

The Promises of EU Citizenship for a Polycentric Union

Introduction

Citizenship remains essentially contested. Rival theories offer alternative perspectives to contemporary political problems and place emphasis on different values. Liberal theories of citizenship, for example, prioritise the protection of the individual from the state by granting them a fairly elaborate set of rights, while republican theories seek to foster the active political participation of the citizenry. Distinctions between different conceptions, however, are easily exaggerated; both theories treat citizenship as a status that places citizens in a position to participate in and contribute to practices of political self-governance.¹ That is to say, self-governance is as central to contemporary conceptions of citizenship as it is to polycentric theory.² This chapter connects both debates and explores the potential citizenship holds for self-governance within a polycentric European Union.

I will draw attention to the different levels of citizenship within the European Union, arising from the different centres of decision-making – European, national, and local,³ and shall argue that our conception of European Union citizenship must be compatible with and respect this multiplicity of decision-making centres. That is, as Joseph Carens said it, ‘our conceptions of citizenship and political community should grow out of, rather than determine, the political and social arrangements that we choose’.⁴ Hence, a more polycentric understanding of citizenship is required within the EU, which recognises the existence of and demonstrates respect for the dispersion of authority within the EU and self-governance at the different levels of government. This distinguishes my argument from more fashionable perspectives on EU citizenship, which place great emphasis on individual free movement and prefer the homogenisation of rights to constitutional divisions of authority and local self-governance. In contrast, while acknowledging the benefits of individual self-governance, I shall emphasize the benefits of collective self-governance and argue that our accounts of citizenship within the EU should not devalue the latter.

The case that demonstrates like no other how a complex interplay of different levels of government affects the governance of citizenship within the EU is *Walloon*.⁵ Section 1 introduces that

¹ Iseult Honohan, ‘Liberal and Republican Conceptions of Citizenship’ in Ayelet Shachar and others (eds), *The Oxford Handbook of Citizenship* (First edition, Oxford University Press 2017).

² Van Zeben, chapter 1

³ Rainer Bauböck, ‘The Three Levels of Citizenship within the European Union’ (2014) 15 German Law Journal 751.

⁴ Joseph H Carens, *Culture, Citizenship, and Community: A Contextual Exploration of Justice as Evenhandedness* (Oxford University Press 2000) 162.

⁵ Case C-212/06 *Walloon*, ECLI:EU:C:2008:178.

decision and highlights what occurs if members of the Court start characterising territorial boundaries demarcating different centres of decision-making as barriers to free movement. Based on a conception of EU citizenship that privileges individual free movement and the homogenisation of rights over national constitutional divisions of authority and local self-governance, the Court challenged Belgium's federal arrangement. Section 2 offers an alternative polycentric conception of Union citizenship that respects divisions of power between different centres of decision-making within the EU. I argue that EU citizenship, due to its two key characteristics – free movement and non-discrimination – is able to contribute to realising two key aspects of polycentric theory: appreciation for local democratic self-governance and overcoming barriers to cooperation between different localities. The principle of non-discrimination on grounds of nationality should be interpreted as requiring deference to the substantive content of national and local citizenship and on the basis of free movement law, we should seek to connect the different localities in a way that respects self-governance within the EU. Section 3 moves from the ambition to shape EU citizenship law so that it respects principles of self-governance to thinking through the position of EU citizens itself in processes of self-governance within the EU. It offers some tentative thoughts on the political rights of EU citizens.

1. *Walloon*

According to Carens, 'talk about citizenship sometimes presupposes, as a background assumption, an idealized (and misleading) conception of the nation-state as an administratively centralized, culturally homogeneous form of political community in which citizenship is treated primarily as a legal status that is universal, equal, and democratic'.⁶ That presupposition is inadequate, he explained, because citizenship is often multi-dimensional and divided, and recognising these divisions 'may be essential to fulfil the commitment to equality that is often expressed in the language of citizenship'.⁷ That the EU constitutes a system of governance that belies the idea of universality and homogeneity, where full equality between citizens is the norm, appears evident. It divides decisional authority between different institutions at three levels of government – supranationally, nationally, and locally – and each of these authorities is permitted to define, within the confines of their powers, the substantive content of their policies. Yet, while citizenship within the EU is multi-dimensional, the background assumption of

⁶ Carens (n 4) 161.

⁷ *ibid.*

universality and equality also informs conceptions of EU citizenship. The decision by the Court of Justice of the European Union (Court of CJEU) in *Walloon* and the relevant literature is incisive in that regard.

Like no other, *Walloon* shows how a complex interaction between different jurisdictions defines the regulation of citizenship within the EU. The governments of Walloon and the French Community in Belgium challenged a care insurance scheme established by Flemish government, which covered non-medical expenses of individuals resident within the Dutch-speaking region or the bilingual region of Brussels. The latter could join on a voluntary basis.⁸ Following a Commission challenge, to make the legislation compatible with Regulation 1408/71 EEC, its scope was extended to individuals working within the Dutch-speaking region or bilingual region of Brussels, but residing within the territory of another EU Member State.⁹ Excluded were residents of Walloon who worked in Flanders or Brussels, irrespective of their nationality.

