



ARTICLES

SPECIAL SECTION – EU CITIZENSHIP, FEDERALISM AND RIGHTS *edited by Dimitry Kochenov*

EU CITIZENSHIP: SOME SYSTEMIC CONSTITUTIONAL IMPLICATIONS

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I. The EU boasts layered citizenships¹ – the nationalities of the Member States are supplemented by an “additional”,² “independent”³ EU-level citizenship granted to Member State nationals and impossible without the nationalities of the Member States.⁴ According to the Court of Justice, it is “destined to be the fundamental status of nationals of the Member States”.⁵ This prophesy from the shapers of the law is slowly being fulfilled, unsurprisingly, as the status has received a significant boost over recent decades,⁶ some disagreements in the literature about its occasional retreat notwithstanding.

¹ C. SCHÖNBERGER, *Unionsbürger: Europas föderales Bürgerrecht in vergleichender Sicht*, Tübingen: Mohr Siebeck, 2005.

² Art. 20 TFEU.

³ Opinion of AG Poiares Maduro delivered on 30 September 2009, case C-135/08, *Rottmann*, para. 23.

⁴ C. SCHÖNBERGER, *European Citizenship as Federal Citizenship: Some Citizenship Lessons of Comparative Federalism*, in *European Review of Public Law*, 2007, p. 63 *et seq.*; M. SZPUNAR, M.E. BLAS LÓPEZ, *Some Reflections on Member States Nationality: A Prerequisite of EU Citizenship and an Obstacle to Its Enjoyment*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: Cambridge University Press, 2017; H.U. JESSURUN D’OLIVEIRA, *Union Citizenship and Beyond*, in *EUI Working Papers LAW*, no. 15, 2018.

⁵ E.g. Court of Justice: judgment of 20 September 2001, case C-184/99, *Grzelczyk*, para. 31; judgment of 17 September 2002, case C-413/99, *Baumbast and R*, para. 82; judgment of 8 March 2011, case C-34/09, *Ruiz Zambrano*, para. 41; judgment of 2 June 2016, case C-438/14, *Bogendorff von Wolffersdorff*, para. 29; judgment of 5 June 2018, case C-673/16, *Coman and Others*, para. 30.

⁶ D. KOSTAKOPOULOU, *Ideas, Norms and European Citizenship: Explaining Institutional Change*, in *Modern Law Review*, 2005, p. 233 *et seq.*; G. PALOMBELLA, *Whose Europe? After the Constitution: A Goal-Based Citizenship*, in *International Journal of Constitutional Law*, 2005, p. 377 *et seq.*; D. KOCHENOV, *A Real European Citizenship: A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe*, in *Columbia Journal of European Law*, 2011, p. 55 *et seq.*

ing.⁷ Ulli Jessurun d'Oliveira's age of the "pies in the sky", if it was ever correctly diagnosed at all,⁸ is now definitely over, even if the question is open as to what precisely to count as the starting point of its demise. Candidates for the starting moment of EU citizenship abound. The point of citizenship's proverbial "birth" could overlap with *Ruiz Zambrano*,⁹ *Rottmann*,¹⁰ *Grzelczyk*,¹¹ *Martínez Sala*,¹² the Treaty of Maastricht,¹³ *Michelletti*,¹⁴ or could have even taken place earlier than that.¹⁵ Important rights effective throughout all EU territory accrue to this supranational citizenship, which stems directly from EU law, thus fulfilling the historic prophecy of *Van Gend en Loos* concerning the "constitutional heritage" of every European.¹⁶ However, this picture is nuanced by the fact that EU citizenship is sometimes, quite surprisingly, characterised as "not intended

⁷ O. GARNER, *The Existential Crisis of Citizenship of the European Union: The Argument for an Autonomous Status*, in *Cambridge Yearbook of European Legal Studies*, 2018, p. 116 *et seq.*; 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*, cit.

⁸ H.U. JESSURUN D'OLIVEIRA, *Union Citizenship: Pie in the Sky?*, in A. ROSAS, E. ANTOLA (eds), *A Citizens' Europe. In Search of a New Order*, London: Sage Publications, 1995, p. 58.

⁹ *Ruiz Zambrano*, cit.; D. KOCHENOV, *A Real European Citizenship*, cit.; S. PLATON, *Le champ d'application des droits du citoyen européen après les arrêts Zambrano, McCarthy et Dereci: de la boîte de Pandore au labyrinthe du Minotaure*, in *Revue trimestrielle de droit européen*, 2012, p. 21 *et seq.*; M. VAN DEN BRINK, *EU Citizenship and EU Fundamental Rights: Taking EU Citizenship Rights Seriously?*, in *Legal Issues of Economic Integration*, 2012, p. 273 *et seq.*; M. HAILBRONNER, S. IGLESIAS SÁNCHEZ, *The European Court of Justice and Citizenship of the European Union: New Developments Towards a Truly Fundamental Status*, in *Vienna Journal of International Constitutional Law*, 2011, p. 498 *et seq.*

¹⁰ Court of Justice, judgment of 2 March 2010, case C-135/08, *Rottmann*; 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?*, in *EUI Working Papers RSCAS*, no. 62, 2011; D. KOCHENOV, *Case C-135/08, Janko Rottmann v. Freistaat Bayern, Judgment of the Court (Grand Chamber) of 2 March 2010*, in *Common Market Law Review*, 2010, p. 1831 *et seq.*; G.-R. DE GROOT, *Overwegingen over de Janko Rottmann-beslissing van het Europese Hof van Justitie*, in *Asiel- en Migrantenrecht*, 2010, p. 293 *et seq.*; H.U. JESSURUN D'OLIVEIRA, *Ontkoppeling van nationaliteit en Unieburgerschap?*, in *Nederlands Juristenblad*, 2010, p. 785 *et seq.*; S. IGLESIAS SÁNCHEZ, *¿Hacia una nueva relación entre la nacionalidad estatal y la ciudadanía europea? TJUE Sentencia de 2 de marzo de 2010 (gran sala), Janko Rottmann C. Freistaat Bayern, Asunto C-135/08*, in *Revista de derecho comunitario europeo*, 2010, p. 933 *et seq.*

¹¹ *Grzelczyk*, cit.

