THE ESSENCE OF EU CITIZENSHIP EMERGING FROM THE LAST TEN YEARS OF ACADEMIC DEBATE: BEYOND THE CHERRY BLOSSOMS AND THE MOON?[1]

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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 multi-level governance, and its impact on the lives of ordinary Europeans. A large 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 EU citizenship's future 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 literatures aside.

Key words: CJEU, equality, EU citizenship, fundamental rights, principles of EU law, reverse discrimination.

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,[2] 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

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[1] 'Of an infinite number of permissible subjects, cherry blossoms and the moon are traditionally held to be the most interesting.' Makoto Ueda, Matsuo Bashō 74 (Tokyo: Kodansha International, 1970).

[2] R Aron, 'Is Multinational Citizenship Possible?' (1974) 41 Social Research 638. For a very informative analysis of the connection existing between the concepts of citizenship and the nation-state, see UK Preuß, 'Problems of a Concept of European Citizenship' (1995) 1 ELJ 271–3.

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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,[3] it is clear that much more is to come. A 'federal European citizenship'[4] 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'.[5] The EU is turning into 'a laboratory for differentiated citizenship',[6] with all the positive and negative consequences of being at the avant-garde of an important transformation.

Analysing the development of EU citizenship law during the last ten years through the prism of the approaches to it adopted in the academic literature,[7] this paper recognizes the foundational role played by the scholars in the total make-over of the Union under the direct influence of EU citizenship. Upon the inclusion in the Treaties,[8] EU citizenship has been pushed forward mostly by a trio of factors: the ground-breaking work of the Judges of the ECJ and its Advocates General;[9] the academic commentary by those who saw important

[3] eg Case C–135/08, *Janko Rottmann v Freistaat Bayern* [2010] ECR I–1449; Case C–34/09, *Gerardo Ruiz Zambrano Office national de l'emploi* [2011] ECR I–0000; Case C–127/08] *Metock and Others* [2008] ECR I–6241; 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 Maduike & Dragica Stević v Bundesminister für Inneres* [2011] ECR I–0000. Several important cases to clarify the legal nature of EU citizenship further are currently pending in front of the Court. See eg Case C–356/11 *O, S*, OJ C 269/74 (2011); Case C–357/11 *L.*, OJ C 269/75 (2011).

[4] C Schönberger, 'European Citizenship as Federal Citizenship: Some Citizenship Lessons of Comparative Federalism' (2007) 19 Revue européenne de droit public 61. See also J Shaw, 'Political Rights and Multilevel Citizenship in Europe' in E Guild, K Groenendijk and S Carrera (eds), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU* (Ashgate 2009) 29.

[5] J Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism' in P Craig and G de Búrca (eds), *Evolution of EU Law* (OUP 2011 2nd ed) 578.

[6] R Bauböck and V Guiraudon, 'Introduction: Realignments of Citizenship: Reassessing Rights in the Age of Plural Memberships and Multi–Level Governance' (2009) 13 Citizenship Studies 440.

[7] While the limitations of such an exercise are obvious, given the sheer amount of the publications engaged with this topic in all the 23 languages of the Union, it is nevertheless possible to outline the most influential trends in the academic thought on EU citizenship during the last ten years.

[8] 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: A Schrauwen, 'European Citizenship in the Treaty of Lisbon: Any Change at All?' (2008) 15 Maastricht Journal of European and Comparative Law 55; D Kostakopoulou, 'Ideas, Norms and European Citizenship: Explaining Institutional Change' (2005) 68 ModLRev 261–2.

[9] eg 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; Opinon of AG Jacobs in Case C–96/04 *Standesamt Stadt Niebüll* [2006] ECR I–3561; Opinion of AG Sharpston in Case C–212/06

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.[10] 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,[11] has been somewhat ignored as of itself.[12]

The most influential academic commentators in this field, such as Gareth Davies, Dora Kostakopoulou, Niamh Nic Shuibhne, Jo Shaw, Eleanor Spaventa, or Joseph Weiler, to name just a few, were never confined in their analyses to merely following the Court and the legislators, as they actively co-shaped the Union and its citizenship hand in hand 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'.[13] 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,[14] 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.[15]

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. Also the extrajudicial writings of the members of the Court play an important role in the academic debate. See, *inter alia*, K Lenaerts, '"Civis europaeus sum": From the Cross-Border Link to the Status of Citizen of the Union' (2011) 3 Electronic Journal of the Free Movement of Workers in the European Community 6; J Kokott, 'EU Citizenship—citoyens sans frontières?' (2005) Durham European Law Institute, European Law Lecture, available at <http://www.dur.ac.uk/resources/deli/annuallecture/2005_DELI_Lecture.pdf> (accessed 20 August 2012).

[10] At the EU level see Directive 2004/38, OJ L 158/77, 2004; S Carrera, 'What Does Free Movement Mean in Theory and Practice in an Enlarged EU?' 11 ELJ (2005) 711–18; C Soriao, 'Libre circulation et séjour dans l'UE: La directive 2004/38 au regard des droits de l'Homme' (2005) 121 Journal des tribunaux, Droit européen 200; MJ Elsmore and P Starup, 'Union Citizenship—Background, Jurisprudence, and Perspective: The Past, Present, and Future of Law and Policy' (2007) 26 Yearbook of European Law 96–100. At the national level, see the country reports of the EUDO citizenship observatory of the European University Institute <http://eudo-citizenship.eu>.

[11] The notion of European citizenship is older than the Maastricht Treaty: D Kochenov and R Plender, 'EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text' (2012) 37 ELR 369 (and the literature cited therein).

[12] Notable exceptions are Kostakopoulou (n 8); Shaw (n 5) 575–84.

[13] J Shaw, 'Constitutional Settlements and the Citizen after the Treaty of Amsterdam' in K Neunreither and A Wiener (eds), *European Integration after Amsterdam: Institutional Dynamics and Prospects for Democracy* (OUP 2000) 297.

[14] cf JR Searle, *The Construction of Social Reality* (Simon and Schuster 1997).

[15] 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 (n 8) 263.

II. STRUCTURE OF THE STUDY: NINE DISAGREEMENTS IN THREE GROUPS

Lately there has been a true flood of EU citizenship literature in law and social sciences[16] and the need for an overview of the key issues discussed by the leading scholars working 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.[17] Dora Kostakopoulou's overview was organized around sketching five theoretical approaches to citizenship in the literature, and then to embrace one.[18] That the present analysis is in some way more patchy is partly informed by the consideration that EU citizenship is too multifaceted and, at the same time, too atypical in a number of ways, to reduce an approach to it to one overarching theory. While theoretically feasible, such ordering does not arise from the literature in its current state and risks turning a blind eye to an array of issues of fundamental importance. It is possible, however, to draw on the most important scholarly disagreements analysed individually, to come up with a tentative quilt-like and diverse picture of the whole. Emphasis on the key points of difference creates a better view of the richness of legal analysis surrounding the concept of EU citizenship and its likely development, allowing the detailed mapping of the multifaceted reality shaped by this concept, while minimizing, at the same time, the negative influences of the dogmatic normative standpoints embraced by some commentators.

[16] See the references throughout this article and also, *inter alia*; S Iglesias Sánchez, '¿Hacia una nueva relación entre la nationalidad estatal y la ciudadanía europea?' (2010) 37 Revista de Derecho Comunitario Europeo 933; T Marguery, 'La citoyénneté européenne joue-t-elle un role dans l'éspace penal de liberté, de sécurité et de justice?' (2010) CDE 387; J 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?* (Nomos 2009) 104; X Groussot, '"Principled Citizenship" and Process of European Constitutionalisation – From a Pie in the Sky to a Sky with Diamonds' in U Bernitz et al (eds), *General Principles of EC Law in a Process of Development* (Kluwer 2008) 315; A Somek, 'Solidarity Decomposed: Being and Time in European Citizenship' (2007) 32 ELR 787; R Bauböck, 'Why European Citizenship? Normative Approaches to Supranational Union' (2007) 8 Theoretical Inquiries in Law 452; M Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship' (2006) 31 ELR 613; S Kadelbach, 'Union Citizenship' in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Hart 2006) 453.

[17] Kostakopoulou (n 8).

[18] These included 'Market citizenship'; 'Civic republican European citizenship'; 'Deliberative European citizenship'; 'Corrective European citizenship'; and 'Constructive European citizenship': Kostakopoulou ibid 238–43. Many more theoretical approaches to citizenship are available, which could potentially be utilized also in the context of EU citizenship analysis. See eg L Bosniak, 'Citizenship Denationalised' (2000) 7 IndJGlobalLegalStud 477; K Rubinstein and D Adler, 'International Citizenship: The Future of Nationality in a Globalised World' (2000) 7 IndJGlobalLegalStud 522. For the analysis of the different approaches in the context of EU citizenship see eg P Mindus, 'Europeanisation of Citizenship within the EU: Perspectives and Ambiguities' (2008) Università degli Studi di Trento Working Paper WP SS, No 2.

Picking up the debate where Professor Kostakopoulou left it—ie at the scholarly discussion of the important judgments of the beginning of this century[19]—the main body of this paper provides a critical 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[20]—to combating non-discriminatory restrictions,[21] and, finally, acquiring the capacity to shape the material scope of EU law.[22] Crucially for its whole federal architecture,[23] the EU has acquired a possibility to defend its citizens from their own Member State of nationality in a number of situations previously deemed as wholly internal, ranging from defending the possession of the legal status of EU citizenship when it is likely to be lost with a nationality of a Member State[24] to the protection of their ability to enjoy key rights associated with this status.[25] Yet, unable to supply a compellingly clear understanding of the scope of such rights,[26] let alone

[19] eg 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.

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

[21] 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; F Jacobs, 'Citizenship of the European Union – A Legal Analysis' (2007) 13 ELJ 591; D Kochenov, 'Free Movement and Participation in the Parliamentary Elections in the Member State of Nationality: An Ignored Link?' (2009) 16 Maastricht Journal of European and Comparative Law 197.

[22] Case C–135/08, *Janko Rottmann v Freistaat Bayern* [2010] ECR I–1449; Case C–34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi* [2011] ECR I–0000; Case C–256/11 *Dereci* [2011] ECR I–0000; Lenaerts (n 9); D Kochenov, 'A Real European Citizenship; A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe' (2011) 18 ColumJEurL 55; P Van Elsuwege, 'Shifting the Boundaries? European Union Citizenship and the Scope of Application of EU Law' (2011) 38 LIEI 263.

[23] On the legitimacy of the use of federal terminology in the legal context of the EU see *inter alia* R Schütze, 'On "Federal" Ground: The European Union as an (Inter)National Phenomenon' (2009) 46 CMLRev 1069.

[24] Case C–135/08, *Janko Rottmann v Freistaat Bayern* [2010] ECR I–1449; G-R de Groot, 'Overwegingen over de Janko Rottmann-beslissing van het Europese Hof van Justitie' Asiel & migrantenrecht (2010) 293; D Kochenov, 'Annotation of Case C–135/08 *Rottmann*' (2010) 47 CMLRev 1831; J Shaw (ed), 'Has the European Court of Justice Challenged the Member State Sovereignty in Nationality Law?' (2011) EUI Robert Schuman Centre for Advanced Studies Paper No 62.