The case revolved around the three levels of citizenship within the EU. As *Walloon* demonstrates, authority over policies' substantive content can be local, while national and EU legal rules simultaneously condition access to local benefits. Moreover, these rules were of a different kind. Common in federal systems,¹⁰ the relevant legislation in Belgium employed the principle of *lex loci domicilii*, which conditions access according to the location of residence.¹¹ EU legislation, on the other hand, applied the principle of *lex loci laboris*, which assigns as the responsible Member State the country where the Union citizen is employed.¹² While meant to guarantee equal working conditions for employees, the fact that the principle of *lex loci laboris* applied to benefits governed by the *lex loci domicilii* principle according to national law generated, discrimination arose between EU citizens resident within another Member State and those whose place of residence was Walloon. That is, an EU citizen economically active within the Dutch-speaking region was entitled to coverage when resident in Germany, but not when in Walloon. The Flemish care insurance scheme excluded all residents of Walloon and did not distinguish between Belgian nationals and non-Belgian EU citizens.

⁸ *Décret portant organisation de l'assurance soins*, (*Moniteur belge* of 28 May 1999) 19149.

⁹ *Décret modifiant le décret du 30 mars 1999 portant organisation de l'assurance soins* (*Moniteur belge* of 9 June 2004) 43593.

¹⁰ Herwig Verschueren, 'The Impact of EU Law on the Devolution of Social Powers in the Member States' in Elke Cloots, G de Baere and Stefan Sottiaux (eds), *Federalism in the European Union* (Hart Pub 2012) 265.

¹¹ Cour constitutionnelle de Belgique, 11/2009 (21 January 2009) para B.12.1-B.14.

¹² Regulation 883/2004 EC on the coordination of social security systems [2004] OJ L 166/1. For the general rule and the many exceptions see: F Pennings, *European Social Security Law* (6th edition, Intersentia 2010) chapter 6.

Reaffirming the purely internal rule, according to which situations lacking a cross-border element (hence, are purely internal to one Member State) are beyond the reach of the EU citizenship provisions on free movement,¹³ the Court held that the exclusion of Belgian nationals fell outside the scope of EU law and was a matter for Belgian law.¹⁴ Those with a nationality of a Member State other than Belgium, however, fell within EU law's ambit, because those EU citizens had exercised their right to free movement.¹⁵ Moreover, the loss of social advantages, as a result of the exercise of this right, was considered to be an impediment to the right to free movement.¹⁶ The legislation at issue created such an effect, because those

pursuing or contemplating the pursuit of employment or self-employment in one of those two regions, might be dissuaded from making use of their freedom of movement and from leaving their Member State of origin to stay in Belgium, by reason of the fact that moving to certain parts of Belgium would cause them to lose the opportunity of eligibility for the benefits which they might otherwise have claimed.¹⁷

The Flemish government invoked the federal division of powers within Belgium as justification, but the judges resolutely rejected that justification, deciding 'that a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order, including those resulting from the constitutional organisation of that State, to justify the failure to observe obligations arising under [EU] law'.¹⁸

The Court's challenge to the insurance scheme is significant, because if based on a plausible rationale, domestic principles of federalism constitute unjustifiable limitations to EU free movement law virtually by definition. It reasoned that because eligibility is 'dependent on the condition of residence in either a limited part of national territory ... or in another Member State',¹⁹ the national

¹³ On the purely internal rule, Miguel Poiros Maduro, 'The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination' in Claire Kilpatrick, Tonia Novitz and Paul Skidmore (eds), *The future of remedies in Europe* (Hart Pub 2000); S  fra O'Leary, 'The Past, Present and Future of the Purely Internal Rule in EU Law' in Michael Dougan, Niamh Nic Shuibh  ne and Eleanor Spaventa (eds), *Empowerment and Disempowerment of the European Citizen* (Hart Publishing 2012); Cyril Ritter, 'Purely Internal Situation, Reverse Discrimination, *Guimont*, *Dzodzi* and Article 234' (2006) 31 *European Law Review* 690; Alina Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe' (2008) 35 *Legal Issues of Economic Integration* 43.

¹⁴ *Walloon* (n 5) para 39.

¹⁵ *Ibid* para 41.

¹⁶ *Ibid* para 46.

¹⁷ *Ibid* para 48.

¹⁸ *Ibid* para 58.

¹⁹ *Ibid* para 47.

measures constituted an obstacle to free movement. Since federalism presupposes a set of overlapping levels of authority, with considerable autonomy for the regions to decide substantive policy, the judges did not solely turn federal boundaries of welfare into unacceptable barriers to free movement, but also challenged an essential feature of federalism. Note also that the matter has implications for non-federal states, because also centralised nation-states are divided in multiple administrative jurisdictions, creating local rights divisions.²⁰ Those residing and working in Amsterdam will be subject to a different local regime of benefits and taxation than those employed in Amsterdam but resident in Rotterdam. Following *Walloon*, this could dissuade free movement, because ‘moving to certain parts of [the country] would cause [EU citizens] to lose the opportunity of eligibility for the benefits which they might otherwise have claimed’.²¹

While recognising the existence of local centres of decision-making, the Court did not acknowledge their importance and failed to take seriously regional and national territorial boundaries of welfare. The prospect of taking up residence within Walloon may be less attractive if it diminishes welfare coverage, but that, of course, is ‘an unavoidable by-product of the choice not to harmonize social security schemes’.²² In case the competence to decide on social welfare arrangements belongs to local authorities, a change of residence in one Member State is supposed to have the same implications as the decision to move to another Member State. It affects one’s social entitlements, sometimes for the better, sometimes for the worse. Free movement rights were never premised on the idea that every potential place of residence had to be as attractive as possible, because that would turn federal borders into quasi-automatic barriers to free movement. If the rationale behind *Walloon* were to become the norm, certainly those Member States constituted along federal lines will find themselves in violation of EU law on a constant basis, the only remedy against which is the harmonisation of social welfare systems and the elimination of national divisions of authority.

