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The Present and the Future of EU Citizenship:
A Bird’s Eye View of the Legal Debate
Abstract
This article scrutinizes the last ten years of the academic debate on EU citizenship law taking nine fundamental disagreements among scholars as staring points. It explores EU citizenship's relationship with three groups of issues of fundamental importance, including the place of this concept within the fabric of EU law, the influence of this concept on the essence of the Union as a system of multilevel governance, and its impact on the lives of ordinary Europeans. A number of key works which influenced the Court and the legislator in the recent years is assessed to outline the likely direction of future research, as well as future EU citizenship's development. Although the literature on the subject is overwhelmingly rich and diverse, this article aspires to provide a representative sample of issues of interest for the framing of the concept at issue from a supranational perspective, necessarily leaving national (or nationalistic) literatures aside.

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The Present and the Future of EU Citizenship

I. Introduction

More than half a billion Europeans holding a nationality of one of the 27 Member States of the European Union (EU) are EU citizens. Citizenship beyond the State, deemed impossible by Raymond Aron,¹ is here, and its importance in shaping the legal position of individuals is rising very rapidly, as it takes over a number of vital aspects of Member States’ nationalities, shifts the jurisdictional boundary between national law and EU law, plays a pivotal role in the construction of jurisdiction by the Court of Justice of the EU (ECJ) influences our perceptions of identity, culture and social solidarity, and potentially changes the nature of States in Europe as well as the essence of the Union.

With the recent EU citizenship case-law in mind,² it is clear that much more is to come. A ‘federal European citizenship’³ is emerging. At this stage Member State nationalities and EU citizenship simply cannot be understood or studied separately anymore: the key starting point of EU citizenship analysis, to agree with Jo Shaw, is ‘to avoid thinking about [the two] as two separate and unrelated phenomena’.⁴ The EU is turning into ‘a laboratory for differentiated citizenship’, ⁵ with all the positive and negative consequences of being at the avant-garde of an important transformation.

Analyzing the development of EU citizenship law during the last ten years through the prism of the approaches to it adopted in the academic literature, this paper recognizes the foundational role played by the scholars in the total make-over of the

Union under the star of EU citizenship. Upon the inclusion in the Treaties, EU citizenship has been pushed forward mostly by a trio of factors: the groundbreaking work of the Judges of the ECJ and its Advocates General, the academic commentary by those who saw important potential behind evasive formulations in the Treaties, and the legislators at both national and supranational level, as they started the on-going process of the Union’s adaptation to the new reality of citizens’ Europe. All the three are profoundly interconnected. While case-law and legislative developments receive a lot of attention in the literature, the evolution of the academic debate which largely informs the two, has been somewhat ignored as of itself.

The most influential academic commentators in this field, such as Dora Kostakopoulou, Niamh Nic Shuibhne, Jo Shaw, Eleanor Spaventa, or Joseph Weiler, to name just a few, were never confined in their analysis to merely following the Court and the legislators, as they actively co-shaped the Union and its citizenship hand in hand.

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6 The pivotal role played by EU citizenship in the Union today is not connected to the recent revisions of the Treaties. In fact, virtually all the recent developments in this vein have been rather inconsequential, if not a disappointment: Annette Schrauwen, European Citizenship in the Treaty of Lisbon: Any Change at All?, 15 MJ 55 (2008); Dora Kostakopoulou, Ideas, Norms and European Citizenship: Explaining Institutional Change, 68 Modern L.Rev. 233, 261–262 (2005).


with other actors. This is the key aspect of the academic legal profession in Europe. To agree with Jo Shaw, ‘the study of governance in the EU [...] is a constructive, rather than a deductive process’. We are not dealing with those who are ‘right’ and those who are ‘wrong’. The evolving status quo would be better described by stating that one group was more successful in shaping socio-legal reality, compared with the other, whose adherents advanced the arguments which were either less convincing or simply too timid, to deploy EU citizenship to its full potential.

II. Structure of the study

Lately there has been a true flood of EU citizenship literature in law and social sciences and the need for an overview of the key issues discussed by the leading scholars working

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13 A fair amount of short-sightedness played a role here too, however. To agree with Dora Kostakopoulou, ‘It is [...] unfortunate that much of the relevant literature in the 1990s did not recognize that the value of European citizenship existed not so much in what it was, but in what it ought to be’: Kostakopoulou (2005) Ideas, Norms, 263.
in the field is now apparent. This paper approaches the myriad relevant sources by taking paradigmatic differences of opinion as staring points. This study is thus fundamentally different in structure from the leading preceding overview of EU citizenship literature by Dora Kostakopoulou, by which it is informed and inspired.\footnote{Kostakopoulou (2005) Ideas, Norms.} Dora Kostakopoulou’s overview was organized around sketching five theoretical approaches to citizenship in the literature, to embrace one.\footnote{These included ‘Market citizenship’; ‘Civic republican European citizenship’; ‘Deliberative European citizenship’; ‘Corrective European citizenship’; and ‘Constructive European citizenship’: Kostakopoulou (2005) Ideas, Norms, 238–243. Many more theoretical approaches to citizenship are available, which could potentially be utilized also in the context of EU citizenship analysis. See e.g. Linda Bosniak, Citizenship Denationalised, 7 Indiana J. Global Legal Stud. 477 (2000); Kim Rubinstein and Daniel Adler, International Citizenship: The Future of Nationality in a Globalised World, 7 Indiana J. Global Legal Stud. 519, 522 (2000). For the analysis of the different approaches in the context of EU citizenship see e.g. Patricia Mindus, Europeanisation of Citizenship within the EU: Perspectives and Ambiguities, Università degli Studi di Trento Working Paper WP SS 2008, No. 2 (2008).} That the present analysis is in some way more patchy is partly informed by the consideration that EU citizenship is too multi-faceted and, at the same time, too atypical, to reduce an approach to it to one overarching theory, which is, although theoretically possible, does not arise from the literature in its current state and risks to result in turning a blind eye on an array of issues of fundamental importance. Emphasis on the key points of difference creates a better view of all the richness of legal analysis surrounding the concept of EU citizenship and its likely development.

Picking up the debate where Professor Kostakopoulou left it – i.e. at the scholarly discussion of the important judgments of the beginning of this century – this paper provides an overview of the last decade of evolution of legal thinking about European citizenship. These were ten overwhelmingly important years, where EU citizenship has definitely moved from a mere activator of other provisions in the Treaty, such as non-discrimination on the basis of nationality, to combating non-discriminatory restrictions, and, finally, acquiring capacity of shaping the material scope of EU law and supplying a new rationale for the European integration process. Crucially for its whole federal architecture, the EU has acquired a possibility to defend its citizens from their own Member State of nationality in a number of situations previously deemed as wholly internal, ranging from defending the possession of the legal status of EU citizenship when it is likely to be lost with a nationality of a Member State to the protection of their ability to enjoy key rights associated with this status.

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supply substantive understanding of justice and other essential principles on which the Union rests, recent developments can also be viewed as making EU citizenship more vulnerable and problematic: ‘sour grapes’.

Notwithstanding the central place EU citizenship came to occupy within the body of EU law, a huge number of issues at the core of this status remains open to contestation, fuelling scholarly debate. In fact, upon the perusal of the academic commentary it might seem that virtually nothing is yet settled in the EU citizenship field: the essential starting points of thinking about EU citizenship remain contested well into its adult age (it is turning twenty). Probably more importantly, however, EU citizenship analysis is at times informed by profoundly doctrinal starting points, forcing scholars not to see what they actually see, preferring purely dogmatic approaches to the actual engagement with the new developments. Such Begriffjurisprudenz, permitting to interpret away the reality which does not suit particular doctrinal stand-points embraced by the author is an important obstacle on the way of the development of EU law and has implications stretching far beyond the EU citizenship law field.

Nine profoundly interrelated essential points of contestation will be presented in what follows. These vaguely split into three themes, including the legal meaning of EU citizenship, covering the nature of this concept, its underlying logic and its place within the body of EU law (III.); EU citizenship’s legal effects within the context of the EU’s federal structure, including its relationship with Member State nationalities, influence on the scope of EU law and the role it plays in framing ECJ’s jurisdiction (IV.); and EU citizenship’s effects in the context of people’s lives, covering its social side, relationship with identity politics of the Member States and EU citizenship’s role for the citizens themselves, ultimately ending up with a question whether it is a ‘good thing’ or a ‘bad thing’: does it corrupt, or liberate the individual? (V.). The conclusion, besides


See Robert Schütze, From Dual to Cooperative Federalism (OUP 2009) (which is a compelling plea against this approach).
underlying the imperfection of our current knowledge, argues for a more critical engagement with the topic (VI.).