[25] Case C–34/09, *Ruiz Zambrano* [2011] ECR I–0000; AP van der Mei, SCG van den Bogaert, and G-R de Groot, 'De arresten *Ruiz Zambrano* en *McCarthy*' (2011) 4 NTER 187; L Ankersmit and W Geursen, '*Ruiz Zambrano*: De interne situatie voorbij' (2011) 4 Asiel & migrantenrecht 156; P Van Elsuwege (n 22); S Iglesias Sánchez, 'El assunto *Ruiz Zambrano*: Una nueva aproximación del Tribunal de Justicia de la Unión europea a la ciudadanía de la Unión' (2011) 24 Revista general de derecho europeo 382.

[26] For an analysis see D Kochenov, 'The Right to Have *What* Rights? EU Citizenship in Need of Clarification' 18 ELJ (2013 forthcoming).

substantive understanding of justice and other essential principles on which the Union rests,[27] recent developments can also be viewed as making EU citizenship more vulnerable and problematic: 'sour grapes'.[28]

Notwithstanding the central place EU citizenship has come to occupy within the body of EU law, a huge number of issues at the core of this status remain open to contestation, fuelling scholarly debate. In fact, from 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. 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 actual engagement with the new developments. Such *Begriffjurisprudenz*, permitting interpreting away the reality which does not suit particular doctrinal standpoints embraced by the author, is an important obstacle in the development of EU law and has implications stretching far beyond the EU citizenship law field.[29]

Nine interrelated essential points of contestation will be presented in what follows (Sections III, IV and V), to prepare the ground for an attempt to come up with a coherent picture of EU citizenship arising from such key disagreements (Section VI). The nine essential points of contestation outlined roughly divide into three interrelated themes, namely, the legal meaning of EU citizenship; EU citizenship's role in the context of the Union's federal structure; and, last but not least, EU citizenship's role in the context of people's lives. Each of the three, in turn, divides into three sub-parts. So the first theme, the legal meaning of EU citizenship, covers the nature of this concept, its underlying logic and its place within the body of EU law (Section III). The second theme, revolving around the EU citizenship's legal effects within the context of the EU's federal structure, includes EU citizenship's relationship with Member State nationalities, its influence on the scope of EU law and the role it plays in framing the ECJ's jurisdiction (Section IV). The third theme, which, if not the most important, is no doubt the cause of the most heated disagreements, is confined to the analysis of the scholarly disagreements on the assessment of EU citizenship's effects in the context of people's lives, and covers EU citizenship's social side, the relationship of this concept with the 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

[27] A Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (2009) 20 OJLS 549; A Williams, *The Ethos of Europe* (CUP 2010). For an informative perspective, see J Neyer, 'Justice, Not Democracy in the European Union' (2010) 48 JComMarSt 903; J Neyer, 'Who Is Afraid of Justice? A Rejoinder to Danny Nicol' (2012) 50 JComMarSt 523.

[28] JHH Weiler, 'Individual and Rights: The Sour Grapes (Editorial)' (2010) 21 EJIL. See also JHH Weiler, 'Europa: "Nous coalisons des Etats nous n'unissons pas des hommes"' in M Cartabia and A Simoncini (eds), *La Sostenibilità della democrazia nel XXI secolo* (Il Mulino 2009) 51.

[29] See R Schütze, *From Dual to Cooperative Federalism* (OUP 2009) (which is a compelling plea against this approach).

a 'bad thing': does it corrupt, or liberate the individual? (Section V).The final part (Section VI) makes an attempt to unite the main conclusions reached from the preceding discussion of academic disagreements about the nature of EU citizenship. As a result of this exercise, EU citizenship emerges out of the disagreements as an independent legal status profoundly affecting EU economic freedoms, the ECJ's jurisdiction and also the distribution of powers between the EU and the Member States, particularly in the field of the regulation of Member State nationalities. Its strongest points relate to the toning down of the Member States' grip on their nationals coupled with a serious broadening of the citizens' horizon of opportunities, thus actively promoting freedom. At the same time, a number of painful questions emerge, most fundamentally in relation to the lack of a conceptual basis for supranational citizenship, its failure to adhere to the ideals of democracy, justice, or equality and the likely negative effects of its core consequence, which is the undermining of the authority of the states without offering a way to fill an emerging gap (Section VI). The conclusion, besides underlining the imperfection of our current knowledge, argues for a more critical academic engagement with the topic (Section VII).

III. THE LEGAL MEANING OF EU CITIZENSHIP

First, debate regarding the *nature* of EU citizenship is considered—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 place of EU citizenship in relation to the specific economic freedoms? That is, what is its role within the body of EU law?

A. EU Citizenship's Nature

The story of scholarly disagreements about EU citizenship is incredibly rich and full of radically different assessments of the same law and identical facts. The legal meaning of EU citizenship is profoundly contested. According to Articles 9 EU and 20 TFEU, EU citizenship is derivative from the nationalities of the Member States in that one presumably cannot exist without another. The starting question is whether or not to make a distinction between the acquisition of EU citizenship (which is purely derivative) and its essence, which is potentially not, in that it accompanies the EU-level legal status and is not in any way based on the national law of the Member States. Here is where a cleavage in the literature emerges. While one camp of commentators, including Dora Kostakopoulou, Miguel Poiares Maduro and

others,[30] 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, hindering it from acquiring legal importance on its own, especially in terms of rights it would grant. In the words of Tesauro, 'non esiste, né potrebbe allo stato ippotizzarsi, una nozione communitaria di cittadinanza, sì che le norme che ne prescrivono il possesso come presupposto soggettivo per la loro applicazione in realtà rinviano alla legge nazionale dello Stato la cui cittadinanza viene posta a fondamento del diritto invocato'.[31] 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'[32] and 'the nexus of rights as granted by the Member States remains intimate'.[33]

It seems that doubting the legal importance of European citizenship based on the fact that access to it is derivative is logically unsound: if *ius soli* citizenship is not better or worse that *ius sanguinis* citizenship[34]—there is no reason to claim that the same should not be valid for *ius tractum* (ie derivative) citizenship:[35] 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 and *contenu*. 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'.[36] Virtually

[30] eg D Kochenov, 'Ius Tractum of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights' (2009) 15 ColumJEurL 181–93.

[31] G Tesauro, Diritto comunitario (5th edn, CEDAM; Wolters Kluwer Italia 2008) 480 [author's translation: 'At the moment the Community notion of citizenship does not exist, not even hypothetically, given that the norms requiring its possession as a subjective condition for their application in reality refer to the national law of the State whose nationality turns into the basis of the invoked right.']

[32] L Besselink and JH Reestman, 'Dynamics of European and National Citizenship: Inclusive or Exclusive? (Editorial)' (2007) 3 EuConst 2.

[33] Ibid. 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': R Bellamy, 'Evaluating Union Citizenship: Belonging, Rights and Participation within the EU' (2008) 12 Citizenship Studies 598.

[34] 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.

[35] Kochenov (n 30) 181; P Dollat, 'La citoyenneté européenne: Théorie et statuts' (Bruylant 2008) 95–104.

[36] Opinion of AG Poiares Maduro in Case C–135/08, *Rottmann* [2010] ECR I–1449, para 23 (emphasis added) [author's translation: 'Union citizenship assumes nationality of a Member State but it is also a legal and political concept independent of that of nationality.'].

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 rights it brings.

In fact, derivation functions practically in such a way that not only does EU citizenship follow Member State nationalities, but the opposite is also possible. Crucially, EU citizens whose Member State nationality from which the status of EU citizenship is derived is put into question can potentially rely on EU citizenship in order to retain their Member State nationality. The ECJ ruled in *Rottmann* that the 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',[37] 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.[38] This would never be possible, should the perspective adopted by Tesauro et al be accurate. 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,[39] which is 27 times more than *one* jurisdiction, where Member State rights operate.[40] As Gianluigi Palombella observes, 'this enables each of us to reconceive the horizon of our zeal capabilities (to recall Sen) beyond the limits of national citizenship and territory'.[41] Add to this the possibility to turn EU citizenship rights *against* one's own Member State of nationality (including when decisions on that very nationality are taken) and the story is complete. The fundamental distinction made between the legal essence of EU citizenship and that of the nationalities of the Member States—anticipated by Dora Kostakopoulou in her study[42]—provides a key for the understanding of the dynamics of EU citizenship

[37] Case C–135/08, *Rottmann* [2010] ECR I–1449, para 42.

[38] Kochenov (n 24) 1833; G Davies, 'The Entirely Conventional Supremacy of Union Citizenship and Rights' in J Shaw (ed), *Has the European Court of Justice Challenged the Member State Sovereignty in Nationality Law?* (EUI Robert Schuman Centre for Advanced Studies Paper No 62 (2011)); D Kostakopoulou, 'European Union Citizenship and Member State Nationality: Updating or Upgrading the Link' in J Shaw (ed), *Has the European Court of Justice Challenged the Member State Sovereignty in Nationality Law?* (EUI Robert Schuman Centre for Advanced Studies Paper No 62 (2011)).

[39] Case C–34/09, *Ruiz Zambrano* [2011] ECR I–0000, para 44; Kochenov (n 22); L Azoulai, 'La citoyenneté européenne, un statut d'intégration sociale' in *Mélanges Jean Paul Jacqué: Chemins d'Europe* (Dalloz 2010); O Golynker, 'European Union as a Single Working-Living Space: EU Law and New Forms of Intra-Community Migration' in A Halpin and V Roeben (eds), *Theorising the Global Legal Order* (Hart 2009) 145;

[40] D 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. For a meticulous analysis of EU citizenship rights, including those functioning in parallel with the rights granted by Member State nationalities see Dollat (n 35) 249–300.

[41] G Palombella, 'Whose Europe? After the Constitution: A Goal-Based Citizenship' (2005) 3 Int'l J. Const. L. 377 (also referring to Amartya Sen, *Development as Freedom* (Knopf 1999)).

[42] Kostakopoulou (n 8) 243.

evolution and the place of this concept in European law, as well as its interrelation with Member State nationalities.[43] In practice, EU citizenship no longer operates as a simple guarantor of the home country rule for those residing in a different Member State compared with their Member State of nationality, but adds, in the words of Besson and Utzinger, 'a European dimension to each national *demos*',[44] which certainly makes the perspective adopted by Besselink 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'.[45]

Needless to say, the very rules on derivative access contained in the Treaties have met with scholarly opposition. Clear arguments have been 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.[46] 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.[47]

Now that the ECJ has clarified beyond any reasonable doubt that although the two are naturally fused together, EU citizenship is different in principle from the nationalities of the Member States, any mode of accessing this status can be chosen. Besides diminishing the harshness of *apartheid européen*,[48] this would do justice to EU citizenship which *de facto* seems to have outgrown its initial framework.[49] Analysis of the history of European integration also

[43] Section IVA *infra*.

[44] S Besson and A Utzinger, 'Towards European Citizenship' (2008) 39 Journal of Social Philosophy 196.

[45] Palombella (n 41) 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' ibid.

[46] Kostakopoulou (n 38); HU Jessurun d'Oliveira, 'Ontkoppeling van nationaliteit en Unieburgerschap?,' Nederlandsch Juristenblad (2010) 785; Kochenov (n 30) 182.

