NESTED "OLD" AND "NEW" CITIZENSHIPS IN THE EUROPEAN UNION: BRINGING OUT THE COMPLEXITY

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The institution of European Union citizenship, which was established by the Treaty on European Union, has been the subject of considerable attention over the last few years. Justifiably so, since European citizenship could be a catalyst for the creation of a Euro-polity endowed with a stronger constitutional framework[1] and greater social legitimacy.[2] Union citizenship also attests that the historic moment seems to have passed for trying to define citizens claims and entitlements in terms of membership in a national community.[3] It is, perhaps, this realization that has prompted work on the constructive potential of this institution and has fueled a more general debate on the viability of the nationality model of citizenship in light of globalization and increasing transnational mobility.[4] It is thus not surprising that the debate concerning European citizenship has shifted into a European debate on citizenship.[5] This has just begun "spilling over" beyond Europe itself, since the possibility of decoupling citizenship and nationality echoes theoretical concerns and practical problems elsewhere, too.[6]

Although Union citizenship has been the subject of detailed legal analyses, the literature tends to treat Union citizenship as a unitary institution comprising an unambiguous set of rights.[7] What seems to have escaped the theorists attention is that

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1 See generally Ulrich K. Preuss, Two Challenges to European Citizenship, 44Political Studies 534-52 (1996); J.H.H. Weiler, European Neo-Constitutionalism: In Search of Foundations for the European Constitutional Order, 44 Political Studies 517-33 (1996); J.H.H. Weiler, The Reformation of European Constitutionalism, 35 J. Common Mkt. Stud. 97 (1997); Elizabeth Meehan, Political Pluralism and European Citizenship, *in* Citizenship, Democracy and Justice in the New Europe (Albert Weale and Percy Lehning eds., 1997); J. Shaw, The Many Pasts and Futures of Citizenship in the EU, 22 Eur. L. Rev. 554 (1997); J. Shaw, The Interpretation of European Union Citizenship, 61 Mod. L. Rev. 293 (1998); Antje Wiener and Vincent D. Sala, Constitution-Making and Citizenship Practice—Bridging the Democracy Gap in the EU?, 35 J. Common Mkt. Stud. 595 (1997).

2 See generally Gráinne de Búrca, The Quest for Legitimacy in the European Union, 59 Mod. L. Rev. 349-376; Daniela Obradovic, Policy Legitimacy and the European Union, 34 J. Common Mkt. Stud. 192 (1996); David Beetham & Christopher Lord, Legitimacy and the European Union, *in* Political Theory and the European Union: Legitimacy, Constitutional Choice and Citizenship (Michael Nentwich and Albert Weale eds., 1998).

3 David Held, Between State and Civil Society: Citizenship, *in* Citizenship 24-25 (Geoff Andrews ed., 1991).

4 Theodora Kostakopoulou, Towards a Theory of Constructive Citizenship in Europe, 4 J. Pol. Phil. 337 (1996); Antje Weiner, Assessing the Constructive Potential of Union Citizenship—A Socio-Historical Perspective, 1 European Integration On-line Papers 17 <http://eiop.or.at/eiop/texte/1997-017a.htm> (visited September 23, 1997); Theodora Kostakopoulou, European Union Citizenship as a Model of Citizenship Beyond the Nation-State, *in* Political Theory and the European Union: Legitimacy, Constitutional Choice and Citizenship (Michael Nentwich and Albert Weale eds., 1998).

5 Dominique Schnapper, The European Debate on Citizenship, 126 Daedalus 199 (1997).

6 See Note, The Functionality of Citizenship, 110 Harv. L. Rev. 1814 (1997).

7 See, e.g., Carlos Closa, The Concept of Citizenship in the Treaty of European Union, 29 Common Mkt. L. Rev. 1137 (1992); Carlos Closa, Citizenship of the Union and Nationality of Member States, *in* Legal Issues of the Maastricht Treaty (David O'Keeffe and Patrick M. Twomey eds., 1994); David O'Keeffe, Union Citizenship, *in* Legal Issues of the Maastricht Treaty (David

European citizenship may not be one but several "citizenships." In this paper, I argue that woven within Union citizenship is the nationality model of citizenship. The nationality model rests on alienage distinctions (i.e., differential rights for members and others) and manifests itself in the qualified recognition of nationals of other member states as full associates. The influence of the nationality model is also reflected in the fact that Union citizenship depends on the tenure or acquisition of national citizenship.[8] Although the nationality model of citizenship prefigures European citizenship, its limitations are profound and cannot be carried forward in the European citizenship model. To transcribe statements and assumptions derived from national citizenship into the discourse and practice of European citizenship will constrain the maturation of the supranational model of citizenship and frustrate its potential to create an inclusive European public.

The purpose of this paper is to bring forth the hidden tensions and opposing political dynamics operating within the monadic totality of Union citizenship. To this end, I examine the processes of reciprocal interaction between "old" (that is, national) and "new" (or European Union) citizenships within an analytical frame that distinguishes between the multiple layers of meaning constitutive of European citizenship. My aim here is not to resolve existing tensions by producing a dialectical synthesis of the contradictions. Instead, I wish to put forward an argument for the analytical separation of the two distinct models of citizenship coexisting within Union citizenship.

Such a separation is timely, considering the modest reforms agreed at the Amsterdam summit and the need to transform European citizenship into a meaningful institution that meets the aspirations of the residents of Europe. Shifting the center of gravity from the nationality model of citizenship to the supranational one is therefore crucial to the future development of European citizenship.

The discussion is structured as follows: Section 1 discusses the novelty of European Union citizenship while section 2 places national fears that European citizenship might be a "dangerous supplement" to traditional notions of sovereignty under critical scrutiny. Section 3 describes the Europeanization of national citizenship, whereby national citizenship is incrementally adapted to the requirements of European Community law. In section 4, the focus shifts to the "nationalization" of European citizenship, that is, to the ways in which the nationality model of citizenship has permeated the new supranational form of citizenship. This section unravels the duality of European citizenship in both the pre- and post-Amsterdam eras and makes some suggestions for further institutional reform.

O'Keeffe and Patrick M. Twomey eds., 1994); Siofra O'Leary, The Evolving Concept of Community Citizenship (1996); Siofra O'Leary, European Union Citizenship: The Options for Reform (1996); Elspeth Guild, The Legal Framework of Citizenship of the European Union, *in* Citizenship, Nationality and Migration in Europe (Mary Fulbrook and David Cesarani eds., 1996); H.-U. Jessurun d'Oliveira, Union Citizenship: Pie in the Sky?, *in* A Citizens' Europe: In Search of a New Order (Allan Rosas and Esko Antola eds., 1995).

8 Treaty Establishing the European Community [EC Treaty], art. 17(1), (art.8(I), prior to renumbering).

I. EUROPEAN UNION CITIZENSHIP AS A NEW FORM OF CITIZENSHIP

The Treaty on European Union granted European citizens the rights of free movement and residence;[9] the right to vote and to stand as a candidate at municipal and European Parliament elections in the Member State of their residence;[10] the right to diplomatic protection when traveling abroad;[11] and the right to access to nonjudicial means of redress through the Ombudsperson and through petitions to the European Parliament.[12] Clearly, European Union citizenship is at present a weak institution, a pale shadow of its national counterparts.[13] And the European Court of Justice has yet to transform the concept of European citizenship into a prominent building block of the evolving EU legal order.[14] However, this should not deflect attention from the fact that the constitutional significance of European citizenship does not lie in the institution's present status, but in what it might be or should be. Advocate General Leger, in his opinion in *Boukhalfa*, captured nicely the promise offered by Union citizenship by stating that:

> [A]dmittedly the concept embraces aspects which have already largely been established in the development of Community law and in this respect it represents a consolidation of existing Community law. However, it is for the Court to ensure that its full scope is attained. If all the conclusions inherent in the concept are drawn, every citizen of the Union must, whatever his nationality, enjoy exactly the same rights and be subject to the same obligations.[15]

The fact that rights, however limited these may be at present, are granted at the supranational level shows that citizenship can no longer be confined within the

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9 EC Treaty, art. 18 (art. 8a, prior to renumbering).

10 Id. at art. 19 (art. 8b, prior to renumbering).

11 Id. at art. 20 (art. 8c, prior to renumbering).

12 Id. at art. 21 (art. 8d, prior to renumbering).

13 Compare O'Keeffe, Union Citizenship, supra note 7, with O'Leary, European Union Citizenship, supra note 7 and D'Oliveira, Union Citizenship: Pie in the Sky?, supra note 7. See also H.-U. Jesserun D'Oliveria, European Citizenship: Its Meaning, Its Potential, *in* Europe After Maastricht: An Ever Closer Union? (Renaud Dehousse ed.. 1994).

14 Interestingly, the European Court of Justice has so far adopted a "consolidating" rather than "constitutionalizing" approach to Union citizenship; that is to say, it has used it in order to reaffirm existing Community law. In *Uecker & Jacquet*, the Court ruled that Article 8 is not intended to alter the scope *ratione materiae* of the Treaty so as to cover internal situations. Kari Uecker & Vera Jacquet v. Land Nordrhein-Westfalen, Joined Cases 64/96 and 65/96, 1997 E.C.R. 3171, [1997] 3 C.M.L.R. 963. In *Skanavi*, the Court addressed the question whether holders of driving licenses need to exchange their licenses for licenses in the host Member State within one year of taking up normal residence, in order to remain entitled to drive a motor vehicle. The question was answered by recourse to Article 43 (art. 52 prior to renumbering) and not to Article 18 (art. 8a prior to renumbering). Skanavi & Chryssanthakopoulos, Case 193/94, 1996 E.C.R. 929, [1996] 2 C.M.L.R. 372. Similarly, in *Stober & Pereira* the Court found Article 52 key in deciding that certain German legislation was incompatible with the Treaty. The German law required children of self-employed workers to reside in Germany in order to qualify for dependent children's allowance. Stober & Pereira v. Bundesanstalt für Arbeit, Joined Cases 4/95 and 5/95, 1997 E.C.R. 511, [1997] 2 C.M.L.R. 213.

