Citizenship's Role in the European Federation

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Forthcoming in R. Schütze (eds) *Globalisatoin and Governance: International Problems, European Solutions* (Cambridge University Press, 2018). Please consult the edited volume for the final version of this text and correct pagination.

EU citizenship plays a much more significant role in EU law than what the cursory reading of Part II TFEU could probably suggest. In fact, this status has outgrown its initial derivation logic and, together with the core principles of the internal market, including, especially, non-discrimination on the basis of nationality, plays a significant role in shaping the nationalities of the Member States of the EU and the rights these statuses bring to their holders. Once the derivation logic emerged in a new light, EU citizenship's necessary potential to inform the inner-workings of outlining the scope of EU law – the core 'federal question' – came to the fore. The EU is still in the middle of a clash between the cross-border internal market logic of scope of the law determination and the ideals of human dignity and human rights protection which are indispensable for any citizenship in any constitutional system to be effective. Rights- and dignity-based arguments are mute in a situation where the scope of the law is determined based on the internal market considerations. Rights claims end up dismissed as non-existent in the eyes of the EU in a federation designed, precisely, not to see human suffering of those it cannot use to the good end of market integration. Such people become invisible and enjoy no protection of the law. There are ways to change this, turning the EU into a constitutional system resting on ethically and morally justifiable rights and principles, as opposed to the logical aberration of ethically contingent acts, such as the fetishisation of cross-border travel. There are good reasons behind the fact that no other democracy fails its citizens on the pretext that they have not taken the bus enough: the EU's untenable approach has to change and this chapter explains both why and how.

* For the full version of the argument presented in this chapter, please consult my 'On Tiles and Pillars', which appeared in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017), 3. I am grateful to Robert Schütze for his comments and patience. The splendid assistance of Jacquelyn Veraldi is gratefully acknowledged.

I. Introduction

The significant impact that European Union (EU) citizenship has on the nationalities of the Member States and the day-to-day functioning of EU law, including both its substance and its scope, is now as clear as day.[1] EU citizenship – the first truly meaningful citizenship status in the world not directly associated with a state – clearly came to affect the nationalities of the Member States it is derived from – including at the level of the rules of their acquisition – and also the material scope of EU law, both in substance, *de facto*, and in theory, by offering an avenue for a novel approach to the 'activation' of EU law, making sure that a case at hand is not 'wholly internal',[2] through an appeal to the 'substance of [EU citizenship] rights'.[3] This being said, uncertainty persists about the formal role that EU citizenship ought to be endowed with in the context of the delimitation of powers between the EU and the Member States:[4] the issue going to the very core of European federalism.[5] This chapter, besides

1 E. Spaventa, 'Earned Citizenship – Understanding Union Citizenship through its Scope' in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017); D. Kochenov, 'Member State Nationalities and the Internal Market: Illusions and Reality' in L. W. Gormley and N. Nic Shuibhne (eds.), *From Single Market to Economic Union: Essays in Memory of John A. Usher* (Harvard University Press, 2012); E. Spaventa, 'Seeing the Wood Despite the Trees?' (2008) 45 *CML Rev* 13.

2 A. Tryfonidou, 'Reverse Discrimination in Purely Internal Situations' (2008) 35 *LIEI* 43; P. Van Elsuwege and S. Adam, 'Situations purement internes, discriminations à rebours et collectivités autonomes après l'arrêt sur l'*Assurances soins flamande*' (2008) 44 *CDE* 655, 662–78; N. Nic Shuibhne, 'Free Movement of Persons and the Wholly Internal Rule' (2002) 39 *CML Rev* 731; R.-E. Papadopoulou, 'Situations purement internes et droit communautaire' (2002) 38 *CDE* 95; P. Maduro, 'The Scope of European Remedies' in C. Kilpatrick et al. (eds.), *The Future of Remedies in Europe* (Hart, 2000); H. Tagaras, 'Règles communautaires de libre circulation, discriminations à rebours et situations dites "purement internes"' in M. Dony (ed.), *Mélanges en Hommage à Michel Waelbroeck*, 2 vols. (Bruylant, 1999), II.

3 S. Platon, 'Le Champ d'application des droits du citoyen européen après les arrêts [*Ruiz*] *Zambrano*, *McCarthy et Dereçi*' (2012) 48 *RTDEur* 21; M. J. van den Brink, 'EU Citizenship and EU Fundamental Rights' (2012) 39 *LIEI* 273; M. Hailbronner and S. Iglesias Sánchez, 'The European Court of Justice and Citizenship of the European Union' (2011) 5 *VJICL* 498.

4 D. Kochenov, 'The Right to Have *What* Rights? EU Citizenship in Need of Clarification' (2013) 19 *ELJ* 502; van den Brink, 'EU Citizenship and EU Fundamental Rights' (above n. 3); Spaventa, 'Earned Citizenship' (above n. 1).

5 See, most importantly, R. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press, 2010). For the key analyses of the EU as a federation besides Schütze, see e.g. K. Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 *AJCL* 205; S. Oeter, 'Federalism and Democracy' in A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law*, 1st edn (Hart, 2006), 53; E. Delaney, 'Managing in a Federal System without an "Ultimate Arbiter"' (2005) 15 *Regional and Federal Studies* 225; S. Fabbrini (ed.), *Democracy and Federalism in the European Union and the United States* (Routledge, 2005); J.-C. Piris, 'L'Union européenne: vers une nouvelle forme de fédéralisme?' (2005) 41 *RTDEur* 243; R. D. Kelemen, *The Rules of Federalism* (Harvard University Press, 2004); K. Lenaerts, 'Interlocking Legal Orders in the European Union and Comparative Law' (2003) 52 *ICLQ* 873; M.

saying a couple of words about the current role of EU citizenship in impacting the nationalities of the Member States (section II), focuses on the arguments in favour of endowing EU citizenship with a formal structural role in determining the scope of EU law, engaging with the critics of such an approach to EU citizenship, especially European Court of Justice (ECJ) President Lenaerts,[6] and siding with the main proponents of this approach, especially Advocate General Sharpston.[7] It deploys three distinct arguments in favour of broadening the Court's view of EU citizenship rights: theoretical, textual and historical. At the core of the discussion is the idea that EU citizenship rights cannot be construed as excluding human rights[8] and should thus take all the values the EU is building upon – as expressed in Article 2 of the Treaty on the European Union (TEU) – most vividly into account.[9] In the context of this analysis the EU is approached as an anthropocentric federation created for the benefit of the citizens (section III). The rights individuals enjoy under EU law (section IV) are then construed as EU citizenship rights (section V), by definition and in contrast with the entitlements of the third-country nationals (section VI). This perspective paves the way to endowing EU citizenship with a renewed structural function in the context of EU federalism (section VII).[10] This is done by associating the enjoyment of a broad spectrum of rights of EU citizenship with a potential to activate the scope of EU

Burgess, *Federalism and the European Union* (Routledge, 2000); L. F. Goldstein, *Constituting Federal Sovereignty* (Johns Hopkins University Press, 2001); K. Nicolaïdis and R. Howse (eds.), *The Federal Vision* (Oxford University Press, 2001); K. Lenaerts, 'Federalism and the Rule of Law' (2010) 33 *Fordham International Law Journal* 1338; D. Sidjanski, 'Actualité et dynamique du fédéralisme européen' (1990) 341 *Revue du marché commun* 655; F. W. Scharpf, 'The Joint Decision Trap' (1988) 66 *Public Administration* 239; M. Cappelletti et al. (eds.), *Integration through Law*, 5 vols. (Walter de Gruyter, 1986), I(3). Judge Pierre Pescatore highlighted the 'caractère fédérale de la constitution européenne', as far back as in the beginning of the 1960s: P. Pescatore, 'La Cour en tant que juridiction fédérale et constitutionnelle' in *Dix ans de jurisprudence de la Cour des Communautés Européennes* (Université de Cologne, 1963), 522.

6 K. Lenaerts and J. A. Gutiérrez-Fons, 'Epilogue on EU Citizenship: Hopes and Fears' in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017); D. Düsterhaus, 'EU Citizenship and Fundamental Rights: Contradictory, Converging, or Complementary?' in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017).

7 E. Sharpston, 'Citizenship and Fundamental Rights – Pandora's Box or a Natural Step Towards Maturity' in P. Cardonnel et al. (eds.), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart, 2012); D. Kochenov, 'A Real European Citizenship: A New Jurisdiction Test' (2011) 18 *CJEL* 55.

8 Sharpston, 'Citizenship and Fundamental Rights' (above n. 7).

9 D. Kochenov, 'The *Acquis* and its Principles: The Enforcement of "Law" vs. the Enforcement of "Values" in the European Union' in A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values* (Oxford University Press, 2017).

10 D. Kochenov and R. Plender, 'EU Citizenship: From an Incipient Form to an Incipient Substance?'(2012) 37 *EL Rev* 369; Sharpston, 'Citizenship and Fundamental Rights' (above n. 7).

law, thereby protecting EU citizens via the supranational level of the law regardless of the connection of the particular situation at hand with the internal market, which is currently at the core of the federal bargain.[11]

II. EU Citizenship's Impact: Superseding the Derivation Logic

Although branded as derivative,[12] EU citizenship, besides supplying the holders with supranational rights beyond their states of origin, also alters the essence of the Member State nationalities it is derived from,[13] including the rules of loss and acquisition of such nationalities. Simply put, although the acquisition and the loss of nationality are not among the issues which the Union is empowered to regulate,[14] the very existence of the internal market[15] amplified by the notion of EU citizenship makes the retention of the pre-existing modes of regulation of such *de jure* extra-*acquis*[16] issues by the Member States clearly unsustainable. It goes without saying that the general duty of loyalty is at work in this field of law just as in any other:[17] the Member States cannot, when acting within their sphere of competence, imperil the achievement of the goals of integration

11 For the criticism of the current status quo, see e.g. G. Peebles, '"A Very Eden of the Innate Rights of Man"?' (1997) 22 *Law and Social Inquiry* 581, 605; P. Allott, 'European Governance and the Re-Branding of Democracy' (2002) 27 *EL Rev* 60; D. Kochenov, 'The Citizenship Paradigm' (2013) 15 *CYELS* 197; C. O'Brien, 'I Trade Therefore I Am' (2013) 50 *CML Rev* 1643; P. Caro de Sousa, 'Quest for the Holy Grail' (2014) 20 *ELJ* 499; D. Kochenov, 'Neo-Mediaeval Permutations of Personhood in Europe' in L. Azoulai et al. (eds.), *Ideas of the Person and Personhood in European Union Law* (Hart, 2016); C. O'Brien, '*Civis capitalist sum*: Class as the New Guiding Principle of EU Free Movement Rights' (2016) 52 *CML Rev* 937.

12 D. Kochenov, '*Ius Tractum* of Many Faces' (2009) 15 *CJEL* 169.

13 Article 9 of the Treaty on the EU (TEU); Article 20 of the Treaty on the Functioning of the EU (TFEU), OJ C115/1, 2009.

14 E.g. Opinion of Poiares Maduro, AG in Case C-135/08, *Janko Rottmann*, EU:C:2010:104, [2010] ECR I-1449, para. 17: 'la détermination des conditions d'acquisition et de perte de la nationalité, – et donc de la citoyenneté de l'Union –, relève de la compétence exclusive des États membres' (also see the references cited therein). This notwithstanding the famous *obiter dictum* in *Micheletti* that decisions on nationality should be taken by the Member States with 'due regard of Community law': Case C-369/90, *Mario Vicente Micheletti et al.* v. *Delegación del Gobierno en Cantabria*, EU:C:1992:295, [1992] ECR I-4239, para. 10. In practice, the Union took part in the framing of state nationality laws on several occasions, all during the pre-accession process, when dealing with the Member States-to-be. For analysis see D. Kochenov, 'Pre-Accession, Naturalization, and "Due Regard to Community Law": The European Union's "Steering" of Citizenship Policies in Candidate Countries during the Fifth Enlargement' (2004) 4 *Romanian Journal of Political Science* 71.

