Fundamental Rights of EU Citizens in Purely Internal Situations: From Reverse Discrimination to Incorporation?

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FUNDAMENTAL RIGHTS OF EU CITIZENS IN PURELY INTERNAL SITUATIONS: FROM REVERSE DISCRIMINATION TO INCORPORATION?

Diplomski rad

Mentorica: doc. dr. sc. Nika Bačić Selanec

ZAGREB, 2023.

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SUMMARY

The phenomenon of reverse discrimination in the EU has been in the focus of academic research and debate due to the inequality it generates between citizens of the European Union, and it continues to create controversies. Reverse discrimination occurs when a Member State treats its own nationals who cannot point to a link with EU law less favourably than those whose situation is covered by EU law. Such a difference in treatment leads to double standards in fundamental rights protection granted to EU citizens, undermining the EU principle of equality. At the same time, the development of EU citizenship suggests this legal status has the potential to tackle the issues of inequality. The Court of Justice has in its jurisprudence developed EU citizenship as a fundamental status of nationals of EU Member States, provoking many interesting and potentially revolutionary interpretations of citizenship in terms of pushing the borders of EU competences to protect fundamental rights. In this context, it seems relevant to explore the extent and the transformative potential of EU citizenship which rejects the supplementary market paradigm and embraces equality as its underlying purpose. This paper discusses the prospect of using the citizenship provisions of EU Treaties as a legal basis to end reverse discrimination by claiming EU competence in purely internal situations. To explain the possible implications of this option, a parallel is drawn with the US constitutional doctrine of incorporation. To that extent, the paper argues that the effects of applying EU fundamental rights protection in purely internal situations on the basis of EU citizenship would be similar to the effects of the incorporation doctrine in the US. Such a possible development in EU law, even if normatively desirable, would be contrary to the EU's current constitutional design. The right forums to end reverse discrimination based on the principle of equality common to the Member States are, at the moment, only national courts or the European Court of Human Rights acting outside the EU's own legal framework. Still, a reform of the current system of EU fundamental rights protection would be welcome as the only way to efficiently end this type of inequality. The problem of reverse discrimination should no longer be tolerated under EU law as it contradicts its underlying substantive values and legal principles.

KEYWORDS: EU law, purely internal situations, reverse discrimination, EU citizenship, fundamental rights, incorporation doctrine

SAŽETAK

Fenomen obrnute diskriminacije u Europskoj uniji u fokusu je akademskih istraživanja i rasprava zbog nejednakosti koju uzrokuje među građanima Europske unije, te nastavlja izazivati kontroverze. Do obrnute diskriminacije dolazi kada država članica svoje državljane koji ne mogu ukazati na poveznicu s pravom Unije stavlja u nepovoljniji položaj od onih koji uživaju zaštitu prava Unije. Takva razlika u postupanju dovodi do dvostrukih standarda u zaštiti temeljnih prava namijenjenih građanima Unije i potkopava europsko načelo jednakosti. U isto vrijeme, razvoj građanstva Europske unije sugerira da ovaj pravni status ima potencijal za borbu protiv nejednakosti. Naime, Sud Europske unije u svojoj je praksi razvio građanstvo Europske unije kao temeljni status državljana država članica, izazivajući mnoga zanimljiva i potencijalno revolucionarna tumačenja statusa građanstva u smislu širenja nadležnosti Unije u zaštiti temeljnih prava. U tom kontekstu čini se relevantnim istražiti opseg i transformacijski potencijal građanstva Unije koji odbacuje supstitucijsku tržišnu paradigmu i prihvaća jednakost kao svoju osnovnu svrhu. U radu se raspravlja o mogućnosti korištenja odredbi Osnivačkih ugovora koje se odnosne na građanstvo kao pravne osnove za dokidanje obrnute diskriminacije i uspostavljanje nadležnosti Unije u isključivo unutarnjim situacijama. Kako bi se objasnili mogući učinci ovakvog razvoja, povlači se paralela s američkom ustavnom doktrinom o inkorporaciji. U radu se stoga brani teza da bi posljedice primjene standarda temeljnih prava Europske unije na temelju statusa građanstva Unije u isključivo unutarnjim situacijama bile slične učincima doktrine o inkorporaciji u Sjedinjenim Američkim Državama. Takav mogući razvoj u pravu Europske unije, iako normativno poželjan, bio bi suprotan trenutnom ustavnom uređenju Unije. Odgovarajući forumi za borbu protiv obrnute diskriminacije, na temelju načela jednakosti koje je zajedničko državama članicama, u ovome trenutku su samo nacionalni sudovi ili Europski sud za ljudska prava, djelujući van pravnih okvira Europske unije. Ipak, reforma sustava zaštite temeljnih prava u Europskoj uniji je dobrodošla jer je to jedini način da se učinkovito stane na kraj ovoj vrsti nejednakosti. S obzirom da pojava obrnute diskriminacije narušava temeljne materijalne vrijednosti i pravna načela Europske unije, više se kao takva ne bi smjela tolerirati.

KLJUČNE RIJEČI: pravo Europske unije, isključivo unutarnje situacije, obrnuta diskriminacija, građanstvo Europske unije, temeljna prava, doktrina inkorporacije

CONTENTS

1 Introduction

The European Union is a community of limited powers based on the principle of conferral.[1] Relatedly, the reach of EU law is limited to situations within its sphere of competence. EU law does not apply to EU citizens who find themselves in purely internal situations. In other words, those who cannot point to a cross-border element are left without the protection of EU law. This feature of EU law gives rise to reverse discrimination, 'a less favourable treatment that is suffered by persons who are in a purely internal situation and, as a result of that, cannot enjoy EU law protection in their own Member State'.[2] EU citizens falling within the scope of EU law are thus able to enjoy the benefits of EU law in any Member State. In contrast, the same Member State is not required under EU law to grant the same standard of protection to its own nationals whose situation lacks cross-border elements. In this sense, reverse discrimination, as any other form of discrimination, fosters inequality and goes directly against 'the values of equality, rule of law and human rights protection, enshrined in the foundations of the European Union'.[3] On a substantive level, this phenomenon indeed poses a problem for the equal and effective implementation of these principles.

Since 1986, it has been pointed out that reverse discrimination is unsustainable in a true common market.[4] As European integration moved forward, the introduction of the status of EU citizenship in the Maastricht Treaty in 1992 has intensified legal debate on this issue, because 'reverse discrimination is difficult to reconcile with the notion of EU citizenship'.[5] The status of EU citizenship has allowed for certain modifications of the purely internal rule.[6] The '*Ruiz Zambrano* test' established by the Court of Justice of the EU (hereinafter: the Court) in the 'eponymous judgment'[7] introduced the possibility of applying EU law in purely internal situations to a limited extent. The 'deprivation of genuine enjoyment of the substance of rights attached to the status of EU citizen' caused by a national measure in purely internal situations

[1] Consolidated version of the Treaty on European Union [2016] OJ C 202/01, Art 5(2) (TEU).
[2] Alina Tryfonidou, 'Purely Internal Situations and Reverse Discrimination in a Citizens' Europe: Time to "Reverse" Reverse Discrimination' in Peter George Xuereb (ed), *'Issues in Social Policy: A New Agenda'*, Jean Monnet Seminar Series (Progress Press 2009) 11.
[3] Art 2 TEU.
[4] Joint Cases C-80/85 and C-159/85 *Edah* ECLI:EU:C:1986:333, Opinion of Advocate General Mischo.
[5] Peter Van Elsuwege, 'The Phenomenon of Reverse Discrimination: An Anomaly in the European Constitutional Order?' in Lucia Serena Rossi and Federico Casolari (eds), *The EU after Lisbon: Amending or Coping with the Existing Treaties*?' (Springer 2014) 162.
[6] See Nathan Cambien, 'The Scope of EU Law in Recent ECJ Case Law: Reversing "Reverse Discrimination" or Aggravating Inequalities?' (2012) 47 Cuadernos Europeos de Deusto 127.
[7] Case C-34/09 *Ruiz Zambrano* ECLI:EU:C:2011:124.

does allow for Article 20 TFEU to be applied in the absence of any cross-border element, and set aside the contested measure.[8]

However, the *Ruiz Zambrano* route has been restricted to a great extent by subsequent case law, most notably *McCarthy*[9] and *Dereci*.[10] In those cases, the Court did not find that national measures undermined 'the effectiveness of the EU citizenship rights'.[11] Nonetheless, the legal debate on the potential of EU citizenship as a trigger for applying fundamental rights protection in reverse discrimination cases is still going on.[12] More specifically, as put by AG Kokott, 'it cannot of course be ruled out that the Court will review its case law when the occasion arises and be led from then on to derive a prohibition on discrimination against one's own nationals from citizenship of the Union'.[13] The right to move and reside freely on the territory of the Union could be interpreted as to contain a self-standing right to reside, which includes EU citizens residing in the Member State of their nationality.[14] This approach would cover the cases of EU citizens in purely internal situations and provide them with EU standard of fundamental rights protection.

