

## UNRESPECTED, UNEQUAL, HOLLOW?

### CONTINGENT CITIZENSHIP AND REVERSIBLE RIGHTS IN THE EUROPEAN UNION

*Willem Maas*\*

*In theory, citizenship denotes intrinsic status, signifying both full membership in the political community and a set of rights that adhere inherently and equally to all citizens. In practice, however, the rights of citizenship are variable and differentiated, and governments often approach citizenship not as a fundamental birthright or basic legal status but rather as a policy tool that is subject to constant adaptation, alteration, and modification. The question of which individuals are citizens is as important as the issue of what the status of citizenship entails. The instability of citizenship is heightened by the pluralism of contemporary societies, bounded political communities in which the processes of state-building and those of nation-building have never been perfectly synonymous. Indeed, the demands of creating and operating a functioning state can clash with those of maintaining or building national identity. The result is the constant creation and recreation of exceptions and partial or quasi-citizenships. This is one sense in which citizenship is contingent: rather than being a fundamental status, it is uncertain and subject to unforeseen and perhaps even accidental events.*

*EU citizenship is also contingent in another sense. Possessing it depends on continued recognition as a citizen of an EU Member State: if one's Member State of citizenship withdraws the status, one's access to the rights of EU citizenship also cease. One of the functions of rights is to insulate and protect individuals from political pressures that challenge their rights, but EU institutions have little power to prevail upon Member States which adjust their citizenship criteria and thereby include or exclude individuals from the status of EU citizen. In light of the contingent nature of citizenship generally, this article introduces three challenges to EU citizenship. First, the efforts of EU institutions to command respect for common European rights reminds us that all rights, whatever their source, are only as meaningful as the legitimacy they enjoy and, ultimately, the force available to impose them. Second, EU institutions must work to limit differential or unequal application of European rights. This is likewise a challenge for all governments committed to equality among citizens. Third, unless EU institutions are able to guarantee some degree of access and portability to the entitlements of the welfare state—in areas such as health care, education, pensions, and other benefits, which*

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\* Jean Monnet Chair in European Integration and Associate Professor of Political Science and Public & International Affairs, Glendon College, York University. Grateful acknowledgements to Jenilee Ward for research assistance.

*remain mostly provided at the national level—the content of EU citizenship will remain meager compared with Member State citizenship.*

I.	INTRODUCTION.....	267
II.	UNRESPECTED: RIGHTS AND ENFORCEMENT.....	269
III.	UNEQUAL: DIFFERENTIAL CITIZENSHIP .....	274
IV.	HOLLOW: CITIZENSHIP WITH LITTLE SUBSTANCE.....	277
V.	CONCLUSION: UNRESPECTED, UNEQUAL, OR HOLLOW EU CITIZENSHIP?..	279

I think you will see to it that we have the right to vote. There is something too mean in looking upon the Negro, when you are in trouble, as a citizen, and when you are free from trouble, as an alien. When this nation was in trouble, in its early struggles, it looked upon the Negro as a citizen. In 1776 he was a citizen. At the time of the formation of the Constitution the Negro had the right to vote in eleven States out of the old thirteen. In your trouble you have made us citizens. In 1812 General Jackson addressed us as citizens—“fellow-citizens.” He wanted us to fight. We were citizens then! And now, when you come to frame a conscription bill, the Negro is a citizen again. He has been a citizen just three times in the history of this government, and it has always been in time of trouble. In time of trouble we are citizens. Shall we be citizens in war, and aliens in peace?<sup>1</sup>

Frederick Douglass, “What the Black Man Wants,” 1865.

If we want Community law to be more than a mere mechanical system of economics and to constitute instead a system commensurate with the society which it has to govern, if we wish it to be a legal system corresponding to the concept of social justice and European integration, not only of the economy but of the people, we cannot fail to live up to what is expected of us.<sup>2</sup>

Opinion of Advocate General Trabucchi,  
*Mr. and Mrs. F v. Belgium*, 1975.

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<sup>1</sup> Frederick Douglass, Address at the Annual Meeting of the Massachusetts Anti-Slavery Society: What the Black Man Wants (Apr. 1865), available at <http://www.teachingamericanhistory.org/library/index.asp?document=495>.

