

The Citizenship Paradigm

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Abstract

This chapter suggests the deployment of the concept of European citizenship as a means of integration alongside the internal market, proposing the citizenship paradigm of European integration to inform the Union's future. This proposal, based on a combination of the initial promise of European unity and the potential of EU citizenship, is not purely utopian but is directly rooted in the primary law as well as in the purpose of the integration project.

I. INTRODUCTION

THE ECONOMIC INTEGRATION ideology, however important and useful, needs to yield to a richer basic vision of the European integration rationale, which is at the core of the Union in Europe. This chapter explains why this is the case and proposes a concrete way of how to do it. Its main purpose, however, is to raise awareness and to open up a discussion rather than solve all the problems it outlines.

Market integration has always been just a *tool* to fulfil the grand promises enshrined in the idea of European unity. The latter has now almost left the stage: the means took the place of the ends, critically undermining what integration stands for as a result. Europe is living through strange times, when free movement is presented as *the core* of the idea of the Union. This presentation is not only questionable, it is also misleading. It is not only that the market cannot possibly be presented as the unique tool of delivering on the grand promise associated with European unity. Its success in bringing about the fulfilment of the Union's ideals is also ultimately unlikely. Equating Europe with the market is misleading. It ignores the essence of what Europe stands for and should thus be discarded.

* Many thanks to Nathan Cambien and Sascha Somek, to Catherine Barnard for the invitation to speak at Cambridge and to Kim Lane Scheppele for the invitation to speak at Princeton. Daniël Overgaauw's editorial assistance is gratefully acknowledged.

It is submitted that European citizenship, deployed alongside the market, could supply the second major tool to save the Union from losing its foundational principles.¹ In the Union as it now stands, where the internal market is presented as the core of what Europe is and stands for, coherence, rationality, happiness and common sense are frequently sacrificed on the altar of this ‘idea’.² Providing bread and circus,³ but also misery,⁴ a perpetuation of the divide between the rich and the poor Member States⁵ and a largely economic vision of those in whose name and for whose benefit it has been created in the first place,⁶ the Union—alongside the Member States no doubt—is guilty of muddling its ethical core up to the point of making it undecipherable⁷ and of installing and policing the idea of citizenship without respect for its subjects.⁸ No idea of justice is in sight,⁹ as the notion of justification in the instances where proportionality is applied is affected by internal market thinking¹⁰ and quasi-federal legalism in the guise of what Philip Allott called the “national constitutional order” heresy.¹¹

Let us assume that the ideal of peace and a better life for all is not to be questioned—this is the primary reason for the existence of authority in a democracy. In this context, it is essential to realise that the internal market is, quite obviously, not the *only* tool to deliver the grand promise of peace and

¹ A Williams, *The Ethos of Europe* (Cambridge, Cambridge University Press 2009).

² Ibid, for notable criticism. See also A Somek, ‘Europe: From Emancipation to Empowerment’ (2013) University of Iowa Legal Studies Research Paper 13/16.

³ JHH Weiler, ‘Bread and Circus: The State of the European Union’ (1998) 4 *Columbia Journal of European Law* 223.

⁴ See, eg, Case C-434/09 *Shirley McCarthy v Secretary of State for the Home Department* [2011] 3 CMLR 10; P Van Elsuwege and D Kochenov, ‘On the Limits of Judicial Intervention: EU Citizenship and Family Reunification Rights’ (2011) 13 *European Journal of Migration and Law* 443.

⁵ See, eg, D Kukovec, ‘A Critique of the Rhetoric of Common Interest in the European Union Legal Discourse’ (2012) Harvard Law School IGLP Working Paper.

⁶ See N Nic Shuibhne, ‘The Resilience of EU Market Citizenship’ (2010) 47 *CML Rev* 1597 for a sound defence of ‘market citizenship’.

⁷ Williams (n 1).

⁸ D Kochenov, ‘Citizenship without Respect’ (2010) NYU Law School Jean Monnet Working Paper 8/10.

⁹ See G de Búrca, D Kochenov and A Williams (eds), *Europe’s Justice Deficit?* (Oxford, Hart Publishing, forthcoming 2014) for one of the first attempts to approach this issue.

¹⁰ J Neyer, *The Justification of Europe* (Oxford, Oxford University Press 2012). See also his debate with Danny Nicol in the pages of the *Journal of Common Market Studies*: J Neyer, ‘Justice, Not Democracy: Legitimacy in the European Union’ (2010) 48 *Journal of Common Market Studies* 903; D Nicol, ‘Can Justice Dethrone Democracy in the European Union? A Reply to Jürgen Neyer’ (2012) 50(3) *Journal of Common Market Studies* 508; J Neyer, ‘Who is Afraid of Justice? A Rejoinder to Danny Nicol’ (2012) 50 *Journal of Common Market Studies* 523.

¹¹ P Allott, *The Health of Nations* (Cambridge, Cambridge University Press 2002) 219. Allott hints at the fact that it is impossible to justify the EU’s constitutional authority via 28 different national doctrines and connects the ideology of a national constitutional order to the doctrinal inability of national legal scholars to cope with reality. See also R Schütze, *From Dual to Cooperative Federalism* (Oxford, Oxford University Press 2009), for a fascinating analysis of the EU’s constitutional legal essence.

a better life for all, and should be treated as such: as one instrument among many. Building the market for the sake of the market is not only indefensible, it is also wrong: by viewing Europe in this vein, we denigrate the idea of European integration and can hardly justify the process—particularly so in times of crisis.¹² It is time to say no to the ends hijacked by the means: the Union is much more than the import and export of clementines. True, in mistaking the boat for the purpose of the journey—with all respect to Kavafis¹³—the Union is in no way unique. Plenty of other polities throughout the ages have mistaken means (democracy, market liberalisation etc) for the ends.¹⁴ The Union has not learned from them.

More than half a century after the beginning of the European integration project, it is a good time to reflect on the basics of it again. This is not only due to its paradox of success, which is organically intertwined with the ongoing crisis.¹⁵ The integration project, with its very *raison d'être* debated and questioned now as much as ever before,¹⁶ is in need of a fundamental reconnection with its own promise: peace in Europe and a better life for all.¹⁷ This chapter joins a growing body of literature critically approaching the vacuum at the ethical core of the Union, regarding all the avalanche of the scholarship based on the presumption 'internal market means the Union' in astonished disbelief. And even though Andrew Williams, Alexander Somek or Jürgen Neyer would vehemently disagree with each other,¹⁸ what their thinking teaches us is fundamental: a new broader vision of the EU and its law is an imperative. Through the decades of the Union's evolution, something crucially important has been forgotten, and redeeming the grand promise of the Union as well as starting a discussion on how it can be achieved past the market station should claim the central place in the legal scholarship.¹⁹

¹² G Morgan, 'European Political Integration and the Need for Justification' (2007) 14 *Constellations* 332; Neyer, *The Justification of Europe* (n 10). See also B Sissenich, 'Justification and Identity in European Integration' (2007) 14 *Constellations* 347.

¹³ Remember his 'Ithaca', for instance, among other poems.

¹⁴ JHH Weiler, 'In Defence of the Status Quo: Europe's Constitutional *Sonderweg*' in JHH Weiler and M Wind, (eds), *European Constitutionalism beyond the State* (Cambridge, Cambridge University Press 2003) 7 (clarifying that a democracy of vile persons will be vile).

¹⁵ JHH Weiler, 'Europe in Crisis: On "Political Messianism", "Legitimacy" and the "Rule of Law"' (2012) *Singapore Journal of Legal Studies* 248.

¹⁶ G de Búrca, 'Europe's *raison d'être*' in D Kochenov and F Amtenbrink (eds), *European Union's Shaping of the International Legal Order* (Cambridge, Cambridge University Press 2013), 21.

¹⁷ Now reflected in arts 2 and 3 TEU.

¹⁸ Williams (n 1); Somek (n 2); Neyer, *The Justification of Europe* (n 10). See also their contributions in de Búrca, Kochenov and Williams (n 9).

¹⁹ This is not the first time that I have voiced this call. See D Kochenov, 'The Essence of European Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon?' (2013) 62 *ICLQ* 97, 136.

This brief discussion aims to achieve two things: to outline the problem and to propose a possible solution, which is also rooted in some current developments. To do this, it makes a fundamental assumption followed by five interconnected points. It is structured as follows. First, the basic assumption is outlined: the EU, which is about a better life for all, was created with the citizen in mind. In focusing on the citizen, it provided a cherished alternative to the classical understanding of inter-state relations, in the vein of the move from ‘diplomacy’ to ‘democracy’, as outlined by Philip Allott.²⁰ Second, the starting point is made: the internal market is a project designed to achieve the grand promise of the Union to the citizens—the key tool of European integration as confirmed by the 1955 Messina Conference and the Spaak Report,²¹ as well as by all the history of the evolution of EU law, including the recent EU citizenship case law, as Niamh Nic Shuibhne has demonstrated.²² Crucially, this chapter argues that although the internal market is a tool, it is not the *only* one and that such a claim of exclusivity, although frequently made, is misplaced.

Third, the chapter then demonstrates that the internal market is not perfect in its functioning towards the achievement of the greater promise, both at the practical level and at the theoretical level. The current crisis aside, the design of this tool has been limiting from the very start—not only by the obvious consideration that prosperity is relative, but also by the inbuilt ignorance of non-economic justice claims from which the market approach suffers.²³ To regard the Union exclusively through the prism of the market thus obstructs the achievement of what the integration project stands for.

Fourth, having discarded the suitability of the internal market as the only tool of European integration, the argument opens the search for the alternative tools to be deployed alongside the market in order to ensure that the promise of the Union is achieved. The chapter tests whether EU citizenship could provide such an alternative tool of integration.²⁴ In this context, it is demonstrated, crucially, that EU citizenship is *not* about the market: a legally sound and coherent distinction between the two can be made by building on the primary law of the Union and keeping the goals of integration in mind.²⁵ Moreover, it is demonstrated that EU citizenship is inevitably

²⁰ P Allott, ‘The European Community is Not the True European Community’ (1991) 100 *Yale Law Journal* 2485.

