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Evan G. Hebert

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"It's just obvious you can't have free immigration and a welfare state."

- Milton Friedman

Introduction

A primary question facing the European Union (EU) is whether supranational citizenship – citizenship above and beyond that of an individual member state – can be reconciled with national sovereignty.[1] The goal for advocates of European citizenship is no less than the creation of a new society, one which requires "uncoupling civic obligation from loyalty to the nation-state."[2] The framework of supranational citizenship, drawing from the discourse of global human rights, confers new rights and obligations upon individuals and prefigures the formation of a new European identity.[3] As a result of this framework, the nation state is no longer the primary generator of citizen rights.[4] Rulings from the European Court of Justice (ECJ), specifically on the topic of national welfare schemes, have played a decisive role in conferring new substantive rights on citizens using the concept of EU citizenship and non-discrimination.[5]

European citizenship law interpreting the Treaty on the Functioning of the European Union's citizenship provisions provides a prime example of how delegation to a supranational authority imbued with

1. Theodora Kostakopoulou, *Nested "Old" and "New" Citizenships in the European Union: Bringing Out the Complexity*, 5 COLUM. J. EUR. L. 389, 389 (1999) ("The institution of European Union citizenship, which was established by the Treaty on European Union, has been the subject of considerable attention over the last few years.").
2. *Id.* at 392.
3. *See id.* (arguing that "European citizenship is intimately connected with political participation and the formation of a European identity").
4. Marlene Wind, *Post-National Citizenship in Europe: The EU As A "Welfare Rights Generator"?*, 15 COLUM. J. EUR. L. 239, 242 (2009) ("[I]f we consider the main producers of new citizen-rights over the past fifty years, the state no longer appears to be the most obvious contender.").
5. *Id.*

powers deriving from a treaty can create a positive cycle whereby the court interprets the law in a manner which further increases the scope and weight of said treaty.[6] The result is a gradual accrual of supranational power to the European Union at the expense of national sovereignty.[7] Part I discusses the history of welfare and citizenship in Europe, starting with the Treaty of Paris and continuing through the passage of the Treaty on the Functioning of the European Union (TFEU). Part II outlines some of the theoretical debates surrounding the status of European citizenship. Part III turns directly to the line of citizenship cases and their implications for the European Union. Finally, Part IV addresses criticism of the ECJ's citizenship jurisprudence, arguing that aggressive enforcement of supranational citizenship rights is necessary to prevent discrimination against European citizens and further the ultimate goal of the TFEU – creating a more social European Union.

Immigration and the Welfare State in Modern Europe

The Rights of European Migrants in Postwar Europe

European states have negotiated the social entitlements of migrants since long before the creation of the European Coal and Steel Community, usually through bilateral agreement.[8] In 1951, the Treaty of Paris conferred worker mobility rights on workers of proven qualifications, establishing a cornerstone of Community law.[9] The subsequent Treaty of Rome enshrined the freedom of movement, defined as "the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration, and other conditions of work and employment."[10] Social protection was attached to participation in the labor market, rather than on a

6. *See infra* Part III.B.
7. *Id.*
8. Dorte Sindbjerg Martinsen, *Social Security Regulation in the EU: The De-Territorialization of Welfare?*, in EU LAW AND THE WELFARE STATE, IN SEARCH OF SOLIDARITY, Oxford University Press (2005) at 89, 92 ("Long before the existence of the European Coal and Steel Community, the conditions of European labour migration and the social entitlements of migrants were negotiated between European states.").
9. *Id.* at 92-93.
10. *See* Agustín José Menéndez, *European Citizenship after* Martínez Sala *and* Baumbast*: Has European Law Become More Human but Less Social?* 3 CTR. FOR EUR. STUD., WORKING PAPER NO. 11, 2009 (quoting the treaty).

universal basis.[11] Subsequent directives promulgated under the Treaty of Rome extended the principle of free movement of workers to the removal of national legislation that discriminated on the basis of nationality and the protection of workers' families' right to remain in a member state where a worker is employed.[12]

The original freedom of movement for workers reflected two realities of postwar Europe—first, the economic need for transnational labor flows in order to implement industrial recovery plans, and second, the recognition that migrant labor was vulnerable to exploitation by national governments with the authority to expel migrants at any time.[13] Hence, the freedom of movement of workers thus gained a dual feature under Community law, regarded both as a functional way to regulate interstate labor flows and promote economic efficiency, and also as a vehicle for social and political integration between the member states.[14] The latter view saw the free movement of workers as the first step in creating a secondary European political community which would ultimately result in an autonomous European citizen with rights that were no longer contingent on economic activity.[15]

When tension arose between these two goals – labor efficiency and socio-political integration – the Court of Justice frequently took an idealistic approach expanding the scope of worker rights.[16] The worker was granted autonomous status with distinct legal rights protected by Community law upon moving across borders.[17] These rights went

11. Martinsen, *supra* note 8, at 93 ("Social protection as attached to labour mobility was initiated by Article 69(4) of the Paris Treaty.").
12. *Id.*
13. *See* Agustín José Menéndez, *European Citizenship after* Martínez Sala *and* Baumbast*: Has European Law Become More Human but Less Social?* 3 CTR. FOR EUR. STUD., WORKING PAPER NO. 11, 10 (2009) (quoting the treaty).
("Thus, the core and uncontroversial content of Community free movement of workers resulted from *both* a normative vision of equal rights . . . *and* from the economic needs of the founding six Member States.").
14. *Id.* at 6-7 (describing freedom of movement of workers as both a "tool of problem-solving, the problem being insufficient productive efficiency" and "a vehicle of political integration . . . as workers would generate social ties binding across borders").
15. *Id.* at 7 ("In the long run . . . the process would result in the affirmation of a status of European citizen fully dissociated from engagement into economic activity.").
16. *Id.* ("the tension between these two alternative conceptions of free movement was never solved . . . but secondary law and the jurisprudence of the Court became influenced by the second conception, which percolated into the legal and general public perceptions of European integration in general, and of free movement of workers in particular.").
17. *Id.*

beyond movement to encompass the right of establishment in another member state and the right to provide services across borders.[18] Individuals were granted the status of worker in certain cases despite not being entirely economically active based on their relationship to a worker or previous employment in the member state.[19] Step by step, Community law went from protecting migrant workers as a source of labor to treating them as autonomous persons with freedom of action.[20]

Community law thus took the first steps toward protecting non-economically active individuals.[21] Residence directives passed in June 1990 granted the right of free movement to students, retirees, and economically inactive persons, but with a catch – those seeking to exercise the right had to demonstrate that they had health insurance and would not become a burden on the social welfare of a member state.[22] This gave the member states a role in approving what for practical purposes represented a residence permit, so immigration of European persons was still a matter of national concern.[23] Again, the focus remained on the value that migrating workers could provide to the host nation, reflecting the economic basis for free movement.[24] In 1992, the Maastricht Treaty codified these rights as part of the concept of Union citizenship without substantively changing the law.[25]

Today, the rights of European migrants flow from two treaty provisions. Article 18 of the Treaty on the Functioning of the European Union [ex. Article 12 EC] establishes that "within the scope of the application of the treaties . . . any discrimination on the grounds of nationality shall be prohibited."[26] Article 21 of the same treaty states, "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the

18. *Id.*
19. *Id.* at 9.
20. *Id.* at 11 (stating that "free movement of workers was defined, together with freedom of provisions and receipt of services and freedom of establishment, as concrete manifestations of a larger personal freedom of action, and concretely a freedom of movement of persons").
21. *Id.*
22. Martinsen, *supra* note 8, at 94.
23. *Id.*
24. *See* Martinsen, *supra* note 8, at 93-94.
25. Martinsen, *supra* note 8, at 94 (stating that the Maastricht Treaty "merely codified the right which had already been adopted by the residence directives").
26. Consolidated Version of the Treaty on the Functioning of the European Union art. 18, May 9, 2008, 2008 O.J. (C 115) 56 [hereinafter TFEU].

limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."[27] Although this provision seems relatively clear on its face, at the time when the TFEU came into force it left more questions than it answered. What constituted "discrimination" under Article 18? What "limitations" would Article 21 be subject to, and would national legislation be required for these rights to be enforceable? These questions were largely left open to interpretation. It would take a series of rulings by the European Court of Justice to resolve many of the issues surrounding how to interpret the new concept of EU citizenship in the context of social welfare policy.[28]

The Development of the Modern Welfare State in Europe

In the modern EU, welfare policy is inextricably tied with immigration and citizenship.[29] Indeed, national welfare policy intersects with many of the freedoms granted by European citizenship, specifically the freedom of movement of persons, nondiscrimination, and the freedom of establishment.[30] When member state legislation erects barriers to those freedoms, they must be based on objective considerations and proportionate to the legitimate aim pursued.[31] If a member state seeks to withdraw European citizenship from a person, it must base its argument for doing so in European, rather than national, law.[32]

Social citizenship and the welfare state grew up at the same time that modern neoliberal capitalism took shape, complementing the economic system despite inherent contradictions between the two by

27. TFEU art. 21.

28. *See* Hadas Alexandra Jacobi, *A Fürstin by Any Other Name? European Citizenship and the Limits of Individual Rights in the E.C.J.*, 17 COLUM. J. EUR. L. 643, 651 (2011) ("Thus, the question arises whether rights derived from an individual's EU citizenship are more like less-enforceable, and subsequentially less meaningful, human rights; or more like institutionally-backed national rights. It is with regard to this question that the role of the ECJ comes into prominence.").

29. *See* Magnus Ryner, *European Welfare State Transformation and Migration*, *in* MICHAEL BOMMES & ANDREW GEDDES, IMMIGRATION AND WELFARE: CHALLENGING THE BORDERS OF THE WELFARE STATE 51, 51 (2d ed. 2005) ("[W]elfare state restructuring and migration condition one and other in EU member states and . . . affect[] our understanding of contemporary forms of social citizenship).

30. *See* Kostakopoulou, *infra* note 78, at 652-55.