It appears as if that is an attractive perspective for many EU lawyers. The majority did not fault the case’s argumentative shortcomings, nor argued against the characterisation of federal boundaries of welfare as unjustifiable barriers to free movement, but submitted that the Court’s delineation of EU law’s scope was insufficiently far-reaching. It should not have stopped with the inclusion of non-Belgian EU citizens, they argued, but have extended the coverage of the Flemish

²⁰ Willem Maas, ‘Equality and the Free Movement of People: Citizenship and Internal Migration’ in Willem Maas (ed), *Democratic citizenship and the free movement of people* (Martinus Nijhoff Publishers 2013) 10.

²¹ *Walloon* (n 5) para 48.

²² Nicolas Rennuy, ‘The Emergence of a Parallel System of Social Security Coordination’ (2013) 50 Common Market Law Review 1221, 1227.

insurance scheme to Belgian nationals resident in Walloon as well. That is, for many, the Court should have rendered fully irrelevant Belgium's federal boundaries as an instrument for confining access to benefits.

The reason that informs this thought is a straightforward one. *Walloon* produced what EU lawyers call reverse discrimination between EU citizens. Reverse discrimination arises if EU law demands Member States to offer preferential treatment to nationals of other states and permits national governments to discriminate against their own nationals.²³ *Walloon* extended social protection only to Walloon residents with the nationality of a Member State other than that of Belgium and permitted Belgium to deny those benefits to residents of Walloon with the Belgian nationality. The dominant perspective in EU citizenship discourse is that reverse discrimination goes against the ideal of equality embodied by citizenship.²⁴ AG Sharpston in her Opinion in *Walloon* expressed that perspective forcefully and eloquently. It is paradoxical, she said, that 'although the last 50 years have been spent abolishing barriers to freedom of movement *between* Member States, decentralised authorities of Member States may nevertheless reintroduce barriers through the back door by establishing them *within* Member States'.²⁵ In her typification of internal federal boundaries as obstacles to free movement, that statement resembles the Court's arguments, but whereas the judges refused to extend coverage also to Belgian nationals, the AG believed that all of Walloon's residents had to have a right to claim protection under the Flemish care insurance scheme. For her, any decision that denies nationals of Belgium eligibility merely because they never exercised the right to free movement would highlight 'the arbitrariness of attaching so much importance to crossing a national border'.²⁶ Such an outcome would certainly be difficult to square with principles of EU citizenship, which challenges 'the sustainability in its present form of the doctrine on purely internal situations'.²⁷

The AG was right in noting the arbitrariness of distinguishing Walloon residents based on whether they have exercised the right to free movement formerly, but failed to recognise that the arbitrary nature of the situation had arisen precisely because of her assumption that the mere prior

²³ For the most detailed analysis of reverse discrimination to date: Alina Tryfonidou, *Reverse Discrimination in EC Law* (Kluwer Law International 2009).

²⁴ Read, for example, Henri de Waele, 'EU Citizenship: Revisiting Its Meaning, Place and Potential' (2010) 12 European Journal of Migration and Law 319, 329; Maduro (n 14) 126; Catherine Jacqueson, 'Union Citizenship and the Court of Justice: Something New Under the Sun? Towards Social Citizenship' (2002) 27 European Law Review 260, 281; Dimitry Kochenov, 'Citizenship without Respect: The EU's Troubled Equality Ideal' (2011) 08/10 Jean Monnet Working Paper.

²⁵ Case C-212/06 *Walloon* [2008] ECR I-1683, Opinion of AG Sharpston, para 116.

²⁶ *Ibid* para 141.

²⁷ *Ibid* para 140.

exercise of free movement rights made non-Belgian nationals resident within Walloon eligible. That is, she overlooked the fact that the situation had never arisen had she not characterised the borders between decentralised authorities as unacceptable barriers to free movement. This problem also went unnoticed by scholars agreeing with the AG. Van Elsuwege and Adam, for example, believed it to be ‘somewhat paradoxical that member states remain entitled to discriminate against their own nationals in a Community that is based on the rule of law and the principle of equal treatment, particularly in the light of the provisions on European citizenship’.²⁸ To realise the ideal of equality embedded within EU citizenship, federal divisions of authority must be overcome and a harmonisation of social rights be realised.²⁹

Walloon confirms Carens’ claim that conceptions of citizenship tend to regard it primarily as a legal status that is universal and equal and neglect institutional divisions of power and the existence of multiple overlapping and interacting centres of decision-making. The case displays a preference for individual free movement rights and the homogenisation of rights over Belgium’s constitutional divisions of authority and local self-governance. On grounds of citizenship mobility, the Court confined the scope of the *lex loci domicilii* principle, employed by Belgium to condition social security coverage, thereby penetrating Belgium’s federal boundaries. Going further even, AG Sharpston, invoking the ideal of equality among citizens, argued that the Court should have rethought its stance on the purely internal rule and reconsidered the justifiability of reverse discrimination in a Union of citizens. If that line of thought were pursued, national fragmentations of power should be overcome altogether and the three levels of citizenship within the EU be reduced to two.

