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Neo-mediaeval permutations of personhood in the  
European Union

Dimitry Kochenov



European University Institute  
**Department of Law**

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## **Abstract**

The legal understanding of personhood is dynamic and evolves through the ages. This paper shows how a contemporary shift, under the influence of, inter alia, the law of the European Union, provides an unexpected excursion into the past, reminiscent as it is of some pre-modern approaches, thus showing deep-rooted conflicts between how the Union operates and the classical ideology of *demos*, democracy and citizenship. The fact that this is undoubtedly inadvertent does not alter the outcomes of this process. The new individualism, which the EU tacitly promotes with all its accidental cosmopolitanism is presented here as neo-mediaevalism. The core distinction at the heart of such legal paradigm of personhood is between the free and unfree; the core moral value is the precise apportionment of liberty among the persons in accordance with their legally recognisable chance and circumstance. This paradigm of personhood, which is essentially private, not public in nature, almost became extinct in contemporary world with the advent of democracy, equality, and the status of citizenship based on the citizen/foreigner distinction. This is what the EU now happens to be reviving. As a result, equality is not treated as a value — not even as a starting presumption; — community does not build on the idea of sovereignty and submission; and liberty is detached from the political realm and does not imply collective self-determination.

## **Keywords**

EU citizenship, Calvin, Equality, Non-discrimination, Rule of Law

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## I. Introduction: the usefulness of amusing tales\*

The most crucial paradigm shift in the last millennium's law of personhood brilliantly documented by Keechang Kim, reached the very core of understanding of equality, liberty and community.<sup>1</sup> Personhood moved from the realm of private to public law, as the core border of personhood drifted from free/unfree to citizen/foreigner, this change bringing with it the necessity of a presumption of equality, thus removing the long-dominant moral ideal of inequality from its pedestal, and the idea of liberty through submission to the sovereign. In its place came political community, which later became one of the core elements of democracy. The EU is very affective in seriously undermining, if not undoing this ages-old development, as this chapter will demonstrate.

The mediaeval paradigm shift behind what still officially informs our approach to personhood in law was distilled in all clarity in the famous *Calvin* case,<sup>2</sup> where the Law Lords, for the first time in history, connected allegiance with natural law, as opposed to simply the law of the land, thus mandating equal protection of the law extending, by virtue of such allegiance, to all the subjects of the King: 'the law is equal and favoureth not'.<sup>3</sup> They thereby allowed a Scot born under James Stuart, the first King of both England and Scotland, to inherit property in England as if he were an Englishman.<sup>4</sup> Allegiance amounted to a totally new kind of bond compared with the Roman and early-mediaeval understandings of personhood and shows how much the presumptions of what it means to be a person in the eyes of the law have changed from the Roman law on personal status and the evolution of its vestiges in the Middle Ages to the seventeenth century understanding. The change marked a full-blown revolution at three levels: liberty, equality and the nature of legal status, marking the beginnings, however rudimentary, of the modern understanding of belonging and the construction of personhood in the eyes of the law.<sup>5</sup>

This contribution uses this shift in legal understanding to extrapolate the possibility of a far-reaching change which is one of the capacities of the law, seeking parallels in the key legal elements of constructing mediaeval personhood and the concept of citizenship in the European Union (EU) today.<sup>6</sup> What we shall see is that a number of crucial presumptions concerning the legal position of a person in law, taken by the Member States of the EU as a given, are past their prime, as they do not fully — not at all in fact — overlap with the law as applied, as it mutated under the influence of the EU, reshaped by the Union either directly or indirectly.<sup>7</sup> Moreover, such assumptions are potentially responsible for a distorted — if not misleading — picture of personhood in European law both at the supranational and at the national levels. The analogy with mediaeval developments will help us keep an eye on the crucial discrepancies between the law as declared and the law as applied. A mediaeval analogy helps to illuminate an understanding of how the contemporary European legal system

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\* I am grateful for useful comments to Loïc Azoulay, Marija Bartl, Sherally Munshi, and the attendees of my lecture at Princeton European Union Programme, in the Fall of 2015 where the first draft of the chapter was presented upon the kind invitation of Sophie Meunier. The final version of this text will appear in L. Azoulay, E. Patatut and D. Barbou des Places (eds), 'Ideas of the Person and Personhood in European Union Law' (Oxford, Hart Publishing, 2016).

<sup>1</sup> K Kim, *Aliens in Mediaeval Law* (Cambridge, Cambridge University Press, 2000).

<sup>2</sup> *Calvin's Case* 7 Coke Report 1a, 77 ER 377.

<sup>3</sup> Sir Francis Bacon, who won *Calvin* as Mr Calvin's counsel, as cited in Kim (n 1) 195.

<sup>4</sup> For a superb discussion, see, Kim (n 1) 176–99.

<sup>5</sup> For a beautiful, intricate and convincing retelling of this story, see, *ibid.*

<sup>6</sup> For the most recent detailed analysis of EU citizenship, see, eg, the contributions in D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge, Cambridge University Press, 2016).

<sup>7</sup> For a detailed account, see, D Kochenov, 'Rounding up the Circle: The Mutation of Member States' Nationalities under Pressure from EU Citizenship' (2010) *EUI RSCAS Working Paper* No 2010/21. But see S Hall, 'Determining the Scope *Ratione Personae* of European Citizenship: Customary International Law Prevails for Now' (2001) 28 *Legal Issues of Economic Integration* 355.

approaches the human being as a person and a citizen.<sup>8</sup> This chapter claims that there is a notable neo-mediaeval turn in the legal framing of personhood in the EU, which can be traced to the same key features of the idea of a person in law that was altered in the era of the *Calvin* judgment: liberty, equality and community: all what being a ‘person’ in law is about.

This sketch does not aspire to provide a full analogy between the mediaeval and the contemporary transformations of the understanding of personhood in law in Europe. Any such analogy would in all likelihood be profoundly misplaced at countless levels if taken literally. Yet, the illustration employed herein will make abundantly clear that we are far removed, in the Union of the beginning of the twenty-first century, from an understanding of citizenship which still rhetorically marks all the legal systems of the EU Member States and are used to legitimise the established organisation of power at the Member State and, consequently, also at the supranational level. The creation and the operation of the Union alongside a whole array of other factors, including the global rise of the human rights ideology<sup>9</sup> and of the culture of justification as opposed to that of authority,<sup>10</sup> are responsible for the rise of accidental cosmopolitanism,<sup>11</sup> in Alexander Somek’s insightful understanding. This triad brings about a radical revision in how the three core elements of personhood in law operate in Europe today. Neo-mediaevalism is thus not a result of a (nostalgic) turn to the remote past, but, rather, a hopeful construction of a future that moves away from an array of fundamental understandings coded into the legal-political framing of reality which dethroned the classical mediaeval approaches around half a millenium ago.

Not merely a rondo, the story this chapter retells is rather a rondo with a variation in form, while its substance is about an incidental trend towards a departure from what seemed an innovation half a millennium ago and what is, officially, the basis for understanding citizenship and statehood in contemporary world. The task of this contribution is not to judge, but to document, showing how the legal understanding of personhood has been severely altered; first, under the influence of sovereignty and Christian soteriology, culminating in a total shift of paradigm of personhood in law in the sixteenth century and, secondly, how a contemporary shift in understanding, under the influence of, inter alia, the law of the European Union, provides an unexpected excursion into the past, reminiscent as it is of some pre-modern understandings, thus showing deep-rooted conflicts between how the Union operates and the classical ideology of citizenship.<sup>12</sup>

The chapter proceeds as follows. The section that follows describes the mediaeval transformation of personhood: the rise of a public law-inspired sovereignist model of the person marked by equality before the law and liberty for all subjects through the formation of a political community and submission to the sovereign by means of allegiance, which opened the age of modernity — not yet democracy-inspired back then — in the reading of personhood in law (section II). This model of personhood, building on equality before the law intertwined with a submission to the sovereign, is then traced into the future, up to its prestigious placement at the centre of the core national constitutional understandings of the ‘self’ by European states which have offered their ‘peoples’ to the Union<sup>13</sup> (section III). This is done only to then remind the reader of the reality of the legal-political functioning of personhood in the Union today — whatever the justifications or the standard practices used to interpret the tensions away. It is perhaps amusing to see in this context that

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<sup>8</sup> L Bosniak, ‘Persons and Citizens in Constitutional Thought’ (2010) 8 *International Journal of Constitutional Law* 9. In the context of the EU, see L Azoulay, ‘L’autonomie de l’individu européen et la question du statut’ (2013) *EUI LAW Working Paper* 2013/14.

<sup>9</sup> G Frankenberg, ‘Human Rights and the Belief in a Just World’ (2013) 12 *International Journal of Constitutional Law* 35.

<sup>10</sup> M Cohen-Eliya and I Porat, ‘Proportionality and the Culture of Justification’ (2011) *American Journal of Comparative Law* 463. But see, S Tsakyrakis, ‘Proportionality: An Assault on Human Rights?’ (2009) 7 *International Journal of Constitutional Law* 468 (for criticism).

<sup>11</sup> A Somek, ‘Europe: Political, Not Cosmopolitan’ (2014) 20 *European Law Journal* 142.

