree with *Trump's* proposal, considering its conservative majority. In such case, it would not only mean that all the persons born in the US territory would be unjustly deprived of their right to citizenship, but it would also undermine the historical purposes of the Citizenship Clause[641], which was mainly established to ensure citizenship to African Americans[642].

In a nutshell, racial discrimination constituted an issue in the early US history and in the developments of US citizenship and it represents a problem, which has not been solved yet. These disparities can derive from a different legal status, like in the case of Puerto Ricans' racial citizenship or it can simply regard a discrepancy between legal and social citizenship. Unfortunately, race still determines immigration policies and citizenship reforms, as *Trump*'s presidency demonstrates. In facts, the proposal to abolish the *ius soli* rule in the US is an indirect attack to racial minorities, bringing to light the fact that America might be a nation of immigrants, but racial equality is a distant perspective.

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[638] See *Supra* Note no 9
[639] See *Ibid.*
[640] See *Supra* Note no 222
[641] See *Supra* Note no 9
[642] On this point, see BUSINESS INSIDER, "3 Cases Offer Clues about How the Supreme Court Would Rule on Trump's Proposed End to Birthright Citizenship", 2018, available at https://www.businessinsider.com/trump-supreme-court-immigration-anchor-babies-2015-8?IR=T, accessed on 19th September 2020 and THE PHILADELPHIA INQUIRER, "Threatening Birthright Citizenship is An Attack on African Americans", 2018, available at https://www.inquirer.com/philly/columnists/solomon_jones/birthright-citizenship-trump-executive-order-14th-amendment-african-americans-20181030.html, accessed on 19th September 2020

5. Concluding remarks

In this chapter, I have underlined the today's challenges of both EU and US citizenship in order to shine a light on the fact that citizenship is not untouchable, it can change over time, evolving in lockstep with society. This can surely present both positive and negative aspects, but, most of the times, challenges and crises can put a strain on the concept of citizenship, underlying its fragility. These considerations can be valid in relation to both citizenships, even if they have different roles within the respective legal orders.

The case of Euroscepticism outlines the fact that the flaws of citizenship can come to the surface, having unpleasant consequences, causing a general atmosphere of diffidence. In my opinion, the criticalities of citizenship, alongside with other factors, are the actual causes of Euroscepticism. In this sense, the fact that the Citizenship Directive[643] leaves much discretion to the States in quite important matters, such as the entry of economic inactive citizens, and the lack of harmonization in the field of social right contributed to the growth of Euroscepticism. So, I strongly disagree with *Ferrera*'s view on social citizenship as a possible solution because the problem is much broader than that. In particular, it must be solved at origin and the only way to mitigate it would be enhancing the dialogue between citizens and EU institutions.

Brexit is actually a cause of the crises of citizenship itself. Nevertheless, the concluding remarks, made above for the Euroscepticism case, can be also applied to the Brexit case because it somehow unearthed the already existing lacunae of EU citizenship. The situation is very delicate since the legal framework is not clear. The UK has chosen to make an agreement for leaving the Union, which means that an "*Hard Brexit"* will not occur, so, British nationals will not become ordinary third-country nationals. What is known is that the most damaged ones would be us: EU citizens and, of course, UK nationals, which would be deprived of important citizenship rights, such as the freedom of movement and voting rights for the European Parliament elections.

[643] See *Supra* Note no 6

The racial citizenship was and has been a contested topic in the US scenario. The US is considered the multi-ethnical country par excellence and it is so, for certain aspects. However, racial equality is still utopian. On the one hand, Puerto Ricans actually possess an unequal citizenship, which is justified on the grounds of territoriality and sovereignty. On the other hand, the situation of African Americans is not justifiable, because they are US citizens to all effects, but they often do not enjoy full social rights. Unfortunately, racial hatred is rooted in American society and the recent killings of *Breonna Taylor* and *George Floyd* brough to light an old and broad issue, which is not destined to end soon.

In conclusion, citizenship is multi-faceted and polyhedral, because it can have several repercussions on our everyday lives and it can, of course, be affected by the outside society. The correct use of citizenship must be taken into consideration because it can be extremely advantageous for people, since it grants a remarkable acquis of rights, which is well known to us: EU citizens. However, it can also be dangerous because the rights of citizens can be limited for several reasons and it can constitute the basis of discriminatory practices.

CONCLUSIONS

As illustrated in present dissertation, the concept of citizenship is multidimensional. In facts, it is not only limited to the notion of belonging of an individual to a state or a supranational organization but presents several facets. In this regard, being a citizen means having an acquis of rights and duties. Furthermore, citizenship affects and is affected by the outside world, because, unfortunately, it is not unassailable.

The two citizenships, analyzed above, offer some interesting comparative insights, even though the EU and US citizenship are profoundly different in nature: the former is supranational, the latter is national. Although evident, this differentiation is of remarkable importance in light of my research because it underlines the points of contrasts of the two legal systems and provides a guideline in the analysis. In particular, the evolution of EU citizenship is not only a story of citizenship, it involves limits and prerogatives of national sovereignty and the contested relationship between Member States and the Union.

