
On Tiles and Pillars: EU Citizenship as a Federal Denominator

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I Decommodification of Personhood in the European Union?

Beyond describing the state of play and the key trends in all the most important aspects of EU citizenship law, the volume you are holding in your hands is designed to take the next logical step. Its core preoccupation is to attempt to unlock the potential of EU citizenship to play a role *alongside* rather than *within* the EU's internal market thinking in shaping the scope *ratione materiae* of EU law. A meticulous investigation of a number of key areas of EU law from criminal law, free movement, privacy and disability, to social rights and consular protection, aims at illuminating the issue of whether EU citizenship is capable of emerging as a self-sufficient lens, even if used alongside other approaches, for viewing and redefining the scope and substance of European integration. This is not done with a supranational 'power-grab' in mind: we are all aware of the tendency of supranational competencies to 'creep'¹ and should naturally be concerned with dealing with this issue expediently and effectively. Instead, EU citizenship and the rights associated therewith is deployed to help the Union out of an internal market *impasse*: the commodification of personhood in Europe, which could legitimately be viewed as a dead-end on the path to European unity, undermining the potential of moving closer to the achievement of the goals of

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¹ Pollack, 'Creeping Competence' (1994) 14 *Journal of Public Policy* 95.

integration going back to the founding moment.² One cannot but agree with Daniel Sarmiento and Eleanor Sharpston writing elsewhere in this volume: ‘the time has come to define what the “fundamental status” of EU citizenship actually entails’.³

Being a citizen is much more than taking a bus across a (usually invisible) border⁴ or being employment-worthy while away from home and thus qualifying for the protections of EU law.⁵ There is thus important potential to be unlocked. How to unlock this potential and to make it work for the benefit of all Europeans, while strictly adhering to the principle of conferral, is the core question behind this volume.

That ‘people must be defined as bearers of commodities in order to gain the rights granted by EU law’⁶ is, notwithstanding the intimate

² Kochenov, ‘The Citizenship Paradigm’ (2013) 15 *CYELS* 197.

³ Sarmiento and Sharpston in this volume, 227.

⁴ Europe is a continent of those who ‘move freely’: Favell, *Eurostars and Eurocities* (Blackwell, 2008). Being ready to use this freedom often shapes the law applicable to your case. The standard logic behind the delimitation of the scope of EU law has best been explained by AG Sharpston in her Opinion in C-34/09, *Ruiz Zambrano*, EU:C:2010:560, para. 86. The passage is worth quoting in full (footnotes omitted):

If one insists on the premise that physical movement to a Member State other than the Member State of nationality is required before residence rights as a citizen of the Union can be invoked, the result risks being both strange and illogical. Suppose a friendly neighbour had taken Diego and Jessica on a visit or two to Parc Astérix in Paris, or to the seaside in Brittany. They would then have received services in another Member State. Were they to seek to claim rights arising from their ‘movement’ it could not be suggested that their situation was ‘purely internal’ to Belgium. Would one visit have sufficed? Two? Several? Would a day trip have been enough; or would they have had to stay over for a night or two in France?

⁵ Cf. Tryfonidou, ‘Reverse Discrimination in Purely Internal Situations’, (2008) 35 *LIEI* 43; Van Elsuwege and Adam, ‘Situations purement internes, discriminations à rebours et collectivités autonomes après l’arrêt sur l’*Assurance soins flamande*’ (2008) 44 *CDE* 655, 662–78; Nic Shuibhne, ‘Free Movement of Persons and the Wholly Internal Rule’ (2002) 39 *CMLRev* 731; Papadopoulou, ‘Situations purement internes et droit communautaire’ (2002) 38 *CDE* 95; Poiaras Maduro, ‘The Scope of European Remedies’, in Kilpatrick et al. (eds.), *The Future of Remedies in Europe* (Hart, 2000); Tagaras, ‘Règles communautaires de libre circulation, discriminations à rebours et situations dites “purement internes”’, in *Mélanges en Hommage de Michel Waelbroeck*, vol. 2 (Bruylant, 1999).

