**Martijn van den Brink**

**EU Citizenship, Federalism and the Three Different Faces of Reverse Discrimination**

**(Draft: please do not cite)**

**Introduction**

Free movement and the right to non-discrimination on grounds of nationality are widely perceived as two sides of the same coin. The right to non-discrimination, being ‘ancillary’ to the right to free movement,[[1]](#footnote-1) reinforces the latter. The right to free movement is made considerably more attractive by guaranteeing equal treatment in the new Member State of residence. Occasionally, however, the two clash. EU law has after all obliged Member States in certain situations to treat their own nationals less favourably than similarly situated citizens coming from other Member States. This phenomenon, called ‘reverse discrimination’, has received considerable attention in the literature, particularly because it appears to sit so uncomfortably with the notion of equal citizenship.

Based on a much longer part of my thesis, this paper provides a brief examination of reverse discrimination through the lens of federal and equal citizenship. Reverse discrimination is without any doubt the upshot of the federal structure of the EU and EU citizenship; it is created by the movement of Union citizens between different and separate Member States with different rules and morals. Despite its federal origins, reverse discrimination also is a distinctly EU phenomenon, which one is not too likely to witness in other federations. This is so for three distinctive reasons: firstly, the federal organisation of some of the Member States; secondly, the adoption and rigorous enforcement of the principle of mutual recognition; thirdly, the peculiar understanding of the right to family reunification for moving EU citizens by the ECJ (for a more elaborate analysis of the three see section 4 of the introduction).

Notwithstanding reverse discrimination being a distinctively EU feature, the adoption of a federal perspective is indispensable. Only by embracing a federal conception of EU citizenship combined with the realisation that the federal structure of the EU, or a misinterpretation thereof, is at the core of the dilemma, an elaborate understanding of the three different faces of reverse discrimination can be produced. The context is federal, requiring a federal perspective in order to understand reverse discrimination and provide for solutions, if necessary.

Despite the abundant literature on reverse discrimination, our understanding can and must be refined. By and large, my argument differs in three respects from currently prevailing ideas. Most importantly, we need to come to realise that we have used one term – reverse discrimination – to describe three different phenomena. This conceptual confusion has blurred our understanding of reverse discrimination. There are three different causes of reverse discrimination, which need to be described and examined separately. The widely ignored distinction between different forms of reverse discrimination has produced too categorical normative views, either defending or dismissing reverse discrimination in its entirety. Instead, we must come to the conclusion that not every form of reverse discrimination is incompatible with equal EU citizenship (section 4). Secondly, those instances of reverse discrimination that are problematic also require a different solution than those generally brought forward in the literature. Instead of harmonising the law through the case law of the ECJ, thereby creating uniform rules for all, the Court should guarantee equal treatment of EU citizens within their Member State of residence (section 3). Thirdly, and following from the above arguments, we should also depart from the idea that reverse discrimination and the purely internal rule are so intimately related that one’s view of reverse discrimination should inevitably affects one’s opinion on purely internal situations, or vice versa. It is argued here that the purely internal rule is the logical consequence of the federal balance of powers within the EU. However, notwithstanding this, not every form of reverse discrimination is justified (section 1). In addition to explaining these three differences, section 2 will provide an overview of the state of the debate.

**1. Reverse discrimination and the purely internal rule**

It is an orthodoxy to state that EU law is only applicable when a situation comes within the scope of EU law. With regard to the free movement provisions, this generally implies that EU law can only be activated in case of a so-called cross-border element: only situations involving interstate movement have a ‘factor connecting them to any of the situations envisaged by [EU] law’.[[2]](#footnote-2) Those situations that ‘are wholly internal to a Member State’,[[3]](#footnote-3) generally those lacking a cross-border element, fall outside the scope of the EU law.

All instances of reverse discrimination link back to this purely internal rule. It is precisely because there are areas which fall outside the scope of EU law that reverse discrimination may arise. While the situation of static EU citizens, that is, those who have never exercised the right to free movement, often does not have a connecting factor to EU law, EU law is applicable to EU citizens who decide to move to another Member State and take up residence there. Those who have moved might, therefore, be able to benefit from more beneficial rules than those static Union citizens.

The purely internal rule, which finds its origins in the case law on the economic free movement provisions, was extended to realm of EU citizenship as well. Early on, the ECJ decided that EU citizenship ‘is not intended to extend the scope *ratione materiae* of the Treaty also to internal situations which have no link with [EU] law’.[[4]](#footnote-4) While the decisions in *Rottmann[[5]](#footnote-5)* and *Ruiz Zambrano[[6]](#footnote-6)* relaxed this cross-border requirement somewhat,[[7]](#footnote-7) the free movement rationale is still omnipresent in the case law on EU citizenship[[8]](#footnote-8) as well as the legislation.[[9]](#footnote-9)

This is to the dissatisfaction of many commentators, who have from the earliest EU citizenship case law criticised this approach. Toner, for example, has claimed that

‘if Citizenship is to have real meaning, in particular by creating a direct link between the Union and the Citizens, then it may become increasingly unacceptable to say to the majority of Citizens who do not make use of their rights under the Treaty to live and work in other Member States that Community law has no application to their situation’[[10]](#footnote-10)

The idea that holding on to the cross-border requirement prevents EU citizenship from breaking loose from its free market rationale[[11]](#footnote-11) has always deeply informed our thinking of EU citizenship and probably still does so.[[12]](#footnote-12) The scholarly debate on EU citizenship and reverse discrimination, set out in the section below, is exemplary.

The criticism on purely internal situations seems to be, in part at least, the consequence of a problematic conceptualisation of the EU and EU citizenship. The federal character of EU citizenship has for a long time been ignored. Moreover, even now it has been unmistakably demonstrated by other scholars that EU citizenship belongs to the federal citizenship family,[[13]](#footnote-13) many find the purely internal situation rule difficult to accept.[[14]](#footnote-14) If the basic element of federalism is that ‘power will be divided between a central authority and the component entities of a nation-state or an international organization so as to make each of them responsible for the exercise of their own powers’,[[15]](#footnote-15) the purely internal rule appears to result logically from the federal division of competences within the Union. The purely internal rule is, as was stated eloquently by Advocate General Léger, ‘justified by the need to confine application of the Treaty provisions or the rules of secondary law resulting therefrom to situations involving certain extraneous factors, in particular situations characterised by the existence of cross-border elements’.[[16]](#footnote-16)

It is not easy of course to delineate precisely when a national measure affects interstate movement and, thus, when EU law applies or not. Also the Court’s ‘confusion between the aim of protecting free movement and the exercise of free movement’ has not been particularly helpful.[[17]](#footnote-17) By stretching the notion of a cross-border element to its outer limits, the ECJ made the demarcation between situations falling within or outside the scope of EU law ‘a game of chance’.[[18]](#footnote-18) While it is understandable, therefore, that abandoning the purely internal situation has been proposed as a solution to the blurred EU legal boundaries,[[19]](#footnote-19) those suggestions risk throwing away the baby with the bathwater. Is radically upsetting the balance of powers within the EU really a price one wants to pay for additional clarity? Additionally, if one believes the ECJ to have unjustifiably blurred the boundaries, a position to which I certainly subscribe, should the inevitable argument then not be that it is for the ECJ to redraw those boundaries, instead of abandoning them completely? The argument for clarity simply cannot support the far-reaching idea that the purely internal situation must be abandoned.

Arguments invoking citizenship’s equality aspirations are more profound and challenging. Even though the existence of purely internal situations is justified by the federal nature of the EU, not every form of reverse discrimination is compatible with EU citizenship’s equality aspirations therefore. Before laying out the argument in more detail, an overview of the state of the debate on reverse discrimination is essential, so as to understand where my argument differs.

**2. EU citizenship and reverse discrimination: the state of the debate**

There seem, broadly speaking, to be two camps in the reverse discrimination debate. The majority of scholars believe that EU citizenship should, sooner rather than later, preclude the existence of reverse discrimination (2.1). Some scholars, to the contrary, have argued that reverse discrimination is an inevitability in a federal polity like the EU, which requires purely internal situations to exist (2.2). A proper conceptualisation of EU citizenship needs to mediate those opposing ideas (2.3).

