

# Multilevel Citizenship in Europe and Canada

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Note to ECSA-C attendees: a version of this paper is scheduled for publication as “EU Citizenship’s Origins, Evolution, and Political Objectives” in *German Law Journal* vol.15 (summer 2014). Though I probably won’t be able to incorporate your suggestions in that publication, I’m scheduled to start a 2-year Marie Skłodowska-Curie / Horizon 2020 project on the future of European citizenship in comparative perspective” for which I can certainly use your suggestions. My presentation (as opposed to this paper) will deal more substantively with Canada.

## Abstract

The triple role of this article is to 1) explain the political origins of a common supranational citizenship in Europe, 2) summarize the evolution of EU citizenship by illustrating the debates about the proper relationship between human rights (for everyone) and citizenship rights (for EU citizens only) and about the relationship between national and EU citizenship (or national and EU law), debates occurring within a context of the ever-expanding scope of EU law, and 3) provide a new perspective on the debates about EU citizenship’s finalité politique or political objectives by placing EU citizenship in comparative perspective. In terms of origins, the main argument is that the goal of creating European citizens has always been an essential element of the European project, rather than an afterthought accidentally introduced in the Maastricht Treaty. The section on evolution describes the expanding scope and growth of supranational citizenship rights from workers to movers to citizens; the main idea is that this continuing expansion and growth of EU citizenship should mean the end of reverse discrimination, in which national law disadvantages those who cannot appeal to EU law but must rely on national law. The main argument of the objectives section is that EU citizenship is not sui generis or without precedent but rather should be seen as one manifestation of the ubiquitous tension between unity and diversity, or commonality and difference, a tension present within any political community but manifest most clearly in other federal states characterized by multilevel citizenship.

## EU Citizenship’s Origins

What is the political objective, or finalité politique, of EU citizenship?<sup>1</sup> The question acquires renewed urgency in the current financial and employment crisis period in which the fundamental aims of the European project more generally are being questioned. Raising the notion of finalité politique, whether of European integration generally or EU citizenship specifically, evokes the idea of a goal-oriented process and of evolution towards a clear destination or final form. For many in the postwar period and the early years of European integration, this destination was a

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<sup>1</sup> For a short history of EU citizenship’s development, see Willem Maas, “European Union Citizenship in Retrospect and Prospect,” in E.Isin and P.Nyers, eds., *Global Handbook of Citizenship Studies* (Routledge, 2014).

European federation. In the 1951 Treaty of Paris, the original six member states promised “to substitute for historic rivalries a fusion of their essential interests; to establish, by creating an economic community, the foundation of a broad and independent community among peoples long divided by bloody conflicts,” and to set up “institutions capable of giving direction to their future common destiny.”<sup>2</sup> This echoed the 1950 Schuman Declaration, which talked of “common foundations for economic development as a first step in the federation of Europe”; a common market would create “a wider and deeper community” and “lead to the realization of the first concrete foundation of a European federation.”<sup>3</sup>

The idea of a European federation, expressed both in the Schuman Declaration and the Treaty of Paris, was not a fringe viewpoint. Instead, it was the consensus position across the political spectrum, except perhaps for some Communists who preferred integration with the Soviet Union.<sup>4</sup> Establishing a federal Europe was not an international relations exercise that would be limited to states; the aim was to create a true supranational community in which individual citizens would share a common status and identity. Capturing this spirit, Winston Churchill called for “a European group which could give a sense of enlarged patriotism and common citizenship to the distracted peoples of this turbulent and mighty continent.”<sup>5</sup> In a speech preceding the 1948 Hague Congress, Churchill said “We hope to reach again a Europe...in which men will be proud to say ‘I am a European.’ We hope to see a Europe where men of every country will think as much of being a European as of belonging to their native land. And wherever they go in this wide domain they will truly feel ‘Here I am at home’.”<sup>6</sup>

The Hague Congress also proposed “a European passport, to supersede national passports and to bear the title ‘European’ for use by the owner when travelling to other continents.”<sup>7</sup> In the words of one of the protagonists (the Prime Minister of Belgium), Europe’s political leaders viewed economic integration as an interim step on the way towards a genuine European political

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<sup>2</sup> Treaty of Paris, preamble.

<sup>3</sup> Schuman Declaration.

<sup>4</sup> But achieving it would be difficult. As Jean Monnet wrote “the fusion of the European peoples cannot result from the only road we are following. In the limited domains of coal and steel - atomic we seek full delegation of national powers to a supranational organization which will make decisions and be subject to controls that are also supranational. But the rest of the economy remains outside these actions. The Common Market itself is a sector as the general conduct of economic affairs - growth, taxes - remains national. The sentiment that their destiny is shared and their prosperity is shared has not been established between the peoples of Europe by the ECSC and will not be by Euratom. How to do it? It is very difficult to find a form that is satisfactory - indeed political - and that is accepted by the parliaments and peoples. We must continue to speak of the Common Market and as far as possible to achieve its beginning at least. But we must find the political opportunity that gives these countries of Europe the sense of a common destiny.” Diary 5 August 1956, my translation. Grateful thanks to the Fondation Jean Monnet pour l’Europe for allowing me to consult the archives.

<sup>5</sup> Winston Churchill, speech delivered at the University of Zurich, 19 September 1946. In the same speech, Churchill also said “there is a remedy which, if it were generally and spontaneously adopted, would as if by a miracle transform the whole scene, and would in a few years make all Europe, or the greater part of it, as free and happy as Switzerland is today. What is this sovereign remedy? It is to recreate the European Family, or as much of it as we can, and to provide it with a structure under which it can dwell in peace, in safety and in freedom. We must build a kind of United States of Europe.” He added that the “structure of the United States of Europe, if well and truly built, will be such as to make the material strength of a single state less important. Small nations will count as much as large ones and gain their honour by their contribution to the common cause.” Winston Churchill, *The Sinews of Peace: Post-War Speeches by Winston S. Churchill*, 198–202.

