EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text

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Abstract
Based on the legal-historical analysis of the key features of EU citizenship as interpreted by the Court before and after the entry into force of the Treaty of Maastricht, it is claimed that the continuity of pre-Maastricht citizenship law was only broken two years ago, when Rottmann was decided and a new rights-based paradigm of EU citizenship law emerged, potentially rivalling the internal market-based vision of European law. This article outlines the countless problems related to the emerging substance of the new paradigm which can develop both ways from where we stand at the moment: either introducing clarity and coherence, or undermining the edifice of EU law.

“Il faut reculer pour mieux sauter.” Michel de Montaigne, Essays, bk 1, Ch.XXXVIII

Introduction
For many years now, the Court of Justice of the European Union (CJEU) has been struggling with the Maastricht promise of EU citizenship, raising a number of fundamental questions of principle surrounding the essence of EU federalism. We demonstrate that this promise, profoundly affecting the whole systemic...
structure of EU law, is an uneasy bedfellow of the foundational assumptions informing the idea of the internal market, historically considered as the core ethos of European integration. And while the Court first read the EU citizenship part of the Treaty with the goal of the internal market in mind, logical problems started to pile up immediately: internal market thinking failed to capture the essential features of the citizenship provisions, thus compromising the straightforward reading of the Treaty text. To dispel fundamental incoherence at least to some extent, the Court was bound to rely on a number of well-known unwritten assumptions, which include, inter alia, the presumption that EU citizenship is not supposed to affect the material scope of EU law, and that a good citizen is mobile and economically active. These are not to be found in art.9 TEU, Pt II TFEU—not even in the Preamble, which underlines the resolution of the High Contracting Parties “to establish citizenship common to nationals of their countries”. Such a reading of EU citizenship, which pre-Maastricht in nature, could not efficiently bridge the gap between the internal market ideology and the citizenship logic enshrined in the Treaties. Indeed, this approach could merely postpone the moment when treating citizenship as a market category would no longer be sustainable and when the coherence of the whole edifice of EU law would be put at stake. This moment is now.

It is not for nothing that the Court has recently started departing from its unwritten law. It has done so in, e.g. *Rottmann*, *Ruiz Zambrano* and *Dereci*. The analysis of the recent discovery of EU citizenship by the Court as well as the reasons behind the unwritten assumptions guiding EU law for so long are at the core of this article. While it is clear that something important is going on, the Court stands to be criticised for offering countless questions disguised as answers, often forgetting about the needs of the citizens themselves, i.e. the main reason for having EU citizenship in the Treaties in the first place, and blurring the contours of the incipient substance of this concept, which we are embarking on outlining.

This article, like ancient Gaul, divides into three parts. The main claim of the first part is that EU citizenship is older than Maastricht, where a de facto pre-existing status was merely codified. Such codification—rather than outright innovation—has had a profound influence on the perception of EU citizenship by the Court, since the reading of the citizenship provisions in the Treaties has been profoundly

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7 TEU Preamble, Recital 10 (first appeared as Recital 8, Preamble, EU Treaty, Maastricht).
9 *Gerardo Ruiz Zambrano v Office national de l’emploi (ONEm)* (C-34/09) [2011] 2 C.M.L.R. 46.
10 *Murat Dereci v Bundesministerium für Inneres* (C-256/11) [2012] 1 C.M.L.R. 45.
12 The ethical foundations of the recent case law are not that clear; while before the Court was at times ready to be inventive only to help individuals like Mr Cowan, Mr Grzelczyk, Mrs Carpenter or Mr Schempp, preserving the family and protecting the citizen is not among the Court’s priorities in Dereci and McCarthy. Well-known criticism of the Court’s handling of the cases involving third-country nationals voiced by Joseph Weiler decades ago can now be applied to its handling of EU citizens’ cases. See J.H.H. Weiler, “Thou Shalt Not Oppress a Stranger” (1992) 3 E.J.I.L. 65. From oppressing the stranger the Court seems to be giving a green light to oppressing our own. This is a powerful illustration of the lack of a conception of justice to inform EU law that would go beyond the text of the Treaties—an issue falling outside the scope of this article, but powerfully raised by A. Williams, “Taking Values Seriously: Towards a Philosophy of EU Law” (2009) 20 Oxford J.L.S. 549.
informed by the legal-theoretical assumptions held in the European Economic Community (EEC) law long before the entry of the Treaty of Maastricht into force.

In search of the roots of such assumptions, which go back to the key features of the pre-Maastricht EU citizenship, the second part turns to the findings of the text published decades ago, when one of us was analysing the incipient form of European citizenship. The main claim of the second part, based on the comparison of the key features of EU citizenship as interpreted by the Court before and after the entry into force of the Treaty of Maastricht, is that the continuity of pre-Maastricht citizenship law was only broken two years ago, when Rottmann was decided and a new non-market rights-based paradigm of EU citizenship law emerged, potentially rivalling the internal market vision. We read all the recent case law of the Court in this vein: as an attempt to move away from the pre-Maastricht presumptions in approaching the essence of EU citizenship, i.e. as a discovery of the actual Treaty text. The move is gradual: drifting closer to the text, against commonly shared assumptions and expectations (however illogical their nature) can be very difficult indeed. The result of the recent developments is the tension between the two alternative visions of the essence of EU integration, where the economic internal market logic is in opposition with the logic of citizenship.

Any paradigm shift of such a scale, involving the very rationale behind the division of competences in a multi-layered legal system, is a painstakingly difficult process, which can take dozens of years to complete. The third part embarks on documenting the persisting tensions between the pre- and post-Rottmann visions of EU citizenship and, consequently, EU law as such, through the analysis of the fundamental standpoints taken by the Court in the course of the clarification of the essentials of EU citizenship which might be in need of reconsideration, as they failed to resolve the outstanding issues. Although the most recent cases of McCarthy and Dereci unquestionably support the tectonic shift away from EEC law, which was promised in Pt II of the then EC Treaty at Maastricht but only started in Rottmann, these cases also occlude clarity that could potentially be shaped on a number of vital points, which patiently waited for dozens of years to be addressed. A fundamental departure from the unwritten assumptions restricting EU citizenship is a reality and cannot be undone. Crucially, besides the Treaty text, it draws on the sound failure of the internal market logic to deliver coherent and reliable results in the interpretation of EU citizenship provisions besides wrongly implying that they do not have any effet utile. In this sense, looking back would offer little more than incoherence and vagueness, incapable of infusing the law with necessary persuasiveness. EU law is thus not anymore the same, requiring a reassessment of a number of conventional wisdoms which were still seemingly true a couple of years ago.

The recent case law of the Court on EU citizenship is a hotly debated topic meticulously analysed in the academic literature from a variety of perspectives, yet we submit that proceeding from case to case in analysing the development of the law is a dangerous venture: scholars risk missing out the essential tectonic processes redefining the core elements of the law by merely “following the news” from the Court. This contribution aspires to overcome such temptation and looks at the fundamental problems related to

12 For analysis, see K. Lenaerts, “‘Civis europaeus sum’: From the Cross-border Link to the Status of Citizen of the Union” (2011) 3 F.M.W. 6, esp. 18; D. Kochenov, “A Real European Citizenship: A New Jurisdiction Test; A Novel Chapter in the Development of the Union in Europe” (2011) 18 C.J.E.L. 56.
13 Many lives can provide telling examples of this. See, e.g. K. Kozhurin, Protopop Avvakum: Zhizn’ za veru (Moskva: Molodaya gvardija, 2011).
14 This point will be discussed in detail below.
the shaping of EU citizenship which would go beyond (merely) the analysis of recent innovations and uncertainties.16 We thus take a step back, following Montaigne’s advice, from the classical perspective that “we must work with(in) the case-law that we have”17 and aspire to identify the gaps, focusing on what we do not have and why, to see how and whether the line of thinking underlying the case law is persuasive and justified. The focus is thus not on the case law, but on the law as such that the Court is doing its best to discover.18

In adopting the promised broader perspective we nevertheless remain within the realm of the classical rights paradigm, leaving it to others to criticise the core assumptions behind EU citizenship, including its demoï-cracy peculiarity19 and its possibly corruptive effects on individuals.20 The traditional tone of this article is reinforced by the fact that it builds on a contribution published by one of us roughly four decades ago in an attempt to discover “an incipient form of European citizenship” within the body of the EEC law of the day.21 It approached the concept from three fundamental angles which are as overwhelmingly relevant today as they were in 1976: classical scholarship is unquestionably instrumental in identifying the core challenges faced by EU citizenship law today.

**EU citizenship as a result of a codification exercise**

A personal status of legal attachment to the Communities had matured long before the formal incorporation of EU citizenship into the *acquis* at Maastricht, representing a natural spill-over inherently connected to the articulation of the internal market. The Treaty of Maastricht has seemingly codified the pre-existing law, without, however, making the text too restrictive. This almost invisible codification has had an overwhelming impact on the treatment of EU citizenship provisions by the Court. Given that the codification did not receive a detailed reflection in the textual formulation of the citizenship provisions in the Treaties, EU citizenship as a result of a codification exercise

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it de facto amounted to the perpetuation of a number of unwritten assumptions, which pre-date the Treaty of Maastricht and ended up incorporated in the case law, affecting our understanding of Pt II TFEU until the present day. The result was a growing tension between the actual text of the Treaties and the vision of EU citizenship espoused by the Court. In other words, not the text of Pt II TFEU, but the pre-Maastricht rationale of EU integration with the goal of the internal market in mind guided the deployment of EU citizenship after the Maastricht incorporation: based on the citizenship practice pre-dating Maastricht the Court refused to see EU citizenship as a category not subjected to the internal market thinking, giving rise to countless problems and contradictions.