*2.1 Reverse discrimination as an unjustifiable violation of equal citizenship*

Shortly after the introduction of EU citizenship, academics started questioning the sustainability of the cross-border requirement. Even prior to the appearance of European citizenship in the case law of the Court, O’Leary, while admitting that applying European law in situations lacking a cross-border link can be extremely intrusive, argued that 'the logic of Union Citizenship, which should be all about equality and the abolition of frontiers, does not preclude such an intrusion'.[[20]](#footnote-20) The Court’s initial statement that EU citizenship does not change the purely internal rule,[[21]](#footnote-21) therefore, was criticised.[[22]](#footnote-22)

According to many, ‘European Union citizenship (…) will require a substantive and not a formal solution to the problem of reverse discrimination’.[[23]](#footnote-23) ‘For starters, it seems inevitable that public authorities must then adhere to rigid equal treatment at all times, whereby any prejudice to the detriment of domestic citizens is no longer possible.’[[24]](#footnote-24) ‘The concept should lead to citizens of the Union being treated absolutely equally.’[[25]](#footnote-25)EU citizenship should, thus, ‘spell a quick death to the concept of reverse discrimination’,[[26]](#footnote-26) because it is ‘an incongruity in a citizen’s Europe’.[[27]](#footnote-27) Accordingly, there is no better ‘argument than that built on Union citizenship’ for prohibiting reverse discrimination.[[28]](#footnote-28)

The most elaborate and forceful account of reverse discrimination from the perspective of equality has been given by Kochenov. Since only those who have moved can invoke their EU citizenship rights, the static EU citizens are strictly speaking no ‘full EU citizens’.[[29]](#footnote-29) Though the ECJ tried to remedy the problem somewhat by stretching the concept of cross-border movement, that EU citizenship has been insufficient for eliminating reverse discrimination is considered ‘shocking from the point of view of common sense’.[[30]](#footnote-30) The lack of equality is a clear demonstration of the ‘minimal idea of justice’ within the case law of the ECJ,[[31]](#footnote-31) and poses a fundamental problem to the concept of EU citizenship; ‘where equality is not safeguarded, there is *no* citizenship’.[[32]](#footnote-32)

Despite the pressure and critique on previous case law in which the ECJ held that EU citizenship law ‘clearly cannot be applied to such purely internal situations’,[[33]](#footnote-33) the ECJ also in *Ruiz Zambrano* refused to given in,[[34]](#footnote-34) even though it dropped its well-known mantra that ‘that 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 EU law’.[[35]](#footnote-35) So, even though those concerned about reverse discrimination because of equality reasons might see *Ruiz Zambrano* as a tentative step forward, those scholars will still not be satisfied by the current state of EU law.

*2.2 Reverse discrimination as an inevitability in a federal polity*

Not everyone believes reverse discrimination to be problematic in a citizens’ Europe. The group of scholars finding this generally recognise the unfortunate consequences of allowing reverse discrimination, but fear that the results brought about by a prohibition of reverse discrimination will be worse.[[36]](#footnote-36) It is believed by those scholars that reverse discrimination follows logically from the division of competences within the EU.

Hanf, for example, believes that ‘the purely internal situation doctrine is a suitable instrument to meet the constitutional necessity of respecting the division of powers between the Union and its Member States’. ‘Differentiation of rights and obligations are the inevitable consequence of any federal or “quasi-federal” organization of public authority’.[[37]](#footnote-37) Also O’Leary, initial critical about allowing reverse discrimination,[[38]](#footnote-38) recently stated that ‘the crux of maintaining the distinction between EU and purely internal cases remains the assertion and identification of which level of authority is competent to regulate an individual EU national’s right.[[39]](#footnote-39) The purely internal situation doctrine, thus, ‘expresses the “federal” notion that there are matters the EU, in principle, should not get involved in’.[[40]](#footnote-40) Reverse discrimination is, thus, considered to be ‘inherent in a system of divided competence’.[[41]](#footnote-41)

Federalism is obviously not a mere theoretical idea. Instead, it is among the core constitutive decisions to be made by society. It is about the constitutional decision to allow the constituting states to determine and keep their own rules and standards as long as they are not governed by federal law. Ritter, though not explicitly referring to federalism, captured the federal essence brilliantly when expressing her liking for reverse discrimination:

‘Maybe the Member States want to raise tax revenue. Maybe the Member States want to tax or discourage or encourage certain industries. Maybe the national authorities have a different interpretation of the proportionality principle from the ECJ's. Maybe the Member States want a higher standard of environmental regulation than the ECJ thinks is necessary. At the moment, the Member States are still free to decide whether reverse discrimination is a price worth paying for keeping their own rules, and they are also free to rectify reverse discrimination by legislating at EC level’[[42]](#footnote-42)

Those invoking federalism to defend reverse discrimination, thus, insist on leaving it to the Member State to decide which fields to harmonise and where to allow differences between Member States to exist.

*2.3 EU citizenship: federal and equal?*

There is without any doubt much to learn from both sides of the debate. It is, therefore, unfortunate that both camps seem to have predominantly engaged themselves with dismissing the views of the other. If the conceptualisation of EU citizenship as a status of equal membership in a federal polity is correct, the arguments of both sides seem relevant. Although boundaries may obviously serve as a tool for reinforcing inequalities and will prevent the creation of uniform treatment for everyone in the system as a whole, a more prudent conclusion appears to be that, assuming that there is value in diversity, boundaries are not necessarily illegitimate human constructs undermining equal treatment. It is seemingly not very useful to blame the ECJ for putting ‘jurisdiction (…) prior to substance’[[43]](#footnote-43) because it has respected purely internal situations or to argue that substance should necessarily be favoured over jurisdiction. Instead, the more fruitful question is how to respect jurisdictional divides as well as to guarantee substantive equality. A tentative argument will be developed here as to how to do so.

**3. Levelling up or levelling down?**

In theory, two routes can be taken to remedy problematic instances of reverse discrimination. The first, which is often embraced by scholars critical of reverse discrimination, is to harmonise rules. In the case of full harmonisation, reverse discrimination will indeed disappear. Being well aware that Member States are unlikely to remedy reverse discrimination, however, the Court is called upon to provide a solution.[[44]](#footnote-44) The ECJ should, through its case law, level up rights to bring them within the EU’s jurisdiction, thereby creating uniform rights for all Union citizens. Even though this argument is not always made explicit, this conclusion cannot but logically follow from the arguments made. If one accepts the case law of the Court creating reverse discrimination as correct, which often appears to be the case,[[45]](#footnote-45) reverse discrimination can only be remedied by building on the case law, thus creating uniform rules based on the standards accepted by the Court. The opposite, levelling down, is only possible once the case law is questioned. In addition, those who believe that EU citizenship should overrule the purely internal situation must by definition believe that uniform rules are a requirement in a polity respecting equal citizenship.

That this solution has not been questioned more widely is remarkable. Considering that reverse discrimination can only arise in the absence of full harmonisation, it appears problematic to call upon the ECJ to harmonise rules precisely when the legislator has not been willing to do so. One may believe that such arguments are predicated upon the ideal of equal EU citizenship, but this ignores the second alternative to mutual recognition, namely treatment according to the laws of the Member States. Equal treatment can also be guaranteed within the jurisdiction of the Member States. Instead of making all EU citizens benefit from one set of laws applicable throughout the EU, differences between the Member States will be respected as long as the member States apply their laws equally to everyone falling within their scope. This is not only more respectful towards the division of powers between the judiciary and the legislator, but also is compatible with the federal nature of EU citizenship. The legislator may of course adopt harmonising legislation, but in the absence thereof, only a levelling down of rights can remedy those instances of reverse discrimination that are problematic. Only this allows jurisdiction and substance to be aligned.