[47] 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: A Lansbergen and J Shaw, 'National Membership Models in a Multilevel Europe' (2010) 8 International Journal of Constitutional Law 50; W Maas, 'Migrants, States, and EU Citizenship's Unfulfilled Promise' (2008) 12 Citizenship Studies 583; Kochenov (n 40) 29–33; D Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (Manchester University Press 2001) 79; D Kostakopoulou 'EU Citizenship: Writing the Future' (2007) 13 ELJ 623. For a magisterial account of the legal migration into the EU see A Wiesbrock, *Legal Migration to the European Union* (Martinus Nijhoff 2010).

[48] É Balibar, *Nous, citoyens d'Europe: Les frontières, l'État, le peuple* (La Découverte 2001) 190–1.

[49] Kochenov and Plender (n 11): the codification of the pre-existing informal status by the Treaty of Maastricht failed to seriously affect the legal edifice of the Union for roughly 20 years—it is only with *Rottmann* and *Ruiz Zambrano* that the Court seems to be starting to discover the far-reaching potential of EU citizenship.

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.[50] It certainly makes little sense to divide the territory of the Union with borders exclusively for the third-country nationals, recreating for this vulnerable category[51] all the problems which free movement of persons was intended to solve.[52] Moreover, EU citizenship does not even cover all Member State nationals.[53] Now that Member States nationalities and EU citizenship have started, conceptually, to part ways,[54] the logical arguments for the automatic exclusion of third-country nationals from the latter status becomes much less convincing.

B. The Underlying Logic of EU Citizenship

Once it is clear that EU citizenship is not affected in its essence by the derivative mode of its acquisition, the citizenship of the Union 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, as envisaged in the Schuman Declaration[55] and the establishment of an ever closer union among the peoples of the Member States,[56] the maturing of EU law has been largely associated with the establishment of the Internal Market.[57] What then is the relationship between EU citizenship and the market? And if EU citizenship is a break away from purely economic 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,[58] 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.

[50] D Kochenov, 'The Impact of European Citizenship on the Association of the Overseas Countries and Territories with the European Community' (2009) 36 LIEI 239; WR Bohring, 'The Scope of the EEC System of Free Movement of Workers: A Rejoinder' (1973) 10 CMLRev 82.

[51] See D Kochenov, 'European Union's Minority Protection', in W Kymlicka and J Boulden (eds), *International Approaches to Governing Ethnic Diversity* (OUP 2013, forthcoming).

[52] For an illuminating historical account see W Maas, *Creating European Citizens* (Rowman & Littlefield 2007). 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: A Wiesbrock, 'Free Movement of Third-Country Nationals in the European Union: The Illusion of Exclusion' (2010) 35 ELR 455; Kochenov (n 30) 286; A Skordas, 'Immigration and the Market: The Long-Term Residents Directive' (2006) 13 ColumJEurL 201.

[53] See for an analysis Kochenov (n 30) 186–90.

[54] This issue will be further assessed in Section IVA below.

[55] See also I Petit, 'Dispelling a Myth? The Fathers of Europe and the Construction of Euro-Identity' (2006) 12 ELJ 661.

[56] TFEU Preamble, recital 1.

[57] See P Kapteyn, *The Stateless Market: The European Dilemma of Integration and Civilization* (Routledge 1995).

[58] Kostakopoulou (n 8) 244–6.

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*,[59] or lying 'outwith the immediate confines of the single market'.[60] 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.[61] Although the now classical distinction between *Marktbürger* and *citoyen* in EU law is not challenged,[62] 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'.[63]

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'[64] provide a sufficient base for the supranational citizenship? Among a myriad of ideal citizenship models formulated by lawyers and political scientists,[65] 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'.[66] To concur with Joseph Weiler, the market is now *alone*, with no 'moral imperative' and no 'mantle of ideals'.[67]

[59] F Wollenschläger, 'A New Fundamental Freedom beyond Market Integration: Union Citizenship and Its Dynamics for Shifting the Economic Paradigm of European Integration' (2011) 17 ELJ 34.

[60] Shaw (n 5) 575.

[61] N Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 CMLRev 1597.

[62] On this distinction see N Reich and S Harbacevica, 'Citizenship and Family on Trial: A Fairly Optimistic Overview of Recent Court Practice with Regard to Free Movement of Persons' (2003) 40 CMLRev 628; Dollat (n 35) 249ff.

[63] Nic Shuibhne (n 61) 1605.

[64] ibid 1608.

[65] For a meticulous overview, see W Kymlicka and N Wayne, 'Return of the Citizen: A Survey of Recent Work on Citizenship Theory' (1994) 104 Ethics 352.

[66] JHH Weiler, 'Bread and Circus: The State of the European Union' (1998) 4 ColumJEurL 231.

[67] ibid.

An ideal of justice among other substantive principles seems to be required to build a sound European citizenship upon.

In the quest for the likely foundations—if not justification[68]—of European integration which could provide EU citizenship with an indispensable core, at least three concepts are discussed in the literature. The idea of justice, focused on by Andrew Williams in his recent ground-breaking work;[69] political representation, in the work of Joseph Weiler;[70] and the idea of equality, analysed elsewhere in detail.[71] All three concepts—especially, an organic combination of the three—could in theory provide a sound foundation for a supranational citizenship stretching beyond the market. In practice, however, they do not.[72]

The picture that emerges out of these studies is discomforting. As Andrew Williams has brilliantly demonstrated, the problems plaguing the key principles of law in the Union could have much deeper roots than one would expect,[73] going as far as the flaws in the foundational philosophy of the European integration exercise,[74] leading to an impoverished idea of justice,[75] and a highly proceduralized vision of the principles of law, threatening to strip the latter of even its most essential substance.[76] 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'.[77] 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

[68] G Morgan, 'European Political Integration and the Need for Justification' (2007) 14 Constellations 332.

[69] Williams, *The Ethos of Europe* (n 27); Willams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (n 27).

[70] JHH Weiler, 'Europa: "Nous coalisons des Etats nous n'unissons pas des hommes"' in M Cartabia and A Simoncini (eds), *La Sostenibilità della democrazia nel XXI secolo* (Il Mulino 2009) 51.

[71] D Kochenov, 'Citizenship without Respect: The EU's Troubled Equality Ideal' (2010) Jean Monnet Working Paper (NYU Law School) 08/10, 74–84.

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

[73] Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (n 27); Williams, *The Ethos of Europe* (n 27).

[74] Williams claims that the EU is based more on the founders' intent, than on a substantive idea of justice: Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (n 27) 549.

[75] ibid; Williams, *The Ethos of Europe* (n 27).

[76] Williams (2009) 'Taking Values Seriously: Towards a Philosophy of EU Law' (n 27) 568–9. For more examples see Kochenov (n 71); A Arnull, 'The Rule of Law in the European Union' in A Arnull and D Wincott (eds), *Accountability and Legitimacy in the European Union* (OUP 2002) 241; G de Búrca, 'The Role of Equality in European Community Law' in A Dashwood and S O'Leary (eds), *The Principle of Equal Treatment in EC Law* (Sweet & Maxwell 1997) 13.

[77] Weiler (n 70) 54 [author's translation: 'today we accumulate the rhetoric of values, at the same time either giving them little importance in the operating parts of the Treaties, or allowing ambiguity prevail'].

though the consistent use of the rhetoric of certain values might suggest otherwise.'[78] The values and virtues problem in the EU is apparent.[79]

When the underlying philosophy is 'based on a theory of interpretation (of original political will) rather than a theory of justice',[80] 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.[81] Drawing on the work by Gareth Davies,[82] Gráinne de Búrca[83] and numerous other commentators, in a recent study dedicated to the functioning of the principle of equality in the context of EU citizenship, the present author was bound to conclude that equality in the EU is not safeguarded, as any substantive understanding of the principle is lacking.[84]

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 resultati politici'.[85] 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.[86] Moreover, the ECJ does not even treat electoral rights as EU fundamental rights, as the case law abundantly demonstrates.[87] It thus seems right to claim that electoral provisions found in Part II TFEU are merely non-discrimination rights.[88]

Citizenship thus came under attack at all the fundamental levels outlined, where one could most legitimately expect this status to play a fundamental role: justice, equality, and democracy. Key values of citizenship remain ignored in the Union. Worse still: no agenda exist to date to remedy the key deficiencies outlined. Having stepped into the citizenship world, the EU is still unable to cope with its birth defect, ie the strong market bias, which is logically

[78] Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (n 27) 560–1.

[79] ibid 558–70. 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 M Kuisma, 'Rights of Privileges? The Challenge of Globalisation to the Values of Citizenship' (2008) 12 Citizenship Studies 613.

[80] Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (n 27) 549.

[81] Kochenov (n 71) 12–27.

[82] G Davies, 'Services, Citizenship, and the Country of Origin Principle', Mitchell Working Paper (Edinburgh) No 2/2007.

[83] De Búrca (n 76).

[84] Kochenov (n 71).

[85] Weiler (n 70) 64 [author's translation: 'is reduced to a consumer of political results'].

[86] Dollat (n 35) 561–5; MS Ferro, 'Popular Legislative Initiative in the EU: Alea Iacta Est', (2007) 26 Oxford Yearbook of European Law 355.

[87] Most recently, in Case C–300/04 *Eman and Sevinger v College van burgemeester en wethouders van Den Haag* [2006] ECR I–8055. See Besselink's, 'Annotation' in 45 CMLRev 806–8 (2008); D Kochenov, 'The Puzzle of Citizenship and Territory in the EU: On European Rights Overseas' (2010) 17 Maastricht Journal of European and Comparative Law 230.

[88] Kochenov (n 30) 197. In general see J Shaw, *The Transformation of Citizenship in the European Union: Electoral Rights and the Restructuring of Political Space* (CUP 2007); G Zincone and S Ardovino, 'I diritti elettorali dei migranti nello spazio politico e giuridico europeo', (2004) 5 Le Istituzioni del Federalismo 741; J Shaw, 'Alien Suffrage in the European Union' (2003) 12 The Good Society 29.

inexplicable in the new situation, where citizenship and the Internal Market conceptually parted ways.[89] The analysis of the recent EU 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.'[90] Nic Shuibhne can thus be absolutely right in turning to the market in her search for the 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 an 'institutional ethos that lacks reasonable coherence *and* moral purpose'.[91] This is problematic well beyond the level of rhetoric, threatening to cause numerous problems in the future.

To say that EU citizenship has an underlying cornerstone 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, frankly, is hardly worthy of this glorifying term'?[92] Although it seems undisputable that the EU is a 'citizenship-capable polity',[93] 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.

C. EU Citizenship's 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

[89] Kochenov and Plender (n 11).

[90] Weiler (n 70) 82 [author's translation: 'the problematic aspect of this case law is precisely that it avoids making a conceptual transition from the free movement based on economic considerations to a freedom based on citizenship']. 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 above, also for the analysis evolving around the principle of equality. See also MP Maduro, 'Europe's Social Self: "The Sickness unto Death"', in J Shaw (ed), *Social Law and Policy in an Evolving European Union* (Hart 2000) 340.

[91] Williams, *The Ethos of Europe* (n 27) 18 (emphasis in the original).

[92] Kochenov (n 71) 9.

[93] N Nic Shuibhne, 'The Outer Limits of EU Citizenship; Displacing Economic Free Movement Rights?' in C Barnard and O Odudu (eds), *The Outer Limits of European Union Law* (Hart 2009) 168.