Although such a shift in interpretation would provide an efficient solution to the problem of reverse discrimination, it would change the underlying bases of EU constitutional law. As AG Sharpston argued in her opinion in the *Ruiz Zambrano* case, the prospect of applying the Charter of fundamental rights of the EU[15] (hereinafter: the Charter) on the basis of a free-standing right to reside which is not confined to a cross-border element 'would involve introducing an overtly federal element into the structure of the EU's legal and political system'.[16] In the same opinion, AG Sharpston compares the described development in the application of EU fundamental rights to the doctrine of incorporation in US law, 'based on the "due process" clause of the Fourteenth Amendment, which does not require an inter-state

[8] ibid, para 42.
[9] Case C-434/09 *McCarthy* ECLI:EU:C:2011:277.
[10] Case C-256/11 *Dereci* ECLI:EU:C:2011:734.
[11] For a further explanation of the Court's strict approach to the 'deprivation of substance of rights' test and the effectiveness of EU citizenship rights, see Katerina Kalaitzaki, 'EU Citizenship as a Means of Broadening the Application of EU Fundamental Rights: Developments and Limits' in Nathan Cambien, Dimitry Kochenov, Elise Muir (eds), *EU Citizenship Under Stress: Social Justice, Brexit and Other Challenges'*, Nijhoff Studies in European Union Law, vol 16 (Brill 2020) 55-57.
[12] See Dimitry Kochenov, 'On Tiles and Pillars: EU Citizenship as a Federal Denominator' in Dimitry Kochenov (ed), '*EU Citizenship and Federalism: The Role of Rights*' (CUP 2017) 11-12.
[13] Case C-434/09 *McCarthy* ECLI:EU:C:2010:718, Opinion of AG Kokott, para 42.
[14] Case C-34/09 *Ruiz Zambrano* ECLI:EU:C:2010:560, Opinion of AG Sharpston, paras 80-101.
[15] Charter of Fundamental Rights of the European Union [2016] OJ C 202/02 (Charter).
[16] Opinion of AG Sharpston (n 14) para 172.

movement nor legislative acts from Congress' in the federal protection of fundamental rights against the States.[17]

This paper will build on the analysis of AG Sharpston and argue that the interpretation of EU citizenship provisions which situates purely internal situations within the field of EU competence is contrary to current EU constitutional design. A parallel will be drawn between the US constitutional doctrine of incorporation to illustrate why there is no proper legal basis in the EU Treaties to allow for such a derogation from the principle of conferral.[18] It will be concluded that the incorporation of fundamental rights protection through EU citizenship would be difficult to reconcile with the EU's constitutional principles because its effects would radically change the division of powers between the Member States and the Union.

The argument will be presented as follows. First, reverse discrimination will be further examined as something that undermines the core values of the EU legal order. An analysis of case law on EU citizenship in purely internal situations will follow, explaining the extent to which the Court has expanded the reach of EU citizenship, providing a critique of the market-based notion of citizenship. The central part of the paper then places the problem in a comparative perspective by assessing the main features of the incorporation doctrine developed by the US Supreme Court. Finally, it will be acknowledged that, as things currently stand, national law should be regarded as the proper legal arena for taking action against reverse discrimination. Nevertheless, it will be emphasised that reverse discrimination should still stay in the focus of the Union *de lege ferenda* and that a political commitment by the Member States will be necessary to achieve full equality.

2 The phenomenon of reverse discrimination in the EU legal order

The following section will place the phenomenon of reverse discrimination in the broader context of the EU legal order. The first part provides an analysis of reverse discrimination as a

[17] ibid.
[18] For a comparative perspective on federalism in the EU and the US, see Sergio Fabbrini (ed), *Democracy and Federalism in the European Union and the United States: Exploring Post-National Governance* (Routledge 2004); Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (OUP 2009).

product of applying the purely internal rule. The second part explores reverse discrimination as an unwanted feature of a legal order that is based on equality and the rule of law.

2.1 Etiology of reverse discrimination: the purely internal rule

Reverse discrimination is caused by the application of the purely internal rule.[19] According to that rule developed by the Court, a case is purely internal when all of its elements 'are confined within a single Member State'.[20] These 'purely internal situations' are thus out of the reach of EU law. EU citizens who cannot point to a link with EU law are left without the protection of EU law.

Saunders[21] was the first case in which the Court applied the purely internal rule. The facts of the case concerned an order issued by the Crown Court of Bristol in a criminal procedure against Mrs Saunders. The order demanded that she move to Northern Ireland and not return to England and Wales for three years. The Court's decision in the preliminary ruling procedure held that freedom of movement within the territory of a single Member State constituted a situation purely internal to the Member State in question and therefore fell outside the scope of the Treaty provisions on free movement of workers.[22] As the ruling in Saunders stated, 'the provisions of the Treaty on freedom of movement for workers cannot … be applied to situations which are wholly internal to a Member State, in other words, where there is no factor connecting them to any of the situations envisaged by Community law'.[23] In essence, the purely internal rule has been developed by the Court to make sure that the application of EU law is in line with the scope of EU law as defined in the Treaties.[24] Consequently, reverse discrimination can be understood as a 'by-product of the vertical division of competences' in the EU.[25]

2.1.1 Vertical division of competences

[19] Alina Tryfonidou, 'The Outer Limits of Article 28 EC: Purely Internal Situations and the Development of the Court's Approach through the Years' in Catherine Barnard and Okeoghene Odudu (eds), *The Outer Limits of European Union Law* (Hart Publishing 2009) 203.
[20] Sara Iglesias Sánchez, 'Purely Internal Situations and the Limits of EU Law: A Consolidated Case Law or a Notion to be Abandoned?' (2018) 14(1) European Constitutional Law Review 7, 9-10.
[21] Case 175/78 *The Queen v Vera Ann Saunders* ECLI:EU:C:1979:88.
[22] ibid, para 12.
[23] ibid, para 11.
[24] Van Elsuwege (n 5) 164.
[25] ibid, 163-164.

When it comes to defining the division of competences between the EU and the Member States, two types of principles are applied. The limits of EU competences are governed by the principle of conferral, while the use of EU competences is governed by the principles of subsidiarity and proportionality.[26] The principle of conferral is the main principle at stake when assessing the possibility of abolishing the purely internal rule.[27] The content of the principle, laid out in Art 5 TEU, defines the Union as acting only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.[28] Competences not conferred upon the Union in the Treaties remain with the Member States, following the rule of retained powers of the Member States.[29] The principle of conferral, as a core principle of the EU constitutional design, enables the EU to function by conferring the sovereignty of the Member States on the bodies of the Union, but only in certain areas and to a certain extent.[30] This principle enables the EU to pass laws which are binding on the Member States while giving them, at the same time, a guarantee that it will not act in areas of competences which are retained by the Member States.

In this light, EU citizenship as a legal status also functions under these principles, and the rights attached to this status are exercised within the sphere of EU law. The status of EU citizenship did create certain autonomous rights of free movement and residence independent of other Treaty provisions governing free movement in the context of market freedoms.[31] Directive 2004/38 (Citizens' Rights Directive)[32] formulates that it shall apply exclusively to Union citizens (and their family members) who move to or reside in a Member State other than that of which they are a national, thus defining that the scope of that right is confined to cross-

[26] Art 5 TEU.
[27] For a broader analysis of the division of competences in the EU, see Jacques Ziller, 'Separation of Powers in the European Union's Intertwined System of Government: A Treaty-Based Analysis for the Use of Political Scientists and Constitutional Lawyers' (2008) 73(3) Il Politico 133.
[28] Art 5 TEU.
[29] ibid.
[30] 'The transfer by the states from their domestic legal system to the community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights', in Case 6-64 *Costa v ENEL* ECLI:EU:C:1964:66, para 3.
[31] Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (6th edn, OUP 2015) 853.
[32] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 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 1612/68 and repealing Directives 64/221, 68/360, 73/148, 75/34, 75/35, 90/364, 90/365 and 93/96 [2004] OJ L158/77 (Citizens' Rights Directive).

border movement.[33] Once EU citizens use their free movement rights, they also enjoy the protection of fundamental rights under EU law.

The fundamental rights enshrined in the Charter are also applied only in situations which are situated in the sphere of EU law. Moreover, the provisions of the Charter governing its field of application explicitly state that the provisions of the Charter are addressed to the Member States only when they are implementing Union law.[34] The Charter text codified the pre-Charter case law on fundamental rights protection in which the Court protected fundamental rights as general principles of EU law only when the Member States were acting within the scope of EU law, demonstrating the Court's respect for the principle of conferred powers.[35]

2.2 Notion and Instances of Reverse Discrimination

As the purpose of the purely internal rule is to ensure the EU does not overstep its area of competence, a number of EU citizens who cannot point to a link with EU law are discriminated against by their own state of nationality since 'Member States are free to apply a more restrictive regime than the one applicable by virtue of EU law to situations that fall within the scope of EU law'.[36] The issue of reverse discrimination is therefore a flaw in the system which is based on the rule of law and the principle of equality.

In cases of discrimination that is 'reverse', 'an unexpected group of persons is treated less favourably than a group of persons that is normally treated less beneficially'.[37] Generally, Member States tend to favour their own nationals, and therefore discrimination suffered by Member State nationals in purely internal situations is considered as 'reverse discrimination'.[38] According to Tryfonidou, instances of reverse discrimination can emerge in three ways: (a) a Member State decides to apply to its nationals a legal regime that is more restrictive than the one granted to nationals of other Member States on its territory; (b) a ruling of the Court obliges a Member State to disregard a national measure that breaches one of the fundamental freedoms

[33] Art 3(1) of the Citizens' Rights Directive as explained in Anja Wiesbrock, 'Union Citizenship and the Redefinition of the "Internal Situations" Rule: The Implications of Zambrano' (2011) 12 German Law Journal 2077, 2079.
[34] Art 51(1) of the Charter. A similar provision is found in Art 6(1) TEU.
[35] See European Union Agency for Fundamental Rights <https://fra.europa.eu/en/eu-charter/article/51-field-application> accessed 15 April 2021.
[36] Tryfonidou (n 19) 203.
[37] Tryfonidou (n 2) 14.
[38] ibid, 14-15.

in situations under the EU law regime; and (c) a piece of Community minimum harmonisation legislation contains a market access clause that allows a Member State to impose on its own nationals stricter requirements than the minimum laid down by the legislation.[39]

In all of these instances, the phenomenon of reverse discrimination generates the inequality of EU citizens that is contrary to both the requirement of respecting fundamental rights of individuals and respect for the rule of law. In substance, creating a divide between EU citizens who can point to a cross-border link and those who cannot and are therefore left without the protection of EU law breaches the core principles of the Union.

2.2.1 An illustration: mutual recognition of same-sex marriages and the possibilities of reverse discrimination

To illustrate how the phenomenon of reverse discrimination unravels in practice, leading to violations of fundamental rights protected by EU law, a recent ruling of the Court will be taken as an example. In *Coman*,[40] the Court held that the term 'spouse' in the Citizens' Rights Directive includes same-sex spouses. Consequently, the ruling required all Member States to mutually recognise same-sex marriages lawfully entered into in other Member States for the purpose of EU free movement rights.[41] The implementation of this ruling can generate reverse discrimination. In this case, inequality would be caused directly by a ruling of the Court that requires the application of the principle of mutual recognition.