15 Boukhalfa v. Germany, Case C-214/94, [1996] 3 C.M.L.R. 22, 38.

framework of national-statist communities,[16] and that the duties which individuals owe the state do not exhaust the responsibilities they have towards other entities, including society, the natural environment or the European society. In this respect, Meehan is correct to say that "it is perhaps less important that the innovations are small than that they are breaches in normal conventions."[17]

In uncoupling civic obligation from loyalty to the nation-state, the institution of European citizenship breaks no new ground. In fact, prior to the emergence of European citizenship, the discourse of global human rights had suggested the possibility of a form of nonterritorial citizenship based on the universal rights of personhood. Drawing upon this discourse, Turner has argued for the replacement of the debate about citizenship with the debate about human rights.[18] Similarly, Soysal has articulated an account of postnational citizenship.[19] Notwithstanding its provocative insights, however, postnational rights theory tends to overlook two important facts that constrain its applicability to the developing theory of European citizenship. First, individual citizens do not derive rights from international law instruments on human rights unless nation-states are willing to recognize and enforce them. In this respect, the primacy of the nation-state is not challenged by postnational citizenship. Unsurprisingly, human rights reform has often led to the modernization rather than the weakening of national citizenship. Second, both Turner and Soysal view citizenship in formalistic terms, that is, as an issue of status and rights, thereby ignoring other important dimensions of citizenship, such as political participation in the polity, civic obligation and a sense of belonging.

European citizenship is different from the postnational model based on human rights. The Community "constitutes a new legal order of international law, . . . the subjects of which comprise not only the member states but also their nationals. Independently of the legislation of the member states, Community law does not only impose obligations on individuals but also confers upon them rights which become part of their legal heritage."[20] More importantly, in many areas, European integration has induced the relaxation of the nationality principle. In addition, European citizenship is intimately connected with political participation and the formation of a European identity—issues which strike at the heart of the building of a "multi-perspectival polity."[21]

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16 Derek Heater, Citizenship: The Civic Ideal in World History, Politics and Education (1990); Bart van Steenbergen, Towards a Global Ecological Citizen, *in* The Condition of Citizenship (B. van Steenbergen ed., 1994).

17 Elizabeth Meehan, Political Pluralism and European Citizenship, supra note 1, at 73.

18 Bryan S. Turner, Outline of a Theory of Human Rights, *in* Citizenship and Social Theory (Bryan S. Turner ed., 1993).

19 Yasemin Nuhoğlu Soysal, Limits of Citizenship: Migrants and Postnational Membership in Europe (1994); Y. Soysal, Changing Citizenship in Europe, *in* Citizenship, Nationality and Migration in Europe, supra note 7.

20 N.V. Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen, Case 26/62, E.C.R. 1, [1963] C.M.L.R. 105.

21 See Gary Marks, Structural Policy and Multilevel Governance in the EC, *in* The Maastricht Debates and Beyond, 2 The State of the European Community 391 (Alan W. Cafruny and Glenda G. Rosenthal eds., 1993). See also Deidre M. Curtin, Postnational Democracy: The European Union in Search of a Political Philosophy (1997).

Evidently, the European Union cannot be explained through the lens of an international organization. Nor can it be understood on the basis of assumptions and concepts derived from the statist paradigm.[22] In like manner, its model of citizenship constitutes neither a loose form of mercantile citizenship designed to facilitate the process of economic integration nor the expression of full membership in a (Euro-) nation's public life. Rather, European citizenship emerges within a much more complex context in which "the identities, rights and obligations associated [. . .] with citizenship are expressed through an increasingly complex configuration of common Community institutions, states, national and transnational voluntary associations, regions, alliances of regions."[23] Citizenship is no longer unitary (that is, conceived of as the internal manifestation of the legal bond between the individual and the state), but multiple.

Multiple citizenship does not simply allow for multiple standards of citizenship and institutional pluralism. It also segments and divides sovereignty and renders the various citizenships more complex. Otherwise put, citizenships do not merely overlap, but are nested within each other and interlock. This nesting facilitates reciprocal interaction and transformation as much as it increases tensions and ambiguities. As will be discussed below, the Community rights of free movement and residence have had a profound impact upon the ways in which states view and treat nationals of other Member States. Notions such as "immigrant," "resident alien" or "temporary guest" have been replaced by that of "Union citizen."[24] Furthermore, Union citizens are encouraged to participate in various types of associative relations beyond national borders and to choose their "civic home."[25] In this respect, it may be argued that the novelty of European citizenship lies precisely in its capacity to change our understanding of citizenship and community, and to prompt a rethinking of membership with a view to opening up new forms of political community. But if this is the case, are not national elites justified to regard Union citizenship as a potentially dangerous supplement?

II. . . . THAT DANGEROUS SUPPLEMENT ...?

If European citizenship entails new conceptions of citizenship and community, then national fears that it may lead to a parallel Euro-nationality and/or collide with conventional understandings of national citizenships are not misguided. Community institutions, for their part, have sought to alleviate such worries, albeit at the expense of European integration itself. Community law upholds the international law maxim that determination of nationality falls within the exclusive jurisdiction of nation-states,[26]

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22 Wolfgang Wessels, An Ever Closer Union? A Dynamic Macropolitical View on the Integration Process, 35 J. Common Mkt. Stud. 267-99 (1997).

23 Elizabeth Meehan, Citizenship and the European Community 1 (1993).

24 Richard Plender, An Incipient Form of European Citizenship, *in* European Law and the Individual (Francis G. Jacobs ed., 1976).

25 This argument is discussed by Miguel Poiares Maduro, We the Court: The European Court of Justice and the European Economic Constitution (1998).

26 Indeed, the International Court of Justice has expressly linked state sovereignty with state power to determine the conditions for loss and acquisition of nationality. See the Nottebohm Case

despite the anomalies that this may create in the field of application of EC law. For instance, whereas the European Court of Justice has pronounced certain concepts that are crucial for the exercise of freedom of movement Community law concepts, it has hesitated to restrict the Member States' freedom to determine the scope of free movement by imposing unilaterally a single definition of nationality. True, nationality for Community law purposes does not have to coincide with nationality for other purposes, and both the United Kingdom and Germany have submitted declarations in this respect.[27] Nevertheless, unilateral determination of nationality for Community law purposes impedes the uniform and consistent application of Community law throughout the territories of the Union.[28]

In *Micheletti*, the Court confirmed that determination of nationality falls within the exclusive competence of the Member States, but it went on to add that this competence must be exercised with due regard to the requirements of Community law.[29] Michelletti, an orthodontist of dual Argentinian and Italian nationality, was not allowed to establish himself in Spain because he was deemed to be a national of Argentina. According to Articles 9(9) and (10) of the Spanish Civil Code, a dual national was deemed to be a national of the country where he or she had habitually resided prior to his or her arrival in Spain.[30] Spain did not deny Michelletti's Italian nationality, but challenged whether the application of Community rights and freedoms was required. The ECJ made it clear that Article 52 EEC (art. 43 on renumbering) does not permit national legislation to impose supplementary conditions, such as residence tests, as preconditions to giving effect to Member State nationality. Without impinging upon the Member States' discretionary power in this area,[31] the ECJ applied the principle of

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(Liechtenstein v. Guatemala), 1955 I.C.J. 4 (Judgement of April 6, 1955).

27 The Federal Republic of Germany has made a declaration on the definition of the expression of "German national," which was attached to the Treaty establishing the European Economic Community. A declaration by the United Kingdom on the definition of the term "nationals" was attached to the 1972 Treaty of Accession by the United Kingdom to the European Communities. Subsequently, in light of the British Nationality Act of 1981, the United Kingdom made a new Declaration on the definition of the term "nationals" on January 28, 1983. See Declaration, O.J. (C 23) 1.

28 Where provisions relating to the payment of expatriation allowance have been at stake, the concept of nationality has played only an ancillary role in determining the identity of the persons entailed to a right under Community law. See, e.g., Gunella v. Commission, Case 33/72, 1973 E.C.R. 475; Airola v. Commission, Case 21/74, 1975 E.C.R. 221; Van de Broek v. Commission, Case 37/74, 1975 E.C.R. 235.

29 See M. V. Michelletti et al. v. Delegacion del Gobierno en Catanbria, Case C-369/90, 1992 E.C.R. I-4329.

30 The provisions of the Spanish Civil code echoed both the 1930 Hague Convention and the Council of Europe's 1963 Convention on the Reduction of Cases of Multiple Nationality. See Convention on Certain Questions Relating to the Conflict of Nationality Laws, art. 1, of April 12, 1930; Council of Europe, Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, European Treaty Series No. 43 (1963). By embracing the ideal of monopatride, these conventions regard dual/multiple nationality as an anomaly. However, international legal norms against dual nationality are gradually changing. See 1997 European Convention on Nationality, Council of Europe, European Treaty Series No. 166 (1997); see generally Bruno Nascimbene, Nationality Laws in the European Union 5 (1996) (arguing that Community law is neutral on the possession of more than one nationality).

31 For the opposite view, see Siofra O'Leary, Nationality Law and Community Citizenship: A Tale

mutual recognition to hold that persons who are legally recognized as nationals of one Member State should be able to exercise their right to free movement without impediments imposed by additional regulations adopted by other Member States.

In any case, the Declaration on Nationality of a Member State, annexed to the Final Act of the Treaty on European Union, expressly states that "the question whether an individual possesses the nationality of a member state shall be settled solely by reference to the national law of the member state concerned."[32] While declarations are not an authoritative part of the EC Treaty, this does not mean the nationality declaration is purely symbolic. Rather, through this declaration the Member States sought to affirm their jurisdiction, fearing perhaps that the maturation of the Community's objectives or the development of Union citizenship could impose limitations on their exclusive power of determination. Declaring that the power of determination belongs to the Member States alone attempts to preclude the European Union from defining or refashioning that power.

Similar declarations were adopted by the European Council at Edinburgh and at Birmingham.[33] The Birmingham Declaration states clearly that Union citizenship constitutes an additional tier of rights and protection that is not intended to replace national citizenship. This has been reaffirmed by the Amsterdam Treaty, which added the statement that "Union citizenship shall complement national citizenships."[34] The choice of the term "complement" is not accidental, for "complements" normally add, not substitute.