States',[94] 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* of EU legal order was enlarged from less than 2.3 per cent of Member States nationals[95] to 100 per cent. 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'.[96] Consequently, the rhetoric of the ECJ claiming that the notion of EU citizenship was not designed to enlarge the scope of EU law,[97] when applied to the scope *ratione personae*, is, with all respect, simply nonsensical.[98] Here is where another important cleavage in the literature emerges. While a number of scholars, including Eleanor Spaventa and Oxana Golynker, welcomed the new interpretation of the scope of EU law in the light of EU citizenship *also* in the context of the economic freedoms—and not only in EU citizenship cases *sensu stricto*,[99]—others maintain, in essence, that the economic freedoms should not be 'contaminated' by the new approach formulated in the context of the citizenship provisions, criticizing the Court for abandoning its pre-citizenship *ratione personae* test[100] 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.[101] The Court's new approach treats all economic activities with a cross-border element present differently from all *non*-economic activities within the scope *ratione materiae* of EU law. Charlotte O'Brien[102] and Alina Tryfonidou[103] criticize the Court for updating its approach following the entry into force of the Treaty of

[94] Case C–34/09, *Ruiz Zambrano* [2011] ECR I–0000, para 41.

[95] 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: K Vasileva, 'Population and Social Conditions' (2009) Eurostat Statistics in Focus 94/2009, 3.

[96] E Spaventa, 'Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects' (2008) 45 CMLRev 13.

[97] eg 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 Kochenov (n 24).

[98] Kochenov and Plender (n 11).

[99] If such context can at all be distilled.

[100] For an analysis, see A Tryfonidou, 'In Search of the Aim of the EC Free Movement of Persons Provisions: Has the Court of Justice Missed the Point?' (2009) 46 CMLRev 1592–5); Kochenov (n 22).

[101] eg Case C–152/03 *Ritter-Coulais* [2006] ECR I–1711. See also Case C–227/03 *AJ van Pommeren-Bourgondiën* [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.

[102] C O'Brian, 'Annotation of Case C–212/05 *Hartmann*, Case C–213/05 *Geven*, Case C–287/05 *Hendrix*' (2008) 45 CMLRev 499.

[103] Tryfonidou (n 100).

Maastricht. O'Brien goes as far as to state that 'the more appropriate assessment of a migrant whose State of work remains unchanged is arguably under [Article 21 TFEU]'.[104] Scholars in this camp find bringing workers who work and reside in different Member States within the scope of economic provisions 'counterintuitive',[105] craving to see more citizens and fewer worker-citizens to whom EU law would apply. This approach is profoundly problematic for a number of reasons, not least because it 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),[106] but whether their *intentions* are directly enough connected to the Internal Market.[107]

According to Oxana Golynker and other commentators[108] who regard the Court's approach approvingly, the Court merely moved away from exercising an *ultra vires* activity of reading citizens' minds towards assessing the facts.[109] Golynker submits in this context that 'it seems 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'.[110] 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 that 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.[111]

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 intentions-based reading of the Internal Market is no longer acceptable. EU citizenship became *lex generalis* covering the situations not caught by the economic free movement provisions.[112] Moreover, it is moving fast to play the same *lex generalis* role where the existence of a cross-border situation is not clearly articulated, ie when either someone's intentions, or the market-considerations as such, cannot possibly play any role, as we have seen

[104] O'Brien (n 102) 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.

[105] C O'Brien, 'Real Links, Abstract Rights and False Alarms: The Relationship between the ECJ's "Real Link" Case Law and National Solidarity' (2008) 33 ELR 654.

[106] For more on the ECJ's approach to jurisdiction in the context of EU citizenship see Section IVC below.

[107] The Tryfonidou/O'Brien vision seems to be based on too narrow a vision of the Internal Market: Kochenov and Plender (n 11).

[108] Golynker (n 39) 151; Kochenov (n 22).

[109] For a compelling analysis of *ultra vires* engagements of the ECJ and the national courts see Paul Craig, 'The ECJ and Ultra Vires Action: A Conceptual Analysis' (2011) 48 CMLRev 395.

[110] Golynker (n 39) 151. See also Opinion of AG Kokott in Case C–287/05 *DPW Hendrix v Raad van Bestuur van het Iutvoeringsinstituut Werknemersverzekeringen* [2007] ECR I–6909.

[111] Art. 26(2) TFEU.

[112] Davies (n 20) 189; Kochenov (n 71) 52–4. But see Wollenschläger (n 59) 30–1.

in *Ruiz Zambrano*, for instance.[113] When Internal Market considerations still play a role, however, clearly it is not intentions but rather economic activity, which matters in deciding which provisions are to apply.

There is another side to the coin of EU citizenship affecting the scope of EU fundamental freedoms, however, which is, regrettably, frequently overlooked. EU citizenship not only enlarges the scope of such freedoms, but also potentially limits them. This is owing to, relative considerations, such as the 'real links' with the host Member State test first formulated in the EU citizenship case law for non-economically active citizens,[114] come to limit the scope of economic free-movement provisions. This is arguably what happened in *Geven*[115] and *Hartmann*,[116] 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.[117] In this context Síofra O'Leary is very convincing in deciphering the signs of 'cross-pollenisation' 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.[118] Drawing a clear dividing line between EU citizenship and economic free-movement case law, thus sticking to the 'old-fashioned classification'[119] is problematic at this point. The two are much interconnected and are likely increasingly to influence each other's scope in the years to come.

IV. EU CITIZENSHIP IN THE CONTEXT OF THE EU'S FEDERAL STRUCTURE

There are 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, debates which are necessarily interrelated with the discussion above of the legal meaning of EU citizenship. The first focuses on the EU citizenship's relationship with the nationalities of the Member States. Are they in harmony or in competition—ie does the growing importance of EU citizenship affect the Member States' competence in the sphere of regulation of their nationalities and the 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 scope of the law of the EU and of the Member States? How does it affect the regulatory autonomy of the Member States and, especially, does it solve the problem of reverse discrimination?

[113] Lenaerts (n 9); Kochenov (n 22).
[114] eg Case C–209/03 *Bidar* [2005] ECR I–211.
[115] Case C–213/05 *Geven* [2007] ECR I–6347.
[116] Case C–212/05 *Hartmann* [2007] ECR I–6303.
[117] See also Section VB below.
[118] S O'Leary, 'Developing an Ever Closer Union between the Peoples of Europe?'(2008) Mitchell Working Paper (Edinburgh) 6/2008, 15–24. See also Golynker (n 39) 153–6.
[119] Golynker (n 39) 151.

Thirdly, scholars disagree on which test of jurisdiction is to be applied by the ECJ in citizenship cases. If being an EU citizen is not enough to fall within the scope of the law, what combination of other factors should one be looking for?

A. EU Citizenship's Relationship with Member States' 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.[120]

An old academic debate, exemplified by the positions adopted by Gerard-René de Groot and Andrew Evans[121] on the one side and Ulli Jessurun d'Oliveira on the other[122] came to a resolution in 2010 when the Court unreservedly embraced de Groot's position that Member States are not absolutely free in framing their nationalities as they see fit. The Court thus explicitly 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?'[123] in the affirmative and ruled in *Rottmann* that EU law has to be taken into account when a decision on nationality taken by a Member State is bound to have implications for the EU citizenship status of a person.[124] Consequently, virtually any instance of loss (and, necessarily, also acquisition[125]) 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.[126] To suggest that this development was not in the making for a long time does not take the development of EU citizenship seriously. Indeed,

[120] This issue is directly related to the interpretation of the derivative nature of the EU citizenship concept discussed above.

[121] A Evans, 'Nationality Law and European Integration' (1991) 16 ELR 190; G-R de Groot, 'Towards a European Nationality Law' (2004) 8 Electronic Journal of Comparative Law.

[122] HU Jessurun d'Oliveira (2010) *Ontkoppeling van nationaliteit* 785; HU Jessurun d'Oliveira, 'Nationaliteit en de Europese Unie' in *Ongebogen recht: Opstellen aangeboden aan Prof. Dr. H. Meijers* (Sdu 1998) 80–1.

[123] HU Jessurun d'Oliveira, 'Case Note 1. Decoupling Nationality and Union Citizenship?' (2011) 7 EuConst 139.

[124] Case C–135/08, *Rottmann* [2010] ECR I–1449, para 59. The case concerned, specifically, the loss of a Member State nationality and, consequently, of EU citizenship.

[125] Following Gareth Davies, to separate the rules on loss and acquisition of nationality would be 'highly illogical and inequitable': Davies (n 38). Indeed, separating the acquisition from the loss of citizenship in the eyes of EU law would seemingly lead to a paradoxical conclusion that fundamental principles of EU law should only be safeguarded when EU citizenship is lost and not when it is being acquired. Without any doubt we will soon have more case law on this matter.

[126] Davies (n 38).

Rottmann has been generally regarded in the literature as a predictable and logical development,[127] especially when viewed in the light of the earlier *Micheletti* ruling,[128] which concerned the necessity to take EU law into account in the cases of recognition of each other's nationality by the Member States.[129] The similarity with conferral and withdrawal of nationalities is obvious in this context.[130] To deny 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.[131] Arguments against such approach go back as far as the 1970s, when Sir Richard Plender convincingly argued against the legality under European law of the British Declarations[132] on UK nationality for the purposes of EEC law.[133] It took the Court 30 long years and a dubious decision in *Kaur*[134] to start checking the nationality decisions of the Member States against EU law, accomplished for the first time, albeit indirectly, in *Rottmann*.[135] In the meanwhile, the literature, and especially the analysis provided by Andrew Evans[136] and Gerard-René de Groot,[137] 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 in 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.[138] EU citizenship came out of

[127] ibid; Kochenov (n 24) 1831.

[128] Case C–369/90 *Micheletti* [1992] ECR I–4239.

[129] For an interesting perspective on this see Shaw (n 5).

[130] Kochenov (n 24) 1831.

[131] Kostakopoulou (2011) *European Court of Justice*; Kochenov (n 30) 182–6 (and the literature cited therein).

[132] Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland on the Definition of the Term 'Nationals', 22 Jan 1972, 1972 OJ (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', 28 Jan 1983, 1983 OJ (C23) 1. For analysis see de Groot (n 121) para 4.

[133] R Plender, 'An Incipient Form of European Citizenship' in FG Jacobs (ed) *European Law and the Individual* (North-Holland 1976) 39.

[134] Case C–192/99 *Kaur* [2001] ECR I–1237; H Toner, 'Annotation of Case C–192/99 *Kaur*' (2001) 39 CMLRev 881; Kochenov and Plender (n 11) 281–2.

[135] 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 eg N Cambien, 'Case C–125/08, *Janko Rottmann v Freistaat Bayern*', 17 ColumJEurL (2011) 386–91; Kochenov (n 24).

[136] Evans (n 121).

[137] de Groot (n 121). See also Kochenov (n 30) 190–3 (and the literature cited therein).

[138] For an analysis at a meta-level see A von Bogdandy and J Bast, 'The European Union's Vertical Order of Competences: The Current Law and Proposals for Reform' (2002) 39 CMLRev 227.

this seriously reinforced, since although the Member States remain free to decide who their nationals are, in doing this they are bound to take EU law fully into account.

The *Rottmann* decision merely reveals a small part 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 is not much research done in this area,[139] the literature raises several important points.