III. The legal meaning of EU citizenship

Firstly, the nature of EU citizenship becomes a subject of a debate – how much is citizenship affected by the derivative mode of its acquisition? Secondly, the underlying logic behind the essence and operation of EU citizenship is contested – is it essentially a continuation of the classical market-oriented freedoms informing the European integration project from its very inception, or something else? If it is indeed a move away from the market, than what is EU citizenship’s essential foundation? Thirdly, and flowing from the above, what should be the right place of EU citizenship in relation to the specific economic freedoms? I.e. what is its role within the body of EU law?

1. Nature

According to Articles 9 EU and 20 TFEU, EU citizenship is derivative from the nationalities of the Member States in that one presumably cannot exist without another. The starting question is whether or not to make a distinction between the acquisition of EU citizenship (which is purely derivative) and its essence, which is potentially not, in that it accompanies the EU-level legal status and is not in any way based on the national law of the Member States. Here is where a cleavage in the literature emerges. While one camp of commentators, including Dora Kostakopoulou, Miguel Poiares Maduro and others, submits that derivation is merely a determinant of access to the status, unrelated to the EU citizenship rights, other scholars, including Giuseppe Tesauro and Leonard Besselink seem to believe that derivative acquisition profoundly affects the very essence of EU citizenship, impairing it from acquiring legal importance on its own, especially in terms of rights it would grant. In the words of Tesauro, ‘non esiste, né potrebbe allo stato ippotizzarsi, una nozione communitaria di cittadinanza, sì che le norme che ne prescrivono il possesso come presupposto soggettivo per la loro applicazione in realtà rinviano alla legge nazionale dello Stato la cui cittadinanza viene

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posta a fondamento del diritto invocato’. 29 In a co-written EuConst editorial Besselink goes even further in submitting that also ‘the kind of rights which the EU citizens resident in another Member State enjoys [sic.] depend primarily on the law of the Member State’ 30 and ‘the nexus of rights as granted by the Member States remains intimate’. 31

It seems that doubting the legal importance of European citizenship based on the fact that access to it is derivative is logically unsound: if ius soli citizenship is not better or worse that ius sanguinis citizenship 32 – there is no reason to claim that the same should not be valid for ius tractum (i.e. derivative) citizenship: 33 particular rules of access to the status have nothing to do with the existence of the status as such, let alone the rights associated therewith. Scholars disagreeing with those colleagues who overemphasize the derivative aspect in EU citizenship make a clear distinction between access to a legal status and its essence. This position was outlined with clarity by AG Poiares Maduro, as he then was, who indicated that ‘la citoyenneté de l’Union suppose la nationalité d’un État membre mais c’est aussi un concept juridique et politique autonome par rapport à celui de nationalité’. 34 Virtually all the ECJ case-law on citizenship is a confirmation of the fact that access to the status of EU citizenship is always provided via the nationality of a Member State does not diminish the importance of the former status, or the EU nature of the rights associated with it.

In fact, derivation practically functions in such a way that it can be legally consequential in both directions. Not only EU citizenship follows Member State nationalities. Also the contrary is true. Crucially, EU citizens whose Member State nationality from which the status of EU citizenship is derived is put into question can...
potentially rely on EU citizenship in order to retain their Member State nationality. The ECJ ruled in *Rottmann* that EU principle of proportionality applies in the situations ‘capable of causing [EU citizens] to lose the status conferred by Article 17 EC and the rights attaching thereto’,\(^{35}\) which comes down to a possibility to force the states to confer/ not to withdraw their nationality in certain cases where EU citizenship status is in danger.\(^{36}\) This would never be possible, should the perspective adopted by Tesauro *et al.* be true. Moreover, even where rights associated with EU citizenship and particular Member State nationalities seem to overlap this is not to be taken at face value: in terms of scale, EU citizenship provides for rights in the territory of the Union,\(^{37}\) which is twenty-seven times more than one jurisdiction, where Member State rights operate.\(^{38}\) Agreeing with Gianluigi Palombella, ‘this enables each of us to reconceive the horizon of our zeal capabilities (to recall Sen) beyond the limits of national citizenship and territory’.\(^{39}\) Add to this the possibility to turn EU citizenship rights *against* one’s own Member State of nationality (including when decisions on that very nationality are taken) and the story is complete. The fundamental distinction made between the legal essence of EU citizenship and that of the nationalities of the Member States – anticipated by Dora Kostakopoulou in her study \(^{40}\) – provides a key for the understanding of the dynamics of EU citizenship evolution and the place of this concept in European law, as well as its interrelation with Member State nationalities.\(^{41}\) In practice, EU citizenship does not any more behave as a simple guarantor of the home

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\(^{35}\) Case C-135/08, *Rottmann* [2010] ECR I-0000, para. 42.


\(^{38}\) Dimitry Kochenov, *Rounding up the Circle: The Mutation of Member States’ Nationalities under Pressure from EU Citizenship*, EUI Robert Schuman Centre for Advanced Studies Paper No. 23/2010 (2010). For a meticulous analysis of EU citizenship rights, including those functioning in parallel with the rights granted by Member State nationalities see Dollat (2008), 249–300.

\(^{39}\) Palombella (2005) *Whose Europe?*, 377 (also referring to Amartya Sen, *Development as Freedom* (Knopf 1999)).


\(^{41}\) Section IV(1) *infra*. 
country rule for those residing in a different Member State, on which Besselink’s perspective seems to be based, but adds, in the words of Besson and Utzinger, ‘a European dimension to each national demos’, which certainly makes the perspective adopted by those insisting on the importance of EU citizenship’s derivative nature much less convincing.

Ius tractum access does not mean ius tractum nature. The consequences of this are very far-reaching indeed. Drawing on an illuminating account provided by Gianluigi Palombella, this amounts to endowing the Union with direct legitimacy, which ‘becomes primary and no longer dependent of the legitimacy of states’.

Needless to say, the very rules on derivative access contained in the Treaties met with scholarly opposition. Clear arguments were made in favour of decoupling access to EU citizenship and Member State nationalities in the future. Positions adopted by Ulli Jessurun d’Oliveira and Dora Kostakopoulou are particularly enlightening in this respect. In fact, it is more or less accepted in the literature, that EU citizenship is incomplete unless it takes third-country nationals onboard in some form, thus moving beyond the confines of Member States’ nationalities.

Now that the ECJ has clarified beyond any reasonable doubt that although the two are naturally fused together, EU citizenship is principally different from the nationalities of the Member States, any mode of accessing this status can be chosen. Besides diminishing the harshness of apartheid européen, this would do justice to EU citizenship which de facto seems to have outgrown its initial framework, going back to

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43 Palombella (2005) Whose Europe?, 367. Expectedly, there is a ‘but’, Palombella submits that ‘rather, [legitimacy] is to depend on the public autonomy of a sovereign that is coextensive with the constitutional text’s range of influence’ (Id.).
45 This can happen either through granting such persons the formal status of EU citizenship in the future, or through providing them with a set of rights comparable to those enjoyed by EU citizens: Anja Lansbergen and Jo Shaw, National Membership Models in a Multilevel Europe, 8 Int’l J Const. L. 50 (2010); Willem Maas, Migrants, States, and EU Citizenship’s Unfulfilled Promise, 12 Citizenship Studies 583 (2008); Kochenov (2010) Rounding up the Circle, 29–33; Dora Kostakopoulou, Citizenship, Identity and Immigration in the European Union: Between Past and Future 79 (Manchester University Press 2001); Kostakopoulou (2007) Writing the Future, 623.
46 Étienne Balibar, Nous, citoyens d’Europe: Les frontières, l’État, le peuple 190-191 (La Découverte 2001).
the Gonzalez tale.\textsuperscript{47} Also the analysis of the history of European integration seems to point in this direction: third-country nationals legally present in the EEC theoretically could become the beneficiaries of free movement of workers provisions.\textsuperscript{48} It certainly makes little sense to divide the territory of the Union with borders exclusively for the third-country nationals, recreating for this vulnerable category\textsuperscript{49} all the problems which free movement of persons was intended to solve.\textsuperscript{50} Moreover, EU citizenship does not even cover all Member State nationals.\textsuperscript{51}

\textbf{2. Underlying logic}

Once it is clear that EU citizenship is not affected in its essence by the derivative mode of its acquisition, it has to be placed within a broader context of the dynamic development of EU law. Notwithstanding numerous nods in the direction of the fédération européenne,\textsuperscript{52} and the establishment of an ever closer union among the peoples of the Member States, the maturing of EU law has been largely associated with the establishment of the Internal Market. What is the relationship between EU citizenship and the market? And if EU citizenship is a break away from purely economic


\textsuperscript{52} See also Isabelle Petit, \textit{Dispelling a Myth? The Fathers of Europe and the Construction of Euro-Identity}, 12 EUR. LJ 661 (2006).
considerations, a potentially more important issue arises, namely, what is its rationale then? The very essence of the Union is in this question.

