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THE RIGHT TO VOTE FOR NON-CITIZENS IN  
THE EUROPEAN MULTILEVEL SYSTEM OF  
FUNDAMENTAL RIGHTS PROTECTION

A CASE STUDY IN INCONSISTENCY ?

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## **Abstract**

The paper analyses the issue of voting rights for non-citizens in the European legal space. Its purpose is to outline the inconsistencies that characterize the European multilevel system of fundamental rights protection and to assess whether the transformations that are taking place both in the law on the books and the law in action hold the potential for overcoming these problems. The paper will maintain that the overlap of three sets of norms and institutions for the protection of fundamental rights creates tensions and paradoxes in the field of voting rights and participation in political life for non-citizens. In addition, it will be argued that the legislative and judicial transformations that are taking place in the European human rights architecture show only limited capacity to address these problems. On the other hand, however, the paper claims that the European experience is by no way unique and rather finds similarities in the history of electoral rights and citizenship in the US constitutional system. Drawing on a comparison with the US experience, therefore, the paper will attempt to advance several legislative proposals to reform the European legal architecture by identifying measures which could be adopted *de jure condendo* to redress the current state of affairs.

## **Keywords**

voting rights – citizens – expatriates – third country nationals – comparative constitutional law

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# The Right to Vote for Non-citizens in the European Multilevel System of Fundamental Rights Protection

## A Case Study in Inconsistency?

Federico Fabbrini\*

### 1. Introduction

In any constitutional democracy based on the rule of law, the right to vote and to participate in political life is regarded as fundamental.<sup>1</sup> As Thomas Jefferson famously wrote in the 1776 Declaration of Independence, “governments are instituted among men deriving their just powers from the consent of the governed.”<sup>2</sup> Who ought to be considered as ‘the governed’, has nonetheless remained a largely unsettled question in legal practice and political theory ever since.<sup>3</sup> The purpose of this paper is to address the issue of voting rights for non-citizens in the European multilevel system of human rights protection. To clarify the terminology employed in the essay ‘citizens’ will be regarded as those individuals holding the nationality of a European Union (EU) Member State and ‘non-citizens’ (or ‘foreigners’ or ‘aliens’) will refer to those individuals who do not hold the nationality of the

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<sup>1</sup> In the leading book on democratic theory ROBERT DAHL, *ON DEMOCRACY* 33 (1998) defines democracy as an association of people characterized by five standards: “1. effective participation 2. equality in voting 3. gaining enlightened understanding 4. exercising final control over the agenda 5. inclusion of adults”.

<sup>2</sup> For a masterpiece comment of the philosophical underpinnings of the Declaration of Independence and its place in the history and theory of democracy and human rights see NORBERTO BOBBIO, *L’ETÀ DEI DIRITTI* 96 (1990). A marvellous historical account can be found also in GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 56 (1993).

<sup>3</sup> Cfr. Cristina Rodriguez, *Noncitizen Voting and the Extraconstitutional Construction of the Polity*, in 8 *INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW* (2010), 30; Rainer Bauböck, *Global Justice, Freedom of Movement and Democratic Citizenship*, in *EUROPEAN JOURNAL OF SOCIOLOGY* (2009), 1. See also Dahl (supra note 1), 22-23 who then advances at 76 the normative claim that “except on very strong showing to the contrary in rare circumstances, protected by law, every adult subject to the laws of the state should be considered to be sufficiently well qualified to participate in the democratic process of governing the state”.

EU Member State in which they reside permanently, because they are either nationals of another EU Member States or of a non-EU country.<sup>4</sup>

In Europe, three levels<sup>5</sup> of norms and institutions for the protection of human rights coexist:<sup>6</sup> fundamental rights are recognized and shielded (i) at the national level,<sup>7</sup> (ii) in the EU legal order (where the European Court of Justice – ECJ operates)<sup>8</sup> and (iii) finally through the mechanisms set up by the Council of Europe – the Human Rights Convention (ECHR) and its Court (ECtHR).<sup>9</sup> Although the overlap of these layers of fundamental rights aims at increasing the protection of the individual, there may be circumstances, however, in which the European three-tiered structure may generate inconsistencies. This paper will argue that in the field of voting rights such problems have materialized: in particular, it will be maintained that the rules on voting rights for non-citizens that exist in the three different levels of the European human rights architecture are in reciprocal tension and produce unexpected shortcomings.

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<sup>4</sup> Concepts such as ‘citizenship’ and ‘alienage’ and their definition have been object of much literary work (both in law, politics, sociology and philosophy). For a general overview see: Lucien Jaume, *Citoyenneté*, in *DICTIONAIRE DE PHILOSOPHIE POLITIQUE* ad vocem (1996), 80; Will Kymlicka, *Citizenship*, in *ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY* vol. 2 ad vocem (1998), 362; Carlo Amirante, *Cittadinanza (teoria generale)*, in *ENCICLOPEDIA GIURIDICA TRECCANI* vol. 6 ad vocem (2003), 1. In the paper, thus, ‘nationality’ will be regarded essentially as a synonym for (possession) of ‘national citizenship’ of a EU State – i.e. a *status* from which follows a number of legal privileges and most notably political rights: for the historical rationale of the distinction between ‘citizenship’ and ‘nationality’ see further the literature quoted *infra* in note 11. Cfr. also Linda Bosniak, *Persons and Citizens in Constitutional Thought*, in 8 *INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW* (2010), 9.

<sup>5</sup> On the concept of multilevel constitutionalism see the work of Ingolf Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam*, in 36 *COMMON MARKET LAW REVIEW* (1999), 703; *Multilevel Constitutionalism in the European Union*, in 27 *EUROPEAN LAW REVIEW* (2002), 511; and lastly, *The Treaty of Lisbon. Multilevel Constitutionalism in Action*, in 15 *COLUMBIA JOURNAL OF EUROPEAN LAW* (2009), 349.

<sup>6</sup> The literature on multilevel protection of fundamental rights in Europe is vast, see among many: *DIRITTI E COSTITUZIONE NELL’UNIONE EUROPEA* (Gustavo Zagrebelsky ed., 2003); *TUTELA DEI DIRITTI FONDAMENTALI E COSTITUZIONALISMO MULTILIVELLO* (Antonio D’Atena et al. eds., 2004); *I DIRITTI IN AZIONE* (Marta Cartabia ed., 2007); Nico Krisch, *The Open Architecture of European Human Rights Law*, in 71 *MODERN LAW REVIEW* 2 (2008), 183; AIDA TORRES PÉREZ, *CONFLICTS OF RIGHTS IN THE EU: A THEORY OF SUPRANATIONAL ADJUDICATION* (2009).

<sup>7</sup> It should be kept in mind that, contrary to what occurs in the US, in Europe with the term ‘national’ reference is made to the States’ level of government, whereas the EU quasi-‘federal’ level of public authority is commonly defined with the term ‘supranational’. The constitutional scholarship on the protection of fundamental rights is broad in any European State. See, e.g., MAURO CAPPELLETTI, *LA GIURISDIZIONE COSTITUZIONALE DELLE LIBERTÀ* (1955); ROBERT ALEXY, *THEORIE DER GRUNDRECHTE* (1986); LOUIS FAVOREU, *DROITS DES LIBERTÉS FONDAMENTALES* (2000); MICHEL TROPER & FRANCIS HAMON, *DROIT CONSTITUTIONNEL* (2007, 30<sup>th</sup> ed.); *I DIRITTI FONDAMENTALI* (Augusto Barbera & Andrea Morrone eds., 2010).

<sup>8</sup> See *THE EU AND HUMAN RIGHTS* (Philip Alston ed., 1999); Armin Von Bogdandy, *The European Union as a Human Rights Organization? Human Rights at the Core of the European Union*, in 37 *COMMON MARKET LAW REVIEW* (2000), 1307; Koen Lenaerts & Eddy de Smijter, *A Bill of Rights for the European Union*, in 38 *COMMON MARKET LAW REVIEW* (2001), 273.

<sup>9</sup> See *A EUROPE OF RIGHTS* (Helen Keller & Alec Stone Sweet eds., 2008); Luzius Wildhaber, *A Constitutional Future for the European Court of Human Rights?*, in 23 *HUMAN RIGHTS LAW REVIEW* (2002), 161; Sionaidh Douglas-Scott, *A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis*, in 43 *COMMON MARKET LAW REVIEW* (2006), 629.

As the essay will claim, the formal and substantive transformations that are currently taking place in legislation at the national and supranational level and in the case law of the European courts show only a limited capacity to overcome these inconsistencies. As such, a more structured solution to the problem seems necessary and the paper will attempt to advance some proposals to enhance the current state of affairs. To this end, the essay will develop a comparison with the United States (US). As will be argued, indeed, the European experience is by no way unique: on the contrary, analyzing the history of electoral rights and citizenship in the US constitutional system may represent an extremely valuable methodological tool to deepen the academic understanding of the European voting rights system and possibly to advance several normative proposals to reform the European legal architecture.

The paper will hence be structured as follows. Section 2 will outline the legal framework of voting rights in the European multilevel system of human rights protection, specifically assessing the positions of national, EU and ECHR law on the question of the enfranchisement of non-citizens. Section 3 will deal with the distinct but related problems of voting rights for expatriates and for third-country nationals, highlighting how the overlap of different layers of human rights protection generates inconsistencies and calls for reform. Section 4 will focus on the ongoing European legal transformations and assess whether developments in the law in the books and the law in action can bring about coherence in the issue of voting rights for non-citizens. Section 5 will analyze in a comparative perspective the US dual citizenship experience and, finally, section 6 will advance several normative conclusions *de jure condendo*.

## **2. Electoral rights in the European multilevel system**

In Europe, all post-World War II democratic Constitutions base their legitimacy on the people and hence enshrine a fundamental right to vote.<sup>10</sup> However, whereas the link between citizenship and franchise finds a strong historical basis,<sup>11</sup> significant variations exist among States on the question of voting rights for non-citizens.<sup>12</sup> The enfranchisement of aliens is indeed a reflection of traditions of political and social inclusion and “is rooted in

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<sup>10</sup> In his celebrated sociological theory of citizenship, THOMAS MARSHALL, *CITIZENSHIP AND SOCIAL CLASS* (1950) argued that political rights (i.e. voting rights) were the second wave of entitlements that the people obtained *vis à vis* the State in the course of the XIX century, after the acquisition of civil rights in the XVIII century liberal revolutions and before the conquest of social rights during the XX century. Cfr. also for a legal and historical approach LUIGI FERRAJOLI, *I DIRITTI FONDAMENTALI* 23 ff (2001); PIETRO COSTA, *CITTADINANZA* (2005).

<sup>11</sup> Since the French Revolution, as highlighted by Michel Troper, *The Concept of Citizenship in the Period of the French Revolution*, in *EUROPEAN CITIZENSHIP: AN INSTITUTIONAL CHALLENGE* (Massimo La Torre ed., 1998), 27. Indeed, during the XIX century the distinction between ‘citizenship’ and ‘nationality’ was precisely useful for the purpose of defining that privileged class of individuals who, amidst the nationals of a State, enjoyed full political rights (i.e. the citizens). See Benoit Guiget, *Citizenship and Nationality: Tracing the French Roots of the Distinction*, in *EUROPEAN CITIZENSHIP: AN INSTITUTIONAL CHALLENGE* (Massimo La Torre ed., 1998), 95.

<sup>12</sup> See Virgine Giraudon, *Citizenship Rights for Non-Citizens*, in *CHALLENGE TO THE NATION-STATE* (Christian Joppke ed., 1998) 272. For an assessment of the evolution of non-citizens rights in a comparative perspective see Christian Joppke, *The Evolution of Alien Rights in the United States, Germany and the European Union*, in *CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES* (Alexander Aleinikoff et al. eds., 2001), 36.

the political culture of the respective countries.”<sup>13</sup> Hence, in the last half century, a number of European countries have adopted legislative measures enabling foreigners to participate in the electoral process at the local level. Many States, on the contrary, have not enfranchised aliens at all. In some EU countries, in addition, voting rights are constitutionally restricted to nationals and any attempt to expand the franchise to non-citizens requires the burdensome process of constitutional amendment.<sup>14</sup>

To name but few examples, in two 1990 decisions, the German *Bundesverfassungsgericht*<sup>15</sup> quashed the bills adopted by two *Länder* allowing foreign residents to take part in local (and *Land*) elections arguing that the constitutional concept of ‘*Volk*’ [people] ought to be interpreted as restricting voting rights only to German nationals.<sup>16</sup> At the opposite end of the spectrum lies instead the United Kingdom (UK), which grants voting rights to selected classes of resident aliens not only at the local level but also in general elections. In fact, participation in Westminster elections is ensured to all Commonwealth citizens as well as to Irish citizens residing in the UK.<sup>17</sup> To reciprocate, Ireland adopted in 1984 a constitutional revision bill<sup>18</sup> which, by overruling a contrary opinion of the Supreme Court,<sup>19</sup> allowed UK citizens to cast their votes for the Irish

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<sup>13</sup> Ulrich Preuss, Michelle Everson, Mathias Koenig-Archibugi & Edwige Lefebvre, *Traditions of Citizenship in the European Union*, in 7 *CITIZENSHIP STUDIES* (2003), 3, 8. See also Rogers Smith, *Citizenship and the Politics of People-Building*, in 5 *CITIZENSHIP STUDIES* (2001), 73; Linda Bosniak, *Constitutional Citizenship Through the Prism of Alienage*, in 63 *OHIO STATE LAW JOURNAL* 5 (2002) 1285.

<sup>14</sup> Currently, among the 27 Member States of the EU 15 extended the franchise at the local level to (at least some classes of) non-EU citizens: Belgium, Denmark, Estonia, Finland, Hungary, Ireland, Lithuania, Luxembourg, the Netherlands, Portugal, Slovenia, Slovakia, Spain, Sweden and the United Kingdom. See for a detailed examinations of the issue JO SHAW, *THE TRANSFORMATION OF CITIZENSHIP IN THE EUROPEAN UNION: ELECTORAL RIGHTS AND THE RESTRUCTURING OF THE POLITICAL SPACE* 76 ff (2007) and also Giovanna Zinconè & Simona Ardovino, *I diritti elettorali dei migranti nello spazio politico e giuridico europeo*, in *LE ISTITUZIONI DEL FEDERALISMO* 5 (2004), 741.

<sup>15</sup> German Constitutional Court BVerfG 63, 37 (Schleswig-Holstein); BVerfG 63,60 (Hamburg) – decisions of 31 October 1990.

<sup>16</sup> See Gerald Neuman, *“We Are the People”: Alien Suffrage in German and American Perspective*, in 13 *MICHIGAN JOURNAL OF INTERNATIONAL LAW* (1991-1992), 259 and Ruth Rubio Marin, *Equal Citizenship and the Difference that Residence Makes*, in *EUROPEAN CITIZENSHIP: AN INSTITUTIONAL CHALLENGE* (M. La Torre ed., 1998), 201, 210 ff.

<sup>17</sup> See S. 1 Representation of the People Act 2000 stating that a person is entitled to vote as an elector at a Parliamentary and local government election if he/she resides in the UK and “[...] c) is either a Commonwealth citizen or a citizen of the Republic of Ireland”. In the literature see Heather Lardy, *Citizenship and the Right to Vote*, in 17 *OXFORD JOURNAL OF LEGAL STUDIES* (1997), 75, 77-78; Shaw (supra note 14), 201.