In order for the provisions of EU law on free movement to be applicable, there has to be a cross-border element that links the case with EU law. In *Coman*, the cross-border element was genuine residence and solemnisation of a (same-sex) marriage in Belgium between a Romanian national and a third country national who later moved back to Romania.[42] The cross-border movement between two EU Member States served as a link to EU law and thus made EU law applicable.

In other circumstances, 'if a Union citizen happens to be a national of, and resides in, a Member State which does not legally recognise same-sex relationships, (s)he will not be able

[39] ibid, 16.
[40] Case C-673/16 *Coman* ECLI:EU:C:2018:385.
[41] For an exhaustive analysis of the ruling, see Dimitry Kochenov and Uladzislau Belavusau, 'After the Celebration: Marriage Equality in EU Law Post- in Eight Questions and Some Further Thoughts' (2020) 27(5) Maastricht Journal of European and Comparative Law 549.
[42] *Coman* (n 40) para 32.

to be joined there by his/her same-sex third-country national spouse, unless, of course, the latter has the right to enter that Member State on a basis other than the EU family reunification rights enjoyed by the Union citizen'.[43] The proportionality assessment in *Coman* involved a fundamental rights argument and Romania, as it was implementing EU provisions on free movement, had to respect the family life of Mr Coman and his spouse as guaranteed under EU law.[44]

However, a same-sex couple in a purely internal situation in Romania could not invoke EU law protection in national courts and Romania would not be obliged to provide protection of their right to respect for family life because its national law does not offer any form of protection to same-sex couples. Romania will therefore grant residence permits to married same-sex couples on the basis of EU law but its own nationals who are not qualified for the protection of EU law and wish to have their same-sex marriage recognised for the purpose of residing in Romania will be left with no protection. Their fundamental rights which are protected under EU law would simply be irrelevant to Romanian authorities because the situation would be purely internal. EU citizens are therefore discriminated against on the basis of having or not having a cross-border element which is relevant enough to trigger the application of EU law.

2.2.2 Reverse discrimination and discrimination based on nationality

Although reverse discrimination in some cases might seem like discrimination based on nationality, this is not entirely the case because nationality is not used as the main ground to draw a line between two groups of people that are treated differently.[45] If we go back to *Coman*, it is apparent that EU law obliged Romania to issue a residence permit to the same-sex spouse of their own national who exercised his free movement rights before returning to Romania. The case concerned migration from the Member State of nationality to a different Member State (host Member State) and then back to the Member State of nationality.

[43] Alina Tryfonidou, 'An Analysis of the ECJ Ruling in Case C-673/16 Coman - The Right of Same-Sex Spouses Under EU Law to Move Freely between EU Member States' – a report for NELFA (January 2019) 16 <http://nelfa.org/inprogress/wp-content/uploads/2019/01/NELFA-Tryfonidou-report-Coman-final-NEW.pdf> accessed 15 April 2021.
[44] *Coman* (n 40) paras 47-50.
[45] Tryfonidou (n 2) 16.

This line of reasoning dates back to *Singh*[46] which established the following. Free movement rights under EU law include the right to return to the Member State of nationality (a different approach would discourage EU citizens from moving in the first place). At the same time, the residence rights of family members of EU citizens who move back to their Member State of nationality should correspond to the rights they would be granted if they moved to a different Member State.[47] The cross-border element that triggered the application of EU law in *Coman* was the cross-border movement between Belgium and the Member State of nationality of the applicant, Romania.

Therefore, Romanian nationals who went to the US, got married with an American national of the same sex in New York and then came back to Romania would be treated less favourably than Mr Coman because they would not be able to rely on EU law to have their marriage recognised for the purpose of residence rights. It is evident from this example that the main ground for discriminating against EU citizens who find themselves in purely internal situations is not their nationality, but their inability to find a factor which situates their case within the scope of EU law, such as cross-border movement between Member States.[48]

3 Constitutional implications of EU citizenship and fundamental rights protection*

As laid out in the previous section, reverse discrimination generated by the application of the purely internal rule goes directly against the substantive values of the EU. The equality of EU citizens is a basic value of the Union enshrined in its primary law.[49] Art 2 TEU provides that equality and respect for human rights are amongst the values the Union is founded on. The wording of the Article defines them as values that are 'common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'.[50]

[46] Case C-370/90 *Surrinder Singh* ECLI:EU:C:1992:296.
[47] Colin Yeo, 'The Surinder Singh Immigration Route: How Does It Work?' <www.freemovement.org.uk/surinder-singh-immigration-route/> accessed 15 April 2021.
[48] Tryfonidou (n 2) 17.
[49] Equality and non-discrimination as founding EU values are deeply enshrined in EU primary law. See Arts 2, 3, 9 TEU, Arts 8, 10, 18, 19 TFEU and Arts 20, 21 of the Charter.
[50] Art 2 TEU.

The phenomenon of reverse discrimination reveals that 'equality in the EU does not in fact behave as a true principle of law'.[51] As Kochenov explains, it is impossible to 'uphold the key elements necessary for the proper functioning of any mature legal system' such as 'equal citizenship, legal certainty and democratic legitimation' when equality 'depends on the need to establish a cross-border element or to prove the deprivation of substance of EU citizenship rights'.[52] Equality in the EU legal order is not unconditional as it depends on whether or not one can point to a link with EU law. EU citizenship therefore is not a status based on equality due to its dependence on links with EU law – 'its declared benefits and protections can always be overridden by personal circumstances of the holder'.[53]

3.1 EU Citizenship and the internal market: market citizenship

In general, the legal concept of citizenship is about the equality of individuals in a society – 'any individual can expect to be regarded as being as valuable a member of the community as any other individual possessing the same status'.[54] It follows that 'the laws apply to all the citizens equally and no action on the part of the citizen is required in order to be entitled to treatment equal with others'.[55] Accordingly, the legal concept of citizenship guarantees equality to all citizens without asking them anything in return.[56]

EU citizenship is driven by a different rationale. The Court accepted the 'internal market logic' when deciding EU citizenship cases, focusing on 'market citizenship [to] compensate[] those whom it claims to have empowered'.[57] In order for a measure to constitute a restriction on market freedoms, the Court examines three requirements: the existence of a cross-border element; the situation has to concern movement with an economic aim; and finally the relevant measure has to specifically restrict the pursuit of cross-border movement with an economic

[51] Dimitry Kochenov, 'Equality across the Legal Orders: Or Voiding EU Citizenship of Content' in Elspeth Guild, Cristina Gortázar Rotaeche and Dora Kostakopoulou (eds), *The Reconceptualisation of European Union Citizenship'* (Martinus Nijhoff 2014) 303.
[52] ibid.
[53] Dimitry Kochenov, 'The Citizenship of Personal Circumstances in Europe' in Daniel Thym (ed), *Questioning EU Citizenship Judges and the Limits of Free Movement and Solidarity in the EU*' (Hart Publishing 2018) 37.
[54] Dimitry Kochenov, 'Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights' (2009) 15(2) Columbia Journal of European Law 169, 173.
[55] ibid.
[56] Kochenov (n 51) 304.
[57] Dimitry Kochenov, 'The Oxymoron of "Market Citizenship" and the Future of the Union' in Fabian Amtenbrink, Gareth Davies, Dimitry Kochenov and Justin Lindeboom (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W. Gormley'* (CUP 2019) 228.

aim.[58] The compensatory logic behind the market freedoms is applied to EU citizenship cases, meaning that those who contribute to the internal market are also those who enjoy the protection of EU law.

EU citizenship has changed the strictly economic rationale of EU law to a certain, although very limited, extent.[59]

3.1.1 The Ruiz Zambrano *case and 'deprivation of substance of rights'*

A seminal judgment concerning the status of EU citizenship and the application of EU law in purely internal situations was delivered in the *Ruiz Zambrano* free movement case. Mr Ruiz Zambrano was a Colombian national who sought asylum in Belgium. His two children were born in Belgium and thus acquired Belgian nationality by *ius soli*. The entire family was to be deported so Mr Zambrano lodged an application for a residence permit based on the Belgian nationality of his children, invoking the protection of EU law. The situation in the case was purely internal, 'as there was no cross-border element, even a remote one, which could provide a bridge with EU law'.[60] All the governments which submitted observations in the case argued that the situation of Mr Zambrano was purely internal to Belgium and as such should be kept out of reach of EU law.[61] Nevertheless, the Court ruled in favour of Mr Zambrano, establishing a test of 'deprivation of genuine enjoyment of substance of rights attached to the status of EU citizenship'.[62] Refusing to grant a residence permit to parents who held Colombian citizenship would force the children, EU citizens, to leave the territory of the EU, and thus deprive them of the enjoyment of the substance of rights attached to their EU citizenship status.[63] The Court also decided that the rights granted to EU citizens who are children of third-country nationals include the right to a work permit for the third country national parents to support the children

[58] Pedro Caro de Sousa, 'Quest for the Holy Grail: Is a Unified Approach to the Market Freedoms and European Citizenship Justified?' (2014) 20(4) European Law Journal 499, 501-502.
[59] ibid, 507-508.
[60] Erik Kotlárik, 'The EU Citizenship in Purely Internal Situations and Reverse Discrimination' (2013) 5 available at SSRN <https://ssrn.com/abstract=2279861> or <http://dx.doi.org/10.2139/ssrn.2279861> accessed 15 April 2021.
[61] *Ruiz Zambrano* (n 7) para 37.
[62] ibid, para 44.
[63] See Kotlárik (n 60) 5-6

because otherwise they would not be able to exercise the substance of rights attached to their EU citizenship status.[64]

The vague concept of 'substance of rights' was introduced in the judgment without any elaboration whatsoever. The same outcome of the case could have been reached by straightforwardly abolishing the purely internal rule. Instead, the Court circumvented the intricacies of revoking the purely internal rule and took the 'substance of rights' route. Unlike the extensive argumentation provided in the opinion of AG Sharpston,[65] the Court restrained itself from entering into a profound analysis of the problems which arise from the case.[66] In her opinion, AG Sharpston provided a broad analysis of the problem of reverse discrimination in the context of the evolving case law on EU citizenship, adding emphasis to the scope of application of EU fundamental rights and proposing the application of EU fundamental rights which would depend on 'the existence and scope of a material EU competence'.[67] Nonetheless, she concluded that 'at the time of the relevant facts, the fundamental right to family life under EU law could not be invoked as a free-standing right, independently of any other link with EU law'.[68] The Grand Chamber took a different approach. The minimalistic approach is quite visible in the judgment – the Court decided the case without mentioning the right to respect for family life.[69] Its 'cryptic' ruling addressed only the citizenship dimension of the case.[70]