**Pre-Maastricht quasi-citizenship**

Around 40 years ago it became generally accepted that no matter how one would officially refer to it, the Communities have de facto succeeded in outlining a class of persons with specific Community law rights and entitlements. This is when citizenship entered, in the words of Wiener, the “informal resources of the *acquis*.” Even though economic free movement rights constituted an important driving factor behind such quasi-citizenship, as *Cowan* and innumerable other cases demonstrate (some of them from the post-Maastricht era, like *Calfa* or *Kostantinidis*), it was not only about the economically active. This came to be codified in the Directives on pensioners and “playboys”, adopted on the basis of art.235EEC. Although the Treaties did not provide a specific legal basis, the Directives were regarded as directly related to the establishment of the internal market, exposing its non-economic side. Add to this the students, and the picture becomes complete: a move towards EU citizenship or, at least, a citizenship-like status represented a natural spill-over accompanying the maturation of the internal market. Countless cases from *Martínez Sala* to *Texeira* can exemplify this reading, as will be demonstrated in detail below. The line between economic and non-economic activities necessarily ends up blurred, until it virtually becomes invisible, when workers get injured outside of the workplace, become unemployed, go back to school, look for work, choose to work part time or work for some alternative kind of remuneration besides money, if not choose a bar “suspect from the point of view of morals” to build their career. Also their family members, even if getting rights only by proxy, water down the artificial divide between “economic” and “non-economic”, which Adorno famously doubted in the “Culture Industry”, even if underlining the privileged position of those who are free enough not to experience the opposition “between [the] work...”.

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27 The internal market was a direct condition for the use of art.235 EEC as a legal basis (this is not any more the case with its successor, art.352 TFEU).


itself and what [one] do[es] apart from it”.\footnote{T. W. Adorno, “Free Time” in The Culture Industry (London: Routledge, 1991), p.189.} Having claimed the right to define who the workers are,\footnote{This became de jure enabled once the European Union came to be competent on the definitional plane. See Mrs M.K.H. Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten (75/63) [1964] E.C.R. 177; [1964] C.M.L.R. 319.} the Court thus had no option but to enlarge the scope of the meaning of this term, de facto accepting the lack of clarity surrounding the borderline between work and life, remuneration and enjoyment, work and rest, thus necessarily enlarging the reach of the internal market.

In this context it was probably irrelevant whether the word “citizenship” would ever appear in the Treaties.\footnote{See on market citizenship, H.P. Ipsen and G. Nicolaysen, “Haager Konferenz für Europarecht und Bericht über die aktuelle Entwicklung des Gemeinschaftsrechts” (1965) 18 N.J.W. For a contemporary account see N. Nic Shiubhne, “The Resilience of EU Market Citizenship” (2010) 47 C.M.L. Rev. 1597.} Three fundamental factors were at play: the Treaties applied to a number of economically active Member State nationals; the situations where the Treaties applied to such people created usable rights and entitlements for them which could be directly invoked against the Member States (sometimes including their own); and the scope of application of EEC law to Member State nationals was necessarily expanding at a very fast pace, as the borderline between what was regarded as economic and what not was necessarily vague. The same consideration also applied to the borderline between what is cross-border (thus falling within the scope of EEC law) and what is wholly internal (thus lying outwith such scope),\footnote{See in market citizenship, H.P. Ipsen and G. Nicolaysen, “Haager Konferenz für Europarecht und Bericht über die aktuelle Entwicklung des Gemeinschaftsrechts” (1965) 18 N.J.W. For a contemporary account see N. Nic Shiubhne, “The Resilience of EU Market Citizenship” (2010) 47 C.M.L. Rev. 1597.} endowing the quasi-citizenship in the making with the scope which was particularly blurred—and thus surprisingly inclusive for a “market citizenship” pure.\footnote{Time establishing the European Union [1984] OJ C77/33 art.3. The article has been analysed by Francesco Caportorti et al., Le traité d’Union européenne: Commentaire du projet adopté par le Parlement européen (Brussels: Université de Bruxelles, 1985), p.33.}

**Codification, not foundation?**

Taken together, these factors were responsible for the emergence somewhere in the 1970s of an ameboïd citizenship-like status, which Spinelli first suggested to codify.\footnote{Mario Vicente Micheletti v Delegación del Gobierno en Cantabria (C-369/90) [1992] E.C.R. I-4239.} This status was an objective reality when the Treaty of Maastricht was being negotiated. This is why, besides EU citizenship literature, crucial EU citizenship case law equally dates back to the pre-Maastricht times.\footnote{R. v Immigration Appeal Tribunal and Surinder Singh (C-370/90) [1992] E.C.R. I-4265; [1992] 3 C.M.L.R. 358.}\footnote{For early analyses see M. Bernstein, “Labour and the European Communities” in M.G. Shimm and R.O. Everett (eds), European Regional Communities: A New Era on the Old Continent (New York: Oceana Publications, 1962); R. Reisner, “National Regulation of the Movement of Workers in the European Community” (1964) 13 A.I.C.L. 361; H. ter Heide, “Free Movement of Workers in the Final Phase” (1970) 6 C.M.L. Rev. 466; J.C. Séché, “The Revision of Regulations Nos. 3 and 4 (Social Security of Migrant Workers) in the Light of their Interpretation by the Court of Justice” (1970) 6 C.M.L. Rev. 170; M. Bouvard, Labour Movements in the Common Market (New York: Praeger, 1972); W.R. Böhning, The Migration of Workers in the European Community (London: Oxford University Press, 1972); E.C. Jett, “Free Movement of Labour in the EEC” (1973) 8 Texas I.L.J. 375.} Micheletti, Singh and Cowan are just three cases in point, demonstrating a high level of logical continuity between pre-Maastricht and post-Maastricht citizenship case law. What Maastricht has done was merely a **codification** of a pre-existing status of EU citizenship, not the **foundation** of a new one, which did not mean, at the same time, that EU
citizenship could not develop beyond its internal market origins. Most importantly, however, the broad nature of the pre-Maastricht status remained intact—the recourse to any restrictive language has been dismissed by the drafters.\textsuperscript{40}

Indeed, although virtually nothing new was added by the drafters of Maastricht to the pre-existing rules on EU citizenship besides the name, the wording of Pt II is sufficiently open to avoid particularly orthodox interpretations; this notwithstanding the fact that all the ambitious proposals, such as the ones aiming at the extension of EU citizenship to long-term resident third-country nationals,\textsuperscript{41} were turned down, pointing to the fact that EU citizenship was probably expected (at least at the initial stages of its development) to mean little beyond the pre-existing quasi-citizenship practice. Besides the opinions of the drafters,\textsuperscript{42} and the vague limitation clauses in the citizenship provisions of the Treaties,\textsuperscript{43} secondary legislation points in this direction.\textsuperscript{44} It is certainly surprising to agree with Davies that a provision of primary law establishing EU citizenship explicitly allows for (if not presumes) core limitations to be introduced via secondary law and other provisions of the Treaties.\textsuperscript{45} Yet this undoubtedly confirms the possible codification reading of EU citizenship in the Maastricht Treaty, as the drafters seemed to be explicitly pointing to the pre-existing status quo, tacitly pushing the Court, at least for a while, to limit the reading of the newly introduced citizenship provisions to the EEC internal market logic.

**EU citizenship ruled by unwritten assumptions**

The modest conclusion that Maastricht merely codified a pre-existing practice rather than creating something absolutely new is not just legal-historical in nature. It is directly connected to the contemporary legal reality, as it helps explain the position taken by the Court in a countless line of cases until this day. We suggest that the Court—probably for a good reason—was unable to interpret the provisions included in Pt II TFEU and its predecessors without the presumption that the Treaty had codified past rules, attempting (while facing constant difficulty) to present EU citizenship as an integral part of the internal market paradigm of European integration. This went on literally for decades and halted the progress of EU citizenship until well into the new millennium, when the picture started to change with \textit{Eman and Sevinger}, Rottmann and Ruiz Zambrano.\textsuperscript{46}

As would be perfectly expected of a Court faced with a codified set of established rules—no matter how eccentrically worded\textsuperscript{47}—upon the entry into force of the Treaty of Maastricht it went on applying Cowan reasoning in numerous citizenship cases even after the provisions on citizenship became legally binding. In \textit{Calfa}, for instance, the ECJ directly refers to Cowan.\textsuperscript{48} It was possible to think for a moment

\textsuperscript{40}This can be explained by the fact that the Member States obviously had different ideas about what EU citizenship was supposed to become. In analysing this issue it is important not to be misled by the Danish example, which represents only one extreme of the spectrum.


\textsuperscript{42}As reflected, for instance, in the Danish Declaration appended to the Maastricht Treaty [1994] OJ C348/4.

\textsuperscript{43}See, e.g. what used to be art.8a(1) EC and is now art.21(1) TFEU. See also the last sentence of art.20 TFEU.

\textsuperscript{44}Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77. The instrument makes a clear distinction between the economically active/financially independent EU citizens—and all the rest.

\textsuperscript{45}G. Davies, \textit{Nationality Discrimination in the European Internal Market} (The Hague: Kluwer, 2003), p.188.


\textsuperscript{47}It can be argued that in the light of the substance of the rules in question the use of the term “citizenship” was clearly unnecessary.


But what if free movement of services and establishment is what EU citizenship really meant for the Court and for the drafters of the Treaties?\footnote{For the logical connections between economic free movement law and EU citizenship see Opinion of A.G. Poiares Maduro in \textit{Alfa Vita Vassilopoulos AE and Carrefour Marinopoulos AE v Elliniko Dimosio, Nomarchiaki Aftodiotikisi Ioannina} (C-158 and 159/04) [2006] E.C.R. I-8135; [2007] 2 C.M.L.R. 2 at [51]. See also A. Tryfonidou, “Further Steps on the Road to Convergence among the Market Freedoms” (2010) 35 E.L. Rev. 36.} Although this point is defensible from a legal-historical perspective given EU citizenship’s pre-Maastricht past, the drafters actually never put it explicitly in the Treaties. The whole codification idea, traceable through virtually all the relevant case law that we have, could also be a creature of the Court’s imagination—a sign of exaggerated attention of the institution to the implied will of the Masters of the Treaties, similar to the laundry list in Eco’s \textit{Pendolo di Foucault}.