¹² Court of Justice, judgment of 12 May 1998, case C-85/96, *Martínez Sala v. Freistaat Bayern*. See also Opinion of AG La Pergola delivered on 1 July 1997, case C-85/96, *Martínez Sala v. Freistaat Bayern*, para. 18.

¹³ C. CLOSA, *Citizenship of the Union and Nationality of Member States*, in *Common Market Law Review*, 1995, p. 487 *et seq.* Cf. S. O'LEARY, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship*, The Hague, Boston: Kluwer Law International, 1996.

¹⁴ Court of Justice, judgment of 7 July 1992, case C-369/90, *Micheletti and Others v. Delegación del Gobierno en Cantabria*, para.10.

¹⁵ W. MAAS, *Creating European Citizens*, Lanham MD: Rowman & Littlefield, 2007; F.G. JACOBS (ed.), *European Law and the Individual*, Amsterdam: North-Holland, 1976.

¹⁶ Court of Justice, judgment of 5 February 1963, case C-26/62, *Van Gend en Loos*. O. DUE, *The Law-Making Role of the European Court of Justice Considered in Particular from the Perspective of Individuals and Undertakings*, in *Nordic Journal of International Law*, 1994, p. 123 *et seq.*

to enlarge the scope *ratione materiae* [of EU law]¹⁷ – a *dictum* of the Court which is most likely *ultra vires*,¹⁸ and certainly significantly out of tune with the case law in other areas. Having been dissected and criticised by the author with Sir Richard Pledger elsewhere,¹⁹ it is most likely bad law by now.

I.1. Crucially, EU citizenship is one of those rare legal statuses which, although entirely dependent on the determination of the boundary of the material scope of the law which created it²⁰ – being a derivative supranational legal status produced by a Union founded on the principle of conferral²¹ – is not yet unquestionably endowed with fundamental rights.²² While numerous rights are obviously there – and this Special Section scrutinises an array of those in detail too, from free movement and family reunification to social assistance, citizens' initiative and fundamental rights in times of economic crisis, to freedom to move investments around the Union and voting rights – the dependence of any EU citizenship rights claims on the division of competences between the EU and the Member States unquestionably demonstrates the far-reaching limits of EU citizenship.²³ This is because the division of competences between the EU and the Member States generally follows what one can term as a cross-border or internal market logic.²⁴ Consequently, the actual usefulness of supranational citizenship in taming the negative externalities of the internal market, as well as in establishing a firm ethical and moral grounding and justification for EU citizenship outside the frame of the internal market

¹⁷ Court of Justice, judgment of 5 June 1997, joined cases C-64/96 and C-65/96, *Land Nordrhein-Westfalen v. Uecker and Jacquet v. Land Nordrhein-Westfalen*, para. 23.

¹⁸ Although Paul Craig does not use it as an example in his notable account: P. CRAIG, *The ECJ and Ultra Vires Action: A Conceptual Analysis*, in *Common Market Law Review*, 2011, p. 395 *et seq.*

¹⁹ D. KOCHENOV, R. PLENDER, *EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text*, in *European Law Review*, 2012, p. 369 *et seq.*

²⁰ See, for a very detailed account, D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit.

²¹ This being said, it is impossible to claim that this derivative status does not impact, in the most direct way, the rules of conferral and withdrawal of the nationalities of the Member States, from which it is derived: D. KOCHENOV, *Member State Nationalities and the Internal Market*, in N. NIC SHUIBHNE, L.W. GORMLEY (eds), *From Single Market to Economic Union: Essays in Memory of John A. Usher*, Oxford: Oxford University Press, 2012, p. 241 *et seq.*

²² E. SHARPSTON, *Citizenship and Fundamental Rights – Pandora's Box or a Natural Step Towards Maturity?*, in P. CARDONNEL, A. ROSAS, N. WAHL (eds), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh*, Oxford: Hart, 2012, p. 245 *et seq.* Cf. S. IGLESIAS SÁNCHEZ, *Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison?*, in *European Law Journal*, 2014, p. 464 *et seq.*; D. KOCHENOV, R. PLENDER, *EU Citizenship: From an Incipient Form to an Incipient Substance?* cit.; P. CARO DE SOUSA, *Quest for the Holy Grail – Is a Unified Approach to the Market Freedoms and European Citizenship Justified?*, in *European Law Journal*, 2014, p. 499 *et seq.*

²³ M. VAN DEN BRINK, *EU Citizenship and (Fundamental) Rights: Empirical, Normative, and Conceptual Problems*, in *European Law Journal*, 2018, p. 1 *et seq.*

²⁴ See, most importantly, A. TRYFONIDOU, *Reverse Discrimination in EC Law*, The Netherlands: Kluwer Law International, 2009.

has been, although theoretically possible,²⁵ truly feeble if not non-existent in practice.²⁶ The result has been the weakening of the EU's justice claims,²⁷ and the punishment and undermining of the life-chances of those citizens who fail to qualify as "good enough" when scrutinised through the internal market lens.²⁸ One of the core features of the EU as it stands consists, accordingly, in ignoring the pain of such unworthy citizens and failing to help those in need, explaining away their plight, as Charlotte O'Brien among others has splendidly demonstrated.²⁹ As far as EU law is concerned, those who are not "good enough" for its scope do not exist, falling between the cracks in the dogmas of the internal market rationality.