²¹ Comité intergouvernemental créé par la conférence de Messine, *Rapport des Chefs de Délégation aux Ministres des Affaires Étrangères* (Mae 120 f/56 (corrigé), Brussels, 21 April 1956) (Spaak Report).

²² Nic Shuibhne (n 6).

²³ Eg, Somek (n 2).

²⁴ Kochenov (n 19); D Kostakopoulou, ‘Ideas, Norms and European Citizenship’ (2005) 68 *MLR* 233 (in general on EU citizenship and its potential).

²⁵ D Kochenov and R Plender, ‘EU Citizenship: From an Incipient Form to an Incipient Substance?’ (2012) 37 *European Law Review* 369.

bound to find itself in fundamental opposition to the market logic, as currently understood in the context of the European integration project. Ignoring this fact misrepresents either one of the two tools discussed (ie, the internal market and citizenship) or both. Moreover, the state of natural tension between the two is instructive for the day-to-day functioning of EU citizenship and the internal market side by side as equally important instruments of European integration.

Finally, the chapter turns to the theoretical writings on EU citizenship as well as the recent case law of the Court of Justice of the European Union (CJEU) to discover how the essence of EU citizenship is usually approached: either as part of the economic tool of integration or as a free-standing outlining. Important developments point in the direction of a possibility of interpreting recent case law as a gradual move from the former to the latter vision.²⁶ This move is unquestionably mandated by the text of the primary law of the Union.²⁷

The concluding part of the chapter introduces the citizenship paradigm of European integration by re-stating the main findings of this exposé and outlining a logical distinction between substantive and procedural functions of integration tools in the context of the vertical division of powers between the EU and the Member States. Only by serving as a measure of such vertical delimitation can a tool of integration be deployed in full. Building on the recent case law and theoretical insights, it presents EU citizenship as a legitimate rival of the market tool of EU integration, endowing the Union with a promise of new important developments. Alternatives are scarce, since the internal market fails us as a tool to deliver on the main promise of European integration: the proposed new vision is not a luxury, it is a necessity.

The citizenship paradigm of European integration is not without its blank spots: problems abound, although these should not be over-emphasised. Most importantly, the new role for European citizenship is not self-evident and is even less of a panacea in the context where the ethical core of the Union represents a void, as Somek and Williams have successfully demonstrated. Much more thinking needs to be done before EU citizenship comes to operate as this chapter proposes.

²⁶ K Lenaerts, “‘*Civis Europaeus Sum*’: From the Cross-border Link to the Status of Citizen of the Union’ (2011) 3 *Electronic Journal of Free Movement of Workers in the European Union* 6, especially 18; D Kochenov, ‘A Real European Citizenship: A New Jurisdiction Test—A Novel Chapter in the Development of the Union in Europe’ (2011) 18 *Columbia Journal of European Law* 56.

²⁷ Kochenov and Plender (n 25).

II. PEACE AND A BETTER LIFE FOR ALL

The starting point of the integration project in Europe consists in essence of two components: a *grand promise* of peace, prosperity, equality etc and the *citizen as the recipient* and beneficiary of this grand promise. To put it differently, the Union has been created with the individual, the citizen, in mind.²⁸ Regrettably, this essential core of what our Union is about is not infrequently forgotten and at times is downplayed, which is why there is a need to re-state this simple point again: the EU grew out of a more ambitious project than simply an urge to integrate the markets of the Member States to a certain degree. This is clear, based on the political statements of the time, the structure and the modality of operation of EU law, a number of failed political developments²⁹ which nevertheless played an obvious role in shaping the current legal-political system of integration, the very definition of supra-nationalism and the whole story of the case law of the Court of Justice. Moreover, this claim is supported by the involvement of the citizens in the institutions and in the direct enforcement of EU law,³⁰ as well as by the principles of democracy and human rights protection, lying at the core of what the EU is about.

Already, the Schuman Declaration contained direct references to ‘la fédération européenne’³¹ and was, in essence, a ‘messianic’ document.³² The underlying thinking behind the project is quite clear: the aim is to improve lives by counterbalancing the excesses of state sovereignty by way of taking human beings directly on board and by taming the Member States’ ability to deviate from the commonly agreed course of peace and prosperity of all, rather than uniquely for ‘their own’ nationals. It is true that binding the Member State—as a potential source of harm—is essential in this context.³³ Yet, what is done is done for the citizens’ protection and

²⁸ See F Jacobs (ed), *European Law and the Individual* (Amsterdam, North Holland, 1976) for an early now-classical analysis.

²⁹ Especially relevant in this context is the Ad Hoc Assembly Instructed to Work Out a Draft Treaty Setting Up a European Political Community, *Draft Treaty Embodying the Statute of the European Community* (Secretariat of the Constitutional Committee 1952–53) and the Draft Treaty Establishing the European Union [1984] OJ C77/33.

³⁰ See, eg, Treaty on the Functioning of the European Union (TFEU), art 267. For analysis, see also M Broberg and N Fenger, *Preliminary References to the European Court of Justice* (Oxford, Oxford University Press 2010).

³¹ The Schuman Declaration (9 May 1950).

³² JHH Weiler, ‘The Schuman Declaration as a Manifesto of Political Messianism’, in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of EU Law* (Oxford, Oxford University Press 2012).

³³ JHH Weiler, *The Constitution for Europe* (Cambridge, Cambridge University Press 1999) 18. The Treaty of Lisbon introduced an important innovation, which demonstrates how far the Member States are bound: the procedure of withdrawal from the Union. EU law now also regulates leaving the Union, ie, the state of exception itself: Treaty on European Union (TEU), art 50. For an analysis, see, eg, A Łazowski, ‘Withdrawal from the European Union and Alternatives to Membership’ (2012) 37 *European Law Review* 523.

well-being. As clarified by the Court in *Van Gend en Loos*, 'Community law is intended to confer on individuals rights, which become their legal heritage'.³⁴ Inter-state relations based on the ideology of the selfish pursuit of the interests of each of the states thus come to be replaced by a legal context where the interests of others and, crucially, of their citizens are taken into account.³⁵ This fundamental shift is of crucial importance and explains the Union's appeal around the world.³⁶

The inclusion of the citizen is essential. Not only is the whole project designed for the benefit of the citizen, who is to enjoy peace and more opportunities in life should the integration project be a success³⁷—and note in this context that it is irrelevant whether the citizen benefiting from the project is economically active or not³⁸—the citizen is also at the core of the political statements, of the institutional structure and of the very essence of EU law, including the fundamental principles of supremacy and direct effect.³⁹ In fact, the very essence of the notion of supra-national integration—as opposed to intergovernmental cooperation—builds around a human being as the main addressee and beneficiary of the new law. As Joseph Weiler has convincingly demonstrated, supranationalism without direct effect and supremacy—for this, read taking the citizen on board—would amount to nothing more than merely wishful thinking: we would only be left with its decisional facet.⁴⁰ In practice, engaging the citizen directly through providing an alternative to the outcomes of the national democratic decision-making process via directly effective supranational law has gradually developed into a specific—and very effective—constitutional tactic of the Union, underlying the day-to-day modality of the EU's

³⁴ Case 26/62 *NV Algemene Transport en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1 (special English edition).

³⁵ Allott (n 20). See also E Basheska, 'The Principle of Good Neighbourly Relations in Europe' (PhD thesis, University of Groningen 2014) for a detailed analysis of this new context under the auspices of EU law.

³⁶ D Kochenov and F Amtenbrink, 'The Active Paradigm of the Study of the EU's Place in the World: An Introduction' in Kochenov and Amtenbrink (n 16), 1. It seems that it would be too far-fetched to state that the EU's special position in the world as the first test case of what Judge Pescatore branded as 'droit de l'intégration' is radically undermined by the crisis of the Economic and Monetary Union (EMU).

³⁷ F de Witte, 'The Role of Transnational Solidarity in Mediating Conflicts of Justice in Europe' (2012) 18 *European Law Journal* 694; D Kochenov, 'On Options of Citizens and Moral Choices of States' (2009) 33 *Fordham International Law Journal* 156.

³⁸ The division of all citizens into *marktburgers* and *citoyens* is half-hearted, if viewed in this vein, even though it is overwhelmingly accepted in EU legal scholarship. See, eg, D Kochenov, 'Ius Tractum of Many Faces: European Citizenship and a Difficult Relationship between Status and Rights' (2009) 15 *Columbia Journal of European Law* 169, 194–95 and the literature cited therein for an overview.

³⁹ See the Court's reasoning in *Van Gend en Loos* (n 34) for the connections between the citizen and the establishment of the fundamental essence of EU law through the principle of direct effect.

⁴⁰ JHH Weiler, 'The Community System: The Dual Character of Supranationalism' (1981) 1 *Yearbook of European Law* 267.

operation.⁴¹ In the words of Gareth Davies, this is nothing other than the ‘humiliation of the state’.⁴² No one could coherently argue that this is not precisely what the Union has been created for. ‘Diffusion of a liberal nationhood’⁴³ has been among its implicit goals all along, resulting in the promotion of a very specific human rights-oriented and context-sensitive notion of constitutionalism based on proportionality.⁴⁴

If we turn to the case law of the Court of Justice, this vision finds a full reflection in the Court’s take on the essence of the Union. From *van Gend en Loos*⁴⁵ to *Ruiz Zambrano*,⁴⁶ the citizen always takes centre stage, both before the coining of the popular phrase referring to the citizenship of the Union as a ‘fundamental status of the nationals of the Member States’⁴⁷ and also after.⁴⁸ Contemporary primary law fully reflects the importance of the citizen for the success of the European integration project, which could be observed from the very beginning. Thus, the preamble to the Treaty of Lisbon speaks of the determination of the high contracting parties to establish EU citizenship common for all the participating states.⁴⁹ All the core principles of integration on which the Union is built, including democracy and human rights protection in particular, are unquestionably citizen-oriented.⁵⁰ In this context, the complex question of ‘what is the

⁴¹ M Kumm, ‘The Idea of Socratic Contestation and the Right to Justification’ (2010) 4(2) *Law and Ethics of Human Rights* 1938 (courts as an essential element of democracy).