<sup>12</sup> On the latter, see, eg, W Kymlicka and N Wayne, ‘Return of the Citizen: A Survey of Recent Work on Citizenship Theory’ (1994) 104 *Ethics* 352.

<sup>13</sup> The High Contracting Parties clarified in the preamble to the Treaties that they are ‘DESIRING to deepen the solidarity between their peoples while respecting their history, their culture and their traditions’.

the new individualism with all its accidental cosmopolitanism could actually be presented — legitimately I claim — as neo-mediaevalism. The key elements of both seem to be overlapping: in practice, equality is not treated as a value — not even as a starting presumption — community does not build on the idea of sovereignty and submission, and liberty is detached from the political realm and does not imply collective self-determination (section IV). The conclusion draws some lessons from the legal evolution of the understanding of personhood in Europe. It notes, especially, that officially the paradigm still has not changed: the constitutions cling to sovereigntist understandings and are ripe with solemn proclamations, while the practice of how the law operates could not be more different. This practice does not find reflection — or does not find a reflection *yet* — in how the law of personhood in Europe is officially constructed.

## **II. Mediaevalism and the change of the paradigm of personhood in law**

Although citizenship is traced to Aristotle in the popular imagination,<sup>14</sup> as well as to the Romans,<sup>15</sup> it would be more correct, with the reference to those remote times, to speak of personhood in law *tout court*. While the law definitely applied to and was shaped by an array of persons, citizenship in the modern understanding — either pre- or post-Marshallian<sup>16</sup> — would be extremely difficult to apply to that context for a number of reasons. One of the main ones among these is that personhood in law up to the crucial turn which culminated more or less with the *Calvin* case in 1608 — what is sometimes referred to as ‘citizenship’ in the textbooks — was mostly private, not public in nature.<sup>17</sup> Although Aristotle conceived of the citizen as — very approximately — a rightful holder of office<sup>18</sup> and although all the way through Roman and mediaeval periods the possession of a certain legal status could imply the exercise of public functions, the paradigmatic border marking the confines of the legal status was based on a fundamentally different consideration, compared with the idea of citizenship — either with or without office — today.

The key legal status-determining distinction, at the core of the understanding of personhood until well into the middle ages, was whether one was free or unfree.<sup>19</sup> So, if citizenship is defined following Brubaker as an ‘instrument and object of closure’<sup>20</sup> — in that it outlines the confines of the group keeping the ‘other’ out, while also defining such a group by formulating the rules on joining or leaving it — the crucial border between the ‘ins’ and the ‘outs’ is now a separation between foreigners and those who have a local status of citizenship: both according to a public law understanding, of course. The foreigner is the enemy.<sup>21</sup> Such a dichotomy was not in place in the past and did not mark the core attributes of personhood in law until the late middle ages.<sup>22</sup> The crucial border between the ‘ins’ and the ‘outs’, which is the defining feature of personhood in law, lay in the realm of private law and denoted whether one was ‘free’ or ‘unfree’.<sup>23</sup>

It goes without saying that there were plenty of locals and foreigners in this world at any period of its historical development, yet, as Kim convincingly demonstrates, this distinction was

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<sup>14</sup> eg C Johnson, ‘Who Is Aristotle’s Citizen?’ (1984) 29 *Phronesis* 73.

<sup>15</sup> AN Sherwin-White, *The Roman Citizenship* 2nd edn (Oxford, Clarendon Press, 1973).

<sup>16</sup> TH Marshall, *Citizenship and Social Class, and Other Essays* (Cambridge, Cambridge University Press, 1950). On the non-applicability of Marshall’s model to the European citizenship context today, see, G de Búrca, ‘Report on the Further Development of Citizenship in the European Union’ (2001) *Zeitschrift für Schweizerisches Recht* 39, esp 50.

<sup>17</sup> Kim (n 1) 1–3.

<sup>18</sup> Johnson (n 14) 82.

<sup>19</sup> Kim (n 1).

<sup>20</sup> R Brubaker, *Citizenship and Nationhood in France and Germany* (Cambridge MA, Harvard University Press, 1992).

<sup>21</sup> C Schmitt, *The Concept of the Political* (G Schwab trans, Chicago, University of Chicago Press, 2007).

<sup>22</sup> Kim (n 1) 200 et seq.

<sup>23</sup> *ibid.*, 1.

inconsequential for the most part, with regard to the legal construction of the law of personhood.<sup>24</sup> Indeed, while people belonged to guilds, towns, parishes and countries, the distinction between ‘us’ and ‘them’ arose all the time without amounting, however, to the key paradigm of the legal approach to personhood. In the medieval period, citizenship was by definition multi-layered, without affecting, however, its dominant universally accepted understanding.<sup>25</sup> So, while the details concerning what being free and unfree implied were changing gradually, from slaves to serfs, from Aristotelian citizens<sup>26</sup> to the *libertini*,<sup>27</sup> the core distinction driving the understanding of what it means to be a person in the eyes of the law clearly stayed unaltered for hundreds of years: you are either free or unfree, with a corresponding gradation of duties and entitlements. It is crucial in this context to understand that the misconception that a slave or a serf is not a person in a world marked by such a division, implying that only the ‘free’ would enjoy a ‘true’ personhood in law is unhelpful and does not correspond to reality.<sup>28</sup> There were simply two different types of persons in law: the free and the unfree, like there are now citizens and foreigners. It is this paradigmatic opposition that mattered, shaping the core importance of each of the two components. Being a slave would not mean, necessarily, not holding an important office,<sup>29</sup> just as being free would not make you King. It is the logic behind determining which line of separation is crucial in the eyes of the law that is important for us.

This distinction defining the legal approach to the person came with a law-supported worldview which is evidently very different from our own.<sup>30</sup> The crucial differences were two. They were interrelated and equally important. The first concerned the understanding of equality and the second concerned the understanding of liberty. Each of the two by analogy with the core free/unfree distinction in the pre-modern law on personhood has no direct parallel to our contemporary understanding of law and society — at least not officially, as we will see.

Liberty was a private-law concept, like the main paradigm of personhood based on private law: born a serf one is unfree and bound to one’s lord and his land. Once freed, one moves up a rank compared to one’s serf parents, but one’s liberty is still very different from that of the lord, translating into a radically different set of rights, privileges and entitlements, detailing whom one can sue, whom one can marry. The whole history of the gradual emergence of statehood and collective freedoms, which started in Europe with the cities, could legitimately be presented as a story of reinventing the private-law meaning of liberty in public law terms.<sup>31</sup> The paradigmatic change in the understanding of liberty had to do with the emergence of the notion of sovereignty, backed by theology, responsible for sowing the seeds of the world of ideas, which we still inhabit today, however changed and differently presented is its actual form.<sup>32</sup> For liberty, to quote once again from the brilliant study by Kim, ‘legal debate ... would shift its focus from the question of “doing” to the question of “being”’.<sup>33</sup> To do versus to be. ‘Doing’ is quite clear in this respect. As a serf, one can work the land, accompany one’s master to war and beget new serfs. One’s liberty is defined by the precise legal position of one’s private legal status of subjugation or freedom. A continuum of liberty thus existed: different categories of persons, finding themselves in different contexts of subjugation or domination would be free to do different things. One of the key tasks of the law, then, was ensuring justice through clarity and

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<sup>24</sup> *ibid.*, 1–19.

<sup>25</sup> Y Blank, ‘Spheres of Citizenship’ (2007) 8 *Theoretical Inquiries in Law* 411.

<sup>26</sup> Johnson (n 14).

<sup>27</sup> Kim (n 1) 3 (meaning ‘freed men’).

<sup>28</sup> *ibid.*, 200–02.

<sup>29</sup> Tilly reminds us that whole provinces of important empires could be run by slaves: C Tilly, *Coercion Capital and European States: AD 990–1992* (London, Wiley-Blackwell, 1992) 24.

<sup>30</sup> JM Balkin, ‘The Proliferation of Legal Truth’ (2003) 26 *Harvard Journal of Law and Public Policy* 5.

<sup>31</sup> Tilly (n 29).

<sup>32</sup> It goes without saying that the understanding of liberty went through an important intellectual evolution, which this chapter is not the proper venue to retell. See, eg, I Berlin, *Liberty* (Oxford, Oxford University Press, 2004).

<sup>33</sup> Kim (n 1) 194.

precision in the apportionment of liberty, ‘legal inequality [being] the essential attribute of the Classical notion of justice’.<sup>34</sup>

This view of freedom is rendered obsolete once liberty turns into a yes or no question and ceases being a matter of making precise the degree of entitlement in each particular case.<sup>35</sup> Such a change happened under the influence of the idea of sovereignty and Christian soteriology ‘by a close analogy to spiritual liberation’.<sup>36</sup> If one can be saved, one is free and this freedom is ensured through one’s allegiance to the sovereign through the law of nature which is also responsible for making him King under the same God that (if one behaves) will open, for the chosen, the doors of heaven. One’s subjugation to his law and sovereignty, which is, as we learnt from *Calvin*, of itself based on natural law, is thus essential for one’s liberty. There is no place for gradations in this straightforward system.