First, since all the nationalities of the Member States provide access to the same single status of EU citizenship from which a constantly growing number 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.[140] This is especially evident once one takes into account the importance of residence, a 'place to hang [one's] hat',[141] 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.[142]

Secondly, EU citizenship *de facto* amounts to the possession of a quasi-nationality of the Member State of residence of which the citizen is not a national,[143] as well as a 'relativisation',[144] if not 'abolition'[145] of the Member State nationalities through Article 18 TFEU. Clearly, EU citizens cannot be equated with foreigners (ie third-country nationals) anywhere in the Union any more.[146] Consequently, the lack of any coordination between the Member States in terms of access to their nationality was bound to result in the mutation

[139] Evans (n 121); de Groot (n 121); K Rostek and G Davies, 'The Impact of Union Citizenship on National Citizenship Policies' (2006) 10 European Integration online Papers 1; Kochenov (n 40) (also covering several important exceptions, such as international visa-free travel).

[140] D Kochenov, 'Double Nationality in the EU: An Argument for Tolerance' (2011) 17 ELJ 330.

[141] G Davies, '"Any Place I Hang My Hat?" or: Residence is the New Nationality' (2005) 11 ELJ 43.

[142] An important exception, which provides a mild counter-current to the generally observable trend, is the case law on the deportations of EU citizens. In a series of recent cases the ECJ seemingly succeeded in watering down the protections against deportations of long-term resident EU nationals, going against the letter and the spirit of the Directive 2004/38, in particular its art 28. See eg Case C–348/09 *P.I.* [2012] ECR I–0000, paras 28–29; Case C–145/09 *Tsakouridis* [2010] ECR I–11979, para 47. For criticism, see annotation by D Kochenov and B Pirker in ColumJEurL (2013, forthcoming).

[143] This is so notwithstanding the fact that EU law as it stands does not prohibit the Member States from including EU citizens on foreigners' registers: Case C–524/06 *Huber v Germany* [2008] ECR I–9705. Analysed by K Hailbronner, 'Are Union Citizens Still Foreigners?' in P Minderhoud and N Trimikliniotis (eds), *Rethinking the Free Movement of Workers: The European Challenges Ahead* (Wolf Legal Publishers 2009).

[144] Wollenschläger (n 59) 4.

[145] Davies (n 141) 55.

[146] Kochenov (n 40) 4.

of the accessibility of the legal status of nationality even without any formal intervention of the EU.[147] The only detailed study of this matter to date[148] distinguishes between two ways of such accommodation: formally, where the nationality laws of the Member States are changed to treat EU citizens differently from third-country nationals on the issues of loss and acquisition of nationality; and informally, with *de facto* preferential treatment for EU citizens when 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.[149] Consequently, while, following *Rottmann*, EU law now plays a role in the framing of Member State nationalities, at the Member State level, EU citizens get preferential access to local nationalities compared with third-country nationals both at the 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 interconnected in practice. The circle is thus 'rounded up'[150]—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:[151] those not in possession of the supranational status have a 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 naturalize in their Member State of residence more easily 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, whether or not the EU is generally competent to act in the field. 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.

[147] There have been several authoritative calls in the literature concerning the necessity to think about granting the EU such power. eg AC Evans, 'Nationality Law and the Free Movement of Persons in the EEC: With Special Reference to the British Nationality Act 1981' (1980) 2 Yearbook of European Law 189; C Blumann, 'La citoyenneté de l'Union européenne (bientôt dix ans): Espoir et désillusion' in V Epping, H Fischer and W Heintschel von Heinegg (eds), *Brücken Bauen und Begehen: Festschrift für Knut Ipsen zum 65 Geburtstag* (CH Beck 2000) 3.

[148] Kochenov (n 40). For a slightly updated short version see also D Kochenov, 'Member State Nationalities and the Internal Market: Illusions and Reality' in N Nic Shuibhne and LW Gormley (eds), *From Single Market to Economic Union: Essays in Memory of John A Usher* (OUP 2012) 245.

[149] Evans (n 121) 193.

[150] Kochenov (n 40).

[151] ibid 28–9.

B. EU Citizenship's Influence on the Vertical Delimitation of the Scopes of the Law

EU citizenship plays a global role in shaping the borderline between national and EU law beyond influencing the scope of Member States' nationalities. This is due to three factors, two of which have been presented above. First, EU citizenship has overwhelmingly enlarged the scope *ratione personae* of EU law.[152] Secondly, the introduction of EU citizenship has also enlarged the scope of the economic freedoms in the Treaties.[153] Thirdly, and probably most importantly, the introduction of EU citizenship pushed the Court towards a profound reassessment of the concept of purely internal situations, by moving more situations, however artificially, within the scope of EU law. This process has been brilliantly documented by Alina Tryfonidou,[154] Niamh Nic Shuibhne,[155] and Peter Van Elsuwege and Stanislas Adam,[156] among other commentators.[157] The classical approach to purely internal situations espoused by such authorities as LA Geelhoed, or Lord Slynn[158] is not supported by the latest developments in the law.[159] EU citizenship exposed reverse discrimination in purely internal situations to much more convincing criticism compared with the arguments advanced in the pre-citizenship (market-oriented) era of development of EU law, since EU citizenship as such is not necessarily a market concept[160] and reverse discrimination targets mostly those who are viewed as not contributing to the market.[161] Moreover, the general equality considerations necessarily connected to the concept of citizenship provide an equally important starting point for criticism of the current state of the law.[162]

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'.[163]

[152] See Section IIIC above. [153] ibid.

[154] A Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe' (2008) 35 LIEI 43; A Tryfonidou, *Reverse Discrimination in EC Law* (Kluwer 2009).

[155] N Nic Shuibhne, 'Free Movement of Persons and the Wholly Internal Rule: Time to Move on?' (2002) 39 CMLRev 731.

[156] P Van Elsuwege and S Adam, 'Situtations purement internes, discriminations à rebours et collectivités autonomes après l'arrêt sur l'Assurances soins flamande' (2008) Cahiers de droit européen 655.

[157] eg D Hanf, '"Reverse Discrimination" in EU Law: Constitutional Aberration, Constitutional Necessity, or Judicial Choice' (2011) 18 Maastricht Journal of European and Comparative Law 26; Kochenov (n 71) 47–52 (and the literature cited therein).

[158] LA Geelhoed, 'De vrijheid van personenverkeer en de interne situatie: maatschappelijke dynamiek en juridische rafels' in E Manunza and L Senden (eds), *De EU: De interstatelijkheid voorbij?* (Wolf Legal Publishers 2006) 49; Lord Gordon Slynn, *Introducing a European Legal Order* (Stevens and Sons 1992) 99.

[159] For an important new analysis in the vein of the classical approach see eg Hanf (n 157).

[160] Section IIIB above.

[161] For discussion see Tryfonidou (2009) 'Reverse Discrimination in EC Law' (Kluwer 2009) 158. [162] Davies (n 82); Kochenov (n 71).

[163] eg Case C–403/03 *Egon Schempp v Finanzamt München V* [2005] ECR I–6421, para 22.

This signifies 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 enough to bring the situation within its scope'.[164] Such movement need not be connected with any physical travel in space or economic activity of the mover.[165]

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 now has virtually nothing to do with borders.[166] The Court stretches *ratione materiae* of EU law to cover virtually hypothetical cross-border situations, eg those depending on cross-border birth,[167] wives' movements,[168] or potential movements in the future.[169] While entitling the growing numbers of individuals to the protections of EU law, such developments stand to be seriously criticized, since they do not actually solve the problem of poor foundations informing the divide between the scopes of national and EU law, and may even exacerbate it, as they risk 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'.[170] Numerous lawyers, including Niamh Nic Shuibhne and, most importantly, AG Sharpston,[171] argue for a gradual total overhaul of the approach to purely internal situations. As AG Sharpston aptly observes, 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'.[172] Dominique Hanf[173] and AG Kokott[174] are more traditional, viewing reverse discrimination as a necessary evil within the context of multi-level EU constitutionalism.

[164] Spaventa (n 96) 14.

[165] eg Case C–413/99 *Baumbast* [2002] ECR I–7091; C–200/02 *Zhu and Chen* [2004] ECR I–9925; Case C–403/03 *Schempp* [2005] ECR I–6421, para 22; 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.

[166] Spaventa (n 96) 14; Van Elsuwege and Adam (n 156) 334; Kochenov (n 71) 44.

[167] Case C–200/02 *Zhu and Chen* [2004] ECR I–9925.

[168] Case C–403/03 *Schempp* [2005] ECR I–6421.

[169] Case C–148/02 *Garcia Avello* [2003] ECR I–11613.

[170] N Nic Shuibhne, 'The European Union and Fundamental Rights: Well in Spirit but Considerably Rumpled in Body?' in P Beaumont, C Lyons, and N Walker (eds), *Convergence and Divergence in European Public Law* (Hart 2002) 188; Kochenov (n 71).

[171] 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.

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

[173] Hanf (n 157).

[174] 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',[175] away from reverse discrimination, it is difficult to see on what fundamental basis this could be done, without leaving the omnipresent market paradigm, however deficient. This challenge might be too much for the Union to take on at this stage.[176] 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.[177] Moreover, this growth brought about a serious diminishing in clarity concerning the vertical delimitation of powers between the two legal orders in the Union.[178]

C. EU Citizenship and the Choice of a Jurisdiction Test

In the most recent line of case law,[179] 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 Internal Market considerations and where Member State borders within the Union or economic activity would not play any role. Welcomed elsewhere,[180] this approach has been criticized by Niamh Nic Shuibhne,[181] Daniel Thym and Kay Hailbronner.[182] Yet, their criticism mostly concerns the extent of the Court's reasoning, rather than its underlying logic and the outcome. Academics seem to agree that the new vision of jurisdiction, which can now be derived from EU citizenship alone, is a ground-breaking 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 to be satisfied for Union citizens to acquire rights in Community law'.[183] The ECJ ultimately concurred and embarked on purifying its case law

[175] Nic Shuibhne (n 175); Opinion of AG Sharpston in Case C–34/09, *Ruiz Zambrano* [2011] ECR I–0000, 139.
[176] Section IIIB above.
[177] Kochenov and Plender (n 11).
[178] P Van Elsuwege and D Kochenov, 'On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights' (2011) 13 European Journal of Migration and Law, 443; Kochenov (n 71) 47–52 (and the literature cited therein).
[179] Case C–135/08, *Rottmann* [2010] ECR I–1449; Case C–34/09, *Ruiz Zambrano* [2011] ECR I–0000; Case C– 434/09 *McCarthy* [2011] ECR I–0000; Case C–256/11 *Dereci* [2011] ECR I–0000. For analysis, see eg N Nic Shuibhne, 'Annotation of Case C–434/09 *McCarthy* and Case C–256/11 *Dereci*' (2012) 49 CMLRev 176; S Adam and P Van Elsuwege, 'Citizenship Rights and the Federal Balance between the European Union and the Member States' (2012) 37 ELR 176; A Wiesbrock, 'Disentangling the "Union Citizenship Puzzle"? The *McCarthy* Case' (2011) 36 ELR 861; Kochenov (n 22); Van Elsuwege (n 22); P Van Elsuwege, 'European Union Citizenship and the Purely Internal Rule Revisited' 7 (2011) EuConst 208; Kay Hailbronner and Daniel Thym, 'Annotation of Case C–34/09 *Ruiz Zambrano*' (2011) 48 CMLRev 1253; Kochenov (n 24).
[180] Kochenov (n 22); Ankersmit and Geursen (n 25); Van Elsuwege (n 22).
[181] N Nic Shuibhne, 'Seven Questions for Seven Paragraphs (Editorial)' 36 EurLRev 161 (2011).
[182] Hailbronner and Thym (n 179).
[183] Spaventa (n 96) 17. See also M Everson, 'The Legacy of the Market Citizen' in J Shaw and G More (eds), *New Legal Dynamics of European Union* (OUP 1995) 73.