<sup>18</sup> IX Amendment to the Constitution modifying Art. 16(1.2) to ensure that “(i) All citizens, and (ii) such other persons in the State as may be determined by law, without distinction of sex who have reached the age of eighteen years who are not disqualified by law and comply with the provisions of the law relating to the election of members of the House of Representatives, shall have the right to vote at an election for members of the House of Representatives”. The constitutional provision was implemented through the adoption of S. 2 Electoral (Amendment) Act 1985 which expressly extended voting rights for Parliamentary elections to “British citizen[s]”. In the literature see K. Tung, *Voting Rights for Alien Residents: Who Wants it?*, in 19 *INTERNATIONAL MIGRATION REVIEW* (1985), 451; Shaw (supra note 14), 203.

<sup>19</sup> Irish Supreme Court, *In re Matter of Art. 26 of the Constitution and in the Matter of the Electoral (Amendment) Bill 1983 [SC No. 373 of 1983]* IR 268.



legislative assembly. Voting rights at the local level, then, are recognized in Ireland to all foreigners.<sup>20</sup>

Given its importance for the establishment of a well functioning democracy, the right to free elections is also codified in the ECHR<sup>21</sup> - an international document which aims at establishing Europe-wide a hard core of fundamental rights that Contracting Parties must ensure *vis à vis* any individual (citizens and foreigners alike) falling under their jurisdiction.<sup>22</sup> Revealingly, Art. 3 of the 1<sup>st</sup> additional Protocol to the ECHR states that the Contracting Parties shall organize free elections “at reasonable intervals, by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature”, without imposing any limitation of the franchise to citizens. Nevertheless, Art. 16 of the ECHR expressly allows for the restriction of the political activities of aliens<sup>23</sup> and traditionally a wide margin of appreciation has been acknowledged by the ECtHR to the Contracting Parties on voting rights issues.<sup>24</sup>

In 1992, a separate Convention was negotiated within the Council of Europe with the aim, made clear in the Preamble, of improving the integration of foreign residents into the local community, “especially by enhancing the possibilities for them to participate in local public affairs”. Art. 6 of the Convention on the Participation of Foreigners in Public Life at the Local Level (CPFPL) therefore requires Contracting Parties to grant aliens who have been resident for 5 years in a State, the right to vote (and, possibly: the right to stand) in local government elections.<sup>25</sup> Although the CPFPL “contains the first unambiguous statement in international law upholding the rights of non-nationals residents to vote in local elections,”<sup>26</sup> however, only a few EU countries have ratified and domestically enforced the treaty so far and some have even adopted reservations and derogations on Art. 6, hence depriving the CPFPL of most of its innovative significance.<sup>27</sup>

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<sup>20</sup> See *supra* note 14.

<sup>21</sup> See Susan Marks, *The European Convention on Human Rights and its “Democratic Society”*, in BRITISH YEARBOOK OF INTERNATIONAL LAW (1995), 209 and H.M. ten Napel, *The European Court of Human Rights and Political Rights: the Need for More Guidance*, in 5 EUROPEAN CONSTITUTIONAL LAW REVIEW (2009), 464.

<sup>22</sup> See ANTONIO CASSESE, I DIRITTI UMANI OGGI 107 ff (2005) and Ernst-Ulrich Petersmann, *Human Rights and ‘Constitutional Justice’ Require Citizen-oriented Adjudication in International Economic Law*, in 20 EUROPEAN JOURNAL OF INTERNATIONAL LAW (2008), 1.

<sup>23</sup> Federico Casolari, *La partecipazione dello straniero alla vita pubblica locale*, in DIRITTO EUROPEO DELL’IMMIGRAZIONE (Marcello Di Filippo et al. eds., 2009), 2.

<sup>24</sup> See *Mathieu-Mohin and Clerfayt v. Belgium* [1987], Application No. 9267/81; *Sante Santoro v. Italy* [2004], Application No. 36681/97; *Py v. France* [2005], Application 66289/01. For a structural analysis of the case law of the ECtHR on Art. 3 Protocol No. 1 see ten Napel (*supra* note 21), 468.

<sup>25</sup> Casolari (*supra* note 23), 5.

<sup>26</sup> Shaw (*supra* note 14), 66.

<sup>27</sup> Currently only 8 States have duly ratified the CPFPL (5 of these are Member States of the EU): Albania, Denmark, Finland, Iceland, Italy, the Netherlands, Norway, Sweden. See Zincone & Ardovino (*supra* note 14), 743.

Voting rights are recognized at the EU level as well.<sup>28</sup> Ever since the decision to elect the EU Parliament by direct universal suffrage in 1979,<sup>29</sup> the citizens of the EU Member States have *de facto* been endowed with new rights of political representation in the supranational sphere. With the enactment of the Maastricht Treaty, however, electoral rights have been given a novel significance under the new heading of EU citizenship.<sup>30</sup> Art. 17 of the European Community Treaty (TEC) affirmed in fact that “every person holding the nationality of a Member State [should] be a citizen of the Union. Citizenship of the Union [should] complement and not replace national citizenship”. And today, with a similar but somewhat innovative language,<sup>31</sup> Art. 9 EU Treaty (TEU) – inserted by the Lisbon Treaty – states that “every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it”.

Among the privileges attached to the possession of EU citizenship electoral rights feature prominently, together with the right of free movement.<sup>32</sup> Citizens of EU Member States have the right not to be discriminated on the basis of nationality in voting and standing as candidates at both municipal elections and EU Parliament elections in the Member State of residence, when this differs from the citizens’ Member State of nationality<sup>33</sup>. According to Art. 22(1) of the Treaty on the Functioning of the European Union (TFEU) – which has replaced, since 1<sup>st</sup> December 2009, Art. 19(1) TEC – “every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State.” Art. 22(2) TFEU [ex Art. 19(2) TEC] then restates the very same rule with regard to EU Parliament elections.

The detailed arrangements and derogations for the exercise of the right to vote and to stand as a candidate in EU Parliament and local elections for EU citizens residing in a Member State of which they are not nationals are contained in Directives 93/109<sup>34</sup> and

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<sup>28</sup> See Siofra O’Leary, *The Relationship Between Community Citizenship and the Protection of Fundamental Rights in Community Law*, in 32 COMMON MARKET LAW REVIEW (1995), 519; Heather Lardy, *The Political Rights of Union Citizenship*, in 2 EUROPEAN PUBLIC LAW 4 (1996), 611; Maria Fraile Ortiz, *Citizenship in Europe – Consequences of Citizenship*, in 19 EUROPEAN REVIEW OF PUBLIC LAW 1 (2007), 125.

<sup>29</sup> Council Decision 76/787, OJ 1976 L278/5.

<sup>30</sup> See Marta Cartabia, *Cittadinanza europea*, in ENCICLOPEDIA GIURIDICA TRECCANI vol. 6 ad vocem (1995), 1; Flora Goudappel, *From National Citizenship to European Union Citizenship: the Re-Invention of Citizenship?*, in 19 EUROPEAN REVIEW OF PUBLIC LAW 1 (2007), 21; Dora Kostakopoulou, *European Union Citizenship: Writing the Future*, in 13 EUROPEAN LAW JOURNAL 5 (2007), 623.

<sup>31</sup> See *infra* note 138.

<sup>32</sup> See Sabino Cassese, *La cittadinanza europea e le prospettive di sviluppo dell’Europa*, in RIVISTA ITALIANA DI DIRITTO PUBBLICO COMUNITARIO 5 (1996), 869; George Bermann, *European Citizenship at Center-Stage: Introduction*, in 15 COLUMBIA JOURNAL OF EUROPEAN LAW (2009), 165. The literature on free movement rights of EU citizens is very broad. See among many: Norbert Reich, *The Constitutional Relevance of Citizenship and Free Movement in an Enlarged Union*, in 11 EUROPEAN LAW JOURNAL 6 (2005), 675; Siofra O’Leary, *Developing an Ever Closer Union Between the Peoples of Europe? A Reappraisal of the Case Law of the Court of Justice on the Free Movement of Persons and EU Citizenship*, in YEARBOOK OF EUROPEAN LAW (2008), 167.

<sup>33</sup> Dimitry Kochenov, *Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights*, in 15 COLUMBIA JOURNAL OF EUROPEAN LAW (2009), 169, 197 ff.

<sup>34</sup> OJ 1993 L329/34.

94/80<sup>35</sup> adopted unanimously by the Council after consulting the EU Parliament, as specified by Art. 19 TEC [now Art. 22 TFEU]. As the recitals of the two directives acknowledge, electoral rights are part of the EU tasks to “organize, in a manner demonstrating consistency and solidarity, relations between the peoples of the Member States”<sup>36</sup> and are “a corollary of the right to move and reside freely enshrined in [the EU] Treaty.”<sup>37</sup> The aim of these provisions “is essentially to abolish the nationality requirement to which most Member States currently make the exercise of the right to vote and to stand as a candidate subject;”<sup>38</sup> their operation, however, is without prejudice “for the right to vote and to stand as a candidate in the Member State of which the citizen is a national.”<sup>39</sup>

On technical grounds,<sup>40</sup> the two directives specify that EU citizens can exercise the right to vote in the Member State of residence if they have expressed the wish to do so simply by producing a formal declaration. Appropriate measures can be adopted by the Member States to avoid the individual concerned voting twice and to ensure that he has not been deprived of the right to vote in his home Member State. Applications to stand as a candidate, then, are subject to the same conditions applying to candidates who are nationals. To address the specific concerns of some EU countries, nonetheless, the directives recognize that the right to stand for the head of the local government unit can be restricted to nationals.<sup>41</sup> Voting rights both in local and EU elections may be subject, moreover, to specific residency requirements in those States in which the proportion of non-national citizens of the Union of voting age exceeds 1/5 of the electoral population.<sup>42</sup>

Therefore, as EU primary and secondary legislation makes clear, the progressive steps taken to enhance European political integration have had relevant consequences on the issue of voting rights.<sup>43</sup> By being awarded the *status* of EU citizens, the nationals of the EU Member States have acquired a supplementary voice in the electoral process. Although the TEU provisions dealing with voting rights in municipal and EU Parliament elections are technically framed as non-discrimination clauses, their effect is to endow EU citizens with the right to vote and to stand for elections at the local as well as at the supranational level in

<sup>35</sup> OJ 1994 L368/38.

<sup>36</sup> Recital 1, Council Directive 93/109; Recital 1, Council Directive 94/80.

<sup>37</sup> Recital 3, Council Directive 93/109; Recital 3, Council Directive 94/80.

<sup>38</sup> Recital 4, Council Directive 94/80. See also with a similar language recital 4, Council Directive 93/109.

<sup>39</sup> Recital 7, Council Directive 93/109; Recital 6, Council Directive 94/80.

<sup>40</sup> For a detailed analysis and critical assessment of the content of the two directives see Cartabia (supra note 30), 8 ff and Epaminondas Marias, *European Citizenship in Action: From Maastricht to the Intergovernmental Conference*, in EUROPEAN CITIZENSHIP: AN INSTITUTIONAL CHALLENGE (Massimo La Torre ed., 1998), 293.

<sup>41</sup> See Art. 5, Council Directive 94/80. This provisions was specifically adopted to address the concerns of France. See BERTAND MATHIEU & MICHEL VERPEAUX, *DROIT CONTITUTIONNEL* (2004), 460 and further note 84 *infra*. According to Marias (supra note 40), 300, however, such derogation is “contrary to the case law of the ECJ [...] which prohibits any discrimination based on nationality” (quoting Case C-92/92 *Collins* [1993] ECR I-5145).

<sup>42</sup> See Art. 14, Council Directive 93/109 (and, with a similar language, Art. 12, Council Directive 94/80). These provisions were specifically adopted to address the concerns of Luxembourg. See however the critical comments of Kochenov (supra note 33), 204.

<sup>43</sup> Cartabia (supra note 30), 7; Lardy (supra note 28), 612; Shaw (supra note 14), 25 ff. For a more general discussion see also Linda Bosniak, *Citizenship Denationalized*, in 7 INDIANA JOURNAL OF GLOBAL LEGAL STUDIES (1999-2000), 447.

their country of residence, their nationality notwithstanding.<sup>44</sup> Moreover, unlike the provisions of the CPFPL,<sup>45</sup> these rights are directly effective in all Member States (subject to the arrangements and the derogations set out in the directives mentioned above) and prevail over contrasting national law, including constitutional law.

In the end, as this short outline illustrates, the picture of voting rights for non-citizens in the European multilevel system of human rights protection is quite intricate. The legislation of European countries differs greatly on the matter and whereas some States enfranchise aliens even for national elections, others deem any extension of the suffrage beyond the citizenry unconstitutional. The international human rights norms provide only limited guidance on this issue: on the one hand, the exclusion of foreigners from the political process is regarded as acceptable by the ECHR; the CPFPL, however marks a “steps towards enhancing the political participation rights of non-nationals.”<sup>46</sup> The EU, finally, adds a new layer of complexity<sup>47</sup> to the picture by recognizing that nationals of one of the EU Member States may vote and stand for local and EU Parliament elections in their country of residence (even) when this is not their country of nationality.

### 3. The problem of inconsistency

Although the existence of three sets of human rights’ norms and institutions in Europe has significantly increased the protection of the individual and his fundamental liberties, there may be circumstances in which such an overlap can be problematic.<sup>48</sup> The concept of ‘inconsistency’ will be advanced here to describe the empirical setbacks that emerge when the different layers of the European multilevel human rights architecture have complex overlapping rules in tension or dissonance with each other. Indeed, as it has been written, in the field of voting rights, especially the development of citizenship and electoral rights at the EU level “has given rise to some inconsistencies and disruptions in national franchise systems.”<sup>49</sup> To highlight this claim, the cases of voting rights for EU citizens expatriated in another EU Member State and for third-country nationals permanently residing in the EU will be addressed in sub-sections 1 and 2 below.

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<sup>44</sup> Kochenov (supra note 33), 203; Shaw (supra note 14), 172. This interpretation has been confirmed by Advocate General Tizzano in his Opinion in Cases C-145/04 *Spain v. UK* and C-300/04 *Eman & Sevinger* [2006] ECR I-7917 § 67-68.

<sup>45</sup> Casolari (supra note 23), 5.

<sup>46</sup> Shaw (supra note 14), 65.

<sup>47</sup> See Edoardo Chiti, *Consequences of Citizenship in Europe: Are New Layers of Complexities Emerging?*, in 19 EUROPEAN REVIEW OF PUBLIC LAW 1 (2007), 99.

<sup>48</sup> Torres Pérez (supra note 6), 12-13. See also David O’Keffe & Antonio Bavasso, *Fundamental Rights and the European Citizen*, in EUROPEAN CITIZENSHIP: AN INSTITUTIONAL CHALLENGE (Massimo La Torre ed., 1998), 251 who underline how “the fragmentation of the [European ‘composite’] system constitutes a major problem in developing a coherent and effective European judicial protection of fundamental rights.”

<sup>49</sup> Anja Lansbergen & Jo Shaw, *National Membership Models in a Multilevel Europe*, in 8 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW (2010), 50, 62.

### 3.1 Electoral rights of EU citizens

The exercise of voting rights for the citizens of the EU Member States can be severely affected by the overlap of the provisions on EU citizenship and national electoral rules.<sup>50</sup> As underlined in the previous section, the nationals of the EU Member States are, *iure tracto*,<sup>51</sup> citizens of the EU: among the privileges connected to this *status* stand prominently the rights to vote and run as candidates in the municipal and EU Parliament elections of the country of residency (when this is not their country of nationality) under the same conditions as nationals of that State.<sup>52</sup> In the literature, voting rights are commonly regarded “as the core of EU citizenship because, through them, individuals benefit of a new set of ‘political rights’.”<sup>53</sup>

EU citizens who reside in a EU country of which they are not nationals are granted in the Member State of residence “the right to participate in politics by way of elections (both actively and passively) at two of at least three vital levels of political representation:”<sup>54</sup> aliens holding the nationality of a EU Member State may in fact vote in the EU country in which they reside for local and supranational elections, but not national elections.<sup>55</sup> Although the institution of EU-wide electoral rights aimed at putting flesh on the bones of EU citizenship<sup>56</sup> by creating a common core of fundamental privileges for the nationals of the EU Member States everywhere they resided within the EU territory,<sup>57</sup> the current multilevel electoral arrangement presents several limits.

