

# A Duty Free Europe? What's Wrong with Kochenov's Account of EU Citizenship Rights

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**Abstract:** This article disputes the recent argument of Dimitry Kochenov advocating an 'EU Citizenship without Duties'. His thesis rests on an untenable form of philosophical anarchism that overlooks the role played by our political obligations to state structures in securing rights. At best, his argument suggests a 'thin' form of EU citizenship that allows European citizens to choose which of the Member States they wish to become morally obliged to. A 'thicker' form of EU level citizenship could only arise by creating civic obligations at the EU level, the position he rejects. To the extent certain Court of Justice judgments in this area reflect parallel reasoning to Kochenov's, they too suffer from a similar failure to appreciate the role of civic duties to particular Member States (or eventually the EU) in creating and securing the status of citizens as equal rights bearers.

## I Introduction and Structure: Kochenov's Provocation

Many commentators have seen the absence of civic duties relating to the rights of EU citizenship as a central flaw.<sup>1</sup> In a recent article,<sup>2</sup> Dimitry Kochenov disputes this view and defends 'an EU citizenship without duties'. He begins by questioning whether citizenship rights necessarily entail correlative civic duties directly related to those rights on the part of the rights-bearer. Section II of his article claims that entailment has

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<sup>1</sup> E.g. J. H. H. Weiler, 'Europa: "Nous coalisons des Etats, nous n'unissons pas des hommes"', in M. Cartabia and A. Simoncini (eds), *La sostenibilità della democrazia nel XXI secolo* (Il Mulino, 2009), at 51, 59 et seq; R. Davis, 'Citizenship of the Union . . . Rights for All?' (2002) 27 *European Law Review* 121; J. Shaw, 'Citizenship of the Union: Towards Post-National Membership?' (1998) 6 *Collected Courses of the Academy of European Law* 343–344.

<sup>2</sup> D. Kochenov, 'EU Citizenship without Duties', (2014) 20 *European Law Journal* 482

increasingly become the exception rather than the rule within most democratic states.<sup>3</sup> For example, he maintains that only a few countries regard the right to vote as entailing a duty to vote, or the right to security as involving a duty of national service, not just in time of war but also in peacetime.<sup>4</sup> In this respect, he contends EU citizenship merely follows a more general trend. However, he extends this empirical observation to make a much broader argument of a normative nature. He adopts a philosophical anarchist position that denies any non-voluntary political obligation to obey the law, either in general or with regard to a particular state.<sup>5</sup> He suggests that rights are best conceived as moral claims that every individual may make against all other individuals and that we ought to respect only to the extent justice requires us to do so.<sup>6</sup> The compatibility of existing laws or states with such moral rights justify any legitimate duties we may have to them, regardless of whether we are citizens or not.<sup>7</sup> Indeed, he implies in Section III that the mutual recognition of these rights by all individuals alone suffices to coordinate human behaviour, taking us beyond the need for any political organisation that might have the coercive characteristics associated with states.<sup>8</sup> In Section IV he applies the argument to EU citizenship and

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<sup>3</sup> Kochenov (2014), 485-91

<sup>4</sup> Kochenov (2014), 483

<sup>5</sup> The most sophisticated modern account of this position, which I will use below to fill out gaps in Kochenov's argument, is that of A. J. Simmons, *Moral Principles and Political Obligations* (Princeton University Press, 1981), cited by Kochenov (2014), p. 484 n. 12

<sup>6</sup> The philosophical basis of Kochenov's account of rights is not always clear. He seems closest to H. L. A. Hart's 'choice' view of rights in 'Are There Any Natural Rights?' (1955) 64 *Philosophical Review* 175, cited at Kochenov (2014), 484 n. 14, and especially J. Feinberg's account of rights as claims in 'Duties, Rights, and Claims', (1966) 3 *American Philosophical Quarterly* 137; cited at Kochenov (2014) 484 n. 14, which link rights to individual liberty. But he also endorses positions by Waldron and Raz who take the 'benefit' or 'interest' view of rights e.g. at Kochenov (2014), 484 n. 16 and 492 n. 77 respectively.