⁴² G Davies, ‘Humiliation of the State as a Constitutional Tactic’ in F Amtenbrink and P van den Bergh (eds), *The Constitutional Integrity of the European Union* (The Hague, TMC Asser Press 2010), 147.

⁴³ W Kymlicka, ‘Liberal Nationalism and Cosmopolitan Justice’ in S Benhabib *Another Cosmopolitanism* (Oxford, Oxford University Press 2006) 134.

⁴⁴ V Perju, ‘Proportionality and Freedom: An Essay on Method in Constitutional Law’ (2012) 1 *Global Constitutionalism* 334.

⁴⁵ *Van Gend en Loos* (n 34).

⁴⁶ Case C-34/09 *Ruiz Zambrano* [2011] 2 CMLR 46.

⁴⁷ Case C-184/99 *Rudy Grzelczyk v Centre public d’aide sociale d’Ottignies-Louvain-la-Neuve* [2001] ECR I-6193 [31]. See also Case C-413/99 *Baubast and R v Secretary of State for the Home Department* [2002] ECR I-7091 [82]; Case C-34/09 *Ruiz Zambrano* [2011] 2 CMLR 46 [41].

⁴⁸ Crucially, even the exact moment of the introduction of the terminology of citizenship into the treaties is irrelevant in this context. European citizenship, as an empowering legal status of the Member States’ nationals, clearly pre-dates the Treaty of Maastricht, as Antje Wiener has shown. See Antje Wiener, ‘Assessing the Constructive Potential of Union Citizenship: A Socio-Historical Perspective’ (1997) 1 *European Integration Online Papers* 17; Antje Wiener, ‘*European Citizenship Practice: Building Institutions of a Non-State*’ (Boulder, Westview 1998). See also R Plender, ‘An Incipient Form of European Citizenship’ in Jacobs (n 28). See also Kochenov and Plender (n 25) for a contemporary analysis of the (lack of) importance of the Maastricht terminological innovation for the EU citizenship practice until very recent developments.

⁴⁹ Recital 10 of the Preamble to the Treaty of Lisbon, which reads as follows: ‘RESOLVED to establish a citizenship common to nationals of their countries.’

⁵⁰ This is notwithstanding the fact that the origins of the democracy and human rights protection thinking at the EU level within the context of the internal market are necessarily connected with the activity of corporations claiming rights and the power games between the courts at different levels. For a great story, see G Davies, ‘Constitutional Disagreement in Europe and the Search for Legal Pluralism’ (2010) Prague Eric Stein Working Papers 1/2010.

Union for?’ boasts quite a straightforward answer: to improve our lives. Apologies are due to those commentators who think that this is too simple. Creating a broader horizon of opportunities for citizens, protected by law from the irrational⁵¹ or harmful behaviour of their own Member States⁵² in a situation where war is impossible, would thus be the true *raison d'être* of the Union—to complement Gráinne de Búrca's powerful analysis.⁵³ Should the Union not be able to deliver on the initial promise of the founders and should it fail to improve our lives, there is no reason to go on with it—at least not in its current form.

All that is done by the Union should necessarily respect this essential starting point: the Union is here as a great promise given to the citizens by the *Herren der Verträge* for the benefit of the citizens as human beings—not as plumbers, travelling doctors or employees of multinational corporations. Crucially, should it turn out that the Union does not deliver on this promise for one reason or another, then the need for such a Union has to be critically re-assessed.⁵⁴

III. THE UNION DOES NOT EQUAL THE MARKET

Having re-stated the foundational starting point of the Union in its relation to the citizen, the question of means arises: which road should be chosen to get to the Promised Land? This is the only context which can possibly clarify the true role of the internal market within the context of EU integration. It is submitted that the internal market, instead of being approached as an ultimate goal of the EU, should be viewed with its essential role vis-à-vis the grand promise in mind, ie, chiefly as a tool (albeit an extremely important one) of furthering European integration. To put it differently, market integration has been chosen as the main tool to deliver on what the Union stands for: a *fédération européenne* marked by peace and freedom. A famous statement ascribed to Jean Monnet captures the nature of the Union well: ‘federalise their wallets—and their minds will follow’. The Schuman Declaration is quite explicit on the instrumental nature of

⁵¹ But see G Davies' contribution in de Búrca, Kochenov and Williams (n 9).

⁵² Needless to say, such protection is not absolute, but it is likely to improve in the future. See, eg, A von Bogdandy et al, ‘Reverse *Solange*: Protecting the Essence of Fundamental Rights against EU Member States’ (2012) 49 *CML Rev* 489. For criticism and analysis, see the special debate which was dedicated to this proposal by the *Verfassungsblog* in the spring of 2012.

⁵³ de Búrca (n 16).

⁵⁴ There is no reason to take integration, which necessarily means taking integration in a particular specific form, for granted. The need for justification is always there. J Neyer, *The Justification of Europe: A Political Theory of Supranational Integration* (Oxford, Oxford University Press 2012); Morgan (n 12); Sissenich (n 12).

economic integration: the economic component of integration is thus not—and has never been—a goal in itself.

Numerous attempts have been made, under the auspices of the realisation of the non-economic programme of the Union, to enlarge the scope of cooperation to other fields, to which the European Defence Community (EDC) and the European Political Community (EPS) projects testify. Yet, as these found no success, the Spaak Report confined the instruments of integration to the economic.⁵⁵ Spill-over was inevitable anyway (this explains the choice of the market as a tool in the first place).⁵⁶ Deploying an economic toolkit, the EU is now a towering presence in a wide array of areas which are not necessarily ‘economic’ on the face of it—from equality on the basis of sex⁵⁷ and shielding the rule of law from questionable international practices⁵⁸ to the regulation of nationality issues,⁵⁹ criminal law⁶⁰ and the European arrest warrant.⁶¹ Countless other examples can be given, all being either initially explained in economic terms or presented as necessary in the context of the success of economic integration. There is no doubt about the fact that taking the economic route of Spaak and Delors has been, to a great extent, a great success.

Too much of success, probably, as the over-emphasis of the economic came at a dear price: out of the economic toolkit of integration, numerous problems sprang. The economic rationale of the EU started overshadowing the initial ambition—as well as the essential reasons behind the integration project as such, leading to a profound misrepresentation of what the EU is about. The public quite understandably came to think about the EU as a guarantor of the correct shape and length of cucumbers, while the elites focused on the economic gains that market integration had delivered. One heard little of the focus on the citizen,⁶² liberty and peace. And while this

⁵⁵ Spaak Report (n 21).

⁵⁶ E Haas, *The Uniting of Europe* (Notre Dame, University of Notre Dame Press 2004).

⁵⁷ B de Witte, ‘The Crumbling Public/Private Divide: Horizontality in European Anti-Discrimination Law’ (2009) 13 *Citizenship Studies* 515; G More, ‘The Principle of Equal Treatment: From Market Unifier to Fundamental Right?’ in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford, Oxford University Press 1999) 517.

⁵⁸ Joined Cases C-402/05P and C-415/05P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351; J Kokott and C Sobotta, ‘The *Kadi* Case: Constitutional Core Values and International Law—Finding the Balance?’ (2012) 23 *European Journal of International Law* 1015.

⁵⁹ Case C-135/08 *Janko Rottmann v Freistaat Bayern* [2010] ECR I-1449. For a critical analysis, see, eg, N Cambien, ‘Case C-125/08, *Janko Rottmann v Freistaat Bayern*’ (2011) 17 *Columbia Journal European Law* 375, 386–91; see also D Kochenov, ‘Annotation of Case C-135/08 *Rottmann*’ (2010) 47 *CML Rev* 1831.

⁶⁰ T Marguery, ‘La citoyenneté européenne joue-t-elle un rôle dans l’espace pénal de liberté, de sécurité et de justice?’ (2010) *Cahiers de droit européen* 387.

⁶¹ J Komárek, ‘European Constitutionalism and the European Arrest Warrant’ (2007) 44 *CML Rev* 9.

⁶² Exceptions are very rare. See, eg, Kostakopoulou (n 24) for a fundamental work arguing for the deployment of EU citizenship to the full.

vision would be legitimate with regard to the existence of peace—Europe was not at war for 60 years (probably because the American troops protected it against a possible Soviet invasion in a bi-polar world,⁶³ and non-EU Europe was not of great interest to the EU in terms of guaranteeing peace⁶⁴)—liberty and the citizen, the main recipient of the fruits of integration to be, should not be so easily forgotten. However, forgotten they were, at least at the systemic level of building the Union.

The economic tool of European integration, instead of being taken for what it is—ie, a means to achieve something greater than what it itself stands for—gradually came to signify the integration project as such, coming to be regarded as synonymous to the Union's ambition. This substitution of ends with means delivered a most disturbing result: the human being, whose liberty and good life is at the core of the rationale of integration, came to be replaced with an economically active citizen: the sole focus of the EU's concerns. This went even further: the Union's intervention in any field came to be constructed as solely economic in essence and rationale, no matter what, which led to the rise in importance of perceived cross-border economic activities, glorifying the very internal borders that the internal market as such pledged to abolish.⁶⁵ This distorted any possible coherence even within the sphere of the functioning of the economic tool of integration, which worked so well. The Union came to be regarded not only as serving those who are economically active, but also those who are not, but are *ex officio* announced to be such by the Union.⁶⁶ This is by virtue of their actions, which, besides having no decipherable economic component, also have no significance (besides 'activating' EU law)⁶⁷ within the auspices of their life projects.⁶⁸ Taking a bus with your disabled child should not determine the fate of your family, for instance.⁶⁹ In other words, the economic tool of integration, having substituted its ends, necessarily started working against itself, undermining its own coherence in a situation when the Union is so much more than trade across the borders abolished for the purposes of this very trade.⁷⁰

⁶³ R Aron, *Le Grand Débat: Initiation à la Stratégie Atomique* (Paris, Calmann-Levy 1963) (theorising the mutually assured destruction doctrine).