A first complication arises because, “in the absence of a universal Community law definition of ‘municipal’, the practical application of Art. 22(1) TFEU [ex Art. 19(1) TEC] *de facto* results in numerous inconsistencies, since what some Member States view as ‘municipal’ can easily fall within the meaning of ‘national’ in others.”<sup>58</sup> Thus, whereas Germany and Austria restrict to nationals the right to vote in *Länder* elections, the UK allows citizens from other EU Member States to cast a ballot even for the devolved legislatures of Scotland, Wales and Northern Ireland.<sup>59</sup> It has been affirmed that these

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<sup>50</sup> Dimitry Kochenov, *Free Movement and Participation in the Parliamentary Elections in the Member State of Nationality: an Ignored Link?*, in 16 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 2 (2009), 197.

<sup>51</sup> Kochenov (supra note 33), 181.

<sup>52</sup> See *supra* text accompanying note 33.

<sup>53</sup> Cartabia (supra note 30), 7. See also Lardy (supra note 28), 612.

<sup>54</sup> Kochenov (supra note 50), 207.

<sup>55</sup> Lardy (supra note 28), 626; Fraile Ortiz (supra note 28), 128; Shaw (supra note 14), 195.

<sup>56</sup> Following the well-known expression of Siofra O’Leary, *Putting Flesh on the Bones of EU Citizenship*, in 24 EUROPEAN LAW REVIEW (1999), 68 (who however was stressing the fundamental role of the ECJ in making the concept of EU citizenship meaningful). See also Chris Hilson, *What’s In a Right? The Relationship Between Community, Fundamental and Citizenship Rights in EU Law*, in 29 EUROPEAN LAW REVIEW (2004), 636, 649.

<sup>57</sup> As famously affirmed by Advocate General Jacobs in his Opinion in Case C-168/91 *Konstantinidis* [1993] ECR I-1191, § 47 stating that “a Community national [is...] entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values, in particular those laid down in the ECHR. In other words, he is entitled to say ‘*civis europeus sum*’ and to invoke that *status* in order to oppose any violation of his fundamental rights.”

<sup>58</sup> Kochenov (supra note 50), 209.

<sup>59</sup> Recital 7, Council Directive 94/80 acknowledges that “the term ‘municipal election’ does not mean the same thing in every Member State” and Annex I to the Directive contains a list of the local government units which

differences between national rules result “in notable discrepancies between the rights enjoyed by European citizens in different Member States, harming the idea of equality among citizens.”<sup>60</sup> Indeed, it seems that the *status* of EU citizen does not carry equal electoral rights in every Member State: rather, its content varies depending from the national laws in force.

The major difficulty, however, is generated by the absence of an EU right to vote in general elections in the Member State of residence when coupled with the national provisions denying expatriate voting. As said, while EU citizens residing in a Member States other than their own can vote and stand as candidate in the local and EU Parliament elections, the national level of political representation in the Member State of residence is left uncovered by EU law.<sup>61</sup> From the perspective of public international law, this state of affairs is acceptable:<sup>62</sup> it was mentioned early on that the ECHR leaves to the States the discretion whether to extend political rights to non-citizens and while some European countries (notably: the UK and Ireland) have decided autonomously to enfranchise some classes of foreigners even for Parliamentary elections, the vast majority of EU States restrict voting rights for aliens at the local level or exclude them *tout court*.<sup>63</sup>

As long as EU Member States allow for expatriate voting, then, the lack of EU provisions establishing a right to vote in national elections in the Member State of residency for the individuals who reside abroad is compensated by the possibility for them to take part in the choice of the legislature in their Member State of nationality.<sup>64</sup> With the aim of emphasizing the link which should exist between an individual and the community mainly affecting his interests, it has been rightly affirmed that “the country of residence [should be] primarily responsible for the inclusion of its resident population [and that] the country of origin should arguably not bear the obligation to make up for it by allowing emigrants [...] to decide the political future of those who stayed behind.”<sup>65</sup> As unsatisfactory as it may be, nonetheless, the possibility to cast an absentee ballot allows at least the persons concerned to express a voice in the election of one national legislature.<sup>66</sup>

The problem arises, on the contrary, for those EU Member States who disenfranchise voters who no longer reside in the State or who have ceased to be resident for a number of

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according to the electoral laws of the Member States follow within the scope of application of Art. 22(1) TFUE [ex Art. 19 TEC].

<sup>60</sup> Kochenov (supra note 50), 209.

<sup>61</sup> Kochenov (supra note 33), 199. See also Shaw (supra note 14), 195 who argues that it is “wholly inconsistent for the EU and the Member States to preserve those participation-rights by means of non-discrimination rights instituted at EU level under Art. 19 TEC in relation to *local* and *European* electoral rights whilst ignoring the impact upon democratic participation in *national* elections” (emphasis in the original).

<sup>62</sup> ten Napel (supra note 21).

<sup>63</sup> See supra note 14.

<sup>64</sup> Shaw (supra note 14), 197.

<sup>65</sup> Ruth Rubio Marin, *Transnational Politics and the Democratic Nation-State: Normative Challenges of Expatriate Voting and Nationality Retention of Immigrants*, in 81 NEW YORK UNIVERSITY LAW REVIEW (2006), 117, 130-131.

<sup>66</sup> Shaw (supra note 14), 197.

consecutive years.<sup>67</sup> Certainly, the decision of States to withhold the right to vote from their citizens who live abroad is closely linked to the history and the political culture of the given State.<sup>68</sup> Perhaps, countries who have traditionally been a place of emigration, or with large minority groups dislocated outside the national borders, could be more favourable to preserving ties with the overseas communities than States of immigration.<sup>69</sup> Hence, e.g., although Italy does not recognize voting rights for foreign residents even at the local level, its Constitution has recently been amended to ensure greater representation in both chambers of Parliament of the *'italiani all'estero'* [Italians living abroad].<sup>70</sup> The opposite rule exists instead in the UK where citizens lose their voting rights after 15 years of continuous residence outside the British territory.<sup>71</sup>

The legal or factual impossibility of casting an absentee vote in several EU Member States, however, generates a paradox: EU citizens who reside abroad, while gaining the right to vote at the municipal and supranational level in their country of residence, are disenfranchised for national elections.<sup>72</sup> This situation seems inconsistent under a plurality of approaches. From an internal market perspective individuals should not be forced to trade away their right to political representation at the State level in order to exercise free movement rights and participate, their alienage notwithstanding, in the local political life of another Member State: Indeed, as it has been written, “instead of benefiting from both free-movement and national political representation rights, [EU citizens] are facing an impossible choice”<sup>73</sup>.

Also from the constitutionalist point of view which I am following in this essay, however, this state of affairs is problematic as the national disenfranchisement of EU citizens expatriated in another EU Member State is in tension with the new supranational normative arrangement and “the creation of a new form of citizenship under the auspices of the [EU].”<sup>74</sup> Since the purpose of EU electoral rights is to allow EU citizens to participate in political life and express their voice in elections even when they reside outside their country of nationality, the impossibility to cast a vote in general election “highlights the [...] tension between national constitutional models and the models of democratic inclusion

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<sup>67</sup> According to Kochenov (supra note 50), 201 currently 7 EU countries deny expatriate voting (some, after a number of years abroad): Cyprus, Greece, Ireland, Hungary, Malta, Slovakia, the United Kingdom.

<sup>68</sup> Rubio Marin (supra note 65), 122.

<sup>69</sup> This may not always be the case though, and different reasons may explain why several Member States restrict expatriate voting while other support it. Cfr. VOTING FROM ABROAD: HANDBOOK ON EXTERNAL VOTING (2007).

<sup>70</sup> See Artt. 1 and 2 Constitutional Revision Bill 1/2001 modifying Artt. 56 and 57 of the Constitution to ensure that 12 deputies and 6 senators be elected “nella circoscrizione Estero”. See Valerio Onida, *Relazione Introduttiva*, in ATTI DEL CONVEGNO ANNUALE DELL'ASSOCIAZIONE ITALIANA DEI COSTITUZIONALISTI: “LO STATUTO COSTITUZIONALE DEL NON CITTADINO”, CAGLIARI 16-17 OTTOBRE 2009 (2010).

<sup>71</sup> Kochenov (supra note 50), 213.

<sup>72</sup> Lardy (supra note 28), 622; Kochenov (supra note 50), 199.

<sup>73</sup> Kochenov (supra note 50), 223.

<sup>74</sup> Sujit Choudhry & Cheryl Saunders, *Symposium of Citizenship: Foreword*, in 8 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW (2010), 6.

required by the goal of European citizenship.”<sup>75</sup> It appears therefore that some further legal developments are necessary to solve this puzzle.

### *3.2. Electoral rights for third-country nationals*

Problems also afflict the right to vote of long-term resident third-country nationals (i.e. individuals holding the nationality of a non EU Member State and permanently residing within the EU).<sup>76</sup> It was highlighted in the previous section that while some European countries have adopted legislations or ratified international agreements (such as the CPFPL) that enfranchise non-citizens in local elections, many EU Member States still restrict the suffrage to citizens.<sup>77</sup> The arguments advanced in these countries to disenfranchise aliens – either based on an ethnic concept of ‘people’<sup>78</sup> or on a republican ideal of citizenship<sup>79</sup> – nevertheless, lose much of their strength and become difficult to justify in light of the impact of EU law.<sup>80</sup> Indeed, “once a Member State has opened its polling stations to Union citizens who lack its legal citizenship, what principled ground can it advance for refusing to consider the claims of other non-(legal) citizens to be admitted?”<sup>81</sup>

It is true that the provisions (establishing EU citizenship and granting voting rights to EU nationals in their country of residence) introduced by the Maastricht Treaty were of such significance that constitutional amendments were required in a number of Member States to ratify the pact.<sup>82</sup> Hence, e.g., Germany expressly introduced a clause allowing EU citizens to vote in local administrative elections in Art. 28 of its Fundamental Law<sup>83</sup> and France did the same in Art. 88-3 of its Constitution (where specific arrangements were also made to ensure that foreigners would not be allowed to “exercer les fonctions de maire ou d’adjoint ni participer à la désignation des électeurs sénatoriaux et à l’élection des sénateurs”).<sup>84</sup> Still, logically speaking, by extending the franchise to several groups of non-citizens (those coming from other EU Member States), these countries have compromised

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<sup>75</sup> Lansbergen & Shaw (supra note 49), 62. See also Kochenov (supra note 33), 201 who argues that “eligibility to vote and stand as candidates at the national elections in the Member State of residence [...] should logically be the ultimate goal of the development of European citizenship.”

<sup>76</sup> Kochenov (supra note 33), 233.

<sup>77</sup> See supra note 14.

<sup>78</sup> See Eniko Horvath & Ruth Rubio Marin, “Alles oder Nichts”? *The Outer Boundaries of the German Citizenship Debate*, in 8 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 1 (2010), 72, 87.

<sup>79</sup> Edwige Liliane Lefebvre, *Republicanism and Universalism: Factors of Inclusion or Exclusion in the French Concept of Citizenship*, in 7 CITIZENSHIP STUDIES 1 (2003), 15.

<sup>80</sup> Lardy (supra note 28), 627.

<sup>81</sup> Lardy (supra note 17), 99 who at 77 defines with the “term ‘legal citizens’ all those who comply with the law’s formula for the acquisition of that *status*”, i.e. those individual holding the formal nationality of the State concerned.

<sup>82</sup> See Cartabia (supra note 30), 9; Fraile Ortiz (supra note 28), 128.

<sup>83</sup> Shaw (supra note 14), 295.

<sup>84</sup> The constitutional revision was required by the decision of the Conseil Constitutionnel 92-308 DC (*Traité sur l’Unione Européenne*), §26-27. See also the decision 92-312 DC (*Loi autorisant la ratification du Traité sur l’Union Européenne*). In the literature see Mathieu & Verpeaux (supra note 41), 318.



the claims in favour of the purity of the electoral body and opened the door for the extension of the suffrage to other classes of non-citizens.<sup>85</sup>

What's more, even though the EU institutions currently lack express powers to regulate the issue of voting rights for third country nationals legally residing within the EU territory,<sup>86</sup> on the basis of the provisions of former Title V TEC Directive 2003/109 on the *status* of third-country nationals who are long-term residents was adopted in 2003.<sup>87</sup> This framework legislation extends to citizens coming from third countries many of the rights enjoyed by EU citizens (although with some exceptions, including voting rights),<sup>88</sup> on the assumptions that "both experience similar forms of dislocation when they reside in a State where they lack the nationality."<sup>89</sup> Even though the directive sets only a minimum standard that can be overcome by more favourable national provisions, indeed, "the principle underpinning this [act] is that domicile generates entitlements both in the forms of equalization of the treatment of third country nationals with nationals of the host Member State in socio-economic life and enhanced protection against expulsion as well as rights of mobility within the EU."<sup>90</sup>

In the light of these developments at the EU level, therefore, the disenfranchisements of non-citizen third-country nationals in some EU Member States generates asymmetries across Europe:<sup>91</sup> Indeed, citizens of non-EU countries who reside for 5 years in a EU Member State are automatically entitled to obtain long-term residence *status*; they enjoy a common core of rights; but, they can vote in local elections only if they happen to reside in a EU State which accords such right.<sup>92</sup> Although certainly EU law only sets a minimum standard for the treatment of aliens and it currently lacks the express powers to harmonize national legislations on electoral issues, it appears that greater coordination among the Member States would diminish the constitutional tensions that emerges from this account.<sup>93</sup> As of today, "it is regrettable, however, that there is no common approach in all EU Member States to this issue."<sup>94</sup>

Of course, several authors, with the purpose of emphasizing the link between citizenship and voting rights, have argued that instead of stressing the need for alien suffrage, citizenship should be made more easily available to third-country nationals

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<sup>85</sup> Kochenov (supra note 33), 227; Horvath & Rubio Marin (supra note 78), 87.

<sup>86</sup> Shaw (supra note 14), 217 ff.

<sup>87</sup> OJ 2004 L16/44. In the literature see Dora Kostakopoulou, "Integrating" Non-EU Migrants in the European Union: Ambivalent Legacies and Mutating Paradigms, in 8 COLUMBIA JOURNAL OF EUROPEAN LAW (2002), 181.

<sup>88</sup> Samantha Besson & André Utzinger, Introduction: Future Challenges of European Citizenship – Facing a Wide-Open Pandora's Box, in 13 EUROPEAN LAW JOURNAL 5 (2007), 573, 580; Goudappel (supra note 30), 41.

<sup>89</sup> Shaw (supra note 14), 236.

<sup>90</sup> Kostakopoulou (supra note 87), 198. *Ceteris paribus*, for an argument in favour of creating an International Bill of Rights for migrants cfr. also Alexander Aleinikoff, *International Legal Norms on Migration: Substance Without Architecture*, in INTERNATIONAL MIGRATION LAW (Ryszard Cholewinski et al. eds., 200), 467.

<sup>91</sup> Lardy (supra note 28), 627; Kochenov (supra note 33), 228.

<sup>92</sup> See Besson & Utzinger (supra note 88), 580; Kostakopoulou (supra note 30), 643 ff.

<sup>93</sup> Shaw (supra note 14), 232.