<sup>7</sup> Kochenov (2014), 487

<sup>8</sup> Kochenov (2014), 491-95

argues that its implicit normative and functional logic not only reflects and helps promote what he calls the ‘de-dutification’ of citizenship but also points to the end of the very status of citizenship as membership of a particular political community and its replacement by responsible membership of the moral community of human beings. Consequently, those advocating that EU citizenship should become associated with a set of particular political duties fail to appreciate its transformative and radical nature.

While written in part as a provocation, Kochenov highlights and defends a key, yet often unarticulated or even recognised, implication of the cosmopolitan teleology that,<sup>9</sup> in common with many others,<sup>10</sup> he seeks to associate with European Citizenship: namely, its potential undermining of the political obligations of citizens not just to the Member States but also to the EU, where he believes such duties should remain absent. Given such a cosmopolitan teleology has figured in many of the most prominent accounts of EU Citizenship offered by both jurists and social and political theorists – not least Kochenov’s own prolific writing on this topic - and arguably forms a strong current in certain of the Court of Justice’s more controversial judgments, indicating some of its problems seems worthwhile.

What follows centres on his normative argument and does not engage with his empirical survey of the ‘de-dutification’ process in Section II of his article.<sup>11</sup> I start by disputing that rights can be

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<sup>9</sup> Kochenov (2014), 488-89.

<sup>10</sup> E.g. in the writings of D. Kostakopoulou, to which Kochenov (2014) frequently approvingly refers (e.g. to D. Kostakopoulou, *The Future Governance of Citizenship* (Cambridge University Press, 2008), 12–44 at 488 n. 43).

<sup>11</sup> Due to space constraints, I shall simply signal that his two related empirical claims, that 1) historically the link of citizenship rights to duties invariably had an exclusionary purpose and 2) that this linkage has steadily declined as citizenship has become more inclusive, can both be questioned. For example, compulsory voting was

disassociated from any obligation towards a given political community, as Kochenov proposes. I contend that some such duty is a condition of having rights. I then turn to the justifications for our having specific civic duties to a given state and their implications for his view of EU citizenship. I distinguish a ‘choice’ from a ‘civic’ account. While he favours the former, even on this account EU citizenship only proves compatible with a lack of civic duties at the EU level to the extent they remain strong at the Member State level. As a result, those seeking a thicker kind of EU citizenship are correct to believe it would entail a development of civic duties towards the EU.

## **II Rights and Political Obligations towards the State**

The problems with Kochenov’s account emerge most clearly when one works backwards from his concluding assertion of ‘the inherent immorality of the state’.<sup>12</sup> This thesis prompts the question of whether any moral grounds might exist for creating and having an obligation not just to states in general but to a particular state. In posing the issue in this way, I accept that we have no obligation to obey the laws of any state just because they are the laws – there must be some external moral reason that renders it justified to do so. I wish to suggest that one such external moral reason may be to secure the very status of individuals as free and equal rights bearers that Kochenov claims dissolves any such obligations. The

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frequently introduced as an instrument of inclusion rather than exclusion, to promote participation by otherwise marginalized citizens within the democratic process (see A. Malkopoulou, *The History of Compulsory Voting in Europe: Democracy's Duty?* (Routledge, 2015)) Moreover, voting remains a legal obligation in a quarter of all democracies, with many mature democracies, such as the UK, seriously considering its introduction (See S. Birch, *Full Participation: A Comparative Study of Compulsory Voting* (Manchester University Press, 2009)).

<sup>12</sup> Kochenov (2014), 494.

reason is as follows: Kochenov's argument requires for its coherence both that all activities requiring coordination and cooperation can be based on uncoerced choice, and that no major conflicts or disagreements exist between rival rights claims. Yet, the need for authoritative coordination and cooperation can be regarded as arising from the 'circumstances of justice' that lead to the need for rights in the first place, while the presence of conflicts and disagreements about these rights form the 'circumstances of politics' within which rival claims need to be reconciled. Taken together, I shall contend that these two circumstances generate a rights-based reason to respect the need for political obligations in general and to obey and participate within a given state in particular. The rest of this section addresses the general argument, the next section the particular argument and its relationship to the 'circumstances of citizenship' – including EU Citizenship.