⁶ Peebles, ‘A Very Eden of the Innate Rights of Man?’ (1997) 22 *Law and Social Inquiry* 581, 605; Allott, ‘European Governance and the Re-branding of Democracy’ (2002) 27 *ELRev* 60; Kochenov (n. 2); O’Brien, ‘I Trade Therefore I Am’ (2013) 50 *CMLRev* 1643; Caro de Sousa, ‘Quest for the Holy Grail’ (2014) 20 *ELJ* 499. Kochenov, ‘Neo-Mediaeval Permutations of Personhood in Europe’, in Azoulai et al. (eds.), *Ideas of the Person and Personhood in European Union Law* (Hart, 2016); O’Brien, ‘*Civis capitalist sum*: Class as the New Guiding Principle of EU Free Movement Rights’ (2016) 52 *CMLRev* 937.

relationship between EU law and fundamental rights,⁷ quite an apt way to capture the nature of the supranational legal system in Europe. Citizenship, on the contrary, presupposes a legal status of equals, associated with political empowerment and the enjoyment of rights, or in T.H. Marshall's iconic distillation, 'basic human equality associated with the concept of full membership of a community.'⁸

A hope has recently arisen in the academic doctrine⁹ inspired by conceptually significant signs coming from the European Court of Justice (ECJ)¹⁰ and the rich history of critiquing the status quo,¹¹ 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.¹² 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,

⁷ For a detailed analysis, see Sharpston, 'Citizenship and Fundamental Rights', in Cardonnel et al. (eds.), *Constitutionalising the EU Judicial System* (Hart, 2012). Cf. Iglesias Sánchez, 'Fundamental Rights and Citizenship of the Union at a Crossroads' (2014) 20 *ELJ* 464. See also O'Leary, 'The Relationship Between Community Citizenship and the Protection of Fundamental Rights in Community Law' (1995) 32 *CMLRev* 519.

⁸ Marshall, *Citizenship and Social Class* (Pluto Press, 1992), 6.

⁹ E.g., Caro de Sousa (n.6); Lenaerts, '*Civis Europæus Sum*', in Cardonnel et al. (eds.) (n.7); Kochenov, 'A Real European Citizenship' (2011) 18 *CJEL* 56; Platon, 'Le champ d'application des droits du citoyen européen après les arrêts [Ruiz] *Zambrano*, *McCarthy* et *Dereçi*' (2012) 48 *RTDeur* 21; van den Brink, 'EU Citizenship and EU Fundamental Rights' (2012) 39 *LIEI* 273; M. Hailbronner and Iglesias Sánchez, 'The European Court of Justice and Citizenship of the European Union' (2011) 5 *Vienna Journal of International Constitutional Law* 498; Spaventa, 'Seeing the Wood Despite the Trees?' (2008) 45 *CMLRev* 13. 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*.

¹⁰ See the whole line of cases commenced with C-135/08, *Rottman*, EU:C:2010:104; C-34/09, *Ruiz Zambrano*, EU:C:2010:560; C-434/09, *McCarthy*, EU:C:2011:277.

¹¹ Writing as early as in 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': Pickup, 'Reverse Discrimination and Freedom of Movement of Workers' (1986) 23 *CMLRev* 135. Cf. the literature in n.5, and section IV.B. below.

¹² For the legal significance of the persons/citizens divide, see, e.g., Bosniak, 'Persons and Citizens in Constitutional Thought' (2010) 8 *I-CON* 9; Azoulai, 'L'autonomie de l'individu européen et la question du statut', *EUI Working Paper LAW* 2013/14. Cf. Kostakopoulou, *The Future Governance of Citizenship* (Cambridge University Press, 2008); Azoulai et al. (eds.) (n.6).

logical and just foundation.¹³ The cases of *Dr Rottmann* and *Mr Ruiz Zambrano* – criticised for the lack of doctrinal clarity¹⁴ and simultaneously praised for almost boring predictability, if not inevitability¹⁵ – 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 rights attaching thereto’,¹⁶ since any such situation would fall, ‘*by reason of its nature and its consequences*, within the ambit of European Union law’.¹⁷ *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’,¹⁸ 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.¹⁹ Citizenship should thus be approached as contestation territory,²⁰ playing a structural role in the organisation of power in the federal Union.²¹

¹³ Caro de Sousa (n.6); Kochenov (n.9).