<sup>6</sup> Netherlands National Archives, catalog 2.19.109 Europese Beweging in Nederland en Voorgangers, inv. 95.

<sup>7</sup> Ibid.

community with a common citizenship: “Full well did they measure the importance of the economic transformations they had just decided, but in their minds, those transformations, for all their greatness, were merely accessory to, or, at the very least, the first stage of a yet greater political revolution.”<sup>8</sup>

Inspired by such thinking, the key rights of EU citizenship – primarily the right to live and the right to work anywhere within the territory of the Member States – can be traced back to the free movement provisions contained in the Treaty of Paris establishing the European Coal and Steel Community, which entered into force in 1952.<sup>9</sup> The difficulties in reaching a common definition of who would qualify for freedom of movement, and the slow ratification of the intergovernmental agreement after it had finally been reached, may help explain the much stronger free movement provisions of the 1957 Treaty of Rome. This expanded the scope of the free movement provisions and granted the European Commission – rather than the Member States, as was the case with the Paris Treaty – the power and the responsibility to propose measures required to bring about free movement of workers.<sup>10</sup>

Despite the gradual growth of European rights from the 1950s onwards, EU citizenship’s legal status was confirmed only in the Maastricht Treaty, which entered into force in 1993. To some extent this can be seen as a terminological delay. Indeed, Commissioner Davignon argued in 1979 that “the status of ‘Community citizen’ [was] officially recognized from the moment when the Treaties granted rights to individuals and the opportunity of enforcing them by recourse to a national or Community court.”<sup>11</sup>

Regardless of when the concept of EU citizenship is deemed to have gained legal validity, its existence and growth is unmistakably part of the more general process of political integration. In the 1957 Treaty of Rome, member states promised to take “common action to eliminate the barriers which divide Europe” and to work towards an “ever closer union.”<sup>12</sup> Over the course of its more than six decades of political development, there has never been agreement in the European Union and its constituent member states about the *finalité politique* or end goal of integration. Indeed the aim of “ever closer union” remains under threat. In September 2013, British Prime Minister David Cameron proposed deleting the idea of “ever closer union” from the treaties, reiterating the view of the Dutch government, which had issued a similar call in June 2013: “convinced that the time of an ‘ever closer union’ in every possible policy area is behind us – as the result of the 2005 referendum on the Constitutional Treaty made clear, the Dutch people were, and still are, discontented with a Union that is continually expanding its scope, as if this were a goal in itself.”<sup>13</sup>

It is not surprising that agreement on the aims of European integration is elusive. (Leaving aside the regular enlargements that have expanded the EU from a cozy club of six western European member states to the current pan-European grouping of 28 member states and

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<sup>8</sup> Paul-Henri Spaak, cited in Willem Maas, *Creating European Citizens*, 12.

<sup>9</sup> Willem Maas, “The Genesis of European Rights,” *Journal of Common Market Studies* 43, no. 5 (2005): 1009–1025.

<sup>10</sup> *Ibid.*

<sup>11</sup> European Commissioner (later Commission Vice-President from 1981-1985) Viscount Étienne Davignon cited in Maas, *Creating European Citizens*, 4.

<sup>12</sup> Treaty of Rome, preamble.

<sup>13</sup> Netherlands Ministry of Foreign Affairs, “European where necessary, national where possible,” 21 June 2013 available at <http://www.government.nl/ministries/bz/news/2013/06/21/european-where-necessary-national-where-possible.html>; “UK keen to delete ‘ever closer union’ from EU treaty,” *EU Observer*, <http://euobserver.com/political/121607>

counting!) Attempting to define the *finalité politique* of EU citizenship is no different from trying to discern the purpose of US or Canadian federal citizenship: in all cases the central citizenship exists in tension with forms of sub-state or subnational political identities, and these decentralized political identities are also represented by their own governments: states in the US, provinces in Canada, member states in the EU. The next section traces some of the ongoing tensions between efforts to build and strengthen a common EU citizenship and continuing desires for member state control, focusing on the debates about EU citizenship's place in the expanding scope of EU law.

### **EU Citizenship's Evolution: Workers to Movers to Citizens**

In December 1992, just before the entry into force of the Maastricht Treaty and its citizenship provisions, Advocate General Jacobs wrote that “a Community national who goes to another Member State [...] should] be treated in accordance with a common code of fundamental values, in particular those laid down in the European Convention on Human Rights. In other words, he is entitled to say ‘*civis europeus sum*’ and to invoke that status in order to oppose any violation of his fundamental rights.”<sup>14</sup> Eighteen years later, Advocate General Sharpston took an even more expansive view: “In the long run, only seamless protection of fundamental rights under EU law in all areas of exclusive or shared EU competence matches the concept of EU citizenship.”<sup>15</sup>

These two quotations encapsulate much of the longstanding debate about reverse discrimination and the proper relationship between EU citizenship and fundamental or human rights. They also illustrate a gradual expansion of the scope of EU law, from a focus on those who move from one Member State to another to a focus on all EU citizens, coupled with a continuing debate about the appropriate extent and magnitude of the fundamental rights protected by Union citizenship.

Free movement is arguably “the bedrock upon which the entire construction of European rights has been built. Citizens of one member state who move to another one to take up residence or employment are caught up in the creation of European rights because they are the beneficiaries of free movement, practice it, and push for its expansion.”<sup>16</sup> The political development of European rights started with certain categories of workers, to all workers, to certain categories of non-workers (e.g. retirees, students), to all citizens.<sup>17</sup>

Until recently, however, the benefits of EU were available only to those who could appeal to EU law by virtue of crossing from one member state into another and ceased being in what was termed a “purely internal situation.” Reverse discrimination – whereby Member States may treat their own nationals worse than nationals of other Member States by invoking a “purely internal situation” in which European law does not apply – has long been a problem within the European Economic Community turned European Union. Yet introducing Union citizenship alters the status of individuals vis-à-vis their governments and implies equality of treatment among citizens. The resulting political dynamics should reduce and ultimately eliminate reverse discrimination.

