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The Present and the Future of EU Citizenship: A Bird's Eye View of the Legal Debate

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**THE PRESENT AND THE FUTURE OF EU CITIZENSHIP:
A BIRD'S EYE VIEW OF THE LEGAL DEBATE**

*Dimitry Kochenov**

Abstract

This article scrutinizes the last ten years of the academic debate on EU citizenship law taking nine fundamental disagreements among scholars as starting 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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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

¹ Aron Raymond, *Is Multinational Citizenship Possible?*, 41 Soc. Res. 638 (1974). For a very informative analysis of the connection existing between the concepts of citizenship and the nation-state, see Ulrich K. Preuß, *Problems of a Concept of European Citizenship*, 1 EUR. L.J. 267, 271–273 (1995).

² E.g. Case C-256/11 *Murat Dereçi, Vishaka Heiml, Alban Kokollari, Izunna Emmanuel Maduiké & Dragica Stević v. Bundesminister für Inneres* [2011] ECR I-0000; Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi* [2011] ECR I-1449; Case C-127/08 *Metock and Others* [2008] ECR I-6241; Case C-135/08, *Janko Rottmann v. Freistaat Bayern* [2010] ECR I-0000; Case C-192/05 *Tas-Hagen and Tas* [2006] ECR I-10451; Case C-200/02 *Zhu and Chen* [2004] ECR I-9925. Case C-256/11 *Murat Dereçi, Vishaka Heiml, Alban Kokollari, Izunna Emmanuel Maduiké & Dragica Stević v. Bundesminister für Inneres* [2011] ECR I-0000.

³ Christoph Schönberger, *European Citizenship as Federal Citizenship: Some Citizenship Lessons of Comparative federalism*, 19 *Revue européenne de droit public* 61 (2007). See also Jo Shaw, *Political Rights and Multilevel Citizenship in Europe*, in Elspeth Guild, Kees Groenendijk, and Sergio Carrera (eds.), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU 29* (Ashgate 2009).

⁴ Jo Shaw, *Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism*, in Paul Craig and Gráinne de Búrca (eds.), *Evolution of EU Law* 575, 578 (OUP 2011).

⁵ Rainer Bauböck and Virginie Guiraudon, *Introduction: Realignments of Citizenship: Reassessing Rights in the Age of Plural Memberships and Multi-Level Governance*, 13 *Citizenship Stud.* 439, 440 (2009).

Union under the star of EU citizenship. Upon the inclusion in the Treaties,⁶ 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,⁷ 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.⁸ 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,⁹ has been somewhat ignored as of itself.¹⁰

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

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).

⁷ E.g. Opinion of AG Jacobs in Case C-168/91 *Kostantinidis* [1993] ECR I-1191; Opinion of AG Léger in Case C-214/94 *Boukhalfa* [1996] ECR I-2253; Opinion of AG Jacobs in Case C-224/02 *Heikki Antero Pusa* [2004] ECR I-5763; Opinion of AG Jacobs in Case C-96/04 *Standesamt Stadt Niebüll* [2006] ECR I-3561; Opinion of AG Sharpston in Case C-212/06 *Government of the French Community and Walloon Government v. Flemish Government* [2008] ECR I-1683; Opinion of AG Sharpston in Case C-34/09, *Ruiz Zambrano* [2011] ECR I-0000.

⁸ At the EU level see Directive 2004/38, OJ L 158/77, 2004; Sergio Carrera, *What Does Free Movement Mean in Theory and Practice in an Enlarged EU?*, 11 Eur. L.J. 699, 711–718 (2005); Canelo Soriao, *Libre circulation et séjour dans l'UE: La directive 2004/38 au regard des droits de l'Homme*, *Journal des tribunaux, Droit européen*, No. 121, 200 (2005); Matthew J. Elsmore and Peter Starup, *Union Citizenship – Background, Jurisprudence, and Perspective: The Past, Present, and Future of Law and Policy*, 26 Ybk. Eur. L. 57, 96–100 (2007). At the national level, see the country reports of the EUDO citizenship observatory of the European University Institute (www.eudo-citizenship.eu).

⁹ The notion of European citizenship is older than the Maastricht Treaty. For legal-historical analysis, see, Antje Wiener, *Assessing the Constructive Potential of Union Citizenship – A Socio-Historical Perspective*, 1 Eur. Integration Online Papers 1 (1997); William Maas, *The Genesis of European Rights*, 43 J. Common Mrkt. Stud. 1009 (2005); Espen Olsen, *The Origins of European Citizenship in the First Two Decades of European Integration*, 15 J. Eur. Public Policy 40 (2008). For the examples of early academic commentary on the subject, see Andrew C. Evans, *European Citizenship: A Novel Concept in EEC Law*, 32 Am. J. Comp. L. 679 (1984); G. Cansacchi, *La cittadinanza comunitaria e i diritti fondamentali dell'uomo*, in Studi in onore di G. Sperduti (Giufre 1984); Andrew C. Evans, *European Citizenship*, 45 Mod. L.Rev. 497 (1982); Guido van den Berghe and Christian H. Huber, *European Citizenship*, in Roland Bieber and Dietmar Nickel (eds.), *Das Europa der Zweiten Generation: Gedächtnisschrift für Christoph Sasse*, Vol. 2 755 (Nomos 1981); Richard Plender, *An Incipient Form of European Citizenship*, in Francis G. Jacobs (ed.), *European Law and the Individual* 39 (North Holland 1979); A. Durand, *European Citizenship*, 4 Eur. L.Rev. 3 (1979).

¹⁰ Notable exceptions are Kostakopoulou (2005) *Ideas, Norms*; Shaw (2011) *Citizenship: Contrasting Dynamics*, 575–584.

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’.¹¹ 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,¹² 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.¹³

II. Structure of the study

Lately there has been a true flood of EU citizenship literature in law and social sciences¹⁴ and the need for an overview of the key issues discussed by the leading scholars working

¹¹ Jo Shaw, *Constitutional Settlements and the Citizen After the Treaty of Amsterdam*, in Karlheinz Neunreither and Antje Wiener (eds.), *European Integration after Amsterdam: Institutional Dynamics and Prospects for Democracy* (OUP 2000)

¹² Cf. John R. Searle, *The Construction of Social Reality* (Free Press 1997).

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.

¹⁴ See, *inter alia*, Kochenov, Dimitry and Plender, Richard, *EU Citizenship: From and Incipient Form to an Incipient Substance? The Discovery of the Treaty Text*, 37 *Eur. L. Rev.* (2012); Lenaerts, Koen, ‘Civis europaeus sum’: *From the Cross-border Link to the Status of Citizen of the Union* 3 *F.M.W.* 6 (2011); Dimitry Kochenov, *A Real European Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe*, 18 *Columbia J. Eur. L.* (2011), 55; Shaw (2011) *Citizenship: Contrasting Dynamics*, 575; Ferdinand Wollenschläger, *A New Fundamental Freedom beyond Market Integration: Union Citizenship and Its Dynamics for Shifting the Economic Paradigm of European Integration*, 17 *Eur. L.J.* 34 (2011); Hans U. Jessurun d’Oliveira, *Ontkoppeling van nationaliteit en Unieburgerschap?*, *Nederlandsch Juristenblad* 785 (2010); Dimitry Kochenov, *Citizenship without Respect: The EU’s Troubled Equality Ideal*, Jean Monnet Working Paper (NYU Law School) 08/10 (2010); Tony Marguery, *La citoyenneté européenne joue-t-elle un rôle dans l’espace pénal de liberté, de sécurité et de justice?*, *CDE* 387 (2010); Luigi Moccia (ed.), *Diritti fondamentali e cittadinanza dell’Unione Europea* (Franco Angeli 2010); Jo Shaw, *The Constitutional Development of Citizenship in the EU Context: With or without the Treaty of Lisbon*, in I. Pernice and E. Tanchev (eds.), *Ceci n’est pas une Constitution – Constitutionalism without a Constitution?* 104 (Nomos, 2009); Dimitry Kochenov, *Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights* 15 *Columbia J. Eur. L.* 169 (2009); Willem Maas, *Unrespected, Unequal, Hollow?: Contingent Citizenship and Reversible Rights in the European Union*, 15 *Columbia J. Eur. L.* 265 (2009); Miriam Aziz, *Implementation as the Test Case of European Citizenship*, 15 *Columbia J. Eur. L.* 281 (2009); Eleanor Spaventa, *Seeing the Wood despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects*, 45 *Common Mrkt. L.Rev.* 13 (2008); Sandrine Maillard, *L’émergence de la citoyenneté sociale européenne* (Presses Universitaires d’Aix-Marseille 2008); Patrick Dollat, *La citoyenneté européenne: Théorie et statuts* (Bruylant 2008); Xavier Groussot, *“Principled Citizenship” and Process of European Constitutionalisation – From a Pie in the Sky to a Sky with Diamonds*, in Ulf Bernitz *et al.* (eds.), *General Principles of EC Law in a Process of Development* 315 (Kluwer 2008); Samantha Besson and André Utzinger, *Towards European Citizenship*, *J. Social Philosophy* 185 (2008);