While connecting EU citizenship with the market in the most direct way was a popular approach at the initial phase of EU citizenship evolution,53 at this stage, the ECJ has made it absolutely clear that EU citizenship does not per se have market-oriented aims and also plays an important role in the lives of those who are not economically active in the context of the Internal Market. The mainstream approach in the literature, which is fully supported by ECJ case-law and secondary EU law instruments consists in characterizing EU citizenship as a Grundfreiheit ohne Markt,54 or lying ‘outwith the immediate confines of the single market’.55 Among the proponents of this approach are Ferdinand Wollenschläger, Dora Kostakopoulou and numerous others.

A concurrent reading, which emphasises the important role of the Internal Market behind the framing of EU citizenship is promoted, inter alia, by Niamh Nic Shuibhne, who argues, essentially, that EU citizenship remains largely a market citizenship.56 Although the now classical distinction between Marktbürger and citoyen in EU law is not challenged,57 Niamh Nic Shuibhne looks for what could actually inform EU citizenship’s development and returns to the economic roots of European integration in answering this question. She submits that ‘[n]o polity, constitutional or otherwise, exists just for the sake of existence. “What” is grounded in constitutionalism is the substantive point. And what the EU constitutionalizes is a framework within which functions, primarily, a market’.58

It is absolutely true that a set of underlying values and principles is indispensable for a polity to function. Yet, would the market alone, even if it is a ‘constitutional market’59 provide a sufficient base for the supranational citizenship? Among a myriad of

53 Kostakopoulou (2005) Ideas, Norms, 244–246. Such approach is directly rooted in the story European integration preceding the introduction of EU citizenship at Maastricht: Hallstein, Walter, Der Schuman Plan (Frankfurt am Main: Vittorio Klostermann, 1951), 18.
57 On this distinction see Norbert Reich and Solvita Harbacevica, Citizenship and Family on Trial: a Fairly Optimistic Overview of Recent Court Practice with Regard to Free Movement of Persons, 40 Common Mrkt. L.Rev. 628 (2003); Dollat (2008), 249 et seq.
58 Id., 1605.
59 Id., 1608.
ideal citizenship models formulated by lawyers and political scientists, the presumption has always been that pure considerations of prosperity provide too thin a foundation for the development of what could aspire to becoming a ‘real’ citizenship. Should we believe, following Wollenschläger, Kostakopoulou et al., that EU citizenship is indeed a citizenship beyond the market – and the ECJ certainly pushes us in this direction – it is necessary to find an alternative basis for it, rather than prosperity and economic freedom: it cannot be left suspended in thin air. To be sure, the moral starting point of the European market integration – that of avoiding yet another war, and dealing with the heritage of the cataclysms of the first half of the last century which lay behind the market at its inception is gone, removed by the ‘paradox of success’. To concur with Joseph Weiler, the market is now alone, with no ‘moral imperative’ and no ‘mantle of ideals’. An ideal of justice among other substantive principles seems to be required to build a sound European citizenship upon.

In the quest for the likely foundations – if not justification – of European integration which could provide EU citizenship with an indispensable core, at least three concepts are discussed in the literature. Andrew Williams in his recent groundbreaking work focuses on the idea of justice, Joseph Weiler – on political representation. Add to this the idea of equality, which has been explored elsewhere and the trio is complete. All the three concepts and especially a combination of the three could in theory provide a sound foundation for a supranational citizenship stretching beyond the market. In practice, they do not, however.

The picture that emerges out of these studies is discomforting. As Andrew Williams has brilliantly demonstrated, the problems plaguing the key principles of law

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60 For a meticulous overview, see Will Kymlicka and Norman Wayne, Return of the Citizen: A Survey of Recent Work on Citizenship Theory, 104 Ethics 352 (1994).
62 Id., 231.
63 Glyn Morgan, European Political Integration and the Need for Justification, 14 Constellations 332 (2007).
in the Union could have much deeper roots than one would expect, going as far as the flaws in the foundational philosophy of the European integration exercise, leading to an impoverished idea of justice, and a highly proceduralised vision of the principles of law, threatening to strip the latter of even its most essential substance. Looking behind the façade of purely rhetorical values, scholars find a worrying void. According to Weiler, ‘oggi, noi accumuliamo la retorica dei valori anche se, nelle parte operative dei trattati, vi diamo poca importanza o lasciamo prevalere ambiguità’. Williams concurs: ‘[t]he principles which the ECJ proceeded to develop through its case-law have not been based on fundamental values that have any coherence, even though the consistent use of the rhetoric of certain values might suggest otherwise.’ The values and virtues problem in the EU is apparent.

When the underlying philosophy is ‘based on a theory of interpretation (of original political will) rather than a theory of justice’, all the fundamental principles of law are in danger. In the citizenship context, a glance at the principle of equality is particularly informative, since equality is one of citizenship’s key elements. Drawing on the work by Gareth Davies, Gráinne de Búrca and numerous other commentators in analyzing the functioning of the principle of equality in the context of EU citizenship

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69 Williams claims that the EU is based more on the founders intent, than on a substantive idea of justice: Williams (2009) *Taking Values Seriously*, 549.
70 Williams (2010) *The Ethos*.
77 Davies (2007) *Services, Citizenship*.
elsewhere, also the present author concluded that equality in the EU is not safeguarded, as any substantive understanding of the principle is lacking.79

The situation is identical in the context of another major facet of citizenship – that of political representation – which seems to be equally undermined. The citizen, as Joseph Weiler demonstrated ‘è ridotto a un consumatore di risultati politici’.80 The possibility of active participation in politics at the European level proper is minimal – quite an obvious reality which no window-dressing in the form of non-binding citizens’ initiative can hide.81 Moreover, the ECJ does not even treat electoral rights as EU fundamental rights, as the case-law abundantly demonstrates.82 It thus seems right to claim that electoral provisions found in Part II TFEU are merely non-discrimination rights.83

Citizenship thus came under attack at all the levels outlined: justice, equality, and democracy. Key values of citizenship remain ignored in the Union. Having stepped into the citizenship world, the EU is still unable to cope with its birth defect, i.e. the strong market bias, which is logically inexplicable in the new situation, where citizenship and the Internal Market conceptually parted ways.84 The analysis of recent citizenship case-law of the ECJ entirely confirms Weiler’s view that ‘[l]’aspetto problematico di questa giurisprudenza è che precisamente omette di compiere la transizione concettuale da una libera circolazione basata sul mercato ad una libertà basata sulla cittadinanza.’ 85 Nic Shuibhne can thus be absolutely right in turning to the market in her search for the

80 Weiler (2009) Nous coalisons des Etats, 64.
83 For a contemporary analysis of the EU’s attempts to deal specifically with this birth defect see e.g. Kochenov and Pledger (2012) European Citizenship.
85 Weiler comes to this conclusion based on the analysis of the political side of the essence of citizenship, but the same holds, as has been demonstrated supra, also for the analysis evolving around the principle of equality. See also Miguel Poiares Maduro, Europe’s Social Self: “The Sickness unto Death”, in Jo Shaw (ed.), Social Law and Policy in an Evolving European Union 325, 340 (Hart 2000).
conceptual foundation of EU citizenship: neither justice, nor political participation, nor equality, can pass a reality check: in the future they could possibly gain in importance, but currently they fail to provide a sound basis for EU citizenship. Consequently, to refer to Andrew Williams once again, the EU is building on the ‘institutional ethos that lacks reasonable coherence and moral purpose’.86

To say that EU citizenship has an underlying corner-stone supplied by the market, as Niamh Nic Shuibhne does, although factually correct in the sense that other perspectives are proven wrong, does not actually solve the conceptual problem of lacking moral purpose which is of no small importance, should citizenship be taken seriously. Or is it true, as submitted elsewhere that EU citizenship is hardly worthy of this glorifying term?87 Although it seems undisputable that the EU is a ‘citizenship-capable polity’,88 a different perspective seems to be necessary. What is clear at this point is that although EU citizenship and the Internal Market have parted ways, which created ‘a fundamental freedom beyond the market’, this parting of ways has not, as of yet, been accompanied by the formulation of any fundamental principle of law, which would supply a moral essence or a durable principled foundation for EU citizenship to fall back on to.