¹⁴ Nic Shuibhne, ‘Seven Questions for Seven Paragraphs’ (2011) 36 *ELRev* 161; Šadl, ‘Case – Case Law – Law’ (2013) 9 *EuConst* 205.

¹⁵ See, e.g., the chapter by Davies in this volume; Davies, ‘The Entirely Conventional Supremacy of Union Citizenship and Rights’, in 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*’ (2010) 47 *CMLRev* 1831.

¹⁶ C-135/08, *Rottman*, para. 42. ¹⁷ *Ibid.* (emphasis added).

¹⁸ C-34/09, *Ruiz Zambrano*, para. 42 (emphasis added).

¹⁹ Weiler, ‘Bread and Circus’ (1998) 4 *CJEL* 223.

²⁰ For a coherent theory of citizenship building uniquely on this idea, see the work of Engin Isin, e.g., Isin, ‘Citizenship in Flux’ (2009) 29 *Subjectivity* 367.

²¹ On citizenship in the federal contexts, see, e.g., Jackson, ‘Citizenship and Federalism’, in Aleinikoff and Klusmeyer (eds.), *Citizenship Today* (Carnegie Endowment for International Peace, 2001). For analyses of the European and comparative perspectives,

A *Drawbacks of the Current Framing of Citizenship in the Context of EU Law*

The Court's excursion down the path of human (rather than economic²²) personhood seems to many to have been short-lived.²³ The ECJ president Koen Lenaerts and José Gutiérrez-Fons claim elsewhere in this volume that the EU is already a democracy and functions smoothly within the scope of its delegated powers,²⁴ thus presenting the arguments for change as superfluous, if not *ultra vires*, as 'the rights attaching to [EU citizenship] do not fully capture the link between EU citizenship and the democratic governance of the EU'.²⁵ Yet numerous scholars tend to disagree with this view on a number of important grounds.²⁶

At issue is not so much whether the EU could formally be presented as a democracy, but whether the Treaties and the case law allow for a more humane construction of personhood in EU law,²⁷ which would not structurally foreclose dignity by sticking strictly to the internal market

see Schönberger, 'European Citizenship as Federal Citizenship' (2007) 19 *ERPL* 63; Neuman 'Fédéralisme et citoyenneté aux Etats Unis et dans l'Union européenne' (2003) 21 *Critique Internationale* 151; van der Mei, 'Freedom of Movement for Indigents' (2002) 19 *Arizona Journal of International & Comparative Law* 803; Fischer, 'European Citizenship' (2002) 5 *CYELS* 357; Strumia, 'Citizenship and Free Movement' (2006) 12 *CJEL* 714; Timmermans, 'Lifting the Veil of Union Citizens' Rights', in Colneric et al. (eds.), *Festschrift für Gil Carlos Rodríguez Iglesias* (Berliner Wissenschafts-Verlag, 2003). For a truly magisterial analysis, see, Schönberger, *Unionsbürger. Europas föderales Bürgerrecht in vergleichender Sicht* (Mohr Siebeck, 2006).

²² The distinction between what is economic and what not is necessarily blurred, which does not help shape the clarity of current EU law. For an analysis of the legal-historical evolution of the approaches to 'economic', see Kochenov and Plender, 'EU Citizenship: From an Incipient Form to an Incipient Substance?' (2012) 37 *ELRev* 369, esp. 373–74; Nic Shuibhne (n.5).