of the unwelcome orthodoxy, which in fact amounted to the discovery of the actual text of Part II TFEU, which contains no references whatsoever to an internal market rationale or the Court's maxim that EU citizenship was not meant to enlarge the material scope of EU law.[184]

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'[185] 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.[186] The two are already being used side-by-side,[187] even if further clarification concerning their practical functioning will be required. This new development is one of the most far-reaching evolutions in the case law in decades. EU citizenship is finally taken seriously.[188]

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'[189] is potentially quite considerable. As advocated by the majority of scholars working in the field,[190] 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. Important though this recognition is, there remain unresolved a considerable number of key questions of fundamental importance. The Court's approach failed to provide clarity concerning the rights of EU citizenship which would be capable of activating EU law in wholly internal situations beyond the problematic right not to be pushed to leave the territory of the Union but not of your Member State of nationality, a right which these cases introduced. Moreover, it is unclear to what extent such rights must be breached to have such effect; what the sources of such rights are; who will decide that such breaches have indeed occurred—national courts, or the ECJ?—and numerous other questions.[191]

[184] For a detailed analysis see Kochenov and Plender (n 11).
[185] Case C–34/09, *Ruiz Zambrano* [2011] ECR I–0000, para 42 (emphasis added).
[186] Lenaerts (n 9); Kochenov (n 22).
[187] Case C– 434/09 *McCarthy* [2011] ECR I–0000, para 56; Kochenov ibid.
[188] Kochenov ibid.
[189] Case C–434/09, *McCarthy* [2011] ECR I–0000, para 53; Case C–135/08, *Rottmann* [2010] ECR I–1449, para 42; Case C–34/09, *Ruiz Zambrano* [2011] ECR I–0000, para 42.
[190] Starting with S O'Leary, who published the first comprehensive monograph on EU citizenship: S O'Leary, *The Evolving Concept of Community Citizenship* (1996) 273–8. See also, *inter alia*, by Nic Shuibhne (n 175) 731; RCA. White, 'Free Movement, Equal Treatment and Citizenship of the Union' (2005) 4 ICLQ 885; Spaventa (n 96) 13; A Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe' (2008) 35 LIEI 44; A Iliopoulou, '*Libre circulation et non-discrimination, elements du statut de citoyen de l'Union européenne*' (Bruylant, 2008) 267; Kochenov (n 30) 234; A Tryfonidou, *Reverse Discrimination in EC Law* (Kluwer 2009) 129; Kochenov (n 71) 80; Van Elsuwege (n 22).
[191] D Kochenov (n 26); Kochenov and Plender (n 11).

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, what 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, ie is it a good or a bad thing? Given the lack of underlying substantive principles in which the supranational status could be rooted, as discussed above,[192] it is only logical that divergent views on this issue are presented in the literature.

A. EU Citizenship and 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'.[193] While they claim that the Union lacks 'any clear organizing concept of social solidarity',[194] Catherine Barnard disagrees in part, finding that '[t]he principle of "solidarity" is taking root as a guiding principle of European Community law'.[195] Her compelling analysis of the case law makes a convincing point that the ECJ used this purely non-economic principle to establish EU citizenship.[196]

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 workers' rights before the incorporation of EU citizenship into the *acquis*,[197] but also, simultaneously, attempting to detach it from EU citizenship *sensu stricto*.[198] In fact, this approach seems to be working well, as the majority of social rights, at

[192] Section IB above.

[193] M Dougan and E Spaventa, '"Wish You Weren't Here . . ." New Models of Social Solidarity in the European Union' in E Spaventa and M Dougan (eds), *Social Welfare and EU Law* (Hart 2005) 181.

[194] ibid 182. See also GS Katrougalos, 'The (Dim) Perspectives of European Social Citizenship' (2007) Jean Monnet Working Paper (NYU) 05/08.

[195] C Barnard, 'EU Citizenship and the Principle of Solidarity' in E Spaventa and M Dougan (eds), *Social Welfare and EU Law* (Hart 2005) 157. See also R O'Gorman, 'The Proportionality Principle and Union Citizenship', (2009) Mitchell Working Paper (Edinburgh) 1/2009 4-11; M Wind, 'Post-National Citizenship in Europe: The EU as a "Welfare Rights Generator?"' (2009) 15 ColumJEurL 239.

[196] Barnard ibid; C Barnard, 'Social Policy Revisited in the Light of the Constitutional Debate' in C Barnard (ed), *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate* (OUP 2007) 121.

[197] S Maillard, 'L'émergence de la citoyenneté sociale européenne' (Presses Universitaires d'Aix-Marseille 2008) 65–80.

[198] ibid 257ff.

a closer inspection, are not in fact granted exclusively on the basis of nationality or EU citizenship. So long term resident third-country nationals usually enjoy social rights too, notwithstanding the fact that problems with the application of Article 18 TFEU to them abound.[199] Consequently, social citizenship emerges as a parallel layer of citizenship in Europe, which is largely residence-based, 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 necessary[200] in the context of the emergence, following Sandrine Maillard, of 'solidarité au-delà de la nationalité',[201] which is independent of nationality.[202] In this context the potential influence of EU citizenship on social solidarity emerges as a much inflated topic. Daniel Thym is absolutely right in this context to state that the 'long-term implications of the social benefits case-law are, from today's viewpoint, less revolutionary than initial analyses suggested.'[203]

Alongside the links between social solidarity and citizenship, and between social solidarity and the State, the presumption of 'social dumping' in the EU is questioned in the literature. It has been generally assumed that EU citizenship, particularly in the context of enlargement, 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. Empirical evidence to support this is missing entirely, as Michael Keating compellingly demonstrates.[204]

In one example, Michael Dougan sounded several warnings along such lines in the wake of the 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

[199] While Sandrine Maillard, among numerous other scholars, seems to presume the non-application of the provision to third-country nationals (ibid 333–5), more progressive accounts are also available: P Boeles, 'Europese burgers en derdelanders: Wat betekent het verbod van discriminatie naar nationaliteit sinds Amsterdam?' (2005) 12 Sociaal-economische wetgeving 502; A Epiney, 'The Scope of Article 12 EC: Some Remarks on the Influence of European Citizenship' (2007) 13 ELJ 611; C Hublet, 'The Scope of Article 12 of the Treaty of the European Communities vis-à-vis Third-Country Nationals: Evolution at Last?' (2009 15 ELJ 757; Kochenov (n 30) 206–9.

[200] An interesting situation, especially concerning posted workers, arose in the field of free movement of services and also in free movement of companies. See eg U Belavusau, 'The Case of *Laval* in the Contest of the Post-Enlargement EC Law Development' (2008) 9 GLJ 2279 (and the literature cited therein). The issue virtually hijacked scholarly attention for a while.

[201] Maillard (n 197) 353ff. [author's translation: 'solidarity outwith nationality'].

[202] ibid 443.

[203] D Thym, 'Towards "Real" Citizenship? The Judicial Construction of Union Citizenship and its Limits' in M Adams et al (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice Examined* (Hart 2013, forthcoming).

[204] M Keating, 'Social Citizenship, Solidarity and Welfare in Regionalised and Plurinational States' (2009) 13 Citizenship Studies 506–10.

undertakings from the CEEC.'[205] Needless to say, none of this has materialized in reality.[206] Endemic in the whole discussion of the dangers of EU citizenship for the social sphere is unfortunately one feature, namely that it 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'.[207]

Moreover, it appears that a nation state is not a necessary platform for a system of social solidarity, which numerous sub-national social security systems demonstrate.[208] The consequences of such dissociations are twofold. First, 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 necessarily guarantee preferential treatment when decoupled from residence.[209] 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 permit access to residence durable enough to endow individuals with social rights: 'residence is new nationality'.[210] In the context of cross-pollenization of EU citizenship and economic freedoms in the Treaties outlined by Síofra O'Leary,[211] a danger also exists that workers' access to social citizenship (in terms of Maillard) could be constrained. This could be done 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 the Court's occasional willingness to help,[212] its general approach to the issue[213] is much criticized in the literature.[214]

[205] M Dougan, 'A Spectre Is Haunting Europe . . . Free Movement of Persons and Eastern Enlargement' in C Hillion (ed), EU Enlargement: A Legal Approach (Hart 2004) 112.

[206] On 'social dumping' and enlargement see eg D Kukovec, 'Whose Social Europe?' (2011) IGL&P Paper No 3 Harvard Law School; Belavusau (n 200).

[207] Keating (n 204). See also C Barnard, 'Social Dumping and the Race to the Bottom: Some Lessons for the European Union from Delaware?' 25 EurLRev 57 (2000).

[208] Keating ibid 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': R Bellamy, 'The European Constitution Is Dead, Long Live European Constitutionalism' 13 Constellations 185 (2006).

[209] Davies (n 145).

[210] ibid; Maillard (n 197) 410.

[211] O'Leary (n 118) 15–24.

[212] Case C–209/03 *Bidar* [2005] ECR I–2119; O Golynker, 'Student Loans: The European Concept of Social Justice According to *Bidar*' (2006) 31 ELR 390.

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

[214] AP van der Mei, 'Union Citizenship and the Legality of Durational Residence Requirements for Entitlement to Student Financial Aid' 16 Maastricht Journal of European and Comparative Law (2009) 477; M Mataija, 'Case C–158/07, *Jacqueline Förster v IB-Groep* – Student Aid and Discrimination of Non-Nationals: Clarifying or Emaciating *Bidar*?' (2009) 15 ColumJEurL 59.

All in all, while scholars too numerous to be mentioned aim to 'shield' national-level solidarity from EU interference, a contrasting approach, exemplified by Gareth Davies' enlightening scholarship, points to the benefits of exposing state-run monopolistic social solidarity systems to competition with a view to increasing efficiency and improving lives.[215] 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.[216] 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'.[217] Consequently, crusades to defend national solidarity against EU encroachments seem to come down to an ideological stance, not grounded in reality.

B. EU Citizenship and Identity

Nations—and nationalities—are conceived by 'creating or elaborating an "ideological" myth of origins and descent'.[218] In *Mythologies* Roland Barthes explains that myths are not important for the story they tell, but for what they do.[219] The identity side of citizenship works in the same way. Although the myth itself is usually so naïf that it does not even pretend to be true 'nationality is to a greater or lesser degree a manufactured item'[220]—'l'oublie et l'erreur historique'[221]—identity's perceived true nature is not thereby undermined, ensuring that people are ready to sacrifice it all; *mourir pour la Patrie*.[222] 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?'[223] 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

[215] Davies (n 82) 21; AP Van der Mei, 'Union Citizenship and the "De-Nationalisation" of the Territorial Welfare State' (2005) 7 European Journal of Migration and Law 210.