<sup>94</sup> Kochenov (supra note 33), 229.

permanently residing within the EU.<sup>95</sup> However, the EU currently has no power to directly grant EU citizenship to third-country nationals,<sup>96</sup> and, since “each State’s law is simultaneously based on juridical traditions, nation-State building, international influences and the role played by migration,”<sup>97</sup> EU countries differ significantly in the specification of the criteria necessary to acquire national citizenship (and, *iure tracto*, EU citizenship).<sup>98</sup> A tenet of international law is, after all, that the States are the sole authorities allowed to decide on what basis to grant their nationality.<sup>99</sup> EU law, then, is mute on the matter and the ECJ has confirmed that the Member States enjoy wide autonomy in the field.<sup>100</sup>

“Generally, citizenship can be acquired in any one of four ways: by descent (*jus sanguinis*), by birthplace (*jus soli*), by naturalisation or by registration.”<sup>101</sup> A detailed analysis of the legislation of the EU Member States is clearly beyond the scope of this essay:<sup>102</sup> it may be stressed though that while the *jus soli* principle is predominant in the UK<sup>103</sup> and Ireland and operates, in certain cases, in France<sup>104</sup> and Germany,<sup>105</sup> the *jus sanguinis* rule still prevails in continental Europe and Scandinavia.<sup>106</sup> Naturalization is available in all Member States but the number of residence years required and the additional conditions (e.g. knowledge of history or language, loyalty oath, good character

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<sup>95</sup> Lardy (supra note 28), 628; Besson & Utzinger (supra note 88), 581; Kostakopoulou (supra note 30), 644.

<sup>96</sup> See Alvaro Castro Oliveira, *The Position of Resident Third-Country Nationals: Is it too Early to Grant Them Union Citizenship?*, in EUROPEAN CITIZENSHIP: AN INSTITUTIONAL CHALLENGE (Massimo La Torre ed., 1998), 185.

<sup>97</sup> Patrick Weil, *Access to Citizenship: a Comparison of Twenty-Five Nationality Laws*, in CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES (Alexander Aleinikoff et al. eds., 2001), 17, 18.

<sup>98</sup> See Stefania Bariatti, *Cittadinanza (diritto comparato e straniero)*, in ENCICLOPEDIA GIURIDICA TRECCANI vol. 6 ad vocem (1988), 1 and Bruno Nascimbene, *Toward a European Law on Citizenship and Nationality*, in CITIZENSHIP AND NATIONALITY STATUS IN THE NEW EUROPE (Siofra O’Leary et al. eds., 1998), 63, 73.

<sup>99</sup> See International Court of Justice, *Nottebohm Case*, judgment of 6 April 1955 ICJ Report 1955 p. 4. In the literature see Rainer Hofmann, *Overview of Nationality and Citizenship in International Law*, in CITIZENSHIP AND NATIONALITY STATUS IN THE NEW EUROPE (Siofra O’Leary et al. eds., 1998), 5, 7 ff.

<sup>100</sup> See Case C-369/90 *Micheletti v. Delegacion del Gobierno en Cantabria* ECR 1992 I-4258. For a thorough analysis of the impact of EU law on domestic nationality laws see however Gerard-René de Groot, *Towards a European Nationality Law*, in 8 ELECTRONIC JOURNAL OF COMPARATIVE LAW 3 (2004).

<sup>101</sup> Atsushi Kondo, *Comparative Citizenship and Aliens’ Rights*, in CITIZENSHIP IN A GLOBAL WORLD: COMPARING CITIZENSHIP RIGHTS FOR ALIENS (Atsushi Kondo ed., 2001), 225, 227.

<sup>102</sup> For a thorough comparative assessment of nationality laws see Weil (supra note 97) and Kondo (supra note 101) as well as the detailed web site supported by the European Union Observatory on Democracy of the European University Institute, available at <http://eudo-citizenship.eu/>.

<sup>103</sup> Zig Layton-Henry, *Patterns of Privilege: Citizenship Rights in Britain*, in CITIZENSHIP IN A GLOBAL WORLD: COMPARING CITIZENSHIP RIGHTS FOR ALIENS (Atsushi Kondo ed., 2001), 116, 117.

<sup>104</sup> See Benoit Guiget, *Citizenship Rights for Aliens in France*, in CITIZENSHIP IN A GLOBAL WORLD: COMPARING CITIZENSHIP RIGHTS FOR ALIENS (Atsushi Kondo ed., 2001), 71, 73.

<sup>105</sup> See Kay Hailbronner, *Citizenship Rights for Aliens in Germany*, in CITIZENSHIP IN A GLOBAL WORLD: COMPARING CITIZENSHIP RIGHTS FOR ALIENS (Atsushi Kondo ed., 2001), 100, 111. As further explained in the text accompanying note 117 *infra*, the *jus soli* principle was introduced in German nationality law only in 1999. Before this reform, Germany was considered as one of the country with the strictest legislation world-wide in the attribution of citizenship to aliens. See Gerald Neuman, *Nationality Law in the United States and Germany: Structure and Current Problems*, in PATHS TO INCLUSION (Peter Schuck et al. eds., 1998), 247.

<sup>106</sup> See Elena Dingu-Kyrklund, *Citizenship Rights for Aliens in Sweden*, in CITIZENSHIP IN A GLOBAL WORLD: COMPARING CITIZENSHIP RIGHTS FOR ALIENS (Atsushi Kondo ed., 2001), 47, 48.

and renunciation of prior nationality) vary considerably between the EU countries.<sup>107</sup> As a consequence, for third-country nationals, the acquisition of citizenship can turn out to be extremely difficult in several EU Member States while being more straightforward in others.

The variations among the laws of Member States, however, is not without effects. On the contrary, it may generate unexpected externalities:<sup>108</sup> once, in fact, a third-country national is able to (relatively more easily) acquire the citizenship of one of the EU Member States (which, e.g. automatically grants citizenship to legal residents after a fixed and limited number of years, or on the basis of birth,<sup>109</sup> or through the amnesty of illegal immigrants) he obtains the rights attached to EU citizenship, including the rights to free movement and to some political participation also in other EU Member States.<sup>110</sup> “Granting national citizenship no longer concerns only one country, but also affects other members of the [EU].”<sup>111</sup> Because of the interdependence of the States in the EU legal framework, either some steps are taken to manage complex phenomena such as citizenship and voting rights or these incongruences will remain.<sup>112</sup>

In conclusion, as this section has highlighted, in the European multilevel structure of human rights protection unexpected problems of inconsistencies may arise. In the field of voting rights this has emerged quite clearly both for EU citizens expatriated in another EU Member State and for third-country nationals permanently residing in the EU. Although legal systems are certainly not perfect machines, tensions and incoherencies between overlapping (national, supranational and international) rules are undeniably problems that have to be tackled. The dynamic and evolving nature of the European multilevel legal order, otherwise, demands that the developments in the law in the books and the law in action be assessed in order to evaluate whether they can successfully resolve the existing shortcomings.

#### 4. Transformations in the European multilevel system

Notwithstanding the difficulties that the overlap of three diverse and contradictory sets of norms dealing with voting rights for non-citizens generate in the European legal space, so

<sup>107</sup> See Weil (supra note 97), 22-23.

<sup>108</sup> Karolina Rostek & Gareth Davies, *The Impact of Union Citizenship on National Citizenship Policies*, in 22 TULANE EUROPEAN & CIVIL LAW FORUM (2007), 89, 115. See also Marie-José Garot, *A New Basis for European Citizenship: Residence?*, in EUROPEAN CITIZENSHIP: AN INSTITUTIONAL CHALLENGE (Massimo La Torre ed., 1998), 229, 232 who emphasizes “the risk of a certain amount of inequality where the access to Union citizenship derives from a naturalization process according to the law of one or another Member State.”

<sup>109</sup> The Irish nationality law is a case in point: as further analyzed in note 116 *infra*, the existence (prior to 2004) of an unconditional *jus soli* rule for the acquisition of nationality generated significant complications as the alien parents of children born in Ireland (and thus: Irish and EU citizens) were able to exercise free movements as bearers of their children to other Member States and this right was protected by the ECJ, see Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] ECR I-9925.

<sup>110</sup> De Groot (supra note 100), 24.

<sup>111</sup> Rostek & Davies (supra note 108), 119.

<sup>112</sup> Nascimbene (supra note 98), 79; de Groot (supra note 100), 24.

far no successful attempt to reform the system has occurred. As will be argued further in sub-sections 1 and 2 below, even the recent substantive and formal transformations taking place both in the case law of the European courts and in the positive law have been unable to tackle the problem of inconsistency that characterize the picture of voting rights for non-citizens in the European human rights architecture.<sup>113</sup> Whereas, in fact, judicial institutions at all layers of the multilevel structure were constrained by strict legal rules that prevented any transformative development in the law in action, States have been unwilling or unable to modify the law in the books either at the national or at the supranational level.

#### 4.1 Legislative developments

At the national level, since the entry into force of the Maastricht Treaty, a debate on the need to reform both domestic laws on citizenship and on voting rights have risen in a number of Member States.<sup>114</sup> In 1998, France updated its nationality law<sup>115</sup> and Ireland did the same twice through constitutional revisions in 1999 and 2004.<sup>116</sup> Eventually, at the end of a highly controversial political process, in 1999 also Germany adopted a new law relaxing conditions for the acquisition of citizenship for permanent resident second-generation immigrants through the application of a mild form of the *jus soli* principle.<sup>117</sup> Despite the “national contestations over policies on electoral rights,”<sup>118</sup> and notwithstanding the problematic relationship with some ethnic minorities (e.g. with the Russians in the Baltic

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<sup>113</sup> On the dynamic nature of the European compound legal system see Joseph Weiler, *The Transformations of Europe*, in 100 *YALE LAW JOURNAL* (1991), 2403 and Francis Snyder, *The Unfinished Constitution of the European Union: Principles, Processes and Culture*, in *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE* (Joseph Weiler & Marlene Wind eds., 2003). Cfr. also G. Martinico, *Constructivism, Evolutionism and Pluralism: Europe's Constitutional Grammar*, in 20 *KING'S LAW JOURNAL* (2009), 309.

<sup>114</sup> Nascimbene (supra note 98), 73.

<sup>115</sup> See Loi 98-170 du 16 mars 1998 *Relative à la nationalité*. See Guiget (supra note 104), 75.

<sup>116</sup> In 1999, the XIX Amendment to the Irish Constitution codified in the fundamental law the *jus soli* principle by stating in Art. 2 that “it is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish nation”. Just five years afterward, in 2004, however, the XXVII Amendment to the Constitution was adopted modifying Art. 9(2.1) which now affirms that “notwithstanding any other provision of this Constitution, a person born in the island of Ireland, which includes its islands and seas, who does not have, at the time of the birth of that person, at least one parent who is an Irish citizen or entitled to be an Irish citizen is not entitled to Irish citizenship or nationality, unless provided for by law”. For an assessment of the political context and legal arguments that contributed to the swift constitutional changes expanding and suddenly restricting the *jus soli* principle – including the impact of the decision of the ECJ in Case C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] ECR I-9925 – see Rostek & Davies (supra note 108), 125 ff, 135 ff. Cfr. also Joann Mancini & Graham Finley, “Citizenship Matters”: *Lessons from the Irish Citizenship Referendum*, in 60 *AMERICAN QUARTERLY* (2008), 575.

<sup>117</sup> See Gesetz 38/99 *zur Reform des Staatsangehörigkeitsrechts*. See Hailbronner (supra note 105), 106 ff. As Horvath & Rubio Marin (supra note 78), 86 highlight “the 1999 reform of the nationality law was aimed at facilitating access to German nationality for second- and third-generation migrants precisely to address the democratic legitimacy gap created by a large population of permanent residents without voting rights.”

<sup>118</sup> Shaw (supra note 14), 88.

States),<sup>119</sup> a number of countries in the newly established democracies of Central and Eastern Europe have enacted legislation enfranchising aliens for local elections.

Whereas a lack of clear *consensus* on the question of alien suffrage exists among the European States (as demonstrated by the continuing low number of ratifications of the CPFPL),<sup>120</sup> some have argued that especially in the field of citizenship laws, the domestic reforms undertaken in the EU countries highlighted a trend in which “States with strict nationality laws are relaxing their rules to facilitate including permanent non-national residents, while States whose nationality law is more open to migrants are tending to make it more restrictive.”<sup>121</sup> It has been a matter of debate whether such “convergence between nationality laws in Europe”<sup>122</sup> resulted from the external pressure of the EU institutions<sup>123</sup> or was rather the product of independent national democratic processes.<sup>124</sup> Nevertheless, it is the reality of this spontaneous coordination between Member States that has in itself been questioned.<sup>125</sup>

On the one hand, significant obstacles to reform exist in some EU countries.<sup>126</sup> In Italy, i.e., for the last decade, legislative proposals pursuing the extension of voting rights to non-EU citizens at the local level<sup>127</sup> have proceeded in parallel with bills aiming at modifying the 1992 law on nationality<sup>128</sup> so as to grant citizenship to children born in Italy to permanent residents third-country nationals and to foreigners who have continuously resided in the country for five years.<sup>129</sup> Beside the juristic debates about the precise constraints of the Constitution – especially on the issue of electoral rights for non-

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<sup>119</sup> See Francesco Palermo & Jens Woelk, *No Representation Without Recognition: the Right to Political Participation of (National) Minorities*, in 25 JOURNAL OF EUROPEAN INTEGRATION 3 (2003), 225.

<sup>120</sup> Lardy (supra note 17), 99.

<sup>121</sup> Rostek & Davies (supra note 108), 119.

<sup>122</sup> Besson & Utzinger (supra note 88), 581 n. 40.

<sup>123</sup> In support see Nascimbene (supra note 98), 77 and de Groot (supra note 100), 20. Cfr. also Enzo Cheli, *Condizione dello straniero e immigrazione: Costituzione e diritto UE tracciano la strada*, in 1 LIBERTÀ CIVILI (2010), 7.

<sup>124</sup> See e.g. Merih Anil, *No More Foreigners? The Remaking of German Naturalization and Citizenship Law, 1990-2000*, in 29 DIALECTICAL ANTHROPOLOGY (2005), 453.

<sup>125</sup> See Rainer Bauböck, Eva Ersbøll, Kees Groenendijk & Harald Waldrauch, *Introduction*, in ACQUISITION AND LOSS OF NATIONALITY: POLICIES AND TRENDS IN 15 EUROPEAN STATES. VOLUME 1: COMPARATIVE ANALYSIS (Rainer Bauböck et al. eds., 2006), 15.

<sup>126</sup> Maurizio Ambrosini, *Cittadinanza ed immigrazione: un terreno conteso*, in 117 RESET 1 (2010), 27.

<sup>127</sup> See, among the various proposals in this direction, the recent bills introduced in the Chamber of Deputies by Deputies Veltroni and Perina: see documents of the Chamber of Deputies A.C. 2840 (October 20, 2009) and in the Senate by Senators Perduca and Poretti: see documents of the Senate A.S. 1607 (November 11, 2009) which both aim at ratifying and enforcing domestically the provisions contained in Chapter C of the CPFPL.

<sup>128</sup> See Legge 5 febbraio 1992 recante nuove norme sulla cittadinanza. For a comment on the Italian nationality law, which has generally been regarded as quite restrictive on the conditions for the acquisition of Italian citizenship, see Alessio Vaccari, *Cittadinanza*, in DIZIONARIO DI DIRITTO PUBBLICO vol. 2 ad vocem (2006), 918.