The dream of an EU citizenship, which came true in 1992 with the Treaty of Maastricht, is the realization of something more than the achievement of a common status for people. It is the first manifestation that the EU is more than economic organization and the realization of a stronger idea of a political cooperation among Member States. As can be seen from the pre-Maastricht scenario, States and Union have always had a difficult relationship, however their indissoluble bond constitutes the very essence of European citizenship. This, in fact, gives us the extraordinary possibility to belong to two dimensions: one national and one that goes beyond these borders. Oppositely, such ideals were not present in the evolution of US citizenship. This one indicated the will of Americans to be American, to belong to America. It was the history of independence from the oppressive British Crown, the history of becoming free by acquiring citizenship.

A great similarity between the two citizenships in point can be found in the array of citizens' rights. In facts, the two legal orders present the same type of citizenship rights. In my opinion, this remark should not be underestimated. The immensity of the European Union resides in the capability of granting the same rights to citizens of the ones ensured at a national level. The regime of duties is different instead. In

this regard, EU citizens do not have any duties toward the Union. In my opinion, the lack of duties for Union citizens should not be seen as negative, because citizens have responsibilities tough. Furthermore, the absence of duties is, of course, connected to the supranational character of the Union since those usually belong to the national space.

Particular attention was given to the role of federalism in the citizenship field. Therefore, the *sui generis* character of the EU causes uncertainties because the kind of Union citizenship can be hardly defined. The main question that should be now addressed is: can we depict the Union citizenship as federal? The answer is no. EU citizenship is not federal, because the Union is neither a federation nor a confederation. Regardless of the formal character, the Union citizenship presents some federal features, which bring it closer to the US model. The interconnection of citizenship and federalism in all its shades, from the relatively weak EU federalist system of the to the strong US one, has a great impact on the enjoyment of citizenship rights. In relation to the freedom of movement, federalism is important in order to guarantee the full enjoyment of the free circulation of citizens, who are entitled to enjoy the same rights everywhere, and the protection of interstate equality without affecting the right to belong of every individual. A federalist dimension can also be found in the exercise of voting rights. Herein, the role of federalism can be dangerous, because it can lead to the weakening of such rights, suffice to stay that some Member States adopt a policy of disenfranchisement of their citizens residing abroad, which is a threat, not only to the right to vote itself, but also to the free movement. Another important remark should be made in relation to the right to health care. Both in the EU and in the US, health care management is regulated at a state level. The national dimension of health care services was particularly challenged after the Covid-19 outbreak. The pandemic has enhanced the flaws of systems, where states are overall left on their own.

I have also highlighted the interrelation between citizenship and immigration because they cannot be considered as different entities. They are dependent from one another, since naturalization is eventually the ultimate aim of the immigrant, who reside in another state. Citizenship is crucial in the EU scenario. In this respect, immigration policies are only directed to third-country nationals. EU citizen can

freely move and reside within the Union, they can also seek employment and work in another Member State. In a globalized world, being EU citizens is an enormous advantage, because it enables us to have a cosmopolitan perspective. Nevertheless, the downside is when citizenship is used as a discriminatory means, becoming the protagonist of anti-immigration policies, as it occurred in *Trump* travel ban[644] saga. The latter represents an emblematic example of declassification of citizenship because it is exploited by the government. In this way, it loses its very important connotations that allow individuals to always belong to their own state, even if they are elsewhere. In particular, it appears dangerous. It creates fear to belong to a state because individuals, as its citizens, may have an unequal treatment.

Citizenship, unfortunately, can be impaired by exogenous factors. Nowadays, the Western world is going through difficult times: the economy was put to a hard test after the 2008 Great Recession, additionally, the EU is dealing with the refugee crisis, the after-effects of Brexit, which is, without any doubts, a consequence of the recent trends of Euroscepticism. Both crises have challenged the judicial interpretation of EU citizenship. To this extent, Euroscepticism can manifest itself in the reluctance of Member States to implement the Citizenship Directive[645]. Some of the core of citizenship rights, such as the right of residence, are mainly disciplined under secondary law and this, of course, may turn into an impediment of the enjoyment of such rights, since Member States have broad discretion on the matter. Regarding Brexit, it has dramatically questioned the precedent jurisprudence in matter of citizenship. The legal uncertainty on the future status of UK nationals characterizes the current scholarly debate. However, Brexit is a great defeat for all the Britons, who believed in the European Dream and in the inestimable right to exercise the freedom of movement. This dream has ended for the UK: the promises of the *Ventotene Manifesto*, the structured notion of citizenship and the idea of cooperation born in Maastricht died in London in 2016. Concerning the overseas scenario, US citizenship struggles with race, in particular,

[644] See *Supra* Note no 230
[645] See *Supra* Note no 6

the black-white gap is still present today and this leads to the creation of two unequal citizenships, not legally, but socially.

In conclusion, we can undoubtedly affirm that citizenship is a fundamental component of our lives, both in a national and in a supranational perspective. Although the two citizenships, herein analyzed, are ontologically different, they can be compared, as some common trend lines can be found. In particular, they present various analogies, especially in terms of derived rights and of the impact of federalism on such rights. Furthermore, the two experiences demonstrate that the jurisprudence, respectively of the CJEU and the US Supreme Court, have given content, modified, distorted the notion of citizenship, exalting its purest and most democratic aspects, but sometimes diminishing it, giving rise to direct or indirect discrimination.

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