It is while burnishing the label on this citizenship which fosters its internal market logic, ignoring the vulnerable instead of defending citizenship bearers from market externalities, that the oxymoronic "market citizenship" was born.³⁰ With respect to those proclaiming it – and they are no doubt correct in their meticulous engagement with the case law³¹ – "market citizenship" is without doubt a misnomer: it simply cannot be taken seriously unless deployed, as the majority of the literature has done, purely descriptively. The reason for this is that to do more requires an inevitable reversal of all the key principles informing the understanding of citizenship and the reasons for the articulation of the term in the first place, which occurs when the full enjoyment of this citizenship's rights and status is made the prize for one's employability and history of travel around the Union, instead emerging from any idea of equality before the law and protecting the vulnerable.³²

²⁵ E.g. D. KOCHENOV, *The Right to Have What Rights? EU Citizenship in Need of Clarification*, in *European Law Journal*, 2013, p. 502 *et seq.*

²⁶ C. O'BRIEN, *Civis Capitalist Sum: Class as the New Guiding Principle of EU Free Movement Rights*, in *Common Market Law Review*, 2016, p. 937 *et seq.*; G. PEEBLES, "A Very Eden of the Innate Rights of Man"? A Marxist Look at the European Union Treaties and Case Law, in *Law and Social Inquiry*, 1997, p. 581 *et seq.*

²⁷ G. DE BÚRCA, *Conclusion*, in D. KOCHENOV, G. DE BÚRCA, A. WILLIAMS (eds), *Europe's Justice Deficit?*, Oxford, Portland: Hart, 2015, p. 459 *et seq.*

²⁸ That a citizenship would punish those who do not qualify as "good citizens" in the eyes of the authority in charge is one of the core functions of the legal status. On this count the EU is not at all atypical, compared with any other public authority in the world, which selects "citizens" among the available bodies, whatever criteria are employed: D. KOCHENOV, *Citizenship*, Cambridge MA: MIT Press, 2019 (forthcoming).

²⁹ C. O'BRIEN, *Unity in Adversity: EU Citizenship, Social Justice and the Cautionary Tale of the UK*, Oxford, Portland: Hart, 2017.

³⁰ N. NIC SHUIBHNE, *The Resilience of EU Market Citizenship*, in *Common Market Law Review*, 2010, p. 1597 *et seq.*; C. O'BRIEN, *Civis Capitalist Sum*, cit.

³¹ N. NIC SHUIBHNE, *Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship*, in *Common Market Law Review*, 2015, p. 889 *et seq.*; N. NIC SHUIBHNE, *Recasting EU Citizenship as Federal Citizenship*, cit., p. 147 *et seq.*; M. VAN DEN BRINK, *EU Citizenship and (Fundamental) Rights*, cit.

³² See, for a very detailed treatment, D. KOCHENOV, *On Tiles and Pillars: EU Citizenship as the Federal Denominator*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 3.

All the talk of democracy and rights³³ within the unchangeable market citizenship paradigm³⁴ could thus be nothing but a renewed entrenchment and glorification of the “wholly internal situation” and “reverse discrimination” thinking accompanied by the presumption that those who opt to remain outwith the scope of EU law³⁵ – by staying at home for instance³⁶ – deserve zero protection and respect within the legal context of the Union. This is an old and deeply troubling story ably characterised by Joseph Weiler as the loss by the Union of a mantle of ideals – and not much has changed in all the years since this characterisation appeared in print.³⁷ By connecting human worth and dignity, any claim to rights, to employability and the mantras of a citizen’s usefulness in the context of the Internal Market, “market citizenship” is the epitome of the ideological space where a human being is openly – not tacitly – commodified, and those evading commodification or perceived as not useful enough are not deemed worthy of the quasi-citizenship at stake.³⁸ They are not “market citizens” and any other citizenship is apparently not on offer.

The result of this is troubling. When made dependent on the division of competences in the scope of the rights it protects, EU citizenship is turned into a neo-mediaeval “citizenship of personal circumstances”:³⁹ a judge first needs to see your full *curriculum vitae* with all your jobs, travel history,⁴⁰ the nationality of your current and former spouses,⁴¹ partners and children,⁴² and bank accounts,⁴³ to see whether you – a

³³ K. LENAERTS, J.A. GUTIÉRREZ-FONS, *Epilogue on EU Citizenship: Hopes and Fears*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 751 *et seq.*; S. PLATON, *The Right to Participate in the European Elections and the Vertical Division of Competences in the European Union*, in *European Papers*, Vol. 3, 2018, no. 3, www.europeanpapers.eu, p. 1245 *et seq.*

³⁴ G. DAVIES, *Social Legitimacy and Purposive Power: The End, the Means and the Consent of the People*, in D. KOCHENOV, G. DE BÚRCA, A. WILLIAMS (eds), *Europe’s Justice Deficit?*, cit., p. 259 *et seq.*; A. SOMEK, *Europe: Political, Not Cosmopolitan*, in *European Law Journal*, 2014, p. 142 *et seq.*

³⁵ E.g. H. KROEZE, *Distinguishing Between Use and Abuse of EU Free Movement Law: Evaluating Use of the “Europe-route” for Family Reunification to Overcome Reverse Discrimination* in *European Papers*, Vol. 3, 2018, no. 3, www.europeanpapers.eu, p. 1209 *et seq.*

³⁶ S. IGLESIAS SÁNCHEZ, *A Citizenship Right to Stay? The Right Not to Move in a Union Based on Free Movement*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 371 *et seq.*; G. DAVIES, *A Right to Stay at Home: A Basis for Expanding European Family Rights*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 468.

³⁷ J.H.H. WEILER, *Bread and Circus: The State of the European Union*, in *Columbia Journal of European Law*, 1998, p. 231.