<sup>129</sup> A major proposal in this sense was advanced by former Interior Minister Amato in 2006: see documents of the Chamber of Deputies A.C. 1607 (August 30, 2006). A similar bipartisan proposal has recently been formulated by Deputies Granata and Sarubbi: see documents of the Chamber of Deputies A.C. 2670 (July 30, 2009).

citizens<sup>130</sup>, however, it has been mainly political cleavages and party politics to prevent so far the adoption of any statute reforming the nationality law or extending alien suffrage.<sup>131</sup> On the other hand, “nationality law is still a policy domain within which the States [...] have maintained almost unlimited national sovereignty.”<sup>132</sup> As some have argued, “in a context in which political debates on nationality and nationality law have acquired growing importance, it is hardly possible to identify clear trends of [a European] legislative harmonisation.”<sup>133</sup>

If structural advancements at the national level seem to be lacking, at the supranational level an analysis of the innovations contained in the Lisbon Treaty – which entered into force on 1<sup>st</sup> December 2009, salvaging most of the improvements included in the defunct Constitutional Treaty – “reveals that the changes to the substance of the existing [EU citizenship] rights are not very important.”<sup>134</sup> The Lisbon Treaty leaves unmodified the voting rights originally codified in the TEC and does not provide for any additional EU competence in the field of electoral law.<sup>135</sup> Nevertheless, following the case law of the ECJ – which began around 10 years ago to emphasize how EU citizenship “is destined to be the fundamental *status* of nationals of the Member States,”<sup>136</sup> the Lisbon Treaty has maintained the amendment to the definition of EU citizenship originally proposed during the Constitutional Convention.<sup>137</sup>

As hinted in section 2 above, in fact, Artt. 9 TEU and 20 TFEU [replacing former art. 17 TEC] now state that EU citizenship “shall be additional to [...] national citizenship” – with

<sup>130</sup> For a thorough reconstruction of the juristic debate on the possibility to expand the franchise to non-citizens see Tommaso Giupponi, *Stranieri extracomunitari e diritti politici. Problemi costituzionali dell'estensione del diritto di voto in ambito locale*, in FORUM DI QUADERNI COSTITUZIONALI (2006), 6 who adopts a skeptical approach emphasizing how, according to Art. 48, co. 1 of the Italian Constitution “sono elettori tutti i cittadini”. For a different view see however Paolo Bonetti, *Ammissione all'elettorato e acquisto della cittadinanza: due vie dell'integrazione politica degli stranieri*, in FEDERALISMI.IT 11 (2003) who argues that “nothing prohibits the extension by ordinary law to non-citizens of the subjective rights granted by the Constitution to citizens”. Cfr. also the positions of Massimo Luciani, *Cittadini e stranieri come titolari di diritti fondamentali. L'esperienza italiana*, in RIVISTA CRITICA DI DIRITTO PRIVATO (1992), 224 and Tommaso Frosini, *Gli stranieri tra diritto di voto e cittadinanza*, in FORUM DI QUADERNI COSTITUZIONALI (2004).

<sup>131</sup> See Daniela Bolognino, *Le nuove frontiere della cittadinanza nel confronto tra “cittadinanza legale” e “cittadinanza sociale”: verso una riforma della legge 5 febbraio 1992 n. 91*, in ASTRID RASSEGNE (2009).

<sup>132</sup> Bauböck, Ersbøll, Groenendijk & Waldrauch (supra note 125), 21.

<sup>133</sup> Ambrosini (supra note 126), 27-28.

<sup>134</sup> Annette Schrauwen, *European Union Citizenship in the Treaty of Lisbon: Any Change at All?*, in 15 MAASTRICHT JOURNAL OF EUROPEAN & COMPARATIVE LAW 1 (2008), 55, 63.

<sup>135</sup> Kochenov (supra note 50), 220.

<sup>136</sup> See Case C-184/99 *Grzelczyk v Centre public d'aide sociale* [2001] ECR I-6193 §31; Case C-224/98 *D'Hoop* [2002] ECR I-6191 § 28; Case C-148/02 *Garcia Avello* [2004] ECR I-11613 §22 On the development of the ECJ case law in the field of EU citizenship see Dora Kostakopoulou, *Ideas, Norms and European Citizenship: Explaining Institutional Change*, in 68 MODERN LAW REVIEW 2 (2005), 233 who distinguish three different steps in the judicial interpretation of the EU citizenship provisions: judicial minimalism, signalling intentions and engineering institutional change. See also James Mather, *The Court of Justice and the Union Citizen*, in 11 EUROPEAN LAW JOURNAL 6 (2005), 722.

<sup>137</sup> Clemens Ladenburger, *Fundamental Rights and Citizenship of the Union*, in GENESIS AND DESTINY OF THE EUROPEAN CONSTITUTION (Giuliano Amato et al. eds., 2007), 311, 318.

the wording ‘shall be additional to’ replacing ‘shall complement’. “This seems a very small and cosmetic amendment. It was however done for a reason and it is submitted that this modification supports a move towards a more independent Union citizenship.”<sup>138</sup> Whereas a complementary EU citizenship cannot exist in the absence of a national citizenship,<sup>139</sup> “if EU citizenship is *additional to* national citizenship, then there might one day be EU citizenship without national citizenship.”<sup>140</sup> To achieve this goal, however, further Treaty amendments would be necessary in order to establish the autonomy of EU citizenship from State citizenship.<sup>141</sup> Indeed, as the *Rottmann* case<sup>142</sup> demonstrates, no such step seems possible on a pure jurisprudential ground.

Rottmann, an Austrian-born, German-naturalized citizen, challenged the decision of the German *Land* Bayern to revoke his naturalization because of his earlier failure to communicate the existence of a criminal trial pending against him in Austria. According to the petitioner, since at the time of the acquisition of the German nationality he lost his Austrian citizenship, the decision of the *Land* Bayern would result in a deprivation of his EU citizenship in violation of EU law. In his opinion, Advocate General Maduro, despite emphatically remarking that EU citizenship “is a juridical and political notion autonomous from that of national citizenship, [...which] presupposes the existence of a political link between the European citizens,”<sup>143</sup> recommended rejecting the action, arguing that a ruling for the plaintiff “would be equivalent to a denial of the Member States’ competence in disciplining the conditions for the acquisition and loss of their citizenship.”<sup>144</sup>

To tell the truth, legal scholars had already foreseen a similar hypothesis<sup>145</sup> and had convincingly argued that “once an individual has obtained the *status* of European citizen, judicial control by the ECJ of cases of deprivation of Member States nationality is perfectly admissible in the light of the effects that this measure will produce on European citizenship rights.”<sup>146</sup> However, in its final ruling, the ECJ followed the opinion of the Advocate General and recognized “the legitimacy, in principle, of a decision withdrawing naturalisation on account of deception [...even] when the consequence of that withdrawal is that the person in question loses, in addition to the nationality of the Member State of naturalisation, citizenship of the Union.”<sup>147</sup> It is argued that such a decision, while being reverential toward

<sup>138</sup> Schrauwen (supra note 134), 59.

<sup>139</sup> *Cartabia* (supra note 30), 4; Cassese (supra note 32), 870. Cfr. also Anna Maria Guerra Martins, *Citizenship of the European Union: Conditions of Citizenship*, in 19 EUROPEAN REVIEW OF PUBLIC LAW 1 (2007), 83, 86.

<sup>140</sup> Schrauwen (supra note 134), 60 (italics in the original).

<sup>141</sup> Schrauwen (supra note 134), 60.

<sup>142</sup> Case C-135/08 *Rottmann v. Freistaat Bayern*, judgment of 2 March 2010.

<sup>143</sup> Opinion of AG Maduro, Case C-135/08 *Rottmann* 30 September 2009 §23 (my translation).

<sup>144</sup> *Rottmann* (Opinion of the Advocate General) §24.

<sup>145</sup> In his theoretical assessment of the limits imposed by the general principles of EU law on the autonomy of the Member States in the field of nationality laws de Groot (supra note 100), 17 n. 80 had convincingly advocated, in a *Rottmann*-like hypothesis, for an answer opposite to that of AG Maduro, on the understanding that it would be “remarkable that a European citizen loses this *status* as a consequence of criminal behaviour, in spite of the fact that he continues to reside within the territory of the Union”. See also Stephen Hall, *Loss of Union Citizenship in Breach of Fundamental Rights*, in 21 EUROPEAN LAW REVIEW 2 (1996), 129, 143.

<sup>146</sup> De Groot (supra note 100), 14 n. 68.

<sup>147</sup> *Rottmann*, §54.

the “power”<sup>148</sup> of the Member States, depreciates the value of EU citizenship, by subjecting its survival to a matter of proportionality analysis.

According to the ECJ, indeed, it is “for the national court to ascertain whether the withdrawal decision at issue in the main proceedings observes the principle of proportionality so far as concerns the consequences it entails for the situation of the person concerned in the light of European Union law.”<sup>149</sup> In the end, the *Rottmann* case makes crystal clear that a right to EU citizenship autonomous from State citizenship is far from being judicially sanctioned. For the purposes of this paper, furthermore, even assuming that in the future the ECJ could reconsider its current position and adopt a teleological interpretation of new Artt. 9 TEU and 20 TFEU to conclude that EU citizen would remain unaffected by the withdrawal and/or loss of his nationality, additional changes in EU primary law would still be unavoidable to draw practical effects from a self-standing EU citizenship in the field of electoral rights.

Otherwise, no help in this regard seems to derive from the EU Charter of Fundamental Rights (CFR) – until recently a purely declaratory document.<sup>150</sup> Although the Lisbon Treaty has eventually attributed the CFR the “same legal value as the Treaties” (as stated in Art. 6 TEU) and the ECJ has immediately begun to recognize the new binding *status* of the CFR in its case law,<sup>151</sup> the provisions of the CFR dedicated to citizenship and electoral rights (contained in Chapter V, emphatically entitled ‘Citizenship’) “are limited to a restatement, largely with the same words, of the single rights already ensured to the EU citizens, and do not attempt to advance a wider and more comprehensive meaning of the concept of EU citizenship.”<sup>152</sup> From this point of view, therefore, the framework of electoral rights in the EU has been left largely unmodified by the Lisbon Treaty<sup>153</sup> and the CFR has been a missed an opportunity to enhance the political rights connected to the *status* of EU citizenship.<sup>154</sup>

#### 4.2 Judicial developments

No major jurisprudential developments have occurred so far either. Certainly, at the national level, courts have limited margins to dynamically interpret their Constitutions and the domestic statutes dealing with voting rights for expatriates and third-country nationals. Thus, e.g., in Italy, the Constitution expressly reserves the exclusive competence to the national legislature in the field of electoral law:<sup>155</sup> therefore, when, in the stalemate of the

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<sup>148</sup> Id., §48.

<sup>149</sup> Id., §55.

<sup>150</sup> On the CFR and the Lisbon Treaty see Marta Cartabia, *I diritti fondamentali e la cittadinanza dell’Unione*, in LE NUOVE ISTITUZIONI EUROPEE: COMMENTO AL TRATTATO DI LISBONA (Franco Bassanini et al. eds., 2008), 81.

<sup>151</sup> The ECJ noted in Case C-555/07 *Kücükdeveci v. Swedex*, judgment of 19 January 2010, nyr, § 22 that “Art. 6(1) TEU provides that the CFR of the EU is to have the same legal value as the Treaties [...]”

<sup>152</sup> Enrico Grosso, *La limitata garanzia dei diritti di partecipazione politica nella ‘Carta dei diritti fondamentali dell’UE’*, in DIRITTI E COSTITUZIONE NELL’UNIONE EUROPEA (Gustavo Zagrebelsky ed., 2003), 172, 178.

<sup>153</sup> See Shaw (supra note 14), 159; Schrauwen (supra note 134), 58.

<sup>154</sup> See Grosso (supra note 152), 185.

<sup>155</sup> See Giupponi (supra note 130), 12.



national political process on the question of electoral rights for non-citizens,<sup>156</sup> a Region and several municipalities decided to act and autonomously enfranchise permanent resident foreigners, the regional and communal provisions extending the franchise to aliens had to be declared as purely programmatic (i.e. as deprived of any legally binding force) by the *Corte Costituzionale*<sup>157</sup> or quashed by the *Consiglio di Stato*.<sup>158</sup>

In general, domestic courts have rather operated as a brake to the expansion of non-citizen suffrage. The position of the German *Bundesverfassungsgericht* on the matter has already been mentioned<sup>159</sup> and a similar stand was recently adopted by the Austrian *Verfassungsgerichtshof*, which in 2004 declared a *Land* law allowing non-EU citizens to participate in local elections unconstitutional for violation of the principle of homogeneity of the electoral body.<sup>160</sup> On the issue of EU-citizens' electoral rights, an attempt was also made to challenge the Austrian bill which disenfranchises EU citizens (non-Austrian nationals but resident in Austria) from the elections held for the municipality of Vienna:<sup>161</sup> but the *Verfassungsgerichtshof* dismissed the claim<sup>162</sup> arguing that the right to vote for local elections in the country of residence granted by EU law did not include the right to vote for a municipality which is also a *Land* in a federal system of government.

Several interesting decisions, on the contrary, are available from the docket of the ECtHR and the ECJ. Notwithstanding the highly political and controversial nature of electoral issues and the discretion of the Member States in the area, both courts have demonstrated in a series of cases a remarkable willingness to get involved in this field.<sup>163</sup> As a matter of fact, however, all these cases deal with the precise reach of voting rights for EU Parliament elections.<sup>164</sup> By chance, moreover, the legal questions raised by litigation were quite specific and the two European courts hence lacked any practical opportunity to address broader issues concerning, e.g., voting rights for EU citizens expatriated to another EU Member State and for third-country nationals. As a consequence, the role of the European judiciary, while relevant in itself, has not been particularly significant so far in addressing the inconsistencies of the European tiered voting rights architecture.

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<sup>156</sup> See *supra* text accompanying note 126 & 131.

<sup>157</sup> See Corte Costituzionale sent. 372/2004, sent. 379/2004, sent. 3005/2005. For an assesment of the decisions see Serena Baldin, *La competenza esclusiva statale sull'immigrazione vs. la legislazione regionale sull'integrazione sociale degli immigrati*, in FORUM DI QUADERNI COSTITUZIONALI (2004).

<sup>158</sup> See Consiglio di Stato, Sez. I, n. 9771/04 (2005). The position of the Council of State indeed evolved over time but the refusal to recognize autonomous competence to extend voting rights to the municipalities was eventually confirmed by the *plenum* of the Council of State in the decision n. 11074/04. For an assessment of this jurisprudence see T. Giupponi, *Stranieri extracomunitari ed elezioni locali: dopo il 'caso Genova', un 'caso Torino'?*, in 1 QUADERNI COSTITUZIONALI (2006), 125.

<sup>159</sup> See *supra* note 15.

<sup>160</sup> Austrian Constitutional Court VfSlg 17.264/2004 [2004].

<sup>161</sup> Kochenov (*supra* note 50), 209.

<sup>162</sup> Austrian Constitutional Court B3113/96, B3760/97 [1997].

<sup>163</sup> See Shaw (*supra* note 14), 189. On the ECJ see also Leonard Besselink, *Case Note: Spain v. UK*, in 45 COMMON MARKET LAW REVIEW (2008), 787, 788 and on the ECtHR see Henry Schermers, *Case Note: Matthews v. UK*, in 36 COMMON MARKET LAW REVIEW (1999), 673.

<sup>164</sup> See Shaw (*supra* note 14), 233.

Although the ECHR leaves a wide margin of appreciation to the Contracting Parties on the issues of citizenship and voting rights,<sup>165</sup> (contrary to the CPFPL – which lacks enforcement mechanisms as well as an adjudicative body in front of which individuals may bring a suit) the ECtHR may be called to decide in the last resort on the compatibility of national measures with the ECHR.<sup>166</sup> Hence, in *Matthews*<sup>167</sup> the ECtHR was confronted with the case of a UK citizen resident in Gibraltar who challenged the UK-implementing act of the EU agreement setting up EU Parliament elections, for violating Art. 3 of the 1<sup>st</sup> additional Protocol of the ECHR.<sup>168</sup> The UK law under review restricted the right to vote for EU Parliament elections to the UK territory only. The petitioner, however, complained that this way she was deprived of her right to vote, despite being a UK (and thus EU) citizen, just because she was residing in Gibraltar (a UK-dependent territory).