Keechang Kim’s illustration of the shift in the understanding of liberty through the discussion of Bodin’s criticism of Aristotle makes this shift crystal clear.<sup>37</sup> Bodin, wrongly presuming that personhood in the law of his times had the same meaning and structure as in the times of Aristotle, criticised the latter for failing to make a distinction, while approaching the notion of citizenship, between, on the one hand, those who owe allegiance to the sovereign<sup>38</sup> — whom we now would brand as ‘citizens’ since ultimately it does not matter who the sovereign one is bound to respect actually is: a large lady, a parliament, or ‘the people’<sup>39</sup> — and, on the other hand, all others. Only the former can enjoy true liberty, it was argued, and this liberty — paradoxically as it sounds — was gained precisely through the act of submission. Since in Bodin’s time the defining borderline determining the essence of personhood in law moved from ‘free/unfree’ to, essentially ‘a local/a foreigner’, understood as ‘under this King/under some other King’, liberty became an attribute of belonging — submission — to a particular sovereign (actually construed through the territoriality of the realm) and lost the preceding dominant meaning of freedom ‘to do’. Once liberty came to mean submission and, in return, the reception of protection from the sovereign, all those who submit are equally graced by law, undermining the previously established gradation of liberty. This also reflected the key idea of Christian soteriology well: either one will be saved or not. No one was only saved a little bit.

The new meaning of liberty defined through a yes or no question brought about a total reshaping of thinking about equality. In the legal paradigm of personhood based on the private legal relationship defined by one’s freedom or unfreedom, equality could not be of any moral value, since such a moral value would delegitimise not only the key division on which the paradigm rested, but also the understanding of liberty as a gradual apportionment of the freedom ‘to do’. Consequently, inequality, rather than equality used to be the moral ideal, emphasising the importance to apportion liberty precisely as the level of freedom of each individual stipulated.<sup>40</sup> This understanding is all but strange. There is overwhelming agreement in the legal-philosophical literature that equality, as such, is a choice which politics make rather than any ‘natural’ way of approaching the organisation of humans living together, which would be the most ideologically charged way to ‘explain’ equality by appeals to nature — more or less what Lord Coke did in *Calvin*.<sup>41</sup> Sir Isaiah Berlin, with his characteristic clarity, claimed that the moral reasons behind the presumption of equality — rather than instrumental considerations — will not and cannot be found, since ‘like all human ends [equality] itself cannot be

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<sup>34</sup> *ibid* 193 (footnote omitted).

<sup>35</sup> *ibid*.

<sup>36</sup> *ibid*.

<sup>37</sup> *ibid* 203–08.

<sup>38</sup> *ibid*, 204, relying, inter alia, on J Franklin, *Jean Bodin and the Sixteenth-Century Revolution in the Methodology of Law and History* (Columbia University Press, New York, 1963).

<sup>39</sup> For a convincing story of the actual articulation of the sovereign, see, eg, C Tilly, ‘War Making and State Making as Organized Crime’, in P Evans, D Rueschemeyer and T Skocpol (eds), *Bringing the State Back in* (Cambridge, Cambridge University Press, 1985) 169; Tilly (n 29).

<sup>40</sup> Kim (n 1) 193.

<sup>41</sup> *ibid* 176 ff.

defended or justified'.<sup>42</sup> It is thus 'neither more nor less "natural" or "rational" that any other constituent of [such ends]'.<sup>43</sup>

Sir Isaiah's was not a political argument about equality's worth<sup>44</sup> or a claim about its necessity.<sup>45</sup> Rather, it was the acknowledgement of the fact that, in philosophy both equality and inequality seem to be rather thinly framed, amounting to mere societal choices, *beliefs*.<sup>46</sup> In this sense, 'it is difficult to see what is meant by considering it either rational or non-rational', continues Sir Isaiah.<sup>47</sup> The currently dominant approach — that equality is a good thing (at least better than inequality<sup>48</sup>) — goes back to the shift in the law on personhood in the late middle ages, when the idea of sovereignty and allegiance de facto shaped a requirement of equality before the law among all those whose liberty is guaranteed, as we have seen, through submission to their sovereign master sanctioned by the God their sovereign master opted to declare that he believed in.

Importantly, the new equality as a legal ideal was not supposed to extend to those who are not bound by *the same* sovereign: allegiance played a key role in this process, creating the harshest principle of exclusion — discrimination on the basis of nationality<sup>49</sup> — which still holds true in the majority of countries around the world, to outrageously inequitable results,<sup>50</sup> treated as unproblematic by lawyers and political theorists alike. All in all, everyone is now free and equal, as long as everyone is under the same sovereign. Modern theorists would re-name submission as membership of the political community,<sup>51</sup> which does not alter the essence of the crucial boundary drawn in the realm of the law of personhood. The division is the same: those under this sovereign versus those under some other sovereign, or no sovereign at all (as defined by *our* law<sup>52</sup>). Foreigners in their foreign lands are, of course, usually not taken into account at all, their possible claims amounting to nothing.<sup>53</sup> Excluding them is presented as a good thing, indeed, an indispensable thing, since it protects the political community, read 'the sovereign', democracy requiring closure.<sup>54</sup> At the same time, the political community is responsible for equality in the current understanding of the word — assuming every person's equal worth: the circular reasoning is strong yet did not scare away Walzer and too

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<sup>42</sup> I Berlin, 'Equality' (1955–1956) 56 *Proceedings of the Aristotelian Society* 326.

<sup>43</sup> *ibid.*

<sup>44</sup> Peter Westen emerged as a famed advocate of equality's emptiness: P Westen, *Speaking of Equality: An Analysis of the Rhetorical Force of 'Equality' in Moral and Legal Discourse* (Princeton NJ, Princeton University Press, 1990). For well-argued disagreements, see, eg, J Waldron, 'The Substance of Equality' (1991) 89 *Michigan Law Review* 1350; K Karst, 'Why Equality Matters' (1983) 17 *Georgia Law Review* 245.

<sup>45</sup> On why such legal concepts are not 'empty', see, A Ross, 'Tù Tù' (1957) 70 *Harvard Law Review* 812.

<sup>46</sup> More specifically, Berlin speaks of the 'belief in the general rules of conduct': Berlin (n 42) 320. See also LP Pojman, 'Are Human Rights Based on Equal Human Worth?' (1992) 52 *Philosophy and Phenomenological Research* 605.

<sup>47</sup> Berlin (n 42) 319.

<sup>48</sup> *ibid.*

<sup>49</sup> B Kingsbury, 'Sovereignty and Inequality' (1998) 9 *European Journal of International Law* 599. In the context of the EU, see A Williams, 'The EU, Interim Global Justice and the International Legal Order' in D Kochenov and F Amtenbrink (eds), *European Union's Shaping of the International Legal Order* (Cambridge, Cambridge University Press, 2013) 62.

<sup>50</sup> Kingsbury, *ibid.*; A Shachar, 'Children of a Lesser State: Sustaining Global Inequality through Citizenship Laws' (2003) *Jean Monnet Working Paper* No 2003/03.

<sup>51</sup> eg M Walzer, *Spheres of Justice* (Oxford, Martin Robertson, 1983). For a general analysis: MJ Gibney, 'The Right of Non-Citizens to Membership' in C Sawyer and BK Blitz (eds), *Statelessness in the European Union* (Cambridge, Cambridge University Press, 2011) 41.

<sup>52</sup> This is where all the undocumented and 'illegal' people come from — especially those born in the territory but not recognised as fully 'in' for whatever reason. Pre-texts for such non-recognition historically varied from marrying a colonial subject to belonging to the inferior race or an ethnic minority. B de Hart, 'The Morality of Maria Toet: Gender, Citizenship and the Construction of the Nation-State' (2006) 32 *Journal of Ethnic and Migration Studies* 49; K Rundle, 'The Impossibility of an Exterminatory Legality: Law and the Holocaust' (2009) 59 *University of Toronto Law Journal* 65, 69–76; D Kochenov and A Dimitrovs, 'EU Citizenship for Latvian Non-citizens: A Concrete Proposal' (2015) 38 *Houston Journal of International Law* 1.

<sup>53</sup> eg Walzer (n 51).

<sup>54</sup> For an enlightening discussion, see, Gibney (n 51).

many others to be named.<sup>55</sup> The easiest is, of course, to pretend that there is only one bounded political community inhabiting this universe, existing in a vacuum with no neighbours: the world of TH Marshall and John Rawls. Our world is so different, that ignoring its crucial multiplicity is the fatal sin of omission virtually impossible to forgive. Forgiven or not, this thinking, conceptually indebted to Bodin's criticism of Aristotle, is so much engrained and accepted as a universal norm that whatever happens to the foreigner does not enter our moral universe.<sup>56</sup> It is not surprising, thus, that in the contemporary political community the foreigner has taken the legitimate place of the mediaeval serf and Aristotelian slave, as the discussion above demonstrates: the free/unfree duality came to be replaced by citizen/foreigner duality at the heart of the legal understanding of personhood.

The shift from free/unfree to local/foreigner as the most crucial legal denominators of personhood was thus of a truly paradigmatic nature, changing our — or our ancestors' — understanding of equality, liberty and the nature of community. The excluded and fenced out group has changed, just as the nature of the legal bond determining each persons' status and entitlements: from private law the person meandered into public law.