²³ C-434/09, *McCarthy*; C-256/11, *Dereçi*, EU:C:2011:734; C-87/12, *Ymeraga*, EU:C:2013:291; C-40/11, *Iida*, EU:C:2012:691; C-86/12, *Alokpa*, EU:C:2013:645. Some scholars strongly criticise the Court (e.g., Spaventa's chapter in this volume) others tend to rationalise the recent developments (e.g., the chapters by Nic Shuibhne and Azoulai in this volume). For a justification of the recent case law from the point of view of the internal coherence as well as the proclaimed democratic nature of the EU, see the epilogue by Lenaerts and Gutiérrez-Fons, in this volume. For the same from the point of view of federalism, see Nic Shuibhne's chapter in this volume.

²⁴ Lenaerts and Gutiérrez-Fons in this volume. ²⁵ *Ibid.*, 752.

²⁶ See, e.g., the chapters by van den Brink, Davies, Spaventa, and Iglesias Sánchez in this volume. Cf. Allott (n.6); Davies, 'Social Legitimacy and Purposive Power', in Kochenov et al. (eds.), *Europe's Justice Deficit?* (Hart, 2015); Somek, 'Europe: Political, Not Cosmopolitan' (2014) 20 *ELJ* 142; Kochenov (n.6); Strumia, 'Remedying the Inequalities of Economic Citizenship in Europe' (2011) 17 *ELJ* 725.

²⁷ Sharpston (n.7); Kochenov, 'Citizenship Without Respect', *Jean Monnet Working Paper* 08/2010.

considerations in the determination of the scope of applicable EU-level rights and whether such a construction would be legally sound and politically feasible. This will determine whether the current EU legal regime of construing personhood, rights, and the vertical delimitation of powers between the EU and the Member States – the tripartite focus of this volume – is sustainable in the medium- to long-term, ensuring the continued success of the EU in the face of the many crises it is facing.²⁸ To be blinded by difficulties is unwise. Eleanor Spaventa is right: ‘hard times do not necessarily have to make bad laws’.²⁹

A legal system where the commodification of the human being is the core rationale behind the construction of personhood in law is most unlikely to win firm support among those it commodifies, going beyond the delight of those very few who are liberated from specific national law obligations as a result of moving about or economic activity, and thus seeing EU law applying to their case. The fundamental principle of equality demanded by the citizenship logic is replaced by liberty from national regulation for a small, vaguely defined group as the guiding principle. Yet liberty from local regulation is self-evidently hardly a sound foundation to build a legal system upon. There is another side to this story, however: this understanding of liberty implies freeing the market from any democratic control, while decoupling citizenship from liberty understood as the idea of collective self-determination.³⁰ Should this thinking be correct, the EU’s ‘democracy’, praised in the legal texts,³¹ emerges as a rather flimsy façade for something else, protecting the market from the citizens, rather than the other way round. We could

²⁸ Amténbrink, ‘Europe in Times of Economic Crisis’, in Dougan et al. (eds.), *Empowerment and Disempowerment of the European Citizens* (Hart 2012) 171, Šadl and Rask Madsen, ‘Did the Financial Crisis Change European Citizenship Law?’ (2016) *ELJ* 40. Cf. Athanassiou and Laulhé Shaelou in this volume; Łazowski, ‘EU Withdrawal’ (2016) 22 *EPL* 115; Menéndez, ‘The Existential Crisis of the European Union’ (2013) 14 *GLJ* 453; Adams et al. (eds.), *The Constitutionalisation of European Budgetary Constraints* (Hart, 2014); von Bogdandy and Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area* (Hart, 2015).

²⁹ Spaventa in this volume, 225.

³⁰ Davies, ‘Humiliation of the State as a Constitutional Tactic’, in Amténbrink and van den Bergh (eds.), *The Constitutional Integrity of the European Union* (Asser, 2010), 147; Somek, ‘The Individualisation of Liberty’ (2013) 4 *Transnational Legal Theory* 258; Somek, ‘On Cosmopolitan Self-Determination’ (2012) 1 *Global Constitutionalism* 405. Cf. Streeck, ‘The Crisis in Context’, in Schäfer and Streeck (eds.), *Politics in the Age of Austerity* (Polity, 2013) 264.