The ECtHR declared the case admissible, arguing that the UK was responsible under the ECHR “for securing the rights guaranteed by Art. 3 of Protocol No. 1 in Gibraltar regardless of whether the elections were purely domestic or European.”<sup>169</sup> On the merit, it found that the EU Parliament contributed to the achievement of the principle of “effective political democracy”<sup>170</sup> protected by the ECHR and that it was therefore for the ECtHR “to determine in the last resort whether the requirements of Protocol No. 1 ha[d] been complied with.”<sup>171</sup> While recognizing that “the State enjoys a wide margin of appreciation”<sup>172</sup> on electoral issues, however, the ECtHR ruled that “in the circumstances of the present case, the very essence of the applicant’s right to vote, as guaranteed by Art. 3 of Protocol No. 1, was denied”<sup>173</sup> – a judgment that helped “strengthen[...] the connection between the citizenship *status* and rights in the EU.”<sup>174</sup>

In the follow up to the *Matthews* case the ECJ also became involved, highlighting the intricacies between the different layers and the interaction between legal regimes in the European multilevel system.<sup>175</sup> After the UK amended its electoral law to comply with the ECtHR ruling, in fact, Spain brought a case in front of the ECJ,<sup>176</sup> complaining that the new UK act violated EU law as the franchise for the EU Parliament was now extended even to

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<sup>165</sup> See *supra* note 24.

<sup>166</sup> See Petersmann (*supra* note 22).

<sup>167</sup> *Matthews v. United Kingdom*, ECHR [1999], Application No. 24833/94.

<sup>168</sup> The literature on the decision is wide and mostly focusing on the issue of the authority of the ECtHR to review a measure adopted by a Contracting Party of the ECHR in his capacity as a Member States of the EU. See Toby King, *Ensuring Human Rights Review of Intergovernmental Acts in Europe*, in 25 EUROPEAN LAW REVIEW (2000), 86; Iris Canor, Primus Inter Pares. *Who is the Ultimate Guardian of Human Rights in Europe*, in 25 EUROPEAN HUMAN RIGHTS REVIEW 1 (2000), 3. For an analysis of the electoral issues involved in the decision see instead Shaw (*supra* note 14), 173 ff.

<sup>169</sup> *Matthews*, §35.

<sup>170</sup> *Id.*, §42.

<sup>171</sup> *Id.*, §63.

<sup>172</sup> *Id.*, §64.

<sup>173</sup> *Id.*, §65.

<sup>174</sup> Kochenov (*supra* note 33), 221-222.

<sup>175</sup> See Maria Elena Gennusa, *La Cedu e l'Unione Europea*, in I DIRITTI IN AZIONE (Marta Cartabia ed., 2007), 91, 126 ff.

<sup>176</sup> Case C-145/04 *Spain v. UK (Gibraltar)* [2006] ECR I-7917.

persons who were not EU citizens (i.e. qualified Commonwealth citizens resident in Gibraltar).<sup>177</sup> The ECJ, however, rejected the argument of the petitioner that EU primary law excluded “a person who is not a citizen of the Union, such as a qualified Commonwealth citizen resident in Gibraltar, from being entitled to the right to vote and stand for election”<sup>178</sup> to the EU Parliament and affirmed, on the contrary, that “the rights recognised by the Treaty are [not necessarily] limited to citizens of the Union.”<sup>179</sup>

If in its ruling in the *Gibraltar* case the ECJ preserved the discretion of the Member States “in setting the precise boundaries of th[e] right to vote [for the EU Parliament...] by granting the right also, in appropriate cases, to persons who are not citizens of the EU,”<sup>180</sup> in the *Aruba* case (decided on the same day),<sup>181</sup> the ECJ, instead, exercised a stricter review over a Dutch law disenfranchising Dutch nationals residing in the Dutch overseas territory of Aruba from EU Parliament elections.<sup>182</sup> Since the petitioners could “rely on the rights conferred on citizens of the EU,”<sup>183</sup> the ECJ addressed the question whether “a citizen of the EU resident or living in an overseas territory has the right to vote and to stand as a candidate in elections to the EU Parliament,”<sup>184</sup> with the understanding that “the definition of the persons entitled to vote and to stand for election falls within the competence of each Member State [but] in compliance with Community law.”<sup>185</sup>

Given that, however, the Dutch law unreasonably withheld voting rights for Dutch nationals residing in Aruba while allowing expatriate citizens residing in other non-member countries to vote for the EU Parliament, the ECJ concluded that the Netherlands had violated the general “principle of equal treatment or non-discrimination”<sup>186</sup> without providing objective justifications. From this point of view, the *Aruba* case demonstrated how “the creation of a Europe-wide personal *status* of citizen of the EU can result in a quite substantial intrusion into the national electoral sovereignty of the Member States,”<sup>187</sup> as the ECJ claimed authority to review the reasonableness of the disenfranchisement of expatriate nationals from EU Parliament elections.<sup>188</sup> However, the ECJ has had no role in reviewing the rules defining voting rights for EU citizens in general elections in their country of residence or for third-country nationals permanently residing in the EU.<sup>189</sup>

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<sup>177</sup> See Shaw (supra note 14), 175 ff and Besselink, (supra note 163), 787.

<sup>178</sup> *Gibraltar*, §70.

<sup>179</sup> *Id.*, §74.

<sup>180</sup> Shaw (supra note 14), 233.

<sup>181</sup> Case C-300/04 *Eman & Sevinger (Aruba)* [2006] ECR I-8055.

<sup>182</sup> See Shaw (supra note 14), 177 ff; Besselink (supra note 163), 801.

<sup>183</sup> *Aruba*, §29.

<sup>184</sup> *Id.*, §32.

<sup>185</sup> *Id.*, §45.

<sup>186</sup> *Id.*, §57.

<sup>187</sup> Shaw (supra note 14), 189.

<sup>188</sup> Besselink (supra note 163), 806.

<sup>189</sup> For a (critical assessment of the) possible extensive interpretations of the ECJ decisions analyzed in this paragraph to address the problems of voting rights for EU citizens expatriated in another EU Member State and for third-country nationals permanently residing within the EU see *infra* the text accompanying note 274.

In conclusion, this summary illustrates how the recent formal and substantive transformations, while certainly relevant in themselves, have fallen short of providing a satisfactory answer to the problem of inconsistency in the European multilevel system. The national legislative reforms did not achieve coherence and the Lisbon Treaty, despite introducing some forward-looking provisions in the TEU, has neither expanded the electoral rights for EU citizens in their country of residence nor established new competences for the EU institutions in the field of naturalization or voting rights for third country nationals. European courts, then, have adopted important rulings but till now these have had narrow effects: while both the ECtHR and the ECJ have reasserted their role in ensuring that expatriates are not unreasonably disenfranchised from EU Parliament elections, and while the latter has also sanctioned a Member State's decision to extend the suffrage for the EU Parliament to non-EU citizens, the core questions on non-citizens voting raised in section 3 have remained unanswered by the judiciary.

## 5. Electoral rights and citizenship in the US

The complex relationship that has emerged in Europe because of the overlap of different norms on citizenship and voting rights, while certainly peculiar in some respects, is not *sui generis*<sup>190</sup> and rather finds similarities in “the early federal experiences of countries like the US [...] founded in their respective beginnings on a voluntary association of their Member States.”<sup>191</sup> From the methodological point of view,<sup>192</sup> therefore, it may be particularly useful to adopt a comparative approach and to examine the US experience with dual citizenship and voting rights as a comparative example for Europe.<sup>193</sup> Needless to say, “a comparison

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<sup>190</sup> See VINCENZO LIPPOLIS, LA CITTADINANZA EUROPEA 75 (1994) and J. Bierbach, *Who's Afraid of Union Citizenship*, in 5 EUROPEAN CONSTITUTIONAL LAW REVIEW (2009), 517 reviewing the book of CHRISTOPH SCHÖNBERGER, UNIONSBÜRGER, EUROPAS FÖDERALES BÜRGERRECHT IN VERGLEICHENDER SICHT (2005). Cfr. Also Jörg Monar, *A Dual Citizenship in the Making: the Citizenship of the European Union and its Reform*, in EUROPEAN CITIZENSHIP: AN INSTITUTIONAL CHALLENGE (Massimo La Torre ed., 1998), 167, 173 ff who criticize the widespread juristic belief according to which “citizenship only makes sense as either a fully National or a fully European citizenship. As sensible as this argument may at first seems, it is actually the result of a sort of ideological trap laid by the French Revolution and further developed and refined by 19th century nationalism.”

<sup>191</sup> Christoph Schönberger, *European Citizenship as Federal Citizenship: Some Citizenship Lessons of Comparative Federalism*, in 19 EUROPEAN REVIEW OF PUBLIC LAW 1 (2007), 61, 64.

<sup>192</sup> See the systematic work of Ran Hirshl, *The Question of Case Selection in Comparative Constitutional Law*, in 53 AMERICAN JOURNAL OF COMPARATIVE LAW (2005), 125 for an overview of the rules governing case selections and their justification.

<sup>193</sup> The advantages of a comparative analysis with the US to understand the EU have been highlighted by a number of scholars, among many LESLIE FRIEDMAN GOLDSTEIN, CONSTITUTING FEDERAL SOVEREIGNTY. THE EUROPEAN UNION IN COMPARATIVE CONTEXT (2001); Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, in 2 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 4 (2004), 633; Daniel Halberstam, *Constitutional Heterarchy: the Centrality of Conflict in the European Union and the United States*, in RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW AND GLOBAL GOVERNANCE (Jeffrey Dunoff et al. eds., 2009), 326. On the use of such comparative assessment specifically in the field of citizenship see Peter Schuck, *Citizenship in Federal Systems*, in 48 AMERICAN JOURNAL OF COMPARATIVE LAW (2000), 195; Vicki Jackson, *Citizenship and Federalism*, in CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES (Alexander Aleinikoff et al. eds., 2001), 127 and for a direct comparison between the US and EU rules on citizenship and free movements rights see Anne Van der Mei, *Freedom of Movement for Indigents: A Comparative Analysis of American Constitutional Law and European Community Law*, in 19 ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW (2002), 803; Francesca Strumia, *Citizenship and Free Movement: European and American Features of a*

does not have to be based on the assumption of a complete identity of development. Its task is not to predict the future but to enlighten the present.”<sup>194</sup> Analyzing the US case, nonetheless, can also provide us with some guidance in advancing a few remarks *de lege ferenda*: an attempt at which the following section will be dedicated.<sup>195</sup>

In the US Constitution of 1787, both a State and a federal citizenship coexisted.<sup>196</sup> The original pact “contained no definition of national citizenship”<sup>197</sup> but Art. I, §8, cl. 2 empowered Congress to make “a uniform rule of naturalization”, and the possession of US citizenship was required as a condition to hold office in Congress and as US President.<sup>198</sup> Art. IV, §2 cl.1, however – rescuing a provision originally codified in the Articles of Confederation<sup>199</sup> – affirmed that “the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States”, making it clear that the States did grant a State citizenship and that the possession of this *status* carried several privileges.<sup>200</sup> “In short, the US Constitution in establishing two citizenships, a federal and a state one, did not define them and did not explain their relationship, i.e. whether they were independent and coordinated or whether one was the condition for the acquisition of the other.”<sup>201</sup>

What’s more, on electoral matters “the Constitution originally left voting rights, even in federal elections, in the hands of the States.”<sup>202</sup> Consistent with the idea of a republican compound of States and peoples,<sup>203</sup> the Constitutional Convention rejected the hypothesis of establishing a uniform electoral rule at the federal level,<sup>204</sup> specifying instead in Art. I, §2 cl. 1 that the members of the House of Representatives would be chosen by the “peoples of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature”. Since the Senate, until the adoption of the XVII amendment in 1913, was also elected directly by the States’ legislatures, for all purposes this arrangement meant that it was for the States to decide

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*Judicial Formula for Increased Comity*, in 12 COLUMBIA JOURNAL OF EUROPEAN LAW (2005-2006), 713. To the best of my knowledge, instead, no direct comparison still exists of the two legal system from the specific point of view of electoral rights.

<sup>194</sup> Schönberger (supra note 191), 65.

<sup>195</sup> Indeed, it was already one of the first comparative scholars RENÉ DAVID & CAMILLE JAUFFRET-SPINOSI, I GRANDI SISTEMI GIURIDICI CONTEMPORANEI 5 (1992, 10<sup>th</sup> ed.) to emphasize that among the goals of the comparative method is the reform of national law: “comparative law is useful to better understand our legal system and to ameliorate it.”

<sup>196</sup> Lippolis (supra note 190), 77.

<sup>197</sup> Alexander Bickel, *Citizenship in the American Constitution*, in 15 ARIZONA LAW REVIEW (1973), 369: Bear in mind what already said in note 7 *supra* that in the US with the term ‘national’ reference is made to the federal level of government.

<sup>198</sup> Earl Maltz, *Citizenship and the Constitution: a History of the Supreme Court’s Alienage Jurisprudence*, in 28 ARIZONA STATE LAW JOURNAL (1996), 1135, 1136.

<sup>199</sup> Lippolis (supra note 190), 76.

<sup>200</sup> GERALD NEUMAN, STRANGERS TO THE CONSTITUTION. IMMIGRANTS, BORDERS AND FUNDAMENTAL LAW 63 (1996); Schönberger (supra note 191), 68; Maltz (supra note 198), 1137.

<sup>201</sup> Lippolis (supra note 190), 78.

<sup>202</sup> Neuman, (supra note 200), 63.

<sup>203</sup> See Goldstein (supra note 193) and Jeff Goldsworthy, *The Debate About Sovereignty in the United States: a Historical and Comparative Perspective*, in SOVEREIGNTY IN TRANSITION (Neil Walker ed., 2003), 423.

<sup>204</sup> Neuman (supra note 200), 63.

who should be enfranchised, and that those eligible to vote at the State level were also able to cast ballots for the federal government.<sup>205</sup>

For the first three-quarters of a century after the enactment of the Constitution, the States had total control of the regime of rights of political participation.<sup>206</sup> Although by the mid 1830s, the exclusivity of the federal power to naturalize was settled, States still preserved the possibility to confer State citizenship and to define their electorates.<sup>207</sup> In various States voting rights were also extended to alien residents:<sup>208</sup> “as a chapter in the history of American federalism, the period of alien suffrage reflected a conception of States as sovereign political entities. The States with alien suffrage allowed non-US citizens to participate in voting at all levels of American government, thereby turning them, explicitly, into ‘citizens’ of the State itself.”<sup>209</sup> At the same time, Art. IV §2 cl.1 of the Constitution ensured that “the citizens of the States ceased to be foreigners for the other States of the new Union without becoming their citizens.”<sup>210</sup>

By the mid XIX century, however, the unclear relationship between the two dimensions of state and federal citizenship began to be increasingly problematic<sup>211</sup> given the “link with the question concerning the legal *status* of freed slaves.”<sup>212</sup> Since the Revolutionary period, a number of Northern States had granted State citizenship and even voting rights to freed slaves.<sup>213</sup> It was a matter of contention, yet, whether the States allowing slavery “could challenge the *status* of citizenship granted by another State”<sup>214</sup> to freed slaves for the purposes of Art. IV §2 cl.1 of the US Constitution. The fragile equilibrium between abolitionists and slaver-holders, however, was destroyed by the decision of the Supreme Court in *Dred Scott*.<sup>215</sup> Writing for the Court, Chief Justice Taney infamously stated that blacks could never be US citizens as they were “negro[es] of African descent, whose ancestors were of pure African blood, and who were brought into this country and sold as slaves.”<sup>216</sup>

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<sup>205</sup> See Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, in 18 LAW & INEQUALITY (2000), 271, 287; Elise Brozovich, *Prospects for Democratic Change: Non Citizen Suffrage in America*, in 23 HAMLINE JOURNAL OF PUBLIC LAW AND POLICY (2001-2002), 403, 411.