<sup>2</sup> Opinion of Advocate General Colomer, Case C-117/01, *K.B. v. Nat'l Health Serv. Pensions Agency*, 2004 E.C.R. I-541, ¶ 80 (citing the opinion of Advocate General Tesaro in Case C-13/94, *P v. S and Cornwall County Council*, 1996 E.C.R. I-2143, which in turn paraphrases the opinion of Advocate General Trabucchi in Case 7/75, *Mr. and Mrs. F v. Belgium*, 6 E.C.R. 679 (1975)).

## I. INTRODUCTION

Any discussion of citizenship and the rights flowing from it must recognize the inherent instability of entitlements and obligations. The rights and duties attached to citizenship can change, often quite rapidly, for any number of reasons. Even the status of citizen itself is subject to all manner of contingencies, exceptions, and reversals, as historical and contemporary examples demonstrate. Not only the empirical realities but also the normative foundations of citizenship are always in flux. As one commentator notes, there is “no notion more central in politics than citizenship, and none more variable in history, or contested in theory.”<sup>3</sup> Alongside rights and duties resulting from their Member State citizenships, citizens of European Union Member States today possess common, transnational, and supranational rights by virtue of Union citizenship.<sup>4</sup> In other words, the many individual rights that flow from disparate parts of Community law have largely been subsumed under the single category of Union citizenship. It remains as true as always that Union citizenship is derived exclusively from Member State citizenship—that is, the only way to become a Union citizen is by acquiring the citizenship of one or more of the Member States,<sup>5</sup> but the status of a Union citizen also provides rights that are autonomous from, and supplementary to those of Member State citizenship.<sup>6</sup> Thus, while Union citizenship is a derivative status, it also confers its own independent entitlements and responsibilities on citizens. Like all sources of rights, however, Union citizenship remains subject to the vagaries of events and political contingency. A critical and skeptical perspective on the relationship between rights and citizenship reveals that all rights are reversible, no matter how fundamental they may appear.

Individuals’ rights today derive from many different sources. All people possess human rights by virtue of the Universal Declaration of Human Rights and other international instruments such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.<sup>7</sup> Europeans, meaning individuals with ties to any of the almost fifty Member States of the Council of Europe—including not only EU and European Free Trade Association Member States but also Turkey, Russia, Ukraine, and many other former Soviet states—possess rights by virtue of the Convention for the Protection of Human Rights and Fundamental Freedoms (commonly called the European Convention on Human Rights) and related protocols as interpreted by the European Court of Human Rights in Strasbourg. In addition, individuals with ties to European Union Member States—citizens, residents, and often also simply sojourners or

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<sup>3</sup> JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 1 (Harvard Univ. Press 1991).

<sup>4</sup> See WILLEM MAAS, *CREATING EUROPEAN CITIZENS* (Rowman & Littlefield 2007).

<sup>5</sup> Willem Maas, *Migrants, States, and EU Citizenship’s Unfulfilled Promise*, 12 *CITIZENSHIP STUD.* 583 (2008).

<sup>6</sup> MAAS, *supra* note 4 at 29.

<sup>7</sup> Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966).

consumers of services—enjoy rights by virtue of the *acquis communautaire*, the Charter of Fundamental Rights and other instruments, as well as the judgments of the European Court of Justice in Luxembourg. Despite the Treaty of Amsterdam’s injunction that “Citizenship of the Union shall complement and not replace national citizenship”—modifying the Treaty of Maastricht’s invocation that “Citizenship of the Union is hereby established” and that “every person holding the nationality of a Member State shall be a citizen of the Union”—EU citizenship has quickly grown into a foundational status.<sup>8</sup> European citizens regard the rights of EU citizenship as central to the integration project.<sup>9</sup> EU citizenship removes member governments’ authority to privilege their own citizens, a hallmark of sovereignty. And as the culmination of supranational rights, European citizenship not only provides individuals with choices about where to live and work, but also forces governments to respect those choices.<sup>10</sup>

In what follows, I will first discuss some ways in which EU citizenship runs the risk of not being respected. This is primarily because the legitimacy on which Union citizenship rests is delicate. As demonstrated by the contested and sometimes erratic evolution of citizenship in national states, assertions that EU citizenship is shielded from politics should elicit skepticism. Second, I explain why EU citizenship is unequal in terms of the outcomes it guarantees to citizens and why policymakers—by which I mean not only legislators, but also others, including members of the executive and judicial branches—must guard against further inequality. Finally, I consider how policymakers must counter the tendencies toward EU citizenship

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<sup>8</sup> Notable works on Union citizenship include: Carlos Closa, *Citizenship of the Union and Nationality of Member States*, 32 COMMON MKT. L. REV. 487 (1995