3. Role within EU law
The day-to-day functioning of EU citizenship does not seem to be much affected in the short term by the conceptual deficiencies it suffers from. The Court regards it as ‘the fundamental status of the nationals of the Member States’,89 creatively applying the provisions of Part II TFEU and clearly recognizing EU citizenship’s far-reaching potential. Unsurprisingly, EU citizenship started influencing the application of the market freedoms sensu stricto by affecting them through the scope ratione personae of EU law. With the entry into force of the Treaty of Maastricht the scope ratione personae

87 Kochenov (2010), Citizenship without Respect, 9.
89 Case C-34/09, Ruiz Zambrano [2011] ECR I-0000, para. 41.
of the EU legal order was enlarged from less than 2.3% of Member States nationals to 100%. It follows that, as outlined with admirable clarity by Eleanor Spaventa, ‘any Union citizen now falls within the [personal] scope of the Treaty, without having to establish cross-border credentials’. Consequently, the rhetoric of the ECJ claiming that the notion of EU citizenship was not designed to enlarge the scope of EU law, when applied to the scope ratione personae, is, with all respect, simply nonsensical. Here is where another important cleavage in the literature emerged. While a number of scholars, including Eleanor Spaventa and Oxana Golynker, welcomed the new interpretation of the scope of EU law in the light of EU citizenship also in the context of the economic freedoms, not only in EU citizenship cases sensu stricto, others maintain, in essence, that the economic freedoms should not be ‘contaminated’ by the new approach formulated in the context of the citizenship provisions, criticizing the Court for abandoning its pre-citizenship ratione personae test to the effect of enlarging the number of economically active persons able to benefit from EU law.

After Maastricht, those workers who moved residence, not jobs, ended up covered by economic free movement provisions – just as all other economically active EU citizens in cross-border situations. The Court’s new approach treats all economic activities with a cross-border element present differently from all non-economic activities within the scope ratione materiae of EU law. Charlotte O’Brien and Alina Tryfonidou criticize the Court and go as far as to state that ‘the more appropriate

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90 This is the amount of EU citizens currently residing in the Member State other than their Member State of nationality. This amount includes economic and non-economic migrants. In pre-citizenship times not all these persons would be covered by EU law. The data is from: Katya Vasileva, Population and Social Conditions, Eurostat Statistics in Focus 94/2009, 3.
93 If such a context can at all be distilled.
94 For an analysis, see Alina Tryfonidou, In Search of the Aim of the EC Free Movement of Persons Provisions: Has the Court of Justice Missed the Point?, 46 Common Mrkt. L.Rev. 1591, 1592-1595 (2009); Kochenov (2011) A Real European Citizenship.
96 Charlotte O’Brien, Annotation of Case C-212/05 Hartmann, Case C-213/05 Geven, Case C-287/05 Hendrix, 45 Common Mrkt. L.Rev. 499 (2008).
assessment of a migrant who State of work remains unchanged is arguably under [Art. 21 TFEU]. They find bringing workers who work in a different Member State than the Member State of their residence within the scope of economic provisions ‘counterintuitive’, craving to see more citizens and fewer worker-citizens to whom EU law would apply. This comes down to arguing for two different tests of the scope of the law to apply to EU citizens not depending on whether they are economically active or not in a cross-border situation (which is the current approach), but whether their intentions are directly enough connected to the Internal Market.

According to Oxana Golynker and others who regard the Court’s approach with an approving eye, the Court merely moved away from exercising an ultra vires activity of reading citizens’ minds towards assessing the facts. Golynker convincingly submits that ‘it [is] appropriate to classify Union citizens who exercised their right to free movement under Art. 18 EC but remained employed or took up employment elsewhere in the Community as Community workers’. It is incontestable that de facto it is impossible to change the economic nature of someone’s activity by swapping the places of employment and residence and the direction of movement should not matter in the context of the Internal Market, which takes an area without internal frontiers as a starting point.

The dogmatic opposition to the Court’s citizenship case-law by those unwilling to see economic freedoms applied to EU citizens with ‘wrong intentions’ fails to convince. Upon the introduction of EU citizenship and the enlargement of the personal scope of supranational law to cover virtually everyone the intention-based reading of the Internal Market is no longer acceptable. EU citizenship became lex generalis covering the

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98 O’Brien (2008), Annotation, 505. This position is very similar to the one expressed by AG Geelhoed in Cases C-212/05 Hartmann [2007] ECR I-6303 and C-213/05 Geven [2007] ECR I-6347.
100 For more on the ECJ’s approach to jurisdiction in the context of EU citizenship see Section IV(3), infra.
105 Art. 26(2) TFEU.
situations not caught by the economic free movement provisions. Not intentions, but economic activity matter in deciding which provisions to apply. This is the law.

There is another side to the coin of EU citizenship affecting the scope of EU fundamental freedoms, however. EU citizenship does not only enlarge their scope, but also potentially limits it, as relative considerations, such as ‘real links’ with the host Member State, first formulated in the EU citizenship case-law for non-economically active citizens, come to limit the scope of economic free movement provisions, what arguably happened in Geven and Hartmann, where the grant of social advantages to economic migrants was subjected to a test of ‘real links’ with the society of the Member State in question. In this context Síofra O’Leary is very convincing in deciphering the signs of ‘cross-pollination’ of EU citizenship and economic free movement of persons case-law, expressing a concern with the unwanted consequences of EU citizenship case-law for economic free movement provisions. Drawing a clear dividing line between EU citizenship and economic free movement case-law, thus sticking to the ‘old-fashioned classification’ is problematic at this point – the two are much interconnected and are likely to influence each-other’s scopes with an increasing intensity in the years to come.

IV. EU citizenship in the context of the EU’s federal structure

Three key academic debates addressing the role played by EU citizenship in the context of the relationship between the national and supranational legal orders in the EU – and necessarily interrelated with the presented above – are the following. The first focuses on the EU citizenship’s relationship with nationalities of the Member States. Are they in harmony or in competition – i.e. does the growing importance of EU citizenship affect the Member States’ competence in the sphere of regulation of their nationalities and the

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108 Case C-213/05 Geven [2007] ECR I-6347.
109 Case C-212/05 Hartmann [2007] ECR I-6303.
110 See also Section V(2), infra.
contents of the latter? Asking the same question in a more general way, secondly, potentially brings the whole body of the law in Europe into a new perspective: what is the effect of EU citizenship on the delimitation of the scopes of the law of the EU and of the Member States? What does it do with the regulatory autonomy of the Member States and, especially, does it solve the problem of reverse discrimination? Thirdly, scholars disagree on which test of jurisdiction is to be applied by the ECJ in citizenship cases. If being EU citizen is not enough to fall within the scope of the law, what combination of other factors should one be looking for?

1. Relationship with nationalities

EU citizenship went far beyond affecting the scope of EU law provisions. It started reshaping the federal status quo in Europe, with direct implications for the division of powers between the EU and the Member States. The starting point of this important process was marked by the profound change which the maturing of EU citizenship introduced into the relationship between EU law and the nationalities of the Member States.113

An old academic debate, exemplified by the positions adopted by Gerard-René de Groot and Andrew Evans114 on the one side and Ulli Jessurun d’Oliveira on the other115 came to a resolution in 2010 when the Court has unreservedly embraced de Groot’s position that Member States are not absolutely free in framing their nationalities as they see fit and thus dismissed Jessurun d’Oliveira’s approach, which was based on an assumption that the regulation of nationalities belongs to a reserved domain of national law of the Member States, where the Union is not in the position to intervene. The ECJ answered Jessurun d’Oliveira’s question ‘is Union citizenship the crowbar that will break open the nationality law of the Member States?’116 in the affirmative and has ruled in Rottmann that EU law has to be taken into account when a decision on nationality

113 This issue is directly related to the interpretation of the derivative nature of the EU citizenship concept discussed above.
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taken by a Member State is bound to have implications for the EU citizenship status of a person. Consequently, virtually any instance of loss (and, necessarily, also acquisition) of a Member State nationality is potentially covered by EU law, thus making the ECJ, in the words of Gareth Davies, ‘the final arbiter’ in citizenship cases. To say that this development was not in the making for a long time would be not to take the development of EU citizenship seriously. Rottmann has been generally regarded in the literature as a totally predictable and logical development, especially when viewed in the light of the earlier Micheletti ruling, which concerned the necessity to take EU law into account in the cases of recognition of each-other’s nationality by the Member States. The similarity with conferral and withdrawal of nationalities is obvious in this context. It thus seems highly unlikely that even Jessurun d’Oliveira himself was surprised at seeing the case-law developing in the direction against which he has argued.