2. Citizenship in a polycentric Union

Even though I highlighted certain of the shortcomings in the Opinion of AG Sharpston and the Court’s decision, pointing out also the potential consequences of putting their interpretations of EU citizenship into effect, I said too little about the reasons for resisting their conclusions. In this section,

²⁸ Peter Van Elsuwege and Stanislas Adam, ‘The Limits of Constitutional Dialogue for the Prevention of Reverse Discrimination’ (2009) 5 European Constitutional Law Review 327, 333. See also: Camille Dautricourt and Sebastien Thomas, ‘Reverse Discrimination and Free Movement of Persons under Community Law: All for Ulysses, Nothing for Penelope?’ (2009) 34 European Law Review 433; Kochenov (n 25).

²⁹ I am not the first to suggest that *Walloon* treaded too lightly on national constitutional federal values. Verschueren (n 11) 283–284; Thomas AJA Vandamme, ‘Case C-212/06, Government of the French Community and the Walloon Government v. Flemish Government, Judgment of the Court of Justice (Grand Chamber) of 1 April 2008, Nyr’ (2009) 46 Common Market L. Rev. 287, 298.

I will specify the ideal contours of citizenship in a Union where authority is divided over multiple overlapping centres of decision-making. That is needed if only because it may not be immediately evident why their conclusions are problematic. One may think, for example, that the decision was insufficiently attentive to Belgium's federal arrangement, which the EU, in accordance with Article 4(2) TEU,³⁰ is expected to respect, but still believe that, everything considered, it struck the correct balance between competing EU values. One could believe that no a priori reason exists to assume that principles of EU citizenship must always give in when encountering the boundaries of Article 4(2). For some, putting into effect AG Sharpston's suggestions is essential for EU citizenship to realise federal ideals.³¹ Others have argued that at least occasionally, 'the federal organisation of a member state can be used as a potential justification for infringing free movement rights under [EU] law',³² thereby implying that we should speak of infringements to free movement law in these circumstances.

These arguments are implausible, because all presume some tension between EU citizenship and the division of powers between different centres of government within the EU that does (or should) not exist. That is, I argue in this section, equal citizenship can be realised without challenging the fragmentation of authority between different centres of government and citizenship mobility does not need to undermine territorial boundaries. In doing so, I highlight that EU citizenship, due to its two key characteristics – free movement and non-discrimination – is able to contribute to realising two key aspects of polycentric theory: appreciation for local democratic self-governance and overcoming barriers to cooperation between different localities. Based on a different conception, the realisation of EU citizenship entails respect for the substantive decisions by and boundaries between national and local processes of self-governance, and EU citizenship law should concern itself with resolving conflicts between different levels of decision-making rather than overcoming these levels altogether. Following that conception, the principle of non-discrimination on grounds of nationality requires deference to the substantive content of national and local citizenship (2.1) and through free movement we should seek to connect the different localities in a way that respects self-governance within the EU (2.2).

³⁰ Accordingly, 'the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'.

³¹ Dimitry Kochenov, 'EU Citizenship as a Federal Denominator' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017).

³² Van Elsuwege and Adam (n 29) 337.

2.1 Non-discrimination on grounds of nationality as a means to self-governance

My claim that no tensions exist between the ideal of citizenship equality and divisions of authority needs some modification, because it is a well-established fact that citizens' substantive rights are not necessarily uniform in polities that divide authority between different centres of government. Within federations, for example, 'more equality between citizens across the federation almost necessarily implies less freedom ... for the component units'.³³ Still, also within federations, there need not be departures from the ideal of equal citizenship. The goal is to embed it within the federation's political structure when determining to whom to extend equal treatment. That is, in case powers are retained by the constituting states, equality of treatment is guaranteed within the boundaries of those states with respect to all citizens resident there.³⁴ The right to non-discrimination on grounds of nationality normally guarantees the same within the EU. A German national resident within Belgium is treated like a Belgian national, which implies, by extension, that the German national resident within Walloon is treated like the Walloon region treats its residents holding Belgian nationality.

This requires a somewhat different perspective on the principle of non-discrimination on grounds of nationality, for commonly we treat it as a constraint on the Member States' political discretion. They cannot enact laws that discriminate against non-national EU citizens. In addition, however, we should also think of that right as constraining the CJEU's discretion. If non-national EU citizens are included within the scope of national or local law and treated on an equal basis, as if they were national citizens, the judges must not interfere with these decisions and provide 'deference to the states on the substantive content of citizenship'.³⁵ Note that this is no endorsement of the notion that decentralisation is almost certainly preferable over centralisation. It is difficult to offer firm conclusions about the ideal division of authority in our societies a-contextually and independent of the matter we seek to regulate.³⁶ All I argue is that Member States' internal structure and the content

³³ Paolo Dardanelli, 'Federal Democracy in Switzerland' in Michael Burgess and Alain-G Gagnon (eds), *Federal democracies* (Routledge 2010) 155.