Although *Ruiz Zambrano* indeed is a groundbreaking judgment, its reasoning is based on previous case law and 'it did not come out of the blue'.[71] The ruling was based on a previous decision in *Rottmann*,[72] which 'set the founding stone that paved the way towards the emancipation of EU citizenship from the limits inherent in its free movement origins'.[73] In *Rottmann*, concerning an applicant who lost both his German and Austrian nationality, the Court of Justice ruled that the situation in which a Member State decides to withdraw the naturalisation of an EU citizen who has already lost the nationality of a Member State he

[64] *Ruiz Zambrano* (n 7) para 44.
[65] Opinion of AG Sharpston (n 14)
[66] Koen Lenaerts, 'EU Citizenship and the European Court of Justice's "Stone-by-Stone" Approach' (2015) 1(1) International Comparative Jurisprudence 1, 2.
[67] Opinion of AG Sharpston (n 14) para 163.
[68] ibid, para 176.
[69] Xavier Groussot, Gunnar Thor Petursson, and Nina-Louisa Arold Lorenz, 'The Paradox of Human Rights Protection in Europe: Two Courts, One Goal?' in Oddný Mjöll Arnardóttir and Antoine Buyse (eds), *Shifting Centres of Gravity in Human Rights Protection* (Routledge 2016) 13.
[70] ibid.
[71] Lenaerts (n 66) 2.
[72] Case C-135/08 *Rottmann* ECLI:EU:C:2010:104.
[73] Lenaerts (n 66) 2.

previously possessed does fall in the sphere of EU law.[74] The situation in *Rottmann* is situated within the ambit of EU law 'by its nature and its consequences' due to the fact that the concerned EU citizen is in a position 'capable of causing him to lose his EU citizenship status'.[75]

In *Ruiz Zambrano*, the Court applied the principles laid out in *Rottmann* and also took a step further in developing the social aspect of EU citizenship which arose in *Grzelczyk.*[76] EU citizenship, which is destined to be the fundamental status of nationals of EU Member States, 'precludes nationals measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'.[77] However, this change in approach did not solve the problem of reverse discrimination and inequality of EU citizens. When it comes to 'drawing the boundaries between the scope of application of EU and national law', the 'genuine enjoyment of substance of rights' criterion even added 'a feeling of legal uncertainty'.[78] Many questions were left open and the Court still had to clarify the role of EU citizenship regarding fundamental rights protection. It was left unclear whether or not fundamental rights could be regarded as a part of the 'substance of EU citizenship rights'. If the answer was affirmative, then EU fundamental rights protection could go beyond the purely internal rule. However, it soon became evident that the Court chose a different path. The possible effects of *Ruiz Zambrano* were significantly constrained by the future cases *McCarthy* and *Dereci*.

3.1.2 Clarifying 'deprivation of substance of rights'

Dereci concerned joined cases which all dealt with a third country national who wished to reside in Austria with their family member who was an EU citizen, a national of Austria and who never exercised their free movement rights. The case gave the Court of Justice an opportunity to provide further clarification on the scope of 'the substance of EU citizenship rights'.[79] In a nutshell, the denial of the genuine enjoyment of substance of EU citizenship rights

[74] *Rottmann* (n 72) para 42.
[75] ibid.
[76] Wiesbrock (n 33) 2083-2084, referring to Case C-184/99 *Grzelczyk* ECLI:EU:C:2001:458, para 31.
[77] *Ruiz Zambrano* (n 7) para 42.
[78] Peter Van Elsuwege and Dimitry Kochenov, 'On Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights' (2011) 13(4) European Journal of Migration and Law 443, 453.
[79] For a critical perspective on developments in EU citizenship case law (*Ruiz Zambrano, McCarthy* and *Dereci*), see Iris Goldner Lang, 'The Reach of EU Citizenship Rights for "Static" EU Citizens: Time to Move On?' in

exists if the EU citizen has to leave not only the territory of the state of their nationality but also the territory of the EU as a whole.[80] Furthermore, the mere desire to keep the family together in the Member State of nationality for economic or other reasons does not indicate to the Court that the EU citizen will be forced to leave the EU territory and thus be deprived of the effectiveness of EU citizenship.[81] The case did address the issue of fundamental rights protection, but the Court simply stated that Art 7 of the Charter is applicable only if the case is situated in the sphere of EU law while, if the case is outside the scope of EU law, the protection could potentially be granted at a national level or at the level of the ECHR.[82] By deciding that the right to respect for private and family life is not a part of the 'substance of rights' pertaining to EU citizenship status, the Court accepted that the family of a third-country national who is facing expulsion from the Member State territory 'could not rely' on their EU citizenship status.[83] This approach allows Member States to 'practically shatter' families consisting of EU citizens and third country nationals.[84]

Considering how the Court narrowed the criterion introduced in *Ruiz Zambrano*, the restrained outcome of *Dereci* might seem as a 'reaction to the anger of the Member States which was stirred up by *Ruiz Zambrano*'.[85] From a doctrinal point of view, *Dereci* 'simply restated the fundamental principle of *Ruiz Zambrano*'[86] and confirmed that the deprivation of the substance of rights attached to EU citizenship is linked to the EU citizen having to leave the territory of the EU and not just the Member State. By developing the test of 'deprivation of substance of EU citizenship rights', the Court definitely challenged the purely internal rule. However, the test of deprivation of the genuine enjoyment of substance of rights applies to situations which are truly exceptional.[87] It does not function as a substitute for the purely internal rule, 'but rather complements the cross-border approach in order to determine whether or not national measures fall within the scope of application of EU law'.[88]

Ana Paula Dourado (ed), *Movement of Persons and Tax Mobility in the European Union: Changing Winds* (IBFD 2014).

[80] *Dereci* (n 10) para 66.

[81] ibid, paras 67-68.

[82] ibid, para 72.

[83] Kotlárik (n 60) 9.

[84] ibid.

[85] ibid, 8.

[86] Gareth Davies, 'The Family Rights of European Children: Expulsion of Non-European Parents' (10 February 2012) EUI Working Paper No RSCAS 2012/04, 3.

[87] Hester Kroeze and Peter Van Elsuwege, 'Editorial: Revisiting *Ruiz Zambrano*: A Never Ending Story?' (2021) 23(1) European Journal of Migration and Law 5.

[88] ibid, 12.

Instead of using only the logic inherent to the internal market and its economic aims, in a limited number of situations it is possible for EU citizens to find a link to EU law by proving deprivation of the substance of EU citizenship rights. This development in EU law is welcome, but in practice it only accentuates the limits of EU citizenship and its divergence from the concept of citizenship based on human dignity and equality. The equality of EU citizens cannot be achieved as long as there are two types of citizens – those who contribute to the market and those who do not. Reverse discrimination stems directly from this scheme of two types of EU citizens, accentuating the dividing line between those EU citizens who have activated their citizenship by contributing to the market, and those who have not.

3.2 Active vs inactive EU citizens and fundamental rights

Market citizenship disqualifies a number of citizens before the law, 'those construed by law as economically active are viewed as inherently more valuable than the uninterested, less affluent or disabled'.[89] Consequently, EU law cares to protect the fundamental rights of EU citizens who have 'activated' their citizenship by engaging in an economic activity with a cross-border element. The logic behind EU citizenship is therefore in conflict with the notion of citizenship based on equality and respect for fundamental rights – 'the human being, whose liberty and good life is at the core of the rationale of integration, came to be replaced with an economically active citizen: the sole focus of the EU's concerns'.[90] Only those EU citizens who exercised their free movement rights enjoy protection of their fundamental rights, making other EU citizens akin to 'second-class citizens'.[91]

3.2.1 The McCarthy *case: whose fundamental rights?*

This is clearly visible from the aforementioned judgment in the *McCarthy* case. Mrs McCarthy was a national of the United Kingdom who also held Irish citizenship. She had always lived in the United Kingdom and was in receipt of state benefit, thus not being a worker, self-employed person or self-sufficient person. After marrying Mr McCarthy, a Jamaican

[89] Kochenov (n 57) 225.
[90] Dimitry Kochenov, *The Citizenship Paradigm* (2013) 15 Cambridge Yearbook of European Legal Studies 197, 207.
[91] Kochenov (n 54) 214.

national, they applied for a residence permit for Mr McCarthy in the United Kingdom under EU law. The Court ruled that Directive 2004/38 does not confer a derived right of residence on Mr McCarthy because Mrs McCarthy had never exercised her right of free movement. She is not a beneficiary of the Directive, so her husband is also not granted a derived right to reside in the United Kingdom on the basis of being married to an EU citizen who has never activated her free movement rights attached to her status as an EU citizen.[92] The Court ruled that 'Directive 2004/38 is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member State'.[93]

After establishing that Mrs McCarthy is not covered by Directive 2004/38, the Court went on to apply the *Ruiz Zambrano* test of deprivation of substance of EU citizenship rights. Despite the fact that the situation of an EU citizen who has not used his free movement rights could not automatically and for that reason alone be perceived as a purely internal situation, EU law could not help Mrs McCarthy to obtain a residence permit for her husband.[94] The refusal of the authorities to issue a residence permit to Mr McCarthy does not deprive Mrs McCarthy of the genuine enjoyment of the substance of her EU citizenship rights and it does not impede the exercise of her right to move and reside freely within the Member States.[95] The fact that Mrs McCarthy also held Irish nationality did not make any difference.[96]

3.2.2 Establishing a link with EU law: the 'dual citizenship' cases

In striking contrast, in the so-called surname cases, *Garcia Avello*[97] and *Grunkin and Paul,*[98] the dual nationality of EU citizens brought the situation into the sphere of EU law. Both cases dealt with EU citizens having different surnames in two legal systems, which was liable to cause serious inconveniences for their right to free movement.[99]

[92] *McCarthy* (n 9) para 42.
[93] ibid, para 43.
[94] ibid, para 46.
[95] ibid, para 49.
[96] ibid.
[97] Case C-148/02 *García Avello* ECLI:EU:C:2003:539.
[98] Case C- C-353/06 *Grunkin and Paul* ECLI:EU:C:2008:559.
[99] *McCarthy* (n 9) paras 51-52.

