

THE EU CITIZENSHIP ACQUIS AND THE COURT OF JUSTICE: CITIZENSHIP VIGILANTE OR MERELY VIGILANT TREATY GUARDIAN?

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TABLE OF CONTENTS

ABSTRACT.....	206
1. INTRODUCTION.....	206
2. EU CITIZENSHIP: A VARIABLE CONCEPT	210
2.1 <i>Market Citizenship</i>	211
2.2 <i>Political Citizenship</i>	212
2.3 <i>Social Citizenship</i>	213
3. THE DEVELOPMENT OF EU CITIZENSHIP	214
3.1 <i>The Evolution of Citizenship Thinking</i>	214
3.2 <i>The Prelude to the Maastricht Treaty</i>	216
4. THE LAW OF EU CITIZENSHIP.....	217
4.1 <i>Citizenship Provisions</i>	217
4.2 <i>Article 17 EC</i>	219
4.3 <i>Article 18 EC</i>	221
5. THE DISCRIMINATION PROVISIONS.....	222
5.1 <i>Article 12 EC</i>	222
5.2 <i>Article 13 EC</i>	223
5.3 <i>Secondary Legislation</i>	225
6. WORKER V PERSON: JUDICIAL INTERPRETATION OF CITIZENSHIP AND THE DEMISE OF THE ECONOMIC LINK	226
6.1 <i>Martinez Sala: Citizenship Expanded Beyond Economic Links</i>	229
6.2 <i>Entry and Residence</i>	230
6.3 <i>Non-Discrimination</i>	232
6.4 <i>Reverse Discrimination</i>	233
6.5 <i>Third Country National/Family Rights</i>	236
6.6 <i>Fundamental Rights</i>	238

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7. TREATY MAKERS' INTENTIONS.....	239
8. THE LISBON TREATY.....	241
9. CONCLUSION	244

ABSTRACT

This article examines the special citizenship status conferred on nationals of the Member States of the European Union (EU): the status of EU Citizenship. The article considers the concept of EU Citizenship, and the citizenship *acquis* with respect to the scope and principles of free movement and equal treatment intended by the drafters of the Treaty of Rome.³ It will examine how the European Court of Justice (ECJ) has interpreted and applied this concept over time, and how the Court views and has expanded the citizenship *acquis* with respect to its dynamic and growing European Union membership. Key Treaty provisions will be scrutinized more closely than others, such as Article 17 EC, which attaches special rights and remedies laid down by the Treaty, and Article 12 EC, which prohibits discrimination against EU citizens on grounds of their nationality. The discussion herein will be presented within the context of the role of the ECJ with respect to its citizenship case law, as well as within the context of relevant primary and secondary legislation. The conclusion will comment on whether or not the ECJ may unreasonably be expanding the concept of EU citizenship beyond that which was envisaged by Treaty-makers, or whether the broadened scope of Citizenship judgments was an expected and accepted consequence of a larger and dynamic EU.

1. INTRODUCTION

Despite the steady process of Community enlargement and legal, institutional and economic integration, by the 1990s there was a growing gap between the European Community (EC) and the European public.⁴ The EC integrationist projects designed to bring about "an ever closer union" had reached the limits of Monnet's neo-functionalist philosophy; further development required an affective dimension.⁵ The EC needed to establish a personal relationship, not just with the Member States but with its individual members; as Shore observed, one cannot have a democracy without the *demos*, and the absence of a European *demos* was undermining the legitimacy of the

³ See generally Treaty Establishing the European Economic Community, Mar. 25 1957, 298 U.N.T.S. 3 [hereinafter EEC Treaty].

⁴ SIONAIDH DOUGLAS-SCOTT, CONSTITUTIONAL LAW OF THE EUROPEAN UNION 480 (Pearson Longman 2002).

⁵ Brigid Laffan, *The Politics of Identity and Political Order in Europe*, 34 J. COMMON MARKET STUD. 81, 83 (1996).

whole EC project.⁶ The continued development and legitimacy of the Community order, therefore, required the creation of a common identity amongst the peoples of Europe and, crucially, by the people towards the European institutions.⁷ The creation of this common identity was sought through the establishment of European Union (EU) citizenship.

Shaw rightly highlights the normative imperative for the creation of an affective dimension to the EU as a means of moving forward the integrationist agenda, and the need to address concerns about a growing legitimacy deficit about Europe's technocratic model of governance; citizenship, comprising elements of both political and social rights, thus became an inevitable response if the creation of a European polity was to take root beyond the economic sphere.⁸ When The Treaty of Maastricht⁹ formally added "Part II - Citizenship of the Union" in 1992, it was criticized as being a derived concept with a political and legal heritage that the Union attempted to incorporate into its own conceptual framework.¹⁰ Implementation was problematic; it was unclear how the new provisions were to apply. Certain citizenship concepts, such as those covering economically active migrants, already existed in other Treaty provisions pre-dating Maastricht. Therefore, some considered EU Citizenship to be redundant,¹¹ while others considered it a half-hearted attempt to create a European identity based on a concept that emerged without reference to existing citizens.¹²

Citizenship thus began, at best, as a label for the economically motivated movement of individuals across the borders of the EC Member States. Therefore, although it was understandable that citizenship was adopted at Maastricht, its form was not necessarily predictable given that a trans-national polity like the Community was expected to

⁶ See Cris Shore, *Whither European Citizenship? Eros and Civilisation Revisited*, 7 EUR. J. SOC. THEORY 2, 33, 38 (2004).

⁷ See Joseph Weiler, *To Be a European Citizen – Eros and Civilisation* 41-42 (U. Wis.- Madison Working Paper Series in European Studies, 1998).

⁸ Jo Shaw, "Constitutional Settlements and the Citizen after the Treaty of Amsterdam", (1998) Jean Monnet Paper 7-98' available at <http://www.jeanmonnetprogram.org/papers/98/98-7—I.html> [hereinafter Shaw, *Constitutional Settlements*].

⁹ See generally Treaty on European Union art. 8, Feb. 7, 1992, 1992 O.J. (C 191) 1 [hereinafter TEU].

¹⁰ Jo Shaw, *European Citizenship: The IGC and Beyond*, European Integration online Paper Vol.1 (1997) No.3 at 1, available at <http://eiop.or.at/eiop/texte/1997-003.htm> [hereinafter Shaw, *IGC*].

¹¹ Izolda Bulvinat, *Union Citizenship and its Role in the Free Movement of Persons Regimes*, 5 Web JCLI, at 3 (2003).

¹² Siofra O'Leary, *European Union Citizenship: Options for Reform*, Institute for Public Policy Research (London, 1996) at 97.

experience difficulties in embracing, without amendment, concepts developed in the context of the nation-state.¹³

The European Court of Justice (ECJ) was called upon to define the Treaty scope of this nebulous concept, ultimately abandoning the requirement for an economic link as a precondition to exercising free movement, and broadening the range of residents who would be subject to its personal scope. The expansionist trend in the Court's sometimes surprising judgments reflected its intent to cast the widest possible social safety net around EU citizens. This has helped "citizenship" evolve into much more than a symbolic label of identity.

The Court, however, may now be exceeding the comfort level of its Member State constituents who have become increasingly wary over free movement of persons, and the possible migration patterns inherent in an enlarged EU.¹⁴ Citizens in the EU founder states of France and the Netherlands rejected the initiative for a Constitutional Treaty¹⁵ in 2005, citing as reasons the remoteness from the EU's Institutions, fear of immigration and concerns over the loss of national identity and rising unemployment. This concern is not to be understated. In June 2008, Ireland held a referendum on the ratification of the Lisbon Treaty,¹⁶ the most recent attempt to overhaul EU Institutions. Irish citizens rejected the Treaty - echoing the 2005 concerns of the French and Dutch voters - citing loss of national identity as a major factor in the rejection; 12% of those voting 'No' did so to protect Irish identity.¹⁷ This rejection reflects growing opposition to one of the EU's fundamental principles, that of free movement.¹⁸

The prevailing psychology evident in the rejection of the Constitutional Treaty in 2005 thus continues to manifest itself in discriminatory conduct against non-nationals, under the assumption that foreigners disproportionately "take" and have nothing to "give" in return. Such an attitude hinders cross-border movement, impairing the exercise of free movement rights, and ultimately damaging the Union's integration effort. Without a strengthened sense of EU identity, there-

¹³ *Id.*

¹⁴ Robin White, *Free Movement, Equal Treatment and Citizenship of the Union* (May 7, 2005) (unpublished manuscript, on file with University of Leicester) [hereinafter "White"].

¹⁵ *See generally* Treaty Establishing a Constitution for Europe, O.J. (C 310/01) 47.

¹⁶ The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, Dec. 13, 2007 O.J. (2007/C 306/01-02) [hereinafter Lisbon Treaty]. *See infra* Section 8 on the Lisbon Treaty.

¹⁷ European Commission. Post-referendum Survey in Ireland - Preliminary Results. Flash Eurobarometer 245, available at http://ec.europa.eu/public_opinion/flash/fl_245_en.pdf [hereinafter "Flash Eurobarometer 245"].

¹⁸ Stephen Mulvey, *Varied Reasons behind Dutch 'No'*, BBCNEWS, June 1, 2005, <http://news.bbc.co.uk/2/hi/europe/4601731.stm>.

fore, free movement risks becoming the Union's dialectical materialism.¹⁹

In reality, citizenship confers fundamental rights. Protection against discrimination on the grounds of nationality is "the most fundamental right conferred by the Treaty and is a basic ingredient of Union citizenship."²⁰ Discrimination based on gender has also been considered within the Treaty framework, and new grounds have also been added through Article 13 EC, which prohibits other forms of discrimination.²¹

This article aims to examine EU citizenship, and discrimination where it occurs based on nationality, primarily within the context of Parts I and II of the Maastricht Treaty. The Maastricht provisions in those Parts form the legal basis on which the ECJ speaks for the Treaty-makers in determining the Treaty's material scope. Provisions such as Articles 17-21 EC established the basis of Union citizenship by defining its membership, rights and obligations. Through these provisions, it is clear that EU citizenship complements national citizenship and operates as a series of concentric circles within which one can simultaneously, for example, be Scottish, British and European.²² Moreover, a citizen holds a wide range of rights depending on the nature of their relationship with the polity. Where a citizen is economically active for example, s/he also gains rights associated with market citizenship.²³ These rights, however, are not exclusionary. Other remedies, including the right not to suffer discrimination on the grounds of nationality under Article 12 EC, are available to citizens, and in fact, form a cornerstone of the entire rights package. This will be explored in greater detail below.

This research also examines the conceptual basis of citizenship, tracing its development through the case law of the ECJ. Trends in the Court's decisions can be observed. Thus one can see additional trends in the evolution in citizenship's protection, from the require-

¹⁹ Institutional efforts to fight racism and xenophobia are highlighted through initiatives such as the European Union Agency for Fundamental Rights (FRA) established in 2007 via Council Regulation (EC) No 168/2007 of 15 February 2007. See The European Union Agency for Fundamental Rights (FRA), http://fra.europa.eu/fra/index.php?fuseaction=content.dsp_cat_content&catid=2, at FAQ 1; European Racism and Xenophobia Network (RAXEN), http://raxen.fra.europa.eu/1/webmill.php?s_displayed=0&s_detail=0. These new initiatives not only underline that noted concerns are widely felt across the Member States, but imply the possibility of successful redress to a greater or lesser extent, through the cultivation of a stronger sense of EU identity through EU citizenship.

²⁰ Case C-274/96, *Bickel v. Franz*, 1998 E.C.R. I-7637 at ¶ 24.

²¹ *White*, *supra* note 14, at 1.

²² DOUGLAS-SCOTT, *supra* note 4, at 483.

²³ Market Citizenship is discussed *infra* in Section 2.1.

ment for “economic activity” as a prerequisite to free movement, to the Court’s inclusion of and reliance on social factors in its judgments. An important question discussed herein is whether the Court’s expanded reliance on such social factors has resulted in the expansion of the scope of the Treaty’s protection beyond the Treaty-maker’s original intent.

To place the Treaty-makers’ intentions into perspective, the paper will firstly explore the meaning and purpose of citizenship, before looking at how EU citizenship was shaped pre-Maastricht. It will then focus on the citizenship provisions of Articles 17 & 18 EC and their inter-relationship with other rights and remedies provided by EC law, notably Article 12 EC, before examining how the ECJ has interpreted these provisions. As movement across a Member State border activates EU citizenship rights, it is also necessary to examine the right to entry and residence in Member States within the context of ECJ Citizenship judgments. The paper will conclude with commentary on whether the Court’s rulings and application of the *acquis communautaire* is consistent with that envisaged by the Treaty-makers.