Even the rise in the popularity of EU citizenship following \textit{Martínez Sala} case law did not challenge the pre-Maastricht understandings. If Mrs Martínez Sala were not a long-term resident of Germany, making the application of free movement of services potentially difficult (even if not impossible), the Court would have opted for services in her case too, it seems. Also Mr Grzelczyk could legitimately be presented as a service recipient. And the situation of Ms D’Hoop is a clear and direct continuation of the now widely accepted logic presented by one of us in the \textit{Singh} case.\footnote{\textit{Singh} is referred to in \textit{Marie-Nathalie D’Hoop v Office national de l’emploi} (C-224/98) [2002] E.C.R. I-6191; [2002] 3 C.M.L.R. 12 at [31].} In other words, the \textit{Grzelczyk/Martínez Sala} case law largely applied the pre-Maastricht paradigm of using a Treaty-based pretext, be it services or citizenship, for moving a particular situation within the scope of the Treaty, based on the purely market-oriented cross-border logic.

This construct was not essentially altered by the fact that it was EU citizenship—rather than an economic free movement provision—that was deployed as a trigger for the application of EU law. Innovation in the EU citizenship field was halted at the level of imitating pre-Maastricht patterns, rather than shaping a new understanding of what EU citizenship and law should be. The Court was very attentive indeed to the presumption of codification, which the \textit{Herren der Verträge} have never expressed in writing.

More important than occasional nods in the services’ or establishment’s direction, however, is that the fundamental assumption entertained by the Court about the essence of EU citizenship is obviously pre-Maastricht in nature: “[EU] citizenship is not intended to enlarge the scope ratione materiae [of EU law].”\footnote{\textit{Uecker and Jacquet} (C-64 and 65/96) [1997] E.C.R. I-1371 at [23]; \textit{Garcia Avello} (C-148/02) [2003] E.C.R. I-11613 at [26].} This is the absolutely crucial mantra which the Court is keen on repeating. However, just as with economic activity, it is obviously not in the text of the Treaties. Part II TFEU never mentions (neither does art.9 TEU) that the citizenship of the Union is supposed to have no effect on the scope of the law—i.e. is legally inconsequential. Explaining the Court’s initial approach only with the Treaty text at hand is impossible. Such an attempt would clearly amount to an outright presumption of the missing effet utile of a number of Treaty provisions—an almost sickening respect vis-à-vis unwritten rules.

No other Part of the Treaty has ever been presented by the Court as unable to affect the division of competences between the EU and the Member States. Indeed, how can one possibly be convincing in arguing that the introduction of the CAP, in one example, was not supposed to alter the balance of powers between the European Union and the Member States? Similarly, could it be safely assumed that free movement of goods or the customs union are “not destined to enlarge the material scope of EU law”, as
the Court assumed in the context of EU citizenship? Not surprisingly, these examples seem absurd. But how is citizenship different? The only difference, we suggest, can be found in its latent pre-Maastricht existence, predating even the earliest drafts of Pt II TFEU. The question remains whether EU citizenship’s history can justify the established treatment of the primary law.

The list of mantras which are painfully hanging in thin air when read against the text of the Treaties can be prolonged and will be addressed in detail in the next part of the article. In one example, the whole idea that the pre-citizenship logic of cross-border situations and the reservation of EU law protections to, preferentially, the economically active subjects of the law clearly sends a message that innumerable weighty assumptions were read into the text of the Treaty provisions dealing with EU citizenship, notwithstanding the fact that their text has been quite simple from the very beginning. The clarity was further occluded by the virtually random outcomes produced by the recent case law, when the Court took crucial decisions of principle with no recourse to any clear logic in deciding whether to apply economic free movement to a particular factual constellation or not. Workers perfectly falling within the classic definition not infrequently end up classed simply as “citizens”, with far-reaching implications for their wellbeing, as happened in Förster, for instance—and the factual constellations where applying economic free movement case law is probably less straightforward, as in the case of Teixeira, construed in such a way that EU economic free movement law applies, offering protection.

The reasons behind awarding particular economic considerations crucial weight in one case, while ignoring them in the other, are hardly convincing and seem to be successfully randomised. One thing is perfectly clear, however: when invoked, economic considerations still play a crucial role, even past the “early citizenship cases” such as Calfa or Kostantinidis. Economic factors are mentioned in McCarthy, underlined in Chen and deployed in Carpenter, among other cases, pointing in the direction of the internal market logic underlying the deployment of EU citizenship.

Readers are to be reminded that neither the Preamble, nor any of the articles in the Treaties dealing with EU citizenship, connect the enjoyment of this status either with economic activity, or with cross-border movement. Interpreting them as if they were requiring such factors to be present in order for EU citizenship to be applied potentially comes close to a contra legem and ultra vires interpretation of the Treaties, in light of the absurd examples presented above. Make no mistake, if Maastricht is treated as a codification of the pre-Maastricht ideas about legal subjecthood in EU law, this way of thinking would only be fully consistent with Pt II TFEU as long as it made legal sense and produced logically coherent, predictable and convincing outcomes. This would not be too simple a test, since any pre-Maastricht reading of Pt II TFEU obviously represents a tension between, on the one hand, a classical legal view of citizenship as unrestrained by economic considerations, cross-border situations, and capable to shape the scope of the law, which is arguably found in the Treaty; and, on the other, the Court’s construction of the EU-level personal legal status substantiated by little more that the vision presumably espoused by the drafters.

55 McCarthy (C-434/09) [2011] 3 C.M.L.R. 10 at [14].
58 See e.g. art.3(2) TEU. Moreover, an economic interpretation of EU citizenship will presumably contradict art.2 TEU too.
The actual text of the Treaties could be given a more careful consideration, if not weight, we suggest, than the unwritten assumptions read into it in the course of the last two decades. Such an approach would build on the presumption of the plasticity of the law. Indeed, as has been submitted elsewhere, “in the progressive interpretation of constitutional documents it not infrequently happens that provisions acquire over a period of time a significance radically different from any which might have been contemplated by their draftsmen.”

This actually happens all the time—from Magna Carta to the US Constitution, the ECHR and now the EU Treaties. Judges and professors, by instigating such transformations, keep the documents alive, making them serve the current socio-economic situation well and ensuring that the law is more than a text putting it on paper. In other words, the study of EU law, just as the deep study of any other legal field, is a “constructive, rather than a deductive process”, its sources are not merely texts, they are social facts. Which other area of law would underscore this better than that of EU citizenship law, with its avalanche of twists and turns roaring over a largely stale wording in the Treaties?

We move on to suggest that all the most important recent developments in EU citizenship law starting with Rottmann represent a move away from the (still dominant) pre-Maastricht reading of this concept, watering down the strong unwritten assumptions that came together with the economic citizenship idea that got codified. This is done, de facto, through discovering the actual Treaty text and letting to rest the presumption of tacit codifications.

**Bridging the two realities: pre-Maastricht versus post-Maastricht EU citizenship**

Turning to the analysis of the “Incipient Form of European Citizenship” distilled in the 1970s allows us to outline the key features marking the concept of EU citizenship prior to its formal Treaty of Maastricht incorporation. This is done only to discover that such features are still omnipresent, in the post-Lisbon world, i.e. the formal incorporation of EU citizenship into the Treaty text did not fundamentally affect the key attributes of the old concept. The most recent case law from Rottmann to Ruiz Zambrano and Dereci demonstrates a serious departure from old assumptions and an attempt to move away from the pre-Maastricht reality by moving closer to the Treaty text.

**Key features of EU citizenship mark 1: anno 1976**

In outlining the contours of the “incipient form of European citizenship”, one of us emphasised that clarification of three lines of issues was required in order to move beyond the incipient in the shaping of the supranational citizenship, including the determination of who is a European citizen; the outline of

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63 K. Thompson et al., It is a Constitution We Are Expounding (Washington, D.C.: American Constitutional Society, 2009); M’Cullogh v Maryland 17 U.S. 316 (1819) 17 U.S. 316 (Wheat.).
the rights enjoyed by such citizens; and the material scope of situations in which such rights can legitimately 
be invoked, with a particular emphasis on non-discrimination on the basis of nationality.

Turning to the state of the law as of 1976 allows the discovery of the main principles in accordance to 
which each of the three questions was answered, as well as an outline of the main assumptions behind the 
personal legal status of attachment to the Communities. These were profoundly interrelated and, based 
on the law of the day, included the following: (1) the Member States are free to determine who will be in 
the possession of the supranational status through national law; (2) the rights associated with such status 
are cross-border in nature, minimising its effect within the “home” Member States of individuals benefiting 
from such rights; (3) the mere possession of a supranational status does not affect the scope of the 
supranational law: the situations of migrant and static persons are not to be compared to each other. It is 
worth addressing them one by one.

Back in the 1970s the EEC was not empowered single-handedly to outline the personal scope of its law 
owing to developments at two levels. The first one was related to the determination of the scope of the 
notions of “worker”, “establishment”, “provision of services”, etc. and ultimately emphasised the importance 
of economic activity for falling within the scope of EEC law. In dismissing A.G. Lagrange’s suggestion 
in *Hoekstra* that the determination of the essence of the term “worker” be left to the Member States, the 
Court emphasised that doing this would leave a possibility for the Member States “to eliminate at will the 
protection afforded by the Treaty to certain categories of persons”. The latter possibility remained, 
however—which is the second level—through the limitation of access to EU freedoms to Member State 
nationals, much criticised as not rooted in the Treaties even if framed in secondary legislation and in 
the test the Court employed to determine the personal scope of the law. Moreover, the Member States 
started bringing Declarations on nationality for the purposes of Community law “not amount[ing] to an 
objective restatement of domestic nationality law”. Although the legality of such declarations was widely 
doubted, it was also acknowledged that no court was likely to ever point to such illegality in practice.