³⁸ G. PEEBLES, “A Very Eden of the Innate Rights of Man?”, cit.; P. CARO DE SOUSA, *Quest for the Holy Grail*, cit.; C. O’BRIEN, *Civis Capitalist Sum*, cit.; D. KOCHENOV, *On Tiles and Pillars*, cit., pp. 3-82.

³⁹ D. KOCHENOV, *The Citizenship of Personal Circumstances in Europe*, in D. THYM (ed.), *Questioning EU Citizenship*, Oxford, Portland: Hart, 2018, p. 37 *et seq.*

⁴⁰ Court of Justice, judgment of 5 May 2011, case C-434/09, *McCarthy*, N. NIC SHUIBHNE, *(Some of) the Kids Are All Right: Comment on McCarthy and Dereci*, in *Common Market Law Review*, 2012, p. 349 *et seq.*

⁴¹ Court of Justice, judgment of 12 July 2005, case C-403/03, *Schempp*; E. SPAVENTA, *Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and Its Constitutional Effects*, in *Common Market Law Review*, 2008, p. 21, note 34.

citizen – “deserve” any EU citizenship rights. This story would not be complete without mentioning that, unlike in the earlier case law, dual nationality could be interpreted against you, as David de Groot’s ground-breaking research has shown.⁴⁴ Neither disability nor pregnancy will help characterise you as a “good” EU citizen either.⁴⁵ A truly minor crime will disqualify you from supranational rights, dignity and respect.⁴⁶ Not even being deemed a worker is enough anymore:⁴⁷ EU law will eagerly side with the Member States oppressing their ethnic and linguistic, and presumably other minorities, as long as frowning upon these groups is part of their “constitutional identity”, thus capable of creating a *de facto* wholly internal situation, depriving “market citizens” otherwise not unworthy *per se* of rights under EU law.⁴⁸ The result is a self-proclaimed constitutional system without a free and self-determining constitutional subject endowed with rights:⁴⁹ a neo-mediaeval construct where liberty and entitlements are strictly apportioned based on esoteric considerations rooted in personal histories, wealth, potential and actual employability, and travel and the willingness to do so: a triumph of contin-

⁴² *Coman and Others*, cit.; Court of Justice, judgment of 14 November 2017, case C-165/16, *Lounes*. Very much depends on whether one of the spouses is an EU citizen and whether this citizenship counts: also S. TITSHAW, *Same-Sex Spouses Lost in Translation? How to Interpret ‘Spouse’ in the EU Family Migration Directives*, in *Boston University International Law Journal*, 2016, p. 58.

⁴³ Court of Justice: judgment of 10 October 2013, case C-86/12, *Alokpa and Moudoulo*; judgment of 19 October 2004, case C-200/02, *Zhu and Chen*. Cf. E. SPAVENTA, *Earned Citizenship – Understanding Union Citizenship through Its Scope*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 204 *et seq.*; C. O'BRIEN, *Civis Capitalist Sum*, cit.

⁴⁴ D.A.J.G. DE GROOT, *Free Movement of Dual EU Citizens*, in *European Papers*, Vol. 3, 2018, no. 3, www.europeanpapers.eu, p. 1075 *et seq.*

⁴⁵ C. O'BRIEN, *Union Citizenship and Disability: Restricted Access to Equality Rights and the Attitudinal Model of Disability*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 509 *et seq.*; C. O'BRIEN, *Civis Capitalist Sum*, cit.

⁴⁶ U. BELAVUSAU, D. KOCHENOV, *Kirchberg Dispensing the Punishment: Inflicting ‘Civil Death’ on Prisoners in Onuekwere (C-378/12) and M.G. (C-400/12)*, in *European Law Review*, 2016, p. 557 *et seq.*; C. O'BRIEN, *Real Links, Abstract Rights and False Alarms: The Relationship between the ECJ's “Real Link” Case Law and National Solidarity*, in *European Law Review*, 2008, p. 643 *et seq.*

⁴⁷ This development was predicted by Síofra O'Leary long ago: S. O'LEARY, *Developing an Ever Closer Union between the Peoples of Europe?: A Reappraisal of the Case-Law of the Court of Justice on the Free Movement of Persons and EU Citizenship*, in *Edinburgh Mitchell Working Papers*, no. 6, 2008, pp.14-24. See, for a majestic treatment, A. TRYFONIDOU, *Impact of Union Citizenship on the EU's Market Freedoms*, Oxford, London: Hart, 2016.

⁴⁸ Court of Justice, judgment of 12 May 2011, case C-391/09, *Runevič-Vardyn and Wardyn*. The case is analysed in this vein in D. KOCHENOV, *When Equality Directives are Not Enough: Taking an Issue with the Missing Minority Rights Policy in the EU*, in U. BELAVUSAU, K. HENRARD (eds), *EU Anti-Discrimination Law beyond Gender*, Oxford, London: Hart, 2018, p. 119 *et seq.* Cf. A. ŁAZOWSKI E. DAGILYTÉ, P. STASINOPoulos, *The Importance of Being Earnest: Spelling of Names, EU Citizenship and Fundamental Rights*, in *Croatian Yearbook of European Law and Policy*, 2015, p. 1 *et seq.*

⁴⁹ Cf. L. AZOULAI, S. BARBOU DES PLACES, E. PATAUT (eds), *Constructing the Person in EU Law: Rights, Roles, Identities*, Oxford, Portland: Hart, 2016.

gent and morally vacant acts necessary to be performed to enter the Union's field of vision and thereby become endowed with personality in its law, which is the law which purports to have claimed you as its citizen, on top of your own national legal order.⁵⁰