Consider first the 'circumstances of justice'. Following Hume and Rawls,<sup>13</sup> these circumstances can be attributed to scarcity, limited altruism and limited knowledge and power. If a superabundance of goods existed, all persons possessed an angelic disposition and, the road to hell being paved with good intentions, everyone could always second-guess each other's actions and had the ability to achieve whatever they wished, then there would be no need for rights.<sup>14</sup> In this idyllic Land of Cockaigne, rights would be superfluous. Its well provided for, pure and altruistic, omniscient and omnipotent inhabitants would have no need to make claims against each other. All could freely choose to act in whatever way they desired and, where necessary, would be able to spontaneously coordinate and cooperate with each other in ways that would always be mutually fulfilling and virtuous. In the absence of these

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<sup>13</sup> J. Rawls, *A Theory of Justice*, (Harvard University Press, 1971) 126-30

<sup>14</sup> R. Bellamy, *Rethinking Liberalism*, (Pinter, 2000) 152-55.

conditions, there will always be competing and disputed claims on scarce goods and a need to settle them justly by deciding who is entitled to what. To secure certain freedoms – even something as mundane as driving through a busy town - will often require coordinating and cooperating with others, given that a complex road system and an urban environment will not appear without a degree of conscious planning. As in Feinberg's imagined world of 'Nowheresville',<sup>15</sup> much might be achieved by people being sensitive to others and dutifully acting on the obligations of some agreed moral code, although the limits of human practical reasoning would almost certainly still lead to some conflicts. However, in this situation individuals would be unable to claim as a right that they could drive at a given moment, such as when there was a green light, or build a house on the land they had bought for the purpose, have privacy or exercise free speech and so forth. They would always be dependent on others possessing sufficient good will and sensitivity to their needs to allow them to do so.

To be able to claim a right without relying on the forbearance or virtue of others requires that it can be enforced even when these others oppose or simply neglect to uphold it. In other words, it requires that others can be obliged to recognise that right. The 'circumstances of politics' enter at this point.<sup>16</sup> These circumstances derive from the need for a political authority to regulate people's behaviour in ways that protect their rights, if need be through coercion, and that can do so legitimately, despite these same people often disagreeing about the nature and basis of their rights and the most appropriate and justified forms of regulation and coercion. As a result, rights emerge as dependent on

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<sup>15</sup> Feinberg (1966), cited by Kochenov (2014) 484 n. 14 and 492.

<sup>16</sup> I take this term from J. Waldron, *Law and Disagreement*, Oxford: Oxford University Press, 1999, pp. 107-18 and A. Weale, *Democracy*, Basingstoke: Macmillan, 1999, pp. 8-13.

politics and a political obligation to a given political community in two related senses.

First, the very existence of rights depends upon individuals being equally subordinate to the laws of a common political authority capable of defining and upholding their rights in a uniform way. Otherwise, which rights they have, when they apply and what they entail will be matters of the differing private judgements of others – we may claim rights but will remain dependent on the consideration and benevolence of others for their recognition and enforcement. In such a situation, individuals will always be prone to injustice and domination by those more powerful than them and to committing, either intentionally or inadvertently, injustice and dominating others in their turn. Some neo liberals of an anarchist persuasion have denied such arguments and claimed that markets emerge through conventions and are capable of operating without any need for a state.<sup>17</sup> Yet, as critics of this position – including many libertarians<sup>18</sup> - note, the operation of markets requires the establishment of property rights and freedom of contract, which are only likely to be secured in an impartial and authoritative way by a state capable of enforcing duties. Not only would a pure free market, without any political assignment of rights and duties, be liable to being unjust, it would be largely unworkable as well. As a result, a duty to belong to and support some form of political community becomes an obligation of justice because such an arrangement is constitutive of the very possibility of a just scheme of rights.<sup>19</sup> Without it, rights will not only not be upheld but also would not even exist, because there will be constant

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<sup>17</sup> The classic text is D. Friedman, *The Machinery of Freedom*, (Chu Hartley LLC, 3<sup>rd</sup> ed., 2014)

<sup>18</sup> Such as F. Hayek, *The Constitution of Liberty*, (University of Chicago Press, 1960).