31. Kostakopoulou, *infra* note 78, at 658.

32. Dennis-Jonathan Mann & Kai P. Purnhagen, *The Nature of Union Citizenship Between Autonomy and Dependency on (Member) State Citizenship - A Comparative Analysis of the* Rottmann *Ruling, or: How to Avoid A European Dred Scott Decision?*, 29 WIS. INT'L L.J. 484, 489-90 (2011).

mitigating capitalism's worst abuses using the tax revenue base generated by business expansion.[33] The regulatory welfare state also provides a predictable foundation for allocating labor and creates the basis for consumer spending.[34] Thus, especially early on, the possibility for positive-sum gains for both labor and capital allowed for the growth of the welfare state in tandem with modern capitalism.[35]

Today, this relationship is somewhat more strained.[36] In many member states, universal entitlement as a basis for allocating social welfare has given way to means testing and fears of "benefit tourism."[37] These fears drive social stratification of migrants, seen as a burden on the state's benefit programs, in a destructive spiral that furthers skepticism of immigrant populations.[38] Moreover, the very notion of means testing is antithetical to the concept of entitlement under supranational citizenship, especially when the national government of the member state is the one conducting the "test."[39] It relegates social rights to the status of economic rights, no longer a substantive guarantee of a certain standard of living *to all*, but rather a safety net for those

33. *Id.* at 55-56.
34. *Id.*
35. *Id.*; *see also* Gøsta Esping-Andersen, *After the Golden Age? Welfare State Dilemmas in a Global Economy*, in WELFARE STATES IN TRANSITION: NATIONAL ADAPTATIONS IN GLOBAL ECONOMIES 1 (Gøsta Esping-Andersen ed. 1996) ("The modern welfare state became an intrinsic part of capitalism's postwar 'Golden Age', an era in which prosperity, equality, and full employment seemed in perfect harmony.").
36. *See* Ryner, *supra* note 29, at 52 (noting increasing welfare privatization).
37. Ryner, *supra* note 29, at 52 (stating that "[p]ublic 'welfare' is increasingly a lower quality product, subject to means tests, and is reserved for the 'deserving poor', who cannot afford private provision and/or pose an 'unacceptable risk' for insurance providers"). Recall that the "benefit tourism" concern was validated by the ECJ in *D'Hoop*, 2002 E.C.R. I-06191 ¶ 29.
38. Ryner, *supra* note 29, at 53 ("Xenophobia and social divisions immanent in the patterns of socio-economic and political restructuring also feed into each other and drive these social groups apart").
39. Ryner, *supra* note 29, at 52-56 ("Means-testing, with its *ipso facto* particularism and state discretion has very little to do with citizenship at all. Despite its 'social dimension', it is this type of social welfare regime that the current patterns of European integration contribute[] towards, with the emphasis placed squarely on economic rights.") ("Means testing, by its very nature, implies top-down imposition. The state decides who are the 'deserving', and what conditions one has to fulfil in order to be classed as deserving. Universalist programmes imply less surveillance and control of clients, and are thus more compatible with the idea of rights.").

unlucky enough to be unable to participate in the market.[40] The former view has a universalist, collectivist ethos, while the latter is an individualistic, status-oriented approach to welfare – one that sees beneficiaries as merely the losers in a depoliticized economy.[41]

The universalist and individualist approaches to welfare exist as competing ideologies within the European Union, with many dialectical permutations.[42] The individualistic, status-oriented welfare regime is present mainly in continental Europe and the UK.[43] Welfare is limited to status-based transfer payments aimed at creating a social safety net, means testing is enforced to determine eligibility, and government assistance is the exception, rather than the norm.[44] The more expansive, social approach to welfare, is associated with the Scandinavian nations.[45] A collectivist ideology – emanating from the strength of the labor movement, prevails as the hegemonic social force, and universal entitlements that cover the needs of the whole of society are the norm.[46] A "dense network of policies and regulations" ensures that social services protect labor, and entitlements are thus premised on the basis of citizenship, rather than means or status.[47]

Overall, member states falling into the second category spend less per capita on social services.[48] While nationalism played a role in the development of social systems in all of postwar Europe, the nations

40. Ryner, *supra* note 29, at 56 (noting that under means-tested systems, the norms surrounding welfare are "hardly distinguishable from the norms associated with the traditional liberal 'economic rights' as opposed to 'social rights.'").

41. Ryner, *supra* note 29, at 56; *see generally* SLAVOJ ZIZEK, THE TICKLISH SUBJECT 353-55 (Verso, 1999) (defining the depoliticization of the economy as "the common acceptance of Capital and market mechanisms as neutral tools/procedures to be exploited").

42. Ryner, *supra* note 29, at 57.

43. Ryner, *supra* note 29, at 57; *see also* Ramón Peña Casas, Working Paper, *Minimum Income Standards in Enlarged EU: Guaranteed Minimum Income Schemes*, EUROPEAN COMMISSION, VS/2005/0376, http://www.eapn.ie/pdfs/ (describing these regimes as legitimizing state intervention only when the market has failed, requiring means testing, and emphasizing individual circumstances, and contrasting them with social democratic schemes that retain a universalistic bent).

44. Ryner, *supra* note 29, at 57 (describing the residual liberal welfare state regime and the conservative status-oriented welfare regime).

45. *Id.* (describing the "social democratic regime").

46. *Id.*

47. *Id.*

48. Ryner, *supra* note 29, at 57; *see also* EUROSTAT, SOCIAL PROTECTION STATISTICS 1 (2016), http://ec.europa.eu/eurostat/statistics-explained/index.php/ (showing each country's social protection expenditures per capita and as a percentage of GDP).

that tied welfare arrangements to nation-building rather than more abstract social rights were those falling in the more conservative, individualist camp.[49] Still, as a general matter the development of the welfare state was premised on a concept of national sovereignty that included a restrictive, national orientation toward citizenship.[50]

Thus, the welfare states of the European Economic Community first afforded limited welfare benefits to "guest workers" despite their status outside the social citizenry on the basis that their migration was necessary to alleviate temporary labor shortages.[51] But as the Court of Justice expanded the rights of workers in a manner that conflicted with this purely economic basis for freedom of movement, the national welfare schemes of the individual member states increasingly came under judicial scrutiny.[52] The Court ruled that the computation of pension benefits must count the years a migrant worker spent working in another member state, that member states could not impose greater social security contributions of workers who had been working and insured in another member state, and that periods of employment in another member state must count for the purposes of determining the rights of potential job seekers.[53] Thus, the pre-Maastricht framework for protecting the rights of workers was already running into conflicts with the national welfare schemes of the individual member states.[54] The development of European citizenship would lead to even further conflict.

49. Ryner, *supra* note 29, at 58 ("The connection between welfare and the 'national question' is perhaps most explicitly clear in the 'conservative' policy regimes.").
50. Ryner, *supra* note 29, at 59 (noting the link between national welfare states and "the practices and discourses associated with the institutionalisation of national citizenship and forms of social belonging oriented towards nationals").
51. Ryner, *supra* note 29, at 60 (stating that "the 'role' ascribed to guest workers was to be a variable in counter-cyclical positive economic state intervention, to be excluded from the benefits of nationally specific transfer payment and insurance systems, even when they contributed to their financing").
52. *See* Menéndez, *supra* note 10, at 12.
53. *See* Case C-443/93, *Vougioukas v. IdrimaKoinonikonAsphalisseon*, 1995 E.C.R. I-4052 ¶¶ 39-41; Case C-18/95, *Terhoeve v. Inspecteur van de BelastingdienstParticulieren*, 1999 E.C.R. I-00345 ¶ 28; Case C-19/92, *Dieter Kraus v. Land Baden-Württemberg*, 1993 ECR I-01663, ¶¶ 16-22.
54. Case C-19/92, *Dieter Kraus v. Land Baden-Württemberg*, 1993 ECR I-01663, ¶¶ 16-22.

In Search of a Theory of European Citizenship

In its barest sense, citizenship is a system of reciprocal obligations between a community and a citizen.[55] Liberal communities emerge from norms of citizenship that give citizens a shared affinity and a feeling of mutual participation in accomplishing common responsibilities.[56] In other words, political communities originate from the bonds of citizenship that establish who is in and who is out.[57] Traditionally, citizenship was defined territorially, in terms of the relationship between an individual and the nation state.[58]

The development of modern citizenship took place in three conceptual phases – civil, political, and social – wherein each expanded the scope of the relationship between the citizen and the nation.[59] The first civil rights developed in the economic field, the most basic and fundamental of these being the right to work.[60] The recognition of these rights was based on the acceptance of a fundamental market ideology, namely that restrictions on the pursuit of trade contravened individual economic freedom, and worse, were detrimental to the prosperity of the nation.[61] Gradually, additional rights were attached to citizenship.[62]

At the same time, the scope of citizenship – the critical question of *who* could invoke these new rights – expanded to include more individuals within the political community.[63] Eventually, citizens gained

55. Ian Ward, *International Order, Political Community, and the Search for a European Public Philosophy*, 22 FORDHAM INT'L L.J. 930, 934 (discussing "the idea of group identity and the sense of reciprocal obligations between community and citizen").

56. *Id.* at 935 ("[T]he sense of affinity that every community needs is established by the inculcation of certain citizenship responsibilities. A sense of belonging comes from a nurtured sense of participation.").

57. *Id.*; *see also* Jürgen Habermas, *Citizenship and National Identity: Some Reflections on the Future of Europe*, 12 PRAXIS INT'L 1, 5 (1992) (arguing that citizenship's "definition of membership serves, along with the territorial demarcation of the country's borders, the purpose of a social delimitation of the state").

58. *See* Kostakopoulou, *infra* note 78, at 633.

59. *See* T.H. Marshall, *Citizenship and the Social Class*, THE WELFARE STATE READER 30, 30 (Christopher Pierson and Francis Geoffrey eds. 2006) ("I propose to divide citizenship into three parts . . . civil, political and social.").

60. *Id.* at 31 ("In the economic field the basic civil right is the right to work, that is to say the right to follow the occupation of one's choice in the place of one's choice, subject only legitimate demands for preliminary technical training.").

61. *Id.*

62. *Id.* ("The story of civil rights in their formative period is one of the gradual addition of new rights.").