This is how the first fundamental feature of European citizenship came to be articulated. The Union lost 
the possibility to outline who its citizens were, allowing Plender to conclude that “we can scarcely 
expect the development of a common definition of persons entitled to the rights [provided by the

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75 See the now obsolete Regulation 15/61 of August 15 [1961] JO 1073/1961, art.1; Regulation 38/64 of March 25 [1964] JO 965/1964, art.1. The same rule was reflected in Regulation 1612/68 of October 15 [1968] JO L295/12, art.1, and entered the EU citizens’ free movement directive, where it is reflected even in the name. For a full list of relevant early secondary legislation documents going beyond the text of the Treaties in limiting the personal scope of EEC law see R. Plender, “Citizenship and Immigration” (2005) E.B.L. Rev. 559, fn.4.
76 In the early cases the Court did not mention the possession of a Member State nationality as a necessary requirement to qualify as a “worker” in the sense of EEC law. In *Hoekstra* (75/63) [1964] E.C.R. 177 it stated, for instance, that the concept of a “worker” “covers those persons who, originally compulsorily affiliated to a social security system as ‘workers’, have subsequently, as such and in consideration of a possible resumption of their activity as workers, been admitted as beneficiaries of a voluntary insurance scheme under national law governed by principles analogous to those of the compulsory insurance”.
supranational legal order].” Only in a very limited number of cases, such as 
Airola,81 could EEC law intervene by ignoring, in the context of supranational law, nationalities imposed by Member States and, more importantly, by requiring that the Member States respect each other’s nationalities—a rule distilled in Auer,82 where the Court prohibited any distinctions between EU citizens on the ground of acquisition of nationality, and Micheletti, where questioning of other Member States’ nationalities was prohibited, and de facto reconfirmed, post-Maastricht, in Chen and Ruiz Zambrano.83

The second fundamental feature of the incipient form of EU citizenship concerned the general assumption of inapplicability of supranational rights in one’s Member State of nationality. In 1976 it seemed that “the cases in which Community law will guarantee an individual’s right to reside or work in his own country are likely to be very exceptional and few”.

Although this situation slightly changed prior to the entry into force of the Treaty of Maastricht with the ECJ judgment in the Singh case, the latter clearly seemed to fall within the scope of “very exceptional and few” and did not reverse the paradigm which characterises the second fundamental feature of the incipient form of European citizenship: the lacking universality of the rights it grants. While this can be viewed as problematic when viewed through the lens of citizenship,84 in the absence of any general provisions on citizenship in the Treaties back in the 1970s it was not at all controversial. Even in light of ambitious goals, including an “ever closer Union among the peoples of Europe” in the Preamble, the Treaties were meant to apply to those contributing (if only indirectly) to the internal market and generality as such was presumably not required, while an economic connotation was, on the contrary, of crucial importance.

The third fundamental feature of pre-Maastricht citizenship, which is a twin sister of the ones outlined above, consisted in its complete official inability to affect either personal or material scope of EEC law. This is not surprising, since the personal legal status in question was based directly on the text of the economic free movement provisions in the Treaties and secondary legislation in force back then. Those who would not fall within the personal scope of such provisions—e.g. by virtue of not qualifying as a service provider, like Mrs Laderer,85 or failing to demonstrate that their move from one Member State to another had an underlying economic rationale behind it, like Dr Werner86—would not be covered by EEC law at all. The same applied to those who did not move, like Morson and Jhanjan: they legitimately could not rely on the rights and entitlements, including EEC equal treatment, designed for “migrant workers” and the like, even though the Court has demonstrated willingness to construct the scope of the law expansively, ready to present numerous situations with no obvious connection to the internal market as falling within the scope of supranational law as discussed above. The influence of this approach, which

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83 Ruiz Zambrano (C-34/09) [2011] 2 C.M.L.R. 46 at [40].
86 For analysis, see A. Tryfonidou, Reverse Discrimination in EC Law (The Hague: Kluwer, 2010), pp.132–139.
gave us Singh and Cowan on the principle of equality, was obviously devastating, eliminating predictability and introducing an element of chance into the determination of which law was to apply, thus enlarging the “number of fields [where EU] law actually permits or even promotes discrimination and unequal treatment”.

Pre-Maastricht incipient form of European citizenship was thus directly based on the written primary and secondary law on the internal market, and largely amounted to the presumption of legality of reverse discrimination and a limited nature of EEC-level rights coupled with limited supranational involvement in deciding who was to fall within the scope ratione personae of supranational law.

Key features of EU citizenship mark 2: old assumptions after Maastricht

On the face of it, the Treaty of Maastricht has changed everything. The brand new article on EU citizenship (art.8 EU) unequivocally stated that:

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union.
2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.”

Notably absent from this text are any references to economic activity, or for that matter, any connection with the internal market; the requirement to move around the Union to “activate” EU citizenship rights; and, most importantly, the idea that the newly introduced citizenship is not supposed to enlarge the scope of EU law. Read in conjunction with the Recital in the Preamble introduced at Maastricht, pointing in the direction of the introduction of the citizenship common to the Member States, the Maastricht art.8 TEU could not legitimately be regarded as anything else but a foundation of the new “Union citizenship [which] is destined to be the fundamental status of nationals of the Member States”.

Besides the fact that this statement is repeated virtually in all the citizenship case law of the ECJ to date—which is an important step forward fully in tune with the radical Treaty change—the Court’s treatment of Maastricht innovations was very restrictive. The major part of the pre-Maastricht “quasi-citizenship” with all its drawbacks and starting assumptions miraculously survived the most radical change of the Treaty text. Having acquired a clear legal shape in written primary law, EU citizenship remained contaminated by its own incipient past dating back to the pre-incorporation days.

So the presumption that the European Union should not participate in the determination of who its citizens are survived. The connection between Member State nationality and EU citizenship was reinforced through the introduction of an explicit reference to Member State nationality, which is a direct reflection of the pre-Maastricht reality. Also the generally restrictive reading of the meaning of nationality remained in place. Already in Kaur the ECJ made a firm connection between the pre-Maastricht and post-Maastricht understanding of Member State nationality in the sense of EU law, unwilling to question the second British Declaration on nationality, just as Plender predicted back in 1976, and denying a British overseas citizen the protection of EU law, thus indicating that EU citizenship’s personal scope will seemingly not

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be different from the pre-Maastricht vision. This opened a theoretical possibility for the Member States to create second-class nationals by way of simple declarations in the future. Although the Micheletti principle on the recognition of each other’s nationalities by the Member States remained in force, the Maastricht revision has not, until very recently, affected the first feature of the “incipient form” of European citizenship, reducing the European Union’s involvement to the minimum, notwithstanding the clear implications of the maturing integration process for the nationalities of the Member States. Not blind to the ongoing developments, the Member States even started to amend their naturalisation legislation in order to ensure that the difference between EU citizens and third-country nationals is duly reflected in the law. This de facto resulted in the creation of at least two different parallel regimes of nationality acquisition in a number of the Member States. One is reserved for EU citizens, the other—for all the rest. In other words, this resulted in the creation of separate national rules on the acquisition of EU citizenship by the Member States responding to an obvious need to react to the changing reality in a situation where the EU would not interfere.

Concerning the second fundamental assumption—dealing with the scope of the law, the Court famously adopted a view that EU citizenship was not supposed to affect EU law’s scope *ratione materiae*. Adhering to this unwritten starting point is profoundly problematic as it amounts to the presumption of the inconsequential nature of EU citizenship law—a point which can only be convincingly defended if there is a direct and unequivocal indication to this effect in the Treaties. And there is none. Moreover, once regarded in the context of the practical effects of the introduction of EU citizenship on the scope of EU law, the Court’s starting assumption comes into contradiction with another stance it adopted: “[Each] national of a Member State … comes within the scope *ratione personae* of the provisions of the Treaty on European citizenship.” The latter position is directly grounded in the Treaty text, since when the Treaties tell us that the nationals of the Member States are EU citizens it would be *contre la lettre* to state the contrary; they unquestionably are. Consequently, it seems that either there is a contradiction between the two standpoints of the Court, or (assuming that there is none) the ECJ presumes that the connection between the personal and the material scopes of EU law is limited.

All the case law to date expectedly demonstrates that the latter is not really true; consequently, the Court is contradicting itself. Innumerable cases can demonstrate that scopes *ratione personae* and *ratione materiae* are profoundly interrelated. Enlarging the personal scope by introducing EU citizenship has as

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94 The Court underlined that there is no difference, emphasising that Mrs Kaur did not lose any rights as “such rights never arose in the first place for such a person”. See *Kaur* (C-192/99) [2001] E.C.R. I-1237 at [25]. Although the Declaration clearly limited the scope of British nationality in the sense of EEC law, whether it would at all be applicable to Pt II TFEU was unclear before *Kaur*. See also S. Hall, “Determining the Scope Ratione Personae of European Citizenship: Customary International Law Prevails for Now” (2001) 28 L.I.E.I. 355.


99 The hints at possible limitations contained in arts 20 and 21 TFEU cannot be interpreted as denying EU citizenship its very logic, if not effet utile.  

a direct consequence a serious broadening of the material scope.\textsuperscript{101} Besides a large number of the cases concerning non-economic free movement and obstacles to free movement,\textsuperscript{102} which would be outside the scope of EU law if not the ECJ’s generous enlargement of the latter’s personal scope, also the cases of economic free movement where the economic intentions behind the move are missing provide vivid illustrations of this fact.\textsuperscript{103} Without any doubt, EU citizenship, when introduced, enlarged the material scope of EU law, even though the unhelpful presumption to the contrary has survived to this day.

Lastly, also the presumption of the limited nature of EU citizenship rights survived the Maastricht Treaty change. The majority of EU citizenship rights were not invocable against one’s state of nationality before Maastricht, and this remained the case also after, notwithstanding the fact that the scope of the law has changed as demonstrated above. There are at least three logical obstacles which this state of affairs encounters in the post-Maastricht world. To start with, there is not a hint of this thinking in the text of the Treaty. EU primary law does not speak either of borders or of any economic activity in relation to EU citizenship. The logic behind Pt II TFEU seems to be radically different from the pre-Maastricht assumptions read into the Treaty text by the Court.