Not to leave the Union any possibility to protect EU citizenship status from the encroachments of the Member States would be to leave it entirely to the Member States to decide who EU citizens are, even when such decisions are taken in breach of the core principles of EU law – a flawed construct whose underlying logic is bound to be criticized whatever the relationship between EU citizenship and Member State nationalities established by the Treaties. Arguments against such an approach go back as far as the seventies, when Sir Richard Plender convincingly argued against the legality under European law of the British Declarations on UK nationality for the purposes of EEC law. It took the Court long thirty years and a dubious decision in

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118 Following Gareth Davies, to separate the rules on loss and acquisition of nationality would be ‘highly illogical and inequitable’: Davies (2011) The Entirely Conventional Supremacy.
122 For an interesting perspective on this see Shaw (2011) Citizenship: Contrasting Dynamics.
126 Plender (1979) An Incipient Form, 39.
Kaur to start checking nationality decisions of the Member States against EU law, what was first done, albeit indirectly, in Rottmann. In the meanwhile, the literature, and especially the analysis provided by Andrew Evans and Gerard-René de Groot, among other commentators, warned of the numerous situations where nationality decisions would be incompatible with EU law long before Rottmann was decided. The Court thus made a small predictable revolution by completely following the mainstream literature on the subject and confirming that the reserved domains which Jessurun d'Oliveira argued for are unknown to the system of EU law. EU citizenship came out of this seriously reinforced, since although the Member States remain free to decide who their citizens are, in doing this they are bound to take EU law fully into account.

Rottmann decision merely reveals but a tiny bit of the full story of the influence of EU citizenship on the nationalities of the Member States. It only focuses on the direct role played by EU law in the sphere of the acquisition and loss of Member State nationalities, but the indirect influence is arguably by far more important. Although there has not been much research done in this area, the literature raises several important points.

Firstly, since all the nationalities of the Member States provide access to the same single status of EU citizenship from which a constantly growing amount of rights is then derived, including the right not to be discriminated against on the basis of nationality, the possibility for one Member State to have a ‘better nationality’ within the EU is nonexistent, legally speaking at least. This is especially evident once one takes into

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128 Dr. Rottmann lost his German nationality by the decision of the German Federal Administrative Court (BVerwG) that opined that such loss would be in full compliance with the EU principle of proportionality: German Federal Administrative Court, BVerwG 5 C 12.10. For more on the proportionality conditions in this case see e.g. Nathan Cambien, Case C-125/08, Janko Rottmann v. Freistaat Bayern, 17 CJEL 375, 386-391 (2011); Kochenov (2010) Annotation.
account the importance of residence, a ‘place to hang [one’s] hat’, to which the majority of practically usable rights are connected in any Member State, as well as the fact that such residence can be established with the use of EU citizenship status.

Secondly, EU citizenship de facto amounts to the possession of a quasi-nationality of the Member State of residence of which you are not a national, as well as a ‘relativisation’, if not ‘abolition’ of the Member State nationalities through the prohibition of discrimination on the basis of nationality contained in Article 18 TFEU. Clearly, EU citizens cannot be equaled to foreigners (i.e. third-country nationals) anywhere in the Union any more. Consequently, the lack of any co-ordination between the Member States in terms of access to their nationality was bound to result in the mutation of the accessibility of the legal status of nationality even without any formal intervention of the EU. The only detailed study of this matter to date distinguishes between two ways of such accommodation: a formal, when the nationality laws of the Member States are changed to treat EU citizens differently from third-country nationals in the issues of loss and acquisition of nationality, and informal, which focuses on de facto preferential treatment which the majority of EU citizens get compared with the third-country nationals in terms of access to the nationality of the Member State of residence, since they are not subject to immigration control and derive residence rights from EU law. Consequently, while, following Rottmann, EU law now plays a role in the framing of Member State nationalities, at the Member State level, EU

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136 This is so notwithstanding the fact that EU law as it stands does not prohibit the Member States from including EU citizens into foreigners’ registers: Case C-524/06 Huber v. Germany [2008] ECR I-9705. Analyzed by Kay Hailbronner, Are Union Citizens Still Foreigners?, in Paul Minderhoud and Nicos Trimikliniotis (eds.), Rethinking the Free Movement of Workers: The European Challenges Ahead (Wolf Legal Publishers 2009).
138 Davies (2005) Any Place, 55.
139 Kochenov (2010) Rounding up the Circle, 4.
140 There have been several authoritative calls in the literature concerning the necessity to think about granting the EU such power. E.g. A.C. Evans, Nationality Law and the Free Movement of Persons in the EEC: With Special Reference to the British Nationality Act 1981, 2 Ybk Eur. L. 173, 189 (1982); Claude Blumann, La citoyenneté de l’Union européenne (bientôt dix ans): Espoir et désillusion, in Volker Epping, Horst Fischer, and Wolff Heintschel von Heinegg (eds.), Brücken Bauen und Begehen: Festschrift für Knut Ipsen zum 65 Geburtstag 3 (Verlag C.H. Beck 2000)
citizens get preferential access to local nationalities compared with third-country nationals both at formal and informal levels even without any direct involvement of EU law in this matter. These developments taken together provide yet another illustration of how much EU citizenship and the Member States nationalities are actually interconnected. The circle is thus ‘rounded up’ – a derivative status of EU citizenship comes to affect the Member State nationalities from which it is derived.

Finally, it can also be argued that the formalization of the preferential treatment of EU citizens in naturalization issues in a number of Member States amounts to the establishment of separate modes of acquisition of EU citizenship: those not in possession of the supranational status have much harder time acquiring Member State nationality since it comes in tandem with EU citizenship in their case. This is unlike those who are already EU citizens and can usually naturalise in their Member State of residence infinitely easier than third-country nationals.

Although Member States are formally in charge of their nationalities, all decisions on nationality issues are subject to the scrutiny of the ECJ and can always be framed in the context of EU law, no matter whether the EU is competent to act in the field or not. The very federal context of the European integration project is responsible for the adaptation of the Member States to the new reality of EU citizenship.

2. Delimitation of the scopes of the law
EU citizenship plays a global role in shaping the borderline between the scopes of national and EU law beyond influencing the scope of Member States’ nationalities. This is due to three factors, two of which have been presented supra. Firstly, EU citizenship has overwhelmingly enlarged the scope ratione personae of EU law. Secondly, the introduction of EU citizenship has also enlarged the scope of the economic freedoms in the Treaties. Thirdly, and probably most importantly, the introduction of EU citizenship pushed the Court towards a profound reassessment of the concept of the wholly internal situations, by moving more situations, however artificially, within the scope of EU law.

143 Kochenov (2010) Rounding up the Circle.
144 Id., 28–29.
This process has been brilliantly documented by Alina Tryfonidou, Niamh Nic Shuibhne and Peter Van Elsuwege and Stanislas Adam, among other commentators. The classical approach to the wholly internal situations espoused by such scholars as L.A. Geelhoed, or the late Lord Slynn is not supported by the latest developments in the law. EU citizenship exposed reverse discrimination in wholly internal situations to much more convincing criticism compared with the arguments advanced in the pre-citizenship era of development of EU law, since EU citizenship as such is not necessarily a market concept while reverse discrimination targets mostly those who are viewed as not contributing to the market. Moreover, the general equality considerations necessarily connected to the concept of citizenship provide an equally important starting point for the criticism of the current state of the law.

It is now settled case-law that ‘the situation of a national of a Member State who [...] has not made use of the right to freedom of movement cannot, for that reason alone, be assimilated to a purely internal situation’. This means a potentially infinite enlargement of EU law’s scope. Eleanor Spaventa is undoubtedly correct, submitting that ‘no national rule falls a priori outside the scope of the Treaty, since movement is

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150 For an important new analysis in the vein of the classical approach see, e.g. Hanf (2011) *Reverse Discrimination*.
151 Section III(2), supra.
enough to bring the situation within its scope'.\textsuperscript{155} Such movement need not be connected with any physical travel in space or economic activity of the mover.\textsuperscript{156}

Consequently, any economic engagement within the Internal Market does not necessarily play a role in shaping the material scope of EU law: EU citizenship does the trick. The meaning of the notion ‘cross border situation’ came to be so technical that it has virtually nothing to do with borders any more.\textsuperscript{157} These developments stand to be seriously criticized, since they do not actually solve the problem if not exacerbating it, as they come down to turning the determination of which law is to apply into a game of chance, simultaneously ensuring that the principle of equality ‘undergoes something of an ideological battering’.\textsuperscript{158} Numerous commentators, including Niamh Nic Shuibhne and, most importantly, AG Sharpston,\textsuperscript{159} argue for a gradual total overhaul of the approach to the wholly internal situations. To agree with AG Sharpston, there is ‘something deeply paradoxical about [the toleration of reverse discrimination by the EU] although the last 50 years have been spent abolishing barriers to freedom of movement between […] Member States’.\textsuperscript{160} Dominique Hanf\textsuperscript{161} and AG Kokott\textsuperscript{162} are more traditional, viewing reverse discrimination as a necessary evil within the context of multi-level EU constitutionalism.