Notwithstanding the Amsterdam concession to national sensitivities, national elites continue to be haunted by the specter of European citizenship as a supplement to national citizenship. They fear that European citizenship, however immature and weak it may be at present, is not simply a mercantile citizenship designed to make the internal market work. It has the capacity to challenge the basic nature of statist citizenship and has implications for citizens' identities. It is perhaps this fear of the "dangerous supplement" that led the Danish representation to declare, in its instrument of ratification of the Treaty on European Union, that Union citizenship as a juridicopolitical concept is entirely different from the Danish concept of national citizenship. As the Danish opt-out declaration states: "[N]othing in the TEU implies or foresees an undertaking to create a citizenship of the Union in the sense of citizenship of the nation-state. The question of Denmark participating in such a development does, therefore, not arise."[35]

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of Two Uneasy Bedfellows, 12 Yearbook of European Law, 353, 378 (1992). D'Oliveira too detected in this ruling a hint that the Court may be finally prepared to assert a degree of Community competence in this area. See H.-U. Jessurun D'Oliveira, Casenote, 30 Common Mkt. L. Rev. 623 (1993). According to Professor Hall, a national measure, which withdraws a person's nationality falls within the scope of Community law, and as such, could be checked for its consistency with the fundamental rights that Community law protects. See Stephen Hall, Loss of Union Citizenship in Breach of Fundamental Rights, 21 Eur. L. Rev. 129 (1996).

32 See Declaration No.2, Final Act of the Treaty on European Union, 1997 O.J. (C 340) 145-172.

33 Edinburgh Declaration, 1992 O.J. (C 348) 2 (December 31, 1992); Birmingham Declaration—A community close to its citizens, Bull. EC 10-1992 § 1.8.

34 Treaty of Amsterdam, October 2, 1997, art. 17(1) (art. 8(1) prior to renumbering).

35 Denmark and the T.E.U., Annex 3: Unilateral Declarations of Denmark, 1994 O.J. (C 348) 1, 4.

The Danish reservations reveal a rather dogmatic adherence to the idea that national citizenship should remain the foundation of political legitimacy and the source of social bonds. Such a line of reasoning, however, freezes national citizenship in time: it overlooks the diachronic as well as synchronic connectedness between old and new citizenships. In reforming their nationality laws, Member States have to take into account the requirements of Community law. It is a well-known fact, for example, that the British Government entered into discussions with the Community concerning the formulation of its second declaration on nationality following the enactment of the 1981 British Nationality Act.[36] On a synchronic level too, the Danish reservations tend to overlook the processes of transformative interaction between the national and Community levels in the domain of citizenship. Far from being an unchanging object, national citizenship is being shaped by developments which take place both above and below the state. If this argument, which will receive full exposition below, is correct, then the relationship between the "new" (European Union) and "old" (national) citizenships cannot be conceived of as complementary; that is, a relationship in which the complement as a super-added element is neutral to and different from what it complements. Nor is it a relationship of substitution. It is, instead, a relationship of ambivalence whereby each element relates back to and passes into the other. But would not this make European citizenship, that "dangerous supplement," constitutive in part of national citizenships?

III. THE INCREMENTAL ADAPTATION OF NATIONAL CITIZENSHIP

Citizenship, as it has developed within the national-statist framework, may be a single concept, but it embodies two intertwined relationships. First, there is the formalistic relationship between the individual and the state, which gives rise to rights, duties and material benefits. Second, there is the affective dimension of membership in a community which is built around ties of belonging and a sense of identity to the "nation." Despite the liberal preoccupation with the former, discussed with respect to postnational citizenship above, it is the latter relationship, concerned with belonging to a nation, that normally determines access to citizenship. True, citizenship and nationality do not always coincide.[37] But generally speaking, the coincidence of the formalistic and affective dimensions has been crucial in solidifying the relation between states and their subjects and is promoted through naturalization laws.

In all publics, whether ethnonational, civic-national or mixed, aliens do not enjoy the wide range of rights that citizens do. For example, aliens' rights to freedom of movement, security of residence, employment opportunities, and political participation are restricted. Continuity in legal residence usually results in "denizenship" and thus in eligibility for or entitlement to naturalization.[38] The gate to full citizenship is

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36 Official Report Standing Committee, British Nationality Bill (20th Sitting), 1981 O.J. (C 810).

37 For example, in the United States, the inhabitants of American Samoa and Swains Island are considered to be "noncitizen nationals."

38 See Tomas Hammar, Democracy and the Nation-State (1990); Rainer Baubock, Transnational Citizenship: Membership and Rights in International Migration (1994). For a comparative study of the evolution of nationality law in the European Union, see generally Citizenship, Immigration and Nationality: Nationality Law in the European Union (Patrick Weil & R. Hansen eds., 1998).

potentially open to newcomers but not too much, for this is often seen to weaken the affective link among the members of the community. As the ultimate gatekeepers, states determine who shall enter their territory, who shall "belong" once admitted and under what conditions, with the national interest as the touchstone.

The threshold of compelling state interest with regard to admission, residence and treatment of "aliens" who are Community nationals has been significantly lowered in the EU. Long before the Maastricht Treaty, the physical presence of Community nationals in the territory of another Member State and their engagement in economic activities there had ceased to be a matter of state permission and tolerance.[39] It has been a matter of exercising fundamental rights. Qualified Community nationals, including workers, work-seekers,[40] self-employed persons, providers and recipients of services,[41] their family members and EEA nationals are entitled to enter the territory of a Member State and to reside without obtaining leave to remain.[42] Notably, prior to the UK's membership to the EEC, a national of another Member State not having the right of abode in the UK required leave to enter and remain in the UK, and was subject to the regulations and controls imposed by the 1971 Immigration Act. This is no longer the case. However, entitlement to continued residence depends upon continued qualification and, with respect to spouses who are nationals of third countries, the continuing duration of marriage.[43] Free movement rights have been granted also to non-active economic actors such as students, pensioners, persons not otherwise covered by Community legislation, and their families, provided that they are economically self-sufficient and are covered by health insurance.[44] Union citizenship has conceptually metamorphosed the Community rights of free movement and residence by enshrining them in the Treaties themselves.[45]

Community nationals and EEA nationals have thus the right to be in the territory of a Member State, reside there, be employed or exercise their profession. More importantly, Articles 39 (art. 48 prior to renumbering), 43 (art. 52 prior to renumbering) and 49 (art. 59 prior to renumbering) EC are directly effective and can be relied upon by individuals in proceedings against public authorities as well as against private

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39 See Regina v. Pieck, Case 157/79, 1980 E.C.R. 2171, [1980] 3 C.M.L.R. 220.

40 See Regina v. Immigration Appeal Tribunal, ex parte Antonissen, Case C-292/89, 1991 E.C.R. I-745, [1991] 2 C.M.L.R. 373.

41 See Luisi & Carbone v. Ministero del Tesoro, Joined Cases 286/82 & 26/83, 1984 E.C.R. 377, [1985] 3 C.M.L.R. 52.

42 See Council Directive 68/360/EEC, art. 3(1), 1968 O.J. Sp. Ed. (II) 485; Regina v. Secretary of State for the Home Department, ex parte Shingara & Radiom, Joined Cases C-65/95 & C-111/95, 1997 E.C.R. I-3343, [1997] 3 C.M.L.R. 703. Compare with Immigration Act, 1988, § 7(1) (Eng.); Immigration (European Economic Area) Order S.I. 1994, No. 1895, made pursuant to the European Communities Act, § 2(2), 1972.

43 See Regina v. Secretary of State for the Home Department, ex parte Zeghraba & Sahota [1997] 3 C.M.L.R. 576.

44 See Council Directive 90/364, 1990 O.J. (L 180) 26 (on the right of residence); Council Directive 90/365, 1990 O.J. (L 180) 28 (on the right of residence for employees and self-employed persons who have ceased their occupational activity); Council Directive 90/366, 1990 O.J. (L 180) 30 (on the right to residence for students). Directive 90/366, annulled on the grounds that it had been adopted on an incorrect legal basis, has been readopted as Council Directive 93/96, 1993 O.J. (L 317) 59.

45 Commission Report of December 12, 1993, on the Citizenship of the Union. COM(93)702 final, at 2-4.

parties.[46] True, Community nationals are required to produce identification documents, but Member States must grant the right of residence to those who produce these documents.[47] Passports and valid national identity cards—even ID cards issued on the condition that they are valid only within the territory of the issuing state[48]—suffice to prove the national identity of the holder. As a proof of the right of residence, a document entitled a Residence Permit is issued. But as this document is declaratory, not constitutive of the right of residence, directly enforceable rights are created irrespective of whether the appropriate residence document has been issued.[49] Migrant workers, of course, may have to comply with administrative formalities on entry, such as to report their presence to the police[50] or to enter the local population register, but not as a condition of residence. Failure to comply with such formalities, therefore, can never be a ground for deportation.

In *Pieck*, a Dutch national working in Wales and who held no residence permit was charged with overstaying his six-month leave to remain in the UK. The European Court of Justice, on a preliminary ruling reference, stated that deportation is incompatible with the provisions of the Treaty since such a measure negates the rights of residence conferred and guaranteed by the Treaty.[51]

In addition, Member States are precluded from imposing restrictions on the residence of Community migrant workers and can terminate their right of residence only on certain expressly stated grounds.[52] That said, the work-seekers' right of residence is more qualified: if they have not found work within a reasonable time limit (six months in the U.K. and three months in the other Member States), they are subject to removal,[53] unless, of course, they provide evidence that they actively seek employment and have genuine chances of being engaged in the future.[54] National provisions that provide for automatic termination of the residence period at the end of three months with no opportunity for extension are unlawful.[55]

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46 See Reyners v. Belgium, Case 2/74, 1974 E.C.R. 631, [1974] 2 C.M.L.R. 305; Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid, Case 33/74, 1974 E.C.R. 1299, [1975] 1 C.M.L.R. 298; Walrave & Koch v. Association Union Cycliste Internationale, Case 36/74, 1974 E.C.R. 1405, [1975] 1 C.M.L.R. 320; Union Royale Belge des Sociétés de Football Association (ASBL) v. Bosman, Case C-415/93, 1995 E.C.R. I-4921, [1996] 1 C.M.L.R. 645.