³⁴ There may be exceptions to that rule and also within the EU Member States are sometimes still permitted by secondary legislation to deviate from the right to non-discrimination on grounds of nationality, as is the case, for example, with social assistance. I will not address that issue here.

³⁵ This was also the meaning of nineteenth-century citizenship in the US, as pointed out by: William J Novak, 'The Legal Transformation of Citizenship in Nineteenth-Century America', *The Democratic Experiment: New Directions in American Political History* (Princeton University Press 2003) 88.

³⁶ Scholars of polycentricity were correct in asserting that '[n]o a priori judgment can be made about the adequacy of a polycentric system of government as against a single jurisdiction'. Charles Tiebout, Robert Warren, and Vincent Ostrom, 'The Organization of Government in Metropolitan Areas: A Theoretical Inquiry' (1961) 55, 838.

of local and national law is in principle for the national centres of decision-making, not for the Court, to decide.

One may think that from the perspective of equal citizenship, no reason exists to assume that equality at the local level is preferable over equality at the national level, but that position would overlook the ideal of democratic equality between citizens. Equality sits at the very core of contemporary understandings of democracy.³⁷ When there is disagreement on substantive results, the fairest way of resolving our disagreements and deciding on a common course of action is through procedures that give equal weight to the preferences of all citizens.³⁸ Deference to the substantive content of national or local citizenship means deference to the outcomes realised through political procedures that treat all citizens as equals. Hence, the principle of non-discrimination can and should be recognised as a principle that acknowledges the importance of democratic self-governance. If national decisions incorporate the requirements of the principle of non-discrimination on grounds of nationality, the Court should restrain itself and respect the democratically legitimated content of domestic law.³⁹

Citizenship scholars responded to *Walloon* with a plea for harmonising social rights within Belgium and an extension of the Flemish care insurance scheme's scope to all of Walloon's residents, with the purpose of realising equality among Union citizens. The underlying conception of the principle of non-discrimination of nationality is hard to square with the EU's multi-level system of governance. We can see now that this tension disappears once we adopt a different perspective on that principle, according to which it aspires to safeguard self-governance on the local level and serves as a constraint on the discretion enjoyed by the Court. Alike federations, which square a devolution of authority with principles of equal citizenship by guaranteeing equality between citizens within the locality in which they reside, the principle of non-discrimination on ground of nationality should be interpreted as requiring respect for the substantive content of citizenship as decided upon by the responsible level of government.

³⁷ Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (Oxford University Press 2008); Robert A Dahl, *Democracy and Its Critics* (Yale University Press 1991).

³⁸ Dahl (n 38); Christiano (n 38); Jeremy Waldron, *Law and Disagreement* (Oxford University Press 1999) 108–115; Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 225–227.

³⁹ Agustín José Menéndez, 'European Citizenship after Martínez Sala and Baumbast' (2009) 11/2009 ARENA Working Paper 1, 37.

Joseph Carens was thus correct to argue that recognising the multidimensionality of citizenship is essential for safeguarding the promise of equality that the language of citizenship usually evokes.⁴⁰ The ECJ's failure to respect the boundaries of local citizenship produced an unjustifiable discrimination between Belgian and non-Belgian EU citizens resident within Walloon. The appropriate solution to that problem, however, is not, along AG Sharpston's line of thought, to revoke decision-making power from local authorities and harmonise social security coverage within Belgium. Had the members of the Court recognised the plurality of actors involved in the governance of citizenship within the EU and not have sought to deny those a legitimate role in that endeavour, they would have realised equality of treatment between citizens within the locality of residence and have respected the federal boundaries of Belgium.

2.2 Principles of free movement as a means to cooperation between local governments

Interdependencies between these different centres of decision-making and levels of government and their inability to tackle collective problems individually may cause them to establish forms of cooperation.⁴¹ Such cooperation does not occur spontaneously, but requires an overarching shared system of rules that are subject to enforcement mechanisms.⁴² To regulate relations between the different federal regions of Belgium, it knows a set of overarching rules that condition, for example, which region is responsible for the social welfare of citizens. Belgium, as I explained, employs the principle of *lex loci domicilii* to delineate who is covered by which social arrangement. The EU can be regarded as serving a similar purpose at a higher level, offering an institutional arrangement whereby it can constrain negative externalities resulting from domestic decisions, and realise collective solutions to problems faced by the Member States.

Cross-border mobility is among the most prominent domains shaped by EU regulation. An elaborate set of rules sets out under what conditions free movement of goods, services, capital, and persons can take place between Member States. Local communities can benefit from the opening up and reconstructing borders, being able to attract well-trained and skilled individuals, while local entrepreneurs can sell their goods and services abroad. That is, by forming a new set of institutions

⁴⁰ Carens (n 4) 161.

⁴¹ If such cooperation is desirable, different centres of authority, as Ostrom said it, 'derive an advantage through the formation of a new public enterprise which could provide a joint service for the larger community of people comprising the several small communities'. Vincent Ostrom, 'Can Federalism Make a Difference?' (1973) *Publius* 218.