15 Article 26(2) TFEU.

16 On the concept of the *acquis* see C. Delcourt, 'The *Acquis Communautaire*: Has the Concept Had its Day?' (2001) 38 *CML Rev* 829.

17 D. Kochenov, 'Case C-135/08, Janko Rottmann v. Freistaat Bayern, judgment of 2 March 2010 (Grand Chamber)' (2010) 47 *CML Rev* 1831.

by undermining the nature and functioning of the EU citizenship status. This basic point is particularly clear following the ECJ's decision in *Rottmann*.[18] The same considerations apply both to the status as such and to the enjoyment of the rights associated with the supranational status.[19]

The internal market and EU citizenship work together to transform the nationality policies of the Member States not by empowering the Union to act in the field of the conferral of nationalities by the Member States, but simply by bringing a profound change to the whole meaning of the Member States' nationalities in contemporary Europe. This evolution is the key to the understanding of the dynamic development of the legal essence of EU citizenship of the near future, as it affects access to supranational status as well as the delimitation of the scope of EU law. EU citizenship has emerged as a federal citizenship[20] endowed with a structural significance in the edifice of EU law. As EU citizenship plays a fundamentally important role in the shaping of EU federalism, the line which could be drawn between the legal concepts of Member State nationality and EU citizenship is becoming ever more flexible and contested.

Already today several Member States differentiate at a formal level between EU citizens and third-country nationals in

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18 Case C-135/08, *Janko Rottmann*, EU:C:2010:104, [2010] ECR I-1449; see e.g. for a brief selection in this sea of reactions: S. Adam and P. van Elsuwege, 'Citizenship Rights and the Federal Balance between the European Union and its Member States' (2012) 37 *EL Rev* 176; A. Tryfonidou, 'Redefining the Outer Boundaries of EU Law' (2012) 18 *European Public Law* 493; H. U. Jessurun d'Oliveira, 'Case C-135/08 *Janko Rottman* v. *Freistaat Bayern* Case Note 1' (2011) 7 *ECLR* 138; G.-R. de Groot and A. Seling, 'Case C-135/08 *Janko Rottman* v. *Freistaat Bayern* Case Note 2' (2011) 7 *ECLR* 150; A. Hinajeros, 'Extending Citizenship and the Scope of EU Law' (2011) 70 *CLJ* 309; R. Palladino, 'Il Diritto di soggiorno nel "proprio" Stato membro' (2011) 2 *Studi sull'integrazione europea* 311; L. J. Ankersmit and W. W. Geursen, '*Ruiz Zambrano*: De interne situatie voorbij' (2011) *Asiel & Migrantenrecht* 156; P. Van Elsuwege, 'Shifting Boundaries?' (2011) 38 *LIEI* 263; D. Kochenov, 'Annotation of Case C-135/08, *Rottmann*' (2010) 47 *CML Rev* 1831; G.-R. de Groot, 'Overwegingen over de *Janko Rottmann*-beslissing van het Europese Hof van Justitie' 1(5/6) (2010) *Asiel & Migrantenrecht* 293; H. U. Jessurun d'Oliveira, 'Ontkoppeling van nationaliteit en Unieburgerschap?' (2010) *Nederlandsch Juristenblad* 785; S. Iglesias Sánchez, '¿Hacia una nueva relación entre la nacionalidad estatal y la cuidadanía europea?' (2010) 37 *Revista de Derecho Comunitario Europeo* 933.

19 Kochenov, 'A Real European Citizenship' (above n. 7).

20 For the analyses of the European citizenship from a federal perspective, see Kochenov (ed.), *EU Citizenship and Federalism* (above n. 1); C. Schönberger, 'European Citizenship as Federal Citizenship' (2007) 19 *European Review of Public Law* 63. See also: G. L. Neuman, 'Fédéralisme et citoyenneté aux Etats Unis et dans l'Union européenne' (2003) 21 *Critique Internationale* 151; A. P. van der Mei, 'Freedom of Movement for Indigents' (2002) 19 *Arizona Journal of International & Comparative Law* 803; T. Fischer, 'European Citizenship' (2002) 5 *CYELS* 357; F. Strumia, 'Citizenship and Free Movement' (2006) 12 *CJEL* 714; C. Timmermans, 'Lifting the Veil of Union Citizens' Rights' in N. Colneric et al. (eds.), *Festschrift für Gil Carlos Rodríguez Iglesias* (Berliner Wissenschafts-Verlag, 2003). For a truly magisterial analysis, see C. Schönberger, *Unionsbürger. Europas föderales Bürgerrecht in vergleichender Sicht* (Mohr Siebeck, 2006).

their naturalisation procedures. These differences are not minor at all. In Italy, for example, the length of minimal legal residence in order to qualify for naturalisation is drastically different for the two categories in question: while EU citizens naturalize in four years, third-country nationals have to wait six years longer.[21] In the near future, the number of Member States to introduce such differences as well as the reach of the differences themselves is likely to proliferate, reflecting the importance of EU law in providing EU citizens with virtually unlimited access to *de facto* unconditional residence and work in the territory of the Union, thus removing EU citizens who chose to reside outside of their Member State of nationality from the category of simple 'foreigners'. Formal naturalisation simplifications thus come on top of the EU law guarantees, which infinitely simplify the meeting of *any* standard naturalisation requirements.[22] Ultimately, the establishment of diverging naturalisation requirements for EU citizens and third-country nationals means that a distinction is made between the acquisition of EU citizenship (necessarily coupled with a Member State's nationality) and the mere acquisition of another Member State nationality. This is a fundamental development, bound to have far-reaching consequences for the legal essence of both legal statuses in question.

Naturalisation in the Member State of residence is already less important by far for EU citizens than for the third-country nationals. This is so because a number of key rights formerly associated with state nationality are granted to EU citizens directly by the EU legal order. Among these are virtually unconditional rights of entry, residence, taking up employment and, crucially, non-discrimination on the basis of nationality.[23] An oft-cited phrase coined by Gareth Davies attributes to Article 18 of the Treaty on the Functioning of the EU (TFEU) – provocatively, but no doubt correctly – the abolition of the nationalities of the Member States.[24] Currently it is not Member

21 Legge N. 91/1992; Zincone and Basili, 'Country Report: Italy', EUDO Citizenship Observatory RSC Paper, EUI, 2009, 13.

22 Consequently, those Member States' nationals who naturalise in their new Member State of residence automatically fall within the scope of EU law even when they lost their previous Member State's nationality, since EU law permitted them to meet the necessary residence requirements: Opinion of Poiares Maduro, AG in Case C-135/08, *Janko Rottmann*, EU:C:2010:104, [2010] ECR I-1449, paras. 10–11.

23 For a critical analysis see Kochenov, '*Ius Tractum* of Many Faces' (above n. 12), 206 (and the literature cited therein).

24 G. Davies, '"Any Place I Hang My Hat?"' (2005) 11 *ELJ* 43; Evans put it slightly differently: 'possession of the nationality of one Member State rather than that of another loses all real significance': see A. Evans, 'Nationality Law and European Integration' (1991) 16 *EL Rev* 190, 195.

State nationality, but EU citizenship, which provides Europeans with the most considerable array of rights, so long as, by virtue of this status, rights in (still[25]) twenty-eight states instead of only one are extended and any discrimination on the basis of nationality is prohibited. Unquestionably, thus, EU citizens not having the nationality of the Member State where they reside are not, any more, simple 'foreigners' in the EU.[26]

This shift from foreigners to European citizens coupled with the tensions it brought about did not affect the core understanding of the federal compact in Europe, however: the creation of EU citizenship notwithstanding, as Ulrich Everling rightly put it, the Member States 'hold responsibility for their peoples',[27] underscoring the crucial importance of their nationalities, to which they alone hold the key,[28] even if loyalty to EU law is required when such a key is used.[29] As a consequence, EU citizenship, though a legal status which is '*autonome*'[30] – autonomous of the nationalities of the Member States – does not exist without a nationality of a Member State,

25 D. Kochenov, 'EU Citizenship and Withdrawals from the Union: How Inevitable Is the Radical Downgrading of Rights?' in C. Closa (ed.), *Secessions and Withdrawals* (Cambridge University Press, 2017).

26 But see C-524/06, *Huber* v. *Germany*, EU:C:2008:724, [2008] ECR I-9705 (on the legality of placing resident EU citizens who are not German nationals on the register of foreigners in Germany). Cf. K. Hailbronner, 'Are Union Citizens Still Foreigners?' in P. Minderhoud and N. Trimikliniotis (eds.), *Rethinking the Free Movement of Workers* (Wolf, 2009).

27 U. Everling, 'The European Union as a Federal Association of States and Citizens' in A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law*, 1st edn (Hart, 2006).

28 See Article 1 Convention Governing Certain Questions Relating to the Conflict of Nationalities, The Hague, 12 April 1930, entered into force 1 July 1937, 179 LNTS 89, 99. This position is also confirmed by the fact that the Court respects the Declarations made by the Member States in clarifying the meaning of their nationalities in the context of EU law. See C-192/99, *Kaur*, EU:C:2001:106. Cf. A. Sironi, 'Nationality of Individuals in Public International Law' in A. Annoni and S. Forlati (eds.), *The Changing Role of Nationality in International Law* (Routledge, 2014).

29 See also Case C-135/08, *Janko Rottmann*, EU:C:2010:104, [2010] ECR I-1449, para. 56; Case C-369/90, *Mario Vicente Micheletti et al.* v. *Delegación del Gobierno en Cantabria*, EU:C:1992:295, [1992] ECR I-4239, para. 10. For analyses, see Iglesias Sánchez, '¿Hacia una nueva relación entre la nacionalidad estatal y la cuidadanía europea?' (above n. 18); Kochenov, 'A Real European Citizenship' (above n. 7), 77.

30 C-135/08, *Janko Rottmann*, Opinion of AG Poiares Maduro, EU:C:2009:588, ECR I-1449, paras. 11, 23: 'Tel est le miracle de la citoyenneté de l'Union: elle renforce les liens qui nous unissent à nos États (dans la mesure où nous sommes à présent des citoyens européens précisément parce que nous sommes des nationaux de nos États) et, en même temps, elle nous en émancipe (dans la mesure où nous sommes à présent des citoyens au-delà de nos États).'

numerous academic[31] and institutional[32] calls for such a development notwithstanding.

This being said, the EU tends not to notice *ex lege* and thus not to protect any of its most vulnerable citizens: the poor,[33] the uneducated,[34] the criminal,[35] the mothers of children with special needs.[36] The 'good' EU citizen, as the ECJ teaches us,[37] is thus the one – and only the one – who meets the expectations of the internal market: to exist in the eyes of EU law it is indispensable to earn, to be relatively healthy and be engaged across borders; that is, to be able to contribute to the internal market the EU is creating. The plight to legal recognition of all those not falling within this image of the 'good' is interpreted away as having no connection to EU law.[38] In this sense Union citizenship is definitely 'neo-mediaeval': it is the personal circumstances of the holder, not the formal legal status as such, which play the crucial role in determining whether EU law – the law that has extended the status – would actually apply to the situation of the concrete individual or not.[39]

Notwithstanding the slowed-down progress towards a formal legal status of equal citizens in the EU, it is clear that the successful development of the internal market is bound to diminish the legal effects of particular Member States' nationalities even further. There are three main consequences. The first is the widening of the gap between EU citizens and

31 E.g. D. Kostakopoulou, 'European Union Citizenship and Member State Nationality' in J. Shaw (ed.), 'Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?', EUI Working Paper RSCAS 2011/5; Jessurun d'Oliveira, 'Ontkoppeling van nationaliteit en Unieburgerschap?' (above n. 18).

32 E.g. most recently, European Economic and Social Committee, 'Opinion on a More Inclusive Citizenship Open to Immigrants (own-initiative opinion)' (Rapporteur P. Castaños, SOC/479, 16 October, 2013): 'The Committee proposes that, in future, when the EU undertakes a new report of the Treaty (TFEU), it amends Article 20 so that third-country nationals who have stable, long-term resident status can also become EU citizens' (para. 1.11).