63. *Id.* (noting the end of slave status in England and the grant of citizenship to peasants).

political rights, such as the right to vote and stand in elections; these were seen as protecting sections of the population that had traditionally wielded little political power.[64] These political rights started as economic in scope (the privilege of a limited economic class) and substance (including, for example, participation in trade associations).[65] They too became universal, personal rights as suffrage for women and non-landowners came into being.[66]

Social rights were the last of the elements of citizenship to develop, connected to a growing consciousness that the removal of barriers to political and economic participation was insufficient to combat growing social inequality.[67] Proponents demanded rights "to a certain standard of civilization . . . conditional only on the discharge of the general duties of citizenship."[68] These rights did not depend on the claimant's economic status, and were thus by nature universal.[69] Their rise coincided with that of the welfare state providing basic social services to all citizens.[70]As a result of the social rights framework, citizenship began to mean more than mere freedom to pursue economic activities without interference.[71] It took an egalitarian turn, seeking to prevent the most extreme forms of inequality and abject poverty.[72] Ultimately, the affording of basic social welfare became part of the exchange between citizens and the state.[73]

64. *Id.* at 32.
65. *Id.* (stating that in the nineteenth century, "the political franchise . . . was the privilege of a limited economic class").
66. *Id.* (arguing that the twentieth century abandoned the economic view of political rights, "attach[ing] political rights directly and independently to citizenship as such").
67. *Id.* at 35 (describing "a growing interest in equality as a principle of social justice and an appreciation of the fact that the formal recognition of an equal capacity for rights was not enough" and noting that "even the complete removal of all the barriers that separated civil rights from their remedies would not have interfered with the principles of the class structure of the capitalist system").
68. *Id.* at 36.
69. *Id.* ("There is therefore a significant difference between a genuine collective bargain through which economic forces in a free market seek to achieve equilibrium and the use of collective civil rights to assert basic claims to the elements of social justice.").
70. *Id.* at 37-38.
71. *Id.*
72. *Id.* at 38-39 (stating that "the preservation of economic inequalities has been made more difficult by the enrichment of the status of citizenship").
73. MICHAEL BOMMES & ANDREW GEDDES, IMMIGRATION AND WELFARE: CHALLENGING THE BORDERS OF THE WELFARE STATE 1 (2d ed. 2005) ("The sovereignty of nation states over a given territory and population was and still is based on the exchange of the political provision of welfare in exchange for the *internal loyalty* of their citizens. If loyalty

The development of the social model of citizenship and the modern welfare state carried with it one dark undercurrent: immigration control.[74] Immigrants were viewed as a threat to the welfare state, and were categorized and granted limited rights according to their ability to produce economic benefits for the host state.[75] Undocumented, guest worker, asylum seeker, family migrant, etc., these categories were used to define, among other rights, immigrants' access to the welfare state.[76] Immigration's challenge to the welfare state is both practical and conceptual, practical in that it demands allocation of theoretically scarce resources, and conceptual as it requires drawing lines on access to the benefits of citizenship.[77]

In the early 1990s, scholars generally viewed European citizenship as merely symbolic, adding little to the pre-Maastricht framework for the free movement of workers.[78] Article 21 of the TFEU stated that "[e]very citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect."[79] But Union citizenship was seen as lacking social content as it was premised on economic justifications designed to promote market integration; thus, it was simply the "mirror image"

is one side of the coin, then the other side is *external closure* at the borders of nation states.") (emphasis original).

74. *Id.* (describing closed borders as the "other side of the coin" of the welfare state); *see also* Menéndez, *supra* note 10 at 4 n. 10 (stating that "the emergence of national welfare . . . required a stronger distinction between nationals (or permanent foreign residents) and foreigners, if only to ensure that eligibility conditions were respected").

75. MICHAEL BOMMES & ANDREW GEDDES, IMMIGRATION AND WELFARE: CHALLENGING THE BORDERS OF THE WELFARE STATE, 2 (2d ed. 2005).

76. *Id.* ("These filters exclude certain forms of unwanted migration, define a variety of legal conditions for immigration and residence, combine them with different welfare entitlements and, consequently, pave the social options for those who enter the country."). *See also* Ryner, *supra* note 29, at 52 (noting how these categories subject migrants to "discretionary state power and discrimination in selective means-tested welfare regimes").

77. *See* BOMMES & GEDDES, *supra* note 73; *See also* Ryner, *supra* note 29, at 52 (noting how these categories subject migrants to "discretionary state power and discrimination in selective means-tested welfare regimes").

78. *See* Dora Kostakopoulou, *European Union Citizenship: Writing the Future*, 13(5) EUR. L. J. 623, 624-25 (2007) (showing how early on, the transformative potential of Union citizenship "remained at the margins of the debate" over the treaty).

79. Consolidated Version of the Treaty Establishing the European Community art. 18(1), Dec. 24, 2002, 2002 O.J. (C 325) 33 [hereinafter ECT].

of pre-Maastricht mercantile citizenship.[80] It also lacked the sense of belonging among citizens that generally accompanies national citizenship.[81] Finally, because Union citizenship depended on being a citizen of a member state, it remained the prerogative of the member states to act as gatekeepers in determining who would access the benefits of Union citizenship.[82] Article 20 of the TFEU supported this narrow conceptual view, stating that Union citizenship would be "additional to," and not replace, national citizenship.[83]

In subsequent years, a second perspective emerged, one that recognized the transformative possibility of Union citizenship and the possibility for incremental change that would make the EU more social.[84] Constructivist scholars argued that the boundaries of political community are constructed by states and individuals themselves rather than inevitably tied to national identity.[85] Therefore, Union citizenship could deemphasize nationalism's role in defining political community as social integration fosters a cosmopolitan orientation towards Union citizens from different member states.[86] Constructivist scholars argued in favor of disconnecting political community from nationality in

80. Kostakopoulou, *supra* note 78, at 625 ("European citizenship appeared to comprise a core of economic entitlements primarily designed to facilitate market integration . . . it reflected a loose and fragmented form of mercantile citizenship."); *see generally* J. d'Oliveira, *Union Citizenship: Pie in the Sky?*, *in* A CITIZENS' EUROPE: IN SEARCH OF A NEW ORDER (A. Rosas and E. Antola eds. 1995).

81. Kostakopoulou, *supra* note 78 (noting that Union citizenship was seen as having a "weak affective dimension"). *See also* Habermas, *supra* note 57, at 7 ("[D]emocratic processes have hitherto only functioned within national borders. So far, the political sphere is fragmented into national units. The question thus arises whether there can ever be such a thing as European citizenship . . . the consciousness of 'an obligation toward the European commonwealth.'").

82. Kostakopoulou, *supra* note 78, at 626 ("Making European citizenship a derivative of national citizenship does not only give prominence to the nationality principle, but, perhaps more worryingly, subjects membership to the European public to the definitions, terms and conditions of membership prevailing in national publics.").

83. TFEU art. 20.

84. Kostakopoulou, *supra* note 78 ("A rival, constructivist perspective did not hesitate to view European citizenship as a marker of a wider socio-political transformation."). Constructivism stands in opposition to essentialism, which would consider citizenship and political community essentially static.

85. Kostakopoulou, *supra* note 78, at 627-28.

86. *Id.* ("European integration has turned Europeans into Union citizens and has fostered a cosmopolitan orientation of openness towards the 'other.'").

defining citizenship, thereby recasting one of the weaknesses of Union citizenship as its major strength.[87]

Union citizenship was an experiment, creating a new, cosmopolitan political community resistant to the pernicious influence of nationalism.[88] Cosmopolitan citizens of the EU would feel affinity and an obligation of care for all of their fellow citizens regardless of member state of origin.[89] The result of this incremental process is "a political order that transcends the Nation State" a new, European social identity.[90] European supranational citizenship also raised the possibility of universal global citizenship and a truly transnational political community.[91]

The Citizenship Cases

Expanding the Scope of Citizenship Rights

In a series of cases, the ECJ expanded the scope of citizenship rights by giving teeth to the concept of non-discrimination and relaxing the requirement that a citizen engage in economic activity or freedom of movement before invoking these rights. Article 21 of the TFEU states that "[e]very citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect."[92]

María Martínez Sala v. Freistaat Bayern explored the extent to which welfare benefits could be tied to residency and national status under this prohibition of member state discrimination against non-

87. *Id.* (stating that the constructivist perspective "was associated with a renewed focus on longstanding concerns about the maintenance of nationality as a proxy for defining political community . . . and the effects of the replacement of the ideal of national homogeneity with multiplicity and diversity").

88. *Id.* ("Europe could thus become the setting for the more ambitious transition to a post national tableau and the prototype for cosmopolitan experimentation on a global scale.").

89. Kostakopoulou, *supra* note 78, at 629 ("[C]osmopolitanism unties the citizen from the bounds of a particular polity."). In its most extreme form, cosmopolitanism entails obligations between an individual and all other persons in the world.

90. *Id.*

91. *See* Habermas, *supra* note 57, at 19 (stating that as a result of early efforts at European unification, "[t]he arrival of world citizenship is no longer merely a phantom").