³¹ For a detailed analysis, see, Lenaerts and Gutiérrez-Fons in this volume. See also Fabbrini in this volume.

compare the effects of large chunks of EU law applied to persons ‘on the ground’ with the effects of the extraterritoriality agreements³² on some nations during the previous incarnation of international law predating the introduction of the principle of the sovereign equality of states.³³ Such arrangements institutionalised the carving out from the scope of local law a number of diverse groups of individuals based on their personal legal statuses, histories and family connections.

The consequences of the current framing of the law, which is, as Gareth Davies rightly says, ‘convoluted and unconvincing’,³⁴ are three-fold. First, the EU legal system can legitimately be perceived as unjust, since the logic of a true constitution is precisely about protecting human dignity and freedom from commodification, rather than making the scope of the available citizenship rights dependent on economic considerations. Second, the legal system undermines equality and thereby citizenship, of which equality is the core element, since equality before the law is precisely about combating commodification in the name of citizenship and social coherence.³⁵ This does not change depending on the level of the law: either you are carved out from the national legal sphere by EU law or denied inclusion within the scope of EU law does not matter as long as the accepted constitutional principles proclaimed in the national constitutions and Article 2 TEU do not play a role in determining who is to be carved out from the scope of a particular legal system and who is not.³⁶ Third, the legal system makes political contestation and fully-fledged participation impossible, thereby severely limiting the number of avenues for the legitimation of supranational law.³⁷ When combined, these three factors strip EU citizens of dignity and create a strong temptation to call the legal system in question authoritarian.³⁸ Citizenship remains paralysed, the wording of the Treaty pointing to its potential importance notwithstanding. Upholding and perpetuating such paralysis on procedural grounds is bound to magnify the drawbacks of

³² Kayaoglu, ‘The Extension of Westphalian Sovereignty’ (2007) 51 *International Studies Quarterly*, 649.

³³ On the elevation of statehood in the contemporary understanding of the term to the leading form of institutional organisation of human societies worldwide: Kjær, *Constitutionalism in the Global Realm* (Routledge 2014).

³⁴ Davies in this volume, 483 (speaking, in particular, about the scope of the Charter of Fundamental Rights of the EU, which is crucially relevant for the understanding of the substance of the rights guaranteed by the EU legal order).

³⁵ Kochenov (n.27), esp. 12–25. ³⁶ *Ibid.*, 34–57. ³⁷ Somek (n.30); Allott (n.6).

³⁸ Somek, ‘Delegation and Authority’ (2015) 21 *ELJ* 240.

the status quo, thus exacerbating, rather than tackling the deficiencies in need of urgent attention.

B Endowing EU Citizenship with a Structural Role

Claiming that the systematic denial of EU citizenship's theoretical importance undermines the coherence of the European edifice and harms the legitimacy of the Union is nothing new, per se. However – and this is the reason behind going to all the trouble of editing this work – some of the Court's relatively recent case law, especially *Rottmann*, *Ruiz Zambrano* and their progeny, to which the contributors to this volume appeal constantly throughout, have demonstrated a doctrinally solid logical opening up to the possibility of reconsidering the absolute domination of the Court's pre-citizenship internal market reasoning in a context where the formal legal status of EU citizenship has entered the Treaties.³⁹ This opening has ignited an overwhelming scholarly debate⁴⁰ and shone a ray of hope through a darkness that could be

³⁹ Kochenov and Plender (n.22).