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<sup>14</sup> Opinion of Advocate General Jacobs delivered on 9 December 1992, *Christos Konstantinidis v Stadt Altensteig - Standesamt and Landratsamt Calw - Ordnungsamt*, Case C-168/91 [1993] ECR I-1191.

<sup>15</sup> Opinion of Advocate General Sharpston delivered on 30 September 2010, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM) (Reference for a preliminary ruling from the Tribunal du travail de Bruxelles (Belgium))*, Case C-34/09.

<sup>16</sup> Maas, *Creating European Citizens*, 5.

<sup>17</sup> Willem Maas, “European Citizenship in Retrospect and Prospect,” in *The Routledge Handbook of Global Citizenship Studies*, ed. Engin Isin and Peter Nyers.

Reviewing the evolution of reverse discrimination in EU law shows that the “purely internal situation” is ever more limited and its invocation ever more contentious. In international relations, ensuring the application of fundamental rights is a matter of state sovereignty. The limits placed on reverse discrimination are thus simultaneously the limits of Member State sovereignty in the face of European law, particularly the ability of Member States to deny their nationals the rights enjoyed by other EU citizens. EU citizenship’s growth has reinvigorated the longstanding prohibition of discrimination on the basis of nationality, and reverse discrimination becomes a practice which is incompatible with EU citizenship’s commitment to equality.

Certainly, the doctrine of direct effect is important for European rights and does alter the relationship between individuals and Member States. But there was always an economic element, or a link to economic activity, in the cases decided by the Court, so that prior to the formal introduction of Union citizenship in the Maastricht Treaty the status had no legal standing independent of the economic aims of European integration.

Elsewhere I have argued that the project of European integration has always been about more than economics – that it is also about creating a community of people that transcends nation states.<sup>18</sup> This argument – which can be characterized as a concern not only with markets but also with rights – does not deny that such non-economic logic is difficult to find before the 1990s in European law and in the cases decided by the Court of Justice. Rather, the idea is that the project of transcending borders and building a European community of people is driven by a shared political commitment independent of any economic rationale.

Advocate General Sharpston’s opinion in the *Ruiz Zambrano* case addresses pointed questions at the persistence of reverse discrimination and sparked significant interest. The case invoked several questions, most notably whether Union citizens enjoy a right of residence in the Member State of nationality irrespective of whether they have previously exercised their European right to move, which traditionally triggered Union law. Sharpston argued that the prohibition of discrimination on grounds of nationality should be interpreted as prohibiting reverse discrimination caused by the interaction between the right to move and reside freely within the territory of the Member States and national law that entails a violation of a fundamental right protected under EU law, where at least equivalent protection is not available under national law.

This argument was grounded on the theory that “transparency and clarity require that one be able to identify with certainty what ‘the scope of Union law’ means for the purposes of EU fundamental rights protection” and the concomitant idea that, “in the long run, the clearest rule would be one that made the availability of EU fundamental rights protection dependent neither on whether a Treaty provision was directly applicable nor on whether secondary legislation had been enacted, but rather on the existence and scope of a material EU competence.” In other words, “provided that the EU has competence (whether exclusive or shared) in a particular area of law, EU fundamental rights should protect the citizen of the EU even if such competence has not yet been exercised.” The Advocate General refers to the Treaty’s affirmation that the EU ‘is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights’ to argue that this “guarantee ought not to be made conditional upon the actual exercise of legislative competence. In a European Union founded on fundamental rights and the rule of law, protection should not depend on the legislative initiative of the institutions and the political process. Such contingent protection of rights is the antithesis of the

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<sup>18</sup> Maas, *Creating European Citizens*.

way in which contemporary democracies legitimise the authority of the State” (here she cites John Locke’s *Two Treatises of Government*).<sup>19</sup>

In framing the question of reverse discrimination in terms of its relationship with EU citizenship, this opinion follows a long line of opinions and rulings emphasizing EU citizenship’s importance, which the Court of Justice has ruled is “destined to be the fundamental status of nationals of the Member States,” conferring on them, in the fields covered by Community law, equality under the law, irrespective of their nationality.<sup>20</sup> Note the important qualifier: equality under the law for Union citizens is limited to fields covered by Community law. Thus the key question becomes the precise extent of Community law in protecting fundamental rights. Reverse discrimination arose because the Court of Justice did not want to intrude on the prerogatives of Member States in areas outside the scope of Community law.

The Treaty of Rome prohibited any discrimination based on nationality,<sup>21</sup> and as early as the early 1970s the Court was quite clear that any discrimination based on nationality was outlawed “whatever be its nature and extent.”<sup>22</sup> The expansive wording of the prohibition on discrimination based on nationality and its expansive interpretation led many commentators to wonder why the Court was reluctant to apply the prohibition to cases of reverse discrimination.<sup>23</sup> Indeed, some early commentators concluded (in retrospect, prematurely) that Community law would ensure that reverse discrimination (in French, des «discriminations à rebours») would not affect the free movement of people because the Court of Justice would be careful to ensure that equal treatment and nondiscrimination would be followed.<sup>24</sup>

Against such optimistic expectations, the *Knoors* decision made clear that reverse discrimination would be disallowed only in cases where there was a sufficient connection with Community law.<sup>25</sup> The Court ruled that, although the provisions of the treaty relating to establishment and the provision of services “cannot be applied to situations which are purely internal to a Member State,” the Treaty’s reference to ‘nationals of a Member State’ who wish to establish themselves in the territory of another Member State “cannot be interpreted in such a way as to exclude from the benefit of community law a given Member State’s own nationals when the latter, owing to the fact that they have lawfully resided on the territory of another Member State and have there acquired a trade qualification which is recognized by the provisions of community law, are, with regard to their state of origin, in a situation which may be assimilated to that of any other persons enjoying the rights and liberties guaranteed by the treaty.” However, the ruling continued, “it is not possible to disregard the legitimate interest which a Member State may have in preventing certain of its nationals, by means of facilities created under the treaty, from attempting wrongly to evade the application of their national

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<sup>19</sup> Opinion of Advocate General Sharpston on the *Ruiz Zambrano* case.