33 Case C-86/12, *Alokpa and Others* v. *Ministre du Travail, de l'Emploi et de l'Immigration*, EU:C:2013:645, [2013].

34 Case C-333/13, *Dano*, EU:C:2014:2358, [2014].

35 Case C-348/09, *P.I.* v. *Oberbürgermeisterin der Stadt Remscheid.*, EU:C:2012:300, [2012]; and Case C-378/12, *Onuekwere* v. *Secretary of State for the Home Department*, EU:C:2014:13 [2014]; U. Belavusau and D. Kochenov, 'Kirchberg Dispensing the Punishment' (2016) 41 *EL Rev* 557.

36 Case C-434/09, *McCarthy* v. *Secretary of State for the Home Department*, EU:C:2011:277, [2011] ECR I-3375.

37 L. Azoulai, 'Transfiguring European Citizenship: From Member State Territory to Union Territory' in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017).

38 O'Brien, 'I Trade Therefore I Am' (above n. 11); Caro de Sousa, 'Quest for the Holy Grail' (above n. 11); D. Kochenov, 'Citizenship of Personal Circumstances in Europe' in D. Thym (ed.) *Reinventing European Citizenship* (Hart, 2017).

39 Kochenov, 'Neo-Mediaeval Permutations of Personhood in Europe' (above n. 11).

third-country nationals in the EU even further. The second is the obvious need to adapt the Member States' nationalities to the new reality, constructing legal statuses more aware of their limitations. The diminution in importance of the nationalities of the Member States as legally meaningful statuses naturally reaffirms the rise of EU citizenship to the most prominent position in regulating the rights of EU citizens. Third, and most crucially, the rules of determination of the scope of EU law need to prevent the Union from failing its most vulnerable citizens in a situation when the national-level protections are bound to weaken as indicated above.

This is the core preoccupation of this chapter: having seen the overwhelming impact of the supranational legal status on the nature and scope of the nationalities of the Member States in the European federal context, how can those nationals who do not qualify as 'good enough' for protection in the context of the internal market be protected? The justice-deficit-prone[40] Union should be prevented from appealing to the fundamental principles of the delimitation of competences between the EU and the Member States when a justification for denying rights and dignity to the most vulnerable citizens is sought thereby.[41] The Union thus has to turn to the citizen not at the level of *rights* per se, but by rethinking, instead, the scope of the limitations perceived as inherently built into its own law in order to ensure that a humane law[42] is created at the supranational level, protecting, rather than punishing the vulnerable in need of protection. Only by reconsidering the approach to the core principles of the vertical delimitation of powers in the EU can such a result be achieved, thereby ensuring that the EU is not anymore perceived by those it was created to help as an 'actor of injustice'.[43] It is crucial, in this context, to remember the EU's roots as an anthropocentric federation and all of its law has always been presented as focusing uniquely on creating additional opportunities for EU citizenship and improving their lives.

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40 D. Kochenov et al. (eds.), *Europe's Justice Deficit?* (Hart, 2015). Cf. D. Kochenov, 'EU Law without the Rule of Law' (2015) 34 *YEL* 74; A. Williams, *The Ethos of Europe* (Cambridge University Press, 2009); F. de Witte, *Justice in the EU* (Oxford University Press, 2015).

41 Kochenov, 'Citizenship without Respect', Jean Monnet Working Paper 08/2010; O'Brien, 'I Trade Therefore I Am' (above n. 11); N. Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 *CML Rev* 1597.

42 C. O'Bien, *Unity in Adversity* (Hart Publiship, 2017); N. Ferreira and D. Kostakopoulou (eds.), *The Human Face of the European Union: Are EU Law and Policy Humane Enough?* (Cambridge University Press, 2016).

43 G. de Búrca, 'Conclusion' in D. Kochenov et al. (eds.), *Europe's Justice Deficit?* (Hart, 2015).

A hope has recently arisen in the academic doctrine[44] inspired by conceptually significant signs coming from the ECJ[45] and the rich history of critiquing the status quo,[46] that the core assumptions underlying EU law and leading to the commodification of the individual could be giving way to a somewhat more mature – constitutional – approach to personhood in EU law.[47] The change could be driven by placing EU citizenship status and the essence of the rights this status is associated with at the core of EU constitutionalism, allowing the two to take a notable place among the main factors delimiting the material scope of EU law, thus putting the EU federal bargain on a more coherent, logical and just foundation.[48] The cases of Dr Rottmann and Mr Ruiz Zambrano – criticised for the lack of doctrinal clarity[49] and simultaneously praised for almost boring predictability, if not inevitability[50] – played a particularly important role here. *Rottmann* teaches us that EU law, at least potentially, restrains the national law of the Member States in all situations 'capable of causing [EU citizens] to lose the status conferred by Article 17 EC [now 9 TEU and 20 TFEU] and the

44 E.g. Caro de Sousa, 'Quest for the Holy Grail' (above n. 11); K. Lenaerts, '"Civis Europæus Sum"' in P. Cardonnel et al. (eds.), *Constitutionalising the EU Judicial System* (Hart, 2012); Kochenov, 'A Real European Citizenship' (above n. 7); Platon, 'Le Champ d'application des droits du citoyen européen' (above n. 3); van den Brink, 'EU Citizenship and EU Fundamental Rights' (above n. 3); Hailbronner and Iglesias Sánchez, 'The European Court of Justice and Citizenship of the European Union' (above n. 3); Spaventa, 'Seeing the Wood Despite the Trees?' (above n. 1). A whole new wave of EU citizenship scholarship literature was inspired by a spectacularly well-argued, detailed, and forward-looking Opinion of AG Eleanor Sharpston in *Ruiz Zambrano*.

45 See the whole line of cases commenced with Case C-135/08, *Janko Rottmann*, EU:C:2010:104, [2010] ECR I-1449; Case C-34/09, *Ruiz Zambrano* v. *Office national de l'emploi (ONEm)*, EU:C:2010:560, [2010] ECR I-1177; Case C-434/09, *McCarthy* v. *Secretary of State for the Home Department*, EU:C:2011:277, [2011] ECR I-3375.

46 Writing as early as 1986, David Pickup argued that 'The just and common sense principle must be that the nationals of *all* Member States are entitled to the same treatment by any given Member State. To say otherwise is to promote discrimination which is, in effect, based upon the difference in nationality of the victim': D. Pickup, 'Reverse Discrimination and Freedom of Movement of Workers' (1986) 23 *CML Rev* 135.

47 For the legal significance of the persons/citizens divide, see e.g. L. Bosniak, 'Persons and Citizens in Constitutional Thought' (2010) 8 *ICON* 9; L. Azoulai, 'L'Autonomie de l'individu européen et la question du statut', EUI Working Paper, LAW 2013/14. Cf. D. Kostakopoulou, *The Future Governance of Citizenship* (Cambridge University Press, 2008); L. Azoulai et al. (eds.), *Ideas of the Person and Personhood in European Union Law* (Hart, 2016).

48 Caro de Sousa, 'Quest for the Holy Grail' (above n. 11); Kochenov, 'A Real European Citizenship' (above n. 7).

49 N. Nic Shuibhne, 'Seven Questions for Seven Paragraphs' (2011) 36 *EL Rev* 161; U. Šadl, 'Case – Case Law – Law' (2013) 9 *ECLR* 205.

50 G. Davies, 'The Entirely Conventional Supremacy of Union Citizenship and Rights' in J. Shaw (ed.), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?*, EUI Working Paper, RSCAS 2011/5. Kochenov, 'Annotation of Case C-135/08, *Rottmann*' (above n. 18).

rights attaching thereto',[51] since any such situation would fall, '*by reason of its nature and its consequences*, within the ambit of European Union law'.[52] *Ruiz Zambrano* built on this, clarifying 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',[53] are equally within the ambit of EU law. EU citizenship, through the rights associated therewith, seemingly acquired the ability to affect the material scope of EU law directly.

The starting assumption behind the recent hopes has been that simple respect for rights cannot be enough: without giving EU citizenship at least a minimally significant structural role in the delimitation of competences between the Union and the Member States, a simple insistence on rights is bound to result in the exacerbation of the problems the EU faces, since the internal market logic would still play a key role in the distribution of the rights the EU is protecting – precisely what one would seek to avoid when attempting to turn market constitutionalism into full-fledged constitutionalism.[54] Citizenship should thus be approached as contestation territory,[55] playing a structural role in the organisation of power in the federal Union.[56]

III. An Anthropocentric Federation

Nothing less than a *fédération européenne* is the *finalité* of the EU's endeavour according to the Plan Schuman,[57] which started

51 Case C-135/08 *Janko Rottmann*, EU:C:2010:104, [2010] ECR I-1449, para. 42.

52 Ibid., para. 42 (emphasis added).

53 Case C-34/09, *Ruiz Zambrano* v. *Office national de l'emploi (ONEm)*, EU:C:2010:560, [2010] ECR I-1177, para. 42 (emphasis added).

54 J. H. H. Weiler, 'Bread and Circus' (1998) 4 *CJEL* 223.

55 For a coherent theory of citizenship-building uniquely on this idea, see the work of Engin Isin, e.g. E. Isin, 'Citizenship in Flux' (2009) 29 *Subjectivity* 367.

56 On citizenship in the federal contexts, see e.g. V. Jackson, 'Citizenship and Federalism' in A. T. Aleinikoff and D. Klusmeyer (eds.), *Citizenship Today* (Carnegie Endowment for International Peace, 2001). For analyses of the European and comparative perspectives, see Schönberger, 'European Citizenship as Federal Citizenship' (above n. 20); Neuman, 'Fédéralisme et citoyenneté aux Etats Unis et dans l'Union européenne' (above n. 20); van der Mei, 'Freedom of Movement for Indigents' (above n. 20); Fischer, 'European Citizenship' (above n. 20); Strumia, 'Citizenship and Free Movement' (above n. 20); Timmermans, 'Lifting the Veil of Union Citizens' Rights' (above n. 20). For a truly magisterial analysis, see Schönberger, *Unionsbürger* (above n. 20).

57 See the Schuman Declaration (1950), https://europa.eu/european-union/about-eu/symbols/europe-day/schuman-declaration_en. Cf. J. H. H. Weiler,

the project to transform Europe over the decades to follow.[58] Federalism, famously characterised by Wechsler as 'the means and the price of the formation of the Union',[59] is thus among the core aspects of the Union's DNA,[60] a fundamental tool for bringing about a tamed co-operation-oriented constitutionalism to the Member States,[61] by limiting their democratic, economic[62] and most recently also monetary and budgetary decisions.[63] As Schönberger rightly put it, federalism in 'the European Union is uniquely European in the same sense that other federalisms are uniquely American, German, or Swiss'.[64] The dialogue about the exact placement of the vertical border of competences is constantly ongoing.[65]

The federal Union does not exist in disconnect from its inhabitants. It has always profiled itself as a coming-together of states[66] for the greater well-being of the individual, or

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'The Schuman Declaration as a Manifesto of Political Messianism' in J. Dickson and P. Eleftheriadis (eds.), *Philosophical Foundations of European Union Law* (Oxford University Press, 2012).

58 J. H. H. Weiler, 'Journey to an Unknown Destination' (1993) 31 *JCMS* 417.

59 H. Wechsler, 'The Political Safeguards of Federalism' (1954) 54 *Columbia Law Review* 543 (he obviously had the United States, not the EU, in mind).