The main outcome of such an approach to the individual is as atypical as it is troubling: before a person's CV and bank accounts have been investigated, the most fundamental, essential legal principles of Western constitutionalism will not apply. This especially concerns *equality before the law*, which does not kick in if you are too poor, like Miss Dano; too pregnant, like Jessy Saint Pris;⁵¹ or too Polish for the Lithuanian State, like Małgorzata Runiewicz. We are thus confronted by the lack of equality before the law as the main starting principle for dealing with EU citizens in a context where the EU produces and constantly re-enacts a neo-mediæval presumption of difference the goodness of which is presumed and does not *per se* require justification.⁵² Why this is the case has been explained to the citizens a thousand times: Niamh Nic Shuibhne might indeed be right that this is the Court willing "to accept the limitations coded into the current federal bargain".⁵³ Yet it is not the protection of a perfect Constitution from human rights concerns – which the Court famously did, *inter alia*, in Opinion 2/13⁵⁴ – but taking such concerns seriously, which ensures that legal systems are both respected and effective. Honouring the bargain, when viewed in this light, could obviously be a big problem.⁵⁵

I.2. Armed with respect for the federal bargain which requires blind faith in and strict adherence to a context-sensitive neo-mediævalism, EU citizenship sends two signals. Firstly, it significantly empowers the willing Member State nationals, "good enough" in the eyes of the supranational authorities, to fall within the scope of EU law. Volumes have been written about the freedom of movement of persons and the right is significant. The very horizon of opportunities of all Member State nationals is broadened by the intercitizenship logic of the supranational status, working as a package of

⁵⁰ D. KOCHENOV, *On Tiles and Pillars*, cit., p. 3 *et seq.*

⁵¹ Court of Justice, judgment of 19 June 2014, case C-507/12, *Saint Prix*; S. CURRIE, *Pregnancy-Related Employment Breaks, the Gender Dynamics of Free Movement Law and Curtained Citizenship: Jessy Saint Prix*, in *Common Market Law Review*, 2016, p. 543 *et seq.*

⁵² D. KOCHENOV, *Neo-Mediaeval Permutations of Personhood in the European Union*, in L. AZOULAI, S. BARBOU DES PLACES, E. PATAUT (eds), *Constructing the Person in EU Law: Rights, Roles, Identities*, cit., p. 133 *et seq.*

⁵³ N. NIC SHUIBHNE, *Recasting EU Citizenship as Federal Citizenship*, cit., p. 176.

⁵⁴ Court of Justice, opinion 2/13 of 18 December 2014, para. 170. P. ECKHOUT, *Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarky?*, in *Fordham International Law Journal*, 2015, p. 955 *et seq.*; D. KOCHENOV, *EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?*, in *Yearbook of European Law*, 2015, p. 94 *et seq.*

⁵⁵ J. BALKIN, *Agreements with Hell and Other Objects of Our Faith*, in *Fordham Law Review*, 1997, p. 1703 *et seq.*

dozens of national legal statuses fused into one.⁵⁶ Secondly, being silent on the scope of the law, EU citizenship is constantly presented to us as relatively weak, all the numerous successes reported notwithstanding. Crucially, it is respectful even when the issues to hand unquestionably fall within the scope of EU law: if a Member States wants to ignore EU law to grant fewer rights to women – it can.⁵⁷ If a Member State wishes to continue abusing its own ethnic minorities by denying them a right to a name – it can.⁵⁸ Both the rights of individuals and the sovereignty of the Member States thus stand protected – to a point.⁵⁹ The flexibility of this arrangement seems to be key, however, which seems to be fundamental to the proverbial “federal bargain”. Moreover, if a Member State you are associated with leaves the EU, your supranational “new” citizenship is thereby extinguished: it is not that personal after all.⁶⁰

II. Although the literature on EU citizenship has been booming in recent years, the absolute majority of analyses have been confined to reactions to the ever-growing and byzantine case law and trying to make sense of the Court’s hints in various directions.⁶¹ This is no doubt the core of legal research and some of the contributions developing scholarship in this direction have been spectacularly illuminating.⁶² The majority of the contributions to this Special Section fit equally well within this established tradition. But what if we tease the “true” lawyers a little and entertain scrutiny of the very context of EU law, using its citizenship as a pretext, in the vein of Pedro Caro de Sousa, Agustín Jo-

⁵⁶ D. KOCHENOV, *Interlegality – Citizenship – Intercitizenship*, in J. KLABBERS, G. PALOMBELLA (eds), *The Challenge of Interlegality*, Cambridge: Cambridge University Press, 2019 (forthcoming); O. GOLYNKER, *European Union as a Single Working-Living Space*, in A. HALPIN, V. ROEBEN (eds.), *Theorising the Global Legal Order*, Oxford: Hart, 2009, p. 151.

⁵⁷ C. O’BRIEN, *The ECJ Sacrifices EU Citizenship in Vain: Commission v. United Kingdom*, in *Common Market Law Review*, 2017, p. 209 *et seq.*

⁵⁸ *Runevič-Vardyn and Wardyn*, cit.; D. KOCHENOV, *When Equality Directives are Not Enough*, cit.

⁵⁹ K. LENAERTS, “*Civis Europaeus Sum*” From the Cross-Border Link to the Status of Citizen of the Union, in P. CARDONNEL, A. ROSAS, N. WAHL (eds), *Constitutionalising the EU Judicial System*, cit., p. 213 *et seq.*; N. NIC SHUIBHNE, *Recasting EU Citizenship as Federal Citizenship*, cit.; D. CARTER, M. JESSE, *The “Dano Evolution”: Assessing Legal Integration and Access to Social Benefits for EU Citizens*, in *European Papers*, Vol. 3, 2018, no. 3, www.europeanpapers.eu, p. 1179 *et seq.*

⁶⁰ M. VAN DEN BRINK, D. KOCHENOV, *Against “Associate EU Citizenship”*, in *Journal of Common Market Studies*, 2019 (forthcoming). But see D. KOSTAKOPOULOU, *Scala Civium: Citizenship Templates Post-Brexit and the European Union’s Duty to Protect EU Citizens*, in *Journal of Common Market Studies*, 2018, p. 854 *et seq.*

⁶¹ See, e.g. a great example of the opposing interpretations of the same case law by two of the most eminent scholars of EU citizenship: N. NIC SHUIBHNE, *Recasting EU Citizenship as Federal Citizenship*, cit., and E. SPAVENTA, *Earned Citizenship*, cit.