47 See Council Directive 68/360, supra note 42, arts. 3(1), 4(1), and 4(3).

48 Giagounidis v. Stadt Reutlingen, Case C-376/89, 1991 E.C.R. I-1069, [1993] 1 C.M.L.R. 537.

49 Echternach & Moritz v. Netherlands Minister for Education and Science, Joined Cases 389-390/87, 1989 E.C.R. 723, [1990] 2 C.M.L.R. 305; see also Regina v. Pieck, 1980 E.C.R. 2171.

50 State v. Watson & Belman, Case 118/75, 1976 E.C.R. 1185, [1976] 2 C.M.L.R. 552.

51 *Pieck*, 1980 E.C.R. 2171. See also State v. Royer, Case 48/75, 1976 E.C.R. 497, [1976] 2 C.M.L.R. 619.

52 These expressly stated grounds are voluntary unemployment, breaks in residence exceeding six consecutive months and for reasons of public policy, public security and public health. See Council Directive 68/360 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, 1968-1969 O.J. Spec. Ed. 485, art. 7(1), 6(2) and 10.

53 See Immigration (EEA) Order, supra note 42, at art. 15(2).

54 See *ex parte Antonissen*, supra note 43. But compare Tsiotras v. Landeshaupstadt Stuttgart, Case C-171/91, 1993 E.C.R. I-2925.

55 See Commission v. Belgium (Treatment of Migrant Workers), Case C-344/95, 1997 E.C.R. I-1035, [1997] 2 C.M.L.R. 187.

Member States are permitted to derogate from the provisions relating to freedom of movement for persons for reasons of public policy, public security or public health. However, these exceptions must be strictly interpreted and cannot be invoked in service of national economic ends.[56] In addition, national measures taken on grounds of public policy or public security must be based on the "personal conduct of the individual concerned,"[57] which must constitute "a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society."[58] A Member State therefore cannot order the expulsion of a Community national as a deterrent or generally preventive action.

In *Bonsignore*, the principal question was whether Community law permitted a Member State national to be deported for reasons of a general preventive nature. Bonsignore, an Italian national who worked in Germany and who accidentally killed his younger brother while handling a pistol, was served with a deportation order because, according to the German authorities, unlawful possession of firearms by aliens threatened the peaceful coexistence of Germans and foreigners.

The European Court of Justice was not convinced by this argument, however. It ruled that a deportation order may be made only when the individual alien may commit breaches of the peace and public security.[59] Previous criminal convictions cannot in themselves constitute grounds for deportation, although past conduct may constitute evidence of a present threat to public policy, particularly if the individual concerned is considered likely to reoffend.[60] By insisting on a strict interpretation of the public policy derogations, the ECJ has circumscribed Member States' discretionary power over migrants from other Member States, thereby diminishing the risk of possible scapegoating of "foreigners" in order to satisfy local public opinion.[61] Moreover, Articles 8 and 9 of Directive 64/221 provide for procedural guarantees and remedies,

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56 See Council Directive 64/221 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, 1952-1967, O.J. Spec. Ed. 117 at art. 2(2).

57 See Van Duyn v. Home Office, Case 41/74, 1974 E.C.R. 1337; [1975] 1 C.M.L.R. 1.

58 See Regina v. Bouchereau, Case 30/7, 1977 E.C.R. 1999, [1977] 2 C.M.L.R. 800.

59 See Bonsignore v. Oberstadtdirektor der Stadt Köln, Case 67/74, 1975 E.C.R. 297.

60 In *Proll*, the Immigration Appeal Tribunal ruled that Community nationals may not be excluded from the UK on the basis of a criminal record alone, and that paragraph 83 of HC 169 (exclusion if convicted anywhere of an extraditable offence) could not apply to a Community worker. See Proll v. Entry Clearance Officer, Düsseldorf, [1988] 2 C.M.L.R. 387. But in Regina v. Home Secretary, ex parte Marchon, [1993] 2 CM.L.R. 132 (a case not referred to the ECJ), it was held that past conduct of a "serious and horrifying" nature and "repugnant to the public" was sufficient to justify deportation on the grounds of public policy, even though Marchon was not likely to reoffend. Marchon, a psychiatrist, had been convicted of conspiracy to import heroin. As this decision was not wholly based on Marchon's personal conduct and the likelihood of his future offending, it appears to subvert Council Directive 62/221, art. 3.

61 As Advocate General Mayras stated in his opinion in *Bonsignore*:

I am, for my part, rather skeptical as to the real deterrent effect of a deportation which is ordered to 'make an example' of the individual concerned.... In point of fact, one cannot avoid the impression that the deportation of a foreign worker, even a national of the Common Market, satisfies the feeling of hostility, sometimes verging on xenophobia, which the commission of an offence by an alien generally causes or revives in the indigenous population.

See Opinion of Advocate General Mayras, Bonsignore v. Oberstadtdirektor der Stadt Köln, Case 67/74, 1975 E.C.R. 308, 315.

such as disclosure of the grounds on which any national measures have been adopted, and a right of appeal. Although the judicial protection established by Directive 64/221 is far from perfect, it has led to the transformation of immigration law and practice in the Member States.[62]

The Community law principle of nondiscriminatory treatment has carried over from citizenship issues into labor law, changing access to employment and provision of employment-related benefits. More specifically, Community workers[63] currently enjoy a wide range of substantive rights: free movement within the territory of other Member States and residence there for purposes of employment; equal access to any form of employment, even that requiring official authorization; equality of treatment in respect of conditions of employment, remuneration and dismissal; and access to all benefits accorded to national workers such as social and tax advantages, housing and participation in trade unions and staff associations. What is interesting for the purposes of this discussion is that the exercise of these rights is not dependent upon any transfer of loyalty to the host state (for example, through naturalization). Nor is length of residence or length of employment a prerequisite for qualifying for a social advantage in the host state, as this depends on an individual's status as worker or resident in the national territory.[64] Spouses and dependent relatives (parents and children) have the

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62 For a discussion of the difficulties arising under Directive 64/221, see Siofra O'Leary, Casenote, The Queen v. Secretary of State for the Home Department, ex parte Gerrard Gallagher, 33 Common Mkt. L. Rev. 777 (1996). Compare Opinion of Advocate General Colomer, Shingara & Radiom, Joined Cases C-65/95 & C-111/95; see also Michael O'Neill, Casenote, Shingara & Radiom, 35 Common Mkt. L. Rev. 519 (1998). For a more detailed discussion of the impact of Directive 64/221 on Member State national law, see Christopher Vincenzi, European Citizenship and Free Movement Rights in the UK, Public Law 259-75 (1995).

63 The "semantic monopoly" that the ECJ has held over the concept of "worker" has yielded a broad interpretation of this term. G. Federico Mancini has used the term "hermeneutic monopoly." See G. Federico Mancini, The Free Movement of Persons in the Case-Law of the European Court of Justice, *in* Constitutional Adjudication in European Community and National Law (Deidre Curtin and David O'Keeffe eds., 1992). The scope of Article 39 includes persons whose employment relationship is governed by public law (see Lawrie-Blum v. Land Baden-Württemberg, Case 66/8, 1986 E.C.R. 2121, [1987] 3 C.M.L.R. 389); workers who, having left their jobs, are capable of taking another (see Hoekstra (née Unger), Case 75/63, 1964 E.C.R. 177, [1964] C.M.L.R. 546); part-timers who supplement their income from private funds (see Levin v. Staatssecretaris van Justitie, Case 53/81, 1982 E.C.R. 1035, [1982] 2 C.M.L.R. 454) or by relying on public assistance (R. H. Kempf v. Staatsecretaris van Justitie, Case 139/85, 1986 E.C.R. 1741, [1987] 1 C.M.L.R. 764); seasonal trainee workers (see Bernini v. Minister van Onderwijs en Wetenschappen, Case C-3/90, 1992 E.C.R. I-1071); employees under on-call contracts (see Raulin v. Minister van Onderwijs en Wetenschappen, Case C-357/89, 1992 E.C.R. I-1027, [1994] 1 C.M.L.R. 227); and work-seekers (*ex parte Antonissen*, supra note 40).

64 Social advantages are all those advantages, which whether or not they are linked to a contract of employment, are generally granted to national workers, primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory, and the extension of which to workers who are nationals of other Member States therefore seems suitable to facilitate their mobility. Ministère Public v. Even & ONPTS, Case 207/78, 1979 E.C.R. 2019, [1980] 2 C.M.L.R. 71; Schmid v. Belgian State, Case C-310/91, 1993 1 E.C.R. 3011, [1995] 2 C.M.L.R. 803; Peter de Vos v. Stadt Bielefeld, Case C-315/94, 1996 E.C.R. I-1417. Note, however, that social advantages are confined to workers and their family members only. See Council Regulation 1612/68 on the freedom of movement of workers inside the Community, 1968-1969 O.J. Spec. Ed. 475, at art. 7(2). See also Centre Public d'Aide Sociale de Courcelles v. Lebon, Case 316/85, 1987 E.C.R. 2811, [1989] 1

right to install themselves with the primary beneficiary and to take up employment themselves.[65] The children of migrant workers are entitled to the same educational opportunities as nationals of the host state,[66] including financial assistance to enroll in courses taken outside the national territory.[67] What is interesting here is that the Community legal system does not replicate the national assumptions and models, developed during the mid 1950's to early 1970's, which depicted migrant workers as single economic actors with low socioeconomic costs to their host countries. Instead, it has developed an intra-EU migration policy that combines free mobility of labor with an integration policy that prescribes how the worker and her/his family should be treated by the host state. The integration policy represents a crucial step toward the development of what Bernard has called "citizenship-oriented nondiscrimination."[68] Citizenship nondiscrimination focuses on the person, rather than on the principle of free movement and the abolition of all obstacles to the free movement of labor, goods, capital and services. This model is based on Article 7(2) of Regulation 1612/68 and on the general nondiscrimination clause contained in Article 12 of the EC Treaty.[69] The

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C.M.L.R. 337. On the rights of families, see Fiorini v. SNCF, Case 32/75, 1975 E.C.R. 1085, [1976] 1 C.M.L.R. 573; Inzirillo v. Caisse d'Allocations Familiales de l'Arrondissement de Lyon, Case 63/76, 1976 E.C.R. 2057, [1978] 3 C.M.L.R. 596. As work-seekers are excluded from the scope of Regulation 1612/68, art. 7(2), they can claim only benefits available under unemployment rules, in accordance with Regulation 1408/71, art. 69(1)(c). See Council Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, 1971 O.J. Spec. Ed. 416 (as amended by Council Regulation 2001/83 O.J. (L 230) 6). However, under UK law, work-seekers are eligible for income support for a period up to six months. Since 1994, a Community national or an EEA national must show that he or she is ordinarily resident in the UK in order to receive income support, council tax benefit or housing benefits.