The European Union is now, at least in part, rowing back on this important late-mediaeval shift. Not that foreigners are treated better than usual — they are not — the bulk of citizens is treated differently through subjection to additional requirements before the presumption of inequality can be reversed, thus qualifying them as free and reaffirming their membership of the community as well as their worthiness of protection by law. The EU has de facto introduced the mediaeval understanding of liberty as a continuum between the entitlements of different relatively strictly policed categories of persons, while also shifting the borderline between those who are 'in' and those who are 'out': it now runs through the body of citizens both at the national and at the supranational level.

### III. The official EU story today: the law of as if

The official story line presents the EU as very closely resembling its own Member States in terms of all the key principles and values, which are said to be shared between the two levels of the law as reflected, for instance, in Article 2 TEU (Treaty on European Union).<sup>57</sup> Further perusal of the Treaties and the case-law of the Court of Justice of the European Union (ECJ) read in the light of a textbook-friendly self-image of the Union reveals that EU law unquestionably builds, inter alia, on the ideas of equality, liberty, democracy<sup>58</sup> and boasts the legal definition of personhood through a clear separation between 'us' and 'them', ie between citizens and foreigners.<sup>59</sup> Indeed, the ECJ built on the promise of the treaties in Part II TFEU (Treaty on the Functioning of the European Union) and Article 9 TEU and turned EU citizenship into a 'fundamental status of the nationals of the Member States'.<sup>60</sup> Even if

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<sup>55</sup> cf J Cohen, 'Changing Paradigms of Citizenship and the Exclusiveness of the *Demos*' (1999) 14 *International Sociology* 250.

<sup>56</sup> But see Kingsbury (n 49); Williams (n 49).

<sup>57</sup> On possible deviations from this default position and dealing with such deviations see, eg J-W Müller, 'The EU as a Militant Democracy' (2014) 165 *Revista de estudios políticos* 141; J-W Müller, 'Should the European Union Protect Democracy and the Rule of Law in Its Member States' (2015) 21 *European Law Journal* 141; C Hillion, 'Overseeing the Rule of Law in the EU: Legal Mandate and Means' in C Closa and D Kochenov (eds), *Reinforcing the Rule of Law Oversight in the European Union* (Cambridge, Cambridge University Press, 2016).

<sup>58</sup> Indeed, democracy is one of the values on which the Union together with its Member States is said to be built: Art 2 TEU. See also A von Bogdandy, 'The Prospect of a European Republic: What European Citizens are Voting on' (2005) 42 *Common Market Law Review* 913.

<sup>59</sup> But see, D Acosta Arcazaro, 'Civic Citizenship Reintroduced? The Long-Term Residence Directive as a Post-National Form of Membership' (2015) 21 *European Law Journal* 200. Long-term residence glorification scholarship severely downplays the fact that such residence is de facto and also frequently de jure operates within the context of a given Member State, not the Union as such: D Kochenov and M van den Brink, 'Pretending There Is No Union: Non-Derivative Quasi-Citizenship Rights of Third-Country Nationals in the EU' (2015) *EUI Working Paper LAW* 2015/07.

<sup>60</sup> eg Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para 31; Case C-13/99 *Baumbast* [2002] ECR I-7091, para 82; Case C-34/09 *Ruiz Zambrano* [2011] 2 CMLR 46, para 41.

someone is not convinced as to how exactly this happened methodologically,<sup>61</sup> this is the law.<sup>62</sup> This new citizenship, which is a more or less well-articulated legal status by now<sup>63</sup> — never mind its *ius tractum* conferral, dependent on the nationalities of the Member States<sup>64</sup> — comes with a powerful package of rights reserved for the citizens — not aliens, ie third country nationals in the supranational context of EU law — and also builds on a powerful promise of equality and non-discrimination among all the holders of this legal status. It is thus derivative at the level of individual articulation through its dependence on the nationalities of the Member States, but autonomous at the level of its day-to-day operation, through the dependence on the Union as a supranational provider of rights.<sup>65</sup> Equality seems to be one of the cornerstones of the status: the list of the prohibited grounds of discrimination is truly comprehensive,<sup>66</sup> and the articulation of the day-to-day application of the non-discrimination provisions of primary and secondary law is growing.<sup>67</sup>

Important in this respect is that alongside a number of well-known prohibited grounds of discrimination traceable to the UN Universal Declaration of Human Rights and the principles of non-discrimination in the national constitutions of the Member States, Union law also refers to the principle of non-discrimination on the basis of nationality,<sup>68</sup> which became one of the beacons of European integration from its earliest days.<sup>69</sup> This principle, although it seems natural to the majority of the students and practitioners of EU law, is in fact radically innovative and has only one major parallel in history, outside of the classical federal context,<sup>70</sup> which also happens to be a truly idealistic one<sup>71</sup> — the attempt of the revolutionary *Assemblée nationale* framing the notion of Frenchness in pre-Napoleonic France, to prohibit nationality discrimination.<sup>72</sup> The prohibition did not work out back then and the radical distinction between locals and foreigners was not in fact questioned either in the French context afterwards or elsewhere in Europe, thus demonstrating faithfulness to the trend which emerged around the time when *Calvin* was decided. Moreover, the idea of the nation came to be rooted in the distinction between the citizens and foreigners, reinforcing the principle of inequality between the holders of different nationalities, owing allegiance to different sovereigns, or, in contemporary language, once again, belonging to different political communities:<sup>73</sup> even dual nationality would not routinely be tolerated until very recent times to ensure that the purity of the separation is not violated.<sup>74</sup>

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<sup>61</sup> U Šadl, ‘Case – Case-Law – Law’ (2013) 9 *European Constitutional Law Review* 205.

<sup>62</sup> T Schulz, ‘Why Being Law Matters’ (2014) *King’s College London Law School Research Paper* No 2014-27.

<sup>63</sup> For an overview, see, Kochenov (n 6).

<sup>64</sup> D Kochenov, ‘*Ius Tractum* of Many Faces: European Citizenship and a Difficult Relationship between Status and Rights’ (2009) 15 *Columbia Journal European Law* 169.

<sup>65</sup> Case C-135/08 *Janko Rottmann* [2009] ECR I-1449, Opinion of AG Poiares Maduro, para 23.

<sup>66</sup> This does not mean that there is no room for improvement, of course: H Meenan (ed), *Equality Law in an Enlarged European Union: Understanding the Article 13 Directives* (Cambridge, Cambridge University Press, 2010).

<sup>67</sup> See, eg, the contributions in D Schiek and V Chege (eds), *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law* (London, Routledge Cavendish, 2009).

<sup>68</sup> Art 18(1) TFEU.

<sup>69</sup> G Davies, *Nationality Discrimination in the European Internal Market* (The Hague, Kluwer Law International, 2003); K Lenaerts, ‘Union Citizenship and the Principle of Non-Discrimination on the Grounds of Nationality’ in B Vesterdorf, N Fenger, & K Hagel-Sørensen (eds) *Festschrift til Claus Gulmann* (London, Thomson Reuters, 2006).

<sup>70</sup> C Schönberger, ‘European Citizenship as Federal Citizenship: Some Citizenship Lessons of Comparative Federalism’ (2007) 19 *Revue européenne de droit public* 61.

<sup>71</sup> European integration as such can also be presented as a messianic project: JHH Weiler, ‘Europe in Crisis: On “Political Messianism”, “Legitimacy” and the “Rule of Law”’ (2013) *Singapore Journal of Legal Studies* 248.

<sup>72</sup> The line of exclusion and inclusion was purely ideological: J Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (Cambridge, Cambridge University Press, 1999).

<sup>73</sup> D Miller, *On Nationality* (Oxford, Oxford University Press, 1997).

<sup>74</sup> T Triadafilopoulos, ‘Dual Citizenship and Security Norms in Historical Perspective’ in T Faist and P Kivisto (eds), *Dual Citizenship in Global Perspective: From Unitary to Multiple Membership* (Basingstoke, Palgrave Macmillan, 2007) 27; P Spiro, *Beyond Citizenship: American Identity after Globalisation* (Oxford, Oxford University Press, 2008).

Given the promise of the prohibition of discrimination on the basis of nationality, the EU could thus depart from the core duality marking the dominant legal paradigm of personhood in contemporary law, but it did not. The core distinction holds at the supranational level — the level at which EU citizenship is granted and operates. Non-discrimination on the basis of nationality is almost a tautology if applied within the confines of one status of personhood in law — however atypical this status might seem — thus without cutting across different statuses. In fact, such a proclamation only increases the sharpness of the distinction between citizens and foreigners so familiar from the transformation described above in that non-EU citizens are not included within the scope of the promised supranational law's 'innovation'. It appears, therefore, that the comparison with what the *Assemblée nationale* did at the end of the eighteenth century is unwarranted: EU citizenship is not a liberation from the idea of nationality.<sup>75</sup> Rather, it is a superimposed nationality of a different level, which seemingly follows exactly the same key logic of exclusion as the one marking the operation of the citizenships of the Member States at the national level. The task of modern citizenship being to exclude and to justify exclusion internally and externally, the national and EU levels of the law fulfill this task following precisely the same blueprint and using the same criterion of exclusion, thus being logically indistinguishable in this regard.