⁶² E.g. F. WOLLENSCHLÄGER, *A New Fundamental Freedom Beyond Market Integration: Union Citizenship and Its Dynamics for Shifting the Economic Paradigm of European Integration*, in *European Law Journal*, 2010, p. 34 *et seq.*; N. NIC SHUIBHNE, *Limits Rising, Duties Ascending*, cit.

sé Menéndez, Charlotte O'Brien and Alexander Somek.⁶³ Questioning the established story can be a useful way to see the well-known case law, as well as all the twists and turns of the European citizenship story, in quite a different light.

It can be argued that EU citizenship works against the established understandings of *a) statehood, b) citizenship, c) democracy and d) equality*, situating these in the context of cosmopolitan constitutionalism.⁶⁴ The current dynamics illustrate the well-noted Joppkean global weakening of citizenship⁶⁵ and the rise of a new way of organising political communities.⁶⁶ European citizenship exemplifies key future global trends in citizenship and the development of constitutionalism, even if as already mentioned, with a necessary, surprising neo-mediaeval twist.⁶⁷

II.1. EU citizenship rights are of great importance, enlarging citizens' horizons of opportunities by a factor of twenty-eight:⁶⁸ work, residence, family reunification and non-discrimination on the basis of nationality where EU law is applicable – all have become claims to be turned against the government of *any* participating State, whether an EU member or not. Moreover, the direct effect of EU law, including its citizenship rights provisions, ensures that national law cannot prevail in the face of EU citizens' supranational entitlements.⁶⁹ States stand "humiliated",⁷⁰ obviously enjoying no power – legally at least – to close their territories and their nations to *others*, however friendly these are proclaimed to be. This touches the core of statehood, if not nationhood: no Member State can decide (some exceptions notwithstanding)⁷¹ who among the EU's citizens may enter its territory, reside and work there. Going further, a similar regime applies to a huge number of foreigners too, be they EEA nationals, third country national family

⁶³ E.g. C. O'BRIEN, *Unity in Adversity*, cit.; A.J. MENÉNDEZ, *Whose Justice? Which Europe?*, in D. KOCHENOV, G. DE BURCA, A. WILLIAMS (eds), *Europe's Justice Deficit?*, cit., p. 137 *et seq.*; P. CARO DE SOUSA, *Quest for the Holy Grail*, cit.; A. SOMEK, *On Cosmopolitan Self-Determination*, in *Global Constitutionalism*, 2012, p. 405 *et seq.*

⁶⁴ A. SOMEK, *The Cosmopolitan Constitution*, Oxford: Oxford University Press, 2014.

⁶⁵ C. JOPPKE, *The Inevitable Lightening of Citizenship*, in *European Journal of Sociology*, 2010, p. 9 *et seq.*

⁶⁶ A. SOMEK, *Europe: Political, Not Cosmopolitan*, cit.

⁶⁷ D. KOCHENOV, *Neo-Mediaeval Permutations of Personhood in the European Union*, cit.

⁶⁸ Until the UK leaves, that is. The figure is not really precise though, since core citizenship rights, including to work and to reside in the territory are enjoyed by EU citizens also outside of the EU territory proper, including, especially, in the EEA and Switzerland, as well as in some overseas possessions of the Member States.

⁶⁹ A. ARENA, *The Twin Doctrines of Primacy and Pre-Emption*, in R. SCHÜTZE, T. TRIDIMAS (eds), *Oxford Principles of European Union Law: Vol. 1: The European Union Legal Order*, Oxford: Oxford University Press, 2018, p. 300 *et seq.*

⁷⁰ G. DAVIES, *The Humiliation of the State as a Constitutional Tactic*, in F. AMTENBRINK, P.A.J. VAN DEN BERG (eds), *The Constitutional Integrity of the European Union*, Hague: T.M.C. Asser Press, 2010, p. 147.

⁷¹ D. KOSTAKOPOULOU, *When EU Citizens Become Foreigners*, in *European Law Journal*, 2014, p. 447 *et seq.*; M. MEDUNA, "*Scelestus Europeus Sum*": *What Protection Against Expulsion Does EU Citizenship Offer to European Offenders?*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 394 *et seq.*

members of EU citizens or other privileged categories.⁷² Furthermore, States have lost the ability to favour “their own” – the first key feature of any citizenship, distinguishing between “us” and “them” – in a growing array of situations: the core outcome of the prohibition of discrimination on the basis of nationality is within the scope of application of EU law.⁷³ EU citizens are now virtually always “us”, striking at the heart of national citizenships. Being unable to empower “their own” affects the nature of European States. Rather than picking citizens through the framing of migration and naturalisation legislation, in the EU the States are picked by citizens directly empowered by EU law. The essential legal characteristics of European States and their nationalities are thereby seriously altered. The new reality has not yet been fully internalised by the legal-political systems of the Member States.