60 Weiler, 'The Schuman Declaration as a Manifesto of Political Messianism' (above n. 57).

61 W. Kymlicka, 'Liberal Nationalism and Cosmopolitan Justice' in S. Benhabib (ed.), *Another Cosmopolitanism* (Oxford University Press, 2006); 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* (T. M. C. Asser Press, 2010), 147. For critical engagements with the recent breakdown of this strategy, see Jan-Werner Müller's works: J.-W. Müller, 'The EU as a Militant Democracy' (2014) 165 *Revista de estudios políticos* 141; 'Should the European Union Protect Democracy and the Rule of Law in its Member States?' (2015) 21 *ELJ* 141; and the contributions in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press, 2016); A. von Bogdandy and P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area* (Hart, 2015); M. Bánkuti et al., 'Hungary's Illiberal Turn' (2012) 23 *Journal of Democracy* 138. See also, R. Uitz, 'Can You Tell When an Illiberal Democracy Is in the Making?' (2015) 13 *ICON* 279; T.T. Koncewicz, 'Of Institutions, Democracy, Constitutional Self-Defence, and the Rule of Law' (2016) 53 *CML Rev* 1753; L. Pech and K.L. Scheppele, 'Illiberalism Withitn' (2017) 19 *CYELS* 3.

62 A. J. Menéndez, 'Whose Justice? Which Europe?' in D. Kochenov et al. (eds.), *Europe's Justice Deficit?* (Hart, 2015).

63 For the EMU members, that is: M. Adams et al. (eds.), *The Constitutionalisation of European Budgetary Constraints* (Hart, 2014); F. Amtenbrink and R. Repasi, 'Compliance and Enforcement in Economic Policy Coordination in EMU' in A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values* (Oxford University Press, 2017).

64 Schönberger, *Unionsbürger* (above n. 20), 67. Cf. B. Dubey, *La Repartition des competences au sein de l'Union européenne à la lumière du fédéralisme Suisse* (Helbing & Lichtenhahn, 2002).

65 Indeed, this is one of the main markers of a truly functioning federation. One could elevate it to the rank of a principle of ambivalence: O. Beaud, 'The Allocation of Competences in a Federation' in L. Azoulai (ed.), *The Question of Competence in the European Union* (Oxford University Press, 2014), 26.

66 The typology of federations is much richer than just the 'coming-together' type: A. Stepan, 'Federalism and Democracy' (1999) 10(4) *Journal of Democracy* 19. For a call to be flexible when operating within particular theoretical frameworks of federalism, see H.K. Gerken, 'Our Federalism(s)' (2012) 52 *William*

'integrative federalism' in Lenaerts's words,[67] consciously putting an emphasis on the 'legal heritage'[68] of freedom, prosperity and unity generated thereby. EU citizenship – 'the fundamental status'[69] – is in fact traceable to the ideas of the first President of the High Authority.[70] Indeed, it is the citizens who were supposed to be the core beneficiaries of integration: the internal market is for them to realise their potential[71] in whatever they chose to do; the area of freedom, security and justice is for them to enjoy across all the EU territory.[72] This is how the well-known story goes: the citizens endow the Union with legitimacy through their supposed democratic engagement and control,[73] and reap the benefits of integration – especially prosperity and peace – in return.[74]

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and Mary Law Review 1549. For good overviews of federalism literature see e.g. R.L. Watts, 'Federalism, Federal Political Systems, and Federations' (1998) 1 *Annual Review of Political Science* 117; D.J. Elazar, 'Contrasting Unitary and Federal Systems' (1997) 18 *International Political Science Review* 237.

67 Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (above n. 5), 263.

68 Case 26/62, *Van Gend en Loos*, EU:C:1963:1, [1963]; see also F. Jacobs (ed.), *EU Law and the Individual* (North Holland, 1976); O. Due, 'The Law-Making of the European Court of Justice' (1994) 63 *Nordic JIL*.

69 Case C-184/99, *Grzelczyk* v. *Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, EU:C:2001:458, [2001] ECR I-6193, para. 31. See also e.g. Case C-413/99, *Baumbast and R* v. *Secretary of State for the Home Department*, EU:C:2002:493, [2002] ECR I-7091; Case C-34/09, *Ruiz Zambrano* v. *Office national de l'emploi (ONEm)*, EU:C:2010:560, [2010] ECR I-1177, para. 41.

70 W. Hallstein, *Der Schuman Plan* (Vittorio Klostermann, 1951), 18; see also H.P. Ipsen and G. Nicolaysen, 'Haager Konferenz für Europarecht und Bericht über die aktuelle Entwicklung des Gemeinschaftsrechts' (1965) 18 *Neue Juristische Wochenschrift* 339. For the analysis of the history of the concept, see A. Wiener, *'European' Citizenship Practice* (Westview Press, 1998); W. Maas, 'The Genesis of European Rights' (2005) 43 *JCMS* 1009; W. Maas, *Creating European Citizens* (Rowman & Littlefield, 2007).

71 Article 3(3) TEU.

72 Article 3(2) TEU. Cf. H. van Eijken and T. Marguery, 'The Federal Entrenchment of Citizens in the European Union Member States' Criminal Laws' in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017). On EU territory, see O. Golynker, 'European Union as a Single Working-Living Space' in A. Halpin and V. Roeben (eds.), *Theorising the Global Legal Migration* (Hart, 2009), 151. Cf. D. Kochenov, 'The EU and the Overseas' in D. Kochenov (ed.), *EU Law of the Overseas* (Kluwer Law International, 2011).

73 A. von Bogdandy, 'The Prospect of a European Republic' (2005) 42 *CML Rev* 913; Lenaerts and Gutiérrez-Fons, 'Epilogue on EU Citizenship: Hopes and Fears' (above n. 6). The number of sceptical scholarly works refusing to take this story for granted is growing, however: Menéndez, 'Whose Justice? Which Europe?' (above n. 62); G. Davies, 'Social Legitimacy and Purposive Power' in D. Kochenov et al. (eds.), *Europe's Justice Deficit?* (Hart, 2015); Allott, 'European Governance and the Re-Branding of Democracy' (above n. 11); A. Somek, 'The Individualisation of Liberty' (2013) 4 *Transnational Legal Theory* 258; A. Somek, 'On Cosmopolitan Self-Determination' (2012) 1 *Global Constitutionalism* 405; J. Přibáň (ed.), *Self-Constitution of European Society* (Routledge, 2016).

74 Alexander Somek retells this cliché story much better (and dismisses it brilliantly): Somek, 'The Individualisation of Liberty' (above n. 73), 258–60. The recent economic crisis introduces an important correction to this part of the story too: integration does not necessarily bring about prosperity.

The core principles of European law, in particular supremacy and direct effect, which we are now prone to take for granted, were created with the citizen in mind, both as an objective and as a means of distilling these principles.[75] The 'anthropocentric nature'[76] of the Union is thus at least as prominent in the Union's core vision of itself as the federal idea of the vertical division of powers between the national and the supranational legal orders. Indeed, naming the citizen the direct beneficiary of supranational law and implying, quite esoterically probably, that such law is endowed by the citizens with democratic credentials[77] – two stories which date back to the early days of integration[78] – was a crucial step away from the classical visions of international law, potentially replacing 'diplomacy' logic with 'democracy' logic in Allott's terms.[79] These are then the stories lying behind the Union's constitutionalisation,[80] now the most accepted symbolic presentation of the Union's legal nature[81] and 'who cares what it "really" is?'[82]

That the Treaties speak of Europeans as citizens of the Union is an important Maastricht addition to the preceding era of a supranational citizenship hidden in the 'informal resources

75 B de Witte, 'Direct Effect, Primacy, and the Nature of the Legal Order' in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law*, 2nd edn (Oxford University Press, 2011).

76 Case C-378/97, *Wijsenbeek*, EU:C:1999:144, [1999] ECR I-6207, Opinion of AG Cosmas, para. 83.

77 Case 26–62, *van Gend en Loos*, EU:C:1963:1, [1963] (the case refers both to the role of the representative institutions at the supranational level and to the structural role of what is now Article 267 TFEU in empowering the individuals). Is it not ironic, as Alexander Somek has noted, that looking at the core of this argument, it is clear that the presumption of the lack of clarity of the law (which is at the core of the preliminary reference procedure) has been used to justify its supreme force in the national constitutional context?: Somek, 'Is Legality a Principle of EU Law?', available at: www.academia.edu/24524007/Is_legality_a_principle_of_EU_law.

78 For one of the early analyses, see e.g. P. Pescatore, 'Fundamental Rights and Freedoms in the System of European Communities' (1970) 18 *AJCL* 343; Jacobs (ed.), *EU Law and the Individual* (above n. 68).

79 P. Allott, 'The European Community Is Not the True European Community' (1991) 100 *YLJ* 2485. Even if, as Joseph Weiler reminds us, *Van Gend en Loos* could be decided uniquely on international law grounds too: J.H.H. Weiler, 'Rewriting *van Gend en Loos*' in Wiklund (ed.), *Judicial Discretion in European Perspective* (Kluwer, 2003).

80 J.H.H. Weiler, 'The Transformation of Europe' (1991) 100 *YLJ* 2401.

81 J.H.H. Weiler, *The Constitution for Europe* (Cambridge University Press, 1999); G. de Búrca and J.H.H. Weiler (eds.), *The Worlds of European Constitutionalism* (Cambridge University Press, 2011). But see P. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (Oxford University Press, 2010).

82 J.H.H. Weiler and U. Haltern, 'The Autonomy of the Community Legal Order' (1996) 37 *HILJ* 411, 422. For a brilliant account of the inherent limitations of the 'constitutional' and 'sovereign' narrative, see P. Eleftheriadis, 'Begging the Constitutional Question' (1998) 36 *JCMS* 255.

of the *acquis*' in Antje Wiener's poignant phrase.[83] Virtually every federation in the world is marked by an intricate layered citizenship arrangement[84] – either expressly articulated or not[85] – and the European Union is not an exception in this regard, boasting a meaningful supranational personal legal status from the very inception of the integration project.[86] The status is 'additional',[87] co-existing with the Member State nationalities and 'not replacing them'.[88] In fact, given the mutual interdependence between the two, from *van Gend en Loos*, where the supranational 'legal heritage' was conferred directly on the Member States nationals, to *Rottmann*, where the possession of the status of Member State national was potentially protected by the Union to ensure the continuous enjoyment of the supranational citizenship additional to it,[89] it would not be an exaggeration to claim that EU's federal constitutional nature and its citizenship matured together, gradually gaining the acceptance of commentators and practitioners, becoming entrenched ever more firmly in the law and the quotidian practice of human lives, until the point when the inhabitants of several Member States came to think of discrimination on the basis of nationality of a particular Member State as a horrible

83 A. Wiener, 'Assessing the Constructive Potential of Union Citizenship' (1997) 1 *European Integration Online Papers* 17. Abundant literature on EU citizenship predated the formal articulation of the status in the Treaties: Hallstein, *Der Schuman Plan* (above n. 70), 18; R. Plender, 'An Incipient Form of European Citizenship' in F. Jacobs (ed.), *EU Law and the Individual* (North Holland, 1976), 39; A. Evans, 'European Citizenship' (1984) 32 *AJCL* 679; A. Evans, 'European Citizenship' (1982) 45 *MLR* 497; G. van den Berghe and C.H. Huber, 'European Citizenship' in R. Bieber and D. Nickel (eds.), *Das Europa der zweiten Generation*, 2 vols. (Nomos, 1981), II; M. Sica, *Verso la cittadinanza europea* (LeMonnier, 1979); M. Stuart, 'Recent Trends in the Decisions of the European Court' (1976) 21 *Journal of the Law Society of Scotland* 40; A. Lhoest, 'Le Citoyen à la une de l'Europe' (1975) 18 *Revue du marché commune* 431; R. Plender, 'The Right of Free Movement in the European Communities' in J.W. Bridge et al. (eds.), *Fundamental Rights* (Sweet & Maxwell, 1973); E. Grabitz, *Europäisches Bürgerrecht zwischen Marktbürgerschaft und Staatsbürgerschaft* (Europa Union Verlag, 1970).

84 Jackson, 'Citizenship and Federalism' (above n. 56); Schönberger, 'European Citizenship as Federal Citizenship' (above n. 20); E. Delaney and L. Barani, 'The Promotion of "Symmetrical" European Citizenship' (2003) 25 *Journal of European Integration* 93.