In the beginning of the internal market there was probably more room for idealism: European law on personhood resulting in the strict separation between EU citizens and third country nationals observable today is at least partly judge-made. From the very beginning the treaties spoke about 'workers of the Member States'<sup>76</sup> without pointing to the fact that those who were to enjoy this status under (then) EEC law were supposed to hold a particular nationality.<sup>77</sup> It goes without saying that the inclusion of nationality into the definition of a worker<sup>78</sup> is profoundly problematic in the internal market where a number of national economies rely on guest-workers' labour, as was the case when nationality came to be regarded as an essential connection between the status of a worker and the rights that workers would enjoy under the supranational law of the EEC.<sup>79</sup>

The Court has definitely played a crucial role in preventing the EU's possible departure from the exclusionary patterns of the classical post-*Calvin* personhood paradigm, which takes the distinction between citizens and foreigners as an almost presumed factor of great importance. So engrained was this vision that the treaties did not even need to mention nationality with regard to the workers' free movement regime<sup>80</sup> — as they did in the context of the free movement of services, for instance.<sup>81</sup> The distinction between citizens and foreigners was deemed to be there anyway.<sup>82</sup> This traditionalism and dogmatic approach to the scope *ratione personae* of EEC law resulted in the exclusion of all the workers holding a non-EU nationality from relying on EU-level rights, thus

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<sup>75</sup> In this particular context 'nationality' is not a value-laden term, following Miller's insightful analysis: Miller (n 73).

<sup>76</sup> Now Art 45(2) TFEU. The reference to 'workers of the Member States' has not changed since the Treaty of Rome.

<sup>77</sup> For a telling account of the birth of free movement of persons law in Europe, see, W Maas, *Creating European Citizens* (Lanham MD, Rowman and Littlefield, 2007).

<sup>78</sup> Case 75/63 *Hoekstra (née Unger)* [1964] ECR 177; Case 61/65 *Vaassen-Göbbels (a widow)* [1966] ECR 261; Case 44/65 *Singer* [1965] ECR 965; Case 66/85 *Lawrie-Blum* [1986] ECR 2121.

<sup>79</sup> S Castles, 'The Guest-Worker in Western Europe – An Obituary' (1986) 20 *International Migration Review* 761.

<sup>80</sup> The story was probably more complex, as there are strong indications in the Treaties that the notion of 'workers of the Member States' had to acquire a territorial, rather than a nationality-based framing. For a discussion, see Kochenov (n 64) (and the literature cited therein).

<sup>81</sup> Art 56 TFEU; Case C-147/91 *Ferrer Laderer* [1992] ECR I-4097, para 7. This is only so, of course, as long as you do not believe, as does Thym, for instance, touching upon this issue in his chapter in this volume, that the Court is not bound by the law, but, rather, by some tacit agreement between the writers of the Treaties. See, for a compelling discussion of the necessarily deceptive nature of originalism, however much 'modernised', KL Scheppele, 'Jack Balkin Is an American' (2013) 25 *Yale Journal of Law and Humanities* 23.

<sup>82</sup> For a historical scholarly debate problematising this distinction, see, DF Edens and S Patijn, 'The Scope of the EEC System of Free Movement of Workers' (1972) 9 *Common Market Law Review* 322; WR Bohring, 'The Scope of the EEC System of Free Movement of Workers: A Rejoinder' (1973) 10 *Common Market Law Review* 81.

making the rights-side of the internal market mostly invisible for this large group.<sup>83</sup> In other words, the ECJ effectively reinforced the grip of the ‘band of citizen-tyrants’<sup>84</sup> ruling over their ‘guests’ who work for them.

Non-discrimination on the basis of nationality came to be interpreted in exactly the same way as the scope of the then Community ‘worker’ status even if the provision establishing the non-discrimination principle does not itself limit its scope to any particular set of nationalities, confined to the ‘scope of the Treaties’<sup>85</sup> instead.<sup>86</sup> In this sense, the EEC could mark a departure from the citizen-foreigner paradigm from the outset giving all the workers legally employed in the Member States supranational-level rights in the internal market, but it did not — at least not on the face of it and certainly not in the name of broadening the application of equality, as will be explained in more detail in the next part. As a consequence — and this was fully confirmed by the Treaty of Maastricht through making a connection between the Member State nationality of every person and her European citizenship<sup>87</sup> — EU law on personhood seems to be a faithful continuation of the ages-old tradition building the notion of the person in law on the distinction between the foreigner and the citizen: no innovation there, submissions from the scholars<sup>88</sup> and EU organs<sup>89</sup> notwithstanding. Once again, one should not be misled by the manner through which Article 18 TFEU functions today: once EU citizenship is regarded as having graduated into a meaningful legal status, Member State nationalities in their totality virtually completely disappear under its umbrella: within the scope *ratione materiae* of EU law they cease to exist in the eyes of the supranational legal system<sup>90</sup> beyond their function of triggering the acquisition by their holders of a status of EU citizenship, which happens automatically through the direct effect of the relevant Treaty provisions.<sup>91</sup> The same can seemingly be said about what is thought of equality and liberty — only EU citizens are fully included, equal and free, all the ‘lacking *demos*’<sup>92</sup> and democratic deficit aspects of the story pointing to the EU’s natural limitations<sup>93</sup> as a proclaimed constitutional system<sup>94</sup> notwithstanding.

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<sup>83</sup> Although a number of exceptions from this approach were later introduced through secondary legislation, these do not reverse, but rather reinforce the distinction between EU citizens and foreigners: Kochenov and van den Brink (n 59); See, also, the relevant Dir 2003/109 and a its very optimistic analysis: D Acosta Arcarazo, *The Long-Term Residence Status as a Subsidiary Form of EU Citizenship* (Leiden, Martinus Nijhoff, 2011).

<sup>84</sup> Walzer, *The Spheres of Justice*, as cited by Gibney (n 51) 62.

<sup>85</sup> Art 18(1) TFEU reads as follows: ‘Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited’.

<sup>86</sup> For a sound criticism of reading a list of nationalities in the text of what is now Art 18 TFEU, see P Boeles, ‘Europese burgers en derdelanders: Wat betekent het verbod van discriminatie naar nationaliteit sinds Amsterdam?’ (2005) 12 *Sociaal-economische wetgeving* 502.

<sup>87</sup> Art 8 TEC, Maastricht version. The principle remains unchanged in Arts 9 TEU and 20 TFEU. It is essential not to forget, in this context, that the definition of a Member State nationality deemed relevant in this context is also very narrow, building on the notion of ‘Member State nationals for the purposes of Community law’ – not on all the richness of the nationality law of the Member States concerned, as confirmed by the Court: Case C-192/99 *Kaur* [2001] ECR I-1237.

<sup>88</sup> eg D Kostakopoulou, ‘European Union Citizenship and Member State Nationality: Updating or Upgrading the Link?’, in J Shaw (ed), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?* (2011) *EUI Working Paper RSCAS* No 2011/62.

<sup>89</sup> See, most recently, European Economic and Social Committee (Rapporteur Mr Pariza Castaños) Opinion ‘A More Inclusive Citizenship Open to Immigrants’ (own initiative opinion) 2014/C 67/04.

<sup>90</sup> G Davies, “‘Any Place I Hang My Hat?’ or: Residence is the New Nationality” (2005) 11 *European Law Journal* 43.

<sup>91</sup> Arts 9 TEU and 20 TFEU. See also M Szipar and ME Blas López, ‘Some Reflections on Nationality of Member States: A Prerequisite of EU Citizenship and an Obstacle to its Exercise’ in Kochenov (n 6).

<sup>92</sup> For a masterful contextualisation, see, G Palombella, ‘Whose Europe? After the Constitution: A Goal-Based Citizenship’ (2005) 3 *International Journal of Constitutional Law* 357.

<sup>93</sup> JHH Weiler, ‘Epilogue: Living in a Glass House: Europe, Democracy, and the Rule of Law’ in C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge, Cambridge University Press, 2016).

<sup>94</sup> A Somek, ‘Is Legality a Principle of EU Law?’, unpublished paper on file with the author; D Kochenov, ‘EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?’ (2015) 34 *Yearbook of European Law*.