[216] Moreover, crucially, such 'protection' of the social security systems always works only one way, benefiting exclusively the richer states in the Union (and their residents), while ensuring a strict separation between the richer and poorer parts, as Damjan Kukovec (n 206) has brilliantly demonstrated in the only serious legal paper on the issue to date: *Whose Social Europe?*

[217] Davies (n 82) 21.

[218] AD Smith, *The Ethnic Origin of Nations* (Blackwell 1986) 147.

[219] 'In a mythical system causality is artificial, false; but it creeps, so to speak through the back door of Nature' R Barthes, *Mythologies* (trans Annette Lavers) (Farrar, Starus and Giroux 1972) 131.

[220] D Miller, 'The Ethical Significance of Nationality' (1988) 98 Ethics 657.

[221] Renan, Ernst, *Qu'est-ce qu'une nation? et autres essais politiques* (Agora 1992) [1st edn 1882] 41.

[222] See on the patriotic sacrifice eg M Walzer, 'Civility and Civic Virtue in Contemporary America' (1974) 41 Social Research 4.

[223] Miller (n 220) 648. See also C. Chwaszcza, 'The Unity of People, and Immigration in Liberal Theory' (2009) 13 Citizenship Studies 451.

creating a community of people on different principles? Or is it, again, about identities and myths?[224]

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'.[225] 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'[226] is the key way to measure EU citizenship's success or failure, others, like Joseph Weiler[227] and Gianluigi Palombella,[228] see the lack of this aspect precisely as a strong point.[229] After all, there is no reason to believe that Habermasean 'constitutional patriotism' is anything else but 'the last refuge of a scoundrel'[230]—which removes ground from under the feet of the analysts viewing EU citizenship from Bellamy's perspective. The general framework of constitutionalism as such—'an empire of uniformity'[231]—is also unlikely to be helpful, as James Tully masterfully demonstrated.[232] 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*'.[233] Serious problems with such a 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.[234] How does one create such a *dēmos* and should one? A 'Constitution', to agree with Joseph Weiler is unlikely to be a helpful tool.[235] Just accepting *dēmoi*cracy could be an option.[236]

Speaking of identity in purely theoretical terms[237]—which plagues much 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.[238] Although this is obviously not to advocate

[224] V Della Sala 'Political Myth, Mythology and the European Union' (2010) 48 JCMS 1.
[225] Elsmore and Starup (2007) 'Union Citizenship', 61.
[226] Bellamy (n 33) 609.
[227] JHH Weiler, 'In Defence of the *Status Quo*: Europe's Constitutional *Sonderweg*' in JHH Weiler and M Wind (eds), *European Constitutionalism beyond the State* (CUP 2003) 7.
[228] Palombella (n 41).
[229] See also D Kostakopoulou, 'Political Alchemies, Identity Games and the Sovereign Debt Instability: European Identity in Crisis or the Crisis in Identity-Talk?' (2012) 63 RevIntlAff 97; D. Kochenov, 'Mevrouw de Jong Gaat Eten: EU Citizenship and the Culture of Prejudice' (2011) EUI Working Paper RSCAS 20011/06.
[230] Weiler (n 227) 18.
[231] J Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (CUP 1995) 59.
[232] ibid 59–98.
[233] Palombella (n 41) 365.
[234] Bellamy (n 72).
[235] Weiler (n 227).
[236] K Nicolaïdes, *The New Constitution as European Demoi–cracy?* (2003) The Federal Trust for Education and Research No 38/03; Weiler ibid.
[237] The term 'identity' itself is questioned: Kostakopoulou (n 229).
[238] J Gerhards, 'Free to Move? The Acceptance of Free Movement of Labour and Non Discrimination among Citizens of Europe' (2008) 10 European Societies 121.

'government by public opinion',[239] social reality has to be taken into account, especially by those seeking 'thick' European identity. The results of Gerhards' study are fascinating.[240] They demonstrate that on average only 33.9 per cent 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,[241] Benelux, France and Denmark and the lowest in Eastern Europe,[242] with Poles being most opposed to the idea of non-discrimination,[243] tightly followed by Lithuanians, Slovenes, Maltese, Hungarians and Czechs. In other words, the main principles of EU citizenship have only become a social reality in North-Western Europe[244] and are failing to reflect the ideals of the population of the new Member States with a notable exception of Estonia,[245] which has its own ugly skeletons in the closet, however.[246]

The whole edifice of European integration[247] is not a reflection of popular sentiments among EU citizens: Greeks prefer the Greeks.[248] Could it be then, that the main identitarian contribution of the EU in general and its citizenship in particular runs contrary to State-doctored myths? If so, European citizenship is a potent tool to be deployed against the 'suffocating bonds'.[249] Gianluigi Palombella, Gareth Davies and Will Kymlicka[250] 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'[251] with 'moral blindness'.[252] 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?[253]

[239] For the criticism of Bryce's work see eg A Vermeule 'Government by Public Opinion: Bryce's Theory of the Constitution' (2011) Harvard Public Law Working Paper No 11-13.

[240] For a concise presentation see Gerhards (n 238) 127 (Figure 1).

[241] 77.8 per cent do not see any reason to discriminate: ibid.

[242] Including Greece, where 87.3 per cent do not share the non-discrimination ideal: ibid.

[243] 96.3 per cent do not embrace non-discrimination: ibid.

[244] Around 80 per cent do not share the ideal in Spain, Portugal, Italy, Austria and the former Eastern Germany: ibid.

[245] 56.1 per cent do not share the ideal: ibid.

[246] On the specificity of Estonian case of legalized discrimination of non-citizen minorities see V Poleshchuk (ed), *A Chance to Survive: Minority Rights in Estonia* (Foundation for Historical Outlook 2009).

[247] At least as far as it requires ensuring non-discrimination on the basis of nationality.

[248] Kochenov (n 71) 74–85.

[249] Palombella (n 41) 382. See also EMH Hirsch-Ballin, *Burgerrechten* (Universiteit van Amsterdam 2011); Kochenov (n 229).

[250] Palombella (n 41); W Kymlicka, 'Liberal Nationalism and Cosmopolitan Justice' in S Benhabib *Another Cosmopolitanism* (OUP 2006) 134. See also G Davies 'Humiliation of the State as a Constitutional Tactic' in F Amtenbrink and P van den Bergh (eds), *The Constitutional Integrity of the European Union* (TMC Asser Press 2010).

[251] Kymlicka ibid 134.

[252] ibid 135.

[253] JHH Weiler, 'Fundamental Rights and Fundamental Boundaries: Common Standards and Conflicting Values in the Protection of Human Rights in the European Legal Space' in R Kastoryano and S Emmanuel (eds), *An Identity for Europe: The Relevance of Multiculturalism in EU Constitution* (Palgrave Macmillan 2009) 78.

All in all, while the mainstream literature sees EU citizenship as a legalistic creation with no implications for identity, spilling ink analysing whether it is a problem—an alternative, negative reading, consists of emphasizing EU citizenship as a liberal check protecting its holders against any state-mandated 'culture' and 'identity' impositions[254] in the State of residence.[255] Non-discrimination on the basis of nationality blocks any moves of the Member States to 'integrate' EU citizens into their societies by imposing parochial culture and language tests,[256] which are gaining in popularity in the context of third-country national migrants.[257] This unquestionably liberates EU citizens—although Joseph Weiler[258] and Ulli Jessurun d'Oliveira[259] disagree.[260] While the ECJ and its AGs seem to fully recognize the EU citizenship's liberating function in this respect,[261] 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.

C. EU Citizenship's Worth

In the long term, 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

[254] Christian Joppke makes 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': C Joppke, 'Immigration and the Identity of Citizenship: The Paradox of Universalism' (2008) 12 Citizenship Studies 542.

[255] Kochenov (n 229) 12–15; Kochenov (n 51).

[256] 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 3993, para 23 (emphasis added).

[257] For an overview and analysis, see R Bauböck and C Joppke (eds), 'How Liberal Are Citizenship Tests?' (2010) EUI RSCAS Working Paper 2010/41; R van Oers, E Ersbøll and D Kostakopoulou, 'Mapping the Redefinition of Belonging in Europe' in R van Oers, E Ersbøll and D Kostakopoulou (eds), *A Re-definition of Belonging?* (Koninklijke Brill 2010) 307; C Joppke, 'Beyond National Models: Civic Integration Policies for Immigrants in Western Europe' (2007) 30 West European Politics 1.

[258] Weiler (n 70) 82.

[259] Jessurun d'Oliveira (n 122) 'Nationaliteit en de Europese Unie'.

[260] 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 (n 229).

[261] 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.'

ideologies.[262] Following Gareth Davies, 'the new Belgians are those who *choose* Belgium'.[263] The element of choice is fundamentally important here, since a classical relationship between an 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 State outside of the EU can empower her to swap States. Under 2 per cent of the world's population changes nationality in the course of their lives.[264] 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, by voting with their feet.[265] 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,[266] from healthcare[267] to education.[268] 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 federalist thinking connecting the choice of jurisdiction and liberty.[269] As Stine Jørgensen observes, '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'.[270] 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'.[271]

The opposing view is espoused by Joseph Weiler, who takes the democratic-legitimating core of a modern State as the starting point.[272] Lacking functional democratic mechanisms apart from the negative freedom inherent in it, EU citizenship is said to corrupt individuals,[273] since political involvement—let alone justice, equality, etc[274]—is simply not part of its package.

[262] For a meticulous overview of literature on the borders of belonging see MJ Gibney, 'The Rights of Non-citizens to Membership' in C Sawyer and BK Blitz (eds), *Statelessness in the European Union* (Cambridge 2011) 41.

[263] Davies (n 141) 56 (emphasis added). See also D Kostakopoulou, 'Citizenship Goes Public: The Institutional Design of Anational Citizenship' (2009) 17 Journal of Political Philosophy 275.

[264] A Shachar and R Hirschl, 'Citizenship as Inherited Property' (2007) 35 Political Theory 253.

[265] SF Kreimer, 'Federalism and Freedom' (2001) 574 Annals AAPSS 66; AO Hirschman, *Exit, Voice, and Loyalty* (Harvard University Press 1970).

[266] D Kochenov, 'On Options of Citizens and Moral Choices of States: Gays and European Federalism' (2009) 33 FordhamIntlLJ 156.

[267] ML Flear, 'Developing Euro-Biocitizens through Migration for Healthcare Services' (2007) 14 Maastricht Journal of European and Comparative Law 239.

[268] S Jørgensen, 'The Right to Cross-Border Education in the European Union' (2009) 46 CMLRev 1567.

[269] eg Kreimer (n 265); SF Kreimer, 'Lines in the Sand: The Importance of Borders in American Federalism' (2002) 150 UPaLRev 980–4; M McConnell, 'Review: Federalism: Evaluating the Founders' Design' (1987) 54 University of Chicago Law Review 1494.

[270] S Jørgensen (n 268).

[271] Davies (n 250).

[272] Weiler (n 253) 73.

[273] Weiler (n 70) 64.

[274] As discussed in Section IIIB above.

Humiliating the State, the main added value of EU citizenship in the view of some, becomes the main reason why it is a 'bad thing' in the view of others.