65 Article 11 of Reg. 1612/68 provides for the right of the spouse and those of the children who are under the age of 21 years or dependent on the worker to take up employment. See Reg. 1612/68, supra note 64. The members of a worker's family qualify indirectly for equal treatment with respect to social and tax advantages. Although spouses cannot claim original rights of social security, they may have access to social security benefits through their status as a member of the family or survivor of the holder of the original rights. See Council Regulation 1408/71, supra note 64, at art. 3. See also Kermaschek v. Bundesanstalt für Arbeit, Case 40/76, 1976 E.C.R. 1669; Caisse d'Allocations Familiales de la Région Parisienne v. Meade, Case 238/83, 1984 E.C.R. 2631.

66 The Court has interpreted Regulation 1612/68, art. 12 generously. See Casagrande v. Landeshauptstadt München, Case 9/74, 1974 E.C.R. 773, [1974] 2 C.M.L.R. 423; Echternach & Moritz, 1989 E.C.R. 723. On the education of the children of migrant workers, see also Directive 77/486, O.J. (L 199) 32.

67 See Di Leo v. Land Berlin, Case C-308/89, 1990 E.C.R. I-4185; Matteucci v. Communauté Française de Belgique, Case 235/87, 1989 E.C.R. 5589, [1989] 1 C.M.L.R. 357.

68 See N. Bernard, What are the Purposes of EC Discrimination Law? *in* Discrimination Law: Concepts, Limitations and Justifications 77 (Janet Dine & Bob Watt eds., 1996). Bernard has distinguished between free movement-based discrimination, where the key issue is whether a measure impedes labor mobility and the integration of worker, and citizenship-oriented nondiscrimination, where the focus shifts to the treatment by a Member State of nationals of other Member States.

69 In *Cowan*, the court held that the condition of nationality contained in a French criminal injuries compensation scheme was incompatible with the general nondiscrimination clause contained in Article 6 of the EC Treaty. See Cowan v. Le Trésor Public, Case 186/87, 1986 E.C.R. 195; [1990] 2 C.M.L.R. 613. Previously, in *Gravier*, the Court applied the same principle to access to and participation in courses of vocational training. See Gravier v. City of Liège, Case 293/83, 1985 E.C.R. 593, [1985] 3 C.M.L.R. 1. On the significance of these cases for the creation of Community citizenship, see Stephen Weatherill, Casenote, Cowan v. Le Tresor Public, 26 Common Mkt. L. Rev.

Community model of worker mobility thus conceives of workers and their families as sociopolitical actors as well as economic actors in their host state, and while it calls for equality of treatment, it does not presume assimilation to the values and culture of that state.

Moreover, national governments are not permitted to introduce arbitrary distinctions or other conditions, which, although applicable irrespective of nationality, are liable to burden migrant workers more, thereby placing them at a particular disadvantage.[70] Conflicting national legislation must be repealed or amended, and, as the European Court of Justice ruled in *Commission v. France*, it is not sufficient that Community law is applied in practice, but not de jure, for this may give rise to uncertainty for those subject to it.[71] Differential treatment of Community workers must be objectively justified and proportionate.[72] Even nondiscriminatory restrictions, that is, measures which are generally applicable, may be in breach of the Treaty if they are liable to hinder or make less attractive the exercise of the fundamental freedoms.[73]

Another example of the "Europeanization" of national citizenship is employment in the public service. Despite claims by national governments that "freedom of movement was not meant to alter the legal situation existing before the Communities were established as regards the organization of the state and in particular access for foreigners to the public service,"[74] the Court of Justice has curbed the traditional state prerogative of identifying the boundaries of its public sector and determining who may

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563 (1989); Jposephine Shaw, European Union Citizenship: The IGC and Beyond, 3 Eur. Pub. L. 413 (1997).

70 The case law on the prohibition of covert forms of discrimination includes: Allue and Another v. Università Degli Studi di Venezia, Case 33/88, 1989 E.C.R. 591, [1991] 1 C.M.L.R. 283; Pinna v. Caisse d'Allocations Familiales de la Savoie, Case 41/84, 1986 E.C.R. 1, [1988] 1 C.M.L.R. 350; Le Manoir, Case C-27/91, 1991 E.C.R. I-5531; Commission v. United Kingdom, Case C-279/89, 1992 E.C.R. I-5785; [1993] 1 C.M.L.R. 564; Spotti v. Freistaat Bayern, Case C-272/92, 1993 E.C.R. I-5185; [1994] 3 C.M.L.R. 629; Commission v. Luxembourg, Case C-111/91, 1993 E.C.R. I-817; Biehl v. Administration des Contributions, Case C-175/88, 1990 E.C.R. I-1779, [1990] 3 C.M.L.R. 143; Scholz v. Università di Cagliari and Cinzia Porcedda, Case C-419/92, 1994 E.C.R. I-505, [1994] 1 C.M.L.R. 873; Schoning-Kougebetopoulou v. Freie Hansestadt Hamburg, Case C-15/96, [1998] 1 C.M.L.R. 931.

71 See Commission v. France, Case 167/73, 1974 E.C.R. 359; [1974] 2 C.M.L.R. 216.

72 For cases construing objective justification, see Boussac Saint-Frères SA v. Gerstenmeier, Case 22/80, 1980 E.C.R. 3427. See also Commission v. Belgium, Case C-300/90, 1992 E.C.R. I-350, [1993] 1 C.M.L.R. 785; Bachmann v. Belgium, Case C-204/90, 1992 E.C.R. I-249, [1993] 1 C.M.L.R. 785; Petrie and Others v. Università degli Studi di Verona and Camilla Bettoni, Case C-90/96, [1988] 1 C.M.L.R. 711. For a case requiring proportionality, see Gebhard v. Consiglio Dell'Ordine Degli Avvocatti e Procuratori di Milano, Case C-55/94, 1995 E.C.R. I-4165, [1996] 1 C.M.L.R. 603. See also *Bosman*, supra note 46.

73 The ECJ has applied its reasoning under EC Treaty art. 30 (Art. 28 on renumbering) to "indistinctly applicable" national provisions which restrict exercise of the freedom of establishment by nationals or non-nationals. See Kraus v. Land Baden-Württemberg, Case C-275/92, 1993 E.C.R. I-1663. The ECJ has also applied this reasoning to provisions that hinder citizens from being employed in another Member State. See *Bosman*, supra note 46. Additionally, the ECJ's line of art. 30 holdings has been applied to provisions hindering intra-Community trade in services. See Sager v. Dennmeyer & Co., Case C-76/90, 1991 E.C.R. I-4221; Customs and Excise v. Schindler, Case C-275/92, 1994 E.C.R. 1039; Alpine Investments BV v. Minister van Financien, Case C-384, 1995 E.C.R. I-1141, [1995] 2 C.M.L.R. 209.

74 See Commission v. Belgium, Case 149/79, 1980 E.C.R. 3881, 3895, [1982] 3 C.M.L.R. 539.

have access to it. Employment in the public sector can no longer be reserved for nationals who have "a relationship of special allegiance to the state and can identify with the interests of the state."[75] The public service exception is confined to posts involving direct or indirect participation in the exercise of powers conferred by public law and to duties designed to safeguard the interests of the state or of other public authorities. The exception does not apply to posts that are too remote from the specific activities of the public service, even though they might come under the state or other public organizations.[76] This case law, coupled with the Commission's notice that specifies the sectors of employment which do not meet the two cumulative conditions mentioned above,[77] has triggered the amendment of constitutional provisions and national legislation in the Member States. For example, the amendment of the 1955 UK Aliens Employment Act by the European Communities (Employment in the Public service) Order of 1991 has led to the opening of a wide range of civil service posts to Community nationals.[78]

Community law has not only diluted the link between the possession of state nationality and the enjoyment of citizenship rights, including local electoral rights in the Member State of residence under Article 19 (art. 8b prior to renumbering) EC. It has changed the ways in which citizens view their own governments as well. Internal institutions and practices and policies are increasingly looked at with a multifocal gaze, and citizens are eager to use whatever opportunities may exist at the Community level in order to induce constitutional developments at the national and subnational levels. The mobilization of regions as institutional actors and the impact of EC dynamics on administrative decentralization in unitary polities, such as France as well as federal polities, such as Germany and Spain, is a good case in point. The "Europeanization" of national sex equality and environmental laws, and the increasing eagerness of organized interests and pressure groups to penetrate EC structures and influence policy output in these areas, is yet another example.

Changing expectations may be enforced effectively with the invention of state liability for breach of Community law, enabling individual citizens to enforce the rights

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75 See Re Katherine Colgan (Queen's Bench Division) [1997] 1 C.M.L.R. 53, 72.

76 Commission v. Greece, Case 290/94, decision of July 2, 1996. To date, the court has held that the following posts do not come within the public service exception: workers in postal services; male and female nurses in public hospitals; researchers engaging in civil research; trainee teachers, secondary school teachers, foreign language assistants in universities, joiners, gardeners, (hospital, children's and crèche) nurses, electricians and plumbers employed by municipal councils; and posts in railways, such as shunters, loaders, drivers, plate-layers, signalmen, office cleaners, painters' assistants, assistant furnishers, battery services, coil winders, armature services, nightwatchmen, cleaners, canteen staff, workshop hands.