⁴⁰ See, e.g., for a brief selection in this sea of reactions: Adam and Van Elsuwege, 'Citizenship Rights and the Federal Balance between the European Union and Its Member States' (2012) 37 *ELRev* 176; Tryfonidou, 'Redefining the Outer Boundaries of EU Law' (2012) 18 *EPL* 493; Nic Shuibhne, '(Some of) the Kids Are All Right' (2012) 49 *CMLRev* 349; Mengozzi, '*Zambrano*, an Unexpected Ruling', in Cardonnel et al. (eds.) (n.7); Hailbronner and Thym, 'Annotation of Case C-34/09 *Ruiz Zambrano*' (2011) 48 *CMLRev* 1253; Jessurun d'Oliveira, 'Case C-135/08 *Janko Rottman v. Freistaat Bayern* Case Note 1' (2011) 7 *EuConst* 138; de Groot and Selig, 'Case C-135/08 *Janko Rottman v. Freistaat Bayern* Case Note 2' (2011) 7 *EuConst* 150; Van Elsuwege and Kochenov, 'On the Limits of Judicial Intervention' (2011) 13 *EJML* 443; Wiesbrock, 'Disentangling the "Union Citizenship Puzzle"?' (2011) 36 *ELRev* 861; Van Elsuwege, 'Case C-434/09, *Shirley McCarthy*' (2011) 7 *EuConst* 308; Hinajeros, 'Extending Citizenship and the Scope of EU Law' (2011) 70 *Cambridge Law Journal* 309; Palladino, 'Il Diritto di soggiorno nel "proprio" Stato membro' (2011) *Studi sull'integrazione europea* 311; Ankersmit and Geursen, '*Ruiz Zambrano*: De interne situatie voorbij' (2011) *Asiel & Migrantenrecht* 156; Van Elsuwege, 'Shifting Boundaries?' (2011) 38 *LIEI* 263; Grand, 'Consécration d'un droit de séjour européen indépendant de la libre circulation' (2011) *L'actualité juridique droit administratif* 38; Houser, 'De la lutte contre les discriminations à rebours à la protection des droit fondamentaux par l'Union européenne' (2011) *L'actualité juridique droit administratif* 1084; Kochenov (n.15); de Groot, 'Overwegingen over de *Janko Rottmann*-beslissing van het Europese Hof van Justitie' (2010) *Asiel & Migrantenrecht* 293; Jessurun d'Oliveira, 'Ontkoppeling van nationaliteit en Unieburgerschap?' (2010) *Nederlandsch Juristenblad* 785; von Toggenburg, 'Zur Unionsbürgerschaft: Inwieweit entzieht sich ihr Entzug der Unionskontrolle?' (2010) *European Law Reporter* 165; Selig, 'Annotation: Case C-135/08, *Janko Rottman*' (2010) 17 *MJ* 470; Iglesias Sánchez, '¿Hacia una nueva relación entre la nacionalidad estatal y la ciudadanía europea?' (2010) 37 *Revista de Derecho Comunitario Europeo* 933.

legitimately presented as fundamental incoherence, given the incompatibility of EU citizenship with the core aspects for determining jurisdiction in EU internal market law.⁴¹

EU citizenship status⁴² and the rights of EU citizenship,⁴³ *as such*, with no regard to the traditional formalistic internal market triggers, such as cross-border situations,⁴⁴ could activate the supranational protection of EU citizens, elevating EU citizenship – however high the threshold required – to a *federal denominator* in the context of EU law, guiding the delimitation of powers between the EU and the Member States in concrete cases, thus doing the same job as the internal market’s own theory of cross-border situations has always been doing in the EU, but in a more coherent, transparent, and ultimately convincing way.⁴⁵

This opening has been extremely short-lived in practice:⁴⁶ the EU citizenship rights in question could apparently merely be confined to the need to guarantee the possibility of using the market freedoms in the future, particularly free movement rights.⁴⁷ The good news is, however, that as the case law develops, this opening has not gone anywhere in theory: the door is always open to use the ‘substance of rights’ of EU citizenship as a potential activator of the material scope of EU law.⁴⁸ It is quite natural in this respect that many fundamental rights should qualify in EU law as scope-defining citizenship rights,⁴⁹ it is only unclear, as yet, which ones.⁵⁰

Now that the Court of Justice has definitely established two key approaches to the scope of EU law: through cross-border situations and through the essence of citizenship rights⁵¹ – a reading of all the recent

⁴¹ As discussed in detail below: III. ⁴² C-135/08, *Rottmann*, para. 42.

⁴³ C-34/09, *Ruiz Zambrano*, para. 42. ⁴⁴ Cf. Lenaerts (n.9); Kochenov (n.9).