<sup>20</sup> *Rudy Grzelczyk v. CPAS*, Case C-184/99 [2001] ECR I-6193.

<sup>21</sup> Article 7: “Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.”

<sup>22</sup> *Marine Labour Code (Commission v France)*, Case 167/73, 4 April 1974, para 44 [1974] ECR 373.

<sup>23</sup> Thus Schermers notes, “it is striking that the Court has been reluctant until now to apply [the prohibition on discrimination on the basis of nationality] to cases of reverse discrimination to the detriment of the nationals of the Member State concerned. It is unclear how this limitation can be justified both in terms of fairness and of uniform application of Community law, as well as in view of the large wording of EC Article 12.” Henry G Schermers, *Judicial Protection in the European Communities*, 5th ed, 92.

<sup>24</sup> Gérard Druésne, “Remarques Sur Le Champ D’application Personnel Du Droit Communautaire: Des «discriminations À Rebours» Peuvent-Elles Tenir En Échec La Liberté de Circulation Des Personnes?,” *Revue Trimestrielle de Droit Européen* 15 (1979): 429–439.

<sup>25</sup> *J. Knoors v Staatssecretaris van Economische Zaken*, Case 115/78 [1979] ECR 399.

legislation as regards training for a trade.”<sup>26</sup> In this case, Mr Knoors, a Dutch citizen wanting to establish himself in the Netherlands after having obtained a professional qualification in Belgium, was subject to Community law. But only individuals with sufficient connection to Community law would be able to avail themselves of these rights.

Similarly to the right of establishment, the right to free movement was restricted to cases involving Community law: “The application by an authority or court of a Member State to a worker who is a national of that same state of measures which deprive or restrict the freedom of movement of the person concerned within the territory of that state as a penal measure provided for by national law by reason of acts committed within the territory of that state is a wholly domestic situation which falls outside the scope of the rules contained in the EEC treaty on freedom of movement for workers.”<sup>27</sup> And as with the right to establishment and the right to free movement, so too family reunification under Community law was restricted: Member State nationals who had not made use of the right of free movement and were thus in a ‘purely internal situation’ could not rely on Community law to obtain a right of residence for their family members: “The treaty provisions on freedom of movement for workers and the rules adopted to implement them cannot be applied to cases which have no factor linking them with any of the situations governed by community law.”<sup>28</sup>

Reverse discrimination was restricted somewhat by the decision that, in cases of dual or plural nationality, an individual could claim the application of Community law against any Member State of nationality.<sup>29</sup> But it remained striking that “court challenges that would anywhere else have been fundamental rights cases were in Europe cases about economic integration.”<sup>30</sup> This peculiar situation persisted because the jurisprudence was based not on a commitment to upholding fundamental rights but rather on the aim of establishing a free market. This tension between rights and markets continues, as the divergent decisions in the *Ruiz Zambrano* and *McCarthy* cases illustrate.

The announcement in the Treaty of Maastricht that “Citizenship of the Union is hereby established” altered the situation in which legal cases were decided on the basis of an economic connection to European law. Henceforth, a new legal category was created, the category of citizen of the Union. In light of the introduction of Union citizenship, Advocate General Jacobs argued that the right to equality and non-discrimination “raises the expectation that citizens of the Union will enjoy equality, at least before Community law.”<sup>31</sup> Similarly, Advocate General Colomer argued that the creation of citizenship of the Union “represents a considerable qualitative step forward” because it separates freedom of movement from its functional or

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<sup>26</sup> *Knoors*, cited above.

<sup>27</sup> *The Queen v Vera Ann Saunders*, Case 175/78 [1979] ECR 1129.

<sup>28</sup> *Elestina Esselina Christina Morson v State of the Netherlands and Head of the Plaatselijke Politie within the meaning of the Vreemdelingenwet; Sweradje Jhanjan v State of the Netherlands*, Joined cases 35 and 36/82 [1982] ECR 3723.

<sup>29</sup> *Claude Gullung v Conseil de l'ordre des avocats du barreau de Colmar et de Saverne*, Case 292/86 [1988] ECR 111.

<sup>30</sup> Ian B. Lee, “In Search of a Theory of State Liability in the European Union,” Jean Monnet Working Paper 9/99 (available at <http://www.jeanmonnetprogram.org/archive/papers/99/990901.html> last accessed 10 January 2014).

<sup>31</sup> Opinion of Advocate General Jacobs, *Faccini Dori v. Recreb Srl*, Case C-91/92 [1994] ECR I-3325. Compare F.G. Jacobs, “Citizenship of the European Union: A Legal Analysis,” (2007) 13 ELJ 591.

economic need and “raises it to the level of a genuinely independent right inherent in the political status of the citizens of the Union.”<sup>32</sup>

Others concur; as Advocate General Kokott has noted, “Union citizens can assert their right to free movement even if the matter concerned or the benefit claimed is not governed by Community law.”<sup>33</sup> And Advocate General Mazák agrees: “Union citizenship, as developed by the case-law of the Court, marks a process of emancipation of Community rights from their economic paradigm.”<sup>34</sup>

As might be expected, it is not only Advocates General who take this line of argument. As the Court ruled first in *D’Hoop* and has repeated consistently since: because “a citizen of the Union must be granted in all Member States the same treatment in law as that accorded to the nationals of those Member States who find themselves in the same situation, it would be incompatible with the right of freedom of movement were a citizen, in the Member State of which he is a national, to receive treatment less favourable than he would enjoy if he had not availed himself of the opportunities offered by the Treaty in relation to freedom of movement.”<sup>35</sup>

Such cases, while combatting reverse discrimination, continue to be based on the fundamental freedoms (such as freedom of movement) rather than on Union citizenship. The incongruity has led some commentators to advocate eliminating the distinction.<sup>36</sup> The *Ruiz Zambrano* decision prohibited reverse discrimination not only the basis of economic logic (as in the past) but rather on the basis of the fundamental rights attached to Union citizenship.