⁶⁴ See Andrew Williams' remarkable analysis of the actual role of the value of peace in the context of EU integration, which is nil—to which Srebrenica and countless other episodes testify: Williams (n 1) 22–64.

⁶⁵ Case C-212/06 *Government of the French Community and Walloon Government v Flemish Government* [2008] ECR I-1683, Opinion of AG Sharpston [143]–[144].

⁶⁶ Kochenov (n 8) 41–45.

⁶⁷ See, eg, Kochenov (n 38) (on EU citizenship and 'activated' EU citizenship).

⁶⁸ See A Tryfonidou, *Reverse Discrimination in EC Law* (Alphen aan den Rijn, Kluwer Law International 2009) for a magisterial analysis of reverse discrimination.

⁶⁹ N Nic Shuibhne, '(Some of) The Kids are Alright: Comment on *McCarthy* and *Dereci*' (2012) 49 *CML Rev* 349.

⁷⁰ See, eg, Joined Cases 80 and 159/85 *Nederlandse Bakkerij Stichting v EDAH BV* [1986] ECR 3359, Opinion of AG Mischo: 'Reverse discrimination is clearly impossible in the long run with a true common market' (at 3375) (concerning goods); Case C-168/91 *Konstantinidis*

The reason for this is quite clear: the emphasis on the economic means of furthering the Union resulted in approaching the economic integration rationale as the only accepted factor underlying the structural organisation of the Union and its law. To put it differently, economic thinking has replaced any other considerations within the context of European federalism.⁷¹ While the literature is abundantly clear, for instance, on the fundamental limitations of the ‘cross-border situation’ logic (which is inherently economic) and has, for decades, showed beyond any reasonable doubt, its *absurd* nature, numerous scholars and practitioners from Geelhoed to Hanf have argued that this absurdity is somehow innate in the system and should thus be accepted.⁷² The exclusively economic way of approaching the Union thus even blocks the thinking about how it could be made better. It is not only the scholars who are to blame for this remarkable lack of vision, however: the institutions of the Union and, particularly, the Court played an even greater role in substituting the ends with the means.⁷³ The perceived uniquely economic nature of the Union gained such a powerful appeal that any other ways of approaching the jurisdictional issues and the vertical division of powers between the Union and the Member States⁷⁴ came to be routinely dismissed, with no arguments cited in support of such dismissals besides the fact that the question at issue is not economic (for this, read cross-border, however loosely conceived). The high point of such developments—the hijacking of the Union by the internal market—is the Court’s famous statement that ‘[EU] citizenship is not supposed to enlarge the scope *ratione materiae* [of EU law]’,⁷⁵ which has so little basis in the

[1993] ECR I-1191, Opinion of AG Jacobs [46] (concerning the free movement of people). The learned AG stated that it is ‘increasingly difficult to see why Community law should accept any type of difference in treatment which is based purely on nationality, except in so far as the essential characteristics of nationality are at stake’. *Government of the French Community and Walloon Government v Flemish Government* (n 65) Opinion of AG Sharpston [117]–[118].

⁷¹ On EU federalism see, eg, K Lenaerts and K Gutman, “Federal Common Law” in the European Union’ (2006) 54 *American Journal of Comparative Law* 1. See also R Schütze, ‘On “Federal” Ground: The European Union as an (Inter)National Phenomenon’ (2009) 46 *CML Rev* 1069; J-C Piris, ‘L’Union Européenne: vers une nouvelle forme de fédéralisme?’ (2005) 41 *Revue trimestrielle de droit européen* 243.

⁷² D Hanf, “Reverse Discrimination” in EU Law: Constitutional Aberration, Constitutional Necessity, or Judicial Choice?’ (2011) 18 *Maastricht Journal of European and Comparative Law* 26; LA Geelhoed, ‘De Vrijheid van Personenverkeer en de Interne Situatie: Maatschappelijke Dynamiek en Juridische Rafels’ in E Manunza and L Senden (eds), *De EU: De interstatelijke voorbij?* (Nijmegen, Wolf Legal Publishers 2006) 31 and 49; cf G Slynn, *Introducing a European Legal Order* (London, Stevens & Sons 1992) 99.

⁷³ For an analysis, see Kochenov and Plender (n 25).

⁷⁴ For a great overview, see A von Bogdandy and J Bast, ‘The European Union’s Vertical Order of Competences’ (2002) 39 *CML Rev* 227.

⁷⁵ Joined Cases C-64 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171 [23]; Case C-148/02 *Garcia Avello* [2003] ECR I-11613 [26].

Treaties or secondary law, that no doubt remains about its belonging to the realm of means/ends confusion.⁷⁶

When the Treaty dedicates a whole part to EU citizenship law,⁷⁷ including the status itself as well as the rights associated with it, the Court's statement de facto amounts to denying to the text of primary law—which it is supposed to protect⁷⁸—any *effet utile*. Indeed, as has been argued elsewhere, such a bold move would be impossible in any other field.⁷⁹ This example—one among many to be sure—suffices to support the hijacking claim: even when the Treaty itself is at stake, the non-economic is dismissed: the citizens are systematically lured into believing that the internal market is all that the EU is about.

IV. THE MARKET IS NOT A SUFFICIENT TOOL OF EUROPEAN INTEGRATION

Besides the fact that the foundational principles of the Union forming the ethos of integration are much richer than the market,⁸⁰ there would be no problem with the 'market only' vision if only the rationale of the internal market, when fully embraced, would actually enable the Union to deliver on the ambitious initial promises underlying the integration process. Once one tool is perfectly functional, there is no need to substitute it with another. The trouble is that in the case of the EU, no one who has an idea of its law would dare to claim that the project does not lose out because of the substitution of the ends with means: the internal market, when turned into the crowning of all ambition, miserably fails to deliver and is one of the systemic reasons behind the ongoing crisis of the Union. Indeed, the EU is not a justice-based organisation,⁸¹ it is not a peace-making organisation⁸² and it has serious problems at its social core,⁸³ to say nothing about democracy.⁸⁴

⁷⁶ As has been shown in detail elsewhere, the rationale behind this statement is pre-Maastricht in nature: it treats EU citizenship as an auxiliary instrument of the internal market and ignores all the crucial innovations of the Treaty on European Union signed in Maastricht: Kochenov and Plender (n 25) 376.

⁷⁷ Part II TFEU (also art 9 TEU).

⁷⁸ 'The Court of Justice of the European Union ... shall ensure that in the interpretation and application of the Treaties the law is observed': art 19(1) TEU.

⁷⁹ Kochenov and Plender (n 25) 376–77.

⁸⁰ See, eg, A Williams, 'The EU, Interim Global Justice and the International Legal Order' in Kochenov and Amtenbrink (n 16), 38, demonstrating the legitimacy of the expectations of turning the EU into an actor of global redistributive justice.

⁸¹ Williams (n 1). See also de Búrca, Kochenov and Williams (n 9) for a global overview of this important problem as well as some possible solutions.

⁸² Williams (n 1) 22–64.

⁸³ Somek (n 2).

⁸⁴ JHH Weiler, 'Europa: "Nous coalisons des Etats nous n'unissons pas des hommes"' in M Cartabia and A Simoncini (eds), *La Sostenibilità della democrazia nel XXI secolo* (Bologna, Il Mulino 2009) 51.

Add to this the constant lack of clarity as to the ethical foundations of the EU's own claims of authority in determining the scope of its law—as pointed out above, crossing a non-existent border should not have a legal significance in determining whether someone deserves the protection of the law⁸⁵—and the fact that *tout n'est pas rose* with the market as a tool of integration becomes clear.

Aside from the fact that using the market as the unique tool of European integration has a dangerous potential of drastically reducing the number of direct beneficiaries of the project—since the addressee of market integration is an 'economic' citizen⁸⁶ and not an ordinary one—essential problems also arise in relation to legitimising EU integration built on such a premise: the answer to the question 'what is the Union for?' visibly loses clarity, should the market be taken too seriously. Of course, having introduced the distinction between the initial promise and the tools of achieving it could be presented as diminishing the importance of scrutinising such tools as legitimising factors. Indeed, if the main promise—however forgotten by the citizens, by the institutions, by the Member States and by the scholars and the media alike in a situation where the emphasis is placed on the market—is appealing enough, a situation could arise when the market as such could simply derive its own legitimacy from the great appeal of the main promise. This does not work in such a way, however, as Joseph Weiler's analysis clearly demonstrates.⁸⁷ Messianic legitimacy is bound to fail,⁸⁸ unless it is derived from a type of a civil religion akin to that described by Robert Bellah and Phillip Hammond,⁸⁹ which is a highly unlikely prospect in Europe. Messianic legitimacy aside, it becomes clear that every tool deployed within the context of EU integration will necessarily have to contribute to the legitimisation of the European project.

Once the internal market is approached from the legitimacy perspective, its weaknesses become even clearer than in the context of the use of uniquely market rationality in establishing the confines of the two legal orders in Europe. First of all, prosperity—what the market delivers, should it work well—is really too relative to play a role of a lasting legitimising factor. The huge wave of intensely anti-European legal commentary not worthy of a mention here which followed the Court's decisions in *Viking*

⁸⁵ JHH Weiler, 'Though Shalt Not Oppress a Stranger' (1992) 3 *European Journal of International Law* 65; É Balibar, *Nous, citoyens d'Europe* (Paris, Découverte 2001).

⁸⁶ However artificially her economic nature is discovered. See also Kochenov (n 8) 41–45 for criticism of such artificiality.

⁸⁷ Weiler (n 15); JHH Weiler, 'In the Face of the Crisis—Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration' (2012) 34 *Journal of European Integration* 825.

⁸⁸ Weiler (n 15).