All in all, even though the EU is not a state and boasts a somewhat atypical system of structures of democratic governance, when scrutinised from the point of view of the Member States at least, the citizenship it has created is in full conformity with the key modern assumption that the core distinction in the law of personhood lies between citizens and foreigners. In this sense, even though EU citizenship is, for obvious reasons, radically different from the nationalities of the Member States, it is much more dull and lacking in novelty, than optimists would assume.<sup>95</sup> Indeed, broadly speaking at least, it is a federal citizenship like any other.<sup>96</sup> Consequently, instead of innovating, what it does is merely *replicate* the Member States' nationalities on a different scale. The chief added value of the supranational status is, then, in the fact that this replication is not complete and does not involve coercive molding of togetherness — *demos*-building.<sup>97</sup> Consequently, the supranational status could be presented as more just and less authoritarian: a modern take on what a national citizenship ideal could be, should coercion and nationalism be excluded from it, replaced by a respect for multiplicity<sup>98</sup> and a rights-based, as opposed to a duties-based, self-justification.<sup>99</sup> The EU idea of freedom is thus *not* based on submission to a sovereign in the vein of Bodin,<sup>100</sup> even if the sovereign is actually the very people, the *demos* itself,<sup>101</sup> democracy implying, following Gibney's apt characterisation, 'the meshing of two ideas: that rights matter and that *demos* rules'.<sup>102</sup>

EU citizenship emerges as overwhelmingly traditional in terms of the key form of exclusion it advocates and, simultaneously, extremely innovative — if not potentially destructive from the point of view of traditional democratic theory — in terms of implicitly denying the necessity of a political community. This is what it tacitly advocates through the promotion of liberation from 'suffocating bonds': a well-known problem addressed in a broader context by a number of writers.<sup>103</sup> Given that this 'problem' is a natural consequence of a new role individualism seems to play in the framing of community while coercive togetherness is more and more difficult to justify,<sup>104</sup> it actually appears that EU citizenship is not innovative at all on this second plane either: an ordinary replication of ordinary and expected features of any standard approach to nationality difficult to justify in this changing world.<sup>105</sup>

In other words, given that the literature bemoaning institutionalised individualism's effects on the ideology of *demos* and nationhood seems to teach the same lesson when applied to the supranational<sup>106</sup> and to the national level<sup>107</sup> — including outside of the context of the Union<sup>108</sup> — the core paradigm of understanding of personhood is the same in the Member States and in the EU as a whole: while *demos* as a starting point of liberty at the complex intersection of sovereignty,

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<sup>95</sup> For a stimulating account of citizenship's possible futures see, eg, D Kostakopoulou, *The Future Governance of Citizenship* (Cambridge, Cambridge University Press, 2008).

<sup>96</sup> Schönberger (n 70). On the general federal context of EU law, see, O Beaud, *Théorie de la fédération* (Paris, PUF, 2007); R Schütze, *From Dual to Cooperative Federalism* (Oxford, Oxford University Press, 2009).

<sup>97</sup> For a spectacular criticism of *demos*-affiliated constitutional patriotism theories – Kostakopoulou (n 95) 66–99.

<sup>98</sup> Palombella (n 92); 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) 18.

<sup>99</sup> D Kochenov, 'EU Citizenship without Duties' (2014) 20 *European Law Journal* 482.

<sup>100</sup> Kim (n 1) 202–08.

<sup>101</sup> For an insightful critique of *any* constitutionalism as a mechanism of oppression, see, J Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge, Cambridge University Press, 1995).

<sup>102</sup> Gibney (n 51) 56.

<sup>103</sup> Somek (n 14) 142; 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).

<sup>104</sup> C Joppke, 'The Inevitable Lightning of Citizenship' (2010) 51 *European Journal of Sociology* 9; A Badiou, *Ethics: An Essay on Understanding of Evil* (London, Verso, 2001).

<sup>105</sup> Joppke, *ibid*.

<sup>106</sup> Somek (n 14).

<sup>107</sup> Joppke (n 104).

<sup>108</sup> eg S Žižek, 'Against Human Rights' (2005) 34 *New Left Review* 10.

submission and democracy, is under attack and increasingly difficult to justify, let alone to forge, the abyss between citizens and non-citizens is at least as important and relevant now as it used to be before. Crucially, this applies equally at both levels of the law in the EU. This sameness is achieved by drawing the boundary of exclusion in exactly the same manner in the EU as the Member States do it: third country nationals are out of the picture unless they settle long-term and are on track to acquire the really meaningful status of citizenship,<sup>109</sup> and rights as well as, crucially, equality, are distributed between the supranational citizens, thus marking out the confines of the community of persons with regard to which EU citizenship serves as an instrument of closure in the vein of Brubaker's thinking.

This story is not the whole truth, however: once the actual operation of EU citizenship is scrutinised, a somewhat different — partly pre-*Calvin* picture of personhood in European law emerges, bringing an array of problems undermining this coherent worldview at both the national and the supranational levels of the law.

#### IV. EU's quasi neo-mediaevalism: the law as is

An inattentive observer will be satisfied with the story of personhood in EU law retold above. At a conceptual level, EU citizenship emerges as a largely thoughtless if not haphazard replication,<sup>110</sup> where the ambitious scale of the model cannot hide the key deficiencies of the replicated originals. Yet, once we start looking below the surface of EU Treaties and case-law it becomes clear, almost immediately, that what we are actually dealing with is a somewhat more complex story than the one of replication presented above. The story is also potentially far more problematic. In fact, the approach to personhood in law which we find in the EU seems to be radically different from what we find at the level of the Member States. Moreover, the Member States' nationalities — usually presented as a model and the source of derivation of the status are also seriously affected by this difference.

The established paradigm of personhood in public law which the EU seemingly follows implies a strict separation between foreigners and citizens accompanied by a strong imperative of equality before the law in dealing with those in possession of the citizenship status, accompanied by the idea of liberty through sovereignty and submission — a criterion which, in its latest emanation is equated with democracy, the sovereign being the people. Since the people is a complex construction by definition,<sup>111</sup> it is impossible, it seems, to reproach the EU by advancing claims that the official story is untenable since there is 'no EU *demos*': *demoi* come and go<sup>112</sup> and could flourish or die in correlation with authority within given boundaries, something that the EU unquestionably enjoys.<sup>113</sup> Indeed, a *demoi* approach could solve this problem, rhetorically at least,<sup>114</sup> allowing the EU to emerge as a republic, for instance.<sup>115</sup> 'Democracy talk' usually disregards the instrumentalist nature of the Union, which operates in the realm of pre-set goals, turning democracy into a game of means, not ends, in Gareth Davies' insightful analysis.<sup>116</sup> Could this approach turn the citizens into a means to an end? A democracy of means is the most reliable way to remove the core of the legal political system

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<sup>109</sup> This is the core goal of Dir 2003/109 as I read it.

<sup>110</sup> But see A Wiener, 'Going Home? "European" Citizenship Practice Twenty Years after', in Kochenov (n. 6).

<sup>111</sup> B Anderson, *Imagined Communities* revised edn (London, Verso, 2006).

<sup>112</sup> N Davies, *Vanished Kingdoms: The Rise and Fall of Nations* (New York, Penguin, 2011).

<sup>113</sup> PL Berger and T Luckmann, *The Social Construction of Reality* (Garden City NY, Doubleday, 1966).

<sup>114</sup> K Nicolaïdis, 'The Idea of European *Demoicracy*' in J Dickson and P Eleftheriadis (eds), *Philosophical Foundations of EU Law* (Oxford, Oxford University Press, 2012); K Nicolaïdis, 'The New Constitution as European "*Demoi*-cracy"?' (2004) 7 *Critical Review of International Social and Political Philosophy* 76.

<sup>115</sup> von Bogdandy (n 58). See also K Lenaerts and JA Gutiérrez-Fons, 'Epilogue on EU Citizenship: Hopes and Fears' in Kochenov (n 6).

<sup>116</sup> G Davies, 'Social Legitimacy and Purposive Power: The End, the Means and the Consent of the People' in D Kochenov, G de Búrca and A Williams (eds), *Europe's Justice Deficit?* (Oxford, Hart Publishing, 2015).

from the realm of potential democratic contestation:<sup>117</sup> precisely the opposite of what democracy normally stands for. There is a difference between taking one's destiny into one's own hands and taking the construction of the Internal Market into one's own hands of course.<sup>118</sup> *Demoicracy*, solving the *demos* problem for 'European democracy' is about the latter. This unquestionably corrupts EU law, unaccustomed to restraints,<sup>119</sup> even if based on delegated authority. Presenting the EU in a democratic vein thus is a powerful ideological tool<sup>120</sup> to remove any democratic contestation from the framing of the very core of its exercise, potentially leading to injustice.<sup>121</sup> This reality, which is always in the shadow of the official story the textbooks rehearse, has profound implications on the actual framing of personhood in EU law.

An alternative approach to finding problems and solving them would be rooted in a totally different kind of literature and based on a totally different attention to detail in presenting the EU's day-to-day. Alexander Somek's accidental cosmopolitanism could offer a useful starting point in this regard.<sup>122</sup> It is descriptive in the most positive sense of the word, it does not construct castles in the sky in contrast to the most popular literature that fly the banners of *demoicracy* and legal pluralism.<sup>123</sup> Instead, it opts against interpreting away the difficulties a democracy perspective faces, the promise in the treaties notwithstanding.<sup>124</sup> Stretched to the extremes, the story emanating from this descriptive understanding is that *demos* and democracy cannot possibly be necessary for freedom, in its contemporary highly individualistic understanding, since as Davies has demonstrated, it is now the liberation from the effects of legitimate democratic outcomes — as opposed to submission in the name of freedom — that is gradually becoming an element of 'citizenship'.<sup>125</sup> As mentioned above, rather than an EU-specific story, this seems to be yet another illustration of the general trend outlined, *inter alia*, by Alain Badiou and Slavoj Žižek.<sup>126</sup>

This is where neo-mediaevalism enters the stage: the EU is the only functioning legal system in the world that is not merely paralysed — at least to some extent — by this (let us crudely call it 'new') liberty's function, which frustrates the system's ability to choose what is good and how to do it together and what is not acceptable and how to fight it together, even if this generates very high costs for some.<sup>127</sup> The EU's core effect seems to reinforce this new understanding, by imposing serious limits on the operation of the legal-political systems of the Member States. The EU thus emerges as structurally anti-*demos* in that it denies the promise of equality and offers a shield against legitimate collective action in the name of reaching its goals, like the construction of the internal market, which are removed from the realm of democratic contestation.