\textsuperscript{156} Simple residence in the Member State other than your Member State of nationality moves you into the scope ratione materiae of EU law no matter whether you worked in that other state (e.g. Case C-413/99 Baumbast [2002] ECR I-7091), or simply resided there working in your Member State of nationality (e.g. Case C-287/05 Hendrix [2007] ECR I-6909; Case C-213/05 Geven [2007] ECR I-6347; Case C-212/05 Hartmann [2007] ECR I-6303), or even without working altogether, like the little Catherine, who never worked and never moved anywhere from the UK (Case C-200/02 Zhu and Chen [2004] ECR I-9925). And what if your EU citizen-wife left you and moved out of your Member State? – also in such cases you are covered (Case C-403/03 Schempp [2005] ECR I-6421, para 22). The latter situation changes, however, should your wife be American or Korean; Spaventa (2008) Seeing the Wood, 21, note 34.
\textsuperscript{160} Opinion of AG Sharpston in Case C-212/96 Government of the French Community [2008] ECR I-1683, paras 143–144.
\textsuperscript{161} Hanf (2011) Reverse Discrimination.
\textsuperscript{162} Opinion of AG Kokott in Case C-434/09, McCarthy [2011] ECR I-0000, para. 61.
Even if Nic Shuibhne, Sharpston and others provide convincing arguments that it is ‘time to move on’, away from reverse discrimination, it is difficult to see on what fundamental basis this could be done, without leaving the market paradigm, as omnipresent as it is deficient. This challenge might be too much for the Union to take on at this stage. One thing is clear, however: EU citizenship resulted in an exponential growth of the scope of EU law, notwithstanding the (textually unsubstantiated) claims that this was not the intention of the drafters. Moreover, this growth brought about a serious diminishing in clarity concerning the vertical delimitation of powers between the two legal orders in the Union.

3. The choice of a jurisdiction test

In a most recent line of case-law, the Court attempted to remedy the much criticized deficiencies of its cross-border situation approach by formulating a new jurisdiction test in EU citizenship cases which would be entirely removed from the Internal Market considerations and where Member State borders within the Union or economic activity would not play absolutely any role. Welcomed elsewhere, this approach has been criticized by Niamh Nic Shuibhne, Daniel Thym and Kay Hailbronner. Yet, their criticism mostly concerned how detailed the Court’s reasoning was, rather than its underlying logic and the outcome. All academics seem agree that the new vision of jurisdiction, which can now be derived from EU citizenship alone, is a groundbreaking innovation in EU law. Eleanor Spaventa regretted that ‘orthodox thinking led us to believe that, in order to fall within the scope of the Treaty, the migration paradigm had

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163 Nic Shuibhne (2002) Free Movement; Opinion of AG Sharpston in Case C-34/09, Ruiz Zambrano [2011] ECR I-0000, 139: ‘In my view, there are significant drawbacks to the Court’s current line of thought. I therefore believe that it is time to invite the Court to deal openly with the issue of reverse discrimination’ (emphasis added).

164 Section III(2), supra.


to be satisfied for Union citizens to acquire rights in Community law\textsuperscript{170} – the ECJ concurred and embarked on purifying its case-law of the unwelcome orthodoxy.\textsuperscript{171}

The Court ruled that any measures ‘which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union’\textsuperscript{172} are within the ambit of EU law. In other words, since 2011 there are two tests of jurisdiction in the Court’s arsenal – a familiar cross-border situation test and a new degree of interference with EU citizenship rights test.\textsuperscript{173} The two are already used side-by-side,\textsuperscript{174} even if further clarification concerning their practical functioning will be required. This new development is one of the most far-reaching revolutions in the case-law in decades. EU citizenship is finally taken seriously.

The new jurisdiction test comes down to a yet another decisive extension of the scope of EU law, since the number of situations which can produce the ‘effect of depriving Union citizens of the genuine enjoyment of the substance of [their EU citizenship] rights’\textsuperscript{175} is potentially truly considerable. Following the constant pressure from scholars it has been established for the first time by the Court that EU citizenship alone can trigger the application of EU law in a number of situations, with all its accompanying and inestimable consequences.\textsuperscript{176} How much clearer could the Court be? The very logic of citizenship is on its side: to doubt whether the new jurisdiction test is established in a convincing way is to doubt the essence of citizenship as such.


\textsuperscript{172} Case C-34/09, Ruiz Zambrano [2011] ECR I-0000, para. 42 (emphasis added).


\textsuperscript{174} Case C-434/09 McCarthy [2011] ECR I-0000, para. 56.


V. EU citizenship and the individual

EU citizenship has direct implications for the daily lives of Europeans. Academic debate focuses on an array of issues in this context. The first to be discussed here concerns social solidarity. What are the effects of EU citizenship on the social side of the nationalities of the Member States, including access to different kinds of benefits and other elements of the social security network? The second focuses on identity politics: if it exists at all, how does the identity side of EU citizenship look like? Finally, drawing on much of the above, is EU citizenship empowering, or is it degrading for EU citizens, i.e. is it a good or a bad thing? Given the lack of underlying substantive principles in which the supranational status could be rooted, it is only logical that divergent views on this issue are presented in the literature.

1. Social solidarity

Michael Dougan and Eleanor Spaventa are absolutely right, ‘the idea of social solidarity can no longer be treated as a national or local monopoly’.\footnote{177} While they claim that the Union lacks ‘any clear organizing concept of social solidarity’,\footnote{178} Catherine Barnard disagrees in part, finding that ‘[t]he principle of “solidarity” is taking root as a guiding principle of European Community law’.\footnote{179} Her compelling analysis of the case-law makes a convincing point that the EU used this purely non-economic principle to establish EU citizenship.\footnote{180}

But is solidarity confined to citizens – or is it broader in scope? Addressing this question, Sandrine Maillard formulates an all-encompassing approach to social citizenship in Europe, not only connecting the concept with the workers’ rights before


\footnote{178} Id., 182. See also George S. Katrougalos, The (Dim) Perspectives of European Social Citizenship, Jean Monnet Working Paper (NYU) 05/08 (2007).


the incorporation of EU citizenship in the *acquis*,¹⁸¹ but also, simultaneously, attempting to detach it from EU citizenship *sensu stricto*.¹⁸² In fact, this approach seems to be working perfectly well, as the majority of social rights, at a closer inspection, are not in fact granted exclusively on the basis of Member State nationality or EU citizenship. Long term resident third-country nationals usually enjoy them too, notwithstanding the fact that problems with the application of Article 18 TFEU to them abound.¹⁸³ Consequently, social citizenship emerges as a parallel layer of citizenship in Europe, which is largely residence-based, requiring situating the whole debate on the European social model within a much larger context – what Maillard is masterfully doing in her study, which demonstrates the fading away in importance of nationality as such in the context of modern social law. The link between a Member State nationality or EU citizenship and social solidarity appears not at all necessary¹⁸⁴ in the context of the emergence, following Sandrine Maillard, of ‘solidarité au-delà de la nationalité’.¹⁸⁵

Alongside with the link between social solidarity and citizenship, the link between social solidarity and the State, as well as the presumption of ‘social dumping’ in the EU is questioned in the literature. While it is generally assumed that EU citizenship can lead to a much feared erosion of solidarity or a ‘race to the bottom’ between the providers of social services at the national and local level,¹⁸⁶ empirical evidence to support this is

¹⁸² Id., 257 et seq.
¹⁸⁴ An interesting situation, especially concerning posted workers, arose in the field of free movement of services and also in free movement of companies. See e.g. Uladzislau Belavusau, *The Case of Laval in the Contest of the Post-Enlargement EC Law Development*, 9 German L.J. 2279 (2008) (and the literature cited therein). The issue virtually hijacked scholarly attention for a while.
¹⁸⁵ Maillard (2008) *L’émergence de la citoyenneté*, 353 et seq. She goes on: ‘la consécration de la solidarité au rang des valeurs de l’Union est de nature à fonder la reconnaissance des droits sociaux attachés à la citoyenneté sociale au profit de tout résident entrant et séjournant régulièrement sur le territoire communautaire, indépendamment de sa nationalité et de toute condition dite d’intégration’: Id., 443 (emphasis added).
¹⁸⁶ In one example, Michael Dougan sounded several warnings in this regard in the wake of EU’s enlargement: ‘Enlargement might lead to large-scale benefit migration towards western countries which have established generous welfare systems; that a massive influx of workers from the CEEC would seriously disrupt labor markets in the EU-15; that difference between wages and other compliances costs might lead to social dumping in favor of undertakings from the CEEC’: Michael Dougan, *A Spectre Is
missing, as Michael Keating compellingly demonstrates.\textsuperscript{187} Thus the whole discussion of the dangers of EU citizenship for the social sphere tends to ignore the facts, which are quite simple: ‘[c]ontrary to the “race to the bottom” hypothesis, European governments have not dismantled their welfare systems in the face of market competition and, indeed, have retained a variety of distinct models’.\textsuperscript{188} Moreover, it appears that a nation state is not a necessary platform for a system of social solidarity, what numerous sub-national social security systems demonstrate.\textsuperscript{189}