Consequently, secondly, it seems certain that the underlying assumptions behind market integration and EU citizenship are not the same. EU citizenship is mostly informed by the will to move the Union “closer to its citizens”, to broaden the horizon of opportunities of individuals through empowering them with the help of rights secured throughout the Union, not merely in their Member State.\textsuperscript{104} This is in marked contrast with the rationale behind the fundamental freedoms, established to facilitate the creation of the internal market through making up for the potential losses suffered by those contributing to the cause of economic integration. Confusing the two underlying rationales by applying approaches designed in the context of operation of one to the framing of another is most unhelpful and also distorts the structural coherence of the Treaties, which definitely do not treat EU citizenship—either formally or substantively—as a part of the internal market project. Instead, they reserved a separate Title IV in Pt III TFEU for the fundamental freedoms which are economic in nature. The scope of the rights in Title IV and Pt II TFEU cannot possibly be identical to those found in the internal market part. Moreover, in art.3 TFEU the Treaty draws a clear dividing line between “an area of freedom, security and justice without internal frontiers” which the Union “shall offer its citizens”,\textsuperscript{105} and the “Internal Market”.\textsuperscript{106} Yet the main interpretation of the scope of Pt II TFEU rights is until this day inspired by that of the pre-Maastricht “incipient form of European citizenship”, which was what is now Title IV TFEU, ruining coherence.


\textsuperscript{103} Ritter-Coulais (C-152/03) [2006] E.C.R. I-1711.


\textsuperscript{105} Article 3(2) TFEU.

\textsuperscript{106} Article 3(3) TFEU.
Thirdly, even if EU citizenship is presumed to be, first and foremost, a market citizenship—which was certainly the case with its “incipient form”, but is not necessarily true today—the notion of the internal market should definitely be approached, in line with the classical principles of interpretation of EU law, with its goals in mind. The internal market is a goal-oriented notion, which is partly defined through what it is established to achieve. Article 26(2) TFEU specifies that “the Internal Market shall comprise an area without internal frontiers in which the free movement of … persons … is ensured”. Deploying a reference to the borders which are being abolished as the crucial part of the test employed by the Court in order to see whether the law would apply seems to be lacking in coherence. It turns out that in interpreting the scope of EU citizenship rights in an atmosphere where no reference to economic activity or cross-border situations is to be found in the Treaties, the Court relies on the notion of “cross-border situation” making the very borders internal market pledges to eliminate indispensable in the reasoning about the scope of EU citizenship rights which are not connected in the Treaty to any economic activity. Such reasoning suffers from serious logical drawbacks and the Court could not ignore the tensions naturally arising from such a shaky construct.

In order to respond to the logical challenges which have been naturally gaining in prominence after Maastricht, two options were open to the Court. It could either come up with a new approach to EU citizenship, deviating from the long-standing practice of the last 20 years, thus breaking up the problematic unwritten tradition. Or it could play with definitions, attempting to stretch the notions of rights, equality and cross-border situations to such an extent that more EU citizens would be able to benefit from EU law. It chose the second, buying umbrellas instead of mending the roof, as a result ending up with no less than four (according to Judge Lenaerts) types of cross-border situations. This essentially signified the blurring of the contours of EU law, leaving the determination of the scope of EU law to a game of chance as Kremzow and Schenpp abundantly demonstrate. It also resulted in a deception of the idea of equality, ending up creating what one of us characterised as a “citizenship without respect”.

All in all, after decades of EU citizenship case law the ECJ failed to move away from the unwritten assumptions concerning the essence of EU citizenship which it read into the Treaties right after Maastricht following the “incipient form of European citizenship”. The Court ended up de facto systematically denying EU citizenship any theoretical importance, placing it in the doctrinal shade of the internal market, thus profoundly occluding the clarity of both, which is most worrisome. In the words of Weiler:

110 Lenaerts, "’Civis europaeus sum’" (2011) 3 F.M.W. 6, 17–18.
In this context a natural question arose whether this situation could be sustained also in the future.

**EU citizenship mark 3, or the breaking point of Rottmann: a blow to unwritten law**

The Court answered this question in the negative in *Rottmann* and has been reaffirming its answer in an important new line of case law ever since. In the two years since *Rottmann* was decided, more has been done in order to break away from pre-Maastricht unwritten assumptions than during the preceding decades of EU citizenship law development. Unlike the previous important EU citizenship case law innovations, such as *Martínez Sala/Grzelczyk* case law discussed above, the *Rottmann/Ruiz Zambrano* line of cases goes beyond the efforts of fitting EU citizenship within the pre-existing context of the internal market, hinting at the total overhaul of the European integration paradigm, underlying the latest citizenship cases.

The Court confronted all three unwritten assumptions. It established that, first, the Member States do not have a legal monopoly to decide who EU citizens are. Secondly, the Court clarified that EU citizenship rights are not reserved for exceptional situations of cross-border movement or relevance, unequivocally demonstrating its willingness to extend them also to the cases that would be regarded as lying outwith the reach of EU law under the previously prevalent approach. Lastly, and probably most importantly, the Court indicated that it is not any more ready to subscribe to its own profoundly controversial maxim that EU citizenship is not intended to enlarge the scope of EU law.

Not aiming to repeat the detailed analyses of the latest landmark cases in numerous thorough case notes (including by Adam and Van Elsuwege, Wiesbrock and others in the pages of this *Review*115), we limit our remarks to the demonstration of the departure from the three fundamental lines of unwritten assumptions outlined above, which are traced back to the pre-Maastricht “incipient form” of EU citizenship. Once such a departure has been established, the drawbacks of how it was conducted in practice will be critiqued in the part that follows.

The first unwritten assumption was confronted in *Rottmann*. The Court established that the principles of EU law are applicable to the cases of the loss and, hence, acquisition of Member States’ nationalities,116 which affect the EU citizenship status of the persons in question. In reply to all the intervening governments which argued, following the pre-Maastricht “incipient form” reasoning, that such issues could not fall within the scope of EU law, the Grand Chamber found that a situation when the very possession of EU citizenship was potentially questioned lay “by reason of its nature and its consequences”117 within the scope of EU law. In terms of its effects on the scope of EU law *Rottmann* is a contemporary restatement of *Hoekstra*: deciding otherwise and following A.G. Poiares Maduro, who suggested in his Opinion that there was a cross-border situation, which did not, however, move the matter within the scope of EU law118

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117 *Rottmann* (C-135/08) [2010] E.C.R. I-1449 at [42].

(just like following A.G. Lagrange in Hoekstra half a century ago), would have meant “allowing the Member States to eliminate at will the protection afforded by the Treaty to certain categories of persons”.

Since Maastricht codified the connection between EU citizenship and the nationalities of the Member States, a move to put limits on the Member States’ actions in the realm of their nationality law which could produce results contradicting the requirements of EU law was long in waiting.

The Court protected EU citizens from possible violations of EU law on the part of the Member States in this overwhelmingly sensitive area. The ECJ moved into the new terrain of EU citizenship discovery in a doubly elegant way. First of all, it distinguished Kaur—a case where it first was offered an opportunity to say exactly the same as it said in Rottmann. This has been done on the ground that Mrs Kaur was not an EU citizen and Dr Rottmann was. Departing from questionable Kaur ignorance of human rights,

Departing from questionable Kaur ignorance of human rights, it is clear that in practical terms Rottmann precludes any unilateral declarations by the Member States which would deprive EU citizens of this status without taking EU law into account. Secondly, by guiding the German Verwaltungsgericht without coming to a conclusion itself, the ECJ also paid lip service to important Member States’ sensitivities. The Court thus effectively solved the first drawback of pre-Maastricht EU citizenship reading by assuming doctrinal control over the supranational status without alienating the Member States. Although it did not break the connection between EU citizenship and Member State nationalities, it effectively became the ultimate guarantor of legality in all the cases concerning the possession of EU citizenship status.

The approach of the ECJ in Rottmann paved way to enlarging the gap between the pre-Maastricht assumptions and the embrace of the Treaty logic which puts at centre stage the citizen herself, replacing the market integration paradigm with that focused on citizens’ rights. However, even before Rottmann, a cross-border situation was not always required. Some of the EU citizens’ rights in the Treaties, such as democratic participation or consular protection, are not conditioned on anything but the possession of this status, provoking a legitimate question: should this logic apply also to other rights? Traditionally, in reconnecting the legal status and the rights stemming from it, the Court demonstrated willingness to invoke unwritten rights, which know no primary or secondary law limitations. This happened in Eman and


121 The Court failed to protect EU citizen’s “right to have rights”: D. Kochenov, “Two Sovereign States vs. a Human Being” in Has the European Court of Justice Challenged the Member State Sovereignty in Nationality Law? (2011), p.11.

122 Rottmann (C-135/08) [2010] E.C.R. I-1449 at [49].

123 See Kaur (C-192/99) [2001] E.C.R. I-1237 at [17] for the observations of the claimant that the UK deprived African Asians of EU and de facto UK citizenship in violation of international law and human rights principles. Although this is well-documented common knowledge, especially following the United Kingdom’s defeat in Strasbourg on this issue and a subsequent public apology by the UK Prime Minister in front of such people as Mrs Kaur (brought several years after Kaur was decided but demonstrating the extent of the problem), the ECJ did not take any human rights arguments into account in the case.

124 Given the Treaty text, a move in this direction will require an intervention from the Herren der Verträge. For criticism see D. Kostakopoulou, “European Union Citizenship and Member State Nationality: Updating of Upgrading the Link?” in Has the European Court of Justice Challenged the Member State Sovereignty in Nationality Law? (2011).


126 In our view this shift is the crucial innovative element of the case, as recognised by innumerable distinguished commentators. For a list see D. Kochenov, “A Real European Citizenship” (2011) 18 C.J.E.L. 56, fnn.2–4. Only one author overlooks this crucial development and is thus not included therein: T. Konstantinides, “La Fraternité Européene [sic]? The Extent of National Competence to Condition the Acquisition and Loss of Nationality From the Perspective of EU Citizenship” (2010) 35 E.L. Rev. 401.
Sevinger, for instance, where an unwritten principle of equality was invoked to the effect of enfranchising in EP elections all EU citizens of Dutch nationality residing in the EU Overseas Country of Aruba.