<sup>19</sup> This argument has Hobbesian and, in the version being employed here, Kantian roots – see A. Stiltz, *Liberal Loyalty: Freedom, Obligation and the State*, (Princeton University Press, 2009) 53-56.

disagreement as to which rights we have.<sup>20</sup> Their assignment by courts will be entirely arbitrary – a form of what Natolino Irti has called juridical nihilism.<sup>21</sup>

Of course, though a coercive political authority might be a condition of justice that does not mean that any given political authority is just. The second political aspect of rights emerges here. If justice is itself controversial we cannot appeal to it as an independent standard for adjudicating on the legitimacy of the various political arrangements that serve to instantiate it. Rather, we will need some form of political mechanism for claiming and defining our rights in a free and equal way against and with others. What might be called the ‘circumstances of citizenship’ arise at this point.<sup>22</sup>

### **III The Circumstances of Citizenship and EU Citizenship**

The ‘circumstances of citizenship’ consist of the existing world of bounded polities within which issues of political membership arise. A wide variety of principles for deciding this issue exist both empirically and normatively. Here I focus on two accounts pertinent to the current discussion: what I shall call the ‘choice’ account and the ‘civic’ account.

The choice account involves the importance of our being able to choose which political community we belong to. Though at times Kochenov appears to deny the need for any political authority at all,<sup>23</sup> at others he seems to accept, as most philosophical anarchists do,<sup>24</sup> that some political authority might be needed. However, like them he argues

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<sup>20</sup> See T. Honoré, ‘The Dependence of Morality on Law’, 13.1 (1993) *Oxford Journal of Legal Studies*, 1.

<sup>21</sup> N. Irti, *Nichilismo giuridico*, (Laterza, 2005).

<sup>22</sup> See R. Bauböck, ‘Morphing the Demos into the Right Shape. Normative Principles for Enfranchising Resident Aliens and Expatriate Citizens’, forthcoming p. 5, who talks of the ‘circumstance of democracy and citizenship’.

<sup>23</sup> E.g. Kochenov (2014), 494, 495.

<sup>24</sup> E.g. See A. J. Simmons, *Justification and Legitimacy* (CUP, 2001), chs 1 and 6.



its legitimacy depends on its being freely chosen by those subject to it.<sup>25</sup> Nevertheless, this position does not entirely fit with his denial of the need for any duties being associated with citizenship *per se*, as opposed to just with European Citizenship as a special sort of status. On this account, choosing a political community can be likened to an amateur singer choosing between choirs. Singing choral music is something that can only be achieved by being part of a collective organisation established for that purpose. If I am a big Bach fan, I will be inclined to choose the Bach rather than the Mozart choir, and if I have an above average voice I might prefer the choir I feel is strongest over the one nearest to where I live. Yet, having made these choices, I incur certain obligations – to attend practices, to follow the agreed tempo, not to sing fortissimo when my part is supposed to be piano, to stay the course and not to pull out before the final performance because I have got bored, and so forth. In other words, I acquire in this way a set of duties relating to membership of a particular choir.

Likewise, though Kochenov follows Nozick in rejecting the ‘fair play’ argument for political obligation,<sup>26</sup> as Simmons has noted this argument does apply in cases where we can choose whether or not to be members of a given community that produces certain collective goods – in this case the collective good of a certain pattern of rights relating to a given account of justice.<sup>27</sup> If I have chosen to belong to a certain community then I acquire duties to cooperate in that community’s coercive maintenance of a unitary scheme of rights by obeying the law, paying taxes and so on. Moreover, when individuals can choose whether they belong to a libertarian or a communitarian polity, say, then that alone

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<sup>25</sup> Kochenov (2014), 496-97.

<sup>26</sup> R. Nozick, *Anarchy, State, and Utopia* (Basil Blackwell, 1974), at 95, cited in Kochenov (2014), 495.

<sup>27</sup> Simmons (2001) ch. 1.

provides the most effective (and necessary) incentive for all polities to enshrine a reasonable conception of justice.<sup>28</sup>

This position would be perfectly compatible with a conception of European Citizenship as free from duties to any Member State in particular but allowing EU citizens free movement to choose between them. *Pace* Kochenov, though, it would not be free of all duties but involve something akin to what Rawls called ‘a natural duty to uphold just institutions’<sup>29</sup>: that is, a recognition that all the Member States reflect reasonable conceptions of justice that EU citizens should respect. Arguably, some such general duty lies behind those limits to EU citizenship rights that Kochenov and, in some cases and on some interpretations,<sup>30</sup> the Court of Justice,<sup>31</sup> have challenged, such as an obligation not to undermine the fiscal capacity of each Member State to provide the public services democratically decided upon by citizens, including by limiting access to health and social security to those who have worked and contributed for a minimum period, to restrict voting in national elections to those willing to commit more permanently to membership by naturalising and so on. Indeed, the rationale for the EU not being a duty-free zone in the literal sense of EU citizens not being able to purchase goods free of duty when travelling between Member States, could be related to a general obligation to maintain the fiscal

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<sup>28</sup> Kochenov (2014), 497 explicitly endorses this argument.