Thus there is a need to delimit the scope of the fundamental rights attached to EU citizenship: EU citizens enjoy such a wide assortment of sources of rights that it is not clear what kinds of cases would *not* fall under some sort of fundamental right. Relevant for this problem is the discussion by Advocate General Poiares Maduro in *Centro Europa 7*, recalling arguments for extending the Court’s role in reviewing Member State measures to assess their conformity with fundamental right, starting with Advocate General Jacobs’s view that any national of a Member State who pursues an economic activity in another Member State may, as a matter of Community law, invoke the protection of his fundamental rights.<sup>37</sup> Noting that the Court did not follow this suggestion, Poiares Maduro nevertheless suggests that all now share the “profound conviction that respect for fundamental rights is intrinsic in the EU legal order and that, without it, common action by and for the peoples of Europe would be unworthy and unfeasible. In that sense, the very existence of the European Union is predicated on respect for fundamental rights. Protection of the ‘common code’ of fundamental rights accordingly constitutes an existential requirement for the EU legal order.” He continues that, while the ECJ does not have jurisdiction to review

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<sup>32</sup> Para 34 of Opinion of Advocate General Ruiz-Jarabo Colomer in *The Queen v. Secretary of State for the Home Department ex parte Shingara and Radiom*, joined cases C-65/95 and C-111/95 [1997] ECR I-3343.

<sup>33</sup> Opinion of Advocate General Kokott, *Tas-Hagen and Tas v. Raadskamer WUBO van de Pensioen- en Uitkeringsraad*, Case C-192/05 [2006] ECR I-10451. para. 33.

<sup>34</sup> Opinion of Advocate General Mazák, *Förster v. IB-Groep*, Case C-158/07 [2008], para.54.

<sup>35</sup> *Marie-Nathalie D’Hoop v Office national de l’emploi*, Case C-224/98 6191 [2002] ECR I-6191, paragraph 30, and *Schwarz and Gootjes-Schwarz*, paragraph 88. Repeated in many subsequent cases.

<sup>36</sup> Tryfonidou writes: “the situation that now exists, under which there are different Treaty provisions governing the position of Member State nationals (i.e., the fundamental freedoms provisions, on the one hand, and the citizenship provisions on the other) should no longer be maintained; a vast topic which would appropriately form the basis of another extensive study and therefore will not be further discussed in this work.” Alina Tryfonidou, *Reverse Discrimination in EC Law*, 160–161.

<sup>37</sup> Opinion delivered on 12 September 2007, *Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le Garanzie nelle Comunicazioni and Direzione Generale Autorizzazioni e Concessioni Ministero delle Comunicazioni*. Case C-380/05 [2008] ECR I-349.



any national measure in the light of fundamental rights, it does have “jurisdiction to examine whether Member States provide the necessary level of protection in relation to fundamental rights in order to be able adequately to fulfil their other obligations as members of the Union.” This type of review, he argues, “flows logically from the nature of the process of European integration. It serves to guarantee that the basic conditions are in place for the proper functioning of the EU legal order and for the effective exercise of many of the rights granted to European citizens.” After raising this suggestion, though, Poiares Maduro qualifies it by arguing that “[o]nly serious and persistent violations which highlight a problem of systemic nature in the protection of fundamental rights in the Member State at issue, would [...] qualify as violations of the rules on free movement, by virtue of the direct threat they would pose to the transnational dimension of European citizenship and to the integrity of the EU legal order.” Significant here is still the reference to the transnational dimension of Union citizenship; reverse discrimination concerns its non-transnational dimension.

Advocate General Kokott’s opinion on the *McCarthy* case challenges Advocate General Sharpston’s opinion on *Ruiz Zambrano*.<sup>38</sup> Kokott argues that a Union citizen who has always resided in a Member State of which she is a national and has also never exercised her right of free movement guaranteed by EU law does not fall within the scope of EU law and that the right of free movement of Union citizens does not (in her view) alter this: “I am not of the view that Union citizens can derive from Article 21(1) TFEU a right of residence vis-à-vis the Member State of which they are a national even where – as in the case of Mrs McCarthy – there is no cross-border element.” Kokott admits that Union citizens who have made use of their right of free movement may rely on more generous EU rules on the right of entry and of residence than nationals of the host Member State who have always resided in its territory – reverse discrimination, but “EU law provides no means of dealing with this problem. Any difference in treatment between Union citizens as regards the entry and residence of their family members from non-member countries according to whether those Union citizens have previously exercised their right of freedom of movement does not fall within the scope of EU law.” Kokott continues: “It is true that in the legal literature consideration is given from time to time to inferring a prohibition on discrimination against one’s own nationals from citizenship of the Union. Advocate General Sharpston too has recently adopted a position to this effect. However, as the Court has stated on a number of occasions, citizenship of the Union is not intended to extend the scope *ratione materiae* of EU law to internal situations which have no link with EU law.”