**4. Different forms of reverse discrimination**

If not all forms of reverse discrimination are problematic, it is important to discern the different forms that exist. Whereas it is if often the case that no distinction is made by scholars, I would not do justice to the bread and depth of the debate if I ignore the distinctions that have been put forward thus far. Two criteria can be used to make a distinction between the different forms of reverse discrimination: origin and effect. The most important distinction based on effect is the one that challenges every form of reverse discrimination that breaches fundamental rights. It is suggested here that this criteria is rather unhelpful (4.1). Somewhat more desirable is a distinction based on whether reverse discrimination removes barriers or simply overcompensates moving Union citizens. Also this classification is too much based on effect, however. (4.2) Instead, a distinction must be based on the origins of reverse discrimination. Three forms of reverse discrimination, all having different origins can be discerned (4.3).

*4.1 The unhelpful distinction: fundamental rights*

It has been suggested that only reverse discrimination entailing a fundamental rights violation needs to be prohibited. Already in 1992, Cassese, Clapham, and Weiler stated that

‘the doctrine of reverse discrimination, whereby no protection is afforded toan individual in a purely national context, is sound in many circumstances. However, to the extent that the Community right claimed by the individual, even in a purely national context, is also a fundamental right recognized by the Court, it is submitted that reverse discrimination becomes problematic in that it creates an unacceptable discrimination between Community nationals depending on the national context in which the violation takes place. It is suggested, therefore, that the Court may wish to review the doctrine with a view to limiting it in this context’[[46]](#footnote-46)

No further elaboration was provided, but the idea seems clear. In case a Member State national, who has not made use of the rights to free movement, claims rights protected by the EU, which also happen to be recognised as fundamental right by the ECJ, the individual should be protected against a breach of that right. This idea is shared by Nic Shuibhne, who has argued that ‘arguments grounded in fundamental rights protection for individuals throughout the Community add all the more appreciably to’ ‘a strong and cumulative base from which the legitimacy of continuing to ignore the reverse discrimination anomaly can be called into question’.[[47]](#footnote-47)

The most elaborate argument brought against discrimination between moving and static Union citizens with regard to their fundamental rights has been made by AG Sharpston in her Opinion on *Ruiz Zambrano*. That the AG is an outspoken critic of ECJ’s refusal to change its stance on reverse discrimination was well known by the time the Opinion was delivered.[[48]](#footnote-48) In the *Ruiz Zambrano* Opinion, however, she urged the ECJ only to prohibit reverse discrimination entailing a fundamental rights violation. The AG argued that the ECJ should at least guarantee equal fundamental rights protection for all Union citizens. She suggested to interpret Article 18 TFEU ‘as prohibiting reverse discrimination caused by the interaction between Article 21 TFEU and national law that entails a violation of a fundamental right protected under EU law, where at least equivalent protection is not available under national law’.[[49]](#footnote-49)

While those arguments might appear powerful, they are, with all due respect, not too helpful. It is, after all, not too easy to demarcate situations in which a fundamental right is at stake from one in which this is not so. More importantly, the areas within which we find reverse discrimination should make one cautious as to the role the Court should play. Reverse discrimination is likely to occur, for example, in relation to the free movement of same-sex couples.[[50]](#footnote-50) Would the ECJ apply the ideas of the learned AG consistently, it would have to force all Member States to open up the institution of marriage to same-sex couples as well, or, vice versa, preclude same-sex marriages everywhere in the EU. If the ECJ is at all capable of deciding these issues, it certainly is not the right actor to do so. The distinction between reverse discrimination entailing a fundamental rights violation and reverse discrimination not having a fundamental rights dimension will thus not lead us anywhere.

*4.2 The incomplete distinction: substantial equality v overcompensation*

A more promising distinction was provided by Tryfonidou, who makes a twofold distinction. On the one hand, there is reverse discrimination created when the Court precludes a Member State from imposing a dual burden on a national from another Member State. She submits this to be ‘positive action leading to substantial equality’,[[51]](#footnote-51) therefore not being discriminatory at all. This kind of reverse discrimination indeed appears to be different from reverse discrimination resulting from favourable treatment that ‘is not necessary for compensating a disadvantage that they would have suffered as a result of exercising one of the fundamental freedoms’.[[52]](#footnote-52) The main example given by Tryfonidou is the family reunification case law, which provides moving Union citizens with additional family reunification rights ‘because they are lucky enough to be able to point to a link with [EU] law’,[[53]](#footnote-53) that is, a cross-border element.

Although intelligible, the distinction lacks clarity. The reverse discrimination created by the case law preventing the imposition of a dual burden finds its origin in the application of the principle of mutual recognition. By referring to a dual burden, Tryfonidou seems to suggest that reverse discrimination is acceptable as long as the requirements in the Member States of origin and destination are equivalent.[[54]](#footnote-54) The application of the principle of mutual recognition, however, is even more likely to arise in the absence of equivalence.[[55]](#footnote-55) This raises the question whether reverse discrimination caused by the application of the principle of mutual recognition is also acceptable when there is no equivalence. This is extremely important. The most controversial cases of reverse discrimination between Union citizens are after all created by the application of the principle of mutual recognition in the absence of equivalence. Such is the case, for example, would the principle of mutual recognition be used to oblige all Member State to recognise same-sex marriages legally celebrated elsewhere.[[56]](#footnote-56)

*4.3 Three causes of reverse discrimination*

In addition to the distinction being insufficiently precise, the distinction made by Tryfonidou has ignored a third form of reverse discrimination. The distinction, therefore, needs to be improved and extended. Firstly, by including all reverse discrimination caused by the application of mutual recognition, regardless of whether a situation of equivalence exists, within the same category. Secondly, by acknowledging that what we have become call reverse discrimination is caused by three different phenomena.[[57]](#footnote-57) The three sections below make a distinction between the three different forms of reverse discrimination and provide a brief overview of how they must be looked at from the perspective of equal EU citizenship.

*4.3.1 Reverse discrimination caused by the federal structure of the Member States*

The first form is reverse discrimination caused by the federal structure of some of the Member States. The situation appeared most clearly in the *Walloon* case, where Belgium explicitly invoked its federal organisation as a defence against the reverse discrimination at stake. Also the controversy around the Scottish tuition fees, which provides for free university education for university Scots and non-British EU citizens, while non-Scottish British citizens are charged fees, serves as an excellent example falling within this category. The interaction of EU law with the Member States’ (quasi-) federal structures have produced three somewhat different forms of reverse discrimination.

I will focus here on the *Walloon* case. This case arose out of a challenge against the Flemish government by the government of the French Community in Belgium and the Walloon government. The applicants challenged a care insurance scheme established by Flemish government, which covered non-medical expenses up to a certain level of those truly residing within the Dutch-speaking region or bilingual region of Brussels. While those residing within the bilingual region of Brussels were allowed to join on a voluntary basis, the residents in the Dutch-speaking region were subjected to the care insurance scheme and, therefore, also the financial contribution to this scheme, on a compulsory basis.[[58]](#footnote-58) After a challenge of the Commission, however, the personal scope was extended so as to also include those residing in another EU Member State but working in the Dutch-speaking region or bilingual region of Brussels.[[59]](#footnote-59) Regulation 1408/71 EEC, after all, provided that ‘a worker employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State’.[[60]](#footnote-60) Excluded still were those residing in Walloon but working in Flanders or Brussels, regardless of whether they were Belgian citizens or non-Belgian EU citizens. **The** legislation was challenged for not including the Belgian and non-Belgian residents in Walloon.