⁴² Van Zeben, chapter 1

with the power to establish a common regime of free movement, smaller communities can achieve results and offer opportunities that they could not realise individually. On the other hand, these collective rules diminish costs of entry and exit companies and individuals had faced had local and national restrictions been in effect. EU citizens are entitled to vote with their feet and move to where they can enjoy the ‘good life’.⁴³ It enhances, in polycentric terms, individuals’ ability for self-governance.⁴⁴

The challenge is finding a durable balance between EU citizen’s individual self-governance and the collective self-governance needed to govern our complex societies. While certain constraints on the autonomous choices of the Member States are justifiable in order to enable individual mobility, I agree with Scharpf, among others, that demanding reasons must exist for these to be imposed through processes other than those in which domestic representative processes had a voice.⁴⁵ First of all, it is not for the judiciary subject the Member States and their regions to the obligation to redesign their policies in order to ensure compatibility with more attractive policies elsewhere, as perceived by individual citizens. That is, contrary to *Walloon*, losses of opportunity to eligibility for benefits, as a consequence of individual mobility, should not be earmarked as obstacles to free movements. Likewise, citizens may be discouraged from continuing to reside in their current place of residence if another region or country offers more substantive protection of rights, but that cannot be taken to mean that the former undermines citizens’ right to residence.⁴⁶ Such or similar interpretations of the right to move and reside freely within the Member States create untenable challenges to the autonomy of the Member States.

More complex and controversial are impediments to free movement that arise out of the application of national substantive standards to mobile citizens. That is, also if the right to free movement is an operationalisation of the principle of non-discrimination on the grounds of nationality, along the lines defended in the previous section, and substantive standards are applied to national and mobile citizens indistinctly, the latter may be worse off if also they had to comply with

⁴³ Floris de Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (Oxford University Press 2015) 61–64.

⁴⁴ Richard A Epstein, ‘Exit Rights Under Federalism’ (1992) 55 *Law and Contemporary Problems* 147; Ilya Somin, ‘Foot Voting, Federalism, and Political Freedom’ in James E Fleming and Jacob T Levy (eds), *Federalism and subsidiarity* (New York University Press 2014).

⁴⁵ Fritz W Scharpf, ‘Legitimacy in the Multi-Level European Polity’ in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press 2010) 108.

⁴⁶ This unfortunate position the Court took in Case C-127/08 *Metock* ECLI:EU:C:2008:449, para 89: ‘the refusal of that Member State to authorise his family members who are nationals of non-member countries to join him there would be such as to discourage him from continuing to reside there and encourage him to leave in order to be able to lead a family life in another Member State or in a non-member country’.

the Member State of origin's rules previously. The principle of mutual recognition intends to protect against such dual burdens. Absent adequate overriding justifications, the Member State of destination is under the obligation to recognise goods, services, and personal statuses lawfully produced, provided, and acquired by the rules of the Member States of origin.⁴⁷ It offers an instructive example of the resolution of coordination problems through principles of free movement. Also within the field of EU citizenship has it been applied to decide which regulatory regime governs the mobile citizen.⁴⁸ However, whatever the merits of this principle, by imposing on Member States the demand to recognise another's laws and constraining it in its application of its own regulatory standards, it also restricts the scope for democratically legitimate national decision-making processes to formulate and apply their own policies.⁴⁹ The resolution of such conflicts must rest upon a careful balance between the individual's rights and interests and the Member State's concerns, requiring an adequate valuation of the public policy interests as defined by national democratic processes. Unfortunately, the balance struck by the Court often appears skewed towards individual free movement rights.⁵⁰ *Walloon* merely serves as another illustration of that phenomenon, the Court deciding that the constitutional division of powers within Belgium could not even be invoked 'to justify the failure to observe obligations arising under [EU] law'.⁵¹

To remove that asymmetry and bring about results that attach more significance to legitimate domestic interests, the EU legislature seems to be the institution best positioned to establish an overarching system of shared rules. That is to say, if there are reasons that justify the containment of national processes of democratic self-governance, national decisions are ideally replaced by European rules brought about by European collective self-governance. The task of drawing up and deciding the framework of general rules that binds all Member States is a complex task, requiring consideration of wide-ranging and often controversial questions of policy and morality, which are subject to substantive disagreement. The EU legislature provides not just a forum where the voices of all those affected by the decision can be heard, but also, it can think through the implications of their decisions and design solutions to common problems at the required level of generality: it addresses all rather than individual

⁴⁷ Christine Janssens, *The Principle of Mutual Recognition in EU Law* (First edition, Oxford University Press 2013).

⁴⁸ For a discussion of some relevant case law: Martijn van den Brink, 'What's in a Name Case? Some Lessons for the Debate on the Free Movement of Same-Sex Couples within the EU' [2016] German Law Journal.

⁴⁹ Alexander Somek, 'The Argument from Transnational Effects I: Representing Outsiders through Freedom of Movement' (2010) 16 European Law Journal 315.

⁵⁰ Scharpf (n 46).

⁵¹ *Walloon* (n 7) Para 58.

situations in specific.⁵² However, while it is far from evident if the prominent role played by the Court and the substantive constraints it imposes on domestic political processes are compatible with our professed allegiance to democratic self-governance, it is indispensable for the enforcement of the collective system of rules within the EU. That is, a complex interplay between different EU institutions is needed to establish and enforce an overarching system of shared rules that overcomes barriers to cooperation within the EU.