Although important, owing, inter alia, to a straightforward invocation of an unwritten right in the absence of any reference to a cross-border situation, and a clarification that the EU citizenship status does not “wane off” when a citizen leaves the Union, Eman and Sevinger only concerned a tiny number of persons and could easily remain a momentous eccentricity confined to its facts, if not Ruiz Zambrano, where the Court established that EU law will protect any EU citizen whose “genuine enjoyment of the substance of [EU citizenship] rights” is put in danger by the national authorities. The Court thus developed Rottmann, but also built on Eman and Sevinger. The logic of the Court would be lost if some rights could expire in the absence of the “cross-border” situations: should that be the case, the Court would never be willing (or, indeed, able) to protect them. The second pre-Maastricht presumption—that EU citizenship rights are somehow limited to particular situations furthering the internal market or connected to crossing the borders—has thus been shattered by the Court.

Moreover, in choosing an unwritten right in Ruiz Zambrano—the right not to be pushed to leave the territory of the Union—the Court hinted that the list of rights contained in Pt II TFEU and elsewhere in the Treaty should be interpreted in the light of the logic of citizenship, thus definitely disconnecting EU citizenship status from the internal market thinking. Importantly, in doing this the Court did not essentially innovate; it simply acknowledged what has been an obvious reality for many years by now: “[T]he Union has overcome its existence as a functionalist entity devoted to market integration.” In this sense the latest case law is a great example of the most legitimate discovery of the law—in the sense that the legal regulation has been moved closer to reflecting the objective reality of EU integration—as opposed to ultra vires judicial activism of which the Court is often accused.

The sister assumption that EU citizenship does not affect the scope of EU law has been removed from the repertoire of the Court completely. Since the assumption was so categorical, it is impossible to present all the recent cases as minor deviations from the main rule. Eman and Sevinger, Rottmann, Ruiz Zambrano, all enlarged the scope of EU law on the face of it: given that in these cases EU law has not been activated via the cross-border situation logic, but through the very status of EU citizenship or the danger to the rights connected therewith, consistent case law has emerged directly confronting the old assumption and claiming a vast new terrain for the scope of the supranational law. Importantly, even in the cases where the Court decides that a situation of a particular EU citizen fails to fall within the scope of EU law, the analysis follows both the pre-Maastricht cross-border approach and the intensity of interference with EU citizenship (status and rights) approach, thus reconfirming the importance of the departure from the unwritten law, as McCarthy and Dereci demonstrate.

By questioning this third unwritten assumption the Court made a full circle, de facto denying its own highly problematic starting point in thinking about EU citizenship any credibility. The ECJ has thus finally discovered the dormant non-market logic in Pt

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127 Eman and Sevinger (C-300/04) [2006] E.C.R. I-8055 at [61]. The principle dates back many decades: Ruckdeschel (117/76) [1977] E.C.R. 1753 at [7].
132 McCarthy (C-434/09) [2011] 3 C.M.L.R. 10 at [53]; Dereci (C-256/11) [2012] 1 C.M.L.R. 45 at [66].
II TFEU, deploying EU citizenship—albeit with a delay of two decades—fully in line with the principle of conferral.

The Court is to be praised for refusing to be paralysed by the “originalist” interpretation of the citizenship provisions in the Treaties. The departure from orthodoxy was vital in a situation where there is apparently such an important perceived contradiction between what the drafters of Maastricht wanted to do with EU citizenship and the potential that is offered by the Treaty text currently in force. The Court clearly regarded EU law as mature enough at this point to be granted a capacity for mutation, growth and plasticity, if not faithfulness to the founding text. Drawing on innumerable examples from the US Constitution to Magna Carta necessarily implies that the pre-textual assumptions which are so overtly obvious in the case of EU citizenship should not be regarded as the only “correct” way of approaching the law. Nevertheless, a number of serious inconsistencies follow from the recent case law. Resolving them will be essential for the effective deployment of the new paradigm of European integration.

Stumbling blocks on the way to the incipient substance: the Court’s recent troubles in moving away from the unwritten assumptions

The new rights-based paradigm of EU citizenship is potentially dangerous if not deployed in an accurate and convincing way, being both very powerful and very vague at the same time. Any right, when classed as an essential right of EU citizenship, can trigger the application of EU law in any field, potentially antagonising the Member States faced with a seemingly eroding scope of powers. While exactly the same was done, in many cases, also via the invocation of the cross-border element logic (as in Schempp, Grunkin Paul, Garcia Avello and many other cases) the new approach, although logically coherent and fully justified at its roots, is bound to meet with resistance as any other perceived novelty. Besides, practical difficulties arise right at the starting point of the new approach: it is entirely based on answering questions about rights and deploys the answers to acquire jurisdiction for the protection of those very rights.

In our analysis the main difficulties arising in the course of the practical application of the new paradigm by the Court include the following: the absence of the EU-level test for the determination of the substance of the rights of EU citizenship able to trigger the application of EU law; the lack of clarity concerning either the legal sources of such rights or the EU-level test to be employed in order to establish the level of breach at which the intervention of EU law would be required; missing clarity as to the legal level of determination whether the rights are sufficiently breached for EU law to intervene—should it be the ECJ, or should the national courts be given a role to play? To move beyond asking questions and outlining the drawbacks of the deployment of the new paradigm of EU law, this part contains a brief section discussing the most obvious ways to solve the outstanding problems marking the application of the new paradigm.

Although all the problematic issues are largely procedural in nature and do not undermine the logical foundations of the Rottmann/Ruiz Zambrano approach, the failure to address them in a convincing and timely manner will harm the legitimacy of the rights-based paradigm of EU law.

The missing test for the discovery of essential rights and the light treatment of the facts

Given that the discovery of ECJ’s jurisdiction in citizenship cases now depends on answering a question about rights, a clear outline of the scope of the notion of the “substance of rights” of EU citizenship is indispensable for the success of the new approach. Yet the Court has not as of yet formulated a clear and reliable test to this effect. Directly from Rottmann and Ruiz Zambrano it is clear that EU law is

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134 Apparently nothing, actually, if one believes Señor Gonzalez’s tale of almost accidental, last-second insertion of EU citizenship into the Treaties at the Maastricht IGC, as retold by J.H.H. Weiler, “To Be a European Citizen: Eros and Civilization” (1997) 4 J.E.P.P. 324.

135 Ruiz Zambrano (C-34/09) [2011] 2 C.M.L.R. 46 at [42].
unquestionably activated where the very status of EU citizenship is undermined, or where citizens are pushed to leave the territory of the Union.\footnote{McCarthy (C-434/09) [2011] 3 C.M.L.R. 10 at [49].} While agreeing with A.G. Mengozzi that the recent approach is “not … limited to the case of minor Union citizens who are dependent on one of their parents …”,\footnote{Opinion of A.G. Mengozzi in Dereci (C-256/11) [2012] 1 C.M.L.R. 45 at [27] (with no explanation why).} not providing a convincing outline of situations where the rights-based jurisdiction is applicable is problematic. The problem is not purely theoretical. In McCarthy the Court did not find that being able to stay with her husband in the United Kingdom was Mrs McCarthy’s EU citizenship right, thus failing the jurisdiction test and washing its hands of the matter. Similarly, in Dereci it failed to find jurisdiction notwithstanding the fact that the case involved EU citizen family members being separated from their third-country national children and spouses. Legal certainty is thus profoundly undermined.

Instead of gradually identifying and protecting the whole spectrum of the substance of the rights of EU citizenship, the Court came to use its own first example of what falls within the scope of the “substance of rights” as co-extensive to the very notion of the “substance of rights” itself. This is not logically coherent, since one specific right is by definition narrower in scope than “the substance of rights”, which is a plural notion. The Court has never justified its approach simply stating that, using McCarthy as an example:

“No element of the situation of Mrs McCarthy, as described by the national court, indicated that the national measure at issue in the main proceedings has the effect of depriving her of the genuine enjoyment of the substance of the rights associated with her status as a Union citizen.”\footnote{Opinion of A.G. Mengozzi in Dereci (C-256/11) [2012] 1 C.M.L.R. 45 at [46].} By contrast with the case of Ruiz Zambrano, the national measure at issue in the main proceedings in the present case does not have the effect of obliging Mrs McCarthy to leave the territory of the European Union.”\footnote{McCarthy (C-434/09) [2011] 3 C.M.L.R. 10 at [50].} Dereci is very similar in this regard.\footnote{Dereci (C-256/11) [2012] 1 C.M.L.R. 45 at [65].}

The ECJ thus dismisses all potential rights of EU citizenship which could be invoked, on the ground that they are not the particular right it used in Ruiz Zambrano. The Court does not even consider any other rights whose substance is meaningful for EU citizens and is silent about the reasons behind its silence. Not providing any reasons profoundly undermines the legitimacy and coherence of the recent jurisprudence.\footnote{See on the importance of reasons and justification in a democracy, e.g. M. Kumm, “The Idea of Socratic Contestation and the Right to Justification” (2010) 4 L.E.H.R. 1.} Moreover, it also undermines legal certainty\footnote{Opinion of A.G. Mengozzi in Dereci (C-256/11) [2012] 1 C.M.L.R. 45 at [49].} and simultaneously degrades the essence of EU citizenship and of the fundamental rights as such. Fundamental notions dismissed too lightly threaten to lose in symbolic legal value.

This is exacerbated by the Court’s selective attention to the facts of the cases in front of it. Its reporting of the facts in McCarthy is a disappointing example of a legal misrepresentation of a personal situation of EU citizens. While the Court duly reported that Mrs McCarthy relied on assistance from her Member State, was not engaged in economic activity and had never moved countries\footnote{McCarthy (C-434/09) [2011] 3 C.M.L.R. 10 at [51]. The Court distinguished Garcia Avello (C-148/02) [2003] E.C.R. I-11613.} (ignoring her second EU nationality in a drastic departure from earlier case law),\footnote{McCarthy (C-434/09) [2011] 3 C.M.L.R. 10 at [49]–[51].} it closed its eyes to the essential elements of the McCarthy family situation which were able to shed some light on what was actually going on.\footnote{The Court can ask for more facts if something is unclear, which has not been done: M. Broberg and N. Fenger, Preliminary References to the European Court of Justice (Oxford: Oxford University Press, 2010), p.355.} Three
children, one of them severely disabled and in need of constant care, went unreported. By not mentioning the actual situation in the McCarthy family, where the United Kingdom was in the process of deporting the only potential bread-winner, leaving his wife and three children, one of them severely disabled, to receive assistance from the State, Mrs McCarthy is presented as an idle layabout: she never worked and always collected social assistance. In committing this sin of omission the Court (which is obviously not the only party to blame in this miscarriage of justice, as the referring court failed to report the facts in full) is hardly achieving any noble goal: McCarthy would provide an ideal factual constellation, with all respect to A.G. Kokott advising to the contrary, for the ECJ to intervene. What the Court was dealing with, in practice, was a Member State ruining the most vulnerable of families touched by need and child disability. By finding that EU law does not apply since, first, Mrs McCarthy is not thereby forced to leave the Union (instead of considering the substance of her rights) and, secondly, since she does not work (instead of mentioning full-time care required by the handicapped child), the Court has punished a mother for the disability of her child by de facto assisting the United Kingdom in ruining her family. It is suggested that a more constructive engagement with the essential rights of EU citizenship could bring about a somewhat less despicable result.