Regarding the Belgian nationals residing in the region of Walloon, the ECJ repeated that EU citizenship is ‘not intended to extend the material scope of the Treaty to internal situations which have no link with Community law’.[[61]](#footnote-61) Those persons simply fell outside the scope of the protection offered by EU law. The Court decided differently for those who had come from other Member States. Because of the cross-border movement, those citizens fell within the scope of EU law.[[62]](#footnote-62) The Court then repeated that, according to established case law, the loss of social advantages due to the exercise of the right to free movement is regarded as an impediment to the right to free movement.[[63]](#footnote-63) The legislation at issue created such an effect ‘inasmuch as it makes affiliation to the care insurance scheme dependent on the condition of residence in either a limited part of national territory (…) or in another Member State’.[[64]](#footnote-64) According to the ECJ, ‘the fact that employed or self-employed workers find themselves in a situation in which they suffer either the loss of eligibility care insurance or a limitation of the place to which they transfer their residence’ is a limitation to the right to move and reside.[[65]](#footnote-65) The Court thus created reverse discrimination. The Belgian citizens residing in Walloon but working in the Dutch-speaking region or bilingual region of Brussels receive a less favourable treatment than those EU citizens who, initially living in another Member State, have taken up residence in Walloon while working in the Dutch-speaking region or bilingual region of Brussels.

It has been suggested that this form of reverse discrimination is incompatible with the principles of EU citizenship and that the federal boundaries within Belgium must give way to equal EU citizenship.[[66]](#footnote-66) Van Elsuwege and Adam, for example, believe it to be ‘somewhat paradoxical that Member States remain entitled to discriminate against their own nationals in a Community that is based on the rule of law and the principle of equal treatment, particularly in the light of the provisions on European citizenship’.[[67]](#footnote-67) Formulating it more boldly, Dautricourt and Thomas have claimed that with respect to the reverse discrimination originating from the federal organisation of the Member States, EU law ‘should no longer tolerate such inequality of treatment’.[[68]](#footnote-68)

Those arguments first of all very easily dismiss the importance of federal boundaries. Verschueren fears that precluding reverse discrimination arising from federal arrangement of a Member State ‘would render meaningless the federal structure of that Member State’.[[69]](#footnote-69) It is hard not to sympathize with those remarks. It is particularly deplorable that the ECJ simply brushes aside those concerns by the statement ‘that a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order, including those resulting from the constitutional organisation of that State, to justify the failure to observe obligations arising under [EU] law’,[[70]](#footnote-70) as if federal boundaries are mere administrative nuisances.

Those ‘federal’ arguments ignore the decision’s main deficiency. The Court fundamentally misinterprets the rationale of the right to free movement. The conclusion that Belgium undermined the right to free movement cannot be maintained without stretching this right beyond the imaginable. The ECJ, invoking earlier case law, decided in *Walloon* that ‘measures which have the effect of causing workers to lose, as a consequence of the exercise of their right to freedom of movement, social security advantages guaranteed them by the legislation of a Member State have in particular been classed as obstacles’.[[71]](#footnote-71) Such was the case, because EU citizens ‘might be dissuaded from making use of their freedom of movement and from leaving their Member State of origin to stay in Belgium, by reason of the fact that moving to certain parts of Belgium would cause them to lose the opportunity of eligibility for the benefits which they might otherwise have claimed’.[[72]](#footnote-72)

That the exercise of the right to free movement is likely to have consequences for the benefits one may claim should be evident. Such is ‘an unavoidable by-product of the choice not to harmonize social security schemes’.[[73]](#footnote-73) The interpretation of the right to free movement cannot possibly imply that the effects of movement are neutral as to the kind and level of benefits one may claim. EU citizens moving to another Member State cannot be ‘exempted from the consequences of existing differences’ between member States.[[74]](#footnote-74) Taking up residence in another Member State may, therefore, come at a price. As a corollary, it might be beneficial for one’s social security protection as well. In addition to taking the federal structure of Belgium more seriously, the Court should particularly have been more critical as to what constitutes an obstruction to the right to free movement or not. The right to free movement cannot be interpreted as requiring that EU citizens who have taken up residence in another Member State are entitled to the same benefits as in the Member State of origin. Such an interpretation of the right to free movement is diametrically opposed to the division of powers within the EU and would, in addition, have devastating consequences for poorer member States. So, rather than claiming that this form of reverse discrimination must be remedied by creating equal rights for everyone residing within Belgium, equal treatment should have been guaranteed for everyone residing within Walloon. A levelling down of rights, not a levelling up is the solution.

*4.3.2 Reverse discrimination caused by the application of the principle of mutual recognition*

The second form of reverse discrimination is reverse discrimination caused by the application of the principle of mutual recognition. This is the oldest form of reverse discrimination, which finds its origins in the internal market. The Member State of destination might be under an obligation to recognise the rules of the Member State of origin. When the rules of the Member State of origin are more beneficial than the rules of the Member State of destination, products, services, or citizens that have complied with the rules of the Member State of origin EU citizens might find themselves in a better position than the citizens within the Member State of destination, creating a situation of reverse discrimination.

The application of the principle of mutual recognition in the field of EU citizenship has not only reinforced but also extended the reverse discrimination caused by the application of mutual recognition. Within the EU citizenship case law, two sub-forms must be distinguished. The first is reminiscent of the one we find within classical internal market case law. The second is the consequence of the nationalities of the Member States being supreme over the status of EU citizenship. As long as nationality remains unaffected by a change in Member State of residence, Member States are able to apply their laws extraterritorially to nationals living in other Member States. This might put those nationals in a better position than other EU citizens residing within that Member State. We find both forms within the case law on the recognition of the spelling of names.

The classical application of the principle of mutual recognition concerning the recognition of a name is found in *Grunkin and Paul*. The facts of that case concerned Leonhard Matthias, the son of dr Paul and mr Grunkin. Leonhard Matthias was born in Denmark but possesses German nationality, as do his parents. The surname registered in Denmark was Grunkin-Paul. The parents requested the German authorities to register their son, who resides with his mother in Denmark, but often stays with his father in Germany, under the same surname. The authorities refused, insisting that only one of the surnames, Grunkin or Paul, could be accepted.[[75]](#footnote-75) This decision was challenged by the parents on the grounds of EU citizenship and the provision of non-discrimination.[[76]](#footnote-76) The ECJ repeated that national legislation disadvantaging nationals of other Member States simply because they have moved is a restriction of Article 21 TFEU and that such is the case for someone ‘having to use a surname, in the Member State of which the person concerned is a national, that is different from that conferred and registered in the Member State of birth and residence’.[[77]](#footnote-77) Since no proper justifications were brought forward,[[78]](#footnote-78) the treatment of Leonhard Matthias by the German authorities was held to be contrary to EU law. To protect free movement, the Member States are, in the absence of a justification of public interest, placed under a duty to recognise the spelling and construction of a name regulated in another Member State. As a consequence, EU citizens from other Member States might be in the possession of a legal status that is not available to the nationals of that Member State, giving rise, according to the classic definition discussed above, to reverse discrimination.

The second sub-form, which results from the hierarchical superior position of the nationalities of the Member States over EU citizenship, is found in *Garcia Avello*. Esmeralda and Diego, the children of Mrs Weber and Mr Garcia Avello were born in Belgium and lived there all their lives. They had never resided in another Member State, but have dual Spanish and Belgium nationality. The Belgian authorities had entered the children in the national registers under the surname Garcia Avello. Meanwhile, the children had been registered as Garcia Weber with the Spanish authorities. The father requested the authorities to change the surname, according to Spanish law, into Garcia Weber. The Belgian authorities rejected the request. The question brought to the ECJ was whether this decision was contrary to the provisions on Union citizenship.[[79]](#footnote-79) The Court decided that a link with EU law exist for persons ‘who are nationals of one Member State lawfully resident in the territory of another Member State’.[[80]](#footnote-80) Having established this link, the Court continued to examine whether the decision of the Belgium authorities was in line with EU law. The Court, after coming to the conclusion that Belgian citizens who also possessed the Spanish nationality find themselves in a different position than those who are only in the possession of Belgian nationality,[[81]](#footnote-81) decided that ‘it is common ground that such a discrepancy in surnames is liable to cause serious inconveniences for those concerned at both professional and private levels’.[[82]](#footnote-82) Belgium was placed under an obligation to recognize the Spanish surname of the couple.