77 Commission Notice, 1998 O.J. (C 72) 2. According to the notice, public health-care services, teaching posts in state educational establishments, research posts for nonmilitary purposes and public bodies responsible for administering commercial services are not covered by the public service exception.

78 For example, France now takes account of compulsory national service in another Member State or EEA country for the purposes of calculating seniority. Greece also takes into account periods of employment in the public service of another Member State for the purposes of promotion on the grounds of seniority. See Opinion of Advocate General Jacobs, Schoning-Kougebetopoulou v. Freie Hansestadt Hamburg, Case C-15/96, [1998] 1 C.M.L.R. 931, 940.

they derive from Community law.[79] Under this principle, national governments are obligated, when certain conditions are met, to pay damages to individuals as a result of breaches of Community law for which they are responsible. The fact that this judicial remedy is enforceable in national courts and that claims for damages against the state are made in accordance with national rules and procedures indicates that European citizens have stakes in multiple, interacting publics.

Furthermore, European citizens may invoke their rights under EC Treaty Articles 39 (art. 48 prior to renumbering), 43 (art. 52 prior to renumbering) and 49 (art. 59 prior to renumbering) not only against the host Member State, but against their state of origin too. Citizens returning to their home state after having been employed elsewhere in the Community, for example, may enforce Community family rights, if these are more generous than national provisions.

In Regina v. IAT & Singh, a British national was able to rely on Community law to protect her Indian spouse when returning to the United Kingdom after working in Germany.[80] Singh had a Community right to remain in the UK as the spouse of a British citizen, who had the right under Community law to set up a business in the United Kingdom without having to meet national criteria for the entry and residence of foreign spouses. By contrast, in Morson & Jhanjan v. State of the Netherlands, the court ruled that workers who have never left their own home state have no rights under Article 39 and could not rely on Community secondary legislation to protect a family member who was a non-EC national.[81] What matters here is the existence of a connecting link with Community law, that is, of a Community element of "inter-State" trade.[82] Lack of such a link renders situations purely internal, subject to domestic law.[83]

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79 States' financial liability to individuals for loss or damage caused by legislative action or inaction is designed to ensure effective protection for individuals. The principle of state liability was established by the European Court of Justice in its historic judgment in *Francovich*. See Francovich & Bonifaci v. Italy, Joined Cases 6/1990 and 9/1990, 1991 E.C.R. I-5357. The ECJ ruled that Italy was liable to compensate the employees of a bankrupt company when it failed to implement Directive 80/987/EC, which established a scheme for the protection of employees in the event of the insolvency of the employer. As the ECJ observed, the effectiveness of EC law might be called into question and the protection of the rights conferred on individuals by EC law would be weakened if individuals could not obtain compensation for infringements of Community law for which Member States are responsible. For a discussion of the substantive conditions for state liability as well as of ECJ's evolving jurisprudence in this area, see Josephine Steiner, EC Law 62-69 (6th ed.1998); Frank Wooldridge and Rose D'Sa, ECJ decides Factortame (No. 3) and Brasserie du Pêcheur, 7 Eur. Bus. L. Rev. 161 (1996). See also Paul Graig, Directives: Direct Effect, Indirect Effect and the Construction of National Legislation, 22 Eur. L. Rev 519 (1997).

80 See Regina v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for the Home Department Case C-370/90 , 1992 E.C.R. I-4265, [1992] 3 C.M.L.R. 358.

81 Morson & Jhanjan v. Netherlands, Joined Cases 35/82 and 36/82, 1982 E.C.R. 3723, [1983] 2 C.M.L.R. 221.

82 But see Opinion of Advocate General Warner, Regina v. Saunders, Case 175/78, 1979 E.C.R. 1129, [1979] 2 C.M.L.R. 216. See also Robin C. A. White, A Fresh Look at Reverse Discrimination?, 18 Eur. L. Rev. 527 (1993).

83 See, e.g., Moser v. Land Baden-Württemberg, Case 180/83, 1984 E.C.R. 2539, [1984] 3 C.M.L.R. 720; *Morson & Jhanjan*, supra note 81; Iorio v. Azienda Autonoma delle Ferrovie dello Stato, Case 298/84, 1986 E.C.R. 247, [1986] 3 C.M.L.R. 665; *Uecker & Jacquet*, supra note 14; Kremzow v. Republik Österreich, Case C-299/95, 1997 E.C.R. I-2629; Kapasakalis, Skiathitis & Kougiaskas v. Elliniko Dimossio, Joined Cases C-225/95, C-226/95 and C-227/95, 1998 E.C.R. I-

It may be the case that the distinction between purely internal situations and situations to which Community law applies does not rest on solid grounds.[84] Whether or not the distinction is sound, however, mobile Europeans are able to invoke their Community status in their state of origin when Community law gives rise to more extensive rights than national law.[85]

Although the discussion hitherto has focused on the empowering and equalizing impact of Community law upon national citizenship, it would be a mistake to assume away the nationality model of citizenship. The legal framework of intra-EU migration may give precedence to equality of treatment over national privileges and territorial sovereignty, but the intergovernmental framework regulating extra-EU migration has respected the traditional prerogatives of the European nation-state, and reinforced the dichotomy between citizens and "foreigners" (that is, non-EU nationals).

Europeanization and democratization of national citizenship thus are not equivalent in all respects. It is well beyond the scope of this paper to examine the retrogressive effects of the European migration regime on national citizenships. What I have sought to demonstrate here is that the notion of national citizenship as self-sufficient and independent of developments in the EU and elsewhere is an utter myth. The Community rights of free movement and European citizenship have subtly transformed national citizenship—albeit not without resistance—by eroding the link between citizenship and state membership on the one hand and national identity on the other. Hence, there can be no simplistic, essentialist opposition between old national citizenships and new, European Union citizenships, for each is reciprocally constitutive. But if this is the case, in what way has the nationality model of citizenship affected European citizenship?

IV. THE DUALITY OF UNION CITIZENSHIP

Union citizenship, like national citizenship, is essentially a process. The process of the creation of European citizenship has unfolded in an incremental way within an arena shaped by conflicting forces (that is, intergovernmentalism v. supranationalism) and opposing visions of "Europe." Just as these interactions are conflicting and ambivalent, so too the institutional form of Union citizenship, which was chosen in order to give these tangled dealings and conflicting interests some coherent form, is non-unitary and ambiguous. Union citizenship combines two distinct models of citizenship: the nationality model of citizenship and an embryonic model of citizenship beyond the nation-state. This duality is present in the personal and material scope of Union citizenship and has been reinforced by the Amsterdam Treaty.

A. The Personal Scope of Union Citizenship

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84 Weatherill and Beaumont argue that the distinction premised on the existence of frontiers which must be progressively abolished. Stephen Weatherill and Paul Beaumont, EC Law 540 (1993).

85 The rights enjoyed under Community law are not amalgamated with those which arise under domestic law within the territory of Member States for their own respective nationals and spouses. Certainly, if one scheme fails to produce the desired effects, individuals are entitled to follow up and adopt the alternative scheme. See *Zeghraba & Sahota*, supra note 43.

Perhaps the clearest manifestation of the grafting of the organizing principles of the nationality model of citizenship onto supranational citizenship is EC Treaty Article 17(1), (ex Article 8(1)), which conditions Union citizenship on Member State nationality. This gives prominence to the nationality principle and subjects the meaning of membership in the European public to the definitions, terms and conditions of membership prevailing in national publics. By so doing, eleven million third-country nationals who are long-term residents of Member States are excluded from the benefits of European citizenship.

This exclusion is difficult to justify from a normative point of view, given that some of these people have lived their whole lives within the territory of the Member States. Interestingly, despite inertia in the Commission and the absence of consensus on the legal status of third-country nationals,[86] several pressure groups[87] and others invited the 1996 Intergovernmental Conference to consider the possibility of extending European citizenship to these individuals. More specifically, the Migrants' Forum proposed revising the TEU by broadening of the concept of European citizenship by conditioning it on domicile; that is, on lawful residence in the Union for a period of five years or more. This could take the form of either making lawful residence an additional criterion to that of municipal nationality or the more radical option of replacing nationality with domicile.

Notwithstanding these proposals, the 1996 Intergovernmental Conference that culminated in the Treaty of Amsterdam did not grant third-country nationals the benefits of free movement. Free circulation or border-free travel is now clearly applicable to third-country nationals.[88] However, as the ECJ has not ruled on the question whether Article 7a EC creates a directly effective right to free circulation, it is doubtful whether Article 62(1) gives third-country nationals an enforceable right to border-free travel. Article 62(3) EC confers on nationals of third countries the right to visa-free travel within the territory of the Member States for a period of no more than three months. Measures defining the rights and conditions under which long-term resident third-country nationals may reside in other Member States are envisaged to be adopted by the Council acting unanimously on a proposal from the Commission or on a Member State's initiative (art. 63(4) EC).[89] Although the creation of further

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86 The matter has been hard to resolve even within the European Parliament, which has criticized the exclusionary nature of European citizenship in the past. See European Parliament, Dury/Maij-Weggen Report, Document A4-0068/96/B; European Parliament, Resolution of March 13, 1996, on the IGC, OJ 1996 C96/77.

87 The pressure groups included the European Union's Migrants' Forum, Starting Line Group, and European Anti-Poverty Network.

88 The right to border-free travel, under art. 7a of the EC Treaty (art. 14 on renumbering) is clearly applicable to third-country nationals under art. 62(1).

89 See the Commission's Proposal for a Council Decision establishing a Convention on rules for the admission of third-country nationals to the Member States of the Community; Bull. E.C. 7/8-1997, at 1.5.2, COM (97) 387. The Commission first announced its intention to draw up a proposal for a Council Directive on the right of third-country nationals to travel in the Community without visa in a Communication issued on 23 February 1994. Commission of the European Communities, Bull. E.C. 4-1994, COM (94) 23 final (February 1994). An Amended Proposal was adopted by the Commission on March 17, 1997. See 106 O.J. (C 139).