<sup>206</sup> See Jamin Raskin, *Legal Aliens, Local Citizens: the Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, in 141 UNIVERSITY OF PENNSYLVANIA LAW REVIEW (1992-1993), 1391, 1395.

<sup>207</sup> Neuman (supra note 16), 292-293.

<sup>208</sup> See Harper-Ho (supra note 205), 273; Brozovich (supra note 205), 408.

<sup>209</sup> Raskin (supra note 206), 1397.

<sup>210</sup> Schönberger (supra note 191), 68.

<sup>211</sup> Maltz (supra note 198), 1138.

<sup>212</sup> Lippolis (supra note 190), 79.

<sup>213</sup> Pamela Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, in 71 UNIVERSITY OF CINCINNATI LAW REVIEW (2002-2003), 1345, 1348.

<sup>214</sup> Lippolis (supra note 190), 80.

<sup>215</sup> *Dred Scott v. Sandford*, 19 US (How.) 393 (1857). For a detailed analysis of the fact preceding the case, the decision of the Court and its effects see PAUL FINKELMAN, *DRED SCOTT V. SANDFORD. A BRIEF HISTORY WITH DOCUMENTS* (1997).

<sup>216</sup> *Dred Scott*, at 404.

Whereas the minority of the Supreme Court argued that any citizen of the States was *ipso facto* a citizen of the US, in the eyes of the majority, a strict separation between state and federal citizenship ought to be made.<sup>217</sup> While States could grant their citizenship to whom they pleased, federal citizenship was reserved only to (the heirs of) those who were citizens of the several States at the time of the adoption of Constitution and to the immigrants naturalized through the rules set by Congress.<sup>218</sup> By engraving in its interpretation of the US Constitution the perpetual exclusion of blacks from the body politics, the Supreme Court made its contribution to the explosion of the Civil War.<sup>219</sup> Eventually, the victory of the North led to the abolition of slavery and to the adoption, in 1868, of a new constitutional amendment<sup>220</sup> in which *Dred Scott* “was effectively, which is to say constitutionally, overruled by a definition of citizenship in which race played no part”<sup>221</sup>.

The XIV amendment’s Citizenship Clause “made State citizenship a matter of federal constitutional law, defining it simply as residence in a State.”<sup>222</sup> By establishing that “all persons born or naturalized in the US and subject to the jurisdiction thereof, are citizens of the US and of the State wherein they reside”, in fact, the XIV amendment asserted the primacy of federal over state citizenship,<sup>223</sup> “limited the power of States to withhold State citizenship from national citizens,”<sup>224</sup> and made sure that residence would become the basis for the exercise of the privileges granted by the States.<sup>225</sup> On the question of suffrage, however, it was only the adoption by Congress and 2/3 of the States of the XV amendment in 1870 that “marked the first time since the constitutional Convention in Philadelphia that the national government of the US grappled directly and extensively with the issues of voting rights.”<sup>226</sup>

The XV amendment, in fact, by barring the States from denying or abridging the right to vote of US citizens on “account of race, colour, or previous condition of servitude” and by granting to the federal Congress the power to enforce the provision by appropriate legislation, tilted the country “toward the nationalization of the right to vote.”<sup>227</sup> As a matter of law and fact, however, beyond this check, the States formally retained control over the qualification necessary to vote and stand even in federal elections<sup>228</sup> and, as it is sadly

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<sup>217</sup> Lippolis (supra note 190), 83.

<sup>218</sup> Finkelman (supra note 215), 34.

<sup>219</sup> Bickel (supra note 197), 370.

<sup>220</sup> Finkelman (supra note 215), 50.

<sup>221</sup> Bickel (supra note 197), 374.

<sup>222</sup> Schuck (supra note 193), 223.

<sup>223</sup> Lippolis (supra note 190), 83-84.

<sup>224</sup> Neuman (supra note 200), 64.

<sup>225</sup> Alexander Aleinikoff, *American Citizenship: an Introduction*, in 5 *CITIZENSHIP STUDIES* 1 (2001), 5.

<sup>226</sup> ALEXANDER KEYSSAR, *THE RIGHT TO VOTE* (2000), 94.

<sup>227</sup> Keyssar (supra note 226), 166.

<sup>228</sup> The Supreme Court confirmed this in *Pope v Williams* 193 US 621 (1904) at 632 where it affirmed that “the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution.”

known<sup>229</sup>, by the end of the XIX century most States were able to deprive of any meaning the promises of the Reconstruction amendments through the adoption of electoral laws that legally disenfranchised black (and other minority) voters.<sup>230</sup> The several States retained instead the power to enfranchise non-citizens for local purposes and the Supreme Court confirmed this practice in 1874:<sup>231</sup> but by the 1920s the tradition virtually disappeared.<sup>232</sup>

The involvement of the federal government in the field of voting rights rose steadily again only during the XX century. The XIX, XXIV and XXVI amendments successively forbade the States the denial or the abridgment of the right to vote of US citizens by reason of sex,<sup>233</sup> failure to pay poll taxes or age.<sup>234</sup> Moreover, finally relying on the enforcement powers set by the XV amendment, in the 1950s Congress started to enact a series of Voting Rights Acts aiming at ensuring effective participation at the polls in those States in which patterns of historical discrimination had taken place.<sup>235</sup> The federal judiciary then played a “central role”<sup>236</sup> in authorizing and supporting “what amounted to a federal takeover of State voting laws:”<sup>237</sup> the Supreme Court upheld the constitutionality of the Voting Rights legislation<sup>238</sup> and subjected to strict scrutiny under the equal protection clause of the XIV amendment all restrictive voting qualifications set up by the States.<sup>239</sup>

“Between the late 1950s and early 1970s [...] in a cascading series of congressional enactments and court decisions, virtually all formal restrictions on the suffrage of adult

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<sup>229</sup> LAWRENCE FRIEDMAN, *LAW IN AMERICA* 69 (2002).

<sup>230</sup> Keyssar (supra note 226), 111. On the so called Jim Crow laws, disenfranchising blacks, paupers and other minorities through out the Southern States in the post-Reconstruction era see COMER VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955).

<sup>231</sup> *Minor v. Happerset* 88 US 162 (1874) (affirming that citizenship has not in all cases been made a condition precedent to enjoy the right to vote).

<sup>232</sup> See Raskin (supra note 206), 1416; Harper-Ho (supra note 205), 282.

<sup>233</sup> Note that the Supreme Court in *Minor v. Happerset* 88 US 162 (1874) had instead denied that the XIV amendment’s privileges and immunities clause required the extension of the franchise to women. See Keyssar (supra note 226), 181.

<sup>234</sup> Raskin (supra note 206), 1425 ff.

<sup>235</sup> Keyssar (supra note 226), 263.

<sup>236</sup> Peyton McCray, *Bringing Equality to Power: How the Federal Courts Transformed the Electoral Structure of Southern Politics, 1960-1990*, in 5 UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW (2003), 665, 667

<sup>237</sup> Keyssar (supra note 226), 266.

<sup>238</sup> See *South Carolina v. Katzenbach* 383 US 301 (1966) (concluding that the Voting Rights Act 1965 is a valid mean to carry out the commands of the XV amendment); *Harper v. Virginia Board of Elections* 383 US 663 (1966) (upholding the provision of the Voting Rights Act 1965 prohibiting polling taxes as condition to vote); *Katzenbach v. Morgan* 384 US 641 (1966) (upholding the provision of the Voting Rights Act prohibiting English-language literacy tests as conditions to vote). On this significant page of the US Supreme Court history see Alexander Bickel, *The Voting Rights Cases*, in SUPREME COURT REVIEW (1966), 79. See also GERALD GUNTHER & KATHLEEN SULLIVAN, *CONSTITUTIONAL LAW* 984 (1997, 13<sup>th</sup> ed.).

<sup>239</sup> See *Baker v. Carr* 369 US 186 (1962) (reviewing apportionment of State legislative seats in Tennessee under the equal protection clause of the XIV amendment); *Reynolds v. Sims* 377 US 533 (1964) (striking down the Alabama districting system for State legislature); *Dunn v. Blumstein* 405 US 330 (1972) (striking down a Tennessee’s provision that required residence in the state for one year and in the county for three months as prerequisite for voting). For a more recent overview of the case law of the US Supreme Court ever since these early judgments in the field of electoral law see then Pamela Karlan, *The Supreme Court’s Voting Rights Trilogy*, in SUPREME COURT REVIEW (1993), 245.



citizens were swept away, and the federal government assumed full responsibility for protecting and guaranteeing those rights.”<sup>240</sup> The expansion of federal competences in the field of electoral law did not directly benefit aliens. Otherwise, although recent trends have highlighted a renewed interest for immigrants suffrage,<sup>241</sup> the issue of voting rights for non-citizens was mainly dealt with indirectly through the adoption by Congress of uniform naturalization rules that facilitate the acquisition of US citizenship (and with it of electoral rights).<sup>242</sup> Whereas citizenship has always been ensured to second generations immigrants by the application of unconditional *jus soli*,<sup>243</sup> since 1952 requirements for naturalization have been eased and made non-discriminatory for all permanent resident aliens.<sup>244</sup>

Thus, in the US, at the conclusion of a series of constitutional transformations,<sup>245</sup> the framework of citizenship and electoral rights had “witnessed a legal revolution.”<sup>246</sup> To begin with, the US dual citizenship system had been overturned “with national citizenship becoming primary and State citizenship secondary and derivative.”<sup>247</sup> Through constitutional revisions, congressional legislation and judicial law-making, competence in the electoral field had then progressively shifted from the States to the federal government: “the Voting Rights Acts, coupled with a succession of Supreme Court decisions, effectively brought to a close the era of State control over suffrage.”<sup>248</sup> Under the existing constitutional arrangement this means that today, by possessing US citizenship, Americans can move from one State to the other and participate in all (State and federal) elections held in their State of residency under conditions of equality.

From this point of view, the developments that have taken place in the US offer some interesting insights for the purpose of resolving the inconsistencies of the European voting rights architecture. Of course, the “comparative analysis with respect to the historical development of [the US] does not imply that the EU would have to follow them on their path to becoming [a] consolidated federal state.”<sup>249</sup> Still, in light of the multiple structural similarities between the two systems in the field of citizenship and voting rights, “the

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<sup>240</sup> Keyssar (supra note 226), 256.

<sup>241</sup> See Monica Varsanyi, *The Rise and Fall (and Rise?) of Non-Citizen Voting: Immigration in the Shifting Scale of Citizenship and Suffrage in the United States*, in 9 SPACE AND POLITY 2 (2005), 113.

<sup>242</sup> Neuman (supra note 16), 310; Rubio Marin (supra note 16), 216. See also Peter Schuck, *The Treatment of Aliens in the United States*, in PATHS TO INCLUSION (Peter Schuck et al. eds., 1998), 203, 237.

<sup>243</sup> Even before the introduction of the XIV amendment, which constitutionalized the principle that people born in the US are US citizenship. See Neuman (supra note 105), 251; Weil (supra note 97), 20. The Supreme Court confirmed that all persons born in the US are US citizens in *US v. Wong Kim Ark* 169 US 649 (1898) (denying that the nationality and the racial origin of the parents may deprive a child born on US soil from US citizenship). Cfr. Thomas Heller, *Changes and Convergence: is American Immigration still Exceptional?*, in CITIZENSHIP IN A GLOBAL WORLD: COMPARING CITIZENSHIP RIGHTS FOR ALIENS (Atsushi Kondo ed., 2001), 196.

<sup>244</sup> See Immigration and Nationality Act 1952 8 U.S.C. 1427. In the literature see Neuman (supra note 105), 255; Schuck (supra note 242), 237. See also Peter Schuck, *The Re-Evaluation of American Citizenship*, in CHALLENGE TO THE NATION-STATE (Christian Joppke ed., 1998), 191.

<sup>245</sup> In the sense of BRUCE ACKERMAN, “WE THE PEOPLE”. VOLUME 2: TRANSFORMATIONS (1998).

<sup>246</sup> Keyssar (supra note 226), 281.

<sup>247</sup> Lippolis (supra note 190), 84.

<sup>248</sup> Keyssar (supra note 226), 282.

<sup>249</sup> Schönberger (supra note 191), 64.

people who make choices for Europe may find the [US] past helpful in honing some ideas to the future.”<sup>250</sup> At the same time, any attempt to draw inspiration from the US experience should “not pretend to deny the uniqueness of the European experience”<sup>251</sup> and so its peculiarities should be properly accommodated. It is with this understanding, therefore, that in the following section some suggestions are formulated.

## 6. Policy through law

Since the recent formal and substantive transformations of the European multilevel structure have proven incapable of addressing the problems of inconsistency in the field of voting rights for non-citizens, other structural reforms appear to be necessary. This section attempts to advance *de jure condendo* several proposals that may be appreciated as a useful step to increase the coherence of the European human rights architecture.<sup>252</sup> I am aware that such proposals may spark debate and that observers may both reasonably disagree on their benefits and be sufficiently sceptical about their practicability. Indeed, it is submitted that a consensus among the European institutional actors would be required to translate these proposals from academic exercise to actual legal reforms but that this is still lacking.<sup>253</sup> Nonetheless, I am convinced that scholars can and should play a role in anticipating questions that are not yet ready for political discussion.<sup>254</sup>

Specifically, two proposals will be advanced. First, to address the problem generated by the overlap of the EU provisions enfranchising EU citizens (only) in local and EU elections and the national rules denying expatriate voting, it will be argued that residence should become the basis for the exercise of electoral rights at the national level: a citizen of one EU Member State who resides in another EU Member State should have the right to vote (also) for the general elections in the Member State of residence. Second, to address the problem of the right to vote of third-country nationals permanently residing in the EU, it will be maintained that either a minimum harmonization of the national laws on local elections should be undertaken (along the lines of the CPFPL) or the power to make laws on naturalization should be shifted to the EU: a third-country national should either benefit from voting rights (at least) at the local level in any EU Member State or have the chance to acquire EU citizenship through a uniform EU-governed process.

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<sup>250</sup> Elizabeth Mehan, *European Integration and Citizens' Rights: a Comparative Perspective*, in 26 PUBLIUS 4 (1996), 99, 119. See also Erin Delaney & Luca Barani, *The Promotion of 'Symmetrical' European Citizenship: a Federal Perspective*, in 25 JOURNAL OF EUROPEAN INTEGRATION 2 (2003), 95, 107 whose comparative work with the US aims at “expanding the range of tools, both comparative and historical at the disposal of academics [...] to encourage more creative options for politicians, judges and bureaucrats faced with the difficult task of creating symmetrical citizenship.”

<sup>251</sup> Schönberger (supra note 191), 64.

<sup>252</sup> In support of a normative approach to the questions of European citizenship *latu sensu* see Massimo La Torre, *Citizenship, Constitution and the European Union*, in EUROPEAN CITIZENSHIP: AN INSTITUTIONAL CHALLENGE (Massimo La Torre ed., 1998), 435, 437 who argues that since the such concept is “not yet permanent and allows for evolution, an evolutive interpretation of it and even a *de lege ferenda* approach are legitimate.”

<sup>253</sup> See also Monar (supra note 190), 183; Kochenov (supra note 50), 202; Besson & Utzinger (supra note 88), 590; Shaw (supra note 14), 232.