Narrowing down the purely internal rule, also those who have never exercised the right to free movement may fall within the scope of EU law. While the existence of the purely internal rule has often been blamed for the existence of reverse discrimination, it is, ironically, this narrowing down that allowed additional forms of reverse discrimination to arise.[[83]](#footnote-83) Whereas traditionally, the principle of mutual recognition was applied so as to ensure that barriers to the right to free movement were eradicated, Belgium was placed under the obligation to recognise the Spanish surname of the Garcia Avello children even though they had never availed themselves of this right. The decision thus forced Belgium to treat foreign nationals better than their own. What explains the situation in *Garcia Avello* is that Spain used nationality as a connecting factor in the determination of the applicability of its law on the spelling of names. It is ultimately not the dual nationality but the extraterritorial application of Spanish law that created the dilemma in *Garcia Avello*. In the absence of clear rules, the ECJ has provided Union citizens with the autonomy to decide the law applicable in case it can benefit from two or more different laws.[[84]](#footnote-84) The Member States are subsequently placed under the obligation to recognise this choice. *Garcia Avello* type situations, thus, closely resemble classic mutual recognition cases, the only difference being that the Union citizen in those cases has not moved between two Member States.

It must first of all be noted that the classical remedy suggested by those critical of reverse discrimination is not feasible. A levelling up of the rights determining the spelling of names requires deciding upon which rules regarding the spelling and formation of names are uniformly valid throughout the EU. Are all rules currently existing within the Member States to be applied throughout the EU, or should a particular set of rules be adopted and, if so, which? Only the legislator has the capacity to decide on such matters. The only way to prevent reverse discrimination in those situations is not to apply the principle of mutual recognition at all. Instead, however, reverse discrimination caused by the application of the principle mutual recognition must be deemed as a justifiable limitation of the ideal of equal EU citizenship.

That the principle of mutual recognition has been used to foster the free movement of EU citizens as well cannot surprise. Federal unions that aim to guarantee and facilitate the free movement of persons among the constituent states will need to ensure that the effects of movement on the personal statuses of their citizens are, as far as possible, neutral. Demands for legal certainty and justice in federal unions that have not unified the substantive law are likely to result in the development of an ‘interstate private law’.[[85]](#footnote-85) To avoid restrictions to free movement, there is a need for principles or rules to be adopted at the federal level. Intuitively, the right to equal treatment might appear to be a more important right than free movement. However, when realising the intimate connection between the two and the severe limitation placed upon the free movement rights of certain categories of citizens in a system that favours national treatment, a better approach seems to be one that recognises the independent value of free movement. Instead of favouring equal treatment at all times when in conflict with the right to free movement, a just as legitimate policy for a polity concerned about the free movement of its citizens is to recognise the right to free movement as a legitimate limitation of equal citizenship. As such, the application of the principle of mutual recognition must be deemed justifiable also when resulting in reverse discrimination among Union citizens.

Also in the absence of free movement, the application of the principle of mutual recognition and the resulting reverse discrimination may very well be justified. What *Garcia Avello* demonstrates is that the supremacy of the Member State nationalities over EU citizenship matters. When a Member State decides to grant rights extraterritorially to its citizens, which is what happened in *Garcia Avello*, those citizens are in the position to benefit from rights that are not available to the citizens of the Member State of residence. The reverse discrimination that might as a consequence arise must be considered as giving effect to the primacy of Member State nationalities. That the primacy of the nationalities of the Member States must matter should be evident. Residence, therefore, is not and should not necessarily be ‘the new nationality’.[[86]](#footnote-86) It was a very deliberate decision to grant EU citizenship to everyone in possession of a nationality of a Member State, not the other way around. The Treaty of Amsterdam unequivocally invigorated this intention: ‘Citizenship of the Union shall complement and not replace national citizenship’.[[87]](#footnote-87) So, the well-known mantra of the ECJ that EU citizenship is ‘destined to be the fundamental status of nationals of the Member States’,[[88]](#footnote-88) thus, indeed seems ‘to be in tension with text, teleology and legislative history’.[[89]](#footnote-89) Although the ECJ in *Rottmann* reinforced the claim that the nationality laws of the Member States must have ‘due regard to European Union law’,[[90]](#footnote-90) this does not justify the view that there exist an ‘entirely conventional supremacy of Union citizenship’.[[91]](#footnote-91) The nationalities of the Member States are thus interconnected with and affected by EU citizenship,[[92]](#footnote-92) but certainly not subordinate to the latter.

Both forms of reverse discrimination caused by the application of the principle of mutual recognition must be deemed legitimate and justifiable deviations of the principle of equal EU citizenship.

*4.3.3 Reverse discrimination caused by the family reunification case law*

The third form of reverse discrimination is found within the family reunification case law. Even though this form might appear similar to the previous, the difference is tremendous. EU citizens that have exercised the right to free movement are provided with family reunification rights more beneficial than static Union citizens. This is so regardless of whether the Member State of origin had ever allowed family reunification. In such cases, the Member State of destination is put under an obligation to recognise this decision, allowing the moving EU citizen to bring the third-country national partner. EU law also provides for more beneficial family rights in the absence of a decision of the Member State of origin, making this form different from the previous.

The case that demonstrates this best is *Metock*. The asylum requests of all four applicants in *Metock* were rejected. After their arrival, they married a non-Irish EU citizen residing in Ireland. Their subsequent applications for residence cards were again refused by the Irish government on the grounds that the applicants had not been lawfully resident in another Member State prior to their arrival. The Court decided that ‘the refusal of the host Member State to grant rights of entry and residence to the family members of a Union citizen is such as to discourage that citizen from moving to or residing in that Member State, even if his family members are not already lawfully resident in the territory of another Member State.’[[93]](#footnote-93) In coming to this conclusion, the ECJ drew inspiration from EU citizenship and the Citizenship Directive.

How can an EU citizen, like the applicants in *Metock*, be discouraged from moving if the family members, to whom the Member State of destination refuses to grant entry and residence rights, were not living with the EU citizen in the Member State of origin either?[[94]](#footnote-94) Suppose that a Union citizen, who happens to be single, moves to another Member State for work purposes. After five years of residence in the Member State of destination, the EU citizen meets, falls in love with, and marries an asylum seeker. Unfortunately for both the asylum seeker and the EU citizen, the asylum application is rejected and the asylum seeker is forced to return to his/her Member State of origin. Indisputably, such a decision has serious consequences for both persons’ family life. To claim that such a decision would be an impediment to the Union citizen’s right to move and reside is very mistaken however. Freedom of movement, in the absence of discrimination on grounds of nationality, is deterred in two situations only: ‘if upon their return their position is worse off than would they have remained; or if they were prevented from enjoying any goods or qualification obtained during their stay in another Member State.’[[95]](#footnote-95) That was not the case in those situations.

Considering that much of the family reunification case law is based on a misinterpretation of the right to free movement, the suggestion that this form of reverse discrimination must be remedied by a further levelling up of rights through the case law of the ECJ should strike us as rather odd, to say the least. Since the reverse discrimination was created by rather flawed case law, the only way to remedy this form of reverse discrimination is to level down and create equal treatment within the Member States. The case law ignores the meaning of Article 18 TFEU on the right to non-discrimination on the basis of nationality, which is there to ensure that Union citizens when taking up residence in another Member State receive, in the absence of justifiable derogations, the same treatment, not better not worse, than the nationals of that Member State. With regard to the family reunification case law, this implies that the EU citizens that have moved will become subject to the family reunification rules in the host Member States. So, an Italian national moving to Germany is subject to the same family reunification rules as a German national, not better not worse.

**Conclusion**

Reverse discrimination is a far more complicated concept than has been assumed thus far. It must be evident that reverse discrimination can be understood only once the idea that reverse discrimination is one phenomenon is abandoned. Instead, an examination of the origins of reverse discrimination, allows us to distinguish three forms of reverse discrimination, which occasionally can be divided further in additional sub-forms. Not only are the three forms distinguishable with regard to their origin, also the answer to the question to what extent they are a justifiable deviations from the equality aspirations of Union citizenship differs.