92. Consolidated Version of the Treaty Establishing the European Community art. 18(1), Dec. 24, 2002, 2002 O.J. (C 325) 33 [hereinafter ECT].

nationals.[93] Martinez Sala was a Spanish national residing in Germany who was denied a child-raising allowance because she was unable to produce a residence permit, despite the fact that she had been living in Germany for many years.[94] The ECJ ruled that Germany's residence permit requirement constituted a violation of the principle of non-discrimination on the basis of national origin.[95] The Court noted that German nationals were not required to produce a residence permit in order to obtain the child-raising allowance, so requiring it of Ms. Sala constituted unequal treatment.[96]

Moreover, the permit was not necessary to establish whether Ms. Sala had the right to reside in Germany because she was an EU citizen, and thus entitled to receive the child-raising allowance so long as she met the requirements that the German government imposed on Germans.[97] The decision thereby gave teeth to the non-discrimination principles in EU law, but left undecided the full extent of the right to move and reside freely within the territory of the member states.[98] It was notable as the first time the Court relied directly on the citizenship provisions in granting social rights to a Union citizen.[99]

In *Baumbast and R.*,[100] the Court addressed whether Article 21 grants a right of residency for non-nationals in a member state.[101]

93. Case C-85/96, *María Martínez Sala v. Freistaat Bayern*, 1998 E.C.R. I-02691 ¶ 1.
94. *Id.* at ¶¶ 13, 17.
95. *Id.* at ¶ 54.
96. *Id.* ("[F]or a Member State to require a national of another Member State who wishes to receive a benefit such as the allowance in question to produce a document . . . when its own nationals are not required to produce any document of that kind, amounts to unequal treatment.").
97. *Id.* at ¶ 65 (holding that Community law precludes member states from "requiring nationals of other Member States authorised to reside in its territory to produce a formal residence permit issued by the national authorities in order to receive a child-raising allowance, whereas that Member State's own nationals are only required to be permanently or ordinarily resident in that Member State").
98. *See id.* at ¶ 60 (stating that "it is not necessary to examine whether the person concerned can rely on Article 8a of the Treaty in order to obtain recognition of a new right to reside in the territory of the Member State concerned"). The Court thus suggested that a right of residence could be found under direct application of the non-discrimination language in Article 8a [later 18(1) ECT]. *Id.*
99. *See* Wind, *supra* note 4, at 256 ("The 1998 *Martínez Sala* ruling was the first case in which the Court relied directly on the citizenship provisions.").
100. Case C-413/99, *Baumbast and R. v. Sec'y of State for the Home Dep't*, 2002 E.C.R. I-7091.
101. *Id.* at ¶ 76 ("[T]he national tribunal seeks essentially to ascertain whether a citizen of the European Union who no longer enjoys a right of residence as a migrant worker in

Specifically, Baumbast – a German national – argued that "the right to move and reside freely within the territory of the Member States" meant that he could establish residency in the United Kingdom despite the fact that he was employed outside the UK.[102] The Commission, UK, and German governments all argued that the Article did not have direct effect as against the member states and was subject to pre-existing limitations from prior to the treaty's adoption, specifically the link between the right of residence and economic activity or sufficient resources.[103]

The Court rejected this argument, holding that as a national of a member state, and thus a Union citizen, Baumbast had the right to directly rely on Article 21 even in the absence of national implementing legislation.[104] While the TFEU provides for some limitations to the right of residence emanating from Union citizenship, including that the migrant citizen have sufficient resources to avoid becoming a burden on the state, the application of those limitations is subject to a proportionality inquiry.[105]

With respect to Mr. Baumbast, the ECJ held that denying him the right to reside in the UK violated Article 21 under the principle of proportionality.[106] Baumbast had sufficient resources to reside in the UK, had lawfully resided there for a number of years with his family as an employed and self-employed person, and did not become a burden on the public finances of the UK.[107] Given these facts, the Court found that denying Baumbast and his family the right to reside in the UK constituted a "disproportionate interference" with the exercise of the right of residence. In other words, the question of where Mr. Baumbast

the host Member State can, as a citizen of the European Union, enjoy there a right of residence by direct application of Article 18(1) EC.").

102. *Id.* at ¶¶ 76-77 ("According to Mr. Baumbast . . . [Article 18] should be interpreted to mean that [he] continues to exercise a right of residence in the United Kingdom while he is working outside the European Union.").

103. *Id.* at ¶¶ 78-79.

104. *Id.* at ¶ 84 ("Purely as a national of a Member State, and consequently a citizen of the Union, Mr. Baumbast therefore has the right to rely on Article 18(1) EC.").

105. *Id.* at ¶ 91 (stating that "those limitations and conditions must be applied in compliance with the limits imposed by Community law and in accordance with the general principles of that law, in particular the principle of proportionality").

106. *Id.* at ¶¶ 91-92 (reciting that proportionality requires "that national measures adopted on [the] subject must be necessary and appropriate to attain the objective pursued" and holding that denying Baumbast residence rights would violate proportionality).

107. *Id.* at ¶ 92.

was employed was irrelevant; he and his family had the right to reside in the UK under Article 21 alone.[108] The ruling stands for the principle that a citizen of the EU can exercise the right to reside in any member state by direct application of Article 21 of the TFEU without engaging in economic activity via employment.[109] *Baumbast* thereby expanded the scope of European citizenship beyond non-discrimination and created a general right of residence for all EU citizens.[110]

In addition to the general right of residence derived from Article 21, the ECJ has found the provision to also protect citizens from discriminatory treatment at the hands of their member state of origin when the member state imposes burdens on the exercise of one of the fundamental freedoms guaranteed by Union citizenship.[111] In *D'Hoop v. Office National de L'Emploi*, a Belgian student was denied a tideover allowance upon graduation because she had completed her secondary education in France.[112] Belgium granted the allowance to young unemployed people immediately after graduation, but only if they completed their secondary education in Belgium; however, the rules permitted the children of migrant workers living Belgium to complete their secondary education in another member state.[113] Thus, the children of migrant workers were free to travel outside Belgium for their education and receive the allowance, while Belgian nationals had to remain in the state to be eligible.[114]

The ECJ considered whether this constituted discrimination against Belgian nationals by placing a barrier that did not exist for non-

108. *See id.* at ¶ 81 (noting that while previously "the Court had held that that right of residence, conferred directly by the EC Treaty, was subject to the condition that the person concerned was carrying on an economic activity," ECT Article 18(1) "conferred a right, for every citizen, to move and reside freely within the territory of the Member States").

109. *Id.* at ¶ 94 ("[A] citizen of the European Union who no longer enjoys a right of residence as a migrant worker in the host Member State can, as a citizen of the Union, enjoy there a right of residence by direct application of Article 18(1) EC.").

110. *Id.*

111. Case C-224/98, *D'Hoop v. Office National de L'Emploi*, 2002 E.C.R. I-06191 ¶¶ 29-33.

112. *Id.* at ¶ 23.

113. *Id.* at ¶¶ 6-7. A previous judgment from the Court held that requiring everyone to complete their secondary education in Belgium in order to receive the allowance discriminated against non-nationals, so Belgium amended the legislation to waive the requirement for the dependent children of migrant workers residing in Belgium. *See* Case C-278/94, *Commission v. Belgium*, 1996 E.C.R. I-4307.

114. *Id.*

nationals on their freedom to pursue education outside Belgium.[115] The Court ruled that the legislation violated D'Hoop's "freedom to move and reside within the territory of the Member States."[116] It held that legislation erecting barriers to the freedom of movement to pursue education in another member state are subject to a proportionality inquiry when they discriminate against nationals of the member state.[117]

Turning directly to the issue of proportionality, the Court found that the means of withholding the allowance from nationals who conducted their secondary education outside the state were disproportionate to the legitimate end pursued, ensuring the subsidy went to graduates seeking work in Belgium.[118] The court first noted that the Belgian government had not raised any defense of the law on this basis, then found that the law was both "too general and exclusive" to be considered proportionate to Belgium's legitimate aims.[119] Specifically, the Court noted that the place where a student conducts their secondary education does not necessarily determine where they ultimately work, and Belgium's choice to zero in on this element to the exclusion of all others in determining eligibility for the benefit could not be justified in relation to the public policy aim cited in justifying the condition.[120] Thus, the legislation created a disproportionate barrier to Belgians' exercise of the freedom to move abroad and pursue secondary education.[121]

The *D'Hoop* decision demonstrates how the concept of EU citizenship expanded the scope of the freedom of movement to cover *persons*, rather than just workers.[122] It also provides an example of EU

115. *Id.* at ¶ 30.
116. *Id.* at ¶ 29.
117. *Id.* at ¶ 36 (stating that "[t]he condition at issue could be justified only if it were based on objective considerations independent of the nationality of the persons concerned and were proportionate to the legitimate aim of the national provisions").
118. *Id.* at ¶¶ 38-39 ("[I]t is legitimate for the national legislature to wish to ensure that there is a real link between the applicant for that allowance and the geographic employment market concerned.").
119. *Id.* at ¶ 37 (noting that "[n]either the Belgian Government nor ONEM has submitted any observations on [proportionality]")
120. *Id.* (holding that the Belgian scheme "unduly favours an element which is not necessarily representative of the real and effective degree of connection between the applicant for the tideover allowance and the geographic employment market, to the exclusion of all other representative elements.").
121. *Id.*
122. *Id.* at ¶ 35 (noting that D'Hoop's rights emanated from her status as a citizen of the Union). D'Hoop was not a worker at the time she sought the tideover allowance, but

citizenship providing new substantive rights to a citizen as against her own state when national legislation infringes on the freedom of movement in a manner that disproportionately affects nationals relative to non-nationals.[123] As a result of *D'Hoop*, member states cannot punish their own nationals for exercising the freedom to move when allocating welfare benefits.[124]

Member states may require a reasonable period of residence in order to establish an EU citizen migrant's bona fide ties to the state and intent to remain prior to distributing welfare.[125] In *Collins v. Secretary of State for Work and Pensions*, an Irish worker was denied a jobseeker's allowance in the United Kingdom because he had not habitually resided there prior to applying for the benefit, and was not a worker.[126] First, the ECJ ruled that the principle of equal treatment of EU citizens requires nondiscrimination in the allocation of "benefit[s] of a financial nature intended to facilitate access to employment in the labour market."[127] Thus, while it was legitimate for the UK to require a period of residence prior to providing unemployment in order to prevent "benefit tourism," the measure needed to be justified under the principle of proportionality.[128] Residence requirements therefore cannot go beyond what is necessary to ensure a connection between the person seeking the benefit and the labor market of the member state.[129]

Finally, the Court emphasized that the application of such statutes must "rest on clear criteria known in advance," with the possibility for judicial review, and cannot depend on the nationality of the individual seeking social assistance.[130] Similarly, in *De Cuyper v. Office National de L'emploi*, the ECJ ruled that a Belgian national who moved to France after claiming unemployment benefits could be denied by the Belgian authorities on the basis that he was no longer a resident. While

was seeking her first employment; regardless, the question of whether she was a worker was irrelevant to the Court's decision. *Id.* at ¶ 40.

123. *Id.*

124. *Id.*

125. Case C-138/02, *Collins v. Sec'y of State for Work and Pensions*, 2004 E.C.R. I-02703 ¶ 65.

126. *Id.*

127. *Id.* at ¶ 63.

128. *Id.* at ¶¶ 50, 69 ("It may be regarded as legitimate for a Member State to grant such an allowance only after it has been possible to establish that a genuine link exists between the person seeking work and the employment market of that State.")

129. *Id.*

130. *Id.*

this constitutes an infringement of Article 21, the breach is justified in light of the public interest in being able to determine the continuing eligibility of the claimant. Thus, it is justified under the principle of proportionality.