<sup>254</sup> For support see, in general, Giulio Napolitano, *Sul futuro delle scienze del diritto pubblico*, in RIVISTA TRIMESTRALE DIRITTO PUBBLICO (2010), 1 and with specific reference to the issues analyzed in this paper: Castro Oliveira (supra note 96), 197; Rubio Marin (supra note 16), 222; Garot (supra note 108), 233.

These proposals draw on a comparison with the US constitutional experience. Indeed, it was highlighted in section 5 that in the US, step by step, residence has become the basis for the exercise of electoral rights for State and federal elections.<sup>255</sup> Whereas originally State citizenship (coupled with other restrictive requirements) was the condition for the exercise of the franchise, the XIV amendment's citizenship clause<sup>256</sup> and the increasing nationalization of electoral rights through the activities of the federal government<sup>257</sup> made voting rights a pure incident of habitation, so that today any individual who holds US federal citizenship can participate in all elections in the State in which he resides. Otherwise, on the issue of alien suffrage, US history shows that while for a long time States autonomously decided whether to extend the franchise to immigrants,<sup>258</sup> in the last century the main avenue pursued in this respect has been the attribution of national citizenship through a uniform naturalization rule set by Congress.<sup>259</sup>

The analysis of the US experience also offers some insightful indications as to which level of government, and which institutions in it, can best be trusted to realize successful reforms in the field of voting rights and citizenship. Hence, in the US, over time it became "abundantly clear to both Congress and the courts that universal suffrage would not be achieved by the decentralized actions of the fifty States, each with its own historical legacy, its own political conflicts, its own minorities, and special issues. If the polity was going to be democratized, it would require action by the national government."<sup>260</sup> Indeed it was through the adoption of a series of revisions to the 1787 Constitution<sup>261</sup> and through the incremental involvement of the federal government in those domains - citizenship and electoral law - that were originally believed to be State's prerogatives<sup>262</sup> that in the US the problems of voting rights were historically addressed.

On the other hand, within the federal government, notwithstanding the central role that courts have played, especially since the 1950s, in ensuring the effectiveness of the right to vote,<sup>263</sup> it has been the political branches of government who have led the efforts in the promotion of electoral rights.<sup>264</sup> As already argued, for long periods of US history "the voteless fared much better appealing to the people and to the legislative, as opposed to the judicial, process. The Supreme Court gave us *Dred Scott* and *Minor v. Happersett*, but Congress and two-thirds of the States gave us the XV amendment and women's suffrage."<sup>265</sup> Today, the responsiveness of the federal judiciary to electoral rights' claims has increased steadily and "the Supreme Court's view ran remarkably parallel to those of Congress."<sup>266</sup>

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<sup>255</sup> See Aleinikoff (supra note 225), 5; Lippolis (supra note 190), 85.

<sup>256</sup> See Schönberger (supra note 191), 70; Karlan (supra note 213), 1349.

<sup>257</sup> See Keyssar (supra note 226), 256; McCray (supra note 236), 667.

<sup>258</sup> See Raskin (supra note 206), 1393; Harper-Ho (supra note 205), 273.

<sup>259</sup> See Neuman (supra note 105), 254; Heller (supra note 243), 200.

<sup>260</sup> See Keyssar (supra note 226), 283.

<sup>261</sup> See Bickel (supra note 197), 374; Gunther & Sullivan (supra note 238), 917.

<sup>262</sup> See Keyssar (supra note 226), 282; Karlan (supra note 213), 1354.

<sup>263</sup> See McCray (supra note 236), 667; Karlan (supra note 239), 245.

<sup>264</sup> See Keyssar (supra note 226), 166; Neuman (supra note 16), 334.

<sup>265</sup> See Raskin (supra note 206), 1440.

<sup>266</sup> See Keyssar (supra note 226), 283.

Still, the elected branches keep the leading position in the policy areas of voting rights as well as of citizenship and migration.<sup>267</sup>

Correspondingly, in designing proposals for a reform of the European multilevel system, the emphasis will be placed on the potential role of the supranational institutions: the nature of the problems of inconsistency emerging in the field of electoral law for non-citizens and the fragmented answers of the Member States show that coherent action can be taken only at the EU level.<sup>268</sup> Otherwise, although the role of the ECJ should not be diminished, it will be claimed that the EU *pouvoir constituant* should be directly at the forefront of the reform efforts, through amendments to the EU founding treaties.<sup>269</sup> Indeed, in the last few years the ECJ has played a remarkable role in enhancing the meaning and reach of EU citizenship<sup>270</sup> and electoral rights,<sup>271</sup> and the possibility of further involvement of the European judiciary in the field could be explored.

Hence, e.g., some have argued that the ECJ could review the national electoral laws denying expatriate voting on the basis of its free movement jurisprudence<sup>272</sup> “to conclude that the latter discourages EU citizens from moving from their Member States of nationality to other Member States.”<sup>273</sup> Similarly, electoral rights for third-country nationals could be judicially sanctioned through an extensive reading of the ECJ’s reasoning in the *Gibraltar* case.<sup>274</sup> Besides being fairly unrealistic, however, these judicial remedies also have some important drawbacks as they seem to be capable only of achieving second-best solutions that do not solve the problems of inconsistency entirely. More fundamentally, though, it is the inherent democratic dimension of the issue of electoral rights which requires

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<sup>267</sup> See Schuck (supra note 242), 217; Rubio Marin (supra note 16), 217.

<sup>268</sup> See Kochenov (supra note 50) 205; Monar (supra note 190), 180. See also Shaw (supra note 14), 232 who highlights the importance of the principle of subsidiarity, and the advantages of a coordinated action at the EU level, but affirms that “the impetus for change seems more likely to come from the national level rather than the EU level.”

<sup>269</sup> See Bruno de Witte, *The Closest Thing to a Constitutional Conversation in Europe: the Semi-Permanent Treaty Revision Process*, in CONVERGENCE AND DIVERGENCE IN EUROPEAN PUBLIC LAW (Neil Walker et al. eds., 2002), 39 and Paul Craig, *Constitution, Constitutionalism and the European Union*, in 7 EUROPEAN LAW JOURNAL 2 (2001), 125.

<sup>270</sup> See O’Leary (supra note 56), 68; Kostakopoulou (supra note 136), 235.

<sup>271</sup> See Besselink (supra note 163), 788; Shaw (supra note 14), 189.

<sup>272</sup> See Case C-192/95 *Tas-Hagen en Tas* [2006] ECR I-10451 (declaring contrary to EU free movement rights a Dutch law which grants a pension to Dutch civilian war victims only if they reside in the Netherlands); Joined Cases C-11 & C-12/06 *Morgan* [2007] ECR I-9161 (declaring contrary to EU free movement rights a German law which sets as a condition for the obtainment of an educational grant for studying in another Member State that the studies are continuation of the educational activity pursued for at least one year in the home Member State).

<sup>273</sup> Kochenov (supra note 33), 219.

<sup>274</sup> See Shaw (supra note ), 234 who emphasize how the ECJ in the *Gibraltar* case has confirmed that the right to vote for the EU Parliament is “certainly not an exclusive right of citizens” but then remarks correctly that this “could – perhaps – embolden the European Commission [and not the Courts!] to make proposals in the future for the EU institutions formally to extend more EU citizenship rights to third country nationals, including to vote in local elections in the Member States on the basis of residence.”

democratic institutions (before unelected courts) to take on the burden of appropriately addressing the democratic challenges that the right to vote for non-citizens poses.<sup>275</sup>

Beyond the institutional issue, it is argued that the proposals advanced here, and inspired by the lessons of the US experience, can offer a satisfactory solution to the problems of inconsistency that were identified in section 3 above. As previously highlighted, a first major tension arises in the European multilevel system because, as the law now stands, citizens of a EU Member State may vote only for municipal and supranational elections when they reside in a Member State of which they are not citizens. EU law does not however grant them electoral rights at the national level in their country of residence and, if their country of nationality denies expatriate voting, they inevitably become disenfranchised. A first proposal for reform, therefore, would be to amend the EU treaties in order to extend voting rights also for general elections to non-citizens holding the nationality of another EU Member States and permanently residing in the EU country concerned.<sup>276</sup>

This proposal *de facto* would make residence the core condition for the exercise of voting rights.<sup>277</sup> This is also the case in the US, where “the terms citizens and residents are considered essentially interchangeable”<sup>278</sup> since the adoption of the XIV amendment. The Supreme Court has confirmed that States have almost no discretion on this issue by striking down in *Dunn v. Blumstein*<sup>279</sup> a State provision that required residency in the State for one year as a prerequisite for voting.<sup>280</sup> If this proposal were enforced, the current contradictions affecting voting rights for EU citizens expatriated in another EU country would be overcome. EU citizens residing in another EU Member State would not risk being deprived of the opportunity to express their voices in the choice of a national legislature where their home country denies expatriate voting; instead, they would be entitled to full political participation anywhere in the EU, no matter what their national origin is.

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<sup>275</sup> See RUTH RUBIO MARIN, IMMIGRATION AS A DEMOCRATIC CHALLENGE (2000). See also Augustin José Menéndez, *The European Democratic Challenge: the Forging of a Supranational Volonté Générale*, in 15 EUROPEAN LAW JOURNAL 3 (2009), 277.

<sup>276</sup> For support see also Lardy (supra note 28), 625; Monar (supra note 190), 180; Kostakopoulou (supra note 30), 644; Kochenov (supra note 50), 221 (who as an alternative argues for prohibiting through EU law the national laws that disenfranchise expatriate citizens); Shaw (supra note 14), 198-199 (who also advance as an alternative way forward the “use of a mechanism of international law outside the formal legal framework of the EU Treaties”).

<sup>277</sup> See Rubio Marin (supra note 16), 226; Garot (supra note 108), 235. See also Gareth Davies, ‘Any Place I Hang My Hat?’ or: *Residence is the New Nationality*, in 11 EUROPEAN LAW JOURNAL 1 (2005), 43, 55.

<sup>278</sup> Lippolis (supra note 190), 85. See also La Torre (supra note 252), 447 ff who while arguing in favour of basing political rights on residence also emphasizes how already “in the American Declarations of Rights, we find that the fundamental justification of citizenship is a common concern in the commonwealth as instantiated by *permanent residence*” (emphasis in the original).

<sup>279</sup> 405 US 330 (1972). See also *Carrington v. Rush* 380 US 89 (1965) (striking down a Texas law that prevented members of the military stationed in the State from establishing residence there for electoral purposes).

<sup>280</sup> See Gunther & Sullivan (supra note 238), 863; Keyssar (supra note 226), 276.

The second problem of the European multi-tiered electoral architecture is generated because, as the law now stands, third-country nationals legally residing in the EU enjoy a set of fundamental rights that is common in all EU Member States on the basis of Directive 2003/109 but their enfranchisement (even for local elections) varies depending on the legislation or the international agreements adopted by the country in which they happen to reside. Moreover, conditions for the acquisition of nationality of a Member State, and indirectly of EU citizenship, differ between EU countries, generating inequalities in the access to the same *status*. To address this situation, two alternative proposals can be envisaged, by amending the EU treaties to empower the EU institutions: either to establish common rules of naturalization,<sup>281</sup> or to make uniform the national legislations so as to ensure the right to vote for non-nationals (at least) at the local level.<sup>282</sup>

The first alternative would allow third-country nationals to acquire EU citizenship following a EU-based naturalization process and, thereafter, to exercise electoral rights. This solution would mirror the US one, where electoral rights are now conditioned by the possession of US citizenship, but the latter automatically stems from birth on US soil or can be acquired by right at the conditions set by the federal naturalization Act.<sup>283</sup> If such a proposal were enforced, the current incoherencies plaguing voting rights for third-country nationals would be resolved by indirectly integrating them in the EU electorate. As a second alternative, however, alien suffrage could be secured at the local level throughout Europe<sup>284</sup> by expanding the scope of Directive 2003/109 or by requiring EU States to sign the CPFPL. An EU-led harmonization of the Member States' provisions on foreigners suffrage could indeed repeal the unreasonable asymmetries that currently exist.

In conclusion, there are several possible solutions to the problems of inconsistency that affect the picture of voting rights in the European multilevel system of human rights protection. By analyzing the US experience and the developments in its dual citizenship and voting rights schemes, one may advance several proposals to reform the law. On the basis of

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<sup>281</sup> For support see also Lardy (supra note 28), 628; Besson & Utzinger (supra note 88), 581; Kostakopoulou (supra note 30), 644; Kochenov (supra note 33), 227. As Castro Oliveira (supra note 96), 196 highlights this solution would imply separating EU citizenship from national citizenship and making the acquisition of the first the priority for long-term residents third-country nationals, just as it is the case in the US.

<sup>282</sup> For support see Lardy (supra note 28), 627; Rubio Marin (supra note 16), 222; Besson & Utzinger (supra note 88), 580; Shaw (supra note 14), 236; Kochenov (supra note 33), 228-229.

<sup>283</sup> See Schuck (supra note 242), 234 Neuman (supra note 105), 251.

<sup>284</sup> The grant of voting rights as an alternative to naturalization should be provided especially for the hypothesis in which EU citizenship could be acquired by long-term residents third-country nationals only by giving up their 'home' citizenship. In this case, in fact, immigrants may not want to renounce their original nationality. For a human rights defence of dual citizenship and for an argument that all nationality laws of liberal democratic States should allow individuals to possess dual citizenship see however P. Spiro, *Dual Citizenship as Human Rights*, in 8 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW (2010), 111. Cfr. also Christian Joppke, *Exclusion in the Liberal State*, in 8 EUROPEAN JOURNAL OF SOCIAL THEORY (2005), 43.

a comparative institutional analysis<sup>285</sup> it appears that the EU is in a relatively more adequate position to manage the inconsistency appropriately. Similarly, although measures could perhaps be adopted at the jurisprudential level, it seems that the most effective transformations would take place through legislative reforms rather than through the activity of the courts. One should not be too naïve as to believe that such proposals will be easily adopted by policy-makers. Throwing light on these issues is, nonetheless, among the honours and duties of constitutional scholarship.

## 7. Conclusion

As this paper has highlighted, the overlap of three diverse sets of norms and institutions dealing with voting rights in the European legal space has generated incoherencies and paradoxes. The examples of the electoral rights of EU citizens who are expatriated in another EU Member State and of third-country nationals permanently residing in the EU have been considered and the analytical concept of inconsistency has been advanced to define them. Notwithstanding the shortcomings of the current state of affairs the paper has argued that no satisfactory development has been produced by the recent transformations at the substantive and formal level: the Member States were unwilling or unable to innovate things through national legislative reforms or EU Treaty amendments and the European courts did not enjoy sufficient margins of manoeuvre to generate changes through dynamic and teleological interpretations of the law.

On the other hand, drawing on a comparative analysis with the US, the paper has attempted to advance a number of normative proposals that could be useful for overcoming the inconsistencies currently afflicting electoral rights for non-citizens in the European human rights architecture. In particular, two amendments to the EU Treaties have been recommended in order to ensure that: 1) EU citizens enjoy full electoral representation in their EU Member State of residence notwithstanding their nationality; and, 2) third-country nationals enjoy a common right to vote in local elections in any Member States of the EU, or, alternatively, can naturalize as EU citizens through a uniform procedure. As an early observer of the US constitutional structure noticed, “there is no more invariable rule in the history of society: the further electoral rights are extended the greater is the need for extending them: for after each concession the strength of democracy increases and its demands increases with its strength.”<sup>286</sup> Will Europe follow this pattern as well?

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<sup>285</sup> See NEIL KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY* (1994) and with specific reference to the EU MIGUEL POIARES MADURO, *WE THE COURT: THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION* (1998), 117.

<sup>286</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, BOOK 1, CHAPTER 4.