What this demonstrates is that currently prevailing theories are inadequate. It cannot be maintained that reverse discrimination is either entirely acceptable because of the federal division of competences within the EU or completely unjustifiable because of the principles of equal Union citizenship. The conclusion that must follow from EU citizenship being a federal citizenship is that equality as well as the division of competences is important. Instead of allowing equal citizenship always to trump the division of competences, or concerns about jurisdictional divides always to undermine equal citizenship, federal citizenship requires a balance between jurisdictional divides as well as substantive equality.

That the federal division of competences cannot entirely justify reverse discrimination must be clear now. The need to balance the division of competences with equal citizenship also requires a profound reconsideration of the ideas how to remedy forms of reverse discrimination that turn out to be an unjustifiable violation of the principles upon which EU citizenship is founded however. Contrary to dominant ideas, which are inspired by a unitary conception of EU citizenship, therefore allowing equality to jump concerns about a division of powers by advocating for a levelling up of rights through judicial decisions of the Court, the federal foundations of EU citizenship require a levelling down of rights. Equal treatment with respect to rights laid down by the Member States must thus be guaranteed at Member State level. Family reunification rights still being a prerogative of the Member States thus requires that all Union citizens, regardless of their nationality, residing within the same Member States should be allowed to benefit from the same family reunification rules. When legislation is determined not by a Member State as a whole but by one of its regions, equal citizenship logically requires that non-discrimination is guaranteed for all Union citizens residing within this region.

Reverse discrimination can be remedied thus without reversing the purely internal situation rule. Equal EU citizenship does not require the EU or the Member State to tear down their federal boundaries, to the contrary. While federal citizens will never be in completely the same position for the simple fact of the division of powers within federation, federalism and equal citizenship are far from mutually incompatible. EU citizenship does not form an exception to this rule.

1. Eleanor Spaventa, ‘Seeing the Wood despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects?’ (2008) 45 CMLRev 13. [↑](#footnote-ref-1)
2. Case C-175/78 *Saunders* [1979] ECR 1129, para 11. See also: Joined Case C-35/82 & 36/82 *Morson and Jhanjan* [1982] 3723, para 16. [↑](#footnote-ref-2)
3. Case 115/78 *Knoors* [1979] ECR I-399, para 24; *Saunders* (n 2) para 11. [↑](#footnote-ref-3)
4. Joined Cases C-64/96 and C-65/96, *Uecker and Jacquet* [1997] ECR I-3182, para 23; Case C‑148/02 *Garcia Avello* [2003] ECR I‑11613, para 26; Case C‑403/03 *Schempp* [2005] ECR I‑6421, para 20. [↑](#footnote-ref-4)
5. Case C-135/08 *Rottmann v Freistaat Bayern* [2010] ECR I-1449. [↑](#footnote-ref-5)
6. Case C-34/09 *Ruiz Zambrano v Office national de l’emploi* [2011] ECR I-1177. [↑](#footnote-ref-6)
7. For an analysis of this development see: Dimitry Kochenov and Richard Plender, ‘EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text’ (2012) 37 ELRev 369. [↑](#footnote-ref-7)
8. Also after *Ruiz Zambrano*, the ECJ held that the provisions on EU citizenship prohibit either national measures ‘that have the effect of depriving [EU citizens] of the genuine enjoyment of the substance of the rights conferred by virtue of her status as a Union citizen *or* of impeding the exercise of her right of free movement and residence within the territory of the Member States’. Case C-434/09 *McCarthy v Secretary of State for the Home Department* [2011] ECR I-3375, para 54. [↑](#footnote-ref-8)
9. The Citizenship Directive only applies to ‘Union citizens who move to or reside in a Member State other than that of which they are a national’. Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77, Article 3(1).