The consequences of such dissociations are two-fold. Firstly it does not matter whether a social citizen is in possession of a legal status of nationality of the Member State of residence or EU citizenship. Secondly, nationality of a Member State or EU citizenship would not guarantee preferential treatment when decoupled from residence.\textsuperscript{190} In this context, the relevance of Member State nationality or EU citizenship in the social plane is only determined by the extent to which the two can affect the access to residence durable enough to endow individuals with social rights: ‘residence is new nationality’.\textsuperscript{191} In the context of cross-pollenisation of EU citizenship and economic freedoms in the Treaties outlined by Síofra O’Leary,\textsuperscript{192} a danger exists that also workers’ access to social citizenship (in terms of Maillard) could be constrained with the use of the tools developed in the context of non-economically active EU citizens, aimed at delaying the full application of Article 18 TFEU in the Geist of the secondary legislation and the case-law aiming to prevent the so-called ‘benefits shopping’. Notwithstanding

\textsuperscript{188} Id., 506. See also Catherine Barnard, Social Dumping and the Race to the Bottom: Some Lessons for the European Union from Delaware? 25 Eur. L.Rev. 57 (2000).
\textsuperscript{189} Keating (2009) Social Citizenship, 506. Looking at the practical functioning of the social assistance systems, Keating thus entirely disagrees with the generally held view, espoused, \textit{inter alia} by Richard Bellamy, that ‘welfare rights tend to be best protected in unitary, parliamentary systems where a strong and cohesive demos provides the social solidarity needed to allow legislative majority’s [sic.] to pass redistributive measures’: Richard Bellamy, The European Constitution Is Dead, Long Live European Constitutionalism, 13 Constellations 181, 185 (2006).
\textsuperscript{190} Davies (2005) Any Place.
\textsuperscript{191} Id.; Maillard (2008) L’émergence de la citoyenneté, 410.
\textsuperscript{192} O’Leary (2008) Developing an Ever Closer Union, 15–24
the Court’s occasional willingness to help, its general approach to the issue is much criticized in the literature.

All in all, while scholars too numerous to be mentioned aim to ‘shield’ national-level solidarity from EU interference, a contrasting approach, exemplified by enlightening Gareth Davies’ scholarship points to the benefits of doing precisely the contrary, i.e. of exposing state-run monopolistic social solidarity systems to competition with a view to increasing efficiency and improving lives. After all, a claim that the ‘shielded’ national solidarity systems are per se better than any possible alternative is absurd and cannot be taken seriously. But since Member State nationalities can be cherished by their holders because of the trust they put in the social services provided by their States, being vocal about the actual detachment of citizenship and ‘social citizenship’ as well as allowing for open competition between what States actually provide can result in the ‘hollowing of national citizenship’. Consequently, crusades to defend national solidarity against EU encroachments seem to come down to an ideological stance, not grounded in reality. Try to explain to a Scottish lady dying of cancer that her life has to be sacrificed in the name of social solidarity as the UK taxpayers’ money is not supposed to be spent in Holland where she would be cured – and embracing the mainstream nationalistic approach becomes much more difficult, if not immoral.

2. Identity

Nations – and nationalities – are conceived by ‘creating or elaborating an “ideological” myth of origins and descent’. In Mythologies Roland Barthes explains that myths are

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not important for the story they tell, but for what they do. The identity side of citizenship works in exactly the same way. Although the myth itself is always garbage; ‘nationality is to a greater or lesser degree a manufactured item’ – ‘l’oublie et l’erreur historique’ – identity’s perceived true nature is not thereby undermined, ensuring that people are ready to sacrifice it all; mourir pour la Patrie. The related debate is well known. ‘If national allegiances can be based on false beliefs, how is it possible for a purportedly rational institution such as morality to accommodate them?’ While philosophers are occupied, European political scientists and legal scholars observe EU citizenship and are expectedly divided around its identitarian content. What if the Union is creating a community of people on different principles? Or is it, again, about identities and myths?

The prevalent perspective in the literature, as outlined, for instance, in the authoritative study by Elsmore and Starup claims that ‘[i]n an EU context citizenship focuses on the legal aspect. It lacks the cultural [...] angle’. Taking this as a starting point, scholars entirely disagree with regard to its implications for the future of EU citizenship. While for some commentators, such as Richard Bellamy, the likely ‘transfer of allegiance to the EU’ is the key way to measure EU citizenship’s success or failure, others, like Joseph Weiler or Gianluigi Palombella, see the lack of this aspect precisely as EU citizenship’s strongest point. After all, there is no reason to believe that Habermasean ‘constitutional patriotism’ is anything else but ‘the last refuge of a scoundrel’ – which removes ground from under the feet of the analysts viewing EU citizenship in Bellamy’s vein. The general framework of constitutionalism as such – ‘an

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199 ‘In a mythical system causality is artificial, false; but it creeps, so to speak through the back door of Nature’, see Roland Barthes, Mythologies (trans. Annette Lavers) (Farrar, Starus & Giroux, 1972), 131.
200 David Miller, The Ethical Significance of Nationality, 98 Ethics 654, 657 (1988).
202 See on the patriotic sacrifice e.g. Michael Walzer, Civility and Civic Virtue in Contemporary America, 41 Soc. Res. 4 (1974).
204 Vincent Della Sala, Political Myth, Mythology and the European Union, 48 JCMS 1 (2010).
208 Palombella (2005) Whose Europe?
empire of uniformity’ – is also unlikely to be helpful, as James Tully masterfully demonstrated. What would be the reason to embark on a European project if it were to result in a grand-scale replication of the Member State-level nationalistic mythology? Gianluigi Palombella seems right that ‘Europe does not need to abandon dēmoi in order to make it e pluribus unum’. Serious problems with this line of thinking arise, however, when classical democratic representation at the EU level, implying the existence of a dēmos is advocated: we come back to Bellamy’s vision. How does one create such a dēmos and should one? A ‘Constitution’, to agree with Joseph Weiler is unlikely to be a helpful tool. Just accepting dēmoicracy could be an option.

Speaking of identity in purely theoretical terms – what plagues an absolute majority of legal and political works in on EU citizenship – does not seem sufficient. In this respect the analysis by Jürgen Gerhards, employing sociological data is of fundamental importance. Although this is obviously not to advocate ‘government by public opinion’, social reality has to be taken into account, especially by those seeking ‘thick’ European identity. The results of Gerhards’ study are fascinating. They demonstrate that on average only 33.9% of EU citizens support the idea of non-discrimination on the basis of nationality, on which EU citizenship rests. Numbers vary greatly across countries. The acceptance of non-discrimination is the highest in Sweden, Benelux, France and Denmark and the lowest in Eastern Europe, with Poland holding an absolute record, tightly followed by Lithuania, Slovenia, Malta, Hungary and the Czech Republic. In other words, the main principles of EU citizenship only became a social reality in North-Western Europe and are failing to reflect the

211 Id., 59–98.
213 Bellamy (2009) The Liberty of the Post-Moderns?
218 For a concise presentation see Gerhards (2008) ‘Free to Move?’, 127 (figure 1).
219 77.8% do not see any reason to discriminate: Id.
220 Including Greece, where 87.3% would discriminate: Id.
221 96.3% would discriminate: Id.
222 Around 80% would discriminate in Spain, Portugal, Italy, Austria and the former Eastern Germany: Id.
ideals of the population of the new Member States with a notable exception of Estonia, which has its own ugly skeletons in the closet, however.

The whole edifice of European integration is not a reflection of popular sentiments among EU citizens: Greeks prefer the Greeks. Could it be then, that the main identitarian contribution of the EU in general and its citizenship in particular is precisely going against State-doctored myths? European citizenship is thus a potent tool to be deployed against the ‘suffocating bonds’. Gianluigi Palombella, Gareth Davies and Will Kymlicka all point in this direction, the latter going as far as connecting the failure to recognize the EU’s ability to ‘tame and diffuse liberal nationhood’ with ‘moral blindness’. Joseph Weiler is more cautious: if States are the only seat of classical democratic legitimacy, how far can the Union be successful in undermining them?