II.2. The implications for the nature of democracy are equally significant. In terms of procedure, EU citizens participate in EU-level and municipal-level elections in their State of residence,⁷⁴ as well as being able to register citizens’ initiatives, provided what these propose is within the scope of EU law.⁷⁵ Even without covering national elections, the EU and its citizenship is a vehicle of democratic inclusion. Simultaneously, however, EU citizenship can shield its bearers from the application of legitimate democratic outcomes to them, once a connection with EU law is found. Having its final say, the Court of Justice then tests the reasonableness and proportionality of any national measure. This potentially covers any national rule objected to by an EU citizen, including rules on nationality itself.⁷⁶ Democracy’s function is thus changed significantly, placing absolute emphasis on contestation.⁷⁷ This produces new users of democracy: cosmopolitans

⁷² D. KOCHENOV, M. VAN DEN BRINK, *Pretending There Is No Union: Non-Derivative Quasi-Citizenship Rights of Third-Country Nationals in the EU*, in D. THYM, M. ZOETEWIJ-TURHAN (eds), *Rights of Third-Country Nationals under EU Association Agreements: Degrees of Free Movement and Citizenship*, Leiden, Boston: Brill Nijhoff, 2015, p. 66.

⁷³ G. DAVIES, *Nationality Discrimination in the European Internal Market*, The Hague: Kluwer Law International, 2003; K. LENAERTS, *Union Citizenship and the Principle of Non-Discrimination on the Grounds of Nationality*, in N. FENGER, B. VESTERDORF, K. HAGEL-SØRENSEN (eds), *Festschrift til Claus Gulmann: Liber Amicorum*, Copenhagen: Forlaget Thomson, 2006, p. 289 *et seq.*

⁷⁴ Cf. F. FABBRINI, *The Political Side of EU Citizenship in the Context of EU Federalism*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism*, cit., p. 271 *et seq.*

⁷⁵ A. IANNÌ, *The European Citizens’ Initiative in Light of the European Debt Crisis: A Gateway Between International Law and the EU Legal System*, in *European Papers*, Vol. 3, 2018, no. 3, www.europeanpapers.eu, p. 1159 *et seq.*

⁷⁶ Rottmann, cit.; D. KOCHENOV, *Case C-135/08, Janko Rottmann v. Freistaat Bayern*, cit.

⁷⁷ M. KUMM, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, in *Law & Ethics of Human Rights*, 2010, p. 1938 *et seq.*

fighting “unreasonable” regulation.⁷⁸ While the trend is not new,⁷⁹ the EU context reinforces it. Having used EU law to choose a State, EU citizens both participate in democratic decision-making and enjoy protection from its legitimate outcomes. This is valid at all levels of the law, including legislation, constitutional-level rules and the duties of State-level citizenship. That said, citizens cannot do much supranationally, given that the design of the Union prevents the essential principles of the internal market from being subjected to democratic contestation, or any other form for that matter.⁸⁰ In a curious ideological twist, the internal market as it stands is presented to the Europeans as rational, technocratic and apolitical, foreclosing any democratic dialogue about Europe’s future development.⁸¹

II.3. Akin to sorting “us” from “them”, equality among the holders of the status is a core feature of citizenship. Its practical realisation depends on how clearly the scopes of EU and national law are delineated: *both* promise equality. Since, as we have seen, EU citizenship cannot bring citizens automatically within the material scope of EU law, additional factors are determinant. The law is malleable: the nationality of your former wife,⁸² being born across a border⁸³ or the vague likelihood of changing States in the future⁸⁴ can suffice to bring EU-level equality into play, covering a flexible group of EU citizens; though not all. While EU and national citizenships extend equally to the same people, the application of EU equality – not dependent only on status – is an either/or question which disables national equality claims, as the question is not answered by analysing the objective situation of the person concerned. The Court’s attempts to frame EU law’s scope through the severity of the actual or potential violation of the essence of EU-level rights⁸⁵ met strong resistance, ruining clarity. When France promises equality to all Frenchmen it cannot possibly deliver, since two French neighbours living largely similar lives can be subject to two different legal systems for reasons bearing no relation to their lives or legal status. The promises of national and EU-level equality are fictitious: indeed, it is the differentiation in the face of the law, rather than equality be-

⁷⁸ A. SOMEK, *Europe: Political, Not Cosmopolitan*, cit.; A. SOMEK, *The Individualisation of Liberty: Europe’s Move from Emancipation to Empowerment*, in *Transnational Legal Theory*, 2013, p. 258 *et seq.*; A. SOMEK, *On Cosmopolitan Self-Determination*, cit.

⁷⁹ A. BADIOU, *L’éthique: Essai sur la conscience du mal*, France: Nous, 2003.

⁸⁰ E.g. G. DAVIES, *Social Legitimacy and Purposive Power: The End, the Means and the Consent of the People*, in D. KOCHENOV, G. DE BÚRCA, A. WILLIAMS (eds), *Europe’s Justice Deficit?*, cit., p. 259 *et seq.*

⁸¹ M.A. WILKINSON, *Politicising Europe’s Justice Deficit: Some Preliminaries*, in D. KOCHENOV, G. DE BÚRCA, A. WILLIAMS (eds), *Europe’s Justice Deficit?*, cit., p. 111 *et seq.*; A.J. MENÉNDEZ, *Whose Justice? Which Europe?*, in D. KOCHENOV, G. DE BÚRCA, A. WILLIAMS (eds), *Europe’s Justice Deficit?*, cit., p. 137 *et seq.*

⁸² *Schempp*, cit.

⁸³ *Zhu and Chen*, cit.

⁸⁴ Court of Justice, judgment of 2 October 2003, case C-148/02, *Garcia Avello*.

⁸⁵ *Ruiz Zambrano*, cit.

fore the law, which emerges as the main supranational – and thus national-level – legal principle, as far as EU citizenship is concerned.