Community competence in matters relating to third-country nationals is a welcome development (Community competence already existed in the conditions of employment of legally resident third country nationals), this reform falls short of treating them as full and respected participants in the European polity. Third-country nationals have not been given European citizenship and will not be able to move and reside within the Community as freely as Community nationals and EEA nationals. Clearly, the absence of political will is a problem. However, if the challenge of supranational citizenship is to push individuals beyond the boundaries of ascriptive identities and to allow a kind of community in which strangers can become associates in a collective experience, then European citizenship should not be allowed to degenerate into a "neo-national" form of citizenship.

B. The Material Scope of Union Citizenship

Although in theory every person holding the nationality of a Member State is a citizen of the Union, in practice the universality of Union citizenship is limited by social and economic differentials. The Member States are prepared to accept Community nationals only if they are economically active or, as mentioned above, economically independent. While the Treaty on European Union is said to have reinforced the right to free movement, which "is now regarded as a fundamental and personal right within the EC and which may be exercised outside the context of an economic activity,"[90] this aspiration does not seem to have materially affected Article 39 (art. 48 prior to renumbering), as interpreted in *Antonissen*, holding that jobseekers have limited rights of residence, and the residence directives.[91] In the academic literature, it has been argued that Article 18(1) (art. 8a prior to renumbering), notwithstanding its textual ambiguities, creates a directly effective and unqualified right for every citizen of the EU to reside in a Member State. However, British courts held that the rights contained in Article 8a are neither free-standing nor absolute; they are expressly subject to the limitations and conditions laid down in the EC Treaty and secondary legislation.[92] This conclusion may be supported by the fact that past Community initiatives on the right of residence have linked the right of residence with economic self-sufficiency.[93]

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90 Commission of the European Communities, Second Report on the Citizenship of the Union, COM(97) 230 (May 1997), at 14. In this report, the Commission contemplated the revision of Article 8a EC, by stating that "from a supplementary legal basis it could be upgraded to a specific legal basis apt to revise the complex body of secondary legislation." Id., at 3.

91 Derrick Wyatt and Alan Dashwood, Wyatt & Dashwood's European Community Law 659 (3d ed. 1993).

92 See Regina v. Secretary of State for the Home Department, ex parte Vittorio Vitale, [1996] 2 C.M.L.R. 587; Regina v. Secretary of State for the Home Department ex parte Vittorio Vitale and Do Amaral, [1995] All E.R. (EC) 946; Regina v. Secretary of State for the Home Department, ex parte Vittorio Vitale, [1995] 3 C.M.L.R. 605, 619. Since Vitale was neither employed nor seeking work with genuine prospects of obtaining it, he did not have the right to reside in Britain after the end of the six month period. In Regina v. Secretary of State for the Home Department, ex parte Adams, [1995] 3 C.M.L.R. 476, the need for clarification on the ambit of Article 8(a) centered on the right to move rather than the right to reside. The Divisional court asked the ECJ whether rights under Article 8a were not merely declaratory and thus whether art. 8(a)1 has direct effect. Unfortunately, the reference was withdrawn when the exclusion order against Mr. Adams was lifted.

93 Commission of the European Communities, Proposal for a Directive on the Right of Residence

For example, in *Martinez Sala*,[94] the ECJ left for the referring court to decide whether Sala, a Spanish national living in Germany who was employed until 1986 and apart from a short period of employment in 1989 later received social assistance under Federal Social Welfare Law, is still a worker within the meaning of Article 7(2) of Regulation 1612/68 or an employed person within the meaning of Article 2 in conjunction with Article 1 of Regulation No 1408/7. The ECJ skipped over the important issue concerning the legal basis of Martinez Sala's right to reside in Germany given her reliance on social assistance. Rather, it focused on whether the child-raising allowance, for which Sala had applied, was a family benefit within the meaning of Article 4(1)(h) of Regulation No 1408/71 and a social advantage within the meaning of Article 7(2) of Council Regulation 1612/68. Having answered this question in the affirmative, the ECJ went on to rule that since Sala had been authorized to reside in Germany, she did come under Community law by virtue of Article 8a EC (Article 18 on renumbering). As a Union citizen, Sala was entitled not to be discriminated against by virtue of the *lex generalis* of Article 6 (Article 12 on renumbering). In this respect, the requirement of the 1985 Federal Law that a national of another Member State should produce a formal residence permit in order to receive a child raising allowance, when that state's own are not required to produce any document of that kind, amounted to unequal treatment prohibited by Article 6 (Article 12 on renumbering) EC. Therefore, Martinez Sala was entitled to consideration of her application on the same terms as German citizens. This ruling reaffirmed that Article 6 (i.e., the prohibition of discrimination on grounds of nationality) remains an alternative route to Council Regulation 1612.[95]

The *Martinez Sala* case also demonstrates that the entanglement of the right of residence with economic activity sits rather uncomfortably with the alleged "constitutional status" of the right to free movement in Article 18 (ex Article 8a) EC. True, the Member States have a legitimate interest in restricting the costs of non-economically active Union citizens upon their welfare system. Equally true, however, the principle of equal treatment does not warrant the creation of two-tier citizenship, that is, for favored and nonfavored (economically inactive) citizens respectively. As a matter of theory, there exist three options for reforming the relationship between economic status and Union citizenship. First, the right of residence could be freed from economic qualifications, but residence in the host Member State would continue to be unconnected with equal treatment in matters of social assistance. Under this option, all Union citizens, regardless of economic status, would be free to move and reside in the

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for Naturals of One Member State in the Territory of Another Member State, COM (89) 275 final (August 1997), 1979 O.J. (C 207) 14, as amended in 1980 O.J. (C 188) 7 and 1990 O.J. (C 175) 85 (aimed at granting a permanent right of residence to all Community nationals and their families who are economically self-sufficient).

94 Maria Martinez Sala v. Freistaat Bayern, Case C-85/96 Judgement of the Court of 12 May 1998 Fries and Shaw argue that:

> after the Court's judgement in *Martinez Sala*, it would appear that something close to a universal non-discrimination right including access to all manner of welfare benefits has now taken root in Community law as a consequence of the creation of the figure of the Union citizen.

Sybilla Fries and Josephine Shaw, Citizenship of the Union: First Steps in the European Court of Justice, 4 Eur. Pub. L. 533 (1998).

95 See Forcheri v. Belgium, Case 152/82, [1984] 1 C.M.L.R. 334.

territory of other Member States, but not all would be eligible to receive social assistance from the host state. Although this option would have the advantage of not imposing economic costs on the host state, its disadvantage is that it maintains the link between equality of treatment and economic productivity.

A second, more radical option would combine an unconditional right to reside with an entitlement to receive equal treatment in social assistance. A person exercising her/his right to free movement but lacking economic resources would be entitled to seek public assistance from the Member State of her residence. This would transform the right to equal treatment from a right granted to workers and their families to one available to Union citizens by reason of lawful residence. Many might view this proposal as political and economic dynamite in light of the disparities among the Member States as regards the extent and scope of social security.[96] However, nothing in this scheme requires that the host state must carry the financial cost alone; Member States could negotiate to share the costs or agree on possible reimbursements of the amounts of benefit paid by the Member State of origin.

Third, the present conditions attached to the right of residence (i.e., sufficient means of subsistence and health insurance) could still apply, but subsequent reliance on social assistance would not affect the right of residence. Under this scheme, beneficiaries of the right of residence and their families would continue to enjoy this right even if later circumstances compelled them to rely on welfare assistance. Similarly, work-seekers would be entitled to be treated by the host state in the same way as work-seekers who are nationals of that state. Once again, the financial burden could be shared or met exclusively by the state of origin. The host state too could be persuaded to meet the cost (or part of it), if it subscribed, for example, to post-productivist welfare principles, such as investment in human capital and the decoupling of welfare benefits from work. Under a post-productivist regime, a state would be willing to invest in optimizing the Union citizens' capacity to make productive contributions and would recognize that productive contributions need not be confined to those arising through participation in the paid labor market.[97] Whereas all three policy options would strengthen the supranational character of Union citizenship, the second and third policy options would make the personal scope of Union citizenship more inclusive.

The tension between the national and supranational models of citizenship complicates the political dimension of Union citizenship, too. Article 19 provides that Union citizens are granted only partial franchise in the Member State where they reside if they are not nationals of the state of their residence. The 1996 Intergovernmental Conference did not extend the political participation of Union citizens at national parliamentary elections, despite the fact that it is at the national level that most decisions relevant to the work of the Community are taken.[98] It may be objected here that admission of Union citizens to the "national community of citizens" would undermine the distinction between nationals and "aliens," dilute the national character of

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96 Siofra O'Leary, European Union Citizenship, supra note 7, at 92.

97 Robert E. Goodin, Toward a Post-Productivist Welfare State (paper presented to Working Group on Political Theory and Social Policy, Paris, May 1998).

98 Andrew Evans, Nationality Law and European Integration, 16 Eur. L. Rev. 190, 210 (1991).

parliamentary elections and jeopardize national interests. Although these objections are widespread and deeply embedded within national cultures that associate nativism with loyalty, they stand in need of reassessment. How justifiable are such worries, for example, given the coordinated efforts to devise a common European security policy, and the fact that defense and security issues usually appear at the margins of the normal parliamentary agenda? After all, commitment to democracy requires strengthening the instruments of democratic participation for Union citizens at all levels of governance. Critics might argue here that Union citizens would be deprived of their right to consent to be part of national publics, if they were automatically allowed to vote at national elections. However, this argument is not very convincing since Union citizens could always demonstrate their consent by choosing to exercise noncompulsory, full electoral rights in the place of residence. This, of course, might affect their voting rights in their Member State of origin. However, considering that several Member States do not permit their own nationals to vote or to stand as candidates if they reside outside their territory, many Union citizens might not hesitate to take this risk.[99]

Equally important for the development of the supranational model of European political citizenship is the development of European political parties operating on a transnational level. Although Article 191 (previously art. 138a) establishes a clear link between the formation of political parties and the expression of political will at the supranational level and European integration, it leaves the matter of the possible setting up and operation of European political parties to the discretion of civil society. In this respect, a framework regulation on the legal status of European political parties, coupled with a regulation on the financial circumstances of European political parties (based on ex Article 138a in conjunction with ex Art. 235 EC) would give greater substance to European political citizenship. Equally important for political citizenship might be the recognition of the rights of association and assembly within the context of Union citizenship provisions. This could be achieved in the future by inserting a new subparagraph in Article 19 EC which would state that "every resident of the Union shall have the right to associate with other residents of the Union in order to represent their interests and defend their rights."[100] In addition, explicit recognition of the residents' right to set up foundations, associations and organizations, coupled with a commitment from the Union to support transnational organizations which promote cooperation in certain policy areas, would contribute to the flourishing of a European civil society.