85 Vicky Jackson demonstrated that not all the federations expressly recognize sub-national citizenships, using Canada and India as examples: Jackson, 'Citizenship and Federalism' (above n. 56), 134–7, 140.

86 Wiener, *'European' Citizenship Practice* (above n. 70); Condinanzi et al., *Cittadinanza del'Unione e libera circolazione delle persone* (above n. 70); cf. Kochenov and Plender, 'EU Citizenship' (above n. 10).

87 Article 20(1) TFEU continues as follows: 'and [shall] not replace national citizenship'.

88 Article 9 TEU. This is what can be referred as EU citizenship's '*Ius Tractum*' nature: Kochenov, '*Ius Tractum* of Many Faces' (above n. 12).

89 Case C-135/08, *Janko Rottmann*, EU:C:2010:104, [2010] ECR I-1449, para. 42. Cf. Kochenov, 'Annotation of Case C-135/08, *Rottmann*' (above n. 18); de Groot, 'Overwegingen over de *Janko Rottmann*-beslissing van het Europese Hof van Justitie' (above n. 18); Iglesias Sánchez, '¿Hacia una nueva relación entre la nacionalidad estatal y la cuidadanía europea?' (above n. 18).

aberration.[90] Thinking this way is most atypical, of course: let us not forget, after all, that the core task of citizenship in any system is to mark those who do and who do not 'belong', its core function being to serve as an instrument of exclusion.[91]

IV. Supranational Rights

It is true that a citizen can benefit from a legal system in a number of ways. Sometimes the very possession of the status can be perceived as gratifying: citizenship can trigger emotions. The most straightforward way to benefit from citizenship, however, is by availing oneself of the rights shaped, distributed and enforced by the legal system in question among its subjects. Modern citizenship, a formal, thin and equal status of legal attachment to a legal-political system *is* chiefly about rights. Even the Oxford English Dictionary defines 'citizenship' as 'the position or status of being a citizen with its rights and privileges'.[92]

In the EU context, as the internal market was gradually taking shape, it came to produce precisely this: an array of directly enforceable rights – the majority of them referred to as fundamental freedoms in contemporary eurospeak[93] – for the citizens to enjoy. Many more rights were gradually added later. The contemporary Part II TFEU, dealing with the citizenship of

90 J. Gerhards, 'Free to Move?' (2008) 10 *European Societies* 121.

91 E.g. M.J. Gibney, 'The Right of Non-Citizens to Membership' in C. Sawyer and B.K. Blitz (eds.), *Statelessness in the European Union* (Cambridge University Press, 2011) (and the literature cited therein).

92 *Oxford English Dictionary* (Oxford University Press, 2012). Cf. C, Joppke, 'The Inevitable Lightening of Citizenship' (2010) 51 *European Journal of Sociology* 37; Joppke, *Citizenship and Immigration* (Polity, 2010), Chapter 3; D. Kochenov, 'EU Citizenship without Duties' (2014) 20 *ELJ* 482; D. Husak, 'Ignorance of Law and Duties of Citizenship' (1994) 14 *Legal Studies* 105; M. Perry, 'Taking Neither the Rights-Talk Nor the "Critique of Rights" Too Seriously' (1984) 62 *Texas Law Review* 1405. While modern democratic citizenship based on duties is inconceivable, legal systems based on duties are certainly as viable as legal systems based on rights: classical Canon Law was built on the ideology of duties and the papal *plenitudo potestatis*, leading the state theorists of the Papal States to deny 'the very principle of a constitutional government as an objectionable heresy': R.C. Van Caeneghem, 'Constitutional History: Chance or Grand Design?' (2009) 5 *ECLR* 447, 457. Obligation is key to Jewish law too: R. Cover, 'Obligation: A Jewish Jurisprudence of the Social Order' (1985) 5 *Journal of Law & Religion* 65.

93 For a wonderful classical presentation of the EU internal market law built on the four freedoms, see C. Barnard, *The Substantive Law of the EU* (Oxford University Press, 2013). Cf. A. Tryfonidou, *The Impact of Union Citizenship on the EU Market Freedoms* (Hart, 2015) (and the literature cited therein). On the intricacies of the gradual transformation of 'freedoms' into 'rights', see A. Tryfonidou, 'The Federal Implications of the Transformation of the Market Freedoms into Sources of Fundamental Rights' in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017).

the Union, lists an array of rights, many of which have parallels in the free movement and freedom of establishment of workers elsewhere in the Treaties, introducing some tensions into the structure.[94]

Although unquestionably forming the most popular core, free movement and the other internal market and Part II TFEU rights, are not the only list of rights known to EU law. In parallel, and as a result of a cocktail of the whims of fashion and well-articulated (as well as fully justifiable) threats from the national courts,[95] basic human rights were added by the ECJ to this construct,[96] producing a two-tier rights system, now reinforced by a direct Treaty reference to the European Convention on Human Rights (ECHR) principles and the constitutional traditions of the Member States,[97] and a Charter of Fundamental Rights of the Union (CFR) at the supranational level to complement (and at times override and undermine) the national rights protection mechanisms.[98] The ECJ is not too rights-eager at times,[99] being officially reluctant to double the efforts of the Council of Europe in the same field.[100] Although EU law is by

94 Tryfonidou, 'The Federal Implications of the Transformation of the Market Freedoms into Sources of Fundamental Rights' (above n. 93); C. O'Brien, 'Social Blind Spots and Monocular Policy Making' (2009) 46 *CML Rev* 1107; S. O'Leary, 'Developing an Ever Closer Union between the Peoples of Europe?' Mitchell Working Paper 6/2008, 14–24.

95 The *Bundesverfassungsgericht* is widely considered the most vocal and authoritative among these. See BVerfGE 37, 271, 2 BvL 52/71 (29 May 1974); BVerfGE 73, 339, 2 BvR 197/83 (22 October 1986); BVerfGE 89, 155, 2 BvR 2134/92, 2 BvR 2159/92 (12 October 1993). For an analysis of the whole story see F.C. Mayer, 'Multilevel Constitutional Jurisdiction' in A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law*, 1st edn (Hart, 2006), 410–20. See also BVerfGE 63, 2267 (2009). For analysis, see e.g. D. Thym, 'In the Name of Sovereign Statehood' (2009) 46 *CML Rev* 1795; C. Wohlfahrt, 'The Lisbon Case' (2009) 10 *GLJ* 1277; A. Steinbach, 'The Lisbon Judgment of the German Federal Constitutional Court' (2010) 11 *GLJ* 367.

96 For the full story, see B. de Witte, 'The Past and Future of the European Court of Justice in the Protection of Human Rights' in P. Alston (ed.), *The EU and Human Rights* (Oxford University Press, 1999); J.H.H. Weiler and N.J.S. Lockhart, '"Taking Rights Seriously" Seriously' (I and II) (1995) 32 *CML Rev* 51 and 669, respectively.

97 Article 6(3) TEU. The provision reads as follows: 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'

98 Joined Cases C-411/10 and C-493/10, *N.S. and M.E.*, EU:C:2011:865, [2011] ECR I-13905, paras. 78–80; Case C-399/11, *Melloni* v. *Ministerio Fiscal*, EU:C:2013:107, [2013], paras. 37 and 63. See also Opinion 2/13, EU:C:2014:2454, [2014], paras. 193 and 195.

99 Spaventa, 'Earned Citizenship' (above n. 1); N. Nic Shuibhne, 'Limits Rising, Duties Ascending' (2015) 52 *CML Rev* 889; D. Kostakopoulou, 'When EU Citizens Become Foreigners' (2014) 20 *ELJ* 447.

100 For a critical analysis of this aspect of the recent jurisprudential moves, see e.g. G. Davies, 'The Right to Stay at Home: A Basis for Expanding European Family Rights' in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017); N. Nic Shuibhne, '(Some of) the Kids Are All Right' (2012) 49 *CML Rev* 349.

definition inspired by the ECHR, a clear message from the *Herren der Verträge* that ECHR law should be taken somewhat more seriously by the Court and other institutions[101] met with overwhelming resistance from the ECJ.[102] So the principled idea of substantively adhering to Council of Europe human rights standards is seemingly out of favour of late with the ECJ, for some hermeneutic procedural and quasi-structural – read essentially irrelevant, from the point of view of human rights protection – reasons.[103]

This does not ultimately alter the fact that the Court is obviously bound by the ECHR, even if not directly, in all that it does for two reasons in addition to the requirements of EU law itself.[104] The first are the expectations of the national constitutional courts – the *Solange* logic.[105] The second are the expectations of the European Court of Human Rights (ECtHR), which are no less legitimate. Both the national courts – and not only *Bundesverfassungsgericht* or *Corte Costituzionale* – and

101 Indeed, there can be no other explanation for the binding requirement on the EU to accede to the ECHR now contained in Article 6(2) ECHR. See also Protocol 8 relating to Article 6(2) TEU on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, OJ 2012 C326/273. Cf. V. Kosta et al. (eds.), *The EU Accession to the ECHR* (Hart, 2014); P. Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Hart, 2013). The subject is not new, of course. For a classical early treatment, see F. Capotorti, '*A propos de l'adhésion éventuelle des Communautés à la Convention européenne des droits de l'homme' in Das Europa der Zweite Generation* (N.P. Engel Verlag, 1981).

102 Opinion 2/13, EU:C:2014:2454, [2014]. Cf. D. Halberstam, '"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) 16 *GLJ* 105; and P. Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue' (2015) 38 *Fordham International Law Journal* 955. See also Opinion 2/94, EU:C:1996:140, [2014].

103 Opinion 2/13, EU:C:2014:2454, [2014], para. 192: '[W]hen implementing EU law, the Member States may, under EU law, be required *to presume* that fundamental rights have been observed by the other Member States, so that … they *may not check* whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.' Piet Eeckhout made a most persuasive argument that federalism and the issues of the division of competences between the EU and the Member States cannot, as such, possibly play any role here, since, no matter which level of government is responsible, the fundamental values, as expressed in the ECHR have to be respected, as rightly put by Eeckhout 'for the CJEU … to assume that responsibility and division of competences are one and the same, is not an example of proper judicial reasoning, to say the least'. It is thus clear that the ECJ simply deploys 'autonomy' as a flimsy pretext to ensure that its own jurisdiction is unchecked: Eeckhout 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue' (above n. 102).

104 Let us not forget that Article 6(3) TEU, codifying famous case law, refers to the ECHR as a source of general principles of EU law.