2. EU CITIZENSHIP: A VARIABLE CONCEPT

National citizenship is traditionally founded on the idea of a shared ethnic and cultural identity.²⁴ In a trans-national body such as the EU, the people do not share the same ethno-cultural identity and a different model is required, based not on emotional attachments to territory (Europe’s geographic boundaries have still not been defined) or a common history or language, but on what Habermas calls “constitutional patriotism.”²⁵

Habermas’ model describes civic and political participation based on loyalty to constitutional norms that are separate from national identity. An approach rejecting the need for shared cultural or ethnic heritage appears attractive because it provides the EU with a philosophical framework within which Turkey can accede. Institutionally, it appears to have been embraced by the EU through, *inter alia*, the Constitutional Treaty and, thereafter, by the pending Treaty of Lisbon,²⁶ although Shore rightly questions its validity in assuming a sense of loyalty to an abstract concept.²⁷ Yet French and Dutch rejection of the Constitutional Treaty in 2005, Irish opposition to the Lisbon Treaty in 2008 and enduring opposition to Turkish accession based partly on Turkey’s different cultural and ethnic traditions, sug-

²⁴ Shore, *supra* note 6, at 35.

²⁵ Jürgen Habermas, *Citizenship and National Identity: Some Reflections on the Future of Europe*, 12 PRAXIS INT’L 1-19 (1992) at 3.

²⁶ The Lisbon Treaty, *supra* note 16.

²⁷ Shore, *supra* note 6, at 36.

gests that constitutional patriotism cannot displace other citizenship models rooted in a shared or similar heritage.

Traditional citizenship theories founded in the nation state describe multiple forms that such a concept can embrace. Douglas-Scott identifies three types: (1) market citizenship, (2) good (or political) citizenship, and (3) social citizenship.²⁸ The Treaty-makers needed to develop a rounded citizenship model balancing all three types to enhance the EC's legitimacy amongst the European peoples. The Treaty's citizenship provisions reflect these themes. Article 17 EC highlights the derived status of EU citizenship, which is only available to nationals of the Member States. The Union itself has no power to grant or withhold EU citizenship; only the Member States have that capacity based on their own specific conditions for nationality.

2.1 *Market Citizenship*

Market citizenship portrays the individual as the holder of economic rights whose protection can be enforced through the national and European courts. Everson describes this individual as '*homo economicus*'; a factor of production with property rights only in themselves and their labor.²⁹ The EU market citizen, therefore, is economically active and consequently enjoys, *inter alia*, the rights of free movement under Articles 39, 43 and 49 EC, including the right to seek genuine work,³⁰ and to provide/receive services³¹ in other EU Member States.

From its outset, the European Economic Community recognized that market citizens were essential to creating the internal market, and by protecting their EC rights through the national courts, the process of European integration was enhanced. It became equally apparent, however, from concerns about the democratic legitimacy of the Union in the late 1980s, that the allegiance of the economically active alone was insufficient to foster a sense of loyalty to the Community amongst the European peoples. Focusing solely on market citizenship overlooked the fact that economic transactions took place within a po-

²⁸ DOUGLAS-SCOTT, *supra* note 4, at 486-514.

²⁹ Michelle Everson, *The Legacy of the Market Citizen*, in *NEW LEGAL DYNAMICS OF THE EUROPEAN UNION* 71 (Gillian More and Jo Shaw, eds., 1995).

³⁰ See generally Case C-292/89, *R v. Immigration Appeal Tribunal ex parte Antonissen*, 1991 E.C.R. I-745 (discussing the application of Article 48 of the EEC Treaty, which controls worker movement); Case 344/87, *Betray v. Staatssecretaris van Justitie*, 1989 E.C.R. 1621 (discussing and applying the status of worker's rights, including free movement, within the EU).

³¹ Cases 286/82 and 26/83, *Luisi and Carbone v. Ministero del Tesoro* 1984 E.C.R. 377; Case 33/74, *Johannes van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, 1974 E.C.R. 1299.

litical and social context and that the citizen was only likely to grant the Union legitimacy if their broader needs were satisfied. As Mouffe argued:

If Europe is not to be defined exclusively in terms of economic agreements and reduced to a common market, the definition of a common political identity must be at the head of the agenda and this requires addressing the question of citizenship. European citizenship . . . must mean identifying with a set of political values and principles which are constitutive of modern democracy.³²

2.2 Political Citizenship

The 'Political Citizen,' described by Everson as '*homo politicus*,' participates actively in the practice of democracy and public life.³³ This is citizenship's defining element for writers such as Closa,³⁴ who see political rights that afford the possibility of influencing state policy as exclusively reserved for nationals; moreover, by granting power (or *cratos*) to the *demos*, the Union had a means of addressing its democratic deficit.

In the EU, the voice of the *demos* had been muffled through the technocratic comitology procedure, the limited (albeit expanded) role of the Parliament, the absence of EU-wide political parties, and an early reluctance to embrace transparency.³⁵ Of course, citizenship had never been aimed solely at the market citizen; the original EEC Treaty had, for example, provided for elections to the European Parliament.³⁶ However, the answer to Shore's question asking who would speak for the *demos* that could not speak for itself³⁷ had traditionally been 'the judges in the European Courts.' A more open approach to transparency and a willingness to hold institutions to account in later cases such as *Bavarian Lager*³⁸ (transparency) and *Jego Quéré*³⁹ (increasing *locus standi* in Article 230 EC proceedings) provided the *demos* with a louder, if indirect, voice. Institutional moves towards increasing participation through the involvement of the Social Partners and open

³² Chantal Mouffe, *Preface of Democratic Politics Today* to DIMENSIONS OF RADICAL DEMOCRACY 8 (Mouffe ed., Verso 1992).

³³ Everson, *supra* note 29, at 76.

³⁴ Carlos Closa, *The Concept of Citizenship in the Treaty on European Union*, 29 COMMON MARKET L. REV. 1137 (1992).

³⁵ Case T-194/94, *Carvel v. Council*, 1995 E.C.R. II-2765 (1995).

³⁶ EEC Treaty art. 138(3) (now Article 190 EC).

³⁷ Shore, *supra* note 6, at 36.

³⁸ Case T-309/97, *Bavarian Lager Co. Ltd. v. Commission*, 1999 E.C.R. II-3217.

³⁹ Case T-177/01, *Jego Quéré & Cie SA v. Commission*, 2002 E.C.R. II-2365.

government under the post-Amsterdam Article 1 TEU also helped forge a stronger political citizenship.

2.3 *Social Citizenship*

To satisfy the conditions for trans-national citizenship, Douglas-Scott argues for a shift from market citizen towards political and social citizenship.⁴⁰ Social citizenship links the citizen with the Union at the human level, and provides a safety net of social support. EU social citizenship was soon evident in the protection of fundamental rights through cases such as *Hauer*⁴¹ and *Nold*,⁴² although its efficacy was hampered by the lack of a clear legislative base and, partly because of hostility to any encroachment on member state sovereignty, by being linked to market goals. This changed gradually, prompting AG Jacobs to proclaim that a Community citizen "is entitled to say '*civis europeus sum*' and to invoke that status in order to oppose any violation of his fundamental rights."⁴³

On the collective level, social citizenship is inclusive because it extends to all individuals the scope of protection in EU law, rather than limiting rights and remedies to those who are economically active within the internal market. At an individual level, it is essential if the individual, as human being, is to connect with the Union. In Rawls' view, individuals cannot participate fully as citizens below a level of social and material well-being.⁴⁴

Social citizenship addresses the 'physiological needs' in Maslow's hierarchy of motivation,⁴⁵ whose satisfaction enables the individual to focus on the market citizen's economic security needs and thence to the fully engaging self esteem and self-actualization needs inherent in political rights. To motivate the peoples of Europe towards the Union, Maslow's theory predicts a need to buttress market citizenship with political and social rights, through which citizens would develop a true sense of belonging and identity. The Treaty-makers did this at Maastricht.

⁴⁰ DOUGLAS-SCOTT, *supra* note 4, at 485.

⁴¹ Case 44/79, *Hauer v. Rheinland-Pfalz*, 1979 ECR 3740.

⁴² Case 4/73, *Nold v. Commission*, 1974 ECR 491.

⁴³ Case C-168/91, *Konstantinidis v. Stadt Altensteig*, 1993 E.C.R. I-1191 at Recital 46.

⁴⁴ DOUGLAS-SCOTT, *supra* note 4, at 500.

⁴⁵ CHARLES B. HANDY, *UNDERSTANDING ORGANIZATIONS* 30 (1993) (citing ABRAHAM MASLOW, *MOTIVATION AND PERSONALITY* (Harper & Row 1954)).

3. THE DEVELOPMENT OF EU CITIZENSHIP

3.1 *The Evolution of Citizenship Thinking*

EU citizenship may have evolved from The Treaty of Rome's Preamble suggesting an "ever closer union among the peoples of Europe," or Article 2 EC, which challenged the Community to establish a common market, characterized by harmonious and balanced economic activities and strong social protection. Either way, a high standard of living and quality of life would produce "economic and social cohesion and solidarity among Member States." Economic success required workers to maximize cross-border employment opportunities, achieved through the elimination of "obstacles to [their] free movement."⁴⁶ Discrimination based on nationality was one such obstacle, so Article 12 EC has always been a Treaty anchor in the "rights" debate. However, "free movement" was a paradox as it only applied to a person who was a national of one Member State undertaking an economic activity in another Member State. It was thus a latent right that was activated only in certain situations.

The link between citizenship and equal treatment probably originated from the Treaty Establishing the European Coal and Steel Community (ECSC), which sought to create "the basis for broader understanding among peoples long divided by bloody conflicts."⁴⁷ Discrimination between Member States was outlawed in the coal and steel industries, and equal treatment was considered the fundamental basis behind successful free movement. This principle expanded to additional industrial sectors, and the principle of equal pay was introduced as Article 141 EC (ex-119 EEC). Therefore, "citizenship" grew from the concept of non-discrimination⁴⁸ within the context of free movement of workers. Consequently, "workers" plus "non-discrimination" equalled "citizenship" in its most "incipient" form.⁴⁹ The intent was for citizenship and non-discrimination principles to be intertwined.

The Common Market developed with the notion that free *commercial* movement, free capital flows and the resultant *economic* success would bring about a permanent partnership, a common identity and peace among member nations. One can surmise, therefore, that "citizenship" was used loosely in an effort to narrow the democratic

⁴⁶ CATHERINE BARNARD, *THE SUBSTANTIVE LAW OF THE EU* 401 (OUP 2004).

⁴⁷ Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC Treaty], *as amended in Treaties Establishing the European Communities* (EC Off'l Pub. Off. 1987).

⁴⁸ John Parry, *EU Citizenship in an Inter-cultural Union* (Federal Union 2005), available at www.federalunion.org.uk/europe/eucitizenship.shtml.

⁴⁹ David O'Keefe, *Union Citizenship*, in *LEGAL ISSUES OF THE MAASTRICHT TREATY* (David O'Keefe and Patrick Twomey, eds., 1994).

deficit by providing a common identity for the peoples of Europe. Even today one questions whether Union citizens perceive a common identity, which cannot occur until realistic and psychological obstacles to free movement are removed. Until then, the Union's full potential cannot be realised and citizens are unlikely to be committed to the Union if they are physically tied to their Member State "at the most basic level."⁵⁰

In the 1970s, the Tindeman's Report⁵¹ argued that Europe needed to get closer to its citizens and recommended creating rights to support the development of political and social citizenship. Later the Adonnino Report⁵² advocated creating a sense of belonging by adopting European symbols such as a European flag, anthem and driving license. This top-down approach, however, was seen as an attempt by the elite to legitimate its own ideology, rather than inspiring a sense of belonging.⁵³ The Report included more successful ideas such as funding international educational exchanges⁵⁴ and proposed a number of substantive rights that formed the basis of the Maastricht citizenship provisions.

In 1987, the Single European Act introduced Article 14 EC to progressively establish the internal market, and assure full recognition of the Four Freedoms (i.e., goods, persons, capital and services). This is still credited with setting the political conditions to extend free movement,⁵⁵ and cementing the inclusion of Citizenship of the Union in Maastricht.

The debate that followed Maastricht sought to clarify citizenship's philosophy according to recognized models on which the application of the Treaty provisions could be based. The three main models identified in the previous section emerged: market, political and social citizenship.⁵⁶

Barnard suggested that while those models often launch citizenship discussions, EU citizenship is really inclusionary or exclusionary. Inclusionary citizenship comports with the social citizen, conferring Treaty protection on a wide range of individuals and con-

⁵⁰ Jukka Snell, *And Then There Were Two: Products & Citizens in Community Law* (May 7, 2005) (unpublished paper, on file with University of Leicester).

⁵¹ 'Towards a Europe for Citizens', *Bulletin of the European Communities* 8/75.

⁵² Report from the ad hoc Committee on a People's Europe to the European Council, Supp. 7/85-Bulletin of the European Communities 7/85.