in the field is now apparent. This paper approaches the myriad relevant sources by taking paradigmatic differences of opinion as starting 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.¹⁵ Dora Kostakopoulou's overview was organized around sketching five theoretical approaches to citizenship in the literature, to embrace one.¹⁶ 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.

Anastasia Iliopoulou, *Libre circulation et non-discrimination, elements du statut de citoyen de l'Union européenne* (Bruylant 2008); Gareth Davies, *Services, Citizenship, and the Country of Origin Principle*, Mitchell Working Paper (Edinburgh) No. 2/2007 (2007); Willem Maas, *Creating European Citizens* (Rowman & Littlefield 2007); Jo Shaw, *The Transformation of Citizenship in the European Union: Electoral Rights and the Restructuring of Political Space* (CUP 2007); Francis Jacobs, *Citizenship of the European Union – A Legal Analysis*, 13 Eur. L.J. 591 (2007); Stéphane Leclerc and Jean-François Akandji-Kombé (eds.), *La citoyenneté européenne* (Bruylant 2007); Elsmore and Starup (2007) 'Union Citizenship'; Alexander Somek, *Solidarity Decomposed: Being and Time in European Citizenship*, 32 Eur. L.Rev. 787 (2007); Enrica Rigo, *Europa di confine: Trasformazioni della cittadinanza nell'Unione allargata* (Meltemi editore 2007); Gerhard Delanty, *European Citizenship: A Critical Reassessment*, 11 Citizenship Stud. 63 (2007); Rainer Bauböck, *Why European Citizenship? Normative Approaches to Supranational Union*, 8 Theoretical Inquiries in Law 452 (2007); Michael Dougan, *The Constitutional Dimension to the Case Law on Union Citizenship*, 31 Eur. L.Rev. 613 (2006); Karolina Rostek and Gareth Davies, *The Impact of Union Citizenship on National Citizenship Policies*, 10 EIoP 1 (2006); Robin C.A. White, *Citizenship of the Union, Governance, and Equality*, 29 Fordham Int'l L.J. 790 (2006); Stefan Kadelbach, *Union Citizenship*, in Armin von Bogdandy and Jürgen Bast (eds.), *Principles of European Constitutional Law* 453 (Hart 2006); Fiorella Dell'Olio, *The Europeanisation of Citizenship: Between the Ideology of Nationality, Immigration, and European Identity* (Ashgate 2005); Kostakopoulou (2005) *Ideas, Norms*, 233; Gareth Davies, *"Any Place I Hang My Hat?" or: Residence is the New Nationality*, 11 Eur. L.J. 43 (2005); Robin C.A. White, *Free Movement, Equal Treatment and Citizenship of the Union*, 4 Int'l & Comp. L.Q. 885 (2005); Gianluigi Palombella, *Whose Europe? After the Constitution: A Goal-Based Citizenship*, 3 Int'l J. Const. L. 357 (2005); Chris Shore, *Whither European Citizenship? Eros and Civilization Revisited*, 7 Eur. J. Social Theory 27 (2004).

¹⁵ Kostakopoulou (2005) *Ideas, Norms*.

¹⁶ 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).

Picking up the debate where Professor Kostakopoulou left it – *i.e.* at the scholarly discussion of the important judgments of the beginning of this century¹⁷ – 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,¹⁸ to combating non-discriminatory restrictions,¹⁹ and, finally, acquiring capacity of shaping the material scope of EU law²⁰ and supplying a new rationale for the European integration process.²¹ Crucially for its whole federal architecture,²² 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 State²³ to the protection of their ability to enjoy key rights associated with this status.²⁴ Yet, unable to

¹⁷ *E.g.* Case C-184/99 *Grzelczyk* [2001] ECR I-6193; Case C-224/98 *D’Hoop* [2002] ECR I-6191; Case C-413/99 *Baumbast and R.* [2002] ECR I-7091; Case C-224/02 *Pusa* [2004] ECR I-5763.

¹⁸ Case C-85/96 *Martínez Sala* [1998] ECR I-2691; Case C-184/99 *Grzelczyk* [2001] ECR I-6193; Case C-413/99 *Baumbast and R.* [2002] ECR I-7091; Case C-456/02 *Trojani* [2004] ECR I-7573. See, in general, Gareth Davies, *Nationality Discrimination in the European Internal Market* (Kluwer 2003); Koen Lenaerts, *Union Citizenship and the Principle of Non-Discrimination on the Grounds of Nationality*, in *Festschrift til Claus Gulmann* (Thomson 2006).

¹⁹ Case C-192/05 *Tas-Hagen and Tas* [2006] ECR I-10451; Opinion of AG Jacobs in Case C-224/02 *Pusa* [2004] ECR I-5763; Dimitry Kochenov, *Free Movement and Participation in the Parliamentary Elections in the Member State of Nationality: An Ignored Link?*, 16 MJ 197 (2009).

²⁰ Case C-135/08, *Janko Rottmann v. Freistaat Bayern* [2010] ECR I-0000; Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l’emploi* [2011] ECR I-0000; Lenaerts (2011) *Civis Europaeus Sum*, 17–18; Kochenov (2011) *A Real European Citizenship*.

²¹ Kochenov and Plender (2012) *European Citizenship*.

²² On the legitimacy of the use of federal terminology in the legal context of the EU see Koen Lenaerts and Kathleen Gutman, “Federal Common Law” in the European Union: A Comparative Perspective from the United States, 54 *Am. J. Comp. L.* 1 (2006); Robert Schütze, *On “Federal” Ground: The European Union as an (Inter)National Phenomenon*, 46 *Common Mrkt. L.Rev.* 1069 (2009); Bernard Dubey, *Administration indirecte et fédéralisme d’exécution en Europe*, *Cahiers de droit européen* 87 (2003). Judge Pierre Pescatore has been pointing out the ‘caractère fédérale de la constitution européenne’ even before the formulation of the principle of supremacy by the ECJ: Pierre Pescatore, *La Cour en tant que juridiction fédérale et constitutionnelle*, in *Dix ans de jurisprudence de la Cour de justice des Communautés européennes: Congrès européen Cologne, du 24 au 26 avril 1963*, 520, 522 (Heymanns Verlag 1963).

²³ Case C-135/08, *Janko Rottmann v. Freistaat Bayern* [2010] ECR I-0000; Gerard-René de Groot, *Overwegingen over de Janko Rottmann-beslissing van het Europese Hof van Justitie*, *Asiel & migrantenrecht* 293 (2010); Dimitry Kochenov, *Annotation of Case C-135/08 Rottmann*, 47 *Common Mrkt. L.Rev.* 1831 (2010); Jo Shaw (ed.), *Has the European Court of Justice Challenged the Member State Sovereignty in Nationality Law?*, *EUI Robert Schuman Centre for Advanced Studies Paper*, 2011/62 (2011).