Garcia Avello dealt with two minors residing in Belgium, who never made use of their right to free movement.[100] Their father was of Spanish and mother of Belgian nationality. According to Spanish law, the Spanish Embassy registered the children with a dual surname, Garcia Weber, while Belgium registered them with their father's surname, Garcia Avello. The parents requested the Belgian authorities to change the surname because they wanted their children to bear the Spanish version of the surname, but their request was refused. The case eventually reached the Court of Justice.

The judgment reiterated how the citizenship of the Union is not intended to extend the scope *ratione materiae* of the Treaty also to internal situations which have no link with Community law.[101] However, such a link with Community law was found to exist in *Garcia Avello*. The case 'dealt with no actual migration across state lines, let alone that it entailed some economic objectives of the movement'.[102] At first, the facts of the case might seem as a classic purely internal one. In spite of an evident lack of cross-border movement, the children of the applicant in the case were 'nationals of one Member State lawfully resident in the territory of another Member State' because of the dual citizenship factor.[103] Furthermore, the discrepancy in surnames under the two legal systems might cause 'serious inconvenience' for EU citizens on many levels, including difficulties regarding recognition of various documents and diplomas obtained under a different surname.[104] These difficulties therefore amount to restrictions on the free movement rights of EU citizens. The Court decided the case by applying the principle of non-discrimination based on nationality.[105] The outcome of the proportionality assessment was that Belgium failed to justify its refusal to grant a change of surname to dual EU citizens and consequently had to 'recognize the surname of a dual Union citizen registered with another Member State'.[106]

The next 'dual citizenship' case, *Grunkin and Paul,* 'unlike *Garcia Avello*, concerned a less far-fetched cross-border situation of a child residing in Denmark, but having only German

[100] See Sandra Winkler, 'Pravo na osobno ime u praksi europskih sudova' in Aleksandra Korać Graovac and Irena Majstorović (eds), *Europsko obiteljsko pravo* (Narodne Novine 2013) 135-136.
[101] *García Avello* (n 97) para 26.
[102] Nika Bačić Selanec, 'A Realist Account of European Union Citizenship' (Doctoral dissertation, University of Zagreb 2019) 318.
[103] *García Avello* (n 97) para 27.
[104] ibid, paras 35-36.
[105] ibid, para 29.
[106] Nika Bačić Selanec, 'A Realist Account of European Union Citizenship' (Doctoral dissertation, University of Zagreb 2019) 320.

nationality'.[107] Germany refused to recognise the Danish surname given to the child (the double-barrelled surname Grunkin-Paul). The Court decided that rights granted by EU citizenship 'preclude the authorities of a Member State, in applying national law, from refusing to recognise a child's surname, as determined and registered in a second Member State in which the child – who, like his parents, has only the nationality of the first Member State – was born and has been resident since birth'.[108] The ruling relied on the precedent established in *Garcia Avello* – 'serious inconveniences' arising from the discrepancy of surnames of EU citizens possessing dual nationality were a disadvantage which qualified as a restriction on free movement rights.[109] These inconveniences were elaborated on by the Court: 'every time the child crosses the border between Denmark and Germany, he will bear a different name which will cause great inconveniences'[110] and 'a difference in surnames is likely to give rise to doubts as to the person's identity and the authenticity of the documents submitted, or the veracity of their content'.[111]

The dual citizenship argument was rejected in *McCarthy*. Moreover, the Court reinterpreted the 'surname cases' and clarified that the link to EU law in *Garcia Avello* and *Grunkin and Paul* was not the dual nationality of EU citizens but the 'serious inconveniences' which restricted free movement rights.[112] Taking into consideration the arguments offered by the Court, Mrs McCarthy's dual citizenship seems not to establish a connecting factor to EU law. The applied measures did not have the effect of depriving her of the genuine enjoyment of the substance of EU citizenship rights or of impeding the exercise of her free movement rights.[113] Accordingly, in such a context, this factor is not sufficient, in itself, to find the situation as covered by Article 21 TFEU.[114]

3.2.3 Market-oriented fundamental rights protection

[107] ibid, 323.
[108] Case C- C-353/06 *Grunkin and Paul* ECLI:EU:C:2008:559, para 39.
[109] ibid, paras 21-23.
[110] ibid, para 32.
[111] ibid, para 28.
[112] Lenaerts (n 66) 4. See also Stanislas Adam and Peter Van Elsuwege, 'Citizenship Rights and the Federal Balance between the European Union and Its Member States: Comment on *Dereci'* (2012) 37(2) European Law Journal 183.
[113] *McCarthy* (n 9) para 54.
[114] ibid, para 55.

The situation in *McCarthy* was also different from the one in the *Carpenter*[115] case. Mr Carpenter, a national of the United Kingdom, was married to Mary Carpenter, a national of the Philippines, who faced deportation. Mr Carpenter provided cross-border services while his wife took care of their children in the United Kingdom, so the Court sought to protect Mr Carpenter's freedom to provide services. Deportation of his wife would pose an impediment to the exercise of his fundamental freedom to provide services.[116] The separation of Mr and Mrs Carpenter would have the effect of deterring Mr Carpenter from exercising his freedom to provide services, therefore undermining its effectiveness.[117] A national measure interfering with the conditions under which Mr Carpenter exercises his freedom to provide services has to be in line with his right to respect for family life.[118] The Court's reasons to take into account the fundamental rights dimension of this case reveal a purely economic paradigm and confirm that active citizens (like Mr Carpenter, who provided cross-border services) are entitled to fundamental rights protection, while non-active citizens are disqualified from fundamental rights assessment.

In *McCarthy,* there were no relevant factors which could trigger the protection of EU law, as the impediments to her right to move were 'purely hypothetical'.[119] Mrs McCarthy's right to respect for her family life was completely irrelevant to the Court because she was a passive, non-active EU citizen. Her situation was purely internal and thus confined to the internal laws of the United Kingdom. Although AG Kokott did tackle the issue of reverse discrimination in her opinion in the case,[120] the judgment of the Court did not address this issue at all. AG Kokott concluded that a static EU citizen such as Mrs McCarthy is not discriminated against compared to mobile EU citizens because she does not fulfil the remaining conditions for the acquisition of longer-term rights of residence that are to be met by Union citizens.[121] These include workers, self-employed persons and self-sufficient persons. The overall message is clear. The Court's approach to EU citizenship allows for reverse discrimination to emerge. Fundamental rights protection depends on one's ability to point to a link with EU law, or one's ability to be lucky enough to trigger the protection of EU law. The question I will continue to analyse is whether or not the Court can change its position by using the status of EU citizenship as a tool

[115] Case C-60/00 *Carpenter* ECLI:EU:C:2002:434.
[116] ibid, paras 38-39.
[117] ibid, para 39.
[118] ibid, para 41.
[119] Lenaerts (n 66) 5.
[120] Opinion of AG Kokott (n 13) paras 39-43.
[121] ibid, para 43.

for applying the EU set of fundamental rights in situations where cross-border movement is non-existent.

4 Using EU citizenship to eliminate reverse discrimination: what the EU can learn from the US

The main purpose of the purely internal rule developed by the Court of Justice is to keep the balance of powers between the Union and the Member States within the boundaries defined by the Treaties, considered as 'the constitutional charter of the EU'.[122] As laid out in the previous sections, the status of EU citizenship indeed does have a transformative potential to shift the market-based logic in a direction towards respect for human dignity and fundamental rights. Protecting fundamental rights stands at the very centre of equality and in principle should be granted to everyone under the same conditions. EU citizenship based on human dignity rather than on market values does seem like a desirable route to take in order to truly achieve equality. Nevertheless, it cannot be used in a way which completely disregards constitutional barriers, such as the principle of conferral. The Court's jurisprudence should aim to interpret EU citizenship rights in conformity with protection of the human dignity of individuals possessing status and at the same time remain in line with the constitutional framework of the EU.

In relation to this, American experience with the so-called 'incorporation doctrine' could be valuable to help understand how a change in fundamental rights protection might affect EU federalism, or the balance of powers between the Union and its Member States.[123] The American constitutional doctrine of incorporation, in essence, demonstrates how the requirement to uphold individual rights, which in the Constitution is originally addressed only to the federal government, can also become binding on the constituent states through different judicial interpretations of a constitutional guarantee of due process for individuals. In this sense, the similarities between the hypothetical usage of EU citizenship rights as a tool for broadening EU competence and the incorporation doctrine in the US are 'striking'.[124] Keeping in mind that the dividing line between national and EU law protection of fundamental rights is still fairly

[122] The Treaty was referred to as 'the basic constitutional charter' for the first time in Case 294/83 *Les Verts* ECLI:EU:C:1986:166, para 23.
[123] See Case C-34/09 *Ruiz Zambrano* ECLI:EU:C:2010:560, Opinion of AG Sharpston para 172.
[124] Martijn van den Brink, 'The Origins and the Potential Federalising Effects of the Substance of Rights Test' in Dimitry Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2017) 102.

unclear, even described as 'puzzling', the US context can shed some light on this issue from a federal perspective.[125] In this context, this section aims to provide an analysis of the incorporation doctrine in the US and its implications. The first part focuses on the Fourteenth Amendment to the US Constitution as a legal basis for incorporation. The second part examines relevant case law to explain the selective approach to incorporation as well as the reach of this approach. The third part lays out how the incorporation doctrine has affected US federalism.

4.1 The Fourteenth Amendment to the US Constitution as a basis for incorporation

The American constitutional doctrine of incorporation, developed by the US Supreme Court during the twentieth century, holds that most of the rights contained in the Bill of Rights,[126] which originally applied only to the federal government, also become binding on the States by virtue of the Fourteenth Amendment's due process clause.[127] Before the ratification of the Fourteenth Amendment, the Bill of Rights was understood as posing limitations only on federal authority.[128] The Supreme Court established this precedent in *Barron v Baltimore* when it ruled that the Fifth Amendment is not applicable to the States but only to the federal government.[129] The ratification of the Fourteenth Amendment changed this legal landscape.