⁵³ DOUGLAS-SCOTT, *supra* note 4, at 482.

⁵⁴ See, e.g., Council Decision (EEC) No. 87/327, 1987 O.J. (L166) 20 (discussing the Erasmus Programme concerning student exchange).

⁵⁵ *Commission Report on the Implementation of Directives 90/364, 90/365 and 93/96*, at 4, COM (1999) 127 final (March 17, 1999) [hereinafter 1999 Commission Report].

⁵⁶ BARNARD, *supra* note 46, at 401.

templating their diverse social needs. It includes all categories of residents and third-country nationals (TCNs). Exclusionary citizenship treats non-nationals as “the other;” a foreigner whose exclusion guarantees citizen security.⁵⁷ Barnard posits that “exclusion” was on the “ascendancy” prior to the Treaty of Amsterdam, and that the EU has been rethinking exclusionary principles.

Yet the 2005 Constitutional Treaty referenda and the 2008 Irish rejection have highlighted the continued existence of exclusionary attitudes. Such attitudes destroy values such as diversity and tolerance. Barnard supports inclusionary principles, citing the value and necessity of employing TCNs to fill job gaps created by an aging population, low birth-rates and skill shortages in key industries.⁵⁸ While some voters seemed unconvinced in 2005, and remain so in 2008, the ECJ has recognized that migrants deserve Treaty protection for their value-added to Community objectives.

3.2 *The Prelude to the Maastricht Treaty*

By the Rome European Council,⁵⁹ European citizenship had become one of the key factors underpinning the Union’s quest for democratic legitimacy. Citizenship would, in Handoll’s view, reflect the aims of the Union as an indivisible body of rights and duties formed by the coherent development of economic, political and social rights.⁶⁰ Shortly after the Rome Council, the European Parliament proposed a new title in the EEC Treaty on protecting fundamental rights and freedoms including, *inter alia*, citizenship rights of non-discrimination on grounds of nationality, freedom of movement and residence, and some political rights.⁶¹ It also proposed rights of free movement and residence for TCNs legally resident in the Community and a provision allowing for the development of citizenship law. In these proposals, the intention to balance rights across the market, political and social citizenship types can clearly be seen.

Maastricht represented the Community’s shift from an economic Europe, in which the market citizen was king, to a social and political union, in which broader citizenship rights were granted to all Member State nationals. The Treaty on European Union substantially

⁵⁷ *Id.* at 402.

⁵⁸ *Id.* at 441-442; *Commission Green Paper on an EU Approach To Managing Economic Migration*, at ¶ 2, COM (2004) 811 final.

⁵⁹ The European Council – Rome. 27-28 October 1990. Bulletin of the European Communities 10/90, I.4

⁶⁰ JOHN HANDOLL, FREE MOVEMENT OF PERSONS IN THE EU 9.57 (1995).

⁶¹ European Parliament Resolution on the Intergovernmental Conferences in the context of the European Parliament’s Strategy for European Union, July 11, 1990, O.J. (C324) 219.

embraced the European Parliament's proposals and inserted a new Part Two to the EC Treaty entitled 'Citizenship of the Union,' which comprised Articles 17-22 EC (ex-Articles 8-8e).

Barber saw these rights as an attempt to alleviate the democratic deficit and enhance the legitimacy of the European Project⁶² reflected in the desire to "establish a citizenship common to nationals of their countries."⁶³ This then became European citizenship's purpose. Significantly, however, including the citizenship provisions in the EC Treaty enabled, in fact, obligated, the ECJ to interpret and enforce them by placing the Court in the driver's seat and granting it the power to steer citizenship's development.

Curiously, although the provisions sought to engender a sense of belonging to the EU amongst Europe's citizens, the vast majority of those provisions are only enforceable against the Member States horizontally.⁶⁴ Whether the citizens recognise that their rights derive from the Union rather than the Member State is, therefore, debatable. In fact, European nationals from EU Member States possess insufficient awareness of their EU Citizen status, and the accompanying rights,⁶⁵ a "communication deficit" that was considered contributory to the failure of the Constitutional Treaty in 2005.⁶⁶

4. THE LAW OF EU CITIZENSHIP

4.1 *Citizenship Provisions*

Article 17 EC establishes Citizenship of the European Union, by defining the EU's membership and asserting that EU citizens are entitled to rights and subject to duties. Articles 18-21 EC contain the substantive citizenship rights. Article 18 EC deals with free move-

⁶² N. W. Barber, *Citizenship, Nationalism and the European Union*, (2002) E.L. REV. 27(3) at 246.

⁶³ Preamble to the Consolidated Treaty on the European Union, 2002 OJ C325.

⁶⁴ BARNARD, *supra* note 46.

⁶⁵ Gallup Organization Hungary, European Union Citizenship, Analytical Report, Flash Eurobarometer Series #213, February 2008, Main Findings at 4-6, available at http://ec.europa.eu/public_opinion/flash/fl_213_en.pdf; see also 13.10.2005, COM (2005) 494 final (March 10, 2005); Communication From the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, The Commission's contribution to the period of reflection and beyond: Plan-D for Democracy, Dialogue and Debate [hereinafter "Plan D"].

⁶⁶ European Commission, Directorate General for Justice, Freedom and Security, Right of Union citizens and their family members to move and reside freely within the Union, Guide on how to get the best out of Directive 2004/38/EC, 2004 O.J. (L158) 77, available at http://ec.europa.eu/commission_barroso/frattini/archive/guide_2004_38_ec_en.pdf [hereinafter "Guide"].

ment of citizens. Articles 19-21 EC grant rights of political citizenship.⁶⁷ Article 19 EC covers voting rights and the right to stand as an electoral candidate in Member State elections.⁶⁸ Article 20 EC entitles EU citizens to diplomatic protection abroad in any diplomatic mission of any Member State.⁶⁹ Article 21 EC covers a citizen's rights to access the Institutions, receive aid from the EU Ombudsman and to receive communication in the official language of their choosing.⁷⁰

Finally, Article 22 EC is an important oversight clause setting forth a monitoring procedure and a legal basis for action. It provides:

The Commission shall report to the European Parliament, to the Council and to the Economic and Social Committee every three years on the application of the provisions of this part. This report shall take account of the development of the Union.

On this basis, and without prejudice to the other provisions of this Treaty, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may adopt provisions to strengthen or to add to the rights laid down in this part,

⁶⁷ A detailed discussion on the political rights under the Treaty is outside the scope herein. Nonetheless, it is important to identify the primary and secondary legislation to which such rights are subject.

⁶⁸ Article 19 EC on voting rights and Article 190 EC on universal suffrage cover electoral rights. Council Decision 76/787/ECSC, EEC, relating to the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, 1976 O.J. (L 278) 1-4, as amended by Council Decision 2002/772, amending the Act concerning the election of members of the European Parliament by direct universal suffrage, 2002 O.J. (L 283); Council Decision 2004/511/EC concerning the representation of the people of Cyprus in the European Parliament in case of a settlement of the Cyprus problem, (2006) O.J. (L 211) 22; Council Directive 93/109/EC laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, 1993 O.J. (L 329) 34; Council Directive 94/80/EC, laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in municipal elections for citizens of the Union residing in a Member State of which they are not nationals, 1994 O.J. (L 368) 38, as amended by Council Directives 96/30/EC 1996 O.J. (L 122) 14 and 2006/106/EC 2006 O.J. (L 368) 409.

⁶⁹ Article 20 EC is subject to secondary legislation: Decision 95/553/EC, regarding protection for citizens of the European Union by diplomatic and consular representations, 1995 O.J. (L 314) 73; Decision 96/409/CFSP, on the establishment of an emergency travel document, 1996 O.J. (L 168) 11.

⁷⁰ Article 21 covers basic rights of access to the Institutions and officials, and is subject to secondary legislation: Decision 94/262/ECSC, on the regulations and general conditions governing the performance of the Ombudsman's duties, 1994 O.J. (L 113); Commission Decision 2000/633/CE, CECA, amending its Rules of Procedure, 2000 O.J. (L 267) (establishing the Code of Good Administrative Behavior).

which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements.

Article 22 EC thus has a two-fold purpose. First, it sets up a requirement for reports every three years on the application of the Citizenship provisions of Part Two of the Treaty.⁷¹ Second, it establishes a legal basis to clear the path for future development of Citizenship rights to ensure that the Union's overriding interest in enhancing its democratic legitimacy keeps pace with its citizens' changing aspirations.⁷² The wording in paragraph 2 could not be clearer: the strengthening of citizenship rights is seen as a dynamic process which is expected to occur as a direct consequence of the reporting requirement within Article 22 EC.⁷³

Despite the importance of political citizenship rights in bringing the EU and its citizens closer, d'Oliveira⁷⁴ has correctly identified that the political dimension remains underdeveloped. Most citizenship activity, including that in the ECJ, relates to free movement and non-discrimination, combined with Article 12 EC.

4.2 *Article 17 EC*

Article 17(1) EC defines the limits of membership and grants citizenship to nationals of the Member States. As Member States retain the right to determine to whom they will grant nationality,⁷⁵ whilst the Union grants citizenship in conceptual terms, it does not

⁷¹ The most recent report provides an assessment of the application of Part II EC for the period between May 1, 2004 to June 30, 2007, and asserts that awareness of citizenship rights is growing. COM (2008) 85 final (Feb. 15, 2008); Report From the Commission, Fifth Report on Citizenship of the Union, (May 1, 2004-June 30, 2007), <http://eur-lex.europa.eu/LexUrlServ/LexUrlServdo?url=COM:2008:0085:FIN:EN:PDF>; SEC (2008) 197, Commission Staff Working Document Annex to the [5th] Report [on European Union Citizenship] from the Commission, at 9, *available at* <http://ec.europa.eu/transparency/regdoc/rep/2/2008/EN/2-2008-197-EN-1-0.Pdf>. The Report notes on page 5, however, that "between June 2006 and February 2007, 19 infringement procedures were opened for non-communication of national implementation measures: in June 2007, 15 were still open, 4 of which had been referred to the ECJ" for infringement proceedings.

⁷² PAUL CRAIG and GRÁINNE DE BÚRCA, *EU LAW – TEXT, CASES AND MATERIALS* 760 (3d ed. 2003) [hereinafter CRAIG and DE BÚRCA]. The need for Council unanimity, however, weakens its practical value.

⁷³ Note that in Article 22, the second paragraph begins "*On this basis*" (with "*this*" making direct reference to the three year report).

⁷⁴ Jessurun d'Oliveira, *European Citizenship: Its Meaning, Its Potential* in Dehousse, R (ed.) *Europe After Maastricht. An Ever Closer Union*, Law Books in Europe (1994) at 147.

⁷⁵ Case 369/90, Micheletti et al. v. Delegacion del Gobierno en Cantabria, 1992 E.C.R. I-4239.

actually control its membership. Union citizenship's separate but complementary status was confirmed in the Treaty of Amsterdam through a statement asserting that Union citizenship does not replace national citizenship. Thus nationals of the Member States automatically fall with the personal scope of the Treaty.

Under Article 17(2) EC, "[c]itizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby." The rights, therefore, are not limited to the specific citizenship provisions in Articles 18-21 EC, but also include other rights contained in the Treaty and secondary legislation.⁷⁶ These rights include *inter alia* the right not to be discriminated against (Articles 12, 13, 141 EC and Directive 2000/43/EC),⁷⁷ the right of free movement (Articles 39, 43 and 49 EC and Directive 2004/38/EC),⁷⁸ and political rights such as Article 190(4) EC (elections to the Parliament) and Article 255 EC (transparency). The connection of Article 17(2) EC with rights elsewhere in the Treaty emphasises the Treaty makers' intention to make the concept meaningful to the citizens and prompted AG La Pergola to describe Part Two EC as progress of "major significance in the construction of Europe."⁷⁹

Although rights and remedies are provided for in the Treaty, there is no mention of duties. Kadelbach⁸⁰ argues that this is because the Union wishes to be accepted as a body politic on the basis of giving rights rather than demanding duties of its citizens. More pragmatically, however, Everson⁸¹ rightly comments that the imposition of duties requires a level of allegiance to the polity that the Union lacks, hence the imperative for creating a European citizenship in the first place.

⁷⁶ BARNARD, *supra* note 46, at 403-404.

⁷⁷ 2000 O.J. (L 180).

⁷⁸ Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, 2004 O.J. (L 158) 77 [hereinafter "Directive 2004/38"]. After the original text was adopted, a subsequent Corrigendum erroneously published the title as 2004/58 leading to confusion concerning this legislation. Corrigendum to Directive 2004/38/EC, 2004 O.J. (L 229) 35. Subsequent corrigenda corrected the error. See Corrigendum to the corrigendum to Directive 2004/58/EC, 2005 O.J. (L 197) 34; Corrigendum to Directive 2004/38/EC, corrected version in 2004 O.J. (L 229); 2007 O.J. (L 204) 28. Corrigendum to Corrigendum to Directive 2004/58/EC, 2004 O.J. (L 229), 2005 O.J. (L30) 27.