<sup>29</sup> Rawls (1971), 333-42.

<sup>30</sup> E.g. F. Scharpf, ‘Legitimacy in the Multilevel European Polity’, 1:2 (2009), *European Political Science Review*, 173.

<sup>31</sup> E.g. in Case C-76/05 Schwarz and Gootjes-Schwarz v. Finanzamt Bergisch Gladbach [2007] ECR I-6849, Case C-158/96 Kohll [1998] ECR I-1935, Case C-157/99 Geraets - Smits v. Stichting Ziekenfonds VGZ [2001] ECR I-5473, Case C-385/99 V.G. Müller-Fauré v. Onderlinge Waarborgmaatschappij O.Z., Zorgverzekeringen U.A [2003] ECR I-4509, and Case C-372/04 Watts v. Bedford Primary Care Trust [2006] ECR I-4325, where a judicially declared right of access to services seems to be disconnected from any duty to ensure they are funded and viable. Such reasoning corresponds to what Irti has called juridical nihilism (Irti, 2005).

viability of States by preventing citizens simply shopping around at whim to the extent that no stable political communities would be possible.<sup>32</sup>

The philosophical anarchist account also suggests it would be inadvisable that the EU displaced the Member States to become itself a political community capable of exacting duties. For that would necessarily prevent citizens from choosing between the Member States.

It is perhaps indicative of the ambivalences and ambiguities of Kochenov's argument that it is unclear how far he would welcome this conclusion. The key problem confronting him, though, is that on this line of reasoning he can only avoid associating EU Citizenship with many duties because these remain largely linked to our membership of whichever Member State we choose. What EU Citizenship adds is a presumption that to the extent we can freely move between these States, then our obligations towards them are chosen and so legitimate.

The most obvious difficulty with this account is that most individuals are sedentary and therefore exercise no choice. Only 2.75% of the EU population - roughly 14 million people – currently reside on a stable basis in a Member State other than their own.<sup>33</sup> Indeed, the choice account relies on this being the case. For the stable citizenship regimes of the Member States create the choices the free moving EU Citizens choose between. By contrast, the civic account for ensuring the legitimacy of the political authority applies even to those who have not moved or chosen their civic status but have rather acquired citizenship through birth. This account rests on the political authority being under the free and equal

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<sup>32</sup> Arguably the Court of Justice has come to close to committing this error not only by not allowing the fiscal viability of public services such as health and education to be a consideration in restricting access to them, as in the Cases cited in n. 31, but also by treating national rules against tax avoidance as violations of free capital movement, on which see S. Ganghof, and P. Genschel 15(1): (2008a), 'Taxation and Democracy in the EU', *Journal of European Public Policy*, 58

<sup>33</sup> EC Press release 15 January 2014 [http://europa.eu/rapid/press-release\\_MEMO-14-9\\_en.htm](http://europa.eu/rapid/press-release_MEMO-14-9_en.htm)

democratic control of those subject to it. The civic account is sometimes given a libertarian reading as suggesting that political authority is thereby subjected to the consent of citizens, and hence comes close to being something they have chosen. Yet, as the philosophical anarchist R. P. Wolff established some years ago, it is practically impossible for even the most direct form of democracy to provide a satisfactory method for citizens to consent.<sup>34</sup> A more realistic view suggests that we have an obligation to participate with others in collectively determining on a free and equal basis the system of rights under which we happen to live.<sup>35</sup>

*Contra* the philosophical anarchists, we can have rights-based obligations to participate in collective processes even when we have not chosen to do so. If I am wandering along a beach and come across a group of people who have formed a chain to pull in a fishing vessel that has got into trouble on the sea, then, assuming I am sufficiently fit to participate and those on the boat will plainly be in grave danger without this help, I am morally obliged to do my bit in this collective endeavour to save the lives of these fishermen. Analogously, it can be argued that given rights require a political authority through which they can be claimed and secured, I have an obligation to support and participate in those institutions that regulate the majority of my interactions with others to ensure that their rights are duly recognised and to do so in the way that most effectively leads to their being treated equitably. Individuals may not have chosen their political community, yet that does not mean they have no obligations towards it. Rather, they are like the beach stroller above who has a natural duty of justice to help save the fishermen or, in this case, to support a judicial authority necessary to uphold rights.