⁸⁹ RN Bellah and PE Hammond, *Varieties of Civil Religion* (San Francisco, Harper & Row, 1982).

and *Laval*⁹⁰ illustrates this point well.⁹¹ Like peace following half a century without war,⁹² or rights when no terrible mass violations occur in any case,⁹³ prosperity does not legitimise power in prosperous societies—a development that can be branded, putting Joseph Weiler’s characterisation in a broader context, as a ‘paradox of success’.⁹⁴ More importantly still, it is very difficult to build a sound constitutional system with no reference to justice—and justice is *not* about the marketplace. The market as de facto a sole basis of a constitutional system is a truly troublesome reality: a ‘constitutional market’⁹⁵ is a contradiction in terms, as Niamh Nic Shuibhne has rightly pointed out. This essentially means that no matter how successful the integration project is economically, it is difficult to count on legitimacy as one of the outcomes of such success. Moreover, should justice in the context of the market be approached through the lens of justification, as Jürgen Neyer has suggested,⁹⁶ for instance, economic rationale and the opportunities for making money end up playing a role of the measure of fundamental rights, thereby drastically exacerbating all the problems outlined above.⁹⁷ Viewed in this light—and agreeing with Joseph Weiler that the market is now ‘alone’ without any ‘mantle of ideals’⁹⁸—the hijacking of the ends by the means is nothing short of a tragedy in the history of Europe.

⁹⁰ Case C-438/05 *International Transport Workers’ Union Federation et al v Vikingline ABP et al* [2007] ECR I-10779; Case C-341/05 *Laval un Partneri Ptd v Svenska Byggnadsarbetareförbundet et al* [2007] ECR I-11767.

⁹¹ For critical analyses, see eg, U Belavusau, ‘The Case of *Laval* in the Context of the Post-Enlargement EC Law Development’ (2008) 9 *German Law Journal* 1279; Kukovec (n 5).

⁹² Weiler (n 3). It should be kept in mind that in the European context, the appeals to peace as a legitimising factor are particularly ironic, should one take the history of bi-polar world and strong American presence on the continent fully into account. The irony is explained well by NATO’s General Secretary Anders Fogh Rasmussen: ‘Soft power alone is no power at all’: A Rettman, ‘NATO Chief: EU Soft Power is “No Power at All”’ *EU Observer* (6 May 2013). Available at: <http://euobserver.com/defence/120046>.

⁹³ Weiler (n 85). This logic explains why the Charter of Fundamental Rights was not met with any particular enthusiasm and will most likely remain stillborn from the point of view of legitimising the Union: M van den Brink, ‘EU Citizenship and EU Fundamental Rights’ (2012) 39 *Legal Issues of European Economic Integration* 273.

⁹⁴ Weiler (n 3) 231.

⁹⁵ Nic Shuibhne (n 6) 1608.

⁹⁶ Neyer, *The Justification of Europe* (n 10); Neyer, ‘Justice, Not Democracy: Legitimacy in the European Union’ (n 10).

⁹⁷ This is a trade-off inherent in the logic of proportionality: M Cohen-Eliya and I Porat, ‘Proportionality and the Culture of Justification’ (2011) *American Journal of Comparative Law* 463. See also S Tsakyrakis, ‘Proportionality: An Assault on Human Rights?’ (2009) 7 *International Journal of Constitutional Law* 468 for criticism.

⁹⁸ Weiler (n 3) 231.

V. EU CITIZENSHIP'S CONFLICT WITH THE MARKET

Should EU citizenship function as a tool of integration alongside the internal market, it is crucial to demonstrate that citizenship is not a market concept and is logically related directly to the promise of integration focusing on the individual rather than to the market as a tool. And if EU citizenship is indeed a potential alternative means of integration to function alongside the internal market, its relation to the latter becomes crucial: is it subordination, rivalry or independent parallel existence?

A clear dividing line is to be drawn in this context between the formulations in the primary law and the case law of the Court of Justice.⁹⁹ As has been demonstrated above, the unquestionable embrace of the internal market as the dominant tool of European integration resulted in the substitution of the idea of European unity with the idea of the internal market, a process in which the Court played an important part. It is no big news that courts can be—and very frequently are—wrong on the essential issues of principle.¹⁰⁰ This does not happen out of ill will; tradition and inertia are more often to blame.

While EU citizenship quite clearly pre-dates the Treaty of Maastricht, its pre-Maastricht emanation was necessarily and unquestionably driven by the logic of the internal market, as the proto-citizenship emerged directly from the economic free movement provisions coupled with the non-discrimination instruments directly connected to the functioning of the economic freedoms.¹⁰¹ This is not to say, though, that this meant that only strictly economic actors were covered. From its early days, market-based integration tended to outgrow the market—this is what spill-over is about, after all. To put it differently, already before the entry into force of the Treaty of Maastricht, the proto-citizenship of the EU-to-be was not co-extensive in its scope with the market freedoms *sensu stricto*.¹⁰² Should the system start noticing human beings and paying serious attention to their situation, the coherence of a presentation of people as merely one of the means of production weakens quite naturally. As a result, serious scholarship on EU citizenship has already emerged at the end of the last century, when the newly-minted concept just started making its first steps.¹⁰³

⁹⁹ See F Wollenschläger, 'A New Fundamental Freedom beyond Market Integration' (2011) 17 *European Law Journal* 3 for a meticulous analysis.

¹⁰⁰ P Craig, 'The ECJ and Ultra Vires Action: A Conceptual Analysis' (2011) 48 *CML Rev* 395.

¹⁰¹ *Cowan, Micheletti, Adoui and Cornouaille* can all be presented as—and essentially are—cases about EU citizenship. Also the first takes on supra-national citizenship were necessarily market-driven: HP Ipsen and G Nicolaysen, 'Haager Konferenz für Europarecht und Bericht über die aktuelle Entwicklung des Gemeinschaftsrechts' [1965] *Neue Juristische Wochenschrift* 18.

¹⁰² Kochenov and Plender (n 25) 373–74.

¹⁰³ See, eg, Wiener, 'European' *Citizenship Practice* (n 48); S O'Leary, *The Evolving Concept Of Community Citizenship* (The Hague, Kluwer Law International 1996).

Obviously, however, it is the Treaty of Maastricht that remains crucial in the EU citizenship story. With the formulation of an independent¹⁰⁴—albeit a *ius tractum*-based¹⁰⁵—status of EU citizenship, the tensions that arose between the strictly market-based vision of the individual in the context of European integration¹⁰⁶ and the first moves towards a more social,¹⁰⁷ if not a more humane, vision of EU integration could potentially be resolved: a brand new part in the treaties dedicated to the citizenship of the EU did not contain any nods in the direction of the market, allowing for a logical separation between the two.

Indeed, while the provisions included in Part II TFEU establish economic freedoms alongside non-economic rights¹⁰⁸ and also contain general references to ‘other’ rights contained in the treaties, plentiful non-economic elements allow for a clear separation between the logic of Part II and the other parts of the TFEU, focusing on the economic freedoms. Crucially, Part II TFEU does not define EU citizenship with reference to the internal market. More important still, it does not require the citizens to engage with the internal market in any way. The distinct nature of the concept is also confirmed by the preamble and Article 3 TEU, which refers to EU citizenship in the context of building an area of freedom, security and justice for the citizens,¹⁰⁹ rather than the internal market, which is referred to in the following paragraph.¹¹⁰ It is thus beyond any doubt that the primary law of the EU does not approach EU citizenship through an essential link with the internal market—the main tool of European integration. In other words, approaching EU citizenship as an extension of the internal market logic would be contrary to the principle of conferral,¹¹¹ ignoring the plain text as well as the structure of the treaties¹¹² and thus amounting to the *ultra vires* reading of the latter.¹¹³ Most importantly, however, by introducing the references to EU citizenship in the preamble and dropping any internal market references from the relevant part of the TFEU, the treaties seem to

¹⁰⁴ *Rottmann* (n 59), Opinion of AG Poiares Maduro [23]. See also D Kochenov, ‘Member State Nationalities and the Internal Market: Illusions and Reality’ in N Nic Shuibhne and LW Gormley (eds), *From Single Market to Economic Union* (Oxford, Oxford University Press 2012), 241, for the legal analysis of the interaction between the two autonomous legal concepts—that of Member State nationality and that of EU citizenship.

¹⁰⁵ As it is derived from the nationalities of the Member States: Kochenov (n 38).

¹⁰⁶ See, eg, Nic Shuibhne (n 6).

¹⁰⁷ Wollenschläger (n 99). See also Kochenov (n 19) for an attempt to reconcile the two visions by showing that they are not in fundamental conflict.

¹⁰⁸ There is a reference to ‘duties’ too; for an analysis, see D Kochenov, ‘European Citizenship without Duties’ (2014) 10 *European Law Journal* (forthcoming).

¹⁰⁹ Article 3(2) TEU.

¹¹⁰ *Ibid.*, art 3(3).

¹¹¹ *Ibid.*, art 5(1).

¹¹² Kochenov and Plender (n 25).

¹¹³ Craig (n 101).

suggest that Part II TFEU is an important reflection of the initial promise of European integration and should be approached as such.

The hijacking of the ends by the means described above resulted in a crucial misrepresentation of what EU citizenship stands for, which continued for almost 20 years against the objections of scholars,¹¹⁴ and several Advocates General.¹¹⁵ Refusing to depart from the market reading of the *entire* text of both treaties, the Court of Justice, alongside virtually all the scholars,¹¹⁶ essentially dismissed the primary law on citizenship at a stroke of a pen, which was deprived of any legal basis: EU citizenship is not meant to enlarge the scope of EU law.¹¹⁷ This came at the cost of the treaties' coherence (as it ignored the manifest non-market nature of Part II TFEU), resulting in a de facto dismissal of the initial promise of integration by presenting the internal market as the only viable approach to reading the Treaty which, since Maastricht, even dropped the word 'Economic' from its title. Moreover, it resulted in the neglect of the principle of conferral, as the misrepresentation of Part II TFEU and its meaning obviously distorted the balance of powers between the EU and the Member States. All this also brought about the destruction of the very rationale of citizenship through denying it any noticeable difference from the internal market logic.