²⁴ Case C-34/09, *Ruiz Zambrano* [2011] ECR I-0000; A.P. van der Mei, S.C.G. van den Bogaert, and Gerard-René de Groot, *De arresten Ruiz Zambrano en McCarthy*, *NTER No. 4*, 187 (2011); Laurens

supply substantive understanding of justice and other essential principles on which the Union rests,²⁵ recent developments can also be viewed as making EU citizenship more vulnerable and problematic: ‘sour grapes’.²⁶

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.²⁷

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

Ankersmit and Wessel Geursen, *Ruiz Zambrano: De interne situatie voorbij*, *Asiel & migrantenrecht* no. 4, 156 (2011); Peter Van Elsuwege, *Shifting Boundaries? European Union Citizenship and the Scope of Application of EU Law*, 38 *Legal Issues of Econ. Integration* (2011) 263.

²⁵ Andrew Williams, *Taking Values Seriously: Towards a Philosophy of EU Law*, 20 *Oxford J. Legal Stud.* 549 (2009); Andrew Williams, *The Ethos of Europe* (CUP 2010).

²⁶ Joseph H.H. Weiler, *Individual and Rights: The Sour Grapes* (editorial), 21 *EJIL* (2010).

²⁷ 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 Poiates Maduro and others,²⁸ 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 ipotizzarsi, una nozione comunitaria 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

²⁸ *E.g.* Kochenov (2009) *Ius Tractum*, 181–193.

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 than *ius sanguinis* citizenship³² – 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

²⁹ Giuseppe Tesaurò, *Diritto comunitario* 480 (5th edn CEDAM; Wolters Kluwer Italia, 2008).

³⁰ Leonard Besselink and Jan H. Reestman, *Dynamics of European and National Citizenship: Inclusive or Exclusive?* (editorial), 3 *Eur. Const. L.Rev.* 1, 2 (2007).

³¹ *Id.* See, similarly, Richard Bellamy: '[EU citizenship] facilitates cooperation between citizens of the member states and their access to citizenship of another member state, but does very little to create a distinctive attachment to the EU itself: Richard Bellamy, *Evaluating Union Citizenship: Belonging, Rights and Participation within the EU*, 12 *Citizenship Stud.* 597, 598 (2008).

³² The ECJ traditionally disallows making any distinctions between Member State nationalities on the ground of how they were acquired: Case 136/78 *Ministère public v. Auer* [1979] ECR 437, para. 28; Case C-369/90 *Micheletti* [1992] ECR I-4239, para. 10; Case C-200/02 *Zhu and Chen* [2004] ECR I-9925; Case C-34/09, *Ruiz Zambrano* [2011] ECR I-0000.

³³ Kochenov (2009) *Ius Tractum*, 181; Dollat (2008), 95–104.

³⁴ Opinion of AG Poiares Maduro in Case C-135/08, *Rottmann* [2010] ECR I-0000, para 23 (emphasis added).

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 study⁴⁰ – 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

³⁵ Case C-135/08, *Rottmann* [2010] ECR I-0000, para. 42.

³⁶ Kochenov (2010) *Annotation*, 1833; Gareth Davies, *The Entirely Conventional Supremacy of Union Citizenship and Rights*, in Jo Shaw (ed.), *Has the European Court of Justice Challenged the Member State Sovereignty in Nationality Law?*, EUI Robert Schuman Centre for Advanced Studies Paper (2011), 5; Dora Kostakopoulou, *European Union Citizenship and Member State Nationality: Updating or Upgrading the Link*, in Jo Shaw (ed.), *Has the European Court of Justice Challenged the Member State Sovereignty in Nationality Law?*, EUI Robert Schuman Centre for Advanced Studies Paper (2011), 21.

³⁷ Case C-34/09, *Ruiz Zambrano* [2011] ECR I-0000, para. 44; Oxana Golynger, *European Union as a Single Working-Living Space: EU Law and New Forms of Intra-Community Migration*, in Andrew Halpin and Volker Roeben (eds.), *Theorising the Global Legal Order* 145 (Hart 2009); Kochenov (2011) *A Real European Citizenship*.

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)).

⁴⁰ Kostakopoulou (2005) *Ideas, Norms*, 243.

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*',⁴² 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'.⁴³

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.⁴⁴ 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.⁴⁵

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*,⁴⁶ this would do justice to EU citizenship which *de facto* seems to have outgrown its initial framework, going back to

⁴² Besson and Utzinger (2008) *Towards European Citizenship*, 196.

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.).

⁴⁴ Kostakopoulou (2011) *European Union Citizenship*; Jessurun d'Oliveira (2010) *Ontkoppeling van nationaliteit*; Kochenov (2009) *Ius Tractum*, 182.

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.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.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 category⁴⁹ all the problems which free movement of persons was intended to solve.⁵⁰ Moreover, EU citizenship does not even cover all Member State nationals.⁵¹

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*,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

⁴⁷ As retold by Joseph Weiler in Joseph H.H. Weiler, *To Be a European Citizen: Eros and Civilization*, 4 J. Eur. Public Policy 324 (1997). For an attempt to reconceptualise EU citizenship in the context of EU legal history and, especially, Treaty amendments, see Kochenov and Plender (2012) *European Citizenship*.

⁴⁸ Dimitry Kochenov, *The Impact of European Citizenship on the Association of the Overseas Countries and Territories with the European Community*, 36 Legal Issues of Econ. Integration 239 (2009); W.R. Bohring, *The Scope of the EEC System of Free Movement of Workers: A Rejoinder*, 10 Common Mktt. L.Rev. 81, 82 (1973).

⁴⁹ See Dimitry Kochenov, *European Union's Minority Protection*, in Will Kymlicka and Jane Boulden (eds.), *International Approaches to Governing Ethnic Diversity* (OUP, 2012).

⁵⁰ For an illuminating historical account see Maas (2007) *Creating European Citizens*. Limited free movement rights granted to third-country nationals who are long term residents by Directive 2003/109 (OJ L 16/44, 2004) do not solve any outstanding problems: Anja Wiesbrock, *Free Movement of Third-Country Nationals in the European Union: The Illusion of Exclusion*, 35 Eur. L.Rev. 455 (2010); Kochenov (2009) *Ius Tractum*, 286; Achilles Skordas, *Immigration and the Market: The Long-term Residents Directive*, 13 Columbia J. Eur. L. 201 (2006).

⁵¹ See for analysis Kochenov (2009) *Ius Tractum*, 186–190. The ECJ missed an important opportunity to decouple EU citizenship from its economic underpinnings of the notion of 'Member State nationals for the purposes of Community law' in the *Kaur* case (Case C-192/99 [2001] ECR I-1237), where it seems to have interpreted the Treaty against the ordinary meaning of its text and ignored the context of grave human rights violations by the UK which echoed in the factual situation in front of it: Anthony Lester (Lord Lester of Herne Hill, QC), *East African Asians Versus the United Kingdom: The Inside Story*, lecture of 23 October 2003, available at

<http://www.blackstonechambers.com/pdfFiles/Blackstone_APL_East%20African%20Asians.pdf>; Imogen Tyler, *Designed to Fail: A Biopolitics of British Citizenship*, 14 Citizenship Stud. 61 (2010).

⁵² See also Isabelle Petit, *Dispelling a Myth? The Fathers of Europe and the Construction of Euro-Identity*, 12 EUR. L.J 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 emphasizes 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.

⁵⁴ Wollenschläger (2011) *A New Fundamental Freedom*.

⁵⁵ Shaw (2010) *Citizenship: Constrasting Dynamics*, 575.

⁵⁶ Niamh Nic Shuibhne, *The Resilience of EU Market Citizenship*, 47 *Common Mrkt. L.Rev.* 1597 (2010).

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 Nic Shuibhne (2010) *The Resilience*, 1605.