⁷⁹ Joined Cases C-4 and 5/95, Stöber and Pereira 1997 E.C.R. I-511 at Recital 50.

⁸⁰ Stefan Kadelbach, *Union Citizenship* 36 (Jean Monnet Working Paper 9/03).

⁸¹ Everson, *supra* note 29, at 89.

To exercise their rights under the Treaty, citizens also have to show that their situation falls within the material scope of the Treaty's protection. However, the Treaty's protection of these rights is less than intuitive because, to fall within its material scope, citizens have generally had to exercise their right of cross-border movement. Simply stated, "[N]o movement, no EU citizenship rights."⁸²

4.3 Article 18 EC

Shaw commented, "[T]he most notable feature of citizenship is that it is founded on the concept of free movement."⁸³ Since most Member State nationals never move, they do not exercise Treaty-based movement rights.⁸⁴ Yet, even static nationals benefit greatly from free movement rights because although they may never leave their hometown, they derive benefits from the free market environment created by the cross-border movement and commerce of others.⁸⁵ "EU citizen" as an autonomous status, therefore, is arguably a misnomer; still only a symbol attaching to the circumstances of movement between Member States of the EU.

Article 18 EC provides Union citizens with rights to free movement; to entry into other Member State territories and to reside therein, subject to the limitations and conditions in the Treaty and in secondary legislation. Directive 2004/38/EC of 29 April 2004, which entered into force on 30 April 2006 is a crucial addition to the Citizenship *acquis*, and illustrates the serious attention the *acquis* has been receiving in this area.⁸⁶ The Directive's primary achievement in re-

⁸² Niamh Shuibhne, *Free Movement of Persons and the Wholly Internal Rule: Time to Move On?*, 39 COMMON MARKET L. REV. 731, 749 (2002).

⁸³ Shaw, *supra* note 10, at 2.

⁸⁴ CATHERINE BARNARD, *THE SUBSTANTIVE LAW OF THE EU* 401 (OUP 2004) (stating that in 2000, less than 2% of the EU working population exercised free movement rights); SEC (2008) 197, *supra* note 71 (stating that more recently, the Commission represented that "[a]s of 1 January 2006, there were approximately 8.2 million EU citizens (not necessarily working) who were exercising their right to reside in another Member State," out of a population statistic as of 1 January 2006 for the EU 25 of 463,646,244) (citing Eurostat, Total Population Table for 1 January, 1997- 2008, available at <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&language=en&pcode=caa10000&tableSelection=1&footnotes=yes&labeling=labels&plugin=1>). Note that this comparison is for illustrative purposes only. Whilst the percentage may not seem to have grown significantly since Barnard cited the 2% movement rate above, the EU has, since 2000, added 12 new Member States, and free movement rights have been expanded as discussed *infra*, implying that the percentage of movers is certainly much greater than in 2000.

⁸⁵ Shuibhne, *supra* note 82, at 731.

⁸⁶ Article 18 EC covers the right to free movement and residence. It is currently applied subject to the secondary legislation in force: Council Regulation (EEC) No

peeling the multiple citizenship Directives was to simplify EU citizenship law, placing it into a single piece of secondary legislation that complemented Article 18 EC.

The rights conferred by Article 18 EC, which have been applied more regularly than any other of the substantive citizenship provisions, are linked both to the economic rights in Articles 39, 43 and 49 EC, and the rights of the non-economically active, as per the Regulations and Directives amended or repealed by Directive 2004/38/EC.⁸⁷ Initially, the paucity of new rights prompted commentators like O'Keefe to question the need for Article 18 EC but, after a slow start, the Court has now provided an answer.⁸⁸

5. THE DISCRIMINATION PROVISIONS

5.1 *Article 12 EC*

Article 12 EC prohibits discrimination on grounds of nationality and is inextricably linked with citizenship. Advocate General Jacobs of the ECJ asserted that "[f]reedom from discrimination on grounds of nationality is the most fundamental right conferred by the Treaty and must be seen as a basic ingredient of Union citizenship."⁸⁹

Article 12 EC applies 'without prejudice' to the provisions in other Treaty articles, therefore, where nationality discrimination is allowed, for example in Article 39(4) EC, Article 12 EC cannot apply. Furthermore, as Article 12 EC applies only "within the scope" of the Treaty, other Treaty articles covering the situation are needed to bring it within the Treaty's material scope. For this reason, protection under Article 12 EC can only be invoked when an individual within the Treaty's personal scope exercises a Treaty right, such as free movement.

Before citizenship, only the economically active and others with a special status in Community law, such as students, fell within the personal scope of the Treaty and could avail themselves of its remedies. The combination of citizenship and Article 12 EC, therefore, extended the protection of EU law increasing the Union's relevance to all citizens and thus enhanced its democratic legitimacy. O'Leary sees Article 17(2) EC's combination with Article 12 EC as confirming "that Union citizenship explodes the 'linkages' which EC law previously re-

1612/68 on freedom of movement for workers within the Community. 1968 O.J. (L 257) 2, as amended by Directive 2004/38/EC *supra* note 78; see Guide, *supra* note 66, at 6.

⁸⁷ Directive 2004/38/EC, *supra* note 78.

⁸⁸ O'Keefe, *supra* note 49.

⁸⁹ Case C-274/96, Bickel and Franz, 1998 E.C.R. I-7637, Recital 24.

quired for the principle of non-discrimination to apply. . . involvement in an economic activity. . .”⁹⁰

Extending rights to non-economically active moves the Union beyond the economic sphere, brings all Member State nationals within the Treaty’s personal scope, and extends EU law remedies to all EU citizens. Citizenship has thus become a safety net of anti-discrimination rights based on nationality, below which citizens of the Member States cannot fall. Lawful residence alone now entitles citizens to rely on Article 12 EC in all situations falling within the material scope of Community law, although *Grzelczyk*⁹¹ confirmed that the right not to be discriminated against on grounds of nationality applied only after the individual exercised their right of movement and residence. The Court has applied the same approach in other cases, granting non-workers the right to equal treatment in relation to residence in another Member State.⁹² Citizenship, therefore, extends the concept of non-discrimination, not just under Article 12 EC, but if a citizen is entitled to all the rights and remedies in the Treaty, to the broader protection from discrimination under Article 13 EC.

5.2 Article 13 EC

Article 13 EC grants authority to combat discrimination based on sex, race, ethnic origin, religion, disability, age or sexual orientation, thus departing from the Union’s prior focus on discrimination based only on sex or nationality.⁹³ Any discrimination undermines “the achievement of Treaty objectives, in particular the attainment of ‘economic and social cohesion and solidarity.’”⁹⁴

As well as increasing the scope of the Treaty’s protection by bringing new grounds of discrimination into Community competence, Article 13 EC makes a difference in relation to sex equality because, in breaking the link with economic activity, it brings substantial numbers of women and men into the anti-discrimination emancipatory programme.⁹⁵ The language behind the new provisions, reflected in the

⁹⁰ Siofra O’Leary, *Putting Flesh on the Bones of European Citizenship*, 24 EUR. L. REV. 68, 77-78 (1999).

⁹¹ Case C-184/99, *Grzelczyk v. Centre Public d’aide Sociale d’Ottignies-Lovain-la-Neuve*, 2001 E.C.R. I-6193.

⁹² Case C-456/02, *Trojani v. Centre Public d’aide Sociale de Bruxelles*, 2004 3 C.M.L.R. 38.

⁹³ Mark Bell, *Equality and The European Union Constitution Introduction*, 33 INDUS. L.J. 242, 245 (2004).

⁹⁴ Ian Sumner, *The Charter Of Fundamental Rights Of The EU And Sexual Orientation*, IFLJ 2002(156) at 6.

⁹⁵ CLAIRE MCGLYNN, *EC SEX EQUALITY LAW: TOWARDS A HUMAN RIGHTS FOUNDATION*, SEX EQUALITY IN THE EUROPEAN UNION 241, 242 (Tamara K. Hervey & David O’Keefe eds., 1996).

preambles to the Race and Framework Directives,⁹⁶ made the connection with fundamental rights evident. Prechal asserts that the inclusion of Article 13 EC reflects the fact that equality and non-discrimination are no longer matters relating to market integration.⁹⁷

Race equality also has a part to play in securing European expansion, as racial differences are more pronounced in relation to the recent and future accession states whose citizens must thus be protected when exercising their fundamental right of free movement. That is not to say that there is no economic rationale for the extension of the Community's competence, especially in the area of race, because, as the Essen Priorities indicate, non-discrimination is expected to help turn the EU into a dynamic, knowledge-based economy. This depends on large numbers of migrants, including those from third countries, to maintain the current ratio of working-to-retired persons.⁹⁸

However, despite the economic benefits that may accrue from protecting these new grounds, authors such as Brown are persuasive when describing the Article 13 EC Directives as vehicles through which the EU can deliver the fundamental right of non-discrimination.⁹⁹ An example is the introduction of a concept of victimization and harassment that was included in the Article 13 EC Directives and the Amended Equal Treatment Directive. Protection against victimization and harassment also reinforces Fredman's view of equality as a fundamental right based on the concept of human dignity.¹⁰⁰

Neither Article 12 nor 13 EC provide general anti-discrimination guarantees, or freestanding rights. These provisions are only applied with other Treaty rights; thus, equality is guaranteed ONLY in relation to the Treaty, and not against Member States.¹⁰¹ Protection from discrimination based on one's nationality is particularly important in the context of a polity based on free movement. In the EU, equality has many facets. It is "simultaneously a value, an objective, a

⁹⁶ Directive 2000/43/EC, Race Directive, 2000 O.J. (L180) 22; Directive 2000/78/EC, General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L303) 16.

⁹⁷ Sacha Prechal, *Equality of Treatment, Non-discrimination and Social Policy: Achievements in Three Themes*, 41 COMMON MKT. L. REV. (2004).

⁹⁸ The Carnegie Council predicts that without a substantial annual increase in migration from third countries, average Gross Domestic Product in the EU will reduce to less than 1%, and will undermine the sustainability of social security systems.

⁹⁹ C. Brown, *The Race Directive: Towards Equality for All the People of Europe*, 21 Y.E.L. 195, 196 (2001).

¹⁰⁰ Sandra Fredman, *Equality: A New Generation?*, 30 INDUS. L. REV. 145, 155 (2001).

¹⁰¹ Sumner, *supra* note 94, at 10.

fundamental right, a positive duty and a legal competence" and must be considered carefully.¹⁰²

Both non-discrimination Articles have the same objective, thus the existence of separate provisions is arguably redundant. *Garcia Avello*¹⁰³ provides an example. There, the ECJ respected the cultural significance attached to Spanish surnames, applying Article 12 EC to force Belgium to register a child's name in accordance with Spanish naming customs. But, given the range of protection in Article 13 EC, naming could be considered an ethnic or cultural trait, rather than one attributable to nationality. So, while the Directives¹⁰⁴ that were implemented after Article 13 was inserted into the EC Treaty in 1999 were obviously intended to expand protection, they also generated confusion. Growing cultural diversity and obvious ethnic characteristics among new EU citizens are likely to blur the distinction between Articles 12 and 13 EC discrimination still further.

5.3. Secondary Legislation

Some have said that requiring the right of residence to depend on an economic link was inconsistent with the Treaty of Rome.¹⁰⁵ Recognizing that many persons were then outside of Rome's intended coverage, three Directives were adopted: (1) Directive 90/364/EEC on the right of residence,¹⁰⁶ (2) Directive 90/365/EEC on the right of residence for persons who have ceased economic activity,¹⁰⁷ and (3) Directive 93/96/EEC on the right of residence for students.¹⁰⁸ According to the Commission's report on their implementation, these Directives were of limited success. Member States resisted the transposition process and citizens found the provisions vague and complex.¹⁰⁹ One can agree with the Commission's inference that the shortcomings in those Directives led to inclusion of Part II in the EC Treaty at Maastricht.¹¹⁰

¹⁰² Bell, *supra* note 93, at 256. This is in addition to legislation on gender equality, mainly related to employment and social security issues.

¹⁰³ Case C-148/02, *Garcia Avello v. Belgium*, 2004 E.C.R. I-11613.

¹⁰⁴ Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, 2000 O.J. (L303) 16; and Directive 2002/73/EC amending Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working condition, 2000 O.J. (L269) 15.

¹⁰⁵ 1999 Commission Report, *supra* note 55, at 4.

¹⁰⁶ 1990 O.J. (L180) 26.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ 1999 Commission Report, *supra* note 55, at 8. *See generally id.* at 15-20 (concerning citizens' problems with the Directives).