In *Trojani v. Centre Public d'aideSociale de Bruxelles*, another case involving student entitlements, the ECJ held that a non-national in a member state with a valid residence permit had the right to receive a minimum allowance provided to citizens of the host state under the fundamental principle of equal treatment as laid down in Article 18 of the TFEU.[131] Some member states may require that non-nationals prove that they will not place a burden on public assistance as a condition of residency. The principle of non-discrimination means that member states cannot withhold assistance from valid residents who originate from another member state regardless of their employment status.[132] Thus, when a citizen has been lawfully resident in a host state for a certain period of time or possesses a residence permit, the host state cannot treat them differently from national citizens.[133]

While the requirement that a person will not become a burden on the state's public assistance is relevant to residency rights, non-national residents cannot be treated any differently from national citizens when a member state allocates welfare.[134] In other words, once a non-national establishes residency in the host state, they are entitled to the same public assistance benefits as a national citizen regardless of whether there is economic productivity.[135] The limitations to Article 18 may seemingly protect member states from the burdens of providing welfare to non-nationals on the basis of their EU citizenship. In reality,

131. Case C-456/02, *Trojani v. Centre Public d'aide Sociale de Bruxelles*, 2004 E.C.R. I-07573 ¶ 44.

132. *Id.* ("[N]ational legislation . . . in so far as it does not grant the social assistance benefit to citizens of the European Union, non-nationals of the Member State, who reside there lawfully even though they satisfy the conditions required of nationals of that Member State, constitutes discrimination on grounds of nationality.").

133. *Id.*

134. *Id.* at ¶ 40 (stating that "while the Member States may make residence of a citizen of the Union who is not economically active conditional on his having sufficient resources, that does not mean that such a person cannot, during his lawful residence in the host Member State, benefit from the fundamental principle of equal treatment as laid down in Article 12 EC").

135. *Id.* at ¶ 43 ("[W]ith regard to such benefits, a citizen of the Union who is not economically active may rely on Article 12 EC where he has been lawfully resident in the host Member State for a certain time or possesses a residence permit.").

however, a member state may only object to providing *residency* to such individuals once it is established that the member state must provide the non-citizen resident with all the same benefits it would provide to its own citizens.[136] The holding in *Trojani* represents a very narrow interpretation of the exceptions to Article 18 and an expansive interpretation of the rights afforded by EU citizenship in the welfare context.[137]

Under certain circumstances, a member state national may gain the protection of EU citizenship rights even absent any exercise of the freedom of movement.[138] In *Zambrano v. Office National de L'emploi*, the ECJ ruled that two children residing as citizens in Belgium had a valid claim under EU law that the deportation of their third-country national (TCN) parents violated their right of residence and free movement.[139] First, the Court explicitly noted that Directive 2004/38 (the residence directive) did not apply to the claimants because they had not moved to or resided in a member state other than that of their national origin.[140] Next, the Court reiterated that the children had the "fundamental status" of Union citizenship under Article 20, and were therefore protected against state measures that interfered with the "genuine enjoyment of the substance of the rights conferred by their status as citizens of the Union."[141] Refusing to grant a right of residence to the parents would force the children to leave the territory of the EU – a result incompatible with their status as Union citizens.[142] Thus, EU law protects TCNs from deportation when they have dependent children who are Union citizens.[143]

136. *Id.*
137. *Id.*; *see also* Wind, *supra* note 4, at 261 (explaining that in *Trojani*, as in *Grzelczk*, "the equal treatment principles seem to completely overrule the restrictions and limitations put down in the Treaty and in secondary legislation, the purpose of which was to protect the Member States from having to share their welfare with nationals from other Member States").
138. *See* Case C-34/09, Zambrano v. Office National de L'emploi, 2011 E.C.R. I-01177 ¶ 38-39.
139. *Id.*
140. *Id.* at 39.
141. *Id.* at 42.
142. *Id.* at 44 ("It must be assumed that such a refusal would lead to a situation where those children, citizens of the Union, would have to leave the territory of the Union in order to accompany their parents.").
143. *Id.*

In the proceedings before the Court in *Zambrano*, the member states and Commission argued in favor of constructing the situation as "purely internal" to the affairs of Belgium, and therefore outside the scope of EU law.[144] The Court rejected this argument based on a functional understanding of the exercise of the rights comprising Union citizenship. The holding invalidated any member state action which has the effect of depriving citizens of the substantive rights of citizenship.[145] Notably, the Court's decision relied on Article 20, the citizenship provision, rather than Article 21 granting freedom of movement.[146] The Court's ruling thereby recognized a penumbra of rights guaranteed by Union citizenship despite the lack of explicit language to that effect in the TFEU.[147]

In *McCarthy v. Secretary of State for the Home Department*, the ECJ distinguished the treatment of TCN spouses of EU citizens from that of TCN parents of EU citizens.[148] The Court ruled that McCarthy, an adult EU citizen, could not bring a claim under Article 20 or Article 21 to seek a right of residence for her Jamaican husband.[149] Contrasting the situation with that in *Zambrano*, the Court found that the claimant would not be deprived of the genuine enjoyment of her EU rights if her husband was not allowed to reside in the member state where he was seeking residence.[150] Unlike *Zambrano*, the denial of the claimant's husband's residence application would not practically result in her leaving the territory of the EU.[151] Because the claimant was seeking rights in her nation of origin, rather than a different member state, she could not rely directly on the citizenship provisions or Directive 2004/38 to claim that denying her husband residence would interfere

144. Opinion of the Advocate General, Case C-34/09, *Zambrano v. Office National de L'emploi*, 2011 E.C.R. I-01177 ¶ 91.
145. *See Zambrano*, decision of the Court, at ¶ 42-44.
146. *Id.*
147. *See* Eleftheriadis, *infra* note 208, at 780 ("Consequently, citizenship does not merely entail the protection of some rights by the enforcement of the correlative duties but, in addition, it protects the 'exercise' of the 'substance' of those rights.").
148. Case C-434/09, McCarthy v. Sec'y of State for the Home Dep't, 2011 E.C.R. I-03375 ¶¶ 53-54.
149. *Id.*
150. *Id.*
151. *Id.* at ¶ 50 ("In that regard, by contrast with the case of *Ruiz Zambrano*, the national measure at issue in the main proceedings in the present case does not have the effect of obliging Mrs McCarthy to leave the territory of the European Union.").

with her freedom of movement.[152] Hence, EU law did not provide a remedy for the claimed deprivation of her rights.[153]

McCarthy demonstrates one of the conceptual challenges in applying the social rights of European citizens. These rights are most effective when the citizen abandons their member state of origin.[154] Article 21 would have governed the denial of McCarthy's husband if she were moving with him to a member state other than that of her origin.[155] The Court's decision to apply the penumbra of rights framework in *Zambrano*, but not *McCarthy*, stemmed from a recognition that the citizen children of TCNs are particularly vulnerable to adverse immigration decisions which result in expulsion from the EU.[156]

In addition, "bona fide" national citizens with foreign spouses will likely receive better treatment from national governments in comparison to nominal national citizens who will likely be discriminated against on the basis of their parents' nationality.[157] Still, unresolved tension exists between the universal framing of the *Zambrano* decision and the Court's reticence to abandon the requirement that a citizen exercises the freedom of movement prior to invoking the rights of EU citizenship.[158]

The Impact of the ECJ Citizenship Cases

Collectively, these cases represent a significant expansion of the rights comprising European Union citizenship, especially for non-workers and students.[159] The citizenship cases also demonstrate that

152. *Id.* at ¶ 54 (noting that despite being a dual citizen of both the UK and Ireland, the claimant had not exercised freedom of movement such as to invoke Article 21 TFEU).
153. *Id.*
154. Eeftheriadis, *infra* note 208, at 782 (identifying the paradox that "a citizen can enjoy EU rights of citizenship only if they abandon the state of their citizenship").
155. *See Baumbast* at ¶¶ 91-92.
156. *McCarthy* at ¶ 50.
157. The rhetoric surrounding "anchor babies" in the United States provides an example of this type of discrimination against children who are, legally speaking, citizens. *See* Rena Flores, *Donald Trump: "Anchor Babies" Aren't American Citizens*, CBS NEWS (Aug. 19, 2015), http://www.cbsnews.com/news/donald-trump-anchor-babies-arent-american-citizens.
158. *See* Eleftheriadis, *infra* note 208, at 782-83 (framing the issue as one of the "paradoxes of EU citizenship").
159. *See* Wind, *supra* note 4, at 259 ("With the development of the Court's case law, it appears as though the originally strict distinction between the rights of workers and non-workers in the EU is becoming increasingly difficult to distinguish").

the Court's view of Union citizenship sharply contrasts with that of the member states.[160] In each of the cases, the member state challenging the non-national's right to the social allowance sought to uphold the distinction between economically-active and economically-inactive migrants.[161] The Court continuously rejected this argument, interpreting the TFEU provisions broadly and advancing a vision of Union citizenship with very limited member state interference proportionate to the aim of preventing fraud.[162] The Court gradually weakened the principle that citizenship rights only vest upon the exercise of the freedom of movement by recognizing member state discrimination against its own citizens exercising the freedom, as well as actions interfering with the substance of its enjoyment.[163]

The series of cases on EU citizenship and welfare directly influenced the drafting of Directive 2004/38/EC, which grants Union citizens the right to permanent residence after spending five years in a host state, and provides for numerous conditions on the regulation of residency by Union citizens.[164] Directive 2004/38/EC eliminated the residence permit obligation for EU citizens residing in member states, limited administrative discretion to expel such citizens, and provided for automatic permanent residence status once a person has resided in a member state for a continuous period of five years.[165] An EU citizen exercising the freedom of movement can rely on the directive in the

160. Wind, *supra* note 4, at 262 ("[T]he Court . . . is already so far ahead in the creation of a true social citizenship encompassing all Union citizens irrespective of their EU nationality that the two bodies—the Court and Member States—seem to be heading in completely opposite directions.").