⁵⁹ *Id.*, 1608.

ideal citizenship models formulated by lawyers and political scientists,⁶⁰ 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'.⁶¹ To concur with Joseph Weiler, the market is now *alone*, with no 'moral imperative' and no 'mantle of ideals'.⁶² 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 justification⁶³ – 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,⁶⁴ Joseph Weiler – on political representation.⁶⁵ Add to this the idea of equality, which has been explored elsewhere⁶⁶ 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.⁶⁷

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

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).

⁶¹ Joseph H.H. Weiler, *Bread and Circus: The State of the European Union*, 4 *Columbia J. Eur. L.* 223, 231 (1998).

⁶² *Id.*, 231.

⁶³ Glyn Morgan, *European Political Integration and the Need for Justification*, 14 *Constellations* 332 (2007).

⁶⁴ Williams (2010) *The Ethos*; Williams (2009) *Taking Values Seriously*.

⁶⁵ Joseph H.H. Weiler, *Europa: "Nous coalisons des Etats nous n'unissons pas des hommes"*, in Marta Cartabia and Andrea Simoncini, (eds.), *La Sostenibilità della democrazia nel XXI secolo*, 51 (Il Mulino 2009).

⁶⁶ Kochenov (2010) *Citizenship without Respect*, 74–84.

⁶⁷ The same seems to hold for the concept of liberty, scrutinized by Bellamy: Richard Bellamy, *The Liberty of the Post-Moderns?: Market and Civic Freedom within the EU*, LSE 'Europe in Question' Discussion Paper No. 01/2009 (2009).

in the Union could have much deeper roots than one would expect,⁶⁸ going as far as the flaws in the foundational philosophy of the European integration exercise,⁶⁹ leading to an impoverished idea of justice,⁷⁰ and a highly proceduralised vision of the principles of law, threatening to strip the latter of even its most essential substance.⁷¹ 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’.⁷² 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.’⁷³ The values and virtues problem in the EU is apparent.⁷⁴

When the underlying philosophy is ‘based on a theory of interpretation (of original political will) rather than a theory of justice’,⁷⁵ 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.⁷⁶ Drawing on the work by Gareth Davies,⁷⁷ Gráinne de Búrca⁷⁸ and numerous other commentators in analyzing the functioning of the principle of equality in the context of EU citizenship

⁶⁸ Williams, (2009) *Taking Values Seriously*; Williams (2010) *The Ethos*.

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*.

⁷¹ Examples of the Rule of Law, justice, and equality can be provided. On the Rule of Law see Williams (2009) *Taking Values Seriously*, 568–569; Dimitry Kochenov, *The EU Rule of Law: Cutting Paths through Confusion*, 2 *Erasmus L.Rev.* 5 (2009); Anthony Arnall, *The Rule of Law in the European Union*, in Anthony Arnall and Daniel Wincott (eds.), *Accountability and Legitimacy in the European Union* 240, 241 (OUP 2002). On justice see Wojciech Sadurski, *The Concept of Legal Equality and an Underlying Theory of Discrimination*, 4 *St. Louis – Warsaw Transatlantic L.J.* 63, 68 (1998); Williams (2009) *Taking Values Seriously*, 547. On equality see Gráinne de Búrca, *The Role of Equality in European Community Law*, in Alan Dashwood and Síofra O’Leary (eds.), *The Principle of Equal Treatment in EC Law* 13 (Sweet and Maxwell 1997); Kochenov (2010) *Citizenship without Respect*. For a majestic work questioning the just substance of the whole European integration project see Williams (2010) *The Ethos*.

⁷² Weiler (2009) *Nous coalisons des Etats*, 54.

⁷³ Williams (2009) *Taking Values Seriously*, 560–561.

⁷⁴ *Id.*, 558–570. See also Joseph Weiler’s unpublished paper on the subject ‘On the Distinction between Values and Virtues in the Process of European Integration’. For the particular citizenship context see Mikko Kuisma, *Rights of Privileges? The Challenge of Globalisation to the Values of Citizenship*, 12 *Citizenship Studies* 613 (2008).

⁷⁵ Williams (2009) *Taking Values Seriously*, 549.

⁷⁶ Kochenov (2010) *Citizenship without Respect*, 12–27.

⁷⁷ Davies (2007) *Services, Citizenship*.

⁷⁸ De Búrca (1997) *The Role of Equality*.

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

⁷⁹ Kochenov (2010) *Citizenship without Respect*.

⁸⁰ Weiler (2009) *Nous coalisons des Etats*, 64.

⁸¹ Dollat (2008), 561–565; Miguel Sousa Ferro, *Popular Legislative Initiative in the EU: Alea Iacta Est*, 26 Oxford Y.B. Eur. L. 355 (2007).

⁸² Case C-300/04 *Eman and Sevinger v. College van burgemeester en wethouders van Den Haag* [2006] ECR I-8055; Leonard F.M. Besselink, in his annotation of Case C-145/04 *Spain v. UK*, Case C-300/04 *Eman en Sevinger*, and ECt.HR Case *Sevinger and Eman v. The Netherlands*, 45 Common Mrkt. L.Rev. 787, 806-808 (2008); Kochenov (2009) *The Impact of European Citizenship*; Dimitry Kochenov, *The Puzzle of Citizenship and Territory in the EU: On European Rights Overseas*, 17 MJ 230 (2010).

⁸³ In general see Shaw (2007), *The Transformation of Citizenship*; Giovanna Zinconone and Simona Ardivino, *I diritti elettorali dei migranti nello spazio politico e giuridico europeo*, 5 *Le Istituzioni del Federalismo* 741 (2004); Jo Shaw, *Alien Suffrage in the European Union*, 12 *The Good Soc’y* 29 (2003).

⁸⁴ For a contemporary analysis of the EU’s attempts to deal specifically with this birth defect see *e.g.* Kochenov and Plender (2012) *European Citizenship*.

⁸⁵ Weiler (2009) *Nous coalisons des Etats*, 82. 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 Poiarés 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*

⁸⁶ Williams (2010) *The Ethos*, 18 (emphasis in the original).

⁸⁷ Kochenov (2010), *Citizenship without Respect*, 9.

⁸⁸ Niamh Nic Shuibhne, *The Outer Limits of EU Citizenship; Displacing Economic Free Movement Rights?*, in Catherine Barnard and Okeoghene Odudu (eds.), *The Outer Limits of European Union Law* 167, 168 (Hart 2009).

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 nationals⁹⁰ 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’.⁹¹ Consequently, the rhetoric of the ECJ claiming that the notion of EU citizenship was not designed to enlarge the scope of EU law,⁹² 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 Golynger, 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*,⁹³ 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* test⁹⁴ 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.⁹⁵ 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’Brien⁹⁶ and Alina Tryfonidou⁹⁷ criticize the Court and go as far as to state that ‘the more appropriate

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.

⁹¹ Spaventa (2008) *Seeing the Wood despite the Trees*, 13.

⁹² E.g. Joined cases C-64/96 & C-65/96 *Uecker and Jacquet* [1997] ECR I-3171, para. 23; Case C-148/02 *Garcia Avello* [2003] ECR I-11613, para. 26. For a critical assessment of this approach in the light of *Rottmann* see Michaela Hailbronner and Sara Iglesias Sánchez, *The European Court of Justice and Citizenship of the European Union* 5 I.C.L.J. 498 (2011); Kochenov (2010) *Annotation*.

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*.

⁹⁵ E.g. Case C-152/03 *Ritter-Coulais* [2006] ECR I-1711. See also Case C-227/03 *A.J. van Pommeren-Bourgoniën* [2005] ECR I-6101; 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.

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).

⁹⁷ Tryfonidou (2009) *In Search of the Aim*.

assessment of a migrant who State of work remains unchanged is arguably under [Art. 21 TFEU].⁹⁸ 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’,⁹⁹ 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),¹⁰⁰ but whether their *intentions* are directly enough connected to the Internal Market.