It follows that an assessment of whether domestic political decisions are compatible with EU law should take place primarily against the legislative framework established within the EU. Applied to the domain of European Union citizenship, decisions taken by national authorities should be evaluated above all in light of the different sources of legislation that govern that domain. That justifies the initial challenge brought by the Commission against the care insurance scheme established by Flanders, on the ground that the exclusion of Union citizens working in the Dutch-speaking region or bilingual region of Brussels but residing in another Member State was incompatible with Regulation 1408/71 EEC.⁵³ Following the amendments Flanders introduced to its scheme, however, it complied with the relevant legislative provisions. In such situations, there must be a strong presumption in favour of the substantive content of national law and processes of self-governance within the Member States. That presumption can be rebutted if the national political decisions pose obstacles to the realisation of other norms of EU law, but such an assessment needs to attach adequate weight to the domestic interests of the Member States. *Walloon* is compatible neither with this strong presumption in favour of local self-governance, nor with the principle that national legitimate interests must be weighed seriously in the Court's legal assessments. Ironically, the Court challenged the ideal of self-governance, central to prominent theories of citizenship, based on its legal construction of EU citizenship.

3. The democratic rights of EU citizenship

The analysis so far has highlighted that conceptions of EU citizenship that neglect the EU's political arrangements threaten self-governance within the EU. I offered an alternative conception that grows

⁵² These advantages are common to the legislature more generally: Jeremy Waldron, 'Separation of Powers in Thought and Practice' (2013) 54 Boston College Law Review 433; Christiano (n 38) 255–259. For a similar conclusion in the context of the EU, read Damian Chalmers, 'The Democratic Ambiguity of EU Law-Making and Its Enemies' in Anthony Arnall and Damian Chalmers (eds), *The Oxford Handbook of European Union Law* (First edition, Oxford University Press 2015).

⁵³ *Décret modifiant le décret du 30 mars 1999 portant organisation de l'assurance soins* (Moniteur belge of 9 June 2004) 43593.

out of and respects these arrangements and construed the principle of non-discrimination on grounds of nationality as requiring deference to the substantive content of national and local citizenship. Furthermore, I argued, we should attempt to use the right to move and reside freely within the EU to overcome territorial boundaries. Finally, I underlined that the principle of self-governance should also guide our assessment of which institutions should enjoy primary responsibility for establishing an overarching systems of shared rules on citizenship movement within the EU. However, whereas my reflections so far highlight how EU citizenship law can be shaped with respect for principles of self-governance, I said little about the position of EU citizens itself in processes of self-governance within the EU. I want to consider that question in this final section.

According to one prominent conception of free movement, it is free movement law itself that constitutes a democratic right of EU citizens. Proponents of this so-called ‘argument from transnational effects’ criticise national democratic procedures for their parochial and exclusionary effects. The demos is bounded and only insiders, those enjoying national or local citizenship, are entitled to a voice in these political processes, which has led to the fear that democratically elected officials decide at the detriment of those who were excluded from the demos. On that account, the demos’ bounded nature constitutes a significant externality, which cannot be overcome if not we include outsiders’ interests in our processes of decision-making. Free movement law allows for one community to be confronted with the value choices taken by other and, possibly precluding the application of democratically enacted rules to outsiders, free movement accomplishes outsider inclusion and reinforces democracy within the EU.⁵⁴

For various reasons, we should treat the argument from transnational effects critically. First, it takes for granted that democracy’s parochial nature – that not all who are affected by it are included in the political system – is problematic by definition. That is not at all evident. For example, it is safe to assume that decisions taken by German representative processes affect all EU citizens resident within the EU to some degree at least. Does it follow that their exclusion from those processes is problematic for that reason alone and that ideally all EU citizens should be included within the German demos? That appears like a rather strong conclusion to me, with remarkably impractical

⁵⁴ Christian Joerges, ‘European Law as Conflict of Laws’ in Christian Joerges and Jürgen Neyer (eds), *‘Deliberative Supranationalism’ Revisited* (2006); Floris de Witte, ‘Sex, Drugs & EU Law: The Recognition of Moral and Ethical Diversity in EU Law’ (2013) 50 *Common Market Law Review* 1545; Miguel Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Hart Pub 1998).

implications at that.⁵⁵ In fact, it seems desirable if German decision-makers are somewhat parochial and consider primarily the interests of those primarily affected by their decisions, i.e., citizens and residents of Germany. This is not to say that the cross-border implications produced by their decisions should be neglected. Through transnational institutional arrangements, Member States could search to mitigate externalities produced by domestic decision-making. Followers from the argument from transnational effects, however, accept with remarkable ease that the transnational processes by which to contain domestic political processes are ideally judicial.⁵⁶ The puzzling element of that argument is that it pretends to extend the scope of democratic processes by granting power to an institution that has wielded its authority so expansively that it likely has done more harm than good to democracy within the EU. Finally, principles of free movement simply do not achieve what the argument from transnational effects credits it for. Even if free movement would just be an operationalisation of the principle of non-discrimination on grounds of nationality, outsiders remain excluded from the political process. All it ensures is the equal application of the substantive value choices taken by representatives of those included within the process.⁵⁷