¹¹⁰ *Id.* at 4-5.

Secondary legislation was “piecemeal” until 2004, when relevant legislation concerning the free movement of persons was codified under a single “Citizenship Directive.”¹¹¹ The Directive repealed *inter alia* the aforementioned regulations and abolished the requirement of community resident permits, even explaining when unequal treatment may be justified. It further established the right of permanent residence not linked to economic activity.¹¹² Free movement now requires only that the mover not be “*an unreasonable burden on the social assistance system of the host MS.*”¹¹³ However, the link may not be completely severed. Craig notes that the original Directive did consider Member States’ financial interests, and although economic activity is no longer “required,” financial self-sufficiency is still expected.¹¹⁴ The new Directive reflects the prioritisation of economic interests, although the ECJ for its part has provided an interesting interpretation.

6. *WORKER V PERSON*: JUDICIAL INTERPRETATION OF CITIZENSHIP AND THE DEMISE OF THE ECONOMIC LINK

The Treaty scope of citizenship is best understood when looking at a form of a citizens – migrants: this could be as a worker, tourist, student, job-seeker, transient, a citizen with no official reason to move, or a family member of the aforementioned. The scope of discrimination that they suffer, therefore, is best understood in the context of migrants who request services from their host State. The context of such services might include establishing a local residence, requesting access to education, applying for social services, or merely accompanying a relocating family member. Discrimination provisions also protect Member State nationals subjected to reverse discrimination at home. This occurs when nationals temporarily leave their country of residence, exercising their free movement rights, but are denied a benefit or local service upon their return as a consequence of their absence.¹¹⁵

Any migrant who is economically active is protected. Article 39 EC protects workers, Article 43 EC protects a citizen’s right of establishment in another Member State, including, *inter alia*, to pursue a business activity, and Article 49 EC protects a citizen’s right to provide services throughout the Union. There is considerable legislative and case history protecting economically active and mobile Member State

¹¹¹ Directive 2004/38/EC, *supra* note 78 (see generally, the preamble para.4).

¹¹² White, *supra* note 14, at 3.

¹¹³ Directive 2004/38/EC *supra* note 78 (see the preamble 10 and 16, and Articles 7, 12, 13 and 14).

¹¹⁴ CRAIG and DE BÚRCA, *supra* note 72, at 756.

¹¹⁵ Case C-224/98, D’Hoop v. Office National de l’Emploi, 2002 E.C.R. I-6191.

nationals, therefore, the focus herein will be on the Court's application of the citizenship provisions where there is no economic activity. The Court has continually expanded its application of the case law, relying on important cases like *Bidar*¹¹⁶ to re-affirm its post-Maastricht citizenship judgments.

After Maastricht, the Court's decisions propelled citizenship beyond the economic, and reached into internal affairs to guarantee personal freedoms. Some questioned the Court's methodology. By applying conceptual rather than primary legislative links, the Court raised questions of competence that are "not to everybody's taste."¹¹⁷ Nonetheless, the Court has considerable license to interpret the Treaty and routinely adopts a teleological approach to its work.

The Court's early cases were typified by a cautious approach to citizenship that consolidated existing Community law rather than seeking to expand into new territory. At the time, development of a citizenship *acquis* seemed unlikely. In the first citizenship case, *Skanavi*,¹¹⁸ the ECJ avoided the citizenship question stating that where non-discrimination¹¹⁹ and free movement were specifically expressed in other Treaty provisions, citizenship provisions were "residual."¹²⁰ Thus, the Court relied on other Treaty provisions such as Article 43 EC, and seeing no need to consider citizenship, argued that Article 18 EC was a residual right, secondary to more specific Treaty rights. In addition, in the cases of *Uecker and Jacquet*, the Court ruled that Article 17 EC was not intended to alter the material scope of the Treaty to wholly internal situations outside the scope of Community law.¹²¹

*Boukhalfa*¹²² was a landmark ruling, where the Court leapt beyond both the Treaty,¹²³ and secondary legislation (Article 7(1) of Regulation 1612/68), to protect a Belgian national employed in the German Embassy in Algiers. The case was noteworthy for Advocate General Léger's support of "the new concept of European citizenship" as both a symbol enshrined in (then) Articles 8 to 8e EEC and one of

¹¹⁶ Case C-209/03, *Bidar v. London Borough of Ealing, Sec'y of State for Educ. and Skills*, 2005 E.C.R. I-02119.

¹¹⁷ Norbert Reich & Solvita Harbacevica, *Citizenship and Family on Trial: A Fairly Optimistic Overview of Recent Court Practice with regard to Free Movement of Persons*, 40 COMMON MKT L. REV 615, 638 (2003).

¹¹⁸ Case C-193/94, *Skanavi and Chryssanthakopoulos*, 1996 E.C.R. I-929.

¹¹⁹ *Id.* at ¶ 21.

¹²⁰ CRAIG and DE BÚRCA, *supra* note 72, at 756.

¹²¹ Cases C-64 and 65/96, *Uecker and Jacquet v. Land Nordrhein-Westfalen*, 1997 E.C.R. I-317.

¹²² Case C-214/94, *Boukhalfa v. Bundesrepublik Deutschland*, 1996 E.C.R. I-2253 (Opinion of A.G. Léger, para. 63).

¹²³ *Id.* at ¶ 14.

the mechanisms for advancing the construction of Europe. Léger accepted the Court's obligation – the “conclusions *inherent* in citizenship” permit every EU citizen to enjoy uniform equal treatment, irrespective of nationality.¹²⁴ The ECJ would do whatever was necessary “to ensure that [the Treaty's] full scope is attained.”¹²⁵ Thus it could be said of the citizenship *acquis* derived from Léger's opinion in *Boukhalfa*, that “[i]f all the conclusions inherent in this concept are drawn, every citizen of the Union must, whatever his nationality, enjoy exactly the same rights and be subject to the same obligations.”¹²⁶

Kostakopoulou believes the Court's reluctance indicated sensitivity to Member States' concerns about the scope of its institutional operation and teleological approach in the run up to the 1996 IGC.¹²⁷ This certainly echoes its hesitancy in developing the *acquis* in other politically sensitive areas, such as fundamental rights, where the supremacy of EC law could be undermined. This suggests that the ECJ's later developments extending the Treaty's personal and material scope may have exceeded the intentions of the Treaty makers. However, it fits with a more general tendency to push open the legal door in a tentative fashion initially before then exploring the new room with enthusiasm.

The Court's reluctance was not shared by the Advocates General, who were keen to adopt a purposive approach as stated above by Advocate General Léger: that the Court was responsible for ensuring that the full scope of citizenship is attained.¹²⁸

The Commission's First Report on ‘Citizenship of the Union’¹²⁹ encouraged the extension of free movement and residence rights beyond the economically active. Its Second Report¹³⁰ observed that citizenship had raised citizens' expectations of the rights that should be conferred and protected. Following the recommendations of the High Level Panel on the Free Movement of Persons, the Commission stated that citizenship rights apply irrespective of the pursuit of gainful activity.¹³¹ To consolidate this conceptual shift from economic activity to social and political citizenship, the Commission proposed revising the existing secondary legislation on entry and residence to reflect the protection of rights for the non-economically active.¹³² These develop-

¹²⁴ *Id.* at ¶ 63 (emphasis added).

¹²⁵ *Id.*

¹²⁶ Boukhalfa, *supra* note 122, at Recital 63.

¹²⁷ Dora Kostakopoulou, Ideas, Norms and European Citizenship: Explaining Institutional Change, 68(2) MOD L. REV. 233, 245 (2005).

¹²⁸ Boukhalfa, *supra* note 122, at Recital 63.

¹²⁹ EUR. PARL. DOC. (COM 702) 1993.

¹³⁰ EUR. PARL. DOC. (COM 230) 1997.

¹³¹ EUR. PARL. DOC. (COM 403) 1998.

¹³² *Id.*

ments spoke of changed political intentions, and in *Martinez Sala*,¹³³ the Court took advantage of the new political situation to extend the availability of remedies using the citizenship provisions.

6.1 *Martinez Sala: citizenship expanded beyond economic links*

Member States did not easily abandon pre-established notions of economic links, or the notion that migrants should be subject to some greater justification before being granted movement and residence rights. However, they slowly accepted Treaty prohibitions on imposing administrative burdens on non-nationals, or refusing them benefits for matters within the Treaty's purview. Today, one thinks of the citizen as an "individual, with rights against the host State."¹³⁴ That perception emerged from the cases that follow.

The landmark *Martinez Sala* judgment opened the door to the granting of rights to the non-economically active and started, as O'Leary suggests, to put flesh on the conceptual bones of European citizenship.¹³⁵ The Court held that *Martinez Sala*, a Spanish national lawfully resident in Germany, fell within the personal scope of the Treaty by virtue of her Union citizenship, independent of whether or not she was a worker. As such, and under Article 17(2) EC, she was entitled to the rights and remedies laid down by the Treaty, including the right under Article 12 EC not to be discriminated against on the grounds of her nationality on matters within the material scope of the Treaty.

As a social benefit under Regulation 1612/68, and as a family benefit under Article 4(1)(h) of Regulation 1408/71, the child-raising allowance fell within the material scope of the Treaty, even though the Regulations previously had only applied to workers. O'Leary sees the novel way in which the Court uses Article 17(2) EC in combination with Article 12 EC, and the broad reading of the secondary legislation, as confirming "that Union citizenship explodes the 'linkages' which EC law previously required for the principle of non-discrimination to apply. . . involvement in an economic activity. . ."¹³⁶

Extending rights to the economically inactive expanded Union citizenship beyond the market citizen, thereby increasing the connection between Union and individual. All Member State nationals were now within the Treaty's personal scope and had access to EU legal remedies. As the Treaty makers had intended, citizenship rights became a safety net of EU rights and remedies below which citizens

¹³³ Case C-85/96, *Martinez Sala v. Freistaat Bayern*, 1998 E.C.R. I-2691.

¹³⁴ BARNARD, *supra* note 46, at 231-232.

¹³⁵ O'Leary, *supra* note 90.

¹³⁶ *Id.* at 77-78.

could not fall. White¹³⁷ sees this dissociation of economic activity from the right of residence as even more striking in later cases such as *Chen*.¹³⁸ What is now clear is that lawful residence entitles a citizen *qua citizen* to rely on Article 12 EC in all situations falling within the material scope of Community law.

6.2 Entry and Residence

The material scope of Community law includes situations that involve the exercise of fundamental freedoms guaranteed by the EC Treaty, or the right to move and reside under Article 18(1) EC. Following the judgment in *Bidar*,¹³⁹ this now includes entry into any Member State for the purpose of pursuing secondary education. Moreover, as the Court held in *Baumbast*, a Union citizen could “enjoy a right of residence by direct application of Article 18(1) EC.”¹⁴⁰

Whilst these decisions are fully congruent with citizenship’s direction, they offer a surprising application. The citizen’s right to enter and reside in another Member State, is not, however, unconditional because Article 18(1) EC refers to “limitations and conditions as laid down” in the Treaty or secondary legislation. Thus, in *Wijsenbeek*,¹⁴¹ Member States could conduct identity checks on individuals entering the country, whilst in *ex parte Yiadom*,¹⁴² public policy considerations from Articles 39, 43 and 49 EC were used in conjunction with Article 18(1) EC to prevent a Union citizen from entering the United Kingdom. A Member State could also rely on any objectively justifiable differences between their own nationals and those of other Member States when determining whether to grant indefinite leave to remain.¹⁴³

Although entry and residence are subject to limitations, restrictions are interpreted strictly and subject to judicial review through national courts.¹⁴⁴ Furthermore, restrictions must be applied in accordance with the limits imposed by Community law, in particular the principle of proportionality.¹⁴⁵ The application of the proportionality principle prompted the Advocate General in *Bidar* to

¹³⁷ White, *supra* note 14, at 4.

¹³⁸ Case C-200/00, *Zhu and Chen v. Secretary of State for the Home Department*, 2004.

¹³⁹ *Bidar*, *supra* note 116.

¹⁴⁰ Case C-413/99, *Baumbast and R v. Secretary of State for the Home Department*, 2002 E.C.R. I-7091 at Recital 94.

¹⁴¹ Case C-378/97, *Wijsenbeek*, 1999 E.C.R. I-6207.

¹⁴² Case C-357/98, *R v. Home Sec’y, ex parte Yiadom*, 2000 E.C.R. I-9265.

¹⁴³ Case C-356/98, *Kaba v. Sec’y of State for the Home Department*, 2000 E.C.R. I-2623 at Recital 31.

¹⁴⁴ *Id.* at Recital 86.