According to Oxana Golynger¹⁰¹ and others¹⁰² who regard the Court’s approach with an approving eye, the Court merely moved away from exercising an *ultra vires* activity¹⁰³ of reading citizens’ minds towards assessing the facts. Golynger 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’.¹⁰⁴ 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.¹⁰⁵

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

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.

⁹⁹ Charlotte O’Brien, *Real Links, Abstract Rights and False Alarms: The Relationship between the ECJ’s “Real Link” Case Law and National Solidarity*, 33 *Eur. L.Rev.* 643, 654 (2008).

¹⁰⁰ For more on the ECJ’s approach to jurisdiction in the context of EU citizenship see Section IV(3), *infra*.

¹⁰¹ Golynger (2009) *European Union*, 151.

¹⁰² *E.g.* Spaventa (2008) *Seeing the Wood*; Kochenov (2011) *A Real European Citizenship*.

¹⁰³ For an analysis see Paul Craig, *The ECJ and Ultra Vires Action: A Conceptual Analysis*, 48 *Common Mrkt. L.Rev.* 395 (2011).

¹⁰⁴ Golynger (2009) *European Union*, 151. See also Opinion of AG Kokott in Case C-287/05 *D.P.W.Hendrix v. Raad van Bestuur van het Uitvoeringsinstituut Werknemersverzekeringen* [2007] ECR I-6909.

¹⁰⁵ Art. 26(2) TFEU.

situations not caught by the economic free movement provisions.¹⁰⁶ 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,¹⁰⁷ come to limit the scope of economic free movement provisions, what arguably happened in *Geven*¹⁰⁸ and *Hartmann*,¹⁰⁹ 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.¹¹⁰ In this context Siofra O’Leary is very convincing in deciphering the signs of ‘cross-pollinisation’ 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.¹¹¹ Drawing a clear dividing line between EU citizenship and economic free movement case-law, thus sticking to the ‘old-fashioned classification’¹¹² 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

¹⁰⁶ Davies (2003) *Nationality Discrimination*, 189; Kochenov (2010) *Citizenship without respect*, 52–54. But see Wollenschläger (2011) *New Fundamental Freedom*, 30–31.

¹⁰⁷ *E.g.* Case C-209/03 *Bidar* [2005] ECR I-2119.

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*.

¹¹¹ Siofra O’Leary, *Developing an Ever Closer Union between the Peoples of Europe?*, Mitchell Working Paper (Edinburgh) 6/2008, 15–24 (2008). See also Golyunker (2009) *European Union*, 153–156.

¹¹² Golyunker (2009) *European Union*, 151.

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.

¹¹⁴ Andrew Evans, *Nationality Law and European Integration*, 16 Eur. L.Rev. 190 (1991); Gerard-René de Groot, *Towards a European Nationality Law*, 8 Electronic J. Comp. L. (2004).

¹¹⁵ Jessurun d'Oliveira (2010) *Ontkoppeling van nationaliteit*, 785; Hans U. Jessurun d'Oliveira, *Nationaliteit en de Europese Unie*, in *Ongebogen recht: Opstellen aangeboden aan Prof. Dr. H. Meijers* 80–81 (Sdu 1998).

¹¹⁶ Hans U. Jessurun d'Oliveira, *Case Note 1. Decoupling Nationality and Union Citizenship?*, 7 Eur. Const. L.Rev. 138, 139 (2011).

taken by a Member State is bound to have implications for the EU citizenship status of a person.¹¹⁷ Consequently, virtually any instance of loss (and, necessarily, also acquisition¹¹⁸) 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.¹¹⁹ 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,¹²⁰ especially when viewed in the light of the earlier *Micheletti* ruling,¹²¹ which concerned the necessity to take EU law into account in the cases of recognition of each-other’s nationality by the Member States.¹²² The similarity with conferral and withdrawal of nationalities is obvious in this context.¹²³ 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.¹²⁴ 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 Declarations¹²⁵ on UK nationality for the purposes of EEC law.¹²⁶ It took the Court long thirty years and a dubious decision in

¹¹⁷ Case C-135/08, *Rottmann* [2010] ECR I-0000, para. 59.

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*.

¹¹⁹ Davies (2011) *The Entirely Conventional Supremacy*.

¹²⁰ *Id.*; Kochenov (2010) *Annotation*, 1831.

¹²¹ Case C-369/90 *Micheletti* [1992] ECR I-4239.

¹²² For an interesting perspective on this see Shaw (2011) *Citizenship: Contrasting Dynamics*.

¹²³ Kochenov (2010) *Annotation*, 1831.

¹²⁴ Kostakopoulou (2011) *European Court of Justice*; Kochenov (2009) *Ius Tractum*, 182–186 (and the literature cited therein).

¹²⁵ Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland on the Definition of the Term “Nationals,” Jan. 22, 1972, 1972 O.J. (L 73) 196; New Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland on the Definition of the Term “Nationals,” Jan. 28, 1983, 1983 O.J. (C23) 1. For analysis see de Groot (2004) *Towards a European Nationality Law*, para. 4.

¹²⁶ Plender (1979) *An Incipient Form*, 39.

*Kaur*¹²⁷ to start checking nationality decisions of the Member States against EU law, what was first done, albeit indirectly, in *Rottmann*.¹²⁸ In the meanwhile, the literature, and especially the analysis provided by Andrew Evans¹²⁹ and Gerard-René de Groot,¹³⁰ among other commentators,¹³¹ 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.¹³² 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,¹³³ 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 non-existent, legally speaking at least.¹³⁴ This is especially evident once one takes into

¹²⁷ Case C-192/99 *Kaur* [2001] ECR I-1237; Helen Toner, *Annotation of Case C-192/99 Kaur*, 39 Common Mrkt. L.Rev. 881 (2001).

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*.

¹²⁹ Evans (1991) *Nationality Law*.

¹³⁰ de Groot (2004) *Towards a European Nationality Law*.

¹³¹ Kochenov (2009) *Ius Tractum*, 190–193 (and the literature cited therein).

¹³² For an analysis at a meta-level see Armin von Bogdandy and Jürgen Bast, *The European Union's Vertical Order of Competences: The Current Law and Proposals for Reform*, 39 Common Mrkt. L.Rev. 227 (2002).

¹³³ Evans (1991) *Nationality Law*; de Groot (2004) *Towards European Nationality Law*; Rostek and Davies, *The Impact of Union Citizenship*, 1; Kochenov (2010) *Rounding up the Circle*.

¹³⁴ Dimitry Kochenov, *Double Nationality in the EU: An Argument for Tolerance*, 17 Eur. L.J. 323, 330 (2011).

account the importance of *residence*, a ‘place to hang [one’s] hat’,¹³⁵ 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,¹³⁶ as well as a ‘relativisation’,¹³⁷ if not ‘abolition’¹³⁸ 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.¹³⁹ 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.¹⁴⁰ The only detailed study of this matter to date¹⁴¹ 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.¹⁴² Consequently, while, following *Rottmann*, EU law now plays a role in the framing of Member State nationalities, at the Member State level, EU

¹³⁵ Davies (2005) *Any Place*.

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).

¹³⁷ Wollenschläger (2011) *A New Fundamental Freedom*, 4.

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)

¹⁴¹ Kochenov (2010) *Rounding up the Circle*. For a slightly updated version see also Dimitry Kochenov, *Member State Nationalities and the Internal Market: Illusions and Reality*, in Laurence W. Gormley and Niamh Nic Shuibhne (eds.), *From Single Market to Economic Union: Essays in Memory of John A. Usher* (Oxford University Press, 2012).

¹⁴² Evans (1991) *Nationality Law*, 193.