The Fourteenth Amendment and its due process clause[130] were part of the reconstruction amendments to the Constitution adopted after the end of American Civil War (1861 – 1865).[131] The reconstruction upgrade of the Constitution was adopted both to establish the equality of all American people (regardless of their skin colour) and to distribute the triumphant set of values to former seceded States.[132] The main goal was 'to build an egalitarian society on the ashes of

[125] Adam and Van Elsuwege (n 112) 185-186.
[126] The first ten amendments to the US Constitution.
[127] See Legal Information Institute, Cornell Law School <www.law.cornell.edu/wex/incorporation_doctrine> accessed 15 April 2021.
[128] See Lee J Strang, 'Incorporation Doctrine's Federalism Costs: A Cautionary Note for the European Union' (2018) 20(2-3) European Journal of Law Reform 129, 131
available at SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3240708 > accessed 1 December 2021
[129] *Barron v Baltimore* 32 US 243 (1833).
[130] US Constitution, Amendment XIV (1). The due process clause is formulated as 'nor shall any State deprive any person of life, liberty, or property, without due process of law'.
[131] See History, <www.history.com/topics/american-civil-war/reconstruction> accessed 15 April 2021.
[132] See Eric Foner, 'The Second Founding: How the Civil War and Reconstruction Remade the Constitution' (WW Norton & Company 2019). See also United States Senate <www.senate.gov/artandhistory/history/common/generic/CivilWarAmendments.htm> accessed 15 April 2021. The 'Confederate States of America' opposed the abolition of slavery promoted by the newly elected President

slavery'.[133] The Constitution became 'a vehicle through which members of vulnerable minorities could stake a claim to substantive freedom and seek protection against misconduct by all levels of government'.[134] The Fourteenth Amendment is the only amendment to the US Constitution which is directly addressed to the States (not the federal government), and, due to its role in the expansion of judicial protection of fundamental rights and liberties in the mid-twentieth century onwards, it has been described as 'a central – if not "the central" – provision in US constitutional jurisprudence'.[135]

Before the emergence of incorporation case law based on the due process clause, the Supreme Court first ruled on the privileges or immunities clause[136] of the Fourteenth Amendment. In the landmark *Slaughter-House* ruling,[137] the Supreme Court rejected the possibility of incorporation of the Bill of Rights through the aforementioned clause. To this day, this ruling has been heavily criticised.[138]

The 1873 *Slaughter-House* cases concerned a piece of legislation adopted by the state of Louisiana which aimed to protect the public health of the city of New Orleans from contamination caused by the unregulated slaughtering of livestock. The concerned statute established a state-owned Slaughter-House company with exclusive rights to perform slaughtering of livestock while butchers had to pay a certain fee to use the State facilities in order to do their job. The butchers of New Orleans claimed, *inter alia*, that the State of Louisiana violated the privileges or immunities clause of the Fourteenth Amendment. The Supreme Court rejected the arguments by concluding that the privileges or immunities clause protects only those rights which 'owe their existence to the federal government'.[139] The majority drew a 'sharp distinction' between federal and State rights of citizens, relying on the wording of the clause which referred to privileges or immunities of 'the citizens of the United

Lincoln and because of that they seceded from the US. See Britannica <www.britannica.com/topic/Confederate-States-of-America> accessed 28 May 2021.

[133] Foner (n 132) preface, xix.

[134] Eric Foner, 'The Strange Career of the Reconstruction Amendments' (1999) 108(2) Yale Law Journal 2003, 2006.

[135] Paul Finkelman, 'The Historical Context of the Fourteenth Amendment' (2004) 13(2) Temple Political & Civil Rights Law Review 389, 389.

[136] US Constitution, Amendment XIV (1). The wording states: 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States'.

[137] *Slaughter-House* 83 US 36 (1872).

[138] For further analysis of the *Slaughter-House* cases and the controversies surrounding it, see Kermit Roosevelt III, 'What If Slaughter-House Had Been Decided Differently?' (2011) 45(1) Indiana Law Review 61.

[139] *Slaughter-House* (n 137) 79.

States'.[140] Secondly, the ruling addressed the federal argument – 'the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people' would be radically changed by imposing the federal standard of fundamental rights protection on the States.[141] In that capacity, the Supreme Court found the wording of the privileges or immunities clause to be insufficient as a legal basis for incorporation in 'absence of language which expresses such a purpose too clearly to admit of doubt'.[142]

The Supreme Court rejected the privileges or immunities clause as a basis for incorporation but afterwards it accepted incorporation of the Bill of Rights through the due process clause of the Fourteenth Amendment. In *Gitlow v New York*,[143] the Supreme Court held that the States must protect the freedom of speech protected by the First Amendment. This decision established a precedent for future case law based on the due process clause.

4.2 Incorporation case law

This subsection will study elements of incorporation case law which are most relevant to support the argument of this paper. The starting point of the analysis is the landmark case *Gitlow v New York*. The second point will focus on the main dilemma of the 'selective' approach to incorporation – which rights should be incorporated and based on which criteria. Thirdly, the reach of incorporation case law will be addressed.

4.2.1 Activating the 'due process' clause

The case which laid the foundation for the incorporation doctrine is the aforementioned freedom of speech case *Gitlow v New York* that was decided in 1925. The facts concerned criminal charges against Benjamin Gitlow, a socialist politician who was charged for violating the criminal anarchy law of the State of New York. Gitlow published and distributed pamphlets which expressed his socialist beliefs, including the 'Left Wing Manifesto'.[144] According to the

[140] *McDonald v Chicago* 561 US 742 (2010) 6-7.
[141] *Slaughter-House* (n 137)78.
[142] ibid.
[143] *Gitlow v New York* 268 US 652 (1925).
[144] For a more detailed account, see JRank <https://law.jrank.org/pages/7160/Gitlow-v-New-York.html> accessed 15 April 2021.

State of New York, this content advocated for the revolutionary overthrow of the government, directly prohibited by the State's criminal anarchy law.

The ruling of the Supreme Court declared that the first amendment rights which guarantee freedom of speech and freedom of press 'are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States'.[145] For the present case, this shift in fundamental rights protection meant that Gitlow could enforce his rights to freedom of speech and freedom of press against the State of New York. The Court would then assess his criminal proceedings in light of his fundamental rights protected by the First Amendment to the US Constitution. After examining the New York criminal anarchy law in the frame of freedom of speech and freedom of press, the Supreme Court ruled that the First Amendment does not protect those individuals whose publications advocate the overthrow of government by force.[146] The outcome of the case was therefore not controversial but the constitutional doctrine introduced in the judgment would later largely affect the development of the US legal system. In *Gitlow v New York*, as in other major constitutional cases, the Supreme Court prudently established a game-changing legal principle, but did not use the newly established competence.[147] The case which marks the judicial genesis of incorporation was decided in a non-conflicting and far-sighted manner. Despite its relevance, the ruling did not offer extensive argumentation.[148] It merely stipulated that the due process clause of the Fourteenth Amendment protects certain fundamental rights from violations by the States. The principle of incorporation was therefore established. The case did not clarify whether the Court opted for selective or total incorporation.[149] The consequent case law that built upon the precedent established in *Gitlow v New York* accepted the doctrine of selective incorporation, the view that only certain rights protected by the Bill of Rights are applicable against the States.[150]

[145] *Gitlow v New York*, 268 US 652 (1925) 666.
[146] ibid, 668.
[147] For a further description of this method of constitutional adjudication, see András Jakab, 'The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law against EU Member States' in Carlos Closa, Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016) 203.
[148] Strang (n 128) 134.
[149] ibid.
[150] ibid, 134-135.

4.2.2 Selective incorporation: which rights?

The doctrine of selective incorporation empowers the courts to decide which rights protected by the Bill of Rights can be enforced against the States.[151] The question which arises is what the criteria are for deciding which rights are enforceable against the States. The 'double jeopardy cases' *Palko v Connecticut*[152] and *Benton v Maryland*[153] are suitable cases to explain the evolution of case law regarding this dilemma.

The Fifth Amendment to the US Constitution protects individuals from double jeopardy.[154] In the 1935 case *Palko v Connecticut*, the Supreme Court rejected incorporation of the double jeopardy clause of the Fifth Amendment. The case involved Frank Palko, a man from Connecticut who robbed a music store and shot and killed two police officers who cornered him while fleeing from the scene of the crime. Palko was first charged with first-degree murder but was convicted of second-degree murder and punished with life imprisonment. The prosecution appealed and won a new trial in which Palko was convicted of first-degree murder and sentenced to death. At the Supreme Court, Palko argued that Connecticut violated his 'double jeopardy' rights which are among the rights that are incorporated through the due process clause of the Fourteenth Amendment and thus applicable against the States. More precisely, he argued that 'what is forbidden by the Fifth is forbidden by the Fourteenth also' and convicting a defendant twice is 'a denial of life or liberty without due process of law'.[155] To sum up, the same standard of fundamental rights protection that is imposed on the federal government should be complied with by the States since the due process clause made the Bill of Rights enforceable against the States.[156]

The ruling explicitly rejected this position. The majority held that there was no 'general rule' which would stipulate that 'whatever would be a violation of the Bill of Rights by the federal government is equally unlawful by the force of the Fourteenth amendment'.[157] Moreover, the decision tried to clarify the criterion for selective incorporation. The Supreme

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[151] See Jerold H Israel, 'Selective Incorporation Revisited' (1982) 71(1) The Georgetown Law Journal 253.
[152] *Palko v Connecticut* 302 US 319 (1937).
[153] *Benton v Maryland* 395 US 784 (1969).
[154] The principle of 'ne bis in idem'. In the US Constitution, Amendment V, the principle is articulated as 'nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb'. See Nolo <www.nolo.com/legal-encyclopedia/the-prohibition-against-double-jeopardy.html> accessed 28 May 2021.
[155] *Palko v Connecticut* 302 US 319 (1937) 322.
[156] ibid.
[157] ibid, 323.