105 Mayer, 'Multilevel Constitutional Jurisdiction' (above n. 95), 410–20. On the scrutiny of the proposals aiming to extend *Solange* logic to make it police the essence of the national constitutional orders of the Member States using EU citizenship as a trigger, see J. Croon-Gestefeld, 'Reverse *Solange*: Union Citizenship as a Detour on the Route to European Rights Protection against National Infringements' in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017); D. Kochenov, 'On Policing Article 2 TEU Compliance' (2014) 33 *Polish YBIL* 145.

the ECtHR can always check whether fundamental rights are indeed respected in the EU. The first functions by potentially limiting the reach of EU law within the national legal system, while the second is about the real and present danger of the ECtHR changing its mind on the courtesy of *Bosphorus*, thereby declining to presume an equal level of protection of the said rights in EU law.[106]

The CFR is an ambiguous latecomer to this feast.[107] The principal point of it seems to lie in the limitations of Article 51 CFI and the fears of the Union's domination over the Member States in the rights field, using rights as a pretext to expand jurisdiction.[108] Probably ironically, the added value of this document, as Haltern so rightly underlined, is not absolutely clear, the long judicial and academic struggle with it notwithstanding: 'Does the … Charter offer better protection of fundamental rights? The Charter itself says no.'[109] Member

106 *Bosphorus* v. *Ireland*, App. No. 45036/98 (30 June 2005). The number of far-reaching discrepancies between EU law and ECtHR law seems to be growing, especially after the ECJ hinted in the ill-advised Opinion 2/13 that the EU's own structural considerations prevail over the protection of human rights, see Opinion 2/13, EU:C:2014:2454, [2014], para. 192: '[W]hen implementing EU law, the Member States may, under EU law, be required *to presume* that fundamental rights have been observed by the other Member States, so that … they *may not check* whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.' Piet Eeckhout made a most persuasive argument that federalism and the issues of the division of competences between the EU and the Member States cannot, as such, possibly play any role here, since, no matter which level of government is responsible, the fundamental values, as expressed in the ECHR have to be respected, as rightly put by Eeckhout 'for the CJEU … to assume that responsibility and division of competences are one and the same, is not an example of proper judicial reasoning, to say the least'. It is thus clear that the ECJ simply deploys 'autonomy' as a flimsy pretext to ensure that its own jurisdiction is unchecked: Eeckhout 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue' (above n. 102). Cf. Case C-542/13, *M'Bodj* v. *Belgium*, EU:C:2014:2452, [2014]; *S.J.* v. *Belgium*, App. No. 70055/10 (19 March 2015), especially the dissenting opinion of Judge Pinto de Albuquerque, paras. 3–4. Cf. also the ECJ's Joined Cases C-411/10 and C-493/10, *N.S. and M.E.*, EU:C:2011:865, [2011] ECR I-13905; and Case C-394/12, *Abdullahi* v. *Bundesasylamt*, EU:C:2013:813, [2013] with the ECtHR's *M.S.S.* v. *Belgium and Greece*, App. No. 30696/09 (21 January 2011) and *Tarakhel*, App. No. 29217/12 (4 November 2014).

107 G. de Búrca, 'The Drafting of the European Union Charter of Fundamental Rights' (2001) 26 *EL Rev* 126; P. Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39 *CML Rev* 945; P. Pescatore, 'La Coopération entre la Cour communautaire, les juridictions nationales et la Cour européenne des droits de l'homme dans la protection des droits fondamentaux: enquête sur un problème virtuel' (2003) 466 *Revue du marché commun* 151.

108 See also Article 6(1)(2) TEU. It is probably ironic that the former Vice-President of the Commission connected the proper functioning of EU law in the future with the necessity to abolish this provision (SPEECH/13/677, Centre for European Policy Studies, 2013) and that some scholars share this perspective: e.g. A. Jakab, 'The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law against EU Member States' in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press, 2016).

109 U. Haltern, 'On Finality' in A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law*, 1st edn (Hart, 2006). See also, J.H.H. Weiler, 'Editorial: Does the European Union Truly Need a Charter of Fundamental Rights?' (2000) 6 *ELJ* 95. For a magisterial analysis, see M. Dougan, 'Judicial Review

States have been steadily watering down the scope of the Charter, on the road to elevating it to the level of the primary law of the EU, the last round taking place at its incorporation into the structure of the Treaties in a binding form.[110] Combined with the preference for structure over substance in the area of human rights protection abundantly demonstrated by the ECJ, not the least in its Opinion 2/13, the picture that emerges is unsettling.[111] This puzzling reality cannot alter the basics described above, however: the essence of the Rule of Law consists precisely in making sure that the law is controlled by law,[112] necessarily implying being subjected to external checks, including those coming from international (i.e. the Council of Europe (CoE)) law.[113] The EU is lucky also to have the 'national' level in this respect: in the face of the serious arguments coming from the national courts, the ECJ is bound to oblige again. The picture of rights at stake is thus multifaceted and dynamic. What seems to be undoubtedly the case is that the rights protected by EU law cannot possibly be read as being limited by the Charter: approaching the Charter as a limit to fundamental rights protection – although theoretically possible[114] – would be an aberration of the law.

V. EU Citizenship Rights

There can be no doubt that the absolute majority of the supranational rights, whatever their precise terminological framing and specific source in the relevant case law, Treaties and legislation, has traditionally amounted in essence to supranational *citizenship* rights. The scope of the main bulk of these has traditionally been connected to a strictly delimited body of the 'nationals of the Member States for the purposes of

of Member State Action under the General Principles and the Charter' (2016) 53 *CML Rev* 1201, 1226–9.

110 For an analysis, see H. Kaila, 'The Scope of Application of the Charter of Fundamental Rights of the European Union in the Member States' in P. Cardonnel et al. (eds.), *Constitutionalising the EU Judicial System* (Hart, 2012) 299 (analysing the reframing of Article II-111 of the Treaty Establishing a Constitution for Europe, which never entered into force. This provision is now Article 51 CFR, however.

111 Kochenov, 'EU Law without the Rule of Law' (above n. 40).

112 Cf. G. Palombella, *È possibile la legalità globale?* (Il Mulino, 2012); G. Palombella, 'The Rule of Law and its Core' in G. Palombella and N. Walker (eds.), *Relocating the Rule of Law* (Hart, 2009).

113 R. Dworkin, 'A New Philosophy of International Law' (2013) 41 *Philosophy and Public Affairs* 2.

114 This could even be the reason behind drafting the CFR in the first place: A. Knook, 'The Court, the Charter, and the Vertical Division of Powers in the European Union' (2005) 42 *CML Rev* 367.

Community law'[115] (later formally branded 'EU citizens') finding themselves within the ambit of EU law: the scope *ratione personae* of EU law is, however dynamic, a relatively simple construct.[116]

Which rights should be associated with the status of EU citizenship is not a purely theoretical matter. In addition to giving citizenship meaning, rights have serious potential to reshape the federal delimitation of powers in the EU in the world where being able to enjoy the 'substance of rights associated with the status' of EU citizenship is key to the delimitation of the boundaries of the material scope of EU law. The interest in the exact framing of EU citizenship rights is on the rise,[117] the fifty-year-old practice of framing the majority of core supranational rights as *de facto* citizenship rights notwithstanding.

An argument has been made, championed by President Lenaerts, that only the rights explicitly mentioned in Part II TFEU are 'true' citizenship rights.[118] This view seems, with respect, too narrow. The arguments against such a narrow view are threefold. They can be grounded in the structure of rights and the textual analysis of Part II TFEU in the Treaties; in the role played by the (pre-)citizenship status throughout the history of EU law in the context of the framing of rights; as well as, most importantly, in the arguments relating to the essential and indispensable connection between citizenship and fundamental rights overwhelmingly accepted in the literature. To narrow the scope of EU citizenship rights to what we find mainly in Article 20 TFEU, which does not contain any core fundamental rights, would thus run counter to the historical functioning of the personal legal status in European supranational law, would be contrary to the Treaty text and structure and would also amount to implying that the EU has created what can essentially be referred to (given the list in Article 20 TFEU) as citizenship without rights – which is as implausible as it is unfortunate. Let us look at all the three groups of arguments against the narrow

115 Case C-192/99, *The Queen* v. *Secretary of State for the Home Department, ex parte Manjit Kaur* [2001] ECR I-1237. For a detailed discussion of this issue, see e.g. Kochenov, '*Ius Tractum* of Many Faces' (above n. 12), 186–90.

116 For the best scholarly account to date, see Spaventa, 'Seeing the Wood Despite the Trees?' (above n. 1). Cf. 'Earned Citizenship' (above n. 1).

117 See e.g. Lenaerts and Gutiérrez-Fons, 'Epilogue on EU Citizenship: Hopes and Fears' (above n. 6); S. Iglesias Sánchez, 'Fundamental Rights and Citizenship of the Union at a Crossroads' (2014) 20 *ELJ* 464; Kochenov, 'The Right to Have *What* Rights?' (above n. 4); Sharpston, 'Citizenship and Fundamental Rights' (above n. 7); van den Brink 'EU Citizenship and EU Fundamental Rights' (above n. 3). See also S. O'Leary, 'The Relationship between Community Citizenship and the Protection of Fundamental Rights in Community Law' (1995) 32 *CML Rev* 519.

118 See most recently Lenaerts and Gutiérrez-Fons, 'Epilogue on EU Citizenship: Hopes and Fears' (above n. 6).

reading poisoning the recent case law on EU citizenship starting with the structural-textual and proceeding to legal-theoretical and, lastly, legal-historical.

Text

The textual and structural arguments are very simple. Part II TFEU does *not* contain an exhaustive list of rights for EU citizens to benefit from. The language of the Treaty is unequivocal: Article 20(2) TFEU states: 'Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia … ', then lists the rights. That the list of these '"inter alia" rights' can be extended by using the special procedure of Article 25 TFEU thus most logically emerges, first, as a possibility offered by the drafters to enlarge the EU citizenship rights' list *sensu stricto* – the specific list of Article 20 TFEU, each element of which has a corresponding article elsewhere in Part II TFEU – as opposed to the list of rights 'provided for in the Treaties', including the unwritten ones, which, as Article 20(2) TFEU indicates, can also be tapped into by EU citizenship.[119] Alternatively, second and probably more importantly, Article 25 TFEU can provide a way to coin new rights hitherto unknown to EU law. Both the possibility of coining *sensu stricto* rights and of using the rights not available in the Treaties provide sufficient explanation for the existence of Article 25 TFEU. To use the provision meant to *extend* the scope of rights following an open list of examples as a justification (as Lenaerts and Gurtiérrez-Fons do)[120] for limiting the scope of rights, thereby depriving EU citizenship of all the breadth of the rights in the Treaties – which Article 20 TFEU refers to but does not expressly cite – is thus a most problematic move of legal reasoning with which it is difficult to agree, as Martijn van den Brink also underlines.[121]

119 One example of such a right among many others, which is unwritten and thus not expressly mentioned in Part II TFEU, is the ability to benefit from equality in a wholly internal situation also outside the territorial scope of EU law, which the Court relied on in Case C-300/04, *Eman and Sevinger*, EU:C:2006:545, [2006] ECR I-8055, para. 61. For analysis see D. Kochenov, 'EU Citizenship in the Overseas' in D. Kochenov (ed.), *EU Law of the Overseas* (Kluwer Law International, 2011) 199; L.F.M. Besselink, 'Annotation of *Spain* v. *UK*, *Eman en Sevinger*, and ECtHR Case *Sevinger and Eman* v. *The Netherlands*' (2008) 45 *CML Rev* 787.

120 Lenaerts and Gutiérrez-Fons, 'Epilogue on EU Citizenship: Hopes and Fears' (above n. 6).

121 M. J. van den Brink, 'The Origins and the Potential Federalising Effects of the Substance of Rights Test' in Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017).

When approached from a strictly textual perspective, the question concerning the precise extent of European citizenship rights[122] thus cannot receive a clear-cut answer; EU citizenship rights seems to be a much roomier category than the list of Article 20 TFEU. Lastly, as clearly follows from *Rottmann*,[123] having citizenship *as such* – the supranational-level status – is clearly protected by the EU law and unequivocally connected to an undisclosed set of rights, which is a construct arguably not rooted in Article 20 TFEU, but in the general broader understanding of what citizenship entails.

Theory

Second, turning to the legal-theoretical framing of the essence of citizenship, the commonly accepted vision of citizenship rights in the academic doctrine is much broader than the contents of the list in Article 20 TFEU. The fact that such a position on the issue is articulated by respected scholars too numerous to mention,[124] as well as illustrious members of the Court, renders this broad view of citizenship rights in the context of EU law eminently defendable.[125] Eleanor Sharpston articulates this position with crystal clarity:

> Whilst a civilised society extends the protection afforded by fundamental rights guarantees to all those who are present on their territory, this does not alter the fact that the people who (*par excellence*) have rights – including, of course, fundamental rights – are citizens. Article 19(1) TEU … states that '[t]he Court of Justice … shall ensure that in the interpretation and application of the Treaties the law is observed.' Viewed in that light, it becomes clear that it would be unthinkable for the Court to interpret the scope

122 Kochenov, 'The Right to Have *What* Rights?' (above n. 4).

123 Case C-135/08, *Janko Rottmann*, EU:C:2010:104, [2010] ECR I-1449, para. 42. Cf. Kochenov, 'Annotation of Case C-135/08, *Rottmann*' (above n. 18).