The principle of conferral is crucial in the context of establishing the logical relationship between the internal market and EU citizenship within the context of European integration. Should one ignore the wording of the treaties and the initial promise of integration, it would be possible to present EU citizenship as, indeed, subordinate to the internal market. The latter is then presented as an end in itself. Such a vision would not be endowed with coherence. Reading the law along such lines would entail the subjugation of the very rationale of citizenship, presuming liberty, equality, freedom and

¹¹⁴ Dora Kostakopoulou played an important role here: D Kostakopoulou, 'Citizenship Goes Public: The Institutional Design of Anational Citizenship' (2009) 17 *Journal of Political Philosophy* 275; D Kostakopoulou, 'European Union Citizenship: Writing the Future' (2007) 13 *European Law Journal* 623; Kostakopoulou (n 24); D Kostakopoulou, *Citizenship, Identity and Immigration in the European Union: Between Past and Future* (Manchester, Manchester University Press 2001); D Kostakopoulou, 'The European Citizenship Menu: Modes and Options' (2000) 7 *Journal of European Public Policy* 477; D Kostakopoulou, 'Nested "Old" and "New" Citizenships in the European Union: Bringing out the Complexity' (1999) 5 *Columbia Journal of European Law* 389.

¹¹⁵ See, eg, *Konstantinidis* (n 70) Opinion of AG Jacobs [46]; Case C-214/94, *Ingrid Boukhalfa v Bundesrepublik Deutschland* [1996] ECR I-2253, Opinion of AG Léger [63]; Joined Cases C-65 and 111/95 *R v Secretary of State for the Home Department ex p Mann Singh Shingara and ex p Abbas Radiom* [1997] ECR I-3343, Opinion of AG Ruiz-Jarabo Colomer [34].

¹¹⁶ See Kochenov (n 38) 172 for a list of sceptical opinions by scholars, including JHH Weiler, PJG Kapteyn, P VerLoren van Themaat, HU Jessurun d'Oliveira and others.

¹¹⁷ *Uecker and Jacquet* (n 75) [23]; *Garcia Avello* (n 75) [26].

political participation,¹¹⁸ to the ideology of economic gains. As has been demonstrated above, not only does it suffer from a number of drawbacks when approached as the only means of integration but also it does not even work as a long-term legitimising factor. This is not to say that EU law is currently able to guarantee any of the crucial elements of what a classical understanding of citizenship is normally presumed to imply: we are confronted with a blueprint, not a finished building.¹¹⁹ The approach to EU citizenship in the context of the ongoing construction of European unity should necessarily be aspirational rather than merely descriptive. In other words, the fact that something does not function properly should not lead to the dismissal of any attempts to correct the situation.

This is particularly acute in the realm of legal scholarship.¹²⁰ We know that, following the hijacking described above, EU citizenship has been misused for a while. Based on a voluminous body of case law from *Martínez Sala*¹²¹ to *García Avello*,¹²² it would not be incorrect to describe it as ‘market citizenship’, as Niamh Nic Shuibhne has done.¹²³ Yet, given that all that the market stands for is antithetical to what is behind the notion of a citizenship of free and equal individuals—what the very concept is designed to emanate, cherish and protect—market citizenship, however ‘real’, cannot be included among the *desiderata* of the integration project. Citizenship, should we believe in the concept at all, is about seeing a worthy human being precisely where the market ideology would see nothing.¹²⁴ A market citizenship is no citizenship. A market constitutionalism is no constitutionalism.

Insisting on a descriptive vision of EU citizenship in such a context—especially after the Court has been consistently guilty of *de facto* dismissing Part II TFEU as incapable of creating legal effects when approached with no connection to market ideology—would imply recognising that it is no citizenship at all and cannot become such. Such recognition would imply the continuation of the trend of (mis-)presenting European unity as just

¹¹⁸ Different approaches to the notion can be found in the literature. Dora Kostakopoulou listed the following: ‘Market citizenship’, ‘Civic republican European citizenship’, ‘Deliberative European citizenship’, ‘Corrective European citizenship’ and ‘Constructive European citizenship’: Kostakopoulou (n 24) 238–43. See, for notable alternative analyses eg, L Bosniak, ‘Citizenship Denationalised’ (2000) 7 *Indiana Journal of Global Legal Studies* 477; K Rubinstein and D Adler, ‘International Citizenship: The Future of Nationality in a Globalised World’ (2000) 7 *Indiana Journal of Global Legal Studies* 519, 522.

¹¹⁹ See Kochenov (n 19) on the many current directions of EU citizenship law.

¹²⁰ J Shaw, ‘Constitutional Settlements and the Citizen after the Treaty of Amsterdam’ in K Neunreither and A Wiener (eds), *European Integration after Amsterdam* (Oxford, Oxford University Press 2000), arguing for a constructive approach.

¹²¹ Case C-85/96 *Martínez Sala* [1998] ECR I-2691.

¹²² *García Avello* (n 75).

¹²³ Nic Shuibhne (n 6).

¹²⁴ KL Karst, ‘Equal Protection of the Laws’ (1986) Nov/Dec *Society* 24; R Bauböck and V Guiraudon, ‘Introduction: Realignment of Citizenship: Reassessing Rights in the Age of Plural Memberships and Multi-Level Governance’ (2009) 13 *Citizenship Studies* 439.

another name for the internal market. All the weaknesses from which the Union suffers notwithstanding, such a position does not seem to be ethically sound and ultimately hardly leads anywhere. There are thus sufficient reasons behind dismissing a descriptive approach in a situation when the law is developing at an ever-faster pace and when the Court is seemingly minded to start approaching the fundamental deficiencies of the main bulk of its Part II TFEU case law seriously.¹²⁵

In a situation where approaching EU citizenship as an inherent part of the internal market *de facto* means dismissing the former while not necessarily reinforcing the latter, the permanent tension between the two is particularly clear: there is no harmony between the two, but a conflict which goes to the core of the two notions.

VI. EU CITIZENSHIP AS A TOOL OF EUROPEAN INTEGRATION

Having demonstrated that EU citizenship and the internal market belong to two related yet principally different fields, it becomes clear that an actual separation of the two in the context of the legal organisation of European integration will have as a consequence the emergence of a duality of tools of integration, substituting the monopolisation of the idea of the Union by the internal market ideology and bringing a positive contribution to the project. Once again, this separation to be introduced between EU citizenship and the market is not an extravagant idea, but a natural course of the development of the Union in Europe mandated by the whole rationale of the project and the text of the treaties.

That EU citizenship can fulfil a function of a tool of integration leaves no doubt based on the Treaty text. This is notwithstanding the fact that the Court and academic commentary alike have not gone far enough as of yet to chart this possibility. Several notable attempts to think beyond the immediate implications of EU citizenship case law—even though they stopped short of what is proposed here—no doubt provide important new perspectives to go beyond the seemingly popular approaches. The latter include, for instance, re-stating the EU citizenship's perceived conflict with the national social security systems and turn out to have implications 'less revolutionary than the initial analysis suggested', as Daniel Thym has rightly remarked.¹²⁶ Likewise, the EU citizenship's perceived secondary importance next to

¹²⁵ *Rottman* (n 59); [2010] 3 CMLR 2; Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)* [2011] 2 CMLR 46; Case C-256/11 *Murat Dereci v Bundesministerium für Inneres* [2012] 1 CMLR 45. See also Kochenov (n 26).

¹²⁶ D Thym, 'Towards "Real" Citizenship? The Judicial Construction of Union Citizenship and its Limits', in M Adams et al (eds), *Judging Europe's Judges* (Oxford, Hart Publishing 2013).

the nationalities of the Member States, another popular starting point for scholars, can be questioned.¹²⁷

Two important departures from the mainstream scholarship are to be mentioned here. Dora Kostakopoulou famously advocates a broader role for EU citizenship in the context of EU integration, approaching it mostly through rights,¹²⁸ while Ingolf Pernice offers recourse to normative legalism to reinforce the citizenship's position.¹²⁹ However, an obvious objection to these ambitious visions comes from the reality itself. As far as the first such vision is concerned, Joseph Weiler's scholarship should be considered: advocating for more rights or their more articulated prominence in a situation where the citizens' own need in having yet more rights protected is unclear and the legitimising effect of rights is highly doubtful.¹³⁰ Although understandable, the classical 'citizen at the centre stage' perspective advocated by Kostakopoulou is fundamentally incapable of reshaping the Union entirely, and such a radical re-shaping is precisely what is required to overturn the EU's market-only nature and revitalise the grand promise. The same applies to the second perspective, consisting in the legal-constructivist thinking: an attempt to reason away the numerous problems related to the actual functioning and essence of EU citizenship. This is what Ingolf Pernice has been trying to do.¹³¹ Although admirable at its origins, this approach is unlikely to be effective, unless the very essence of the Union is reassessed. Advocate General Miguel Poiares Maduro, as he then was, correctly stated that: 'When the Court describes Union citizenship as the "fundamental status" of nationals it is not making a political statement; it refers to Union citizenship as a *legal* concept which goes hand in hand with specific rights for Union citizens.'¹³² Yet, this is not enough to endow the newly discovered legal concept with the importance it deserves.

The main weakness of the tackling of EU citizenship in the case law of the Court and in the scholarly literature so far concerns one essential point: EU citizenship, however optimistically assessed, has been usually presented—sometimes implicitly, not explicitly—as operating within the context of internal market thinking, not as a tool of integration per se. In his analysis of the citizenship case law of the Court, Joseph Weiler outlined

¹²⁷ For an analysis see, eg, Kochenov (n 104).

¹²⁸ Kostakopoulou (n 24).

¹²⁹ I Pernice, 'The EU—A Citizens' Joint Venture: Multilevel Constitutionalism and Open Democracy in Europe' (2012) Walter Hallstein-Institut Working Paper.

¹³⁰ Weiler (n 33) 18.

¹³¹ Pernice (n 129). Pernice's starting point is the following: 'I understand the people not as an abstract entity "*Volk*" or nation, but as the individuals having decided to unite and constitute themselves as the subjects of legitimacy by organizing themselves politically within what we call "state", the citizenship of which they earn ... My proposal is to consider the constitution of Europe in the same way.'