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’¹⁴³ – 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:¹⁴⁴ 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,¹⁴⁵ Niamh Nic Shuibhne¹⁴⁶ and Peter Van Elsuwege and Stanislas Adam,¹⁴⁷ among other commentators.¹⁴⁸ The classical approach to the wholly internal situations espoused by such scholars as L.A. Geelhoed, or the late Lord Slynn¹⁴⁹ is not supported by the latest developments in the law.¹⁵⁰ 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 concept¹⁵¹ while reverse discrimination targets mostly those who are viewed as not contributing to the market.¹⁵² 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.¹⁵³

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’.¹⁵⁴ 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

¹⁴⁵ Alina Tryfonidou, *Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens’ Europe*, 35 *Legal Issues of Econ. Integration* 43 (2008); Alina Tryfonidou, *Reverse Discrimination in EC Law* (Kluwer 2009).

¹⁴⁶ Niamh Nic Shuibhne, *Free Movement of Persons and the Wholly Internal Rule: Time to Move on?*, 39 *Common Mrkt. L.Rev.* 731 (2002).

¹⁴⁷ Peter Van Elsuwege and Stanislas Adam, *Situations purement internes, discriminations à rebours et collectivités autonomes après l’arrêt sur l’Assurances soins flamande*, *Cahiers de droit européen* 655 (2008).

¹⁴⁸ E.g. Dominik Hanf, “Reverse Discrimination” in *EU Law: Constitutional Aberation, Constitutional Necessity, or Judicial Choice*, 18 *Maastricht J. Eur. & Comp. L.* 26 (2011); Kochenov (2010) *Citizenship without Respect*, 47–52 (and the literature cited therein).

¹⁴⁹ L.A. Geelhoed, *De vrijheid van personenverkeer en de interne situatie: maatschappelijke dynamiek en juridische rafels*, in Elisabetta Manunza and Linda Senden (eds.), *De EU: De interstatelijkheid voorbij?* 31, 49 (Wolf Legal Publishers 2006). See also Lord Gordon Slynn, *Introducing a European Legal Order* 99 (Stevens and Sons 1992).

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*.

¹⁵² For discussion see Tryfonidou (2009) *Reverse Discrimination*, 158.

¹⁵³ Davies (2007) *Services, Citizenship*; Kochenov (2010) *Citizenship without Respect*.

¹⁵⁴ E.g. Case C-403/03 *Egon Schempp v. Finanzamt München V* [2005] ECR I-6421, para 22.

enough to bring the situation within its scope'.¹⁵⁵ Such movement need not be connected with any physical travel in space or economic activity of the mover.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.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'.¹⁵⁸ Numerous commentators, including Niamh Nic Shuibhne and, most importantly, AG Sharpston,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'.¹⁶⁰ Dominique Hanf¹⁶¹ and AG Kokott¹⁶² are more traditional, viewing reverse discrimination as a necessary evil within the context of multi-level EU constitutionalism.

¹⁵⁵ Spaventa (2008) *Seeing the Wood*, 14.

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.

¹⁵⁷ Spaventa (2008) *Seeing the Wood*, 14; Van Elsuwege and Adam (2009) *Situations purement internes*, 334; Kochenov (2010) *Citizenship without Respect*, 44.

¹⁵⁸ Niamh Nic Shuibhne, *The European Union and Fundamental Rights: Well in Spirit but Considerably Rumpled in Body?*, in Paul Beaumont, Carole Lyons, and Neil Walker (eds.), *Convergence and Divergence in European Public Law* 17, 188 (Hart 2002).

¹⁵⁹ Opinion of AG Sharpston in Case C-212/06 *Government of the French Community and Walloon Government* [2008] ECR I-1683; Opinion of AG Sharpston in Case C-34/09, *Ruiz Zambrano* [2011] ECR I-0000.

¹⁶⁰ Opinion of AG Sharpston in Case C-212/96 *Government of the French Community* [2008] ECR I-1683, paras 143–144.

¹⁶¹ Hanf (2011) *Reverse Discrimination*.

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’,¹⁶³ 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.¹⁶⁴ 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.¹⁶⁵

3. The choice of a jurisdiction test

In a most recent line of case-law,¹⁶⁶ 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,¹⁶⁷ this approach has been criticized by Niamh Nic Shuibhne,¹⁶⁸ Daniel Thym and Kay Hailbronner.¹⁶⁹ 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

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*.

¹⁶⁵ Peter Van Elsuwege and Dimitry Kochenov, *On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights*, 13 Eur. J. Migration & L. (2011) 443; Kochenov (2010) *Citizenship without Respect*, 47–52 (and the literature cited therein).

¹⁶⁶ Case C-135/08, *Rottmann* [2010] ECR I-0000; Case C-34/09, *Ruiz Zambrano* [2011] ECR I-0000; Case C- 434/09 *McCarthy* [2011] ECR I-0000.

¹⁶⁷ Kochenov (2011) *A Real European Citizenship*; Ankersmit and Geursen (2011) *Ruiz Zambrano*; Van Elsuwege (2011) *Shifting the Boundaries?*

¹⁶⁸ Niamh Nic Shuibhne, *Seven Questions for Seven Paragraphs (editorial)*, 36 Eur. L.Rev. 161 (2011).

¹⁶⁹ Kay Hailbronner and Daniel Thym, *Annotation of Case C-34/09 Ruiz Zambrano*, 48 Common Mrkt. L.Rev. 1253 (2011).

to be satisfied for Union citizens to acquire rights in Community law¹⁷⁰ – the ECJ concurred and embarked on purifying its case-law of the unwelcome orthodoxy.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’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.¹⁷³ The two are already used side-by-side,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’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.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.

¹⁷⁰ Spaventa (2008) *Seeing the Wood*, 17. See also Michelle Everson, *The Legacy of the Market Citizen* in Jo Shaw and Gillian More (eds.), *New Legal Dynamics of European Union* 73 (OUP 1995).

¹⁷¹ For the analysis of the most recent developments see Anja Wiesbrock, *Disentangling the “Union Citizenship Puzzle”?* *The McCarthy Case*, 36 E.L.Rev. 861 (2011); Niamh Nic Shuibhne, *Annotation of Case C-434/09 McCarthy and Case C-256/11 Dereci*, 49 Common Mrkt. L. Rev. 349 (2012); Stanislas Adam and Peter Van Elsuwege, *Citizenship Rights and the Federal Balance between the European Union and Its Member States: Comment on Dereci*, 37 Eur. L. Rev. 176 (2012); Kochenov and Plender (2012) *European Citizenship*.

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

¹⁷³ Lenaerts (2011) *Civis Europaeus*, 17–18; Kochenov (2011) *A Real European Citizenship*.

¹⁷⁴ Case C-434/09 *McCarthy* [2011] ECR I-0000, para. 56.

¹⁷⁵ Case C-434/09 *McCarthy* [2011] ECR I-0000, para. 53; Case C-135/08, *Rottmann* [2010] ECR I-0000, para. 42; Case C-34/09, *Ruiz Zambrano* [2011] ECR I-0000, para. 42; Case C-256/11 *Dereci* [2011] ECR I-0000, para. 66.

¹⁷⁶ The enlargement of the scope *ratione materiae* of EU law as a direct logical consequence of the introduction of EU citizenship has long been expected in the literature and has been advocated by a number of scholars, starting with Siofra O’Leary, who published the first comprehensive monograph on EU citizenship: O’Leary (1996), 273–278. See also, *inter alia*, by Nic Shuibhne (2002) *Free Movement*, 731; White (2005) *Free Movement*; Spaventa (2008) *Seeing the Wood*, 13; Tryfonidou (2008) *Reverse Discrimination*, 44; Iliopoulou (2008) *Libre circulation*, 267; Kochenov (2009) *Ius Tractum*, 234; Tryfonidou (2009) *Reverse Discrimination*, 129; Kochenov (2010) *Citizenship without Respect*, 80; Van Elsuwege (2011) *Shifting Boundaries?*.