What the Court has done in McCarthy and Dereci is logically unsound: the creation of a new EU citizenship paradigm in the context of EU law seems to be accompanied by a tacit demand that families move from one Member State to another in cases where the “substance of EU citizenship rights” is deemed by the Court not to be affected by the Member State actions. Such an approach goes against the very purpose of the new jurisdiction test as the underlying assumption that moving around is good for you makes no sense on the face of it, which was the main reason behind looking for alternatives to the cross-border situation test in the first place. There is no logical justification for requiring that handicapped children cross the non-existent borders within the internal market.

Unclear sources of EU citizenship rights and the blurred threshold of breach to warrant EU intervention

Part of the problem is related to the Court’s silence with regard to the legal sources of the “substance of rights” of EU citizenship and the minimum thresholds of breach of such rights, which would activate EU law. Not knowing the origin of rights on which the jurisdiction of the Court is now dependent is problematic, since such rights can be derived from a virtually unlimited pool of resources, be it Pt II TFEU, unwritten general principles of law, substance of the notion of citizenship as such, or the inspiration from the ECHR, or the Charter of Fundamental Rights, as well as from international law and the national constitutional traditions—all of these being in line with the understanding of the sources of rights in EU human rights law and policy. In the absence of any decipherable test, the only source of the substance of rights of EU citizenship is thus the case law of the ECJ itself, where such rights are named. A clear preference of the Court seems to lie with unwritten rights essential for the functioning of the concept of citizenship. This is how the right not to be forced to leave EU territory in Ruiz Zambrano, or the understanding of equality in Eman and Sevinger can be classed.

147 McCarthy (C-434/09) [2011] 3 C.M.L.R. 10 at [25].
148 Opinion of A.G. Kokott in McCarthy (C-434/09) [2011] 3 C.M.L.R. 10 at [42].
150 This is to be confirmed in Yoshikazu Iida v City of Ulm (C-40/11) (2012, pending).
The silence of the Court can be explained, in part, by the limitation clauses contained in the Charter of Fundamental Rights of the European Union (CFR). The protection of fundamental rights has come to occupy a central place in the Court’s jurisdiction test but, ironically, the drafters of the CFR seemingly tried to limit the scope of EU human rights protection, also demonstrating, in the words of Judge Pescatore, “une ignorance totale en ce qui concerne l’objet propre du processus communautaire et la répartition des compétences entre l’[UE] et les États membres”. The document has from its very inception been criticised by scholars predicting that an expansion in the scope of EU fundamental rights protection would happen anyway owing to the systemic tensions within the multi-layered legal system of the Union, where all the levels converge in the citizens they share. Interpretation of art.51(1) CFR being quite restrictive at the moment, it seems that EU citizenship, not the Charter, is likely to be the main trigger of protection of fundamental rights in the Union. In any case, it is clear that the claim of jurisdiction following the Rottmann/Ruiz Zambrano approach on the basis of Charter rights is logically impossible as it will result in an attempt to deploy Charter rights to shape the scope of EU law, defying the limitation on the Charter’s scope contained in the document itself. An alternative would be to use the Charter, alongside the ECHR, as a source of inspiration for the Court to discover unwritten principles of law—which it could be doing already, albeit without telling anyone. The Court is very familiar with this approach, which has been employed since the first steps the European Union made in the field of human rights protection—with mixed results: sometimes the Court apparently does not feel like human rights, oppressing the stranger and now, seemingly, also its own, as in McCarthy and Dereci.

The lack of clarity qua sources is supplemented by the lack of clarity as to the minimum threshold of breach of the substance of EU citizenship rights which EU law would not tolerate. In outlining the best possible approach to be used in this regard, it is possible, following Judge Lenaerts, to start with the wording chosen by the Court in the recent cases. Clearly,

“a restrictive interpretation of the expression ‘national measures which have the effect of depriving…’ would render the term ‘substance’ redundant as a de facto loss of a right attaching to the status of citizen of the Union would, by definition, affect its substance.”

In other words, what the citizenship paradigm of EU law implies is that EU citizenship will serve as an activator or EU law in what used to be deemed as wholly internal situations, not only in the cases where the highest level of the breach of rights has occurred. It will be up to the Court to clarify, however, how serious the likelihood of breach has to be for EU law to step in.

The analysis of the recent case law demonstrates that the threshold is currently placed extremely high: in Ruiz Zambrano the Court intervened where a Member State failed to abide by its own law; the Belgian authorities refused to grant employment and residence rights to third-country national parents of Belgian children based on national law designed specifically for such situations under the pretext that the children

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156 For criticism, see Opinion of A.G. Bot in Scattolon v Ministero dell’Istruzione, dell’Università e della Ricerca (C-108/10) (2012) 1 C.M.L.R. 17 at [120].
159 Lenaerts, “‘Civis europaeus sum’” (2011) 3 F.M.W. 6, 15.
could theoretically be registered as Colombians before acquiring Belgian nationality. This perspective, which is also questionable from the point of international law, ultimately warranted EU law intervention.

By contrast, in McCarthy and Dereci the national law was formally complied with. In our view such national law-centred vision of the Rottmann/Ruiz Zambrano jurisdiction test is not sufficient. EU citizens’ rights can only be considered as sufficiently protected if EU law opens a possibility to act against the national rules which are obviously unreasonable. Such a broader vision would also be in line with Judge Lenaerts’s vision and can be confirmed by the Court’s own approach in Rottmann: while no national law seemed to be disregarded, the Court still ruled—with a view to the harshness of the likely consequences of the national decision depriving Dr Rottmann of his only nationality—that the EU principle of proportionality was applicable. The same could be done in Dereci: how reasonable is it to require a youngster of former Yugoslav nationality to leave Austria for the whole duration of the consideration of his residence application knowing that he resided in Austria virtually since the moment of his birth and has nowhere to go? This is exactly the case where EU law intervention in the light of proportionality would be feasible. Going against day-to-day violations of EU citizens’ rights by the laws which make little sense on their face could thus be the main area of deployment of the true European citizenship, seriously improving the climate of rights protection in Europe and compensating for the deficient scope of the Charter. To ignore this potential by going solely for the most exceptional cases of “systemic failure”, as von Bogdandy et al. have recently proposed, would fall short of the potential of the new approach to improve lives and improve the European Union’s legitimacy, as the defender of citizens from unjustifiable national regulation.

The role of the national courts

Another crucial issue for the Court to resolve concerns the legal level of the determination of the breach of rights, as well as of the severity of such breach. The foundational starting point in thinking about such issues has always been the principle of uniform application of EU law, dating back to Costa. In Dereci, however, the Court seems to be moving away from it, for the ECJ ruled that “the denial of the genuine enjoyment of the substance of the rights conferred by virtue of [one’s] status as a citizen of the Union … is a matter for the referring court to verify”. This is a puzzling finding in the context of the Rottmann/Ruiz Zambrano jurisdiction test, which is based on a fundamental connection between the breach of the substance of rights of EU citizenship and the possibility for EU law to step in. In this context leaving it up to the national courts to determine the breach of the substance of EU citizenship rights de facto amounts to delegating to them not merely the question of the exact amount of rights associated with EU citizenship, but, fundamentally, also the question whether the ECJ is competent and whether EU law should apply. This statement of the Court is, no doubt, a mistake: it clearly can be interpreted as amounting to giving up EU citizenship as a supranational legal status in contradiction to the letter and the spirit of the Treaties, thus undermining the “fundamental status of the nationals of the Member States”. The latest case law potentially represents an attack on the legal

159 Ruiz Zambrano (C-34/09) [2011] 2 C.M.L.R. 46 at [23]. The Belgian authorities presumed that Belgian nationality was acquired because Ruiz Zambrano “disregarded the laws of his country”, which was a wrong interpretation of applicable Colombian law: M. Olivas and D. Kochenov, “Case C-34/09 Ruiz Zambrano: A Respectful Rejoinder”, Public Law and Legal Theory Series Paper 2012/W/1, University of Houston (2012), pp.3–4.
164 Dereci (C-256/11) [2012] 1 C.M.L.R. 45 at [74] (emphasis added).
165 See e.g. Ruiz Zambrano (C-34/09) [2011] 2 C.M.L.R. 46 at [41].

ability of the ECJ to determine its own jurisdiction in citizenship cases, which is a most surprising move, especially given that EU citizenship, alongside a handful of other fundamental concepts, unquestionably belongs to the realm of EU law, as opposed to the national law of the Member States. Following along the same lines would endow the national courts with the ability to determine the rights of EU citizens, de facto renouncing this EU-level legal status, which contradicts the very core of the division of competences between the national courts of the Member States and the ECJ.

A more coherent way to involve the Member States’ courts has been demonstrated in Rottmann: once the ECJ rules that a certain issue falls within the scope of EU law, it is most reasonable to leave the application of the principles, which the ECJ clarified to be applicable to the situation at issue, to the national courts. This approach allows recourse to the national courts’ knowledge of the situation on the ground in the best possible way, while strengthening the relationship of co-operation between the different levels of judiciary in Europe. This can only be done, however, once the applicability of EU law has been clearly asserted by the ECJ. In the case of the contrary the very rationale of EU law is undermined, as the determination of its scope comes to be conditioned exclusively on the judgment of the national courts.