161. Wind, *supra* note 4, at 262.

162. *Id.*

163. *See D'Hoop* at ¶ 38-40; *Zambrano* at ¶ 42-44; *see also* Síofra O'Leary, *The Past, Present and Future of the Purely Internal Rule in EU Law*, 44 IRISH JUR. 13, 45 (2012) ("Is the enjoyment of the status of Union citizenship . . . contingent on free movement and the existence of a cross-border element? The answer to this broad question would, as the Court has now indicated in *Rottmann*, *Ruiz Zambrano* and *McCarthy*, have to be no.").

164. Síofra O'Leary, *The Past, Present and Future of the Purely Internal Rule in EU Law*, 44 Irish Jur. 13, 45 (2012) at 261-62 (stating that "[i]n at least some respects, the Member State governments went quite far in accepting the Court's previous case law" in adopting the directive and quoting language from the directive that echoes the Court's decision in *Trojani*); Council Directive 2004/38/EC, 2004 O.J. (L 158) 77 (EC).

165. Directive 2004/38/EC at 94-95; Directive 2004/58/EC at ¶ 16.

national courts of the state to which they are migrating, or failing that, the ECJ.[166]

On the issue of expelling Union citizens, the directive states that beneficiaries of the right of residence should not be expelled so long as they do not become an "unreasonable burden" on the welfare of the host state and that expulsion should not be an automatic result of relying on social assistance.[167] In defining "unreasonable burden," it directs the member state to consider whether the non-national is experiencing temporary difficulties and take into account the duration of residence, personal circumstances, and amount of aid granted to the beneficiary.[168] The result is that it is difficult for a member state to show that an individual has placed an unreasonable burden on social assistance so as to justify withholding residence rights in a particular case.[169] This has led to the criticism that the directive is unhelpfully vague.[170] Still, the unreasonable burden requirement protects against capricious member state interpretations of the limitations placed on the right of residence enjoyed by EU citizens as the directive is continually implemented.[171]

EU law thus gives the ECJ a very large role in making welfare policy for the member states, especially as it relates to questions of eligibility for non-nationals.[172] This supplants a core area of state sovereignty, namely the power to define who has access to the benefits

166. Directive 2004/38/EC at 94-95.

167. *Id.* at 82.

168. *Id.*

169. *See* Case C-258/04, *Office National de L'Emploi v. Ioannidis*, 2005 E.C.R. I-8275; Case C-192/05, Tas-Hagen v. Raadskamer WUBO van de Pensioen-en Uitkeringsraad, 2006 E.C.R. I-1045; and Case C-406/04, *De Cuyper v. ONEM*, 2006 E.C.R. I-10451; *see also* Kay Hailbronner, *Union Citizenship and Access to Social Benefits*, 42 COMMON MKT. L. REV. 1245, 1261 (stating that an unreasonable burden under the directive will be "difficult to show" and that "[i]n a particular case it will hardly ever be possible").

170. *See* Kay Hailbronner, *Union Citizenship and Access to Social Benefits*, 42 COMMON MKT. L. REV. 1245, 1262 ("As general rules, they are at best useless if not harmful. There are no criteria whatsoever to decide whether an individual may ever become an unreasonable burden on the social system. Every dependence on a social system increases the burden.").

171. *Id.* (offering that the rules "perhaps make some sense in the particular context they were used as a basis for checking the legislative implementation of a Directive by the Member States").

172. *See* Wind, *supra* note 4, at 263 ("[S]ince the majority of secondary legislation in this area is based on a codification of the ECJ case law, the Member States appear to have accepted that in supranational entities where compromises and creativity are in constant demand, courts are deemed to play a significant role in policy making.").

provided by participation in the political community.[173] Welfare eligibility is central to defining the ties of solidarity that bind citizens to each other and to the nation.[174] As a result of EU citizenship law, the issue of who is entitled to the rewards of citizenship is no longer the sole province of the member states participating in the Union.[175] This constitutes a de-nationalization of welfare in the EU.[176]

Each of the citizenship cases asked the question of whether the claimant was entitled to share in the benefits of the national political community. In Westphalian Europe, the answer to this question depended on the nationality of the claimant. Under the EC framework, the answer depended on whether the claimant economically contributed to the welfare of the member state.[177] Under a truly cosmopolitan framework, aid would be given out to Union citizens on the basis of their inherent worth. Presently, the state of the law is somewhere between the second and third perspectives, but for scholars considering the arc of the Court's jurisprudence it is easy to imagine that things are moving in a cosmopolitan direction.

The decisions in *Sala* and its progeny were based on a constructivist reading of Union citizenship.[178] The Court expansively interpreted the language of the citizenship provisions, providing them with new, independent legal meaning.[179] Thus, the issue of Union citizenship demonstrates how delegating enforcement of abstract treaty principles to a supranational court leads inexorably to the creation of new

173. *See* Wind, *supra* note 4, at 263; *see also* Hailbronner, *supra* note 170, at 1265 (noting that "[h]istorically, welfare systems were constructed as part of a general process of State building . . . closely connected to the development of the nation State").

174. *See* Hailbronner, *supra* note 170, at 1265.

175. Hailbronner, *supra* note 170, at 1265; Wind, *supra* note 4, at 263.

176. *See* Martinsen, *supra* note 8, at 110 (arguing that "de-nationalization of welfare in the EU has largely been achieved").

177. *See* Kostakopoulou, s*upra* note 78, at 625 (discussing the EC model of "mercantile citizenship").

178. *See* Kostakopoulou, s*upra* note 78, at 635 ("The ECJ did not hesitate to embark upon a constructivist reading of Union citizenship. In *Martinez Sala,* the ECJ held that lawful residence of a Community national in another Member State is sufficient to bring her within the scope of ratione personae of [the citizenship treaties].").

179. *Id.* (stating that "the court displayed its capacity to attach a new constructive meaning to the status of citizenship of the Union, thereby overriding the interests of Member States.").

legal rights and deeper social relations among member states.[180] The ECJ has continually interpreted Article 21 of the TFEU in an expansive way, bringing new welfare issues under the umbrella of non-discrimination based on national origin.[181] This process of dynamic interpretation represents more than simply tinkering at the margins of EU law, but rather, constitutes a fundamental preconception of the normative assumptions underlying the process of European integration.[182]

Dynamic interpretation of the citizenship provisions contained in constitutive treaties of the EU has expanded the power of the ECJ relative to the member states.[183] The Court does this in three ways.[184] First, it defines the outer limits of EU law in an expansive manner.[185] Second, it transforms former market rights into citizenship rights that do not depend on economic activity.[186] Third, it develops new remedies that accompany the enforcement of citizenship rights, and makes these directly applicable against the member states.[187] The result of this process is that the vagueness of the citizenship provisions of treaty law is construed in a manner which favors social integration and nondiscrimination on the basis of nationality.[188] In this way, the Court has followed the spirit of the TFEU even when its decisions have only a tenuous basis in the treaty's language.[189]

In constructing Article 18 as creating an individually-enforceable right, the court both pressured EU member states to implement the treaty and opened an avenue for immigrants to challenge their treatment on the basis of equal standing under the law. In doing so, the court affirmed its ability to weigh in on issues which fell outside the

180. *Id.* ("[T]he progressive extension of intra-European welfare is an extraordinary example of how the bits and pieces of integration redefine competencies and intervene in virtually all areas of national law and policy.").

181. *Id.*

182. *Id.* (noting that the Court's decisions alter the social contract between member states and citizens/residents).

183. Jacobi, *supra* note 28, at 645 (describing the Court's "intentionalist interpretive approach" to removing barriers to integration on an ad-hoc basis).

184. *Id.*

185. *Id.*.

186. *Id.*

187. *Id.*

188. *Id.* (highlighting the Court's "aggressive interpretation of the Treaty on the Functioning of the European Union (TFEU), which takes its spirit and objective—namely the creation and sustenance of an integrated European market—into greater consideration than the text of the Treaty itself").

189. *Id.*

realm of economics. Welfare therefore provides a prime example of how Union citizenship "penetrates and subverts national citizenship" despite the TFEU's language stating that it is simply "additional to" national citizenship.[190]

The Peculiar Phenomenon of European Citizenship

Evaluating the Utilitarian Reciprocity Model of Citizenship

On what basis does EU citizenship create a special relationship between citizens and the member states, one that is sufficient to justify providing welfare to European migrants? Scholars have addressed this question under varying theoretical perspectives.[191] Pavlos Eleftheriadis has suggested that citizenship should not be centered around the ideals underlying the formation of the EU – including distributive justice and nation-building – but rather, reciprocity.[192] Reciprocity forms the basis of the general social contract undergirding the state and providing it with legitimacy.[193] It also forms the basis for state compliance with international agreements and treaty-based law.[194]

Under a reciprocity model, discrimination against non-national EU citizens is unjustified from the utilitarian standpoint of a member state wishing that its own nationals are not subject to reciprocal discriminatory treatment.[195] This explains why supranational citizenship mainly provides rights to citizens in political communities other than their own, and why a special relationship between citizens and the EU

190. Kostakopoulou, *supra* note 78 ("European citizenship penetrates and subverts national citizenship, thereby triggering off tensions, institutional displacement and the incremental transformation of domestic structures and practices in ways that had not been anticipated.").

191. *See* Eleftheriadis, *infra* note 208, at 786-87 (describing other scholars' conclusions and proposing a new formation of citizenship based on the principle of reciprocity).

192. *See* Eleftheriadis, *infra* note 208, at 787-89.

193. *See* Eleftheriadis, *infra* note 208, at 787-89; *see also* John Rawls, POLITICAL LIBERALISM 50 (1993) ("Reasonable persons [desire] a social world in which they, as free and equal, can cooperate with others on terms all can accept. They insist that reciprocity should hold within that world so that each benefits along with others.").

194. *See* Eleftheriadis, *infra* note 208, at 789-90 (arguing that "[r]eciprocity over many interactions is . . . a much better model for why states obey international law").