Court's reflection on the case concludes that protection against double jeopardy has 'value and importance' but it is 'not of the very essence of a scheme of ordered liberty'.[158] The protection of double jeopardy found in the Fifth Amendment does not express 'a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental'.[159] The majority opinion held that Connecticut did not intend to accumulate trials against the accused 'out of cruelty' – the State merely intended to secure 'a trial free of substantial legal errors'.[160] The Supreme Court went on to examine whether the double jeopardy rights are fundamental to the concept of due process.[161] The absorption of certain rights protected by the Bill of Rights through the Fourteenth Amendment's due process clause depends on whether 'liberty and justice would exist if these were sacrificed'.[162] The fundamental rights protection standard for the States should be different from the one for the federal government and therefore violations of certain rights by the States do not undermine the entire constitutional system.[163] The ruling in *Palko* therefore allowed the States to impose their own standards on double jeopardy violations as long as these did not violate the 'test of fundamental fairness'.[164]

The 1969 decision in *Benton v Maryland* overruled such a holding. John Benton was accused of burglary and larceny. He was acquitted for larceny and convicted of burglary. After the trial it was established that the jurors in the case were sworn in based on a provision that was ruled unconstitutional by the Supreme Court. Benton accepted the option of having a second trial in which he was convicted of both burglary and larceny. The case reached the Supreme Court and the ruling rejected the conclusion that was reached in *Palko v Connecticut*. '[T]he obstructions on the road to the imposition of federal double jeopardy standards upon the states have been swept away.'[165] The majority held that protection against double jeopardy 'represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment'.[166] The Supreme Court emphasised that protection against double jeopardy traces back to Greek and Roman times, as well as to the common law of England, and 'it is fundamental to the American scheme of justice'.[167] *Palko* was overruled

[158] ibid, 325.
[159] ibid.
[160] ibid, 328.
[161] ibid, 323.
[162] ibid, 326.
[163] ibid, 328.
[164] Richard G Larsen, 'State Double Jeopardy After *Benton v Maryland'* (1970) 1(1) Loyola University Chicago Law Journal 98, 99.
[165] ibid.
[166] *Benton v Maryland* (n 153) 794.
[167] ibid, 795-796.

because the settled case law which emerged after *Palko* indicated that its 'roots had thus been cut away years ago'.[168] One of these cases decided after *Palko* was the case *Duncan v Louisiana*[169] which expressed the idea that 'once it is decided that a particular Bill of Rights guarantee is "fundamental to the *American* scheme of justice," the same constitutional standards apply against both the State and Federal Governments'.[170] Therefore, it is not a question whether a right is considered as fundamental in any civilized legal system but whether it should be considered fundamental in the American scheme of justice.[171] The 'fundamental fairness' criterion was thus relaxed in favour of incorporation of the double jeopardy clause. In other words, protection against double jeopardy was, in essence, considered fundamental to the US legal system, whereas its denial could undermine the American scheme of justice.

The majority in *Benton v Maryland* thus incorporated the Fifth Amendment right through the Fourteenth Amendment's due process clause. The gradual evolution in case law established the following postulate: once a right contained in the Bill of Rights is defined as a right which is fundamental to the US legal order, the same standard applies both to the federal authorities and to the States.

The doctrine of selective incorporation accepted by the Supreme Court holds that 'most of the provisions of the Bill of Rights apply with full force to both the federal government and the States'.[172] A right that is so fundamental to the American scheme of ordered liberty or that is 'deeply rooted in American history and tradition'[173] should be fully respected by the federal government and the States. Although the Supreme Court did not accept the total incorporation theory, the theory of selective incorporation which was embraced allowed the Supreme Court to incorporate almost every right guaranteed by the Bill of Rights.[174]

4.2.3 The reach of incorporation case law

[168] ibid, 795.
[169] *Duncan v Louisiana* 391 US 145 (1968). The case incorporated a Sixth Amendment right to a jury trial.
[170] *Benton v Maryland* (n 153) 795.
[171] *Duncan v Louisiana* 391 US 145 (1968) 149.
[172] *McDonald v Chicago* 561 US 742 (2010), Opinion of Justice Alito 1.
[173] *Washington v Glucksberg* 521 US 702, 721 (1997) 720-721.
[174] *McDonald v Chicago* 561 US 742 (2010), Opinion of Justice Alito 16. As described in *McDonald v Chicago* 561 US 742 (2010), Opinion of Justice Alito 17, rights which have not been incorporated through the Due Process Clause are: 'the Sixth Amendment's right to a unanimous jury verdict, the Third Amendment's protection of quartering of soldiers, the Fifth Amendment's grand jury indictment requirement, the Seventh Amendment's right to a jury trial in civil cases and the Eighth Amendment's prohibition on excessive fines'.

Selective incorporation hence resulted in the 'near-total' incorporation of the Bill of Rights.[175] Other rights which have been incorporated include free exercise of religion,[176] freedom of the press,[177] the right against self-incrimination,[178] the right to a speedy trial,[179] the right to an impartial jury,[180] protection against cruel and unusual punishments,[181] etc. The Ninth Amendment which relates to retained rights of people not enumerated in the Constitution and the Tenth Amendment which contains the principle of retained powers of the States were not incorporated due to their content which simply does not require incorporation.[182]

In the 2010 case *McDonald v Chicago*, the Supreme Court ruled on incorporation of the Second Amendment right to keep and bear arms. That constitutional right is regarded as highly controversial and is severely criticised in US society.[183] The ruling itself refers to the right as having 'controversial public safety implications'.[184] The majority of five out of nine justices decided that the right to keep and bear arms is incorporated through the due process clause. The Supreme Court first went to determine whether the right is fundamental to the American scheme of ordered liberty or whether it is deeply rooted in the history and tradition of the American nation.[185] The answer to both was affirmative.[186] Therefore this Second Amendment right is qualified to be absorbed by the Fourteenth Amendment and is thus fully applicable against the States. By following the logic of previous incorporation cases, *McDonald v Chicago* cemented the fact that even a selective approach which is formally accepted by the Supreme Court managed to pave the way to the almost total incorporation of the Bill of Rights.

4.3 The incorporation doctrine's effects on US federalism

[175] Strang (n 128) 135.
[176] *Cantwell v Connecticut* 310 US 296 (1940).
[177] *Near v Minnesota* 283 US 697 (1931).
[178] *Malloy v Hogan* 378 US 1 (1964).
[179] *Klopfer v North Carolina* 386 US 213 (1967).
[180] *Parker v Gladden* 385 US 363 (1966).
[181] *Robinson v California* 370 US 660 (1962).
[182] Legal Information Institute, Cornell Law School <www.law.cornell.edu/wex/incorporation_doctrine> accessed 15 April 2021.
[183] See Washington Post <www.washingtonpost.com/news/made-by-history/wp/2018/02/22/what-the-second-amendment-really-meant-to-the-founders/> accessed 15 April 2021.
[184] *McDonald v Chicago* 561 US 742 (2010), Opinion of Justice Alito 36.
[185] ibid, 19.
[186] The ruling relied on the previous case *District of Columbia v Heller* 554 US 570 (2008) which decided that the right to keep and bear arms was immanent to the notion of self-defence as well as rooted in American history and tradition. See *McDonald v Chicago* 561 US 742 (2010), Opinion of Justice Alito 19-45.

After outlining the key elements of the case law on incorporation, it is necessary to examine the implications this doctrine has had on US federalism. As explained throughout this section, incorporation of the Bill of Rights through the Fourteenth Amendment profoundly changed the system of fundamental rights protection in the US by imposing the federal standard of fundamental rights protection on the States. This development in US law is positive because it narrowed the States' power to blatantly violate the common standards of protecting fundamental rights of individuals. In other words, if the majority in *Palko* had reached the decision which was confirmed years later in *Benton*, Mr Palko would not have been sentenced to death and eventually electrocuted.

However, the possibility of enforcing a large fund of fundamental rights protected by the federal Constitution against the States meant that control over a significant range of areas which were originally State law is now taken over by the federal entity. One of the main arguments against the doctrine of incorporation was precisely the 'federal argument' which posits that imposing the federal standard on the States will hurt the principle of federalism and halt State experimentation.[187]

Federalism stands at the centre of US constitutional law. Moreover, it is 'a crucial structural principle of the US Constitution',[188] described as a 'cornerstone of the Constitution'.[189] The principle of federalism relates to the distribution of powers between the federal entity and the comprising States, with each reserving their sovereignty in certain areas. Generally, there are two theoretical models of federalism depending on the relationship between the federal and State areas of competence.[190] Dual federalism implies a federal structure functioning as a dichotomous system which clearly separates State authority from federal authority.[191] In contrast, cooperative federalism rejects the mutually exclusive division of competences and accepts overlapping spheres of authority between federal and State components.[192] The effects which the doctrine of incorporation has had on the US legal system correspond to the vision of

[187] *McDonald v Chicago* 561 US 742 (2010), Opinion of Justice Alito 36.
[188] See Strang (n 128) 130.
[189] John McGinnis and Ilya Somin, 'Federalism vs States' Rights: A Defense of Judicial Review in a Federal System' (2004) 99(1) Northwestern University Law Review 89.
[190] Schütze (n 18) 4-5.
[191] ibid, 5.
[192] ibid.

federalism supported by the Supreme Court in its case law during the mid-twentieth century – a conception of cooperative federalism which 'does not identify discrete spheres of power'.[193]

One of the main arguments against incorporation was the claim that enforcing federal fundamental rights protection standards on the States restricts state experimentation.[194] As Justice Alito articulated in the majority opinion in *McDonald v Chicago*, enforcing a Bill of Rights guarantee against the States restricts 'their ability to devise solutions to social problems that suit local needs and values'.[195] In fact, incorporation always limits 'experimentation and local variations' in a federal context.[196] However, it does not eliminate them.[197] Restricting State regulatory choices in practice simply means that the choices are transferred from the States to the federal government.[198] At an institutional level, the authority to regulate is shifted from legislative bodies to courts.[199] To a certain extent, this relocation also enables concentration of powers in Congress due to Congress's power to enforce the Bill of Rights against the States.[200]

Incorporating the Bill of Rights against the States significantly 'altered the constitutional relationship between the States and the federal government'.[201] Broadening the federal standard of fundamental rights protection strengthened the equality of US citizens whose fundamental rights were violated. At the same time, its implications significantly affected the core principle of the American constitutional order.

Before major incorporation cases were decided, US citizens were able to invoke the guarantees enshrined in the Bill of Rights only against the federal authorities. Incorporating most of the Bill of Rights into the Fourteenth Amendment brought a large portion of human rights protection under the control of federal government, creating a significant shift in the balance of powers. The inter-state movement was no longer a factual requirement for the States to be obliged to apply the Bill of Rights through their national courts. The States no longer had wide discretion in defining their own standards of fundamental rights protection, owing to the fact that their legislative choices were largely limited by the federal Constitution.