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<sup>34</sup> R. P. Wolff, *In Defense of Anarchism* (Harper and Row, 1970).

<sup>35</sup> The argument that follows is indebted to Stilz (2009), ch. 7.

In this respect, being born into a given political community can be likened to finding oneself already a member of the local Bach choir, the members depending on you to do your bit in bringing about the collective performance that is a fair and equitable system of laws. That need not tie you forever to a given community anymore than one must remain a member of a given choir but, *contra* Kochenov, it constrains your freedom to flit from one to another at whim without any obligations whatsoever.<sup>36</sup> It suggests that in moving to another state one either retains one's civic membership of one's original state, such as paying taxes, while still having the natural duty to uphold the just institutions of the state one visits, or one gives up one's previous civic obligations and acquires another set to one's new state. As I noted, the choice and civic accounts are not incompatible, rather the choice account is parasitic on the civic account.

What are the implications of the civic account for EU Citizenship? Imagine the choirs of my original example operate democratically, choosing what to perform, who will conduct, and how often they practice by free and fair deliberation among their members followed by a majority vote. If some choirs form a union to perform certain large choral works, that may extend their civic choral obligations and engagements in a variety of ways. A series of democratic agreements between the original constituent choirs might allow singers to cooperate when necessary on joint larger projects that are mutually agreed and to freely move between these choirs, staying in the Bach choir but singing for extended or shorter periods in the Mozart choir, say, and possibly to switch allegiance permanently to the Mozart choir if they find they prefer it. It could even lead to the choirs amalgamating into a larger choir, of which the original smaller choirs become sub groups. By analogy, the prime rights based

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<sup>36</sup> He appears to advocate this scenario Kochenov (2014) 497-98.

obligations of individuals within the EU will be to the system that regulates most of their interactions with others to preserve their rights. At present, that remains their Member States. Through democratic agreements between the Member States their citizens have acquired mutual rights of free movement but their civic duties remain principally to the Member State of their citizenship and, to a lesser degree, to any Member State they may have chosen to move to. Over time, those that do move may shift their civic obligations entirely to the chosen Member State by becoming citizens of it – indeed, arguably they have a duty to do so if their rights become increasingly dependent on that Member State.<sup>37</sup> To the extent the interconnections between individuals become more extensive, a rights based obligation may arise to establish more extensive political institutions of some kind that are likewise under the free and equal control of those subject to them. On the civic account, to the degree that the EU has become already and develops in the future as a juridical order distinct from the Member States, then so one can expect the duties of EU Citizens to support and control it to grow.<sup>38</sup>

#### **IV Conclusion**

I have argued that rights cannot be detached from either something like a state or obligations to it, as Kochenov suggests. A view of EU Citizenship

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<sup>37</sup> On the obligation of immigrants to acquire citizenship, see Helder De Schutter and L. Ypi, 'Mandatory Citizenship for Immigrants', 45(2) (2015) *British Journal of Political Science*, 235.

<sup>38</sup> Some such reasoning seems to underlie Jurgen Habermas's view of the EU undergoing a popular constitutional moment to establish an EU level democracy in *The Crisis of the European Union: A Response* (Polity, 2012). Although I believe this result is better achieved by a 'demoicratic' Union of democratic states (R. Bellamy, 'An Ever Closer Union Among the Peoples of Europe': Republican Intergovernmentalism and Demoicratic Representation within the EU', *Journal of European Integration* 35(5) (2013): 499-516, this takes us beyond the immediate issue under debate here.

can be given that is light on duties and emphasises freedom of choice, but that choice account does not remove any obligations to particular Member States. If anything it makes those obligations all the more justified and necessary. The civic account could be read as weakening duties to the Member States but only in so far as it strengthens those that EU Citizens have to the EU. Either way, Kochonov's picture of a duty-free Europe seems open to rights-based objections.