124 E.g. Iglesias Sánchez, 'Fundamental Rights and Citizenship of the Union at a Crossroads' (above n. 117); van den Brink, 'EU Citizenship and EU Fundamental Rights' (above n. 3); Hailbronner and Iglesias Sánchez, 'The European Court of Justice and Citizenship of the European Union' (above n. 3); J. Shaw, 'Citizenship of the Union', Jean Monnet Working Paper 6/1997; O'Leary, 'The Relationship between Community Citizenship and the Protection of Fundamental Rights in Community Law' (above n. 117).

125 Even the lawyers who see this position as largely undesirable agree on the soundness of the legal reasoning behind it, e.g. D. Düsterhaus, 'EU Citizenship and Fundamental Rights: Contradictory, Converging or Complimentary?' in Kochenov (ed.) *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017).

> and content of the citizenship provisions in the Treaty without recourse to fundamental rights.[126]

Advocate General Sharpston stated this very important point in her *Ruiz Zambrano* Opinion in similarly convincing fashion, advocating 'true citizenship, carrying with it a uniform set of rights and obligations in a Union under the rule of law in which respect for fundamental rights must necessarily play an integral part'.[127] This reasoning, which can only seem innovative in the through-the-looking-glass reality of the Union in Europe, gained traction. Advocate General Szpunar fully endorses Eleanor Sharpston's view in his Opinion in *Alfredo Rendón Marín* and *CS*, in the course of his discussion of the exact meaning of the 'substance of rights', refusing to treat 'fundamental rights' as separate from 'citizenship rights' and thus respecting the age-old tradition on which Eleanor Sharpston's approach equally rests:

> The term 'substance of the rights' employed by the Court inevitably calls to mind the concept of 'the essential content of the rights' or 'the essence of the rights', *particularly of fundamental rights* well known in the constitutional traditions of the Member States and in EU law as well.[128]

Indeed, we can safely agree that citizenship without fundamental rights would be too much of a departure from the basic tenets of constitutionalism[129] to allow even in the context of the constitutional market, which is the EU today.[130] For the Court to refuse fundamental rights to citizens could thus amount to failing to ensure that 'the law is observed' in the sense of Article 19(1) TEU – a move as shameful as a new *Stork* would have been.[131] In *Stork* the ECJ found almost sixty years ago that its obligation to ensure 'that the law is observed' prohibited it from taking into account the fundamental rights of the parties reflected *in casu* in the provisions of the German Basic law. In other words, it refused to take any fundamental rights arguments into account.

It is worrisome of course that *Stork* logic seems to be more and more *en vogue* in Kirchberg. If a constitutional system

126 Sharpston, 'Citizenship and Fundamental Rights' (above n. 7), 267.

127 Case C-34/09, *Ruiz Zambrano* v. *Office national de l'emploi (ONEm)*, ECLI:EU:C:2010:560, [2010] ECR I-1177, Opinion of AG Sharpston, para. 3.

128 Case C-165/14, *Rendón Marín* v. *Administración del Estado*, EU:C:2016:675, [2016]; and Case C-304/14, *Secretary of State for the Home Department* v. *C.S.*, EU:C:2016:75, [2016], Opinion of AG Szpunar, para. 128 (footnotes omitted).

129 Sharpston, 'Citizenship and Fundamental Rights' (above n. 7).

130 Nic Shuibhne, 'The Resilience of EU Market Citizenship' (above n. 41).

131 Case 1/58, *Stork* v. *High Authority*, EU:C:1959:4, [1959].

is alive and well, the fundamental rights of citizens cannot easily be ruled out due to a particularly narrow reading of the text of the Treaties in the name of a vague goal of protecting the delimitation of powers in a federation. A citizenship without fundamental rights is as problematic as a legal system which does not take fundamental rights into consideration as a matter of principle, while pretending to be constitutional. Indeed, this is precisely why *Stork* was overruled a lifetime ago. The protection of surrogate 'citizenship rights' devoid of 'fundamental rights' thus equals acting on a truly questionable assumption which could mean the denial of the very existence of citizenship in the EU. If taken seriously, such an assumption sits uneasy with the text of the Treaties and the principle of conferral, flying in the face of *Herren der Verträge* expressing an unequivocal wish 'to establish citizenship common to nationals of their countries'.[132] It is thus highly unlikely that the 'substance of rights' will merely remain a 'curious belly-rumble on the part of ECJ judges'[133] in Martijn van den Brink's no less curious turn of phrase. Protecting EU citizenship without protecting the fundamental rights of citizens is impossible and is bound to result in a legal aberration.

History

The third argument is historical. Historically, individuals with an EU-recognised legal status as Member State nationals for the purposes of EU (then EEC) law enjoyed – just as EU citizens do now – a much broader spectrum of rights 'in the Treaties' and elsewhere in written and also unwritten EU law than what President Lenaerts claims to be the scope of citizenship rights. Whether this has been stated directly in the Treaties[134] or not[135]

132 Recital 10 of the Preamble to the TEU (first appeared as recital 8 of the Preamble to the TEU, Maastricht, 7 February 1992, entered into force 1 November 1993, OJ 1992 C191/1, 31 ILM 253).

133 van den Brink, 'The Origins and the Potential Federalising Effects of the Substance of Rights Test' (above n. 121), 95.

134 As is the case with the provision of services, for instance, as confirmed in Case C-147/91, *Ferrer Laderer*, EU:C:1992:278, [1992] ECR I-4097, para. 7.

135 As is the case with the freedom of movement of workers, for instance: Case 75/63, *Hoekstra* v. *Administration of the Industrial Board for Retail Trades and Businesses*, EU:C:1964:19, [1964] ECR 347; Case 61–65, *Vaassen-Göbbels* v. *Management of the Beambtenfonds voor het Mijnbedrijf*, EU:C:1966:39, [1966] ECR 377; Case 44–65 *Hessische Knappschaft* v. *Maison Singer et fils*, EU:C:1965:122, [1965]; Case 66/85, *Lawrie-Blum* v. *Land Baden-Württemberg*, EU:C:1986:284, [1986] ECR 2121. For a drastic example of how far-reaching the implications of this are, showing that even the criminal liability of third-country nationals is potentially greater than that of EU nationals as a result for the same offence, cf. Case C-230/97,

did not matter much in practice. In the numerous contexts where supranational rights could most legitimately be construed as applicable to all the persons falling within the scope of EU law, the Court limited their reach to those in possession of supranational-level (i.e. EU citizenship) status.[136]

The type of brand applied to describe the personal status is largely irrelevant in this context: internal market law – and the crucial connection to the persons it would empower – functioned quite well before the word 'citizenship' formally made it into the Treaties.[137] 'Member State nationals for the purposes of EU law' described the same group of people which is now called 'EU Citizens' well,[138] even if the personal scope of supranational law has been significantly upgraded as a result of the Maastricht terminological shift.[139] Supranational rights were (and still largely are) there to endow the nationals of the Member States – Europeans[140] – with extra opportunities, *not* so much the foreigners present in Europe.[141] Once the Treaty of Maastricht made the formal move of introducing supranational citizenship into the framework of EU law, all the classical EU citizenship case law – in Eleanor Sharpston's enlightening and thorough analysis[142] – becomes about securing of the enjoyment of *fundamental rights* by the citizens in question.

Awoyemi, EU:C:1998:521, [1998] ECR I-6781 (Mr Awoyemi, a third-country national having moved from one Member State to another, failed to exchange his Community-model driving licence and could not question the proportionality of the criminal penalty imposed on him by the Belgian state since provisions on free movement in the EC Treaty did not apply to him) with Case C-193/94, *Skanavi and Chryssanthakopoulos*, EU:C:1996:70, [1996] ECR I-929.

136 Importantly, Article 18 TFEU case law is limited to EU citizens. For analysis, see P. Boeles, 'Europese burgers en derdelanders' (2005) 12 *Sociaal-economische wetgeving* 502. Cf. T. Hervey, 'Migrant Workers and Their Families in the European Union' in J. Shaw and G. More (eds.), *New Legal Dynamics of the European Union* (Clarendon Press, 1995); R. Plender, 'Competence, European Community Law and Nationals of Non-Member States' (1990) 39 *ICLQ* 599, 605.

137 Kochenov and Plender 'EU Citizenship' (above n. 10).

138 The obvious scholarly disappointment notwithstanding: Plender, 'An Incipient Form of European Citizenship' (above n. 83).

139 Spaventa, 'Seeing the Wood Despite the Trees?' (above n. 1).

140 The Member States are free to determine who 'their' EU citizens are, even if they make a narrow judgment, excluding some of their nationals from the scope of 'nationality for the purposes of EU law' (*Kaur*), which is the correct contemporary understanding of 'nationals of the Member States' in the context of Articles 9 TEU and 20 TFEU. This being said, the Member States are not free not to recognise each other's nationalities when legally conferred (*Micheletti*), discriminate between 'natural born' and naturalised citizens (Case 136/78, *Auer*, EU:C:1979:34, [1979] ECR 437, para. 28) or deviate from the core principles of EU law in ruling on their nationality (*Rottmann*).

141 The lines between citizens and foreigners are often blurred: P. Järve, 'Sovetskoje nasledije i sovremennaja ètnopolitika stran Baltii' in V. Poleshchuk and V. Stepanov (eds.) *Ètnopolitika stran Baltii* (Nauka, 2013); D. Kochenov and A. Dimitrovs, 'EU Citizenship for Latvian Non-Citizens' (2016) 38 *Houston JIL* 55.

142 Sharpston, 'Citizenship and Fundamental Rights' (above n. 7).

Ironically – and clearly reflecting the intention of the drafters[143] – the Charter has not affected this situation much: 'everybody' in the Charter is the 'everybody' the arcane Article 51 CFR can see: the 'everybody' within the (personal, for our purposes) scope of EU law. Let us not forget that the majority of those who are not in possession of EU citizenship are thus excluded – and this is in line with the Court's case law on the scope of non-discrimination on the basis of nationality: the core boundary between 'us' and 'them' in any citizenship law, including the supranational law in Europe.[144] This demonstrates with sufficient clarity EU citizenship's traditional, rather than innovative nature. EU citizenship thus fits surprisingly well within the ambit of Brubacker's proverbial definition as an ideal 'instrument and an object of social closure'.[145]

VI. Non-Citizens and EU law

The situation of EU citizens and third-country nationals in any Member State is categorically different,[146] allowing talk of an 'unfulfilled promise of European citizenship'.[147] The outgrowth of the personal scope of some of the freedoms to encompass third-country nationals is fairly recent[148] and only compares with difficulty with the intensity and scope of the rights EU citizens

143 Knook, 'The Court, the Charter, and the Vertical Division of Powers in the European Union' (above n. 114); de Búrca, 'The Drafting of the European Union Charter of Fundamental Rights' (above n. 107).

144 Kochenov, 'Neo-Mediaeval Permutations of Personhood in Europe' (above n. 11); F. Strumia, 'Remedying the Inequalities of Economic Citizenship in Europe' (2011) 17 *ELJ* 725.

145 R. Brubaker, *Citizenship and Nationhood in France and Germany* (Harvard University Perss, 1992), 23.

146 The EU and the Member States announced on a number of occasions that this difference is bound to be reduced, the third-country nationals gradually coming to be treated as EU citizens. However, as Directive 2003/109/EC overwhelmingly demonstrates the differences are there to stay. For the assessment of the legal position of the third-country nationals in the EU see e.g. Kochenov, '*Ius Tractum* of Many Faces' (above n. 12), 225–9; M. Hedemann-Robinson, 'An Overview of Recent Legal Developments at Community Level in Relation to Third country Nationals Resident within the European Union, with Particular Reference to the Case-law of the European Court of Justice' (2001) 38 *CML Rev* 525; H. Staples, *The Legal Status of Third-Country Nationals Resident in the European Union* (Kluwer Law International, 1999); I. Ward, 'Law and the Other Europeans' (1997) 35(1) *JCMS* 79; S. Peers, 'Towards Equality: Actual and Potential Rights of Third-Country Nationals in the European Union' (1996) 33 *CML Rev* 7.