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’.¹⁷⁷ While they claim that the Union lacks ‘any clear organizing concept of social solidarity’,¹⁷⁸ Catherine Barnard disagrees in part, finding that ‘[t]he principle of “solidarity” is taking root as a guiding principle of European Community law’.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.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

¹⁷⁷ Michael Dougan and Eleanor Spaventa, “Wish You Weren’t Here...” *New Models of Social Solidarity in the European Union*, in Eleanor Spaventa and Michael Dougan (eds.), *Social Welfare and EU Law* 181 (Hart 2005).

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

¹⁷⁹ Catherine Barnard, *EU Citizenship and the Principle of Solidarity*, in Eleanor Spaventa and Michael Dougan (eds.), *Social Welfare and EU Law* 157 (Hart 2005). See also Roderic O’Gorman, *The Proportionality Principle and Union Citizenship*, Mitchell Working Paper (Edinburgh) 1/2009 4-11 (2009); Marlene Wind, *Post-National Citizenship in Europe: The EU as a “Welfare Rights Generator?”*, 15 *Columbia J. Eur. L.* 239 (2009).

¹⁸⁰ Barnard (2005) *EU Citizenship and the Principle of Solidarity*, 157; Catherine Barnard, *Social Policy Revisited in the Light of the Constitutional Debate*, in Catherine Barnard (ed.), *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate* 109, 121 (OUP 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

¹⁸¹ Maillard (2008) *L'émergence de la citoyenneté*, 65–80.

¹⁸² *Id.*, 257 *et seq.*

¹⁸³ While Sandrine Maillard, among numerous other scholars, seems to presume the non-application of the provision to third-country nationals (*Id.*, 333–335), more progressive accounts are also available: Pieter Boeles, *Europese burgers en derdelanders: Wat betekent het verbod van discriminatie naar nationaliteit sinds Amsterdam?*, *Sociaal-economische wetgeving*, No. 12, 502 (2005); Astrid Epiney, *The Scope of Article 12 EC: Some Remarks on the Influence of European Citizenship*, 13 *Eur. L.J.* 611 (2007); Chloé Hublet, *The Scope of Article 12 of the Treaty of the European Communities vis-à-vis Third-Country Nationals: Evolution at Last?*, 15 *Eur. L.J.* 757 (2009); Kochenov (2009) *Ius Tractum*, 206–209.

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.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'.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.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.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'.¹⁹¹ In the context of cross-pollination of EU citizenship and economic freedoms in the Treaties outlined by Síofra O'Leary,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

Haunting Europe ... Free Movement of Persons and Eastern Enlargement, in Christophe Hillion (ed.), *EU Enlargement: A Legal Approach* 111, 112 (Hart 2004). None of these have materialized. For a well-argued reply see Belavusau (2008) *The Case of Laval*, 2279.

¹⁸⁷ Michael Keating, *Social Citizenship, Solidarity and Welfare in Regionalised and Plurinational States*, 13 *Citizenship Stud.* 501, 506–510 (2009).

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).

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, *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).

¹⁹⁰ Davies (2005) *Any Place*.

¹⁹¹ *Id.*; Maillard (2008) *L'émergence de la citoyenneté*, 410.

¹⁹² O'Leary (2008) *Developing an Ever Closer Union*, 15–24

the Court's occasional willingness to help,¹⁹³ its general approach to the issue¹⁹⁴ is much criticized in the literature.¹⁹⁵

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.¹⁹⁶ 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'.¹⁹⁷ 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'.¹⁹⁸ In *Mythologies* Roland Barthes explains that myths are

¹⁹³ Case C-209/03 *Bidar* [2005] ECR I-2119; Oxana Golynger, *Student Loans: The European Concept of Social Justice According to Bidar*, 31 Eur. L.Rev. 390 (2006).

¹⁹⁴ Case C-158/07, *Jacqueline Förster v. IB-Groep* [2008] ECR I-8507.

¹⁹⁵ Anne Pieter van der Mei, *Union Citizenship and the Legality of Durational Residence Requirements for Entitlement to Student Financial Aid*, 16 MJ 477 (2009); Mislav Mataija, *Case C-158/07, Jacqueline Förster v. IB-Groep – Student Aid and Discrimination of Non-Nationals: Clarifying or Emaciating Bidar?*, 15 Colum. J. Eur. L. Online 59 (2009).

¹⁹⁶ Davies (2007) *Services, Citizenship*, 21; Anne Pieter van der Mei, *Union Citizenship and the "De-Nationalisation" of the Territorial Welfare State*, 7 Eur. J. Migration & L. 203, 210 (2005).

¹⁹⁷ Davies (2007) *Services, Citizenship*, 21.

¹⁹⁸ A.D. Smith, *The Ethnic Origin of Nations* 147 (Oxford: Blackwell, 1986).

not important for the story they tell, but for what they *do*.¹⁹⁹ 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’²⁰⁰ – ‘l’oublie et l’erreur historique’²⁰¹ – identity’s perceived true nature is not thereby undermined, ensuring that people are ready to sacrifice it all; *mourir pour la Patrie*.²⁰² 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?’²⁰³ While philosophers are occupied, European political scientists and legal scholars observe EU citizenship and are expectedly divided around its identitarian *contenue*. What if the Union is creating a community of people on different principles? Or is it, again, about identities and myths?²⁰⁴

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’.²⁰⁵ 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’²⁰⁶ is the key way to measure EU citizenship’s success or failure, others, like Joseph Weiler²⁰⁷ or Gianluigi Palombella,²⁰⁸ see the lack of this aspect precisely as EU citizenship’s strongest point. After all, there is no reason to believe that Habermasian ‘constitutional patriotism’ is anything else but ‘the last refuge of a scoundrel’²⁰⁹ – 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

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).

²⁰¹ Ernst Renan, *Qu’est-ce qu’une nation? et autres essais politiques* 41 (1st ed. 1882, Agora 1992).

²⁰² See on the patriotic sacrifice e.g. Michael Walzer, *Civility and Civic Virtue in Contemporary America*, 41 *Soc. Res.* 4 (1974).

²⁰³ Miller (1988) *The Ethical Significance*, 648. See also Christine Chwaszcza, *The Unity of People, and Immigration in Liberal Theory*, 13 *Citizenship Stud.* 451 (2009).

²⁰⁴ Vincent Della Sala, *Political Myth, Mythology and the European Union*, 48 *JCMS* 1 (2010).

²⁰⁵ Elsmore and Starup (2007) ‘Union Citizenship’, 61.

²⁰⁶ Bellamy (2008) *Evaluating Union Citizenship*, 609.

²⁰⁷ Joseph H.H. Weiler, *In Defence of the Status Quo: Europe’s Constitutional Sonderweg*, in Joseph H.H. Weiler and Marlene Wind (eds.), *European Constitutionalism beyond the State* 7 (CUP 2003)..

²⁰⁸ Palombella (2005) *Whose Europe?*

²⁰⁹ Weiler, (2003) *In Defence of the Status Quo*, 18.

empire of uniformity'²¹⁰ – is also unlikely to be helpful, as James Tully masterfully demonstrated.²¹¹ 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*'.²¹² 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.²¹³ How does one create such a *dēmos* and should one? A 'Constitution', to agree with Joseph Weiler is unlikely to be a helpful tool.²¹⁴ Just accepting *dēmoicracy* could be an option.²¹⁵

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.²¹⁶ Although this is obviously not to advocate 'government by public opinion',²¹⁷ social reality has to be taken into account, especially by those seeking 'thick' European identity. The results of Gerhards' study are fascinating.²¹⁸ 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,²¹⁹ Benelux, France and Denmark and the lowest in Eastern Europe,²²⁰ with Poland holding an absolute record,²²¹ 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 Europe²²² and are failing to reflect the

²¹⁰ James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* 59 (CUP 1995).

²¹¹ *Id.*, 59–98.

²¹² Palombella (2005) *Whose Europe?*, 365.

²¹³ Bellamy (2009) *The Liberty of the Post-Moderns?*

²¹⁴ Weiler (2003) *In Defence of the Status Quo*.