¹³² Opinion of AG Poiares Maduro in Case C-524/06 *Heinz Huber v Germany* [2008] ECR I-9705 [19] (emphasis added).

this problem with admirable clarity: ‘L’aspetto problematico di questa giurisprudenza è che precisamente omette di compiere la transizione concettuale da una libera circolazione basata sul mercato ad una libertà basata sulla cittadinanza.’¹³³ Although it is no doubt true that the market ideology has been playing an overwhelming role in citizenship cases,¹³⁴ it does not remove the problem of the ignorance of the very essence of the concept of citizenship inherent in the drawback which Weiler outlined; indeed, it reinforces this problem.

This is why, should the potential of EU citizenship be unlocked in full, it is essential to start with the very underlying logic of integration, going down to the core of European federalism. In practice, this largely means one thing. To be a true tool of integration alongside the market, EU citizenship should necessarily operate at two levels: substantive *and* procedural. Ignoring the latter gives the essence of EU citizenship up to the market ideology again. Even if the substantive issues are solved with rights and EU citizenship in mind—what Dora Kostakopoulou advocated long ago and what the Court has been doing in a long array of cases from *Martínez Sala* to *Grzelczyk* and *García Avello*¹³⁵—once the very jurisdictional claim is based on the market rationale as opposed to that of EU citizenship, the latter ends up *de facto* subjugated to the internal market as the main tool of integration. In this sense, all the cases listed above do not actually concern the deployment of EU citizenship logic *per se* in the context of EU integration, but merely the application of this logic in the context of the internal market. The market thinking, and nothing else, allowed the Court to claim jurisdiction and to apply substantive EU law in the first place in all the cases that could be characterised as *quasi-citizenship* cases.¹³⁶

To deploy the EU citizenship logic of integration as a fully fledged alternative to the market logic of integration, the jurisdictional aspect of the law is essentially important. Only by having established jurisdiction with no recourse to the rhetoric of economic activity and cross-border movement can the non-market tool of integration be deployed. Once jurisdiction is established, substantive issues in each ‘non-market’ case will need to be decided, just as happened at the level of establishing jurisdiction, with no recourse to the market rationale, completing the picture.

Although the separation between the procedural and the substantive elements could seem to be quite straightforward in this context, it has to be stated that this is not the case. In particular, this is visible in the case of

¹³³ Weiler (n 84) 82. The problematic aspect of this case law is precisely in that it fails to fulfil the conceptual transition from a freedom of movement based on the market to a freedom based on citizenship.

¹³⁴ Nic Shuibhne (n 6).

¹³⁵ This openness of the Court to the non-market elements in the consideration of the substance of EU citizenship cases has been noticed by scholars. See, eg, Wollenschläger (n 100).

¹³⁶ Kochenov and Plender (n 25).

the equality claims rooted in EU citizenship.¹³⁷ The fact is that equality is an inherently substantive concept.¹³⁸ It deals with choosing a comparator in the same/different situation, a characterisation which depends as much on the jurisdictional line separating the legal orders as on the substance of the situations compared.¹³⁹ This is because comparisons across jurisdictional divides are usually not allowed: ‘jurisdiction prior to substance’¹⁴⁰ necessarily distorts the logic of substantive equality, as essentially identical situations end up being treated as non-comparable to each other and the substantive analysis does not even begin. A clear illustration of why this is a problem is the treatment of reverse discrimination by the highest courts in different Member States. Those courts which do not allow the line between national and EU law to exclude the application of equality, like the Italian Corte Costituzionale,¹⁴¹ necessarily come to absolutely different conclusions in concrete cases compared with the courts considering the situations of citizens covered, for whatever reason, by different legal systems as essentially incomparable, such as the Belgian Cour Constitutionnelle.¹⁴²

Reverse discrimination is just an illustration and should be treated as such. What is more important than the individual unjust outcomes is the emptiness of the concept of substance of the law, which is entirely divorced from the jurisdictional issues in a situation where the borderline between the legal orders is fluid and contested, as is the case in the EU. In the context of EU citizenship, this means that the outcome in pretty much any citizenship case depends on two issues: the national doctrine of equality (especially its treatment of the cases of citizens across the jurisdictional divide)¹⁴³ and the logic of the internal market (cross-border movement, presence of a cross-border situation without such movement,¹⁴⁴ or economic activity).¹⁴⁵ Given

¹³⁷ D Kochenov, ‘Equality across the Legal Orders; Or Voiding EU Citizenship of Content’ in E Guild, C Gortázar Rotaèche and D Kostakopoulou (eds), *The Reconceptualisation of European Citizenship* (Leiden, Martinus Nijhoff, 2014), 301.

¹³⁸ GA Cohen, ‘On the Currency of Egalitarian Justice’ (1989) 99 *Ethics* 906; J Waldron, ‘The Substance of Equality’ (1983) 89 *Michigan Law Review* 1350.

¹³⁹ Kochenov (n 137).

¹⁴⁰ D Chalmers, G Davies and G Monti, *European Union Law*, 2nd edn (Cambridge, Cambridge University Press 2010) 463.

¹⁴¹ See, eg, Italian *Corte Costituzionale*, sentenza 16–30 dicembre 1997, No 443, para 6: ‘nel giudizio di eguaglianza affidato a questa Corte non possono essere ignorati gli effetti discriminatori che l’applicazione del diritto comunitario è suscettibile di provocare’.

¹⁴² Belgian Cour Constitutionnelle, Judgment 11/2009 of 21 January 2009. See also P Van Elsuwege and S Adam, ‘The Limits of Constitutional Dialogue for the Prevention of Reverse Discrimination’ (2009) 5 *European Constitutional Law Review* 327, 335–37.

¹⁴³ The former is a pure tautology without the latter. See, eg, I Berlin, ‘Equality’ (1955–56) 56 *Proceedings of the Aristotelian Society* 301.

¹⁴⁴ You should not necessarily move to be ‘cross-border’: see, eg, Case C-403/03 *Egon Schempp v Finanzamt München V* [2005] ECR I-6421 [22].

¹⁴⁵ For an overview, see Lenaerts (n 26) 18.

the great variety of the Member States and the contradictory approaches¹⁴⁶ to what is and what is not within the scope of EU law read through the market, it is impossible to speak of the actual functioning of EU citizenship as a tool of EU integration. The market thinking is too prominent, and so are all the problems necessarily associated with it. EU citizenship is inherently based, like any other form of citizenship would be, on the concept of equality between the bearers of the status. To make any sense, such equality cannot be entirely dependent on the approaches to the notion adopted in one of the dozens of legal systems concerned, coupled with the uncertainty associated with the cross-border situations.

Moreover, crucially, jurisdictional tests should make not only technical but also ethical sense. Moving across borders was not deprived of such sense—at least not entirely—when approached in the context of pure market integration.¹⁴⁷ By contrast, to ask EU citizens to take the bus in order to benefit from family reunification and other rights is an essentially different matter, which is ethically indefensible and nonsensical on the face of it. Jurisdiction in citizenship cases should not follow the market rationale for those cases to be legally sound.

The situation where EU citizenship would provide not only the substance but also a procedural benchmark in the case law is not purely hypothetical. Faced with all the problems outlined above, the Court has deployed EU citizenship as a procedural measure of jurisdiction on a number of occasions. Make no mistake, such use of citizenship is not mandated by an ideological stance, but is necessitated by the requirements of coherence, legitimate expectations and *effet utile* of EU law. In other words, it does not take an activist court to recognise the problematic nature of deploying EU citizenship as an instrument to decide on the substance in a situation where the jurisdiction threshold is set using the market rationale. As has been demonstrated above, the two (citizenship and the market) are in conflict with each other, producing particularly strange outcomes and ruining the coherence and the very workability of the European project. The Court's jurisdictional deployment of EU citizenship is seen in *Eman and Sevinger*, *Rottmann*, *Ruiz Zambrano*, *McCarthy*, *Dereci* and other cases. To cut a long story short—it is meticulously analysed in the literature anyway¹⁴⁸—suffice it to say that the Court builds jurisdiction for the supranational legal order based on the need to protect the status of EU citizenship¹⁴⁹ and the

¹⁴⁶ *Zhu v Chen* (C-200/02 [2004] ECR I-9925) is a good example. An infinite number of others can be given by any graduate student reading EU law at a respectable University.

¹⁴⁷ A Tryfonidou, 'In Search of the Aim of the EC Free Movement of Persons Provisions' (2009) 46 *CML Rev* 1591, 1592–95.

¹⁴⁸ Lenaerts (n 26); Kochenov (n 26).

¹⁴⁹ *Rottmann* (n 59) [42].

rights stemming therefrom.¹⁵⁰ In this context, one should not be misled by the outcomes: even in the cases where the test does not bring the Court—for one reason or another—to satisfactory results that enable it to take the side of the claimant,¹⁵¹ the very deployment of the new EU citizenship-based jurisdiction test is of fundamental importance, notwithstanding all the problems it potentially brings about in the context where lawyers are too used to the internal market ideology to instantly comprehend the logic of EU citizenship as an alternative tool of EU integration.¹⁵² It is clear at the moment, however, that EU citizenship, besides being a tool to work with the substance of rights-based claims, also provides a tool to rule on jurisdictional issues. In other words, EU citizenship logic is at the core of the determination of the border between EU law and the national law of the Member States, occupying a place next to the market logic which used to dominate the scene until Dr Rottmann's hasty departure from Austria.¹⁵³

The recent case law proves the viability of deploying EU citizenship as an alternative tool of integration coexisting with the market, as it provides the rationale for the decision on both jurisdictional and substantive issues, thus solving the tension between EU citizenship and the market outlined above and having such a negative impact in the early quasi-citizenship cases.¹⁵⁴ That said, numerous problems arise with the technicalities of the deployment of EU citizenship as a jurisdictional tool.¹⁵⁵ Which rights should activate EU law, thus overriding Member State regulation? How far should they be breached? Now that the principle is set, it will be fascinating to follow the development of the case law of the Court on these issues. There is no way back: the market/citizenship coexistence when the former determines jurisdiction while the latter takes care of the substance is so damaging for both rationales that the Court is faced with the absolute necessity of clarifying the vital points outlined above, rather than avoiding them as it has been doing for too long.¹⁵⁶ While citizens are not so much in a hurry to get all the questions answered, the Court definitely is, since any unsubstantiated decision undermines its authority and there is no other tool besides being convincing that could save this situation. It is crucial to realise in this context that pretending that EU citizenship is about the market or could be approached with the internal market in mind is *not* convincing. This is where the EU citizenship paradigm of EU integration emerges.