Whether mobile Union citizens should be included within national democratic processes and EU law should draw the boundaries of the national demos differently is a controversial matter. On the one hand, there is little disagreement, so appears to me, that all Union citizens should be entitled to a vote in elections to the European Parliament. Somewhat more controversial, though also not widely contested among democratic theorists,⁵⁸ is that EU citizens should be included in the local demos and entitled to vote for and stand in local elections of their community of residence. EU law guarantees EU citizens these political rights.⁵⁹ However, excluded from the package of EU citizenship rights is the right to vote and stand in national elections within the Member State of residence. No

⁵⁵ For some discussion of the principle of All Affected Interests and its limitations, Robert E Goodin, 'Enfranchising All Affected Interests, and Its Alternatives' (2007) 35 *Philosophy & Public Affairs* 40; Sarah Song, 'The Boundary Problem in Democratic Theory: Why the Demos Should Be Bounded by the State' (2012) 4 *International Theory* 39; Rainer Bauböck, 'Stakeholder Citizenship and Transnational Political Participation: A Normative Evaluation of External Voting' (2007) 75 *Fordham Law Review* 2393.

⁵⁶ According to de Witte, '[t]he notion of constrained democracy is implemented by removing agency, or self-determination, from "the political" sphere, and re-allocating it to a different type of government, whether judicial ... expert-based ... administrative ... or the individual (through market structures)'. de Witte (n 55) 1554.

⁵⁷ For a persuasive elaboration of the limits of the argument from transnational effects, read: Somek (n 50); Alexander Somek, 'The Argument from Transnational Effects II: Establishing Transnational Democracy' (2010) 16 *European Law Journal* 375.

⁵⁸ Bauböck (n 56).

⁵⁹ Article 22 TFEU. There are certainly difficulties that remain, such as the question of what constitute local elections. I will not enter that debate here.

Member State has opened the boundaries of the national demos to include non-national resident EU citizens and EU law does not require them to draw these boundaries differently.

One take on this situation is that denying EU citizens political rights in national elections is an unjustifiable limitation of their right to free movement,⁶⁰ but that argument begs the question of whether mobile EU citizens must be entitled to democratic inclusion within their state of nationality or residence. Certain Member States exclude nationals who have left the territory and are resident abroad (for a certain duration) from the franchise.⁶¹ Such policies not just sit uncomfortably with the right to free movement, but also constitute a clear democratic wrong, because it deprives mobile Union citizens from a say in national elections but also on who represents them in the Council of ministers.⁶² However, it remains an open question of whether mobile EU citizens must be included in the national franchise of their country of nationality or residence.

The real question is how to draw the boundaries of the demos from a democratic perspective. The democratic boundary debate is lengthy and complex and I will not seek to offer a full answer to that question here. It seems questionable to me, however, to argue that it is a democratic essential to extend the franchise to newly arrived migrant Union citizens. The better solution for temporary residents, such as job-seekers or students, is to guarantee their political rights in their Member State of nationality. On the other hand, the longer the citizen resides in a country of which she does not possess the nationality, the more legitimate her claim to full democratic inclusion. The permanent exclusion of foreigners from the national franchise violates principles of democratic justice and the EU should seek to remedy such democratic wrongs. Two potential avenues exist for enhancing EU citizens' democratic standing. Either the Member States could offer non-national EU citizens a reasonable opportunity to naturalise, or EU citizens are entitled to vote and stand in national elections once they have acquired permanent residence. Both options improve EU citizens' ability to participate in national processes of democratic self-governance.⁶³

⁶⁰ Federico Fabbrini, 'The Political Side of EU Citizenship in the Context of EU Federalism' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press (forthcoming) 2016); Dimitry Kochenov, 'Free Movement and Participation in the Parliamentary Elections in the Member State of Nationality: An Ignored Link?' (2009) 16 *Maastricht Journal of European and Comparative Law* 197

⁶¹ For an overview of different rules on external voting, read Bauböck (n 56).

⁶² The different contributors to the following debate appears to share that view: Rainer Bauböck, Philippe Cayla and Catriona Seth (eds), *Should EU Citizens Living in Other Member States Vote There in National Elections?* (EUI RSCAS Working Paper 2012).

⁶³ For a variety of views on where EU citizens should vote, read: *ibid.*

Conclusion

According to dominant conceptions of EU citizenship, the Court is justified in challenging national and local practices of self-governance and divisions of authority in order to promote the individual mobility of Union citizens and harmonise their rights. I offered a different understanding of EU citizenship in this chapter, more attuned to the EU's polycentric nature. The principle of non-discrimination on grounds of nationality must be understood not just as a constraint on the discretion of national decision-makers, but should also require European institutions to respect the substantive content of national and local citizenship. In addition, rather than posing a challenge to territorial divisions of authority, the right to free movement should connect and allow for cooperation between the different localities. The Court should not determine the political and social arrangements within the EU based on its best understanding of EU citizenship, but rather, our conceptions of EU citizenship should grow out of these arrangements. That requires a more polycentric understanding of EU citizenship, which recognises the existence of and demonstrates respect for the dispersion of authority within the EU.