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[193] See Strang (n 128) 136.
[194] *McDonald v Chicago* 561 US 742 (2010) Opinion of Justice Alito 37.
[195] ibid, 37 - 38.
[196] ibid, 44.
[197] ibid, 38.
[198] *McDonald v Chicago* 561 US 742 (2010), Opinion of Justice Breyer, dissenting 2.
[199] ibid.
[200] As described in Strang (n 128) 139.
[201] Opinion of Justice Breyer (n 198) 11.

5 Reverse discrimination as a problem of national legal orders

The previous section provided an analysis of the US constitutional doctrine of incorporation and its federalising effects. The main reason for the comparative approach was to support the position that the use of EU citizenship as a legal basis for protecting fundamental rights of static EU citizens would be similar to the incorporation doctrine and difficult to reconcile with the current constitutional architecture of the EU. The Supreme Court developed a constitutional doctrine which served as a judicial tool to expand the application of the Bill of Rights against the States. The doctrinal shift was introduced in *Gitlow v New York* and it was incrementally developed in subsequent case law. The incorporation doctrine held that the due process clause of the Fourteenth Amendment absorbed only those rights that are fundamental to the American legal system and its tradition. The Court of Justice similarly introduced the vague concept of 'deprivation of genuine enjoyment of substance of EU citizenship rights' in *Ruiz Zambrano*. The main constitutional significance of that ruling is the emergence of EU citizenship as a status that can protect EU citizens from Member State action even in purely internal situations. The abstract formulation 'substance of EU citizenship rights' empowers the Court to gradually identify what is 'the substance of rights' attached to the status of EU citizenship. The Court can rule on a case-by-case basis to decide which rights form the content of the sole 'substance' of EU citizenship, which is a framework quite similar to the one of selective incorporation. In this respect, EU citizenship certainly has the potential to tackle the issues of inequality in the EU. After all, the status of EU citizenship is envisaged as the fundamental status of Member State nationals.

At the same time, the fundamental rights dimension of EU citizenship seems much more complex than it was with incorporation. As was argued in the previous section, a change in fundamental rights protection in the US through the doctrine of incorporation significantly altered the distribution of powers between the federal government and the States. In the EU context, a shift of that kind is hardly possible solely through the status of EU citizenship. As things currently stand, the intended role for the protection of fundamental rights in the EU constitutional framework is not to expand the scope of EU law. Of course, a similar argument could have been made in the US regarding the doctrine of incorporation. Nevertheless, the Fourteenth Amendment, as the 'Reconstruction amendment' addressed directly to the States, which sought to unite a nation torn by structural misconceptions of civil rights resulting in a

civil war, gave the Supreme Court a solid legal basis for further federalisation. The conception of 'liberty' as a fundamental value inherent in the due process of law and as such protected by the federal Constitution triggered the application of the Bill of Rights against the States and fostered stronger federalisation. The legal setting in the EU is somewhat different. The scope of application of the EU Charter as defined in Art 51 of the Charter explicitly disqualifies the prospect of such 'federal evolution' in EU law.[202] Moreover, Art 6(1) TEU also precludes the transformation of the Charter into a federal catalyst by emphasising once more that the Charter 'shall not extend in any way the competences of the Union as defined in the Treaties'.[203] The principle of conferral which governs the limits of EU competences cannot be ignored in this respect because the competence to protect fundamental rights in purely internal situations is left to the Member States. The borders of EU law fundamental rights protection therefore could not be pushed significantly without the formal consensus of the constituent powers of the EU.[204] More precisely, the competences of the EU, as a top constitutional issue regulated by the Treaties, could be increased only through the ordinary revision procedure and only if all Member States ratify the proposed revision.[205] In this setting, it would be hard to interpret EU citizenship as a status which entails certain fundamental rights that could be invoked even in purely internal situations.

It should nonetheless be emphasised that reverse discrimination should not be tolerated in any sense. Reverse discrimination occurs when EU law and national law interact, leaving a static group of citizens of a Member State in a less favourable position than a dynamic group of citizens. The whole legal situation may be perceived as if national law causes inequality and, consequently, it is national law that should fix it.[206] Such a perspective would allow EU citizens who are left without EU law protection in purely internal situations to seek protection in front of their national courts on the basis of their constitutional principle of equality.[207]

5.1 National law and the ECHR

[202] Xavier Groussot, Laurent Pech, Gunnar Thor .Petursson, 'The Reach of EU Fundamental Rights on Member State Action after Lisbon' in Sybe de Vries, Ulf Bernitz, Stephen Weatherill (eds), *The Protection of Fundamental Rights in the EU after Lisbon*' (Hart Publishing 2013) 99.
[203] Art 6(1) TEU.
[204] Adam and Van Elsuwege (n 112) 185-186.
[205] Art 48 TEU.
[206] Cambien (n 6) 145.
[207] ibid, 146-147.

All EU Member States should adhere to principles of equality and respect for the rule of law.[208] This is evidently not the case. The very existence of reverse discrimination is a clear indication that Member States do not adhere to these principles. It would be hard to justify any interpretation of the principle of equality that substantially legitimises this type of inequality. The EU Member States do not have to comply with the EU law standard of fundamental rights protection outside the scope of EU law. However, all EU Member States are parties to the ECHR, and national judiciaries should apply its standards of fundamental rights protection.[209]

Of course, lower courts and top courts of the Member States are not the end of the road. The possibility of lodging an application to the ECtHR might currently be the most effective tool for preserving the equality of citizens in respective Member States.[210] As AG Kokott stated in her opinion in *McCarthy*, EU citizens who find themselves in purely internal situations should invoke their ECHR rights before the national courts and, if necessary, at the ECtHR.[211] In her opinion, she acknowledges the difficulties arising from enforcement of the purely internal rule, but clearly states that this fundamental rights violation is not a matter of EU law. The ECtHR, on the other hand, would have the competence to adjudicate on whether or not a contested national measure is compatible with the ECHR. In *Dereci*, the Court also instructed the national court to respect its obligation to protect the right to respect for private and family life under the ECHR due to the fact of the inapplicability of EU law in the case.[212] The current situation seems to indicate that national, EU, and ECHR levels of fundamental rights protection 'are partially overlapping and partially exclusive'.[213] This setting does not offer efficient protection of fundamental rights which should be at the centre of EU law, but it does provide options for those who are ignored by EU law to find an avenue to protect their individual rights.[214]

6 Conclusion

[208] See Monica Claes, 'How Common Are the Values of the European Union?' (2019) 15 Croatian Yearbook of European Law and Policy vii.
[209] In Case C-127/08 *Metock* ECLI:EU:C:2008:449, paras 78-79, the Court of Justice reiterated the purely internal rule and went on to say that all Member States are parties to the ECHR and should apply its standards of fundamental rights protection in areas of their exclusive competence.
[210] See Dominik Hanf, 'Reverse Discrimination in EU Law: Constitutional Aberration, Constitutional Necessity or Judicial Choice' (2011) 18(1-2) Maastricht Journal of European and Comparative Law 29, 55.
[211] Opinion of AG Kokott (n 13) para 60.
[212] *Dereci* (n 10) paras 72-73.
[213] Kotlárik (n 60) 9.
[214] ibid.

This paper has addressed the issues of the inequality of EU citizens caused by their inability to point to a link with EU law. Reverse discrimination stems directly from the purely internal rule which is substantively incompatible with the notion of dignity-based citizenship. The Court's case law has not evolved from the assumption that EU citizenship should be driven by a purely economic aim. Instead, the Court's vision of EU citizenship has moved in the direction of a status which is fundamental and can offer protection beyond the market rationale in the form of the test of 'deprivation of the substance of EU citizenship rights'. The subsequent case law interpreted this development in EU law quite restrictively, refusing to broaden the conception of fundamental rights protection under the premise of equality of EU citizens.

In the central part of the paper, a parallel was drawn with the constitutional doctrine of incorporation developed by the US Supreme Court. The comparative analysis of the incorporation case law backed up the position of the Court of Justice on fundamental rights protection and EU citizenship which is embodied in the application of the purely internal rule. Unlike in the US where the Fourteenth Amendment paved the way for applying fundamental rights inherent in due process against the States, in the EU the Charter explicitly rejects this option. The limitations posed in the Charter and also in the TEU are an expression of the principle of conferral, the basic principle governing the EU as a community of limited powers. Consequently, the protection of fundamental rights in EU law is confined to the implementation of legislative acts of the EU institutions and cross-border movement between the Member States. Fundamental rights protection in purely internal situations amounts to 'retained powers of the Member States',[215] which form an integral part of their sovereignty even after the Lisbon Treaty. In this light, under the current constitutional setting which qualifies the competence of fundamental rights protection in purely internal situations as a retained competence of the Member States, the scope of EU law could not be expanded by constructing a basis for European incorporation only through EU citizenship. To fight against inequality caused by the application of the purely internal rule, the proper legal forums are national courts and the ECtHR.

Nonetheless, the Court of Justice should continue insisting on EU citizenship as a fundamental status of Member State nationals. As AG Sharpston explained in her extensive Opinion in *Ruiz Zambrano*, developments in EU citizenship case law will sooner or later give the Court an opportunity to decide 'whether the Union is not now on the cusp of constitutional

[215] Art 4(1) TEU.

change'.[216] But, for this change to emerge, two factors are necessary: 'both an evolution in the case law and an unequivocal political statement from the constituent powers of the EU (its Member States), pointing at a new role for fundamental rights in the EU'.[217] The systemic question of such constitutional importance should be resolved by amending EU primary law (the Treaties and the Charter) to establish a common framework for fundamental rights protection which transcends the existing scope of EU law. Since reverse discrimination is contrary to the basic values upon which the Union is founded, political action at the EU level designed to effectively end reverse discrimination is more than welcome. After all, ignoring this type of inequality over the long term is both damaging to the aim of preserving the EU as a community oriented towards individuals, and a hindrance to achieving an ever closer Union based on true equality.

[216] Opinion of AG Sharpston (n 14) para 177.
[217] ibid, para 173.

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