195. *See* Habermas, *supra* note 57, at 13 ("From the utilitarian point of view, one could try to establish these special duties by indicating the mutual benefit a community would gain through the reciprocal performances of some act . . . [this] justifies a prohibition against the exploitation of guest workers through the reciprocity of special duties and rights.")

is absent; the "special relationship" is actually a multilateral one among the states of the EU.[196] Thus, EU citizenship is not a separate status independent from national citizenship, but rather a group of rights reciprocally afforded to non-nationals under the multilateral framework of the EU.[197]

However, this model does not address some of the issues surrounding European immigration, such as the question of what should be done about migrants who cannot contribute to the economy of the member state accepting them, and the practical reality that immigration flows reflect the balance of political and economic power between the member states, and are thus inherently *non*-reciprocal.[198] As such, it is hard to justify the imposition of special duties between member states and EU national migrants solely upon the basis of reciprocity – especially in the welfare context.[199] Moreover, reciprocity cannot explain the substance of the Court's holding in *D'Hoop*, which protected an EU citizen's rights against their own national government on the basis of the supranational right to move and reside freely contained in Article 21 of the TFEU.[200] The Belgian government gained no discernable reciprocal benefit from complying with the judgement in that it pertained solely to its own nationals' eligibility for a social allowance. The decision was based on a moral principle of equal treatment which overrides the national interest in determining welfare eligibility.[201] Similarly, *Zambrano* involved a member state's treatment of a TCN whose country of origin did not belong to the EU and how that treatment bore upon the rights of a citizen of that state under EU law.[202]

196. *See* Eleftheriadis, *infra* note 208, at 778 ("The main content of European citizenship is not, therefore, a complete scheme of political status or social protection, but a certain right to equal treatment by *other* political communities.").
197. *See* Eleftheriadis, *infra* note 208, at 792 (arguing that "the nationals of the European Union do not derive a separate status of citizenship from the Union, but only rights under reciprocity, whenever they become active economic agents or stakeholders in another member state").
198. *See* Eleftheriadis, *infra* note 208, at 792.
199. *See* Habermas, *supra* note 57, at 13-14.
200. *See D'Hoop* at ¶ 30.
201. *Id.* at ¶ 34 ("[T]he national legislation thus places at a disadvantage certain of its nationals simply because they have exercised their freedom to move . . . [s]uch inequality of treatment is contrary to the principles which underpin the status of citizen of the Union, that is, the guarantee of the same treatment in law.").
202. *See Zambrano* at ¶ 42-44.

Thus, the ECJ has stepped beyond what reciprocity alone might justify. The Court has recast integration as a social, rather than economic process, in each of its decisions protecting EU citizens as persons – not workers.[203] *D'Hoop* showed that European citizenship could create legal rights against a person's member state of origin, expanding the concept of EU citizenship beyond the notion of mere reciprocity to encompass true nondiscrimination in determining who is eligible for welfare. Most importantly, these cases emphasize that the issue of social entitlement is to be interpreted by the ECJ under EU law, rather than individually by each state.[204] Given the pressures on the modern welfare state in an austerity-stricken Europe, this means that the social assistance programs of the states comprising the EU will rise and fall together.[205] In other words, reciprocity squares best with the old, economic model of European Community law – a position from which the Court has moved on.[206]

European Citizenship and the Democratic Deficit

The Court of Justice has stated that Union citizenship is the "fundamental status" of nationals of the individual member states.[207] Still, European citizenship demonstrates several peculiar features. While European citizenship is referred to as "additional to . . . national citizenship" in the TFEU, a would-be European citizen does not invoke her supranational rights unless she leaves her member state of origin

203. *See* Martinsen, *supra* note 8, at 109 ("The European dimension of welfare has come to cover all citizens of the Union, irrespective of their economic status. Attached as the social security dimension is to the free movement of persons, it confirms that European citizenship has indeed been ascribed a substantial content.").

204. *See* Martinsen, *supra* note 8, at 110 (stating that "territorial principles as effective means to demarcate welfare are subject to further challenge by Community law" and speculating that European politicians will have a difficult time challenging the Court's decisions given the need for unanimity among states and the "autonomy and authoritative position of the Court").

205. *See* Martinsen, *supra* note 8, at 110 (framing this issue as a collective action problem since "it only takes one Member State out of twenty-five to agree with the interpretations of the Court and politics will not be in a collective position to act").

206. *See* Hailbronner, *supra* note 170, at 1264 (noting the importance of "the transition from purely economic to social membership for Union citizens").

207. *See* Case C-184/99, *Grzelczyk v. Centre Public d'AideSociale*, 2001 E.C.R. I-6193 ¶ 31.

and travels to another member state.[208] In other words, an EU citizen receives no rights against their member state of origin by virtue of their "complementary" EU citizenship.[209] Moreover, the rights and duties that traditionally connect a citizen to a state, such as raising and distributing taxes, do not exist between a citizen and the EU.[210] Finally, there is marked tension between the principle of European citizenship complementing national citizenship and the reality that the former supplants the latter whenever there is a conflict.[211]

The tension between national and Union citizenship highlights two interrelated concerns about the impact of integration on Europeans' political rights: first, the eroding power of national legislative bodies, and second, the increasing distance between individual "citizens" and the supranational bodies governing Europe – this has been termed the "democratic deficit."[212] This argument starts from the theoretical perspective that as the size of a citizenry increases, the ability of an individual citizen to effect political change decreases as a function of the number of individual participants in the political community.[213] When the polity grows too large, political bargaining takes place at the level of technocratic and bureaucratic elites as the need for delegation of responsibilities grows.[214]

208. *See, e.g.*, Pavlos Eleftheriadis, *The Content of European Citizenship*, 15 GERMAN L.J. 777, 779 (2014) ("Only persons who have exercised movement in the European Union enjoy the right of European Citizenship.").

209. *Id.*

210. *Id.* at 778 ("There are few rights and duties connecting European citizens to the European Union itself. The Union does not raise its own taxes, nor does it have its own social welfare arrangements . . . [a]ll political rights are exercised through the Member States. All social rights are dependent on national schemes.").

211. *See id.* ("A theory of European citizenship must accommodate the peculiar phenomenon of Union citizenship existing side by side with that of the member states . . . [b]ut how is it possible that these parallel special bonds do not conflict with each other?").

212. *See* Menéndez, *supra* note 10, at 2 (arguing that "*Sala* and *Baumbast* have . . . exacerbated the processes of Europeanisation of what used to be exclusive national competences, and the judicialisation of decision-making processes where representative institutions used to have the exclusive word" and that therefore "the story about the unstoppable emancipation of European citizens from their national and economic chains is simply wrong"). *See generally* Thomas Jensen, *The Democratic Deficit of the European Union*, LIVING REV. IN DEMO. 2009, at 1-3.

213. *See* Thomas Jensen, *The Democratic Deficit of the European Union*, LIVING REV. IN DEMO. 2009, at 1 ("As the size of a polity increases, the possibility of effective citizen participation decreases as a function of the time needed to express one's views.").

214. *Id.*

This formulation of democratic participation, as applied to the EU, holds that the increasing competencies of European institutions and corresponding limits on national policymaking discretion inevitably reduce the effectiveness of democratic political participation.[215] Despite the expanding rights provided by EU citizenship, citizens lack an effective vehicle to actually control policy.[216] At worst, the result of this deficit could be a European polity that has fundamental disagreements with the direction and shape that the EU is taking.[217]

Under the democratic deficit theory, the ECJ has arguably made Europe less democratic through its forays into national welfare policy under the banner of nondiscrimination. Agustín José Menéndez criticizes the *Sala* decision and its importance as a precedent in other related cases on this basis.[218] First, Menendez argues that forcing "Europeanization through judicialisation" overextends EU law into areas which should be left to national governments.[219] In addition, *Sala* and the turn to supranational citizenship promotes "non-solidaristic" logic by emphasizing individual rights under EU law, rather than the common good, as a basis for ECJ decisions.[220] Finally, Menendez holds that *Sala* created poor distributive outcomes by privileging workers with the ability to cross national boundaries and therefore receive the rights promised by the TFEU.[221]

Menendez does not claim to reject Europeanization in and of itself; rather, he writes that when "Europeanisation entails a shift of power from representative political institutions to courts," it exacerbates the democratic deficit inherent in supranationalism.[222] In his

215. *Id.* ("If the democratic ideal is maximum citizen participation, then large-scale representative structures will inevitably fall short in comparison to their smaller counterparts.").

216. *Id.*; *see also* Habermas, *supra* note 57, at 6 ("For the citizen, this translates into an ever greater gap between being affected by something and participating in changing it . . . politics has gradually become a matter of administration, of processes that undermine the status of the citizen and deny the republican meat of such status.").

217. Thomas Jensen, *The Democratic Deficit of the European Union*, LIVING REV. IN DEMO. 2009, at 1-3; *see also* Habermas, *supra* note 57, at 8 ("Given that the role of citizen has hitherto only been institutionalized at the level of nation-states, citizens have no effective means of debating European decisions and influencing the decisionmaking processes.").

218. *See* Menéndez, *supra* note 10, at 2.

219. *See* Menéndez, *supra* note 10, at 36.

220. *See* Menéndez, *supra* note 10, at 2-3.

221. *See* Menéndez, *supra* note 10, at 36.

222. *See* Menéndez, *supra* note 10, at 37.

view, the "million euro question" of welfare policy – determining eligibility – cannot be taken out of the hands of national governments without causing backlash among member states.[223] Menendez also states that ECJ meddling in the social policies of individual governments might deter them from increasing welfare benefits on the basis that a future ECJ decision expanding the scope of entitlements could cause program costs to spiral out of control.[224]

In addressing Menendez's claims regarding the possibility that the turn toward supranational citizenship is anti-democratic, one must keep in mind that the overall aim of Article 18 of the TFEU and related ECJ jurisprudence is to empower those individuals who lack a voice in national parliaments in the first place – namely, immigrants.[225] These people may find it harder to participate in traditional politics, or worse, encounter a population or parliament which is hostile to them simply due to xenophobia. Immigrant groups within societies are too fragmented and differentiated to constitute a single political coalition that could appeal to the legislature.[226]

Immigrants, despite contributing to the economy overall in terms of productivity, add pressure to already-burdened low-income workers with national citizenship due to labor competition.[227] Disparate immigrant groups also pitted against each other in a similar manner.[228] The result is that political alliances among migrant workers, or migrant workers and other low-income workers, are nearly impossible.[229] As such, nationalist economic populism and anti-migrant sentiment are far more salient in national political discourse (and consequently, legislative debate) than before the courts.