⁴⁵ Iglesias Sánchez (n.7); Sharpston (n.7).

⁴⁶ At least as far as the outcomes for the plaintiffs were concerned. Cf. Spaventa’s chapter in this volume; Nic Shuibhne, ‘Limits Rising, Duties Ascending’ (2015) 52 *CMLRev* 889.

⁴⁷ As argued by Lenaerts and Gutiérrez-Fons, in this volume.

⁴⁸ See, e.g., C-165/14, *Rendón Marín* and C-304/14, *C.S.*, Opinion of AG Szpunar, EU: C:2016:75.

⁴⁹ See the discussion in section II.C. below, and the literature in n.7. But see, Lenaerts and Gutiérrez-Fons in this volume.

⁵⁰ Kochenov, ‘The Right to Have *What* Rights?’ (2013) 19 *ELJ* 502.

⁵¹ For a clear invocation of both in one paragraph, see, e.g., C-434/09, *McCarthy*, para. 53. The Court speaks of the effect ‘of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of that status, or of impeding the exercise of their right of free movement and residence within the territory of the Member States’ (providing, *en passant*, a seemingly misleading reading of C-148/02, *García Avello*, EU: C:2003:539).

case law which the absolute majority of the contributing authors, including President Lenaerts,⁵² share – the rights of EU citizenship, as opposed to, uniquely, the cross-border considerations related to the internal market (however broadly conceived), emerge as one of the key elements in determining the material scope of EU law in concrete situations. There is a route open – in theory but also in practice – to endow a pool of EU citizenship rights which can also be unwritten,⁵³ with the ability to play the leading structural role in EU federalism: by elevating EU citizenship to play a role as the Union’s federal denominator not replacing but operating alongside the established cross-border situation approach. To put it simply, the exact shape of the scope *ratione materiae* of EU law and by extension, of the national law of the Member States, came to depend, at least in part, on our vision of EU citizenship and in particular on the scope of the essential rights associated with this concept, falling within, following Eleanor Sharpston’s suggestion, ‘the existence and scope of a material EU competence’.⁵⁴ The outcome of such a use of EU citizenship and the rights associated therewith could infuse the edifice of Union federalism with new coherence, making the law more predictable and also easier to justify, thus strongly contributing to the enhancement of the legitimacy of the Union. In addition, it will also allow the institutions to honour the core aspects of the legal-philosophical building blocks they deploy, departing from counter-intuitive EU-specific approaches to a handful of fundamentals, such as citizenship, equality and judicial restraint.⁵⁵ Indeed, the cross-border situations approach as construed by the Court, knows virtually no limits as long as ‘future movement’ can trigger EU law and justify setting national regulation

⁵² Lenaerts (n.9).

⁵³ An argument can be made that unwritten rights were in action in at least three recent EU citizenship cases of crucial importance: C-300/04, *Eman and Sevinger*, EU:C:2006:545 (general principle of equality); *Rottmann* (continuing enjoyment of EU citizenship status); *Ruiz Zambrano* (a right not to be made to leave the territory of the Union). Attempts to reframe these cases as classical Part II TFEU rights’ cases, are quite problematic. For the critique of the invocation of *Garcia Avello* parallels (future cross-border movement) in the *McCarthy* analysis of *Ruiz Zambrano*, see, e.g., Kochenov (n.9), 89. Cf. van den Brink in this volume.

⁵⁴ Sharpston (n.7), 270 (original emphasis removed). See also C-34/09, *Ruiz Zambrano*, Opinion of AG Sharpston, para. 163. For an analysis, see, in a broader context, Dougan, ‘Judicial Review of Member State Action under the General Principles and the Charter’ (2016) 53 *CMLRev* 1201, 1226–1229.

⁵⁵ Bengoetxea, ‘Reasoning from Consequences from Luxembourg’, in Koch et al. (eds.), *Europe. The New Legal Realism* (DJØF, 2010), 39; Anderson, “Discovery” in Legal Decision-Making’ (Kluwer, 1996).