This reliance on the distinction between a “purely internal situation” and one subject to EU law may change: “It cannot of course be ruled out that the Court will review its case-law when the occasion arises and be led from then on to derive a prohibition on discrimination against one’s own nationals from citizenship of the Union.” But, for Kokott, *McCarthy* does not “provide the right context for detailed examination of the issue of discrimination against one’s own nationals” because “a ‘static’ Union citizen such as Mrs McCarthy is not discriminated against at all compared with ‘mobile’ Union citizens”: a Union citizen in Mrs McCarthy’s position “cannot rely on EU law in order to obtain for him or herself and his or her family members a right of residence in the Member State in which that Union citizen has always lived and of which he or she is a national.” Her solution is to appeal to the European Convention on Human Rights: “the United Kingdom might be obliged, by virtue of being a party to the ECHR, to grant Mr McCarthy a right of residence as the spouse of a British national living in England. This is not, however, a question of EU law, but only a question of the United Kingdom’s

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<sup>38</sup> Advocate General’s Opinion - 25 November 2010 *McCarthy*, Case C-434/09.

obligation under the ECHR, the assessment of which falls exclusively within the jurisdiction of the national courts and, as the case may be, the European Court of Human Rights.”

Unlike Advocate General Sharpston’s call for “seamless protection of fundamental rights under EU law in all areas of exclusive or shared EU competence” in order to match the concept of EU citizenship, there is little in Advocate General Kokott’s proposals to suggest an active role for the European Court in Luxembourg or a review of fundamental rights as founded on Union citizenship. Advocate General Kokott thus does not (here at least) appear to share the views of her colleague AG Sharpston or of AG Poiares Maduro, who argues that the prohibition of discrimination on the basis of nationality “is no longer merely an instrument at the service of freedom of movement; it is at the heart of the concept of European citizenship and of the extent to which the latter imposes on Member States the obligation to treat Union citizens as national citizens. Though the Union does not aim to substitute a ‘European people’ for the national peoples, it does require its Member States no longer to think and act only in terms of the best interests of their nationals but also, in so far as possible, in terms of the interests of all EU citizens.”<sup>39</sup>

### **EU Citizenship’s Political Objectives**

Citizenship denotes an intrinsic status and a set of rights that adhere inherently and equally to all citizens. Because governments increasingly approach citizenship as a policy tool that is subject to variation and modification, identifying *which* individuals are citizens is as important as the question of what the status of citizenship entails.<sup>40</sup> The pluralism of contemporary societies, bounded political communities in which the processes of state-building and those of nation-building have never been perfectly synonymous, increases the instability of citizenship as the demands of creating and operating a functioning state clash with those of maintaining or building a common identity.<sup>41</sup> The result is the constant creation and recreation of exceptions and partial or contingent citizenships and policy changes such as those now occurring in Europe.<sup>42</sup>

In federal states such as the United States and Canada, the introduction of federal rights empowered individuals and redrew the relationship between the governments of the centre and the units. Citizenship limits the power of Member States to treat their own nationals worse than nationals of other Member States. This does not eliminate the tension between centre and unit (or federal and regional; EU and Member State) law but should give extra weight to former over the latter. Thus it is not surprising but rather expected that Union citizenship represents an expansion of the Union citizens’ social rights and well-being that sometimes outmatches the social protection offered at the national level. Jurisdictional issues remain, but the growth of Union citizenship means that EU law should grow to encompass any right protected or promoted by shared citizenship.

The details of the various cases concerning reverse discrimination are noteworthy because they exhibit the expansive rights logic that citizenship entails. The expansive logic of shared citizenship helps explain why populist parties in Europe tend to be opposed to EU citizenship and most of what it entails, including free movement rights and the Schengen system

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<sup>39</sup> Opinion of Advocate General Poiares Maduro, *Heinz Huber v Bundesrepublik Deutschland*, Case C-524/06 [2008] ECR I-09705. Para 18.

<sup>40</sup> Willem Maas, “Unrespected, Unequal, Hollow?: Contingent Citizenship and Reversible Rights in the European Union,” *Columbia Journal of European Law* 15, no. 2 (2009): 265–280.

<sup>41</sup> *Ibid.*, 265.

<sup>42</sup> Maarten Peter Vink and Rainer Bauböck, “Citizenship Configurations: Analysing the Multiple Purposes of Citizenship Regimes in Europe,” *Comparative European Politics* 11, no. 5 (September 2013): 621–648.

doing away with border controls.<sup>43</sup> Comparative federalism is an appropriate lens for examining reverse discrimination, and the political development of federal rights in federal states such as the United States and Canada provides a useful historical parallel with current and future developments in the EU.<sup>44</sup>

Perhaps the development of the incorporation doctrine in the United States, a development which Advocate General Sharpston discusses in her *Ruiz Zambrano* opinion, is difficult to compare because it is historically distant and the focus was not primarily on individuals. The case of Canada, however, provides a parallel which is more contemporary, because the Canadian Charter of Rights and Freedoms was introduced relatively recently, in 1982, and challenged the constitutional division of powers between the federal and provincial governments. In the *Labour Conventions* case, the Privy Council had infamously held that the federal government lacked the constitutional authority to implement treaty obligations which encroached on provincial jurisdiction. Lord Atkin concluded that “an incursion by the federal government into provincial jurisdiction by means of the treaty power” was “as much an affront to the self-government principle” as any attempt would be for the executive to make domestic laws in a unitary state.<sup>45</sup> The result was that only when provinces agreed could the federal government encroach on provincial responsibilities.

This delicate constitutional balance was upset with the introduction of the Charter of Rights and Freedoms: “At the most abstract level, the Charter elevates citizenship to a constitutional category. The citizens’ possession of rights changes the relationship between the governors and the governed. This is true in the obvious sense that the rights of the latter are judicially enforceable against the rights violations perpetrated by the former. Citizens participate not only as voters influencing the composition of legislatures, but also in their capacity to trump the majority legally by resorting to the courts.”<sup>46</sup>

The possession of rights by individual Union citizens on the basis of their Union citizenship similarly changes the relationship between the Member States and individual Union citizens; citizens may now resort to the courts to enforce their rights against their governments. EU citizenship’s introduction into the treaty similarly elevated citizenship into a constitutional category, even if the substance of the rights (primarily freedom of movement) was not particularly new. In this light, ECJ cases since 1993 can be seen as attempts to grapple with the new constitutional status of EU citizenship.