The EU's official story does not hold, not because there is no *demos* and there is democratic deficit. Rather than the difficulties with the subjective perceptions of European 'peoplehood' or the

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<sup>117</sup> MA Wilkinson, 'Politicising Europe's Justice Deficit: Some Preliminaries', in Kochenov et al, *ibid*; AJ Menéndez, 'Whose Justice? Which Europe?' in Kochenov et al, *ibid*.

<sup>118</sup> G Peebles, "'A Very Eden of the Innate Rights of Man'": A Marxist Look at the European Union Treaties and Case Law' (1998) 22 *Law and Social Inquiry* 581.

<sup>119</sup> Somek (n 94); Kochenov (n 94).

<sup>120</sup> On the ideological essence of internal market knowledge, see M Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political' (2015) 21 *European Law Journal* 572. See, also, for a broader account, P Agha, 'The Empire of Principle' in J Přibáň (ed), *The Self-Constitution of European Society* (Abingdon, Routledge, 2016).

<sup>121</sup> D Kochenov and A Williams, 'Justice Deficit Introduced', in Kochenov et al (n 116).

<sup>122</sup> Somek (n 14).

<sup>123</sup> For somewhat atypical voices in the flood of the popular literature, see, eg, G Davies, 'Constitutional Disagreement in Europe and the Search for Legal Pluralism' (2010) *Eric Stein Working Paper* No 1/2010; G Letsas, 'Harmonic Law: The Case against Pluralism' in Dickson and Eleftheriadis (n 114) 77; RD Kelemen, 'On the Unsustainability of Constitutional Pluralism' (2016) 23 *Maastricht Journal of European and Comparative Law* 88.

<sup>124</sup> Lenaerts and Gutiérrez-Fons (n 115).

<sup>125</sup> Davies (n 103).

<sup>126</sup> Badiou (n 104); Žižek (n 108).

<sup>127</sup> Badiou (n 104).

objectively vacant place left in the system of EU law for the people of Europe,<sup>128</sup> it appears we are now observing a shift in law away from equating freedom with democracy, through the medium of national unity and the double submission of the individual, which the two require: fitting the mould of the nation and accepting democratic outcomes which are (very often) contrary to one's interests. The very starting point is that the EU is, by law, by its very design, *the denial* of *demos*-like unity among the people which would be legally consequential in the core fields of regulation. In this sense it is like any other federation. Reconciling the EU and the *demoi*, thus, is difficult, if not impossible. How can this be?

Once we take a closer look at how EU law actually operates, it seems to be premised on the need to apportion liberty on the basis of persons' actions, wealth and life-styles, *not* their submission to the sovereign (or collective self-determination), ie the status of citizenship, as the classical post-*Calvin* approach would require. Belonging to the 'non-existent' European *demos* or the national-level *demoi* will not help at all, since the EU instead of favouring equality before the law, offers its law precisely as a tool against submission (read: collective self-determination) — the one which used to imply liberation, remember? — to those who do not feel like being treated like their peers in the national systems. This includes the deserters from both facets of the grand submission narrative: those who dislike the idea of being part of the nation, its *demos*, and those who dislike the outcomes of the fully legitimate operation of such a nation's democracy. The EU thus by definition cannot offer voice on the core issues,<sup>129</sup> since its goals are pre-set.<sup>130</sup> What it does, instead, is offer exit but also to those who are still within their polity: exit without exiting, as it were. Such a fictitious exit is only possible since it is policed through the supranational level of the law; the offer of this exit emerges as the EU's strategy of taming the Member States — their humiliation, after all, is the EU's constitutional tactic, in Davies' memorable phrasing.<sup>131</sup> This turns the *demoi*, tenable fictions, which are perceptible and alive, as it were, but also necessarily fictitious by definition — the imagined communities — into untenable fictions in their own land, with far-reaching effects for national democracy, which are still to be experienced in full.

In other words, while the core of the modern understanding of personhood in law is the reading of liberty as a yes or no question, as explained in the first part, this is not the understanding that EU law promotes. It is only at the level of proclamations that EU citizenship, as such, is about freedom and the enjoyment of rights. The law tells us that 'EU citizens shall enjoy the rights ... provided for in the Treaties'.<sup>132</sup> Once the actual enjoyment of rights is scrutinised, an important correction arises, which profoundly alters the legal meaning of personhood in Europe, bringing it closer to the mediaeval ideal of a strict apportionment of what different people within the same society and under the same authority can do depending on their level of personal freedom, ascribed by law while taking subtle differences in their individual legal statuses into account. Asking who enjoys the crucial European-level rights is not merely a rhetorical question, as it would be, for instance, in the post-*Calvin* union of England and Scotland. The traditional answer is 'the one who owes allegiance' to the sovereign, ie holds the status of a subject in this monarchy or is a citizen in this democracy, should we project several centuries — the one who is bound by the law to the equal extent as all the co-participants in the same national project. Belonging to a *Volk* with the honour it brings could be presented as an extreme version of this reasoning,<sup>133</sup> which also knows a (more popular) strictly civic emanation, as embodied in the fourteenth amendment, for instance.

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<sup>128</sup> On the dual subjective-objective essence of the definition of nationality: Miller (n 73) ch 1.

<sup>129</sup> See AO Hirschman, *Exit, Voice, and Loyalty* (Cambridge MA, Harvard University Press, 1970).

<sup>130</sup> G Davies (n 116).

<sup>131</sup> Davies (n 103).

<sup>132</sup> Art 20(1) TFEU.

<sup>133</sup> JQ Whitman, 'On Nazi "Honour" and the New European "Dignity"' in C Joerges and N Singh Ghaleigh (eds), *Darker Legacies of Law in Europe* (Oxford, Hart Publishing, 2003) 243.

Such an answer is never, and cannot possibly be, formulated in terms of ‘falling within the scope of the law’,<sup>134</sup> which, in the EU, often stands for ‘send us your CV with a photo and we will see’ (whether you enjoy any citizenship rights, that is). Criticism of this situation on logical and technical grounds is abundant and poignant.<sup>135</sup> Little attention has been paid to how this state of affairs alters the essence of European constitutionalism. Personalisation and individualisation of the scope of the law is a tragedy which several generations of EU lawyers saw unfolding,<sup>136</sup> which was only made possible through the obscure complexity of the rules and a total removal of the EU from democratic control of its aims, as discussed above. Moreover, the overwhelming importance of the economic activity advanced<sup>137</sup> in the supranational context — precisely the things the EU wants to see on your CV — ensures that this individualisation is almost entirely private, rather than public in nature, yet, its function in the EU is precisely to frame the boundary of public law. The core of your EU citizenship — including the essence of your rights — now depends on your *employer* — from a cross-border MacDonald’s to HSBC — as much as on your Member State. This being said, this is definitely the new *order* rather than sheer anarchy — it is this ‘being order’ that makes EU’s neo-mediaevalism so effective and so frightening.

It goes without saying that ‘the scope of the law’ answer is a logical impossibility, in a legal system reasoning from consequences.<sup>138</sup> It is not to criticise the Court, which tries admirably to infuse the questionable design of the EU with at least a modicum of logical coherence.<sup>139</sup> Rather, personalising the relationship between the person and the law, this neo-mediaevalism ceases to live up to the ideal of generality in the law’s application to *all*, assumes that the status of citizenship can be disregarded by the public authority the belonging to which this very status is there to signify. We are all aware of the justifications, including respect of the Member States’ sovereignty and so forth.<sup>140</sup> It is crucial to ensure, however, that the discussion of the justifications of the current situation does not obscure an analysis of the law Europeans now have to live under, either as *demos* or as *demoi*, which they are unable to change, because this is how the EU works as a republic. Let us look at our law, which is quite simple.

The law’s construction — both at the national and at the EU level, as sides of the same coin — implies that the principle of equality before the law is missing. Like under feudalism, inequality claims the place as the key moral ideal: it is the just separation between those who by virtue of their actions, occupations, wealth or other factors, acquire a claim to a larger portion of legal protection — let us call it freedom — than their peers holding the same legal status.

In fact, the same state of affairs could be restated in a slightly more radical fashion than this. It is common knowledge, of course, that equality is an instrument in the hands of the law, a *belief*,<sup>141</sup>

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<sup>134</sup> Or, the extreme version of the same, ‘[EU] citizenship is not intended to enlarge the scope *ratione materiae* [of EU law]’, which used to be a standard addition to the ECJ case-law on the subject: eg Joined cases C-64 and 65/96 *Uecker and Jacquet* [1997] ECR I-1371, para 23; Case C-148/02 *Garcia Avello* [2003] ECR I-11613. For criticism, see, D Kochenov and R Plender, ‘EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text’ (2012) *European Law Review* 369.