147 W. Maas, 'Migrants, States, and EU Citizenship's Unfulfilled Promise' (2008) 12 *Citizenship Studies* 583.

148 D. Thym, 'EU Migration Policy and its Constitutional Rationale' (2013) 50 *CML Rev* 709. For a critical overview of the secondary legislation in force, see e.g. S. Carrera et al., 'Labour Immigration Policy in the EU' (2011) *CEPS Policy Brief* 240; D. Acosta Arcarazo, *The Long-Term Residence Status as a Subsidiary Form of EU Citizenship* (Brill-Nijhoff, 2011).

are endowed with:[149] almost all the entitlements third-country nationals enjoy in the EU legal system are *de facto* and also *de jure* dependent on a number of conditions, not stemming directly and exclusively from the status of legal presence in the EU, which allows questioning some of the literature glorifying the treatment of non-citizens in the EU, misleadingly comparing third-country nationals with citizens.[150] Agreeing with Étienne Balibar, fortress Europe still is, in numerous vital respects, a system of *apartheid européen*:[151] the internal market remains a Morgana's castle and thus has nothing to offer those who 'do not belong',[152] showing these people an entirely different Europe and an entirely different law compared to the one which EU citizens know and enjoy.[153]

EU law guarantees the non-availability of the core achievements of the united Europe to the (permanent resident) foreigner, numerous solemn declarations notwithstanding.[154] At issue is not the mistreatment of those who are not EU citizens but rather, the failure to extend the same legal, political and social reality to these people – let us not even call this 'rights' – ensuring that all that Europe has been about over the last half a century simply does not exist for them: free movement and non-discrimination on the basis of nationality are the first which spring to mind. Where an EU citizen benefits from the Union with its territory and opportunities, a foreigner is by law confined

149 For global overviews, see D. Thym and M.H. Zoetewij-Turhan (eds.), *Rights of Third-Country Nationals under EU Association Agreements* (Brill-Nijhoff, 2015); A. Wiesbrock, *Legal Migration in the European Union* (Brill-Nijhoff, 2010).

150 E.g. D. Acosta Arcarazo, 'Civic Citizenship Reintroduced?' (2015) 21 *ELJ* 200; A. Wiesbrock, 'Granting Citizenship-Related Rights to Third-Country Nationals' (2012) 14 *European Journal of Migration and Law* 63; D. Acosta Arcarazo, *The Long-Term Residence Status as a Subsidiary Form of EU Citizenship* (above n. 148).

151 É. Balibar, *Nous, citoyens d'Europe?* (La Découverte, 2001), 190–1.

152 For an enlightening perspective on how this could be changed: Boeles, 'Europese burgers en derdelanders' (above n. 136).

153 D. Kochenov and M. J. van den Brink, 'Pretending There Is No Union' in D. Thym and M.H. Zoetewij-Turhan (eds.), *Rights of Third-Country Nationals under EU Association Agreements* (Brill-Nijhoff, 2015) 63; S. Iglesias Sánchez, 'Fundamental Rights Protection for Third Country Nationals and Citizens of the Union' (2013) 15 *European Journal of Migration and Law* 137.

154 See, most importantly, Presidency Conclusions, Tampere European Council (15–16 October 1999). Para. 21 of the Conclusions reads as follows:

> The legal status of third-country nationals should be approximated to that of Member States' nationals. A person, who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit, should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens; e.g. the right to reside, receive education, and work as an employee or self-employed person, as well as the principle of non-discrimination *vis-à-vis* the citizens of the state of residence. The European Council endorses the objective that long-term legally resident third-country nationals be offered the opportunity to obtain the nationality of the Member State in which they are resident.

to Slovenia, France, or Portugal, with the borders as transparent, as often absurdly impenetrable. This is a story of unity hidden from foreign eyes.[155] Indeed, this is precisely what *apartheid* stands for:[156] imagining some other legal planet and legally exiling to it all those you do not want to accept in full, while allowing them to work in your town and walk the same streets.[157]

The picture could not be more different for the nationals of the Member States of the Union. 'Europe', whatever we find in the tabloids, is profoundly entrenched both as a reality and as an opportunity. The European Union has thus gradually emerged, to agree with Ulrich Everling, as 'a Federal Association of States and Citizens'.[158]

VII. Structural role for EU citizenship?

As we have seen, the scope of EU citizenship rights in the EU is clearly *not* limited to what Part II TFEU chose to list. Before and unless a broader array of rights of EU citizenship assumes the role of the federal denominator in the EU, EU citizenship remains largely one of the tools within the context of the internal market, summoned to serve the Union at the price of closing our eyes to the simple fact that as far as the framing of any legal system is concerned, the relationship between citizenship and the market is necessarily not harmonious, but in acute conflict: issues of equality and vulnerability cannot possibly be decided on the basis of someone's employability or market worth. Proportionality and legality lose their appeal, seeing their functions paralysed and their effectiveness, as legal tools, undermined,[159] in a context where market considerations as opposed to core human rights and values provide the frame for every outstanding issue. Instead of correcting absurdity and

155 Kochenov and van den Brink, 'Pretending There Is No Union' (above n. 153).

156 See e.g. South African Bantu Homelands Citizenship Act, 1970, which instituted the denaturalisation of the black majority during Apartheid. Cf. J. Dugard, 'South Africa's Independent Homelands' (1980) 10 *Denver Journal of International Law & Policy* 11.

157 For an extreme example, see K. Rundle, 'The Impossibility of an Exterminatory Legality' (2009) 59 *University of Toronto Law Journal* 65, 69–76. For a contemporary EU example, see Kochenov and Dimitrovs, 'EU Citizenship for Latvian Non-Citizens' (above n. 141); D. Kochenov et al., 'Do Professional Linguistic Requirements Discriminate?' (2013) 10 *European Yearbook of Minority Issues* 137.

158 Everling, 'The European Union as a Federal Association of States and Citizens' (above n. 27).

159 Somek, 'Is Legality a Principle of EU Law?' (above n. 77); Kochenov, 'EU Law without the Rule of Law' (above n. 40); S. Tsakyrakis, 'Disproportionate Individualism' in D. Kochenov et al. (eds.), *Europe's Justice Deficit?* (Hart, 2015).

prejudice, the Union is not infrequently their generator and enforcer.[160] The negative implications of this are amplified by the fact that the problematic status quo is so much part of the day-to-day that not enough scholarly and political attention is paid to the negative potential of the current deployment of citizenship in the context of EU's constitutionalism – the royal garb without an emperor, affecting the lives of us all.[161]

The fundamental dissonance between the essence of the internal market and the essence of citizenship notwithstanding, the main interpretation of the scope of Part II TFEU has to this day mostly been inspired by what Sir Richard Plender around forty years ago called the 'incipient form of European citizenship'.[162] This 'incipient form' was rooted in what is now the Internal Market, Title IV TFEU, *not* the EU Citizenship, Part II TFEU. It thus largely assumes that EU citizenship is only deployable as an element of the internal market. This is the *decorative citizenship of the EU*. The core mantras of decorative EU citizenship are simple. EU citizenship has consistently been presented by the powers that be as, even if not the least relevant, then definitely somewhat of an auxiliary factor in determining the crucial *koiné* of Union law and the delimitation of its depth and scope as the law stands to date. In the half-hearted and oft-quoted words of the Court of Justice, it is one of those parts of the *acquis* which is, quite astonishingly, not supposed to affect the material scope of EU law.[163] Federalism and the respect of the Member States' perceived autonomy and authority is usually the only sweet pill to make this excessive modesty *vis-à-vis* citizenship tolerable.[164]

Once it is recognised that the logic of citizenship makes it indispensable to separate EU citizenship from the internal market in terms of its day-to-day operation and, probably more importantly, in terms of the mode of shaping the scope of EU law, it becomes possible to speak of the emergence of a *structural citizenship of the EU*. While the structural and

160 Gráinne de Búrca had a sense that this was the case long ago, writing that equality 'does not have a single coherent role in [EU] law': 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) 14.

161 Weiler, *The Constitution for Europe* (above n. 81).

162 Plender , 'An Incipient Form of European Citizenship' (above n. 83), 39.

163 E.g. Joined Cases, C-64–5/96 *Uecker and Jacquet*, EU:C:1997:285, [1997] ECR I-3182, para. 23; Case C-148/02, *Garcia Avello* v. *Belgium*, EU:C:2003:539, [2003] ECR I-11613, para. 26.

164 N. Nic Shuibhne 'Recasting EU Citizenship as Federal Citizenship: What Are the Implications for the Citizen when the Polity Bargain Is Privileged?' in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017).

decorative functions of EU citizenship could possibly overlap in some circumstances, such overlaps, although probably tolerable for purely practical reasons, are unlikely to shape clarity and foster crisp legal reasoning. The two are natural rivals, clarity necessarily being occluded when they operate hand in hand.

The guiding role of the Court in the federal context is indispensable[165] – the institutional structure cannot of itself, contrary to what Herbert Wechsler used to advocate on the example of US federalism for instance,[166] be enough to build and ensure the lasting operation of a robust federal legal system.[167] It is thus for the Court to make the fundamental choices and to convince both the citizens and their Member States that the choices made are correct and viable in the long term. As EU law stands today, issues with justice and the overwhelming internal market bias radiating from EU institutions could be taken as signs that the Court has so far not been as effective in shaping clarity about the law as one would have wished.

The Court can always rely on internally coherent attempts to interpret the grievances of European citizens away.[168] Law alone is not enough, however – the social fabric matters too – and here the Court's efforts along internal market lines can prove problematic: a good court convinces and inspires. The first consideration for such a court to take into account is the constant necessity to remember that it is undesirable to interpret away the key notions' very core. Consistent attempts to move in this direction are bound to work against the legitimacy of the judiciary[169] and, by extrapolation, of the whole of the Union in the eyes of its citizens, thus emerging as utterly counterproductive.[170]

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165 Indeed, passive federal-level courts are dangerous: J.O. Newman, 'The "Old Federalism"' (1982–3) 15 *Connecticut Law Review* 21.

166 Wechsler, 'The Political Safeguards of Federalism' (above n. 59).

167 L.A. Baker, 'Putting the Safeguards Back into the Political Safeguards of Federalism' (2001) 46 *Villanova Law Review* 951.

168 K. Lenaerts, 'The Court's Outer and Inner Selves' in M. Adams et al. (eds.), *Judging Europe's Judges* (Hart, 2013). See also J.H.H. Weiler, 'Epilogue: Judging Europe's Judges – Apology and Critique' in the same volume.

169 The Courts' only basis for strong claims to legitimacy is reason: the more people are not convinced, the less legitimacy the institution enjoys: M. Kumm, 'The Idea of Socratic Contestation and the Right to Justification' (2010) 4 *Law and Ethics of Human Rights* 142.

170 O'Brien, 'Social Blind Spots and Monocular Policy Making' (above n. 94); O'Leary, 'Developing an Ever Closer Union between the Peoples of Europe?' (above n. 94). It is possible to speak about 'contamination' of economic free movement of persons law with some restrictive rules originating in the Court's inconclusive approach to EU citizenship. See Case C-94/07, *Raccanelli* v. *Max-Planck-Gesellschaft*, EU:C:2008:425, [2008] ECR I-5939, para. 37; Case C-213/05, *Geven* v. *Land Nordrhein-Westfalen*, EU:C:2007:438, [2007] ECR I-6347; Case C-158/07, *Förster* v. *Hoofddirectie van de Informatie Beheer Groep*, EU:C:2008:630, [2008] ECR I-8507.

In the light of the above the answer to the question ‘which role for European citizenship?’ is abundantly clear: EU citizenship, associated with the broadest array of rights, is bound to assume a structural role, should the ideals of dignity, equality, democracy and the rule of law prevail, to say nothing of the mere structural coherence of the primary law at hand, which must obviously be respected too.