All in all, although the existence of the new paradigm of EU law has been forcefully asserted by the Court in all the recent EU citizenship cases, important technical problems of at least two orders arise. The first concerns the outline of the scope of the rights of citizenship, their sources and the approaches to the assessment of the minimal degree of breach for EU law to be activated. If left undefined, it threatens to seriously undermine EU citizenship and the whole non-economic paradigm of EU law, which is slowly emerging through the discovery of the Treaty text. The second concerns the role played by the Member States’ courts in this process. If overemphasised, it threatens to undermine the uniformity of application of EU law and disconnect from EU law the essence of the “fundamental status” of EU citizenship, which is “independent” of the Member States’ nationalities and granted by the Union in the first place. The consequences thereof would be disastrous, as the foundational principle of uniform application of EU law—responsible for the latter’s workability and systemic nature—ends up profoundly undermined.

Double circular reasoning seems to be emerging in this context: given, first, that the scope of EU law depends on answering the question about rights and the main instrument capable to shed light on this question is not applicable to the situations which are outside EU law’s scope and, secondly, that the ECJ’s jurisdiction in EU citizenship cases depends on the breach of the substance of EU citizenship rights, which can be, however, for the national courts to determine.

Resolving the deficiencies

To resolve these serious deficiencies, it is necessary to go back to the starting point: to revisit the texts of the relevant provisions of the Treaties and the foundational cases that sketched the contours of the new paradigm, i.e. Rottmann and Ruiz Zambrano. Since the Treaties do not connect the enjoyment of the substance of EU citizenship rights with movement or limit EU citizenship rights to the right not to leave the territory of the Union, the rights paradigm should not be artificially connected to movement, which the Court seems to be suggesting in McCarthy or Dereci. It is quite sensible to expect that rights be sufficiently protected without taking a bus. First of all, however, it is necessary to clarify that a particular right deployed in Ruiz Zambrano is not synonymous with the whole array of rights which can activate EU law. In hinting at the contrary in McCarthy and Dereci the Court’s reasoning is particularly unconvincing.

Secondly, the Court should not be ashamed of being humane once again: its main task is to help the citizens, not to justify why it cannot intervene, no matter what. While in the past (in Cowan, Carpenter, Baumbast, Chen and innumerable other cases) the Court was clearly on the side of the citizens, McCarthy...
and Dereci point in the opposite direction, sending a profoundly disturbing signal. Being humane in this context means being open to seeing unnecessary human suffering as well as being ready to deal with it. Artificial procedural boundaries are most unhelpful in this context. One of the least helpful answers the ECJ can give is “go to Strasbourg”—as we heard in Dereci—and as was implied in McCarthy. When the legal problem is somewhat more interesting than a handful of (partly) immigrant families, or a mother on the verge of being left alone with three children, one of them disabled, the Court is usually more interested in the issue of human rights protection, to which all of its human rights jurisprudence effectively testifies. Moreover, Strasbourg is unlikely to help, since it puts the emphasis, logically enough, on not splitting the families and does not normally guarantee the right to reside in a particular jurisdiction. This is exactly the opposite case when compared with what is cherished by the ECJ, with its right not to be pushed to leave the territory of the Union test and is a feat of most unfriendly cynicism vis-à-vis those whose family members are being deported. By knowingly doing nothing when families are being split the ECJ is most likely violating the principles of the ECHR, should we presume that a right to normal family life is one of the EU citizenship rights—it has always been, at least, to which all the free movement of workers legislation testifies. Moreover, should the McCarthys or the Derecis end up in Strasbourg, the families will most likely be offered the opportunity to leave the Union, which is in direct contradiction to even the minimal vision of EU citizenship espoused by the ECJ in both cases. The core of the problem, it seems, is that the ECJ seems to presume that the essential rights of EU citizens are none of its business (while stating the contrary). This is obviously a wrong presumption, since the ECHR is merely a minimal standard and the European Union should aspire to achieve a higher level of protection than that, which would be difficult to do if the Court is unwilling to help.

A way to overcome the mounting difficulties would be to admit that EU citizens are human beings of flesh and blood who sit at home, give birth to babies and fall in love, and treat them accordingly. In this context any unnecessary suffering will be suspect ab initio. Any law presuming that splitting a family is fine, for instance, should by definition receive the highest level of critical scrutiny. Europe is in need of moral leadership more sorely than ever in the face of the accumulating failures of the increasingly nationalistic Member States and flocks of helpless politicians unable to deal with the economic crisis. It is difficult to imagine a better time for the Court to do the right thing. The principle of proportionality could be most helpful in this regard. The ECJ will then protect EU citizens from nonsensical unjustifiable rules, which it has been doing for many decades already. The Member States will only need to justify their behaviour, which will both reinforce their democracies—since a real democracy cannot function based on nonsensical rules, especially if they harm individuals—and protect EU citizens from abuse. In this sense, the current threshold of the activation of the law, is unjustifiably high: allowing the European Union to intervene only when a Member State attempts to deprive an EU citizen of the legal status of EU citizenship, as in Rottmann, or when a Member State demonstrably fails to abide by its own law, as in Ruiz Zambrano, is unlikely to help the majority of EU citizens who are in need of the Union’s protection.

167 Dereci (C-256/11) [2012] 1 C.M.L.R. 45 at [72].
173 Lenaerts, “‘Civis europaeus sum’” (2011) 3 F.M.W. 6, 15.
A more down-to-earth approach is needed, extending the protections of EU law to all EU citizens suffering from unjustifiable and harmful regulation.\textsuperscript{175}

What has to be absolutely avoided is having two different levels of scrutiny depending on the jurisdiction test chosen by the Court: \textit{Rottmann/Ruiz Zambrano} “substance of rights” test should not be milder (or stricter) than the classical cross-border situation test. It is essential in the context of the new paradigm that the Court has finally conceded, in line with the text of the Treaty, that moving around the Union does not possess any magical value of its own. An EU citizen that has moved is not better or worse than the one who decided to stay at home. Applying different thresholds of the substance of rights in these two situations would imply that movement around the Union still plays a crucial role under the new paradigm and this cannot, logically speaking, be the case, since the new approach arose, as has been demonstrated above, in reply to the failure of the movement-based approach to the scope of EU law to address the problems arising in the context of EU citizenship law efficiently. Should the parity of scrutiny not be established between the two jurisdiction tests, in any situation when the Court tacitly advises someone to move across the non-existent border within the internal market, i.e. recommends in engaging in an act deprived of any possible sense on the face of it, we will be dealing with a serious violation of EU citizenship rights. Europe does not need such nomadic rituals to discover the dignity and rights of its citizens.\textsuperscript{176} This will finally infuse post-citizenship law with some common sense: making people move for the sake of moving simply does not further any identifiable goal, let alone being illegal under Pt II TFEU, which lists free movement as a “right”. What is the point of making Mrs McCarthy use this right under the threat of the deportation of her loved one? The Court failed to answer.

\textbf{Conclusion}

This article has demonstrated that the key paradigm of EU law is changing. This change is fully grounded in the Treaty text and represents a necessary move in ensuring that the Union is to move closer to achieving the ambitious objectives the Treaties set for it. Although a number of issues remain unresolved, these are largely procedural in nature, unable to throw a shadow on the fundamental shift in the main rationale behind integration.

From EU citizenship based on the economic paradigm of the internal market and thus grounded in the unwritten assumptions pre-dating the entry into force of the Treaty of Maastricht with its Pt II EC (now Pt II TFEU), the European Union is moving towards a new paradigm in the organisation of its law, which is essentially based on the protection of the vital interests of citizens through the intervention of EU law. An emerging emphasis on rights is to be applauded in the light of all the array of logical tensions and inconsistencies plaguing the Union’s development and operation as outlined above, caused by the application of the internal market paradigm to the Union where citizenship came to play a hugely important role, which is bound to gain further momentum for at least two simple reasons: disregarding the text of the Treaties any longer is not sustainable and pretending that EU citizenship is about economic cross-border movement is not convincing. The law has to make sense in order to be effective.

Disconnecting EU citizenship and the internal market, although seemingly revolutionary, represents a return to the Treaty text accompanied by a move away from the unwritten assumptions which could happen 20 years ago, but owing to inertia and the weight of the economic-minded tradition in the interpretation of the Treaty provisions only came about just now. It is beyond any doubt that key questions of EU citizenship should be answered having EU citizenship logic in mind, not simply on the basis of the internal market logic and ancient unwritten presumptions, however dear to the hearts of some of us.

\textsuperscript{175} See in the same vein, e.g. Davies, “Humiliation of the State as a Constitutional Tactic” in \textit{The Constitutional Integrity of the European Union} (2010).

\textsuperscript{176} See, however, Opinion of A.G. Trstenjak in \textit{Yoshikazu Iida v Stadt Ulm} May 15, 2012 at [92].
At the same time, to agree with A.G. Sharpston, “the desire to promote appropriate protection of fundamental rights must not lead to the usurpation of competence”. Without clear references to the sources of rights and the reasons why the particular sources are either chosen or left unused, even a perfectly legitimate action in the name of human rights protection can acquire a flare of ultra vires, harming the whole endeavour of the Court. The same does not uniquely apply to the sources of rights, but also to the assessment of the severity of breach by the Member States—another vitally important aspect of EU citizenship jurisprudence where clarity is yet to be shaped. The consequences of the erosion of trust in what the Court is doing in the domain of EU citizenship are likely to be truly dramatic, since it is abundantly clear at this stage that any return to a purely cross-border situation thinking is not a viable option any more: the new paradigm has been formulated in response to the obvious inadequacy of the classical one, based on the internal market logic, in the context of the citizens’ Union after Maastricht.

All in all, the Treaty has been transformed from one that regulates the consequences of transactions that involve exchanges between Member States and economic actors in the context of the internal market to one that regulates the rights of those who enjoy the common citizenship established thereby.

177 Opinion of A.G. Sharpston in Ruiz Zambrano (C-34/09) [2011] 2 C.M.L.R. 46 at [168].