   are a national [↑](#footnote-ref-9)
10. Helen Toner, ‘Judicial interpretation of European Union citizenship– Transformation or consolidation? (2000) 7 MJ 158, 169-170. [↑](#footnote-ref-10)
11. Hence, the popular description of EU citizenship as market citizenship: Michelle Everson, ‘The Legacy of the Market Citizen’ in Jo Shaw and Gillian More (eds), *New Legal Dynamics of European Union* (Clarendon Press, 1995) 73; Niamh Nic Shuibhne, ‘The Resilience of EU Market Citizenship’ (2010) 48 CMLRev 1597; Dora Kostakopoulou, ‘Ideas, Norms and European Citizenship: Explaining Institutional Change’ (2005) 68 MLR 233. [↑](#footnote-ref-11)
12. Kochenov and Plender (n 7); Dimitry Kochenov, ‘A Real European Citizenship; A New jurisdiction Test; A Novel Chapter in the Development of the Union in Europe’ (2011) 18 ColJEurL 56; Koen Lenaerts, ‘‘*Civis Europeus Sum*’: from the cross-border link to the status of citizen of the Union’ (2011) OnlJMW 6; Ferdinand Wollenschläger, A New Fundamental Freedom Beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration’ (2011) 17 ELJ 1;Norbert Reich and Solvita Harbacevica, ‘Citizenship and Family on Trial: A Fairly Optimistic Overview of Recent Court Practice with Regard to Free Movement of Persons’ (2003) 40 CMLRev 615; Agustín José Menéndez, ‘Which Citizenship? Whose Europe?—The Many Paradoxes of European Citizenship’ (2014) 15 GLJ 907; Michelle Everson, ‘A Citizenship in Movement’ (2014) 15 GLJ 965; Editorial Comments, ‘Two-speed European Citizenship? Can the Lisbon treaty Help Close the Gap?’ (2008) 45 CMLRev 1. [↑](#footnote-ref-12)
13. Christoph Schönberger, ‘European Citizenship as Federal Citizenship: Some Citizenship Lessons of Comparative Federalism’ (2007) 19 ERPL 61; Christoph Schönberger, *Unionsbürger: Europas föderales Bürgerrecht in vergleichender Sicht* (Mohr Siebeck 2005); Willem Maas, ‘Equality and the Free Movement of People: Citizenship and Internal Migration’ in Willem Maas (ed), *Democratic Citizenship and the Free Movement of People* (Martinus Nijhoff 2013) 9; Denis Lacorne, ‘European Citizenship: The Relevance of the American Model’ in Kalypso Nicolaïdis and Robert Howse (eds), *The Federal Vision* (OUP 2003) 427. Dimitry Kochenov, ‘EU Citizenship and Federalism: The Role of Rights (CUP forthcoming). [↑](#footnote-ref-13)
14. Some use a federal conceptualisation but still criticise the purely internal rule. See, for example, Dimitry Kochenov, ‘The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon?’ (2013) 62 IntCompLQ 97; Anastasia Iliopoulou-Penot, ‘The Transnational Character of Union Citizenship’ in Michael Dougan, Niamh Nic Shuibhne, and Eleanor Spaventa (eds), *The Empowerment and Disempowerment of the European Citizen* (Hart 2012) 15. [↑](#footnote-ref-14)
15. Koen Lenaerts, ‘Federalism: Essential Concepts in Evolution – The Case of the European Union’ (1998) 21 FordIntLJ 746. [↑](#footnote-ref-15)
16. Case C-192/99 *Kaur* [2001] ECR I-1237, Opinion of AG Léger, para 24. [↑](#footnote-ref-16)
17. Miguel Poiares Maduro, ‘The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination’ in Claire Kilpatrick, Tonia Novitz, and Paul Skidmore (eds), *The Future of Remedies in Europe* (Hart 2000) 117, 124. [↑](#footnote-ref-17)
18. Dimitry Kochenov, ‘Citizenship without Respect: The EU’s Troubled Equality Ideal’ (2010) JMWP 08/10. See also: Astrid Epiney, ‘The Scope of Article 12 EC: Some Remarks on the Influence of European Citizenship’ (2007) 13 ELJ 611, 616; Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177, Opinion of AG Sharpston, para 88. [↑](#footnote-ref-18)
19. Niamh Nic Shuibhne, ‘Free Movement of Persons and the Wholly Internal Rule: Time to Move on? (2002) 39 CMLRev 731; Camille Dautricourt and Sebastien Thomas, ‘Reverse Discrimination and Free Movement of Persons under Community Law: All for Ulysses, Nothing for Penelope’ (2009) 34 EurLRev 433, 447. [↑](#footnote-ref-19)
20. Síofra O’Leary, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship* (Kluwer Law International 1996) 278. For a similar view shortly after EU citizenship was introduced see: Robin CA White, ‘A fresh look at reverse discrimination’ (1993) 18 ELRev 527, 532. [↑](#footnote-ref-20)
21. *Uecker and Jaquet* (n 4). [↑](#footnote-ref-21)
22. See, for example: Toner (n 10). [↑](#footnote-ref-22)
23. Maduro (n 16) 126. [↑](#footnote-ref-23)
24. Henri de Waele, ‘EU Citizenship: Revisiting its Meaning, Place and Potential’ (2010) 12 EJML 319, 329. Not only ‘starters’ share this opinion. Also the editors of the Common Market Law Review believe that this is the case: Editorial Comments (n 12). [↑](#footnote-ref-24)
25. Case C-214/94 *Boukhalfa* [1996] ECR I-2253, Opinion of AG Léger, para 63. [↑](#footnote-ref-25)
26. De Waele (n 22) 329. See also: Sara Iglesias Sánchez, ‘Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison?’ (2014) 20 ELJ 464, 470; Reich and Harbacevica (n 12) 634. [↑](#footnote-ref-26)
27. Alina Tryfonidou, ‘Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens’ Europe’ (2008) 35 LIEI 43. [↑](#footnote-ref-27)
28. Catherine Jacqueson, ‘Union Citizenship and the Court of Justice: Something New Under the Sun? Towards Social Citizenship’ (2002) 27 ELRev 260, 281. See also: Daniela Garcia, ‘Are There Reasons to Convert Reverse Discrimination into a Prohibited Measure’ (2009) 18 ECTRev 179. [↑](#footnote-ref-28)
29. Dimitry Kochenov, ‘*Ius Tractum* of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights’ (2009) 15 CJEL 169, 214. Mather fully agrees: Member State nationals do ‘not in effect become a Union citizen (…) until he or she has crossed his or her own border’. James D Mather, ‘The Court of Justice and the Union Citizen’ (2005) 11 ELJ 722, 735. [↑](#footnote-ref-29)
30. Dimitry Kochenov, ‘Citizenship without Respect; The EU’s Troubled Equality Ideal’ (2010) JMWP 08/10, 51. [↑](#footnote-ref-30)
31. Ibid. See also: 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 Citizenship* (Brill 2014). [↑](#footnote-ref-31)
32. Kochenov (n 28) 5. [↑](#footnote-ref-32)
33. Case C-212/06 *Walloon* [2008] ECR I-1683, para 38. [↑](#footnote-ref-33)
34. *Ruiz Zambrano* (n 6)***.*** Hailbronner and Iglesias Sánchez’ remark that the case ‘defines a fundamental area of protection where this discrimination cannot arise anymore’ is undoubtedly correct though. Michaela Hailbronner and Sara Iglesias Sánchez, ‘The European Court of Justice and Citizenship of the European Union: New developments Towards a truly European Status’ (2011) 5 VJICL 498, 516. See also: Peter van Elsuwege, ‘The Phenomenon of Reverse Discrimination: An Anomaly in the European Constitutional Legal Order?’ in Lucia Serena Rossi and Federico Casolari (eds), *The EU after Lisbon: Amending or Coping with the Existing Treaties?* (Springer 2014) 161, 170. [↑](#footnote-ref-34)
35. As was stated by the ECJ in, for example: *Uecker and Jaquet* (n 4) Case C-192/05 *Tas-Hagen and Tas* [2006] ECR I-10451, para 23; Case C-499/06 *Nerkowska* [2008] ECR I-3993, para 25; *Garcia Avello* (n 4), para 26. For an analysis see Kochenov and Plender (n 7). [↑](#footnote-ref-35)
36. See, for example, Cyril Ritter, ‘Purely internal situation, reverse discrimination, *Guimont*, *Dzodzi* and Article 234 (2006) 31 ELRev 690, who fears that a prohibition on reverse discrimination will lead to a litigation-mad, almost completely deregulated pan-European society where public choices are made by ECJ judges’. [↑](#footnote-ref-36)
37. Dominik Hanf, ‘‘Reverse Discrimination’ in EU Law: Constitutional Aberration, Constitutional Necessity, or Judicial Choice?’ (2011) 18 MJ 26, 56-57. [↑](#footnote-ref-37)
38. O’Leary (n 19). [↑](#footnote-ref-38)
39. Síofra O’Leary, ‘The Past, Present and Future of the Purely Internal Rule in EU Law’ in Michael Dougan, Niamh Nic Shuibhne, and Eleanor Spaventa (eds), *Empowerment and Disempowerment of the European Citizen* (Hart 2012) 37, 64. [↑](#footnote-ref-39)
40. Anne Pieter van der Mei, ‘The Outer Limits of the Prohibition of Discrimination on Grounds of Nationality: A Look Through the Lens of Union Citizenship (2011) 18 MJ 62, 78. ‘Es gehört zu den Charakteristika des Staatenverbunds der Europäischen Union’, according to Jörg Gundel, ‘Die Inländerdiskriminierung zwischen Verfassungs- und Europarecht: Neue Ansätze in der deutschen Rechtsprechung’ (2007) 122 Deutsches Verwaltungsblatt 269, 270. [↑](#footnote-ref-40)