¹⁴⁵ *Bidar*, *supra* note 116 (Opinion of Advocate General Geelhoed, Recital 30).

comment that the restrictions requiring citizens not to be an unreasonable burden on public finances in Directives 90/364/EEC and 93/96/EEC were “flexible.”¹⁴⁶

In *Trojani*,¹⁴⁷ an unemployed Frenchman lawfully resident in Belgium received Treaty protection when the Belgian Government sought to deny his application for ‘Minimex’, a social assistance benefit providing a minimum subsistence allowance for persons with inadequate resources.¹⁴⁸ He could not establish residence rights relying on Articles 39, 43 or 49 EC but, as an EU citizen, he could count on the direct application of Article 18(1) EC.¹⁴⁹ Applicants may have to show sufficient resources so as not to burden a Member State’s social security system (as per Directive 90/364EC); once a citizen’s legal residency is established, however, any national legislation withholding benefits might constitute nationality-based discrimination prohibited by Article 12 EC. The combination of Articles 12, [17], and 18 EC prohibit the automatic denial of social benefits, or expulsion.¹⁵⁰ This alignment with citizenship’s overall destination extends the direct connection between Union law and the citizen, providing citizenship with the maximum effect, whilst still respecting Member States’ national sensitivities over borders.

The Court’s willingness to move beyond the requirement for movement is likely to be tested in *Jipa*,¹⁵¹ a recent case that revolves around the lawfulness of national measures to restrict free movement straddling the period before Romania acceded to the Union. In February 2008, the Advocate General’s opinion argued “that the fact that Mr. Jipa has not made use of his right of freedom of movement cannot, for that reason alone, assimilate his situation to a purely internal situation.”¹⁵² Advocate General Mazák rightly observed that “[t]he right to move freely within the territory of the Member States guaranteed by Article 18(1) EC would be rendered meaningless if the Member State of origin could, without valid justification, prohibit its own na-

¹⁴⁶ *Id.* at Recital 31.

¹⁴⁷ Case C-456/02, *Trojani v. Centre Public d’Aide Sociale de Bruxelles (CPAS)*, 2004 E.C.R. I-07573.

¹⁴⁸ *Id.* ¶ 7.

¹⁴⁹ *Id.* ¶ 2.

¹⁵⁰ *Id.* ¶ 46.

¹⁵¹ Case C-33/07, Opinion of the Advocate-General, *Ministerul Administrației și Internelor – Direcția Generală de Pașapoarte București v. Gheorghe Jipa* (February 14, 2008), available at <http://eur-lex.europa.eu/Notice.do?val=464595:cs&lang=en&list=464595:cs,455220:cs,455036:cs,451602:cs,451207:cs,442359:cs,434924:cs,433337:cs,432980:cs,426939:cs,&pos=1&page=1&nbl=78&pgs=10&hwords=free%20movement~citizenship~&checktexte=checkbox&visu=#texte>.

¹⁵² *Id.* ¶ 32.

tionals from leaving its territory to enter the territory of another Member State.”¹⁵³

6.3 Non-Discrimination

*Grzelczyk*¹⁵⁴ confirmed that citizenship, combined with Article 12 EC, brought new rights and remedies into play once the individual had exercised their rights of movement and residence. The question was whether a Member State could restrict an entitlement to social benefits to its own nationals, while still denying it to students from another Member State. The Court held that this was direct discrimination on grounds of nationality and, therefore, a breach of Article 12 EC. As *Grzelczyk* had exercised his right under Article 18(1) EC, the situation fell within the material scope of the Treaty and although maintenance grants were excluded by Article 3 of Directive 93/96/EEC,¹⁵⁵ social assistance was not.

Although a student having recourse to social assistance may not meet the self-sufficiency conditions for residence, a residence permit can only be refused if the student was an “unreasonable burden.” *Grzelczyk* had not been a burden for the first three years of his residency and only sought assistance for the final year of his course; this was hardly unreasonable.

The Court applied the same approach in a number of other cases, including *Trojani*,¹⁵⁶ where non-workers were entitled to claim the right to equal treatment. *Trojani* developed citizenship beyond previous rulings because the right of residence was derived from national rather than Community law. Despite this, the Community law remedy against nationality discrimination was triggered.

White detects an emerging principle in the Court’s judgments that suggests an entitlement to equal treatment for social protection based on the extent of the citizen’s “integration. . . into the fabric of the host Member State.”¹⁵⁷ This explains why *Martinez Sala*, who had been resident for twenty-five years in a Member State, was entitled to a long-term child raising allowance; why *Grzelczyk*, who was a relatively short-term resident, was entitled to a short-term benefit; and why, in *Collins*,¹⁵⁸ a job seeker was refused an allowance because he was not a habitual resident in the host Member State.

¹⁵³ *Id.* ¶ 35.

¹⁵⁴ Case C-184/99, *Grzelczyk*, 2001 E.C.R. I-6193.

¹⁵⁵ 1993 O.J. (L317) 59.

¹⁵⁶ *Trojani*, *supra* note 147.

¹⁵⁷ *White*, *supra* note 14, at 14.

¹⁵⁸ Case C-138/02, *Collins v. Sec’y of State for Work and Pensions*, 2004 E.C.R. I-02703.

In *Garcia Avello*,¹⁵⁹ the Court held that Articles 12 and 17 EC prevented a Member State from refusing a surname change for a family who wished to combine the father's surname with the mother's maiden name according to the Spanish tradition. Although nationals of the host State could not change their name in such circumstances, the Court held that the *Garcia Avello* children concerned could not suffer discrimination on the grounds of their dual nationality. Thus, equal treatment provisions justified different treatment. Although the case was not decided on the basis of fundamental rights, the link between citizenship and fundamental rights was highlighted in the Advocate General's Opinion.¹⁶⁰

The extent to which the scope of non-discrimination has been developed is consistent with the importance the Treaty makers placed on this area, both through Article 12 EC, and the increased interest in all forms of discrimination under Article 13 EC.¹⁶¹

Advocate General Jacobs in *Pusa*¹⁶² sought to move the Court further from discrimination as the basis for citizenship, proposing a progressive extension of the freedom of movement so that non-discriminatory restrictions were also precluded. The Court, however, relied on a difference of treatment that placed those who had exercised their free movement rights at a disadvantage compared to those who had not. Any difference had to be objectively justified on grounds independent of nationality and proportionate to achieving a legitimate aim.

6.4 Reverse Discrimination

Reverse discrimination exists where a State does not extend to its own nationals the treatment it is required under EU law to give to nationals of other Member States. It touches the heart of the *kompetenz-kompetenz* question about the limits of Union law vis-à-vis the Member States, and the Court has held that the matter rests with the Member States.¹⁶³ Movement is normally required to bring the situation into the Union arena, such as in the pre-citizenship case of *Singh*.¹⁶⁴ However, Maduro¹⁶⁵ points out that EU remedies can be extended to internal situations where the EU has a policy interest, for

¹⁵⁹ Case C-148/02, *Garcia Avello v. Etat Belge*, 2003 E.C.R. I-11613.

¹⁶⁰ *Id.* at Recital 27.

¹⁶¹ See discussion *supra* section 5.2.

¹⁶² Case C-224/02, Opinion of the Advocate-General, *Pusa v Osuupankkien Keskinäinen Vakuutusyhtio*, 2003 at Recital 20; 2004 O.J. (118) 41.

¹⁶³ Uecker and Jacquet, *supra* note 121.

¹⁶⁴ Case C-370/90, *Surrinder Singh*, 1992 E.C.R. I-4265.

¹⁶⁵ Miguel P. Maduro, *The Scope of European Remedies: The Case of Purely Internal Situations and Reverse Discrimination*, in *THE FUTURE OF REMEDIES IN EUROPE* 117, 121 (Claire Kilpatrick et al. eds., Hart Publishing 2000).

example Article 141 EC, through which the EU seeks inter alia to treat individuals as the “peoples of Europe” without reference to nationality.¹⁶⁶

Even where the right of free movement is used manipulatively, such as in *Akrich*,¹⁶⁷ the situation falls within the material scope of the Treaty. Within this context, if citizenship is a general requirement for non-discrimination, there should be no difference in the treatment of Union citizens merely because one has crossed a national border and the other has not. *Prima facie*, therefore, reverse discrimination seems to run counter to the original intention behind citizenship by requiring something more than mere nationality of one of the Member States.

Inroads have been made into this position through an expansive reading of when Community law is affected. In *D’Hoop*,¹⁶⁸ Community law was activated when an individual was denied an unemployment “tideover” allowance by her own country because she had completed her education in another Member State. As a citizen, she fell within the personal scope of the Treaty. Having exercised her right of free movement by studying abroad, she came within its material scope. Accordingly, EU law protected her.

Using the deterrence argument from *Singh*, the Court found it incompatible with the principle of free movement for a citizen to receive less favorable treatment in their own Member State than they would have enjoyed had they not moved. This law, though applied in a different citizenship context, was more recently confirmed in *Ionidis*.¹⁶⁹ There, the Court ruled that the denial of tideover compensation to an EU citizen based only on issues of the citizen’s nationality, where the sole ground of the denial is that the citizen completed his secondary education in another EU Member State, “is contrary to Article 39 EC.”¹⁷⁰

The Court went further in *Carpenter*¹⁷¹ to settle the issue of an internal matter relating to UK immigration rules as those rules affected the third-country-national wife of a British citizen. Mr. Carpenter had not exercised his right of free movement, and was thus covered “neither by secondary legislation nor *Singh*.”¹⁷² Accepting the need for

¹⁶⁶ Case 43/73, *Defrenne v. Sabena* (No.2), 1976 E.C.R. 455, at 10.

¹⁶⁷ C-109/01, *Sec’y of State for the Home Dept. v. Akrich*, 2003 E.C.R. I-9607.

¹⁶⁸ *D’Hoop*, *supra* note 115.

¹⁶⁹ Case C-258/04, *Office national de l’emploi v. Ioannis Ioannidis*, 2005 E.C.R. I-8275.

¹⁷⁰ *Id.* at Operative Part.

¹⁷¹ Case C-60/00, *Carpenter v Sec’y of State for the Home Department*, 2002 E.C.R. I-6279.

¹⁷² Eleanor Spaventa, *From Gebhard to Carpenter: Towards a (Non-) Economic European Constitution*, 41 COMMON MKT. L. REV. 743, 766 (2004).

a link with free movement provisions, the Court determined that a significant proportion of Carpenter's business involved the provision of services to advertisers in other Member States; thereby bringing him under Community law through Article 49 EC. The Court further ruled that Mr. Carpenter's separation from his wife would be detrimental to their family life, and hence the conditions under which he exercised his right to provide services. Acierno rightly points out that this could only have had a tenuous and indirect effect on the freedom to provide services.¹⁷³

It is difficult to justify reverse discrimination in the light of European citizenship, where remedies should be available to all based on their shared citizenship. Shuibhne recognizes that the Court has made progress. She sees the Court's decisions in this area as "progressing the scope of EC law beyond work, beyond establishment and beyond services."¹⁷⁴

D'Hoop and *Carpenter* make it clear, however, that the Court is not ready to go beyond movement. By demanding an element of movement be identified, the Member States' right to control situations wholly internal to themselves is preserved. Protection of national sovereignty was a paramount concern at the time of the Treaty and remained such, evidenced by Article 3 Directive 2004/38/EC,¹⁷⁵ in which the Treaty makers confirmed the exclusion of wholly internal situations.¹⁷⁶

Yet where are the limits of a "wholly internal situation?" As the EU continues to absorb the citizens of its newest Member States, and attempts to guide them in adoption and incorporation of the *acquis*, new aspects concerning the scope of "wholly internal" continue to emerge with respect to citizenship rights. If the trend for the ECJ to adopt the opinions of its Advocates General is any indication, the idea of "wholly internal" is also being widened. Of note, Advocate General Mazák's opinion in *Jipa*, as well as the recent holding in *Eind*,¹⁷⁷ are consistent with previous rulings and represent an expansionist approach. The Court will continue to liberally apply fundamental freedoms, construing proportionality in favour of free movement. Similarly, it will continue to rule against a Member State's attempts to

¹⁷³ Silvia Acierno, *The Carpenter Judgment: Fundamental Legal Rights and the Limits of the Community Legal Order*, EUR. L. REV. 403, 404-05 (2003) [hereinafter Acierno].

¹⁷⁴ Shuibhne Niamh, *Free Movement of Persons and the Wholly Internal Rule: Time To Move On?*, 39 COMMON MKT. L. REV. 731, 757 (2002).

¹⁷⁵ Council Directive 2004/38 (EC), *supra* note 78.

¹⁷⁶ See Case C-1/05, *Jia v Migrationsverket*, 2006 E.C.R. I-00001 Operative ¶ 2.