The extension of the powers of the European Parliament at Amsterdam is likely to encourage the participation of Union citizens in the European enterprise.[101] More

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99 See the Commission's Second Report on Union Citizenship, supra note 90.

100 At the 1996 IGC, the Italian and Austrian governments, in a joint memorandum on Union citizenship, proposed a new Article 8g, which would state that "Citizens of the Union shall have the right to freely associate in the form of political parties operating at the European level which are based on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law." The 1996 Intergovernmental Conference: Retrospective Database <http://europa.eu.int/en/agenda/igc-home> (visited November 24, 1999).

101 The Amsterdam Treaty also institutionalized the right to information. However, its exercise is subject to principles and limits on grounds of public and private interest to be decided by the Community by qualified majority voting and co-decision within two years. 1997 O.J. (C 340) 44 at art. 191a (art. 255 on renumbering). See also Svenska Journalistforbundet v. Council of the European Union, Case T-174/95, 1998 E.C.R. II-2289.

specifically, the extension of the scope of the co-decision procedure as well as its simplification (i.e., through the removal of the third reading) puts the Parliament on a more equal footing with the Council in the legislative process. With regard to the procedure for the election of the European Parliament by direct universal suffrage, the Amsterdam Treaty provides for the Community's power to adopt common principles (Article 190 (ex Article 138)), and a legal provision has been inserted into the same article to permit the adoption of a single statute for Members of the European Parliament. All these reforms strengthen the political authority of the European Parliament and consolidate its democratic legitimacy in the European polity. By so doing, they are likely to enhance civic bonds and the awareness of citizens that they belong to a common European society.

Although these measures would, if implemented, enhance the supranational model of European citizenship, the traces of nationality model would nevertheless remain. An example of this is Article 20 (ex Article 8(c)) EC which establishes the right to protection by diplomatic and consular authorities of any Member State in a third country where the citizen's own Member State is not represented. The implementation of this right essentially depends on the cooperation of the Member States. The latter have so far adopted two decisions (19 December 1995) and have laid down the rules for the delivery of an emergency travel document (June 1996). Naturally, the agreements concluded by the Member States do not have the same binding nature as those adopted under EC legislation and do not give rise to enforceable rights to consular protection. In this respect, the Union citizens' right to consular and diplomatic protection has a hybrid nature. On the one hand, entitlement depends on an individual's status as a national of a Member State. Its realization reaffirms that diplomatic protection falls within the states' domain of jurisdiction. On the other hand, the principle of equality of treatment is not confined inside the borders of the Union but has been extended to the external dimensions of Community law.

C. Citizenship and the New Title on Freedom, Security and Justice

Whilst equal treatment of Community nationals extends to the external dimensions of Community law, the prospect of the abolition of internal frontier controls has engendered an intensification of controls at the external frontiers and the emergence of a restrictive immigration and asylum regime. As discussed in the context of the personal scope of Union citizenship above, the bestowal of citizenship and rights to citizens of the Member States has been accompanied by processes of exclusion, discrimination and marginalization of long-term resident third-country nationals, immigrants and refugees. What European policymakers seem to have overlooked is that external and internal rules of membership are mutually dependent and co-determinative. External rules on entry have always had a profound impact on the rules and conditions of community membership. Official policy responses to the challenge of immigration thus reveal a lot about the nature of a polity and the meaning of citizenship. The consequences of very restrictive immigration policies are felt by the whole community and not only by those who seek admission. The emergence of a restrictive European immigration regime has given rise to many criticisms and serious concerns about the future of the European project and the democratic quality of its

membership rules. More specifically, the so-called Third Pillar of the Maastricht Treaty has been criticized for its secretive intergovernmental decisionmaking processes, the absence of clear objectives, and lack of judicial and Parliamentary supervision, as well as for the rights deficit and the restrictive character of many of the agreed-on policies.[102]

The Amsterdam Treaty has introduced some important reforms to the Third Pillar. More specifically, the new Treaty has transferred from the old Third Pillar to the new Community pillar, responsibility in the areas of immigration and asylum matters pertaining to third-country nationals, external border controls and judicial cooperation in civil matters. The new Title has set out a five-year transitional period from the entry of the new Treaty into force, during which the Council will take decisions by unanimity and the Commission will share the right of initiative with the Member States. At the end of this period, the Commission's right of initiative will become exclusive, per Article 67(2)1 (art. 73o(2)1 prior to renumbering) and the Council, acting unanimously, may decide that qualified majority voting and co-decision with the European Parliament will apply to part or all of the transferred matters. In addition, the Amsterdam Treaty has incorporated the much-criticized Schengen acquis into the EC/EU institutional framework. The Council will have to identify the acquis and determine the correct legal basis for each of its provisions and decisions constituting the acquis in accordance with their subject matter. Until such determination has been made, the Schengen measures will be regarded as acts adopted on the basis of the Third Pillar.[103]

It may be noted here that these developments constitute a definite departure from the secretive, unaccountable intergovernmental framework of cooperation in immigration and asylum matters. Bearing in mind that immigration and asylum policy were subject to the states' traditional sovereign control, it is a remarkable achievement that all matters relating to the free movement of persons are placed within the First Pillar—although that progress has come at the cost of fragmentation in Community policymaking processes due to the British, Irish and Danish opt-out protocols.

However, one must not overlook the problems and risks entailed by the new arrangements in both procedural and substantive terms. In procedural terms, the democratic deficit has been reduced but not removed and the role of the Court of Justice has been heavily circumscribed.[104] The ECJ will have no jurisdiction to review measures and decisions relating to the maintenance of law and order and the safeguarding of national security, per Article 68(2) EC. In addition, requests for preliminary rulings will be confined to national courts and tribunals against whose decisions there is no remedy under national law. Under Article 68(1) EC these requests will be discretionary, not mandatory, as former Article 177 once required. Adjustment of the preliminary rulings procedure is bound to undermine legal certainty and lead to inconsistent interpretation of Community law across the Member States, because the ECJ may not even have the opportunity to rule on important questions of Community

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102 See Michael Spencer, States of Injustice (1995); David O'Keeffe, The Emergence of a European Immigration Policy, 20 Eur. L. Rev. 20, 20-36 (1996); David O'Keeffe, Recasting the Third Pillar, 32 Common Mkt. L. Rev. 893 (1995).

103 See the Protocol on Integrating the Schengen Acquis into the EU Institutional Framework, in Treaty of Amsterdam, 1997 O.J. (C 340) 93.

104 Jörg Monar, Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation, 23 Eur. L. Rev. 320, 335 (1998).

law. Courts of last instance may not refer questions to the ECJ, or significant questions of EC law may not even reach the national courts of last instance. Individuals who now have to pursue their cases through the successive tiers of national jurisdiction face expense and delay. Furthermore, Article 68(3) states that rulings given by the ECJ in response to requests by the Council, the Commission or a Member State shall not apply to judgments of courts and tribunals of the Member States that have become res judicata. However, issues falling within Community competence can only become res judicata if the ECJ has ruled on them.

In substantive terms too, the objective "to maintain and develop the Union as an area of Freedom, Security and Justice" (See Article 61 of the EC Treaty), instills in Community law the logic that portrays immigration and asylum as security issues. This, in turn, reinforces the boundaries between citizens and long-term resident third-country nationals, third-country nationals and refugees. In this respect, Title has not only reinforced the duality of Union citizenship, but has also swayed its character to favor the nationality model of citizenship. By hegemonically defining the terms of the political and legal discourse on the emergent common immigration policy, Title IV on "visas, asylum, immigration and other policies related to free movement of persons" promotes the development of a "protective Union." The new title's contribution towards enhancing the democratic quality of citizenship and developing the Union not only as a common market but as a system of values therefore seems highly debatable. But surely, European citizenship cannot endure in this form: If it is to develop to a genuine form of citizenship beyond the nation-state and mature as an institution, then the normative foundations and boundaries of membership in the European polity must be rethought. This, as I have argued throughout the paper, may well require the analytical separation of the distinct models of citizenship underlying Union citizenship and the shift of the center of gravity from the national to the supranational one.

In concluding this discussion, it may be said that although the institutional design of Union citizenship has been informed by assumptions derived from the nationality model citizenship, Union citizenship carries within it both the remains of its birth and the possibility of its transformation; the traces of a defective origin and the invitation to transcend it. However paradoxical, the coexistence of two opposing models of citizenship within Union citizenship is not totally constraining. The tension is also enabling in some important respects. First, the duality of Union citizenship enhances the realization that Union citizenship, as it is at present, is not of fixed and enduring form. Rather, it is an experiment and a transition. Second, it helps expose and overcome the limitations of national citizenship. Finally, as Union citizenship is essentially a challenge rather than a finished institution, the likelihood of its failure to function as a catalyst for the formation of a European polity cannot but force a genuine reappraisal of its scope and content. This is likely to open up a critical space within which the dual nature of Union citizenship is exposed, the limits of its instituted form become clearer and its transformation may become a possibility. It is in this precarious and often ambiguous play between the old and instituted on the one hand, and the new and instituting on the other, that a new way of thinking about the rights, expectations and loyalties of individuals who are members of the old national and new European citizenries, is likely to emerge.