¹⁵⁰ See, eg, *Ruiz Zambrano* (n 126) [42]; *McCarthy* (n 4) [53].

¹⁵¹ As happened in *McCarthy* (n 4), for instance.

¹⁵² D Kochenov, 'The Right to Have *What* Rights?' (2013) 19 *European Law Journal* 502.

¹⁵³ The two jurisdiction tests are used side by side at the moment: *McCarthy* (n 4); *Dereci* (n 125).

¹⁵⁴ Kochenov and Plender (n 25); Kochenov (n 26).

¹⁵⁵ Kochenov (n 152).

¹⁵⁶ *Ibid*; N Nic Shuibhne, 'Seven Questions for Seven Paragraphs' (2011) 36 *European Law Review* 161.

VII. ESTABLISHING THE CITIZENSHIP PARADIGM

Unlike in the world of science,¹⁵⁷ in law it is the people, not nature, who decide on the rules ('laws').¹⁵⁸ Unlike scientific paradigms, legal paradigms (unless they are guilty of half-heartedness) do not merely explain the given; they strive to create a better reality.¹⁵⁹ Yet, given that our reality is also social, which implies inertia and, usually, a cherished belief in the past, changing a paradigm in law is often as difficult as it is in science. Multiple factors are to be taken into account, besides the purely rational-legalistic side of things: signals from society (like the growing acceptance of same-sex marriage changing equality law, for instance)¹⁶⁰ or signals from the judiciary as well as the élites in general (like the initial acceptance of the European integration project as reinterpreted by the Court in the Member States, for instance)¹⁶¹ are to be considered. All these play an essential role in the evolution of the very reality which we all inhabit, ie, the evolution of the law.

Paradigms change at different levels. At the most global level, all law travels from one paradigm to another, as Duncan Kennedy has described in his work.¹⁶² The same happens at the supra-national and national levels as well.¹⁶³ This chapter has suggested that EU law is now on the brink of a big change: the market paradigm of European integration is being replaced by the citizenship paradigm. As has been outlined above, all the necessary ingredients for a successful transformation are in place, even if more research into the particular technicalities of EU citizenship's deployment in a new fundamental capacity is no doubt required.

The citizenship paradigm of European integration consists of deploying European citizenship as an integration tool which would function alongside the internal market. Such a tool to provide an alternative to the vision of integration fixated on the internal market is absolutely necessary to ensure

¹⁵⁷ TS Kuhn, *The Structure of Scientific Revolutions* (Chicago, University of Chicago Press 1962).

¹⁵⁸ See Philip Allott's work, using international law and relations as a case study for the re-statement of this simple truth: P Allott, *Eunomia* (Oxford, Oxford University Press 1990); Allott (n 11).

¹⁵⁹ It took us, lawyers, many generations to come to this understanding dismissing the 'scientific' fantasy of the law. For a great plea to take reality into account in EU law see R Schütze (n 11).

¹⁶⁰ See, eg, R Wintermute and M Andenæs (eds), *Legal Recognition of Same-Sex Partnerships* (Oxford, Hart Publishing 2001).

¹⁶¹ See, eg, B Davies, *Resisting the European Court of Justice* (Cambridge, Cambridge University Press 2012).

¹⁶² See, eg, D Kennedy, 'Three Globalizations of Law and Legal Thought: 1850–2000' in DM Trubek and A Santos (eds), *The New Law and Economic Development* (Cambridge, Cambridge University Press 2006) 19.

¹⁶³ See, eg, Perju (n 44).

that the EU fulfils its original mission and works for all Europeans,¹⁶⁴ given that the Union in Europe and the market are not synonyms, notwithstanding the fact that this is at times forgotten.¹⁶⁵ Instead of presenting EU citizenship as a continuation of the market ideology, it is thus connected with the idea of striving to achieve the initial promise of integration: peace and a better life for all.

The citizenship paradigm is not only about steering the substance of the law or outcomes in particular cases. Crucially, it moves beyond substantive law and enters the world of procedures by affecting the rationale behind the vertical delimitation of powers in the Union between the supranational and the national legal orders. This allows it to function as a fully fledged integration tool instead of simply steering the outcomes in the cases where EU's *ratione materiae* has been claimed via the employment of the internal market jurisdictional tools, such as the establishment of a cross-border situation. Since citizenship and the market are not necessarily easy bedfellows¹⁶⁶ (far from it), ensuring that citizenship has its own procedural vistas deviating, if necessary, from the internal market logic is crucial for the success of the Union.

This is what the Court shows us in a line of recent case law: EU citizenship acquired a possibility to affect the vertical division of powers in Europe.¹⁶⁷ The Court's initial endorsement is encouraging, but the potential for EU citizenship to play the role of a tool of EU integration alongside the market under the current treaties has been clear since Maastricht.¹⁶⁸ Given that the paradigm is only at the initial stages of articulation, numerous issues will need to be clarified as to the exact modality of its functioning. This is the case both at the substantive level and at the procedural level of the deployment of EU citizenship. What is essential, however, is that no treaty change is required. By affecting the essence of the logical fabric of EU law, the new paradigm potentially saves the European project from the market impasse, re-articulating the initial promise again and appealing to the individual with no regard to arbitrary characterisations of 'cross-border', 'economic' and others which play the indispensable role in the context of the market paradigm. In doing this, it does not simply appeal to rights in legitimising itself, but offers rights-driven logic as a sufficient rationale for the delimitation of the legal orders. This is very different from appeals to citizenship rights combined with the acknowledgement that these can only be protected when a jurisdiction based on the market paradigm has been established. The outcome of a consistent deployment of the citizenship paradigm should thus

¹⁶⁴ Part III.

¹⁶⁵ Part II.

¹⁶⁶ Part IV.

¹⁶⁷ Part VI.

¹⁶⁸ Kochenov and Plender (n 25).

be nothing less than saving the coherence of the law via the elimination of the inherent clashes between the citizenship-based logic of the substantive analysis and the market-based logic of the *ratione materiae* delimitation.

Numerous issues remain, however. Two essential questions to be answered are as follows: how should the material scope of EU law be framed under the citizenship paradigm without disappointing the Member States and remaining faithful to the principle of conferral? Equally importantly, how should the substantive analysis be framed to ensure that the citizenship paradigm is deployed to the full and reaches its objectives? Ironically, the Court has not yet answered these questions in any detailed and clear way.¹⁶⁹ There is no need to be disappointed, however—wholly internal situations were also constructed one day as they are not required by the Treaty text—just as the idea that one can take EU law back home from a foreign adventure, of what *Mathot* and *Singh*, respectively, stand as reminders. What we now take for granted in the context of the market paradigm has not always been there. Worse still, it is actually quite new. The same creative process is now happening again, albeit in a new context: *Rottmann*, *Ruiz Zambrano* etc are but the first steps.

As the journey continues, the two questions formulated above will receive gradually better formulated answers. To safeguard coherence and deploy the new paradigm in full, the Court will most likely struggle with the issue of the separation of the market logic from the logic of citizenship. This will be most difficult when ruling on substance: the test of proportionality will need to be deployed without looking at the internal market as an overwhelmingly important consideration. At the level of the determination of the scope *ratione materiae* too, a number of questions will need to be answered. Which rights of EU citizenship can activate EU law? How much do they need to be breached to have such an effect? Will the national courts (as in *Rottmann* and *Dereci*) or the Court of Justice (as in *Ruiz Zambrano* and *McCarthy*) be in a position to assess this? Although only the first steps have been taken to provide the answers, which fall outside the scope of this chapter, the far-reaching effects of these steps in terms of shaping the coherence of EU law is overwhelmingly clear: moving about is not required to be protected by EU law as a citizen.

The most difficult problems arise, however, around the main principles to guide the application of EU citizenship at both levels—procedural and substantive. A substantive approach to justice seems to be necessary, which could be rooted in the principles enshrined in Article 2 TEU. If EU law really moves beyond the market, EU citizenship will necessarily be moving in the direction of amplifying EU citizens' chances in life by providing them with additional opportunities and by offering them extra tools to develop

¹⁶⁹ Kochenov (n 152).

their personal life projects,¹⁷⁰ focusing on the areas where their Member States of nationality either opt for not delivering—as in *Ruiz Zambrano*—or cannot intervene at all due to the supra-national nature of a right—as in free movement cases.

While empowering the citizens, the new approach will also bring about a number of potentially difficult issues, since the Court of Justice will often clash in its assessment with the legitimate outcomes of the national legislative process in the Member States. This problem should not be exaggerated, however, since, first, this is essentially the role of the courts in any democracy built around the concept of justification¹⁷¹ and, second, this is how the EU works already.¹⁷² Since this problem is a systemic element of the federal arrangement of power in Europe, it cannot be presented as something specific to the citizenship paradigm. The latter is definitely a creature of EU law, with all the loved and hated features attributed to it in the context of the current internal market paradigm of integration. What citizens, the law and the Member States alike will definitely win from the new arrangement, besides having the initial grand promise redeemed, is undoubtedly ethical coherence. It is suggested that to discard personal travel history¹⁷³ as a relevant factor when taking decisions on the protection of citizens' rights is essential and this is what the citizenship paradigm offers.

¹⁷⁰ G Palombella, 'Whose Europe? After the Constitution: A Goal-Based Citizenship' (2005) 3 *International Journal of Constitutional Law* 357, referring to Sen's work in the context of EU citizenship.

¹⁷¹ Kumm (n 41).

¹⁷² Davies (n 42).

¹⁷³ See the Opinion of AG Sharpston in *Ruiz Zambrano* (n 125), criticising many aspects of this logic.