The most recent cases illustrate the tension between desires for Member State control and the common rights of Union citizenship. One early commentator notes that the *Ruiz Zambrano* judgement may have unintended consequences on national migration and nationality law: extending the scope of Union rights may entice member states with “to render it all the more difficult for individuals to gain access to European citizenship in the first place,” by tightening the conditions for admission of third country nationals and other categories of potential

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<sup>43</sup> Willem Maas, “Freedom of Movement Inside ‘Fortress Europe,’” in *Global Surveillance and Policing: Borders, Security, Identity*, ed. Elia Zureik and Mark B. Salter, 233–245. The Dutch populist Pim Fortuyn campaigned to reintroduce border controls within the EU, a perspective shared at various points by France’s *Front nationale*, the Austrian Freedom Party, the Danish People’s Party, and others.

<sup>44</sup> Willem Maas, “Free Movement and Discrimination: Evidence from Europe, the United States, and Canada,” *European Journal of Migration and Law* 15, no. 1 (2013): 91–110; Willem Maas, ed., *Democratic Citizenship and the Free Movement of People*.

<sup>45</sup> *Canada (A.G.) v. Ontario (A.G.)* [1937] A.C. 326 (P.C.) [1937] 1 D.L.R. 673 [Labour Conventions].

<sup>46</sup> Alan C. Cairns, “The Charter: A Political Science Perspective,” *Osgoode Hall Law Journal* 30:3 (1992) p.619.

immigrants to compensate for their lack of control over the admission of family members of EU citizens.<sup>47</sup> And considering “the vast implications of obtaining Union citizenship, Member States may be inclined to restrict the possibilities for second generation immigrant children to acquire citizenship upon birth in their territory as well as making it more difficult for first generation migrants to become naturalised.”<sup>48</sup>

Such a political backlash is recommended by populist parties such as the Freedom Party in the Netherlands, whose press release on *Ruiz Zambrano* predicts “anchor babies” and claims the ruling will “lead to a new wave of migration to Europe and unwanted parenthood. Having children thus becomes simply a means of obtaining a residence permit and that is not in the interests of these children, their parents, and the European population.”<sup>49</sup> This view is misguided from the perspective of European law, because obtaining Union citizenship continues to depend on obtaining national citizenship, which remains the prerogative of Member States.<sup>50</sup> Yet it may lead to the political dynamics described above, where the growth of European rights prompts Member States to limit access to those rights by restricting access to national citizenship.

Just as important as the potential political backlash to the growing rights of EU citizenship is division within the legal community, as illustrated by the judgement in the *McCarthy* case. Both judgements closely follow the recommendations laid out by the respective Advocate General opinions which, as noted above, contain contradictory elements. One early commentator notes that *McCarthy* appears to limit the application of *Ruiz Zambrano*: “Contrary to some readings the ‘purely internal’ rule has not been abolished but persists, if in a modified form. Only in exceptional cases, where ‘the very enjoyment of the substance of rights conferred by the status of EU citizenship’ is in question does a situation with no cross-border element fall within the scope of EU law.”<sup>51</sup>

The *McCarthy* decision opposes the more expansive logic in *Ruiz Zambrano* because unlike in *Ruiz Zambrano*, where the EU residence rights of the two children who had EU citizenship by virtue of their Belgian citizenship was judged to depend on granting rights to their parents, Mrs McCarthy’s EU residence rights were judged not to depend on a residence permit for her spouse. Mrs McCarthy never moved outside her Member State and was receiving social assistance. Yet this does not negate the issue of fairness. Someone in Mrs McCarthy’s position who was not a UK citizen but a citizen of any other EU state *would* receive a spousal residence permit, on the basis of EU law. (Indeed, what would happen if Mrs McCarthy moved to denounce her UK citizenship and then claimed, on the basis of her Irish citizenship, the right that the *McCarthy* outcome denied her?) A comparison of the two cases concludes correctly that

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<sup>47</sup> Anja Wiesbrock, “The Zambrano case: Relying on Union citizenship rights in ‘internal situations’,” European Union Democracy Observatory on Citizenship, available at <http://eudo-citizenship.eu/citizenship-news/449-the-zambrano-case-relying-on-union-citizenship-rights-in-internal-situations>

<sup>48</sup> Ibid.

<sup>49</sup> <http://www.pvv-europa.nl/index.php/component/content/article/38-daniel-van-der-stoep/2669-stop-de-ankerbabys.html> My translation.

<sup>50</sup> Willem Maas, “Migrants, States, and EU Citizenship’s Unfulfilled Promise,” *Citizenship Studies* 12, no. 6 (2008): 583–595.

<sup>51</sup> Stephen Coutts, “Case C- 434-09: Shirley McCarthy v. Secretary of State for the Home Department,” European Union Democracy Observatory on Citizenship, available at <http://eudo-citizenship.eu/citizenship-news/475-case-c-434-09-shirley-mccarthy-v-secretary-of-state-for-the-home-department> accessed 26 November 2013.

“Extending rights to non-citizens without extending the same to citizens risks undermining the concept of citizenship.”<sup>52</sup>

These two cases and similar ones that the Court will undeniably be asked to consider in the future demonstrate the unresolved and perhaps unresolvable tension between different levels of citizenship and different ideas about what Union citizenship should mean. Of course, the EU is not a unitary state but rather has more in common with a federal political system. Thus the tensions between difference and equality which exist in federal states also continue to exist in the Union. Federations – the form of political system the EU appears to be becoming – must manage the strains between the need for local community and an overarching federal citizenship that guarantees the same rights to all members of the polity.<sup>53</sup>

The *Ruiz Zambrano* decision raises foundational questions about the relationship between Union citizenship and fundamental rights. Advocate General Sharpston expresses these questions clearly: “is the exercise of rights as a Union citizen dependent – like the exercise of the classic economic ‘freedoms’ – on some trans-frontier free movement (however accidental, peripheral or remote) having taken place before the claim is advanced? Or does Union citizenship look forward to the future, rather than back to the past, to define the rights and obligations that it confers? To put the same question from a slightly different angle: is Union citizenship merely the non-economic version of the same generic kind of free movement rights as have long existed for the economically active and for persons of independent means? Or does it mean something more radical: true citizenship, carrying with it a uniform set of rights and obligations, in a Union under the rule of law in which respect for fundamental rights must necessarily play an integral part?”