¹⁷⁷ Case C-291/05, *Minister voor Vreemdelingenzaken en Integratie v. R.N.G. Eind*, E.C.R. 2007 ¶ 37 (Judgment of the Court, Dec. 11, 2007), Operative part of judgment reported at 2008 OJ (C) 51/14.

define a situation as internal based on vague assertions that internal policy or security reasons exist that would merit the restriction of a Member State national's free movement to other EU Member States.¹⁷⁸

6.5 Third Country National/Family Rights

The ECJ has even extended citizen rights to unlawfully resident third-country nationals (TCNs), and is attempting to fine-tune its judgments. The rights of TCNs were discussed prior to Maastricht, but *Baumbast*¹⁷⁹ extended the case law by deriving a new right of residence for TCNs under Article 12 of Regulation 1612/68/EEC.¹⁸⁰ While the EU citizen was residing outside the Union, his TCN wife and his children lived in a Member State other than the one of which he was a national. Based on the children's needs, his wife was granted a derivative right of residence as a "primary carer,"¹⁸¹ because to deny residence would "deprive the children of a right [to education]."¹⁸² A right to remain as the primary carer can also be derived from a child who is not the Union citizen's natural child but who is a "family member" for the purposes of the secondary legislation. While acknowledging the human importance of the family, little reference was made to respect for family life under Article 8 ECHR, and there is only a passing comment about protecting family relations under the principles of "liberty and dignity" in EC law.¹⁸³

In *Akrich*, the Court found that lawful residence was necessary for a TCN family member to obtain the free movement benefits associated with the TCN's EU-citizen spouse.¹⁸⁴ However, respect for the EU citizen's quality of family life was more important, thus the Court interpreted the Treaty through the lens of human rights in reaching its verdict.¹⁸⁵

*Chen*¹⁸⁶ confirmed the concept of derivative rights for primary carers in an even more remarkable case. An expectant Chinese mother moved from China to give birth in Ireland with the aim of gaining her child, Catherine, Irish nationality and thus a right of residence in the UK. The Court held that even though Catherine was wholly dependent on the mother, as a Union citizen, Catherine had a right to

¹⁷⁸ Jipa, *supra* note 151, ¶¶ 42-48 and Conclusion.

¹⁷⁹ Baumbast, *supra* note 140.

¹⁸⁰ 1968 O.J. SPEC. ED. (L 257) 2.

¹⁸¹ Baumbast, *supra* note 140 at Recital 64.

¹⁸² *Id.* at Recital 71.

¹⁸³ *Id.* at Recital 50.

¹⁸⁴ C-109/01, Sec'y of State for the Home Dept. v. Akrich, 2003 E.C.R. I-9607.

¹⁸⁵ *Id.*

¹⁸⁶ Chen, *supra* note 138.

rely on Article 18(1) EC. Her mother had sufficient resources to prevent them from becoming an unreasonable burden on the State, hence Catherine could remain and her mother, therefore, obtained a derivative right of residence as the primary carer.

However, Member State concerns were noted and in its more recent *Jia* judgment, the Court limited the *Akrich* reading. The Advocate General distinguishes the two cases' fact patterns,¹⁸⁷ as does the Court,¹⁸⁸ and takes the discussion in another direction. The Court firmly upheld the Member States' sovereign right to determine who shall be granted legal residence within its borders. It held that a TCN family member of an EU national is not automatically guaranteed the right to enter and reside in the family member's home country even though the TCN claims financial dependence. Such determinations are left to the Member States.¹⁸⁹ The Advocate General acknowledged the burden of confusion faced by Member States in this sensitive area,¹⁹⁰ the Court, however, was clear that the Member States could rise to the challenge and that when exercising their power, they were certainly capable of facilitating the basic freedoms guaranteed by the EC Treaty.¹⁹¹ The Advocate General's Opinion in *Jia*, however, implies that this situation, which impacts heavily on national citizenship, is far from settled.

This is no more evident from the Court's very recent decision in *Eind*¹⁹² where the Court considered the case of a Dutch national who had moved to the UK for employment and thus enjoyed rights guaranteed by Article 39 EC. As such, he was granted the right of residence under Regulation 1612/68. He was then joined by a dependent daughter, born in 1989, who came directly from Surinam, and who did not have a right to residence in the Netherlands or the UK. She was also granted a UK residence permit to reside with her father. Shortly thereafter, Mr. Eind's ill-health caused him to relocate to the Netherlands with his daughter. However, the Dutch government refused a residence permit to Miss Eind, claiming that her right to Community residence did not extend beyond the UK, especially since her father's ill-health made him economically inactive, effectively curtailing Mr. Eind's free movement protection under the community workers' law.¹⁹³

¹⁸⁷ *Jia*, *supra* note 176, ¶¶ Intro, 1, 2.

¹⁸⁸ *Id.* ¶¶ 31, 32.

¹⁸⁹ *Id.* Operative, ¶ 2.

¹⁹⁰ *Jia*, *supra* note 174, ¶¶ 29, 62, Conc.

¹⁹¹ *Jia*, *supra* note 174, ¶¶ 39-43.

¹⁹² *Eind*, *supra* note 177.

¹⁹³ *Id.* ¶¶ 9-13.

While the ECJ upheld the principle that a residence permit granted under Community Regulation 1612/68 by a Member State, is only applicable to that State,¹⁹⁴ the Court would not support Dutch arguments that the matter was an internal one where it would effectively split the family.¹⁹⁵ The Court not only relied on the fact that the daughter was a dependent under the age of 21 within the meaning of EU legislation protecting dependents¹⁹⁶ but on the basis of precedent. The ECJ would entertain no arguments that would deter an EU citizen from exercising his/her right of free movement, which would have been the case if the Dutch government refused to allow Eind to live with a close family member.¹⁹⁷ Therefore, although Mr. Eind was no longer economically active, and notwithstanding that his daughter had never had the right to reside in the Netherlands, the ECJ ruled that Article 10 (1) of Regulation 1612/68, as amended by Regulation 2434/92, would confer residence rights on Miss Eind and allow her to live in the country in which her father was a national.¹⁹⁸ The Court found to do otherwise would run counter to EU objectives, which have long recognized "the importance of ensuring protection for family life."¹⁹⁹

Clearly family concerns are fundamental to the citizen *qua citizen* and to deny derivative rights, although perhaps not envisaged by the Treaty makers at the time, would affect not only market citizenship rights but also the citizen's willingness to identify with the Union. Engendering a sense of belonging is not best achieved by breaking up a family, thus the Court in *Eind* and *Chen*, can be said to be giving effect to the Treaty makers' intentions.

6.6 Fundamental Rights

Whilst the Court preferred to answer the question in *Chen* using citizenship arguments, the Advocate General saw it as involving fundamental rights. Baby Chen had lost the right to Chinese citizenship and could only visit China for up to thirty days; if her mother had been denied a right of residence in Europe, the family would have been split and the child abandoned.²⁰⁰ This would have breached Article 8 ECHR and the Court's own protection of fundamental rights.²⁰¹

¹⁹⁴ *Id.* ¶ 25.

¹⁹⁵ *Id.* ¶¶ 34, 37.

¹⁹⁶ 1968 O.J. (L 257) 1, art. 10.

¹⁹⁷ *Id.* ¶¶ 36, 37-45, 101-106.

¹⁹⁸ *Id.* ¶ 2.

¹⁹⁹ *Id.* ¶ 44.

²⁰⁰ *Id.* at Opinion Recital 93.

²⁰¹ Case 26/69, *Stauder v. City of Ulm*, 1969 E.C.R. 419.

Reich and Harbacevica²⁰² argued that the Court extended the definition of what constituted a restriction on economic activity to include fundamental rights, such as family life. However, the convoluted approach in *Carpenter*, by which the protection of family life was achieved only through the economic freedoms confirms Acierno's view that, although the introduction of European citizenship constitutes a significant evolution towards the intended social and political citizenship, the established tradition and case law still has its focus on the economic rights of the market citizen.²⁰³ The Treaty makers may not have envisaged the Court's journey beyond economic rights, but the destination remains wholly predictable in light of their intentions.

One of the weaknesses of fundamental rights in the EU is their limited application; they apply to those who fall within the personal scope of the Treaty and have limited application to TCNs, who have had to rely on an association with an EU citizen to derive rights. Since *Baumbast* and *Chen*, however, the legislative protection of TCNs did improve with Directive 2003/109/EC, which became effective in January 2006. This grants to financially secure TCNs with 5-years lawful residence in the EU rights similar to those of EU citizens.²⁰⁴

Of greater concern to EU citizens is the limitations imposed on their rights under Article 24 of the Accession Treaty of 2003, which permits a derogation from Article 39 EC's free movement rights in relation to EU citizens from the eastern accession countries.²⁰⁵ Restrictions can be applied for up to seven years, provided they are not more stringent than those applying to TCNs, and are subject to periodic review. The transition measures are driven by concerns about non-EU members entering the Union through the eastern accession states, and a fear among some member states that accession would precipitate mass migration from the populous new members. Despite a positive first report on the beneficial economic effects on the three states that opened their borders to the 2004 Accession Countries, only four more have followed suit, whilst only ten countries allow unrestricted free movement from Bulgaria and Romania. Clearly some EU citizens are more equal than others.²⁰⁶

7. TREATY MAKERS' INTENTIONS

The ECJ's development of citizenship must be viewed through the prism of the Treaty makers' political intentions; the enhancement

²⁰² Reich and Harbacevica, *supra* note 117.

²⁰³ Acierno, *supra* note 171 at 406.

²⁰⁴ Council Directive 2003/109, 2004 O.J. (L 16) (EC).

²⁰⁵ 2003 O.J. (L 236); 2003 O.J. (L 227).

²⁰⁶ *EU Free Movement of Labour Map*, BBCNEWS (Jan. 4, 2007), available at <http://news.bbc.co.uk/1/hi/world/europe/3513889.stm>.

of democratic legitimacy in the Union. Barber described citizenship “not primarily, a set of legal rules; it aspired to change the way individuals identified with the Community institutions.”²⁰⁷

Engaging with the Union citizens was always going to be an evolving process, highlighted by the Commission’s Citizenship Reports²⁰⁸ that described how individuals’ expectations of citizenship changed over time. Before, *Carpenter* and *Chen*, the Commission’s Third Report on Citizenship²⁰⁹ had proposed a connection between citizenship and fundamental rights, believing it legitimate to go beyond Articles 17-21 EC and examine the protection of fundamental rights. The legislature had not kept pace with new developments in family relationships, prompting criticism from Advocate General Geelhoed in *Baumbast*, who saw the Court as preserving the law’s relevance that the legislature had not.²¹⁰

Though many of the Court’s decisions have developed the application of citizenship beyond the wording of the Treaty provisions, this development was compatible with the overall plan to make the Community relevant to its citizens. Article 22 EC recognised the need for citizenship’s ongoing development and the subsequent endorsement of the Court’s decisions in Directive 2004/38/EC²¹¹ supports this assessment. The third perambulatory paragraph repeats *Grzelczyk*’s assertion that Union citizenship should be the fundamental status of Member State nationals, whilst the direct effect of Article 18(1) EC (*Baumbast*) is confirmed in the eleventh perambulatory paragraph. Rights of residence for TCNs are addressed in the fifth preambulatory paragraph and Article 2(2) Dir, whilst Article 3(1) Dir confirms *Uecker and Jacquet*’s exclusion of reverse discrimination from Community competence. Moreover, the Court’s case law supporting the award of rights based on the degree of assimilation with the host State is endorsed in the Directive by varying the rights depending on length of residence. However, Article 24 Dir falls short of *Trojani*, where a right of residence arising under national law activated Community equal treatment remedies.

Reich and Harbacevica rightly see an activist judicial approach in the ECJ’s dealings,²¹² but this does not imply the Treaty makers do not support the Court. Fundamentally, citizenship was an answer to

²⁰⁷ Barber, *supra* note 62, at 246-247.

²⁰⁸ EUR. PARL. DOC. (COM 702), *supra* note 127; EUR. PARL. DOC. (COM 230), *supra* note 128; EUR. PARL. DOC. (COM 506) (2001).

²⁰⁹ EUR. PARL. DOC. (COM 506) (2001).

²¹⁰ *Baumbast*, *supra* note 140, at Recital 87.

²¹¹ Council Directive 2004/38 (EC), *supra* note 78.

²¹² Reich and Harbacevica, *supra* note 117, at 627.

“the question of actual and perceived lack of legitimacy.”²¹³ Whether the Court or the legislature answer this question is less important than whether the response enhances the Union’s legitimacy.