<sup>135</sup> eg A Tryfonidou, ‘Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens’ Europe’ (2008) 35 *Legal Issues of Economic Integration* 43; N Nic Shuibhne, ‘Free Movement of Persons and the Wholly Internal Rule: Time to Move on?’ (2002) 39 *Common Market Law Review* 731; R-E Papadopoulou, ‘Situations purement internes et droit communautaire: Un instrument jurisprudentiel à double fonction ou une arme à double tranchant?’ (2002) *Cahiers de droit européen* 95; RAC White, ‘A Fresh Look at Reverse Discrimination?’ (1993) 18 *European Law Review* 527. This fundamental literature in EU law has been as strong as inconsequential.

<sup>136</sup> For an overview, see, D Kochenov, ‘Citizenship without Respect’ (2010) *Jean Monnet Paper* (NYU Law School) No 08/10.

<sup>137</sup> On the core implications of this aspect of EU law on personhood, see the lucid analysis by A Somek in his chapter in this volume.

<sup>138</sup> J Bengoetxea, ‘Reasoning from Consequences from Luxembourg’ in H Koch, K Hagel-Sørensen, U Haltern and JHH Weiler (eds), *Europe. The New Legal Realism* (Copenhagen, Djøf Publishing, 2010) 39.

<sup>139</sup> For a crisp exposé, see, A Tryfonidou, *Reverse Discrimination in EC Law* (The Hague, Kluwer Law International, 2009).

<sup>140</sup> D Thym, ‘Frontiers of Citizenship. Three Approaches and Their Methodological Limitations’ in Kochenov (n 6).

<sup>141</sup> As discussed in Berlin (n 42).

rather than a philosophically sound principle.<sup>142</sup> This belief unites contemporary societies, however, since it seems to be corresponding particularly well to the starting position of thinking about the person — the citizen — and the law: equality of all (at least of all those holding the status) in the eyes of the authority granting the status of legal attachment to the community. In other words, equality becomes the *starting presumption* of thinking about the relationship between the persons in every given legal system. In the EU, this starting presumption function of equality is nowhere to be found: quite on the contrary, the presumption is differentiation, unless ‘falling within the scope of the law’ is demonstrated.

The legal system is built in such a way that the majority of those who acquired the legal status of attachment to it will never be in the position to be rich enough, economically active enough, or simply lucky enough to be graced by the application to them of the promise of equality.<sup>143</sup> The presumption of inequality, in their particular case, will never be rebutted and will shape the law they know, the rights in the Union, which they enjoy and the limits of opportunity they face, thus shaping their lives. Equality being the core element of personhood in law, those not capable to enter the scope of equality are de facto excluded from citizenship. They are on the other side of the in/out divide.

Approached from the national level, however, the picture is probably even more problematic: all those lucky enough to qualify for the EU-level rebuttal of the presumption of inequality frequently end-up carved out from the national *demos* commanding a legitimate legal claim to their allegiance, liberated from the application of the outcomes of the democratic process at the national level to them and thus breaking up the idealistic story all the national constitutions are so eager to tell. Once there is no presumption of equality at the supranational level, it obviously cannot hold at the national level either, when both levels of the law claim the same persons as their citizens.<sup>144</sup>

Should this presentation of the operation of EU law be correct, the Union is very effective in pursuing justice understood as a mediaeval apportionment of privileges best suited to a particular situation of each person, while the presumption is *against* equality before the law and the idea of freedom understood through democracy and equality before the law could not be more antagonistic to what EU law is about. Where EU justice is about apportioning privilege based on the factors having no relation to the legal status held by individuals, equality becomes an impossibility, since the idea is not limited to the scope of a particular legal system as such a legal system defines it. Rather, equality is about ensuring that all those possessing a legal status of attachment to the sovereign are always put on the equal footing vis-à-vis the law. Unlike in the middle ages — and since the times of *Calvin* at least — ‘the law favoureth not’. Importantly, this is not how EU law approaches the idea justice, since equality does not even serve the function of the starting presumption, as we have seen. To the contrary, in the EU the law will favour and promote the interests of some groups of citizens and downgrade and ignore the interests of others based on a highly flexible idea of the ‘scope of the law’, which has nothing to do at all with the status as such and is thus a rhetorical method to disown some of the citizens while furthering the interests of others in a legal context where equality is still on the books, even if it does not function as a starting presumption or, for that matter, as a principle of law.<sup>145</sup>

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<sup>142</sup> *ibid*; Pojman (n 46).

<sup>143</sup> Kochenov (n 136).

<sup>144</sup> This being said, the national constitutional provisions as interpreted by the highest national courts could of course remove differentiated treatment based on the functioning of EU law by extending EU law protections to all the nationals under national law, as the Italian *Corte costituzionale* has done, for instance. This practice remains atypical in the EU, however. See, eg, *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’ (in judging on equality this Court is entrusted with it is impossible to ignore the discriminatory effects, which Community law is susceptible of provoking).

<sup>145</sup> For and important early analysis, see, G de Búrca. ‘The Role of Equality in European Community Law’ in A Dashwood and S O’Leary (eds), *The Principle of Equal Treatment in EC Law* (London, Sweet and Maxwell, 1997) 13.

Equality, thus, is not guaranteed even at the most basic level,<sup>146</sup> ie the level of uniform application of the rules to a given status, which seriously undermines the formal legal relevance of the latter.<sup>147</sup>

The picture will not be complete before the reasons behind excluding lives from the scope of the law are touched upon. This has been done in the literature on a number of occasions in great detail. Salvation was an idea unifying and demanding equality at the time *Calvin* was decided. Soteriology was the leading field that had a direct impact on law. Those who submit to wrong Gods and neighbouring sovereigns will not be saved. The EU-embraced soteriology is different. Only those who move — actually or potentially — across the eradicated (by definition of such market) borders of the internal market, obtain access to the tools, within the EU's system of legal truth — to build on Jack Balkin<sup>148</sup> — to reverse the presumption of inequality applied to them by default by EU law. While the stated aim is well-known and consists in contributing to the cause of building a strong internal market,<sup>149</sup> while the aim was once logical, it makes little sense now. To avoid one's family's ruin one has to take a bus across a non-existent border,<sup>150</sup> since historically — before citizenship that is — moving across borders could legitimately imply economic activity benefiting us all. To cut the long story short, the reasons for exclusion are purely ideological and self-contained, inexplicable logically. The ideologies packed into the exclusionary reasoning are engrained in the system of supranational law to such a degree that they are non-negotiable and cannot be contested democratically. No bus ticket or a clear willingness on the part of the judges to believe that you might possibly buy one in the future — and the presumption of inequality will not be reversed.

## V. Conclusion

This chapter has argued that the approach to personhood in law in the contemporary European Union is both typical and atypical. To start with the typical — EU citizenship resembles much more than not a most ordinary nationality of any random contemporary state, thus being much less innovative and unique, than what many scholars have claimed. Crucially, the core paradigm of personhood in law seems to be — in the EU's self-image — building on the 'golden standard' of the Member States and the key distinction between the foreigners and the citizens. The mediaeval parallel drawn in this chapter helped us uncover the pre-modern paradigm of personhood in law, the one which does not know Bodinean sovereignty, allegiance and, by extension, democracy and opposes the idea of equality. The core distinction at the heart of such legal paradigm of personhood is between the free and unfree; the core moral value — the precise apportionment of liberty among the persons in accordance with their legally recognisable chance and circumstance. This paradigm of personhood, which is private, not public in nature, almost became extinct with the advent of democracy, equality, and the status of citizenship based on the citizen/foreigner distinction is what the EU is now forcefully reviving. The fact that this is undoubtedly inadvertent does not alter the outcomes of this process. In EU law as it stands borders of presumed inequality run through societies, the starting assumption in the law of personhood is that of the desirability of the apportionment of liberty. Lastly, collective self-determination *en par* with the submission to the sovereign is frowned upon in an atmosphere where democratic contestation of ends, which the legal system is striving to achieve is both *de jure* and *de facto* impossible. Due to this neo-mediaevalism, the EU's approach to personhood is actually much

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<sup>146</sup> Sir Isaiah, to refer to his important work again, distinguished between two levels of approaching equality: equality as rules (based on the idea of uniform application of the norm, which is a necessary part of any rule of law) and equality *per se* (as the highest moral standard of valuing the just nature of the rules): Berlin (n 42).

<sup>147</sup> The current system is reminiscent of the extraterritorial approach to jurisdiction over the nationals commonly practiced by the most powerful countries in the semi-colonised nations in the 19th–early 20th century. On extraterritoriality see, eg, T Kayaoglu, 'The Extension of Westphalian Sovereignty: State Building and the Abolition of Extraterritoriality' (2007) 51 *International Studies Quarterly* 649.

<sup>148</sup> Balkin (n 30).

<sup>149</sup> A Tryfonidou, 'In Search of the Aim of the EC Free Movement of Persons Provisions: Has the Court of Justice Missed the Point?' (2009) 46 *Common Market Law Review* 1592.

<sup>150</sup> For more on the operation of EU law see, eg, Kochenov (n 136).

more atypical than many scholars have claimed. Through the developments described above the EU is drifting in a dangerous direction of extinguishing the classical ideas of self-determination and human worth in public law *tout court*.