## Conclusion

The process of constitutionalizing the rights of EU citizenship is slow, as is the process of reducing the possibilities for reverse discrimination. Advocate General Sharpston’s *Ruiz Zambrano* recommendation that EU citizenship should become “true citizenship, carrying with it a uniform set of rights and obligations” would repudiate the principle that EU citizenship complements and does not replace national citizenship, the formulation of the Amsterdam Treaty. Recognizing the finalité politique of EU citizenship as true citizenship would recognize the reality that rights are expansive and not easy to contain. Indeed, an expansive rights logic is inherent in the principle of equality: recognizing EU citizens as fellow citizens means recognizing that they have rights on the same basis as ‘our’ citizens.<sup>54</sup>

An essay almost 25 years old, entitled ‘Is Reverse Discrimination Still possible under the Single European Act?’, concluded that “aiming at an internal market, or completing it, while at the same time continuing to attach importance to the crossing of national frontiers is itself

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<sup>52</sup> Helena Wray, “Family Life and EU Citizenship: A commentary on McCarthy C-434/09 5 May 2011,” European Union Democracy Observatory on Citizenship, available at <http://eudo-citizenship.eu/citizenship-news/479-family-life-and-eu-citizenship-a-commentary-on-mccarthy-c-43409-5-may-2011> accessed 26 November 2013.

<sup>53</sup> Willem Maas, “Varieties of Multilevel Citizenship,” in *Multilevel Citizenship*, ed. Willem Maas.

<sup>54</sup> Thus, Herwig Verschueren argues: “All EU citizens, including those who find themselves in a purely internal situation, should be able to rely on the prohibition of discrimination based on nationality and they should also be able to invoke the right not to be obliged to migrate if they want to claim the status which applies to those EU citizens who have made use of the right to free movement.” Verschueren, “Reverse Discrimination: An Unsolvable Problem?” in Paul Minderhoud and Nicos Trimikliniotis, *Rethinking the free movement of workers: The European challenges ahead* (Nijmegen: Wolf Legal Publishers, 2009), p.118.

contradictory.”<sup>55</sup> This presages the eventual elimination of the distinction between movers and non-movers, grounded not on economic logic but on the common status of Union citizenship. A more recent commentator states boldly that “reverse discrimination is no longer a justified difference in treatment and thus should no longer be permissible in the EC legal system”,<sup>56</sup> but then prevaricates by concluding that the EU “is, and will always be, a supranational organization of limited scope and aims and, accordingly, its general principles and rules should only apply to situations that fall within its scope. Therefore, reverse discrimination will be able to fall within the scope of the Community principle of equality only if it conflicts with one of the (broader) aims of the Community and thus comes within the general scope of EC law.”<sup>57</sup> Yet the continuing tensions between the universalizing function of a central citizenship and decentralized sources of local rights highlights the contingent nature of all rights in compound polities; the promise of Union citizenship is membership in a polity that is not simply multinational but that also supercedes nationality.<sup>58</sup>

Because it introduces rights that apply directly to individuals and which individuals may invoke, Union citizenship is not simply another international treaty: the rights it introduces, coupled with the nature of the enforcement mechanisms in place to ensure that these rights are respected, mean that EU citizenship approximates Member State citizenship more than would a treaty between states to establish supranational organization of limited scope and aims.<sup>59</sup> This fits with the historical reality that the introduction of economic rights in the European Community was coupled with a political project, and that the effort to entrench and expand a set of supranational rights into a supranational citizenship reflects the will to create a community of people rather than simply a free market area.<sup>60</sup>

The limits on reverse discrimination are simultaneously the limits of member state sovereignty in the face of European law, particularly the ability of member states to deny their nationals the rights enjoyed by other Union citizens. Debate about what EU citizenship is and should be matter because EU citizenship is intricately tied to the wider European project. EU citizenship’s success or failure will determine the future of European integration. Thus the question of the *finalité politique*, or political aim, of EU citizenship raised in the introduction is worth repeating. European Council President Herman van Rompuy captures the idea: “Europe is much more than a product for a customer, a consumer that allows you to cross borders without identity documents or no longer needing to exchange money on vacation. We are more than customers. We are European citizens. The first is about an interest. The second a value. We have gained an identity beyond that of our country or our people.”<sup>61</sup> This is the realization of Churchill’s dream of a Europe in which people “will be proud to say ‘I am a European’,” but the process of constitutionalizing EU citizenship continues.

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<sup>55</sup> Hans Ulrich Jessurun d'Oliveira, “Is Reverse discrimination still permissible under the Single European Act?” in *Forty years on : the evolution of postwar private international law in Europe* (Deventer: Kluwer, 1990).

<sup>56</sup> Tryfonidou, *Reverse Discrimination in EC Law*, 162.

<sup>57</sup> *Ibid.*, 166.

<sup>58</sup> Maas, “Migrants, States, and EU Citizenship’s Unfulfilled Promise.”

<sup>59</sup> Maas, “Unrespected, Unequal, Hollow?: Contingent Citizenship and Reversible Rights in the European Union,” 270–271.

<sup>60</sup> Maas, *Creating European Citizens*, 5, 7.

<sup>61</sup> Toespraak van de heer Herman Van Rompuy, Voorzitter van de Europese Raad n.a.v. Koningsdag met als thema ‘Het Europees burgerschap’ 15 November 2013, EUCO 235/13. My translation.