²¹⁵ Kalypso Nicolaïdes, *The New Constitution as European Demoi-cracy?* (The Fed. Trust for Educ. and Research No. 38/03, 2003); Weiler (2003) *In Defence of the Status Quo*.

²¹⁶ Jürgen Gerhards, *Free to Move? The Acceptance of Free Movement of Labour and Non Discrimination among Citizens of Europe*, 10 Eur. Societies 121 (2008).

²¹⁷ For the criticism of Bryce's work see e.g. Adrian Vermeule, *Government by Public Opinion: Bryce's Theory of the Constitution*, Harvard Public Law Working Paper No. 11-13, (2011).

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,²²³ which has its own ugly skeletons in the closet, however.²²⁴

The whole edifice of European integration²²⁵ is not a reflection of popular sentiments among EU citizens: Greeks prefer the Greeks.²²⁶ 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’.²²⁷ Gianluigi Palombella, Gareth Davies and Will Kymlicka²²⁸ 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’²²⁹ with ‘moral blindness’.²³⁰ 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?²³¹

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’ impositions²³² in the State of residence.²³³ Non-discrimination on the basis of nationality absolutely blocks any moves of the Member States to ‘integrate’ EU citizens

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’shinstv 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.

²²⁶ Kochenov (2010) ‘Citizenship without Respect’, 74–85.

²²⁷ Palombella (2005) *Whose Europe?*, 382. See also E.M.H. Hirsch-Ballin, *Burgerrechten* (Universiteit van Amsterdam 2011); Kochenov (2011) *Mevrouw de Jong*.

²²⁸ Palombella (2005) *Whose Europe?*; Will Kymlicka, *Liberal Nationalism and Cosmopolitan Justice*, in Seyla Benhabib, *Another Cosmopolitanism* 134 (OUP 2006); Gareth Davies, *Humiliation of the State as a Constitutional Tactic*, in Fabian Amtenbrink and Peter van den Bergh (eds.), *The Constitutional Integrity of the European Union* (T.M.C. Asser Press 2010).

²²⁹ Kymlicka (2005) ‘Liberal Nationalism’, 134.

²³⁰ Id., 135.

²³¹ Joseph H.H. Weiler, *Fundamental Rights and Fundamental Boundaries: Common Standards and Conflicting Values in the Protection of Human Rights in the European Legal Space*, in Riva Kastoryano and Susan Emmanuel (eds.), *An Identity for Europe: The Relevance of Multiculturalism in EU Constitution* 73, 78 (Palgrave Macmillan 2009).

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).

²³³ Kochenov (2011) *Mevrouw de Jong*, 12–15; Kochenov (2012) *European Union’s Minority Protection*.

into their societies by imposing culture and language tests,²³⁴ gaining in popularity in the context of third-country national migrants.²³⁵ This unquestionably liberates EU citizens – although Joseph Weiler²³⁶ and Ulli Jessurun d'Oliveira²³⁷ disagree.²³⁸ While the ECJ and its AGs seem to fully recognize the EU citizenship's liberating function in this respect,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.²⁴⁰ Following Gareth Davies, 'the new Belgians are those who *choose* Belgium'.²⁴¹ The element of choice is fundamentally important here, since a classical relationship between an

²³⁴ 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 *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 *Halina Nerkowska v. Zakład Ubezpieczeń Społecznych Oddział w Koszalinie* [2008] ECR I-3993, para 23 (emphasis added).

²³⁵ For an overview and analysis, see Rainer Bauböck and Christian Joppke (eds), *How Liberal Are Citizenship Tests?*, EUI RSCAS Working Paper 2010/41 (2010); Ricky van Oers, Eva Ersbøll, and Dora Kostakopoulou, *Mapping the Redefinition of Belonging in Europe*, in Ricky van Oers, Eva Ersbøll, and Dora Kostakopoulou (eds), *A Re-definition of Belonging?* 307 (Koninklijke Brill 2010); Christian Joppke, *Beyond National Models: Civic Integration Policies for Immigrants in Western Europe*, 30 *West Eur. Pol.* 1 (2007).

²³⁶ Weiler (2009) *Nous coalison 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.).

²³⁷ Jessurun d'Oliveira (1998) *Nationaliteit en de Europese Unie*.

²³⁸ 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) *Mevrouw de Jong*.

²³⁹ AG Jacobs explained the mechanics of this function of EU citizenship in his Opinion in Case C-148/02 *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'.

²⁴⁰ For a meticulous overview of literature on the borders of belonging see Matthew J. Gibney, *The Rights of Non-citizens to Membership*, in Caroline Sawyer and Brad K. Blitz (eds.), *Statelessness in the European Union* 41 (Cambridge 2011).

²⁴¹ Davies (2005) *Any Place*, 56 (emphasis added). See also Dora Kostakopoulou, *Citizenship Goes Public: The Institutional Design of Anational Citizenship*, 17 *J. Political Philosophy* 275 (2009).

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.²⁴² 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.²⁴³ 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,²⁴⁴ from healthcare²⁴⁵ to education.²⁴⁶ 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.²⁴⁷ 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'.²⁴⁸ 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'.²⁴⁹

The contrarian view is espoused by Joseph Weiler, who takes the democratic-legitimizing core of a modern State as the starting point.²⁵⁰ Lacking functional democratic mechanisms besides the negative freedom inherent in it, EU citizenship is said to corrupt individuals,²⁵¹ since political involvement – let alone justice, equality

²⁴² Ayelet Shachar and Ran Hirschl, *Citizenship as Inherited Property*, 35 *Pol. Theory* 253 (2007)..

²⁴³ Seith F. Kreimer, *Federalism and Freedom*, 574 *Annals AAPSS* 66 (2001); A.O. Hirschman, *Exit, Voice, and Loyalty* (HUP 1970).

²⁴⁴ Dimitry Kochenov, *On Options of Citizens and Moral Choices of States: Gays and European Federalism*, 33 *Fordham. J. Int'l L.* 156 (2009).

²⁴⁵ Mark L. Flear, *Developing Euro-Biocitizens through Migration for Healthcare Services*, 14 *Maastricht J. Eur. & Comp. L.* 3 (2007).

²⁴⁶ Stine Jørgensen, *The Right to Cross-Border Education in the European Union*, 46 *Common Mrkt. L.Rev.* 1567 (2009).

²⁴⁷ E.g. Kreimer (2001) *Federalism and Freedom*; Seith F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 *U. Penn. L.Rev.* 973, 980–984 (2002); Michael McDonnell, *Review: Federalism: Evaluating the Founders' Design*, 54 *U. Chi. L.Rev.* 1484, 1494 (1987).

²⁴⁸ Jørgensen (2009) *The Right to Cross-Border Education*, 1567.

²⁴⁹ Davies (2010) *The Humiliation*.

²⁵⁰ Weiler (2009) *Fundamental Rights and Fundamental Boundaries*, 73.

²⁵¹ Weiler (2009) *Nous coalisons des Etats*, 64.

etc.²⁵² – 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 individualism²⁵³ 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’.²⁵⁴ 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’²⁵⁵ – 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.²⁵⁶ 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

²⁵² As discussed in Section III(2), *supra*.

²⁵³ Weiler (2009) *Fundamental Rights and Fundamental Boundaries*.

²⁵⁴ Palombella (2005), 365.

²⁵⁵ *Id.*

²⁵⁶ According to Jagerskiold, denying of the right to leave is ‘is a source of much unnecessary suffering around the world’: S. Jagerskiold, *The Freedom of Movement*, in L Lenkin (ed.), *The International Bill of Rights. The Covenant on Civil and Political Rights* 166, 167 (Columbia University Press 1981).

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'.²⁵⁷ 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.

²⁵⁷ Andrew Williams, *Human Rights and the European Court of Justice: Past and Present Tendencies*, Warwick Law School Legal Stud. Research Paper No. 2011-06, 53 (2011).

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