II.4. As a result of the blurred and contested essence of EU citizenship, the nature of the state, democracy and national citizenship in the EU are profoundly transformed. By its very existence, the EU and its citizenship promote one particular type of constitutionalism⁸⁶ to which the Member States are bound to adhere, which implies an emphasis on proportionality and justification,⁸⁷ and a toning down of representative democracy and equality claims. Due to the penetrating nature of EU law, the relationship between the levels of the law in this model is far more complex than in the majority of "straightforward" federations:⁸⁸ the EU is much more malleable and haphazard.⁸⁹ Two key features of national citizenship do not hold true here: in a Union where EU law enjoys supremacy and direct effect and the scope of this law is necessarily blurred, citizenship firstly does not bring about equal treatment. Secondly, national citizenship does not provide better treatment than other EU citizens within the scope of application of EU law. EU law thus brings about a very significant alteration to the very legal essence of the Member States' nationalities. Crucially, the humiliation of the state and undermining of the key features of citizenship is not accompanied by a solid doctrinal or practical alternative: we are not shown a new way. Instead, we are constantly treated to the dogmatic mantra of the perceived benefits of the "apolitical" internal market. As a result, morally and ethically vacant reasons rooted in the internal market – such as the programmed-in belief that those who chose to move about in space are entitled to more constitutional protections and are more "valuable" as EU citizens – can set aside fundamental human rights concerns and key principles of the national constitutional law of the Member States. Setting aside the norms of a particular legal order is not a problem *per se*, of course. It becomes a problem, however, when the reasons underpinning this are not sufficiently clear – if not arcane – and are entirely removed from the realm of democratic testing.

III. The legal context of the EU, amplifying and reinforcing the global trends in citizenship, equality and democracy, also brings with it grave challenges, and as a path-dependent process faces virtually no serious challenge. Critical analyses of it are equally

⁸⁶ V. PERJU, *Proportionality and Freedom – An Essay on Method in Constitutional Law*, in *Global Constitutionalism*, 2012, p. 334 *et seq.*

⁸⁷ J. NEYER, *Justification of Europe: A Political Theory of Supranational Integration*, Oxford: Oxford University Press, 2012.

⁸⁸ O. BEAUD, *Théorie de la fédération*, Paris: Presses universitaires de France, 2007.

⁸⁹ R. SCHÜTZE, *From Dual to Cooperative Federalism: The Changing Structure of European Law*, Oxford: Oxford University Press, 2009.

limited and surprisingly new.⁹⁰ Hungary and Poland, with their crises of the rule of law,⁹¹ or the United Kingdom, with its anti-immigration populism,⁹² oppose the EU for entirely different reasons. However, the ongoing process of reinvention both of citizenship and the state in the EU has only just begun. Exposing it with clarity and scrutinising its implications for the development of the constitutional systems around the world is a starting point for coping with a reality which is here to stay. The sterile and cartoonish official story retold in EU textbooks simply does not hold, and States which fail to take note are in danger of getting a rude awakening in the near future, be it through absurd populist victories or by finding themselves attempting to implement Brexit-like claims. An alternative narrative of EU citizenship, to contribute to a sound dynamic understanding of the evolution of statehood and citizenship in Europe and beyond is sorely needed at the moment. EU citizenship, focused on fundamental rights, equality and a critical rethinking of the core grounds behind the division of competences between the EU and the Member States, could provide such a much-needed narrative and a starting point, offering a sounder and less awkwardly "depoliticised" paradigm of European integration than the *pure* internal market. One can coexist with the other, but the realisation that the essential starting points of the internal market and of EU citizenship are incompatible should necessarily be the starting point of such a journey.⁹³

This is the context that the contributions to this Special Section should be considered within. All the *Articles* which follow are rooted in the conference dedicated to the publication of *EU Citizenship and Federalism*, which dissected the role EU citizenship rights could play as potential triggers of jurisdiction, to save this supranational personal legal status from the internal market contamination currently opposing, as we have seen, citizenship's necessary rationale and purpose. The conference was held at the Court of Justice and the University of Luxembourg in November 2017, and was made possible with the generous help from the *Amicale des référendaires*, William Valasidis of the Court of Justice and Eleftheria Neframi of the University of Luxembourg. The core

⁹⁰ See, e.g., Editorial comments, *The Critical Turn in EU Legal Studies*, in *Common Market Law Review*, 2015, p. 881 *et seq.* (and the literature cited therein). Cf. A. WILLIAMS, *The Ethos of Europe: Values, Law and Justice in the EU*, Cambridge: Cambridge University Press, 2009; F. DE WITTE, *Justice in the EU: The Emergence of Transnational Solidarity*, Oxford: Oxford University Press, 2015.

⁹¹ L. PECH, K.L. SCHEPPELE, *Illiberalism Within: Rule of Law Backsliding in the EU*, in *Cambridge Yearbook of European Legal Studies*, 2017, p. 3 *et seq.*; W. SADURSKI, *How Democracy Died (In Poland): A Case Study on Anti-Constitutional Populist Backsliding*, in *Sydney Law School Research Paper*, no. 1, 2018; Z. SZENTE, *Challenging the Basic Values – Problems with the Rule of Law in Hungary and the Failure to Tackle Them*, in A. JAKAB, D. KOCHENOV (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford: Oxford University Press, 2017, p. 456.

⁹² Cf. C. CLOSA (ed.), *Secession from a Member State and Withdrawal from the European Union: Troubled Membership*, Cambridge: Cambridge University Press, 2017.

⁹³ Cf. D. KOCHENOV, *The Citizenship Paradigm*, in *Cambridge Yearbook of European Legal Studies*, 2013, p. 197 *et seq.*

question this Special Section engages with is simple: how far is EU citizenship deserving of its name and what kind of rights could Europeans legitimately see as unquestionably associated with it – as opposed to with a proxy of the internal market, that is. Let us cast another glance at EU citizenship's lived reality and systemic implications and join these nine wonderful authors – both upcoming and already famous – in attempting to move the debate forward.

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