41. Steve Peers, ‘Free Movement, Immigration Control and Constitutional Conflict’ (2009) 5 EuConst 173, 192. [↑](#footnote-ref-41)
42. Ritter (n 36) 710. [↑](#footnote-ref-42)
43. Damian Chalmers, Gareth Davies, and Giorgio Monti, *European Union Law* (CUP, 2010; 2nd ed) 463. [↑](#footnote-ref-43)
44. Nic Shuibhne (n 18) 769; Alina Tryfonidou, *Reverse Discrimination in EC Law* (Kluwer 2009) 229-230. [↑](#footnote-ref-44)
45. The family reunification debate, discussed in chapter 5, provides an excellent example of this. [↑](#footnote-ref-45)
46. Antonio Cassese, Andrew Clapham, and Joseph Weiler, ‘1992 – What are our Rights? Agenda for a Human Rights Action Plan’ in *Human Rights and the European Community: Towards 1992 and Beyond* (Conference Reports: Strasbourg 20-21 November 1989) 66. [↑](#footnote-ref-46)
47. Niamh Nic Shuibhne, ‘The European Union and Fundamental Rights: Well in Spirit but Considerably Rumpled in Boday?’ in Paul Beaumon, Carole Lyons, and Neil Walker (eds), *Convergence and Divergence in European Public Law* (Hart 2002) 177, 194. [↑](#footnote-ref-47)
48. Case C-212/06 *Walloon* [2008] ECR I-1683, Opinion of AG Sharpston. [↑](#footnote-ref-48)
49. Opinion of AG Sharpston (n 17). [↑](#footnote-ref-49)
50. See chapter 4 for a futher analysis. [↑](#footnote-ref-50)
51. Tryfonidou (n 44) 221-222. [↑](#footnote-ref-51)
52. Ibid. [↑](#footnote-ref-52)
53. Ibid 224. See also: Alina Tryfonidou, ‘Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach’ (2009) 15 ELJ 634. [↑](#footnote-ref-53)
54. The example used by Tryfonidou to explain what form of reverse discrimination is in fact not more than the prevention of a double burden is Joined Cases C-29/94, C-30/94, C-31/94, C-32/94, C-33/94, C-34/94 and C-35/94 *Aubertin and others* [1995] ECR I-301. A Member State, which requires hairdressers to have fulfilled the necessary training requirements, should allow hairdressers from other Member States to practice there without a diploma, as long as they have practiced in another Member State for several years. A certain level of equivalence was thus required in this situation. [↑](#footnote-ref-54)
55. Maduro (n 17) 128. [↑](#footnote-ref-55)
56. See chapter 4 for an analysis. [↑](#footnote-ref-56)
57. A very similar distinction was made by: Hanf (n 37) 34-36. [↑](#footnote-ref-57)
58. [*Décret portant organisation de l'assurance soins*](http://www.ejustice.just.fgov.be/cgi/article.pl?numac=1999035594&caller=list&article_lang=F&row_id=1&numero=1&pub_date=1999-05-28&dt=DECRET&language=fr&du=d&fr=f&choix1=ET&choix2=ET&fromtab=+moftxt+UNION+montxt+UNION+modtxt&nl=n&trier=promulgation&pdda=1999&pdfa=1999&pddj=28&pddm=05&pdfj=28&sql=dt+=+%27DECRET%27+and+pd+between+date%271999-05-28%27+and+date%271999-05-28%27+&rech=1&pdfm=05&tri=dd+AS+RANK+), (*Moniteur belge* of 28 May 1999) 19149. [↑](#footnote-ref-58)
59. *Décret modifiant le décret du 30 mars 1999 portant organisation de l'assurance soins* (*Moniteur belge* of 9 June 2004) 43593. [↑](#footnote-ref-59)
60. Council Regulation 1408/71 EEC **on the application of social security schemes to employed persons and their families moving within the Community [1971] OJ L 149/2,** Article 13(2)(a). [↑](#footnote-ref-60)
61. *Walloon* (n 3) para 39. [↑](#footnote-ref-61)
62. Ibid para 41. [↑](#footnote-ref-62)
63. Ibid para 46. [↑](#footnote-ref-63)
64. Ibid para 47. [↑](#footnote-ref-64)
65. Ibid para 48. [↑](#footnote-ref-65)
66. Case C-212/06 *Walloon* [2008] ECR I-1683, Opinion of AG Sharpston. [↑](#footnote-ref-66)
67. Van Elsuwege and Adam (n 20) 334. They are more susceptible to the demands of federalism though than AG Sharpston. [↑](#footnote-ref-67)
68. Camille Dautricourt and Sebastien Thomas, ‘Reverse Discrimination and Free Movement of Persons Under Community Law: All for Ulysses, Nothing for Penelope’ (2009) 34 EurLRev 433, 451. [↑](#footnote-ref-68)
69. Herwig Verschueren, ‘The Impact of EU Law on the Devolution of Social Powers in the Member States’ in Elke Cloots, Geert de Baere, and Stefan Sottiaux (eds), *Federalism in the European Union* (Hart 2012) 265, 283-284. [↑](#footnote-ref-69)
70. Walloon (n 3) para 58. [↑](#footnote-ref-70)
71. Walloon (n 3) para 46. [↑](#footnote-ref-71)
72. Walloon (n 3) para 48. [↑](#footnote-ref-72)
73. Rennuy (n 19) 1227. [↑](#footnote-ref-73)
74. Christensen and Malmstedt (n 19) 94. Pennings (n 31) 74. [↑](#footnote-ref-74)
75. Case C-353/06 *Grunkin and Paul* [2008] ECR I-7639, Opinion of AG Sharpston, paras 21-23. [↑](#footnote-ref-75)
76. Note that an earlier case, entailing the same facts was dismissed by the ECJ: Case C-96/04 *Niebüll* [2006] ECR I-3561. [↑](#footnote-ref-76)
77. Ibid paras 21-22. [↑](#footnote-ref-77)
78. Ibid para 32-34. [↑](#footnote-ref-78)
79. Case C‑148/02 *Garcia Avello* [2003] ECR I‑11613, paras 13-19. [↑](#footnote-ref-79)
80. Ibid para 27. [↑](#footnote-ref-80)
81. Ibid para 31-35. [↑](#footnote-ref-81)
82. Ibid para 36. [↑](#footnote-ref-82)
83. For this conclusión see also: Alina Tryfonidou, ‘Purely Internal Situations and Reverse Discrimination in a Citizen’s Europe: Time to “Reverse” Reverse Discrimination?’ in PG Xuereb (ed), *Issues in Social Policy: A New Agenda* (2009) Jean Monnet Seminar Series 11; Dimitry Kochenov, ‘Citizenship without Respect; The EU’s Troubled Equality Ideal’ (2010) JMWP 08/10 47. [↑](#footnote-ref-83)
84. On the party autonomy in the names cases see: Toni Marzal Yetano, ‘The Constitutionalisation of Party Autonomy in European Family Law’ (2010) 6 JPrivIntL 155; Kuipers (n 51); Vonk (n 51) 133. [↑](#footnote-ref-84)
85. Vanessa Abballe, ‘Comparative Perspectives of the Articulation of Horizontal Interjurisdictional Relations in the United States and the European Union: The Federalization of Civil Justice’ (2009) 15 NEJIntCompL 1. See also: Alex Mills, ‘Federalism in the European Union and the United States: Subsidiarity, Private Law, and the Conflict of Laws’ (2010) 32 UPJIntL 369; Milena Sterio, ‘The Globalization Era and the Conflict of Laws: What Europe Could Learn From the United States and Vice Versa’ (2005) 13 CardJIntCompL 161; Ralf Michaels, ‘The New European Choice-of-Law Revolution’ (2008) 82 TulLRev 1607. [↑](#footnote-ref-85)
86. For the opposite view see: Gareth Davies, ‘‘Any Place I Hang my Hat?’ or: Residence is the New Nationality’ (2005) 11 ELJ 43. [↑](#footnote-ref-86)
87. Now Article 20 TFEU. [↑](#footnote-ref-87)
88. Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para 31; Case C-224/98 *D’Hoop* [2002] ECR I-6191, para 28; Case C-413/99 *Baumbast* [2002] ECR I-7091, para 82; Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, para 65; Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177, para 41. [↑](#footnote-ref-88)
89. JHH Weiler, ‘Epilogue: Judging the Judges – Apology and Critique’ in Maurice Adams and others (eds), *Judging Europe’s Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart 2013) 235, 248. [↑](#footnote-ref-89)
90. Case C-135/08 *Rottmann* [2010] ECR I-1449. For previous cases in which the ECJ expressed this view see: Case C-369/90 *Micheletti* [1992] ECR I-4239, para 10; Case C-179/98 *Mesbah* [1999] ECR I-7955, para 29; Case C-192/99 *Kaur* [2001] ECR I-1237, para 19; Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, para 37. [↑](#footnote-ref-90)
91. Gareth Davies, ‘**The Entirely Conventional Supremacy of Union Citizenship and Rights’ in Jo Shaw (ed), *Has the European Court of Justice Challenged Member States Sovereignty in Nationality Law* (EUI RSCAS Working Paper 2010). See also: Dimitry Kochenov, ‘Case Note on C-135/08 *Janko Rottmann v Freistaat Bayern*’ (2010) 47 CMLRev 1831.**  [↑](#footnote-ref-91)
92. Gerard-René de Groot, ‘Towards a European Nationality Law’ (2004) 8 ElecJCompL; Dimitry Kochenov, ‘Rounding Up the Circle: The Mutation of Member States’ Nationalities Under Pressure from EU Citizenship’ (EUI RSCAS Working Paper 2012/23). [↑](#footnote-ref-92)
93. Ibid para 64. [↑](#footnote-ref-93)
94. For such an argument, see also Tryfonidou (n 15); Pedro Caro de Sousa, ‘Quest for the Holy Grail – Is a Unified Approach to the Market Freedoms and European Citizenship Justified?’ (2014) 20 ELJ 499, 511. A similar argument was made by AG Geelhoed. Case C-1/05 *Jia*, Opinion of Advocate General Geelhoed, [2007] ECR I-1, para 71. [↑](#footnote-ref-94)
95. Maduro (n 64) 125. [↑](#footnote-ref-95)