223. *See* Menéndez, *supra* note 10, at 39 ("It is surely the case that a common citizenship should entail a modicum of solidarity towards the nationals of other Member States, but that does not wipe out the million euro question of any welfare policy, which is determining who is and who is not eligible.").
224. *See* Menéndez, *supra* note 10, at 40.
225. *See* Ryner, *supra* note 29, at 67.
226. *Id.* (noting how "welfare state constituencies . . . are increasingly fragmented within societies" and arguing that "[t]he idea of mobilising an adequate solidarity among these 'strangers' is a daunting task.").
227. *Id.*
228. *Id.*
229. Ryner, *supra* note 29, at 68 ("Hence, rather than forming alliances to counter the neoliberal project of economic restructuring, immigrants and nationalist welfare state constituencies are pitted against each other, and this generates sub-optimal outcomes for both groups, and adds further to the momentum of neo-liberalism.").

By contrast, the principle of direct effect, when combined with the TFEU's more social view of citizenship, provides a means for immigrants to appeal to a body other than the one which is actively discriminating against them.[230] Anti-discrimination provisions exist precisely in order to check against the worst abuses of democratic processes. By creating new legal rights at the national level, the directly-effective judgments of the citizenship cases have made discrete adjudication by the courts a more effective form of redress for migrants than reliance on legislative institutions. Moreover, the legal rights created by the citizenship cases (and the national court decisions interpreting them) are shared by all non-member state minorities with Union citizenship, addressing the problem of immigrant groups being pitted against each other.[231]

It should also be noted that the Maastricht treaty and TFEU were signed (with some minor reservations) by all the member states' elected national representatives.[232] So long as the ECJ decisions on citizenship fall within the framework set up by these treaties and logically contribute to the integration of Europe, they do not meaningfully create a new democratic deficit. Supranational citizenship is the best mechanism to facilitate such integration; vesting the concept with legal weight is thus entirely reasonable and necessary.[233] Even more importantly, discrimination on the basis of nationality is a direct impediment to participation in the political process at both the national and supranational level.[234] Preventing such discrimination is therefore in line with a democratic view of European citizenship.[235] While the political rights of migrant EU citizens were guaranteed by treaty and implementing directives, rather than ECJ cases, access to basic social welfare is a precondition of exercising these rights.[236]

230. *See infra* Part III.A (outlining the cases that applied non-discrimination principles to national determinations of immigrant welfare rights.).
231. Ryner, *supra* note 29, at 68.
232. *See infra* Part II.A (describing the origins of the TFEU).
233. *See* Jacobi, *supra* note 28, at 645, 651 (noting the "prominence" of the ECJ in this policy arena).
234. *See* Ryner, *supra* note 29, at 67-68 (noting the barriers faced by immigrants in attempting to organize politically).
235. *See* Habermas, *supra* note 57, at 11 ("A concept of citizenship, the normative content of which has been dissociated from that of national identity, cannot allow arguments for restrictive and obstructionist asylum or immigration policies.").
236. *See* Marshall, *supra* note 59, at 36 (showing how social rights create the conditions wherein political rights can be exercised as part of the development of citizenship).

Menendez also claims that the *Sala* court's intrusion into the welfare policies of member states may make the EU less social.[237] "Whereas the extension of economic freedoms to non-nationals may result in a positive-sum game," he writes, "that is not necessarily the case when we are dealing with welfare benefits, which institutionalise what some citizens owe others, and thus necessarily entail a redistribution of resources."[238] Yet the claim that the concept of EU citizenship as articulated in Sala marks an "individualistic" turn in EU law, as opposed to a collective European identity, correctly identifies a trend but draws the wrong conclusions.[239]

To argue that the EC "economic citizen" framework was more social because it focused on universally endorsed "public goods," presumably economic growth, mistakenly implies that decisions under that framework were uncontroversial and did not create winners and losers as well.[240] Allowing free movement of workers inherently risks displacing domestic labor. The EC was politically contentious and created individually-enforceable rights using the figure of the economic citizen, so *Sala* was not qualitatively different in this respect.[241]

In other words, EC/EU law did not become any more individualistic in respect to individual rights after *Sala*. It simply changed the basis for said rights by removing the need for a claimant to be economically active.[242] Unless one is against Maastricht and the TFEU themselves, it seems hard to fault the ECJ for its social and supranational definition of EU citizenship-given that one main purpose for these treaties was to take the project of European integration beyond economics alone.[243] Universal human rights, such as freedom from discrimination on the basis of nationality, are public goods themselves even if they do not necessarily generate economic growth (although they certainly

237. Menéndez, *supra* note 10, at 39.
238. *Id.*
239. *See* Hailbronner, *supra* note 170, at 1264 (noting the importance of "the transition from purely economic to social membership for Union citizens").
240. *See supra* Part I.A (outlining the cases in which the Court was forced to choose between a restrictive interpretation of the freedom of movement based on economic integration, and a more expansive one that prefigured the deepening of social relations as well).
241. *See Dieter Kraus* at ¶¶ 16-22 (ruling on a migrant worker's claim for discriminatory violation of the freedom of movement).
242. *See Sala* at ¶ 65
243. *See* Kostakopoulou, at 627-28.

facilitate it). *Sala*, therefore, did not make the EU anti-social in any important way.

The final question of the distributive implications of *Sala* seems the least worrisome of Menendez's concerns. Although logically, there is some truth to the belief that only some newly-empowered EU citizens have the means to take advantage of the rights conferred by *Sala*, it seems hard to imagine how they could do so directly at the expense of those who lack such means.[244] The criticism of the expansion of new rights on the basis that some citizens can secure them better than others does not rise to the level of undermining the justification of creating said rights. Imperfect redistributive outcomes are likely inevitable whenever new freedoms are conceived.[245]

Ensuring migrants' access to welfare, via the application of non-discrimination principles, is a first step toward making the freedom of movement available to all – not just those with the means to migrate without relying on social assistance. Menendez cites the "deterrent effect" – the possibility that states will limit welfare expenditures out of fear of an adverse ECJ decision – which is also fairly improbable.[246] Even in the wake of the citizenship cases, states may require an applicant to prove a bona fide connection to the state so long as this does not discriminate on the basis of nationality.[247] As long as entitlement is chiefly determined by national government authorities, the possibility of a deterrent effect seems remote.

Finally, the democratic processes of the member states may be the exact reason why the ECJ is the best-positioned institutional body within the EU to push supranational citizenship by expansively interpreting the TFEU's citizenship provisions.[248] National politics play a small role in the decisions of the Court, as compared to the EU's other institutions, because the Court's decisions must be overturned

244. *See supra* Part II.A (showing the conflicts between domestic workers and migrant labor in postwar Europe).

245. *See* HeliAskola, *Tale of Two Citizenships? Citizenship, Migration and Care in the European Union*, 21(3) Soc. & L. Studies 341, 341-65 (2012) (arguing that from a feminist perspective, freedom of movement is an example of gendered citizenship); *supra* Part I.B (describing litigation over the then-new rights created by Community law).

246. *See* Menéndez, *supra* note 10, at 40 (referencing "distributive outcomes" of the citizenship cases).

247. *See Collins* at ¶ 65.

248. *See* Martinsen, *supra* note 8, at 110.

unanimously via collective action by the member states.[249] The Court is thereby able to take a step-by-step approach, gradually expanding the scope of citizenship rights based on the cases before it and its institutional capital.[250]

The issue of Article 21's direct effect demonstrates the importance of *Sala* and its progeny.[251] The *Sala* case was a strategic first step; since Ms. Sala was already lawfully residing in Germany and was a de facto naturalized citizen, the Court was able to rely on the nondiscrimination provision of Article 18 without going so far as to give direct effect to Article 21.[252] But by the time *Baumbast* was decided, the Court had sufficient confidence in *Sala*'s reasoning to extend it that additional weight.[253] This step-by-step approach effectively extended the citizen rights contained in the TFEU while affirming the Court's own competence to rule on matters on national social policy.[254] The retrospective nature of judicial decision-making ensures that the law develops with particular consideration for the actual circumstances affecting social welfare policy while ensuring that determinations of eligibility under national schemes are consistent with the citizenship provisions of EU law. Not all "deficits" are created equal.

Conclusion

Ultimately, the debate over the importance and wisdom of the citizenship decisions is simply a microcosm for ongoing arguments regarding the role of supranational institutions in crafting a new, transnational European identity. Worries regarding democratic deficits, judicialization of national competencies and inequitable distributive outcomes are often levied at the EU as a whole. Although Article 20 of the TFEU explicitly states that EU citizenship does not replace that of nations, domestic policymakers in member states will likely

249. *Id.*

250. *See* Zoe Egelman, *The Evolution of Citizenship Adjudication in the European Union*, YALE REV. INT'L STUD. 1 (2012) (referring to the *Sala* case as a stepping-stone to the direct applicability of the TFEU's citizenship provisions).

251. *Id.*

252. *Id.* ("In Martinez Sala, because the appellant was for all purposes a "de facto" member of German society, it was easy for the Court to invoke her rights under Article 17 EC. This reasoning was the necessary stepping-stone that, once established in ECJ precedent, would later enable the Court to render Article 17 EC directly effective [in *Baumbast*].").

253. *Id.*

254. *See supra* Part III.B (describing the impact of the citizenship cases on European integration).

continue to view decisions of the ECJ which erode their decision-making competencies with skeptical eyes.

Is the process of Europeanization a top-down or bottom-up process? The perception that a panel of unelected judges with no background in welfare policy are handing down decisions which determine the "million-euro question" of who can stay on the dole is certainly not positive for the optics of Europeanization, evincing a top-down approach. In the current environment of austerity, it is undeniable that social policy – and the balance of power between states and EU institutions – has become an extremely politicized issue. The Court must tread carefully.

However, the importance of the citizenship cases in the development of a connected, social Europe cannot be denied. In defining the rights of European citizens as persons, rather than workers, the ECJ took a critical step forward in constructively constituting the European Union as something more than a multilateral, reciprocal framework for economic integration. As the institutional actor best positioned within the EU to carry the banner of supranationalism, the ECJ will continue to play a role in reconstituting the meaning and orientation of citizenship as the European experiment marches on. For European citizens facing discrimination at the hands of member state governments, the continuing vigilance of the ECJ in defending immigrants' welfare rights serves as a reminder of their inherent worth and an example of sovereignty yielding to justice.