All in all, while the mainstream literature sees EU citizenship as a legalistic creation with no implications for identity, going on to discuss whether it is a problem – an alternative, negative reading, consists in emphasizing EU citizenship as a liberal check protecting its holders against any state-mandated ‘culture’ and ‘identity’ impositions in the State of residence. Non-discrimination on the basis of nationality absolutely blocks any moves of the Member States to ‘integrate’ EU citizens.

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223 56.1% would discriminate: Id.
224 On the specificity of Estonian case of legalized discrimination of non-citizen minorities see Vadim Poleshchuk (ed.), Shans vyzhit’: Prava men’shistv v Estonii i Latvii (Foundation for Historical Outlook 2009).
225 At least as far as it requires ensuring non-discrimination on the basis of nationality.
230 Id., 135.
232 Christian Joppke made a compelling case for the finding that ‘the national particularisms, which immigrants and ethnic minorities are asked to accept across European states are but local versions of the universalistic idiom of liberal democracy’: Christian Joppke, Immigration and the Identity of Citizenship: The Paradox of Universalism, 12 Citizenship Stud. 533, 542 (2008).
into their societies by imposing culture and language tests,\textsuperscript{234} gaining in popularity in the context of third-country national migrants.\textsuperscript{235} This unquestionably liberates EU citizens – although Joseph Weiler\textsuperscript{236} and Ulli Jessurun d’Oliveira\textsuperscript{237} disagree.\textsuperscript{238} While the ECJ and its AGs seem to fully recognize the EU citizenship’s liberating function in this respect,\textsuperscript{239} the ‘genuine links’ jurisprudence of the Court is in direct tension with the liberal essence of EU citizenship. It is to be seen how it will evolve, but there is certainly a danger in allowing the ‘genuine links’ to become a push for the acceptance of State-level mythology, profoundly undermining EU citizenship’s potential.

3. Good thing vs. bad thing

In a long-term perspective should the negative vision of the identity side of EU citizenship be correct, residence comes to the fore as the main distinction between those who are in and those who are out, as opposed to myths and ideologies.\textsuperscript{240} Following Gareth Davies, ‘the new Belgians are those who \textit{choose} Belgium’.\textsuperscript{241} The element of choice is fundamentally important here, since a classical relationship between an

\begin{itemize}
  \item This goes beyond simple prohibitions, as the Member States are encouraged to adapt to the changed reality, where the EU potentially plays an important role. According to AG Poiares Maduro, ‘Citizenship of the Union \textit{must} encourage Member States to no longer conceive of the legitimate link of integration only within the narrow bonds of the national community, but also within the wider context of the society of peoples of the Union’: Opinion of AG Poiares Maduro in Case C-499/06 \textit{Halina Nerkowska v. Zakład Ubezpieczeń Społecznych Oddział w Koszalinie} [2008] ECR I-3993, para 23 (emphasis added).
  \item Weiler (2009) \textit{Nous coalition des Etats}, 82. He speaks of the ‘ghettoisation’ of migrants. In Weiler’s view, ‘la Corte dissuade dall’integrazione dei migranti nelle loro comunità ospiti’ (Id.).
  \item Jessurun d’Oliveira (1998) \textit{Nationaliteit en de Europese Unie}.
  \item This disagreement might be caused by the idealistic vision of the ‘integration’ systems of the Member States. For a first-hand (critical) account of a Dutch culture test, for instance, see Kochenov (2011) \textit{Mevrouw de Jong}.
  \item AG Jacobs explained the mechanics of this function of EU citizenship in his Opinion in Case C-148/02 \textit{Garcia Avello} [2003] ECR I-11613, at para. 63 (footnotes omitted): ‘The concept of “moving and residing freely in the territory of the Member States” is not based on the hypothesis of a single move from one Member State to another, to be followed by integration into the latter. The intention is rather to allow free, and possibly related or even continuous, movement within a single “area of freedom, security and justice”, in which both cultural diversity and freedom from discrimination [are] ensured’.
  \item For a meticulous overview of literature on the borders of belonging see Matthew J. Gibney, \textit{The Rights of Non-citizens to Membership}, in Caroline Sawyer and Brad K. Blitz (eds.), \textit{Statelessness in the European Union} 41 (Cambridge 2011).
\end{itemize}
individual and a State does not presuppose anything like this. A citizen can try to change her State through democratic or violent means, but no legal system outside of the EU can empower her to swap States. Only under 2% of the world’s population change nationality in the course of their lives. Scholars applaud EU citizenship for offering individuals this possibility of choosing where to live their lives, which ultimately amounts to choosing friends, foes, and the law, voting with their feet. The Union offers a much broader playground of opportunities than any individual State would, enabling EU citizens to live their lives as they, as opposed to a State where they were born and of which they are nationals, see fit, from work to marriage, from healthcare to education. Through the EU, Member States act as facilitators of personal choices not limited by their own borders or particular ideologies. This approach is in line with the federalist thinking connecting the choice of jurisdiction and liberty. Agreeing with Jørgensen ‘in the eyes of the citizens, welfare benefits, freedom of movement and the principle of non-discrimination all support and supplement the legal position of the individual’. Catching the essential core of this vision, Davies brings it to apotheosis, claiming that the constitutional tactic of the EU amounts to ‘humiliating the State’.

The contrarian view is espoused by Joseph Weiler, who takes the democratic-legitimating core of a modern State as the starting point. Lacking functional democratic mechanisms besides the negative freedom inherent in it, EU citizenship is said to corrupt individuals, since political involvement – let alone justice, equality

251 Weiler (2009) Nous coalisons des Etats, 64.
etc. – is simply not part of its package. Humiliating the State, the main added value of EU citizenship in the eyes of ones, becomes the main reason why it is a ‘bad thing’ in the eyes of the others.

Palombella offers a possible way to resolve the conflict between the two perspectives through dissociating State and popular sovereignty, which diminishes the importance of the State, and, simultaneously, tackles the problematic individualism of the ‘humiliating the State’ vision. He argues that ‘it is evident that popular sovereignty can withstand the passage of time, as an expression of our trust in democracy, and it can do so independently of the fate of the state as a form of the organization of power’. Consequently, it is fundamental not to confuse the decline of the sovereignty of the State – ‘concept founded on the reduction of law to the will of the state as an autonomous macro-person’ – and the decline of the sovereignty of the citizens. The sovereignty of the people is presumably reinforced by an ability to choose the community, as opposed to an obligation to be faithful to the one which you possibly find unbearable. Consequently, Weiler’s and Davies’ perspectives on the essence of the Union and its citizenship can theoretically be reconciled. However, how important is seeking this reconciliation at this stage? Even the most optimistic accounts of EU citizenship would not present it as a real and imminent danger to Member States and their nationalities.

Can it be that both Davies with his ‘humiliation of the State’ and Weiler with his ‘corrupting the individual’ accounts of the Union are guilty of exaggerating its imminent positive or negative effects? Playing a devil’s advocate, can this cleavage be resolved through simple toning down of the claims? Presently, the majority of EU citizens are not even aware of possessing this status. What is clear, however – and in this Joseph Weiler’s work going against the flood of the literature embracing a purely individualistic approach to EU citizenship’s potential is overwhelmingly important – is that the EU is unquestionably not mature enough to offer citizenship grounded in substantive values independent of ‘humiliating the State’. This is its main problem which is unlikely to be

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252 As discussed in Section III(2), supra.
254 Palombella (2005), 365.
255 Id.
solved any time soon and of which all those working in the field of EU citizenship should be acutely aware. Individualism has clear limits.

VI. To conclude

Agreeing with Williams, ‘the ECJ’s future challenges are both administrative and philosophical in nature’. The same applies to legal scholarship. While philosophical challenges present a truly fundamental challenge, the majority of the literature, strangely, focuses on the administrative ones. To realize EU citizenship’s full potential this will have to change. As this overview has demonstrated, plenty of scholars are engaged with EU citizenship, yet, the most important problems underlying its essence are only tackled by very few commentators, led by Gareth Davies, Dora Kostakopoulou, Andrew Williams and Joseph Weiler. The constructive potential of EU citizenship is unlikely to be fully realized without a shift in the register of scholarly engagement with this important area of law. To be successful in shaping the Union in the years to come such commentary will have to be less ideological and less distracted by day-to-day events. Lastly, drawing inspiration only from the negative features of EU citizenship, opposing it to a State is potentially dangerous – a more balanced account of the concept has to be created.

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