Gianluigi Palombella offers a possible way to resolve the conflict between the two perspectives through dissociating State and popular sovereignty, which diminishes the importance of the State, and, simultaneously, tackles the problematic individualism[275] 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'.[276] Consequently, it is fundamental not to confuse the decline of the sovereignty of the State—a 'concept founded on the reduction of law to the will of the state as an autonomous macro-person'[277]—and the decline of the sovereignty of the citizens.[278] 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.[279] 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? Could this cleavage be resolved through a 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 goes against the flood of literature embracing a purely individualistic approach to EU citizenship's potential as 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 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. A SKETCH OF THE BIGGER PICTURE: KEY OUTCOMES OF THE ANALYSIS

All in all, the brief overview of scholarly disagreements presented above permits a broad sketch of EU citizenship's essence as it emerges from the literature. This sketch leaves no doubt that the legal importance of EU

[275] Weiler (n 253).
[276] Palombella (n 41) 365. [277] ibid. [278] ibid.
[279] According to Jageskiold, 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* (Columbia University Press 1981) 167.

citizenship is on the rise and notwithstanding the numerous outstanding problems affecting the development of this legal status, its potential to play a more prominent role in EU law is obvious. This has to do with three profoundly interrelated key aspects of EU citizenship, which are most evident in the scholarship, namely: EU citizenship's legal nature; its place within the EU's federal structure; and its impact on individual lives. In all three aspects outlined above, and in their tripartite subdivisions, important developments have been observed during the last ten years. So what do the discords in the academic literature teach us about EU citizenship and the evolution of EU law as such?

A. Legal Nature: Three Main Conclusions

Concerning the legal nature of EU citizenship, the literature allows distilling three main points. First, EU citizenship (its derivative[280] *ius tractum* acquisition notwithstanding[281]) has unquestionably outgrown the act of derivation, turning into an *autonomous* legal status,[282] which is essentially independent from the nationalities of the Member States as far as the role it plays and the rights it brings. This development necessarily results in a marked diminution of the role of Member States' nationalities in the context of EU law. Given the autonomous nature of EU citizenship, the exclusion of those who are long-term EU residents but are not in possession of one of the Member States' nationalities is logically more and more difficult to justify. Consequently, the legal situation of third country nationals residing in the Union, who are now essentially excluded from all the key benefits which EU law has to offer in terms of creating a single territory of opportunity for all to enjoy,[283] will remain an important frontier of EU citizenship law. Such *apartheid européen* will need to be dealt with sooner or later.[284]

Secondly, the foundations of such an independent status are actually quite feeble. Pointing towards the Internal Market as an underlying value supporting supranational citizenship, however legitimate,[285] seems profoundly insufficient. It is vital to ground the new independent legal status in something more than mere economic interactions. In fact, EU citizenship has already outgrown its market rationale in many respects.[286] The literature offers a trio of potentially useful starting points to consider in this regard: democracy,[287] equality[288] and justice.[289] As of now, however, all of them unquestionably fail

[280] Arts 9 EU and 20 TFEU.
[281] Kochenov (n 30).
[282] Opinion of AG Poiares Maduro in Case C–135/08 *Rottmann* [2010] ECR I–1449, para 23.
[283] L Azoulai, 'Marges de la citoyenneté européenne – Obligations étatiques, équité transnationale, Euro-Bonds' in B Fauvarque-Cosson et al (eds), *La citoyenneté européenne*, (Société de la législation compareé 2011).
[284] Balibar (n 48) 190.
[285] Nic Shuibhne (n 61).
[286] Wollenschläger (n 59).
[287] Weiler (n 70).
[288] Kochenov (n 71).
[289] Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (n 27); Williams (2010) *The Ethos of Europe* (n 27).

the reality check in the EU context. Consequently, EU citizenship is clearly threatened, if not undermined, by the questionable foundations of this status, partly balancing in thin air, rather than firmly sitting on the conceptual ground. It is thus unavoidable that the issue of EU citizenship's foundations will have to be dealt with by the Court and the legislator: nods in the direction of the 'market' are insufficient in the contemporary context, when the legal importance of this status is growing at an astonishing pace.

Thirdly, EU citizenship now affects the interpretation of pre-citizenship economic freedoms too. In this it does not show any signs of being practically undermined by the conceptual deficiencies described above. During the last decade it clearly came to play the essential role in framing EU law's development, becoming 'the fundamental status of the nationals of the Member States',[290] promised as long ago as in *Grzelczyk*.[291] The scope of the fundamental economic freedoms is now profoundly affected by the citizenship concept.[292] The main problem, which can arise in this context, is the potential spread of at times less generous rules of access to non-discrimination on the basis of nationality from the context of EU citizenship law covering non-economically-active citizens to the economic free-movement law.[293] A firewall will need to be put in place to protect the EU's fundamental freedoms.

B. Influencing the EU's Federal Structure: Three Main Conclusions

The second most popular topic addressed in EU citizenship literature concerns the possible influence of such citizenship on the vertical delimitation of the two legal orders in the EU. First, it is indisputable that EU citizenship moved beyond mere autonomy from the nationalities of the Member States and came to profoundly affect the essence of such nationalities, as the ECJ acquired jurisdiction to check the legality of the decisions on granting and withdrawing EU citizenship (and, consequently, the very nationalities of the Member States[294]) by the national authorities.[295] This reaffirmed once again that nationality is not a reserved domain where EU law cannot intervene,[296] thus definitely clarifying the division of powers between the two legal orders in Europe. At the informal level the legal importance of Member States' nationalities has also been diminishing, ending up 'relativised',[297] if not, in many respects 'abolished'.[298] This led to a conceptual reframing of the balance between the two statuses. A number of Member States went as far as to establish *de facto* separate rules on the acquisition of EU citizenship,[299] compared with the acquisition of nationalities only. The main problem arising in this context is the poor coordination of nationality matters between the

[290] Case C–34/09 *Ruiz Zambrano* [2011] ECR I–0000, para 41.
[291] Kochenov and Plender (n 11).
[292] Golynker (n 39); O'Leary (n 118).
[293] ibid 15.
[294] Case C–135/08 *Rottmann* [2010] ECR I–1449.
[295] Kochenov (n 148).
[296] de Groot (n 121).
[297] Wollenschläger (n 59) 4.
[298] Davies (n 141) 55.
[299] Kochenov (n 40).

Member States, some of them still lost in the sovereignty mythology and unwilling to take full account of the reality where without such coordination they actually regulate little.

Secondly, EU citizenship led to an exponential growth of the scope of EU law, notwithstanding the unconvincing ECJ claims to the contrary. The analyses in the literature put it straight: EU citizenship is responsible for an overwhelming enlargement of the scope *ratione personae* and, also, of the material scope too, as the two are directly connected.[300] Consequently, the Court is now discovering a new paradigm of EU integration,[301] where EU citizenship logic can potentially replace, at least in some cases, the ideology of cross-border effects, undermining the dogmatism of cross-border situation thinking. In other words, EU citizenship plays a fundamental role in the framing of the scope of EU law. This, however, caused a number of problems, as legal certainty is not always taken absolutely seriously in the process:[302] many questions concerning the vertical delimitation of powers in the Union remain.

These can theoretically be addressed via a reform of the ECJ's jurisdiction tests. This is the third most important aspect of EU citizenship's influence on the federal nature of the Union. EU citizenship came to play a role as an activator of EU law even in the context where no cross-border situation is invoked, as we have seen in *Rottmann* and *Ruiz Zambrano*.[303] This, notwithstanding the apparent limitations of this approach in *Dereci*, means a dawn of a new Union, where not the economic cross-border considerations, but the respect of fundamental rights plays a crucial role in the activation of the supranational law.[304] The new approach has been rightly criticized for its vagueness,[305] however, as it seemingly poses more questions than it provides answers.[306]

C. EU Citizenship and Ordinary Lives: Three Main Conclusions

Most importantly, however, EU citizenship directly affects all the holders of this status, as it offers Europeans a radically broadened horizon of opportunities and in this sense seriously contributes to liberty in the Union through empowering individuals. Literature analysis of EU citizenship's influence on ordinary lives allows, first, dismissing the claims that it negatively affects social solidarity within the national contexts of the Member States, as social rights build on the idea of social citizenship which is not directly connected to the status of Member State nationality as such.[307] This finding is further reinforced by the fact that a direct link between social solidarity and the State is not

[300] Spaventa (n 96); Kochenov (n 71).
[301] Kochenov and Plender (n 11).
[302] Spaventa (n 96); Nic Shuibhne (n 175); Van Elsuwege and Adam (n 156).
[303] Lenaerts (n 9); Kochenov (n 22).
[304] Kochenov and Plender (n 11).
[305] Van Elsuwege (n 22); Nic Shuibhne (n 181); Adam and Van Elsuwege (n 179).
[306] Kochenov (n 26).
[307] Maillard (n 197).

obvious either.[308] Moreover, any 'shielding' of national social solidarity systems from EU citizenship's influence exacerbates the unequal distribution of wealth around the Union, thus benefiting only the richest Member States[309] and is based on a bluntly unsound presumption that what is being shielded is better than any possible alternative, undermining possible reforms which can benefit all.[310] Given that no 'race to the bottom' is actually observable in the EU,[311] much of the literature on the negative effects of EU citizenship on social solidarity seems largely conceptually empty.

Secondly, literature analysis allows dispelling the myth that EU citizenship is merely a legalistic status that does not affect the identity of the nationals of the Member States. Of course it does, and it does so by releasing them from the 'suffocating bonds'[312] by protecting them from the Member States[313]—an approach which is particularly clear in the light of the new vision of the activation of EU law, where cross-border situations are not required and the protection of rights plays a key role. In this sense, the EU is to be praised for not trying to emulate nation-states.[314]

This leads us, thirdly, to a more fundamental question: if the EU citizenship's main strength is to undermine the Member States' grip on their nationals, thus *de facto* undermining the states as such, is it capable of supplying something positive to compensate for shattering the national foundations, which are also generally perceived as the foundations of democracy, equality and justice?[315] This is where the main drawback of EU citizenship, ie the absence of a value basis and conceptual foundation comes again to the fore. Although to state that Member States would perish under its pressure would be stretching it too far, thus toning down the immediate relevance of the question posed, it will be necessary to deal with the fundamental conceptual void at the basis of EU citizenship sooner, rather than later. As EU citizenship develops, however, this drawback can also solve itself in the process: let us wait and see.

VII. FINAL REMARKS

As Williams correctly observes, 'the ECJ's future challenges are both administrative and philosophical in nature.'[316] 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

[308] Keating (n 204).
[309] Kukovec (n 206).
[310] Davies (n 82).
[311] Barnard (n 207); Keating (n 204) 506–10.
[312] Palombella (n 41) 382.
[313] Davies (n 250); Kochenov (n 229).
[314] Weiler (n 235); Palombella (n 41).
[315] Weiler (n 70).
[316] A Williams, 'Human Rights and the European Court of Justice: Past and Present Tendencies' (2011) Legal Studies Research Paper Warwick Law School No 2011-06, 53.

citizenship, yet, the most important problems underlying its essence are only tackled by very few commentators, led by, *inter alia*, Dora Kostakopoulou, Gareth Davies 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 formulated. Although the tradition of *renku*-writing would have it otherwise, this overview has hopefully demonstrated that there are plenty of other interesting topics worthy of discussion when the myriad legal problems surrounding EU citizenship is addressed: time to move beyond the cherry blossoms and the Moon.