8. THE LISBON TREATY²¹⁴

Where the Court has led in combining citizenship with the non-discrimination provisions, the Treaty-makers are now following. The Lisbon Treaty, if ratified, will formally link (current) Articles 12 and 13 EC with the citizenship provisions in a renamed Part II to the Treaty on the Functioning of the European Union (FEU); codifying the case law, Part II would be re-titled ‘Non-discrimination and Citizenship’.²¹⁵ This would reinforce the centrality of fundamental rights to the citizenship *acquis*, and is one area in which the Lisbon Treaty provides significant scope for further development of a more meaningful notion of EU citizenship through the potential for linking citizenship with the Charter of Fundamental Rights. Opinions of the Advocates General, inter alia through *Chen* and *Akrich*, already indicate a willingness to view EU law through the lens of fundamental rights. With the Charter’s integration into the canon of EU law through (proposed) Article 6(1) FEU, the scope for bolstering the fundamental rights of EU citizens, as social citizens, would be enhanced.²¹⁶

²¹³ Barber, *supra* note 62, at 246.

²¹⁴ Lisbon Treaty *supra* note 16. While a detailed examination of the Lisbon Treaty and its ultimate fate following its recent rejection by Ireland in June 2008 are outside the scope of this article, for additional commentary and references, see Susan Sandler, *Cross-Border Competition and the European Defence Equipment Market*, 7 WASH. U. GLOBAL STUDIES L. REV. (forthcoming Summer 2008), [hereinafter Sandler], Section XVIII. COMMENTARY: THE TREATY OF LISBON, Special thanks to Ms. A.J. Cochrane, Assoc. Lecturer, University of Derby, UK for the many academic exchanges on this topic.

²¹⁵ Under the Lisbon Treaty, the new Part II FEU will comprise: Article 17 FEU ((current) Article 12EC); Article 17a FEU ((current) Article 13 EC); Article 17b FEU ((Current) Article 17EC). Articles 18-22 FEU will be based on (current) Articles 18-22 EC with some textual changes. Formal combination of the non-discrimination and citizenship sections in this way lends political endorsement to the Court’s judicial activism and opens new doors for developing the Treaty’s material scope.

²¹⁶ Whilst the UK has negotiated an exemption to the Charter of Fundamental Rights, this could well be a chimera if the ECJ employs the Charter in its judgments. The seminal *Van Gend en Loos* judgment (Case 26/62), established the supremacy of EU law, including establishing the persuasive authority of judgments of the ECJ on matters of EU law. Where ECJ decisions are based on or informed by the Charter of Fundamental Rights, UK courts may well be obliged to follow the ruling, notwithstanding the UK opt-out.

The Lisbon Treaty would continue the move away from the historically economic-oriented citizenship by enhancing the range of political citizenship rights. Although many of the rights under the (proposed) Part II FEU are merely taken from elsewhere in that Treaty, such as (proposed) Article 21a (current Article 255 EC) on transparency, and (proposed) Article 21b (current 286 EC) on data protection, they start adding textual volume - and thus weight - to what is currently a somewhat anemic Treaty section. As Professor Peers notes,²¹⁷ however, a new right is added whereby a mass petition (at least one million citizens from a 'significant number of Member States') could invite the Commission 'to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties'.²¹⁸ The Treaty, under (proposed) Article 21 FEU, lacks detail of how this right may be enforced to the European Parliament and Council but clearly places the provision within the citizenship arena as a contribution to enhanced EU political citizenship.

Irish rejection of the Lisbon Treaty on 12 June 2008 stopped what had hitherto been a relatively smooth endorsement process.²¹⁹ Although the Irish rejection has raised concerns about whether the Lisbon Treaty will ever be ratified, this is not itself a fatal situation for the EU.²²⁰ In fact, it is important to note that prior to the Irish referendum, eighteen of the twenty-seven Member States had already ratified the Treaty, and although in theory, the Irish "No" could stop the Treaty altogether, this is unlikely. The political will in the Member States to ratify Lisbon is strong. Member States have continued with ratification since the Irish referendum,²²¹ which signals an obvious interest in moving the process forward notwithstanding the Irish posi-

²¹⁷ Steve Peers, Statewatch analysis, EU Reform Treaty Analysis no. 3.2: Revised text of Part Two of the Treaty establishing the European Community (TEC) (2007), *available at* <http://www.statewatch.org/news/2007/aug/eu-reform-treaty-part-two-tec-3-2.pdf>.

²¹⁸ (Proposed) Article 8b(4) EU.

²¹⁹ Of the twenty-seven Member States, Ireland was the only State to hold a referendum, as required by its constitution. The vote was held on June 12, 2008. The results can be reviewed in Flash Eurobarometer 245, *supra* note 17.

²²⁰ Sandler, *supra* note 214 at Section XVIII.

²²¹ The current state of the Lisbon Treaty ratification as of July 10, 2008: The Treaty has been ratified by Austria, Bulgaria, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovakia, Slovenia, and the United Kingdom. Ratification in Belgium, The Czech Republic, Italy, Poland, Spain and Sweden is still pending. Ireland has not ratified. Poland's parliament has approved the Treaty, but its president must still sign it. See, Europa Website, Treaty of Lisbon, *available at* http://europa.eu/lisbon_treaty/countries/index_en.htm#.

tion. The French Presidency of the EU, which commenced July 1, 2008 and will continue for the next six months, has vowed to work with Ireland on the matter to resolve outstanding issues.²²²

The Lisbon Treaty, like the Constitutional Treaty on which it is extensively based, reflects the political will of the European Council and, if it is not adopted in its current form through a second Irish referendum, is likely to re-appear at a later date.²²³ Whether the Irish will be officially asked to reconsider their decision is currently under debate. Despite the media hype, the post-vote quarterbacking does not suggest that the Irish rejected Lisbon Treaty principles. Although voter turnout was relatively high for a European election at 53%²²⁴, and the margin of victory for the 'No' Campaign was significant – 53% 'No' and 46% 'Yes' – the immediate post-referendum research indicates that the problem was largely due to the lack of communication about the substance of the Treaty.

Of those not voting, 52% abstained because they did not understand the Treaty, whilst the biggest reason for the 'No' vote was because individuals did not feel that they knew enough about the Treaty and were unwilling to vote 'Yes' to something they did not understand.²²⁵ Whilst this might tempt many in Brussels to consider demanding that the Irish vote again, there are risks inherent in doing so.

If the EU is serious about forging a sense of loyalty to the Union through a concept of citizenship with market, political and social dimensions, any attempt to ignore the people's political voice could work against citizenship objectives. Moreover, it risks reinforcing negative stereotypes of an out-of-touch polity run by bureaucrats who are unwilling to share their *cratos* with the European *demos*. Continuing with ratification, therefore, risks widening the democratic deficit, while suspending the process risks perpetuating unwieldy governance mechanisms. Those mechanisms, however unwieldy, are still valid and

²²² BBC News, Sarkozy warns EU on treaty debate, July 10, 2008, available at <http://news.bbc.co.uk/2/hi/europe/7499143.stm>. See also, Euractive, Interview: There is collective remorse in Ireland, July 9, 2008, <http://www.euractiv.com/en/future-eu/interview-collective-remorse-ireland/article-174099>; Euractive, Sarkozy sweet-talks European Parliament, July 11, 2008, available at <http://www.euractiv.com/en/future-eu/sarkozy-sweet-talks-european-parliament/article-174150>.

²²³ It should be noted in this context that when Ireland rejected the Treaty of Nice in 2001, a second referendum was held one year later that resulted in Irish acceptance of the Treaty. See e.g., COUNCIL OF THE EUROPEAN UNION, Brussels, 20 June 2008, 11018/08, CONCL 2, at 1, available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/101346.pdf.

²²⁴ Though 53% is low for Ireland. See Flash Eurobarometer 245, *supra* note 17, at 3 (reporting that 67% of Irish citizens voted in the previous general election).

²²⁵ *Id.* at 3, 7.

allow the EU to continue functioning,²²⁶ albeit in a rather suboptimal administrative context as far as the Institutions are concerned.

France, which currently holds the rotating EU Presidency, has lobbied for the ratification process to continue. The fact that other nations have acquiesced in Treaty ratification confirms a prevailing attitude amongst them against having to undertake another round of Treaty revisions. The Member State Governments, therefore, must be prepared to deal with the impact of this approach on the democratic deficit if or when it occurs. Thus, whilst the EU decision-makers are now faced with difficult decisions and uncertainty over whether Treaty ratification will occur, the ECJ is once again likely to be the main instrument for developing the citizenship *acquis* and ensuring that the Union is able to adapt and reflect its citizens' aspirations.

9. CONCLUSION

Shore observantly concluded that EU citizenship was "designed not so much to generate support for the EU among its would-be European public, but to invent a category of 'European public' in the first place."²²⁷

The Treaty-makers sought to create a sense of legitimacy amongst a European public possessed of market, political and social citizenship rights, delivered through, *inter alia*, Articles 12 and 17-21 EC. These rights were deliberately accompanied by a legal basis, Article 22 EC, through which change, when needed, could be facilitated.

The existence of Article 22 EC suggests that the Treaty-makers did not intend to proscribe citizenship's full application without leaving scope for future development. To achieve the Treaty-makers' objectives, citizenship rights had to evolve to encompass and reflect changing expectations amongst the polity's citizens. In other words, citizenship was always envisaged as being dynamic in nature, and to have a framework that could adapt to the changing circumstances of the Member States and the expectations of their nationals. Due to the fact that those expectations could not have been predicted with any certainty at the time of Maastricht, especially in light of the scheduled accessions that added millions of citizens to the EU population, the Treaty-makers set citizenship's objectives, but left room for its development.

The ECJ has taken its guardianship of citizenship's dynamic elements to heart. When the political will to develop the Treaty's scope into a meaningful set of rights was lacking, judicial activism ensured the concept remained relevant. Through decisions such as *Mar-*

²²⁶ The Treaty of Nice remains the governing legal basis.

²²⁷ Shore, *supra* note 6, at 31.

tinez Sala and *Grzelczyk*, the Court broke the link between economic activity and Community rights, extending the rights and remedies under EC law to all citizens of the Union who came within the material scope of the Treaty. Movement, crossing a border, however, is still needed to bring someone within the scope, but the Court has taken an expansive approach to rights, notably through the combination of citizenship and Article 12 EC. Recent cases, such as *Jipa*, indicate that the ECJ is watching Member State restrictions very carefully. Non-discrimination is now at the heart of Union citizenship, with the Court asserting that "Union citizenship is destined to be the fundamental status of national of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality."²²⁸

In the areas of social assistance (*Bidar*, *Trojani*, *D'Hoop*, and more recently, *Ionnidis*) and family and fundamental rights (*Baumbast*, *Chen*, *Jia* and *Eind*), the ECJ has identified a broad menu of rights that reflect the evolving needs of Europe's citizens. Developments in reverse discrimination were more tentative, possibly because it encroached on areas historically the preserve of the nation-state and, therefore, considered a compromise with respect to the supremacy of national or EC law.

Since *Jipa* and *Eind*, even this hesitancy appears to be weakening with the Court arguing that its liberal reading is consistent with the Treaty-makers' intentions. It is now asserting that the restrictions needed to preserve national sovereignty in wholly internal situations must be balanced with recognition of what "wholly internal" really means for the Union's fundamental rights and freedoms. Consequently, it now requires Member States to provide a specific and clear justification of the need to restrict those freedoms when they seek to limit an EU citizen's movement. In all these areas, the Treaty-makers' legislative developments have retrospectively validated the Court's citizenship *acquis* as contributing to their goal.

Citizenship, however, is not the panacea for Europe's other inadequacies, such as the lack of democracy or sense of remoteness from the EU political institutions but is an essential part of the process.²²⁹ Although the Court has ploughed a purposive furrow in trying to create a European people with a common bond tying Member State nationals to the Union, the solution to the democratic deficit requires broader institutional and political reform. French and Dutch rejection of the Constitutional Treaty in 2005 and Irish opposition to the Lisbon Treaty this year were wake-up calls.

²²⁸ Grzelczyk, *supra* note 91, at Recital 31.

²²⁹ Shaw, *Constitutional Settlements*, *supra* note 8.

Clearly further work is needed to convince citizens why they should embrace the Treaty, and in this regard, the Court's application of the citizenship *acquis* provides a locus for their loyalty. The benefits conferred on them by EU citizenship and the Treaty exist not in any remote way, but in a very practical and substantive sense, with everything they buy and everywhere they go. Development of this locus will also require that Member State governments rethink their own relationship with the EU, and refrain from blaming the Union for unpopular decisions, or claiming for themselves the credit for positive initiatives that are more favorably received. The broadly encouraging signs from the momentum of the Lisbon Treaty and the dialogue it has generated confirms that whilst the European Courts have been active in giving substance to the meaning of "European citizen", this vigilantism has given effect to the Treaty-makers' original intentions. The ECJ, therefore, has been more than a vigilant guardian of the Treaty but less than a vigilante in pressing the citizenship *acquis* forward. It has however, been the agent and overseer by which the founding fathers have delivered – and continue to deliver – on their intent and by which the determination to lay the foundations of an ever-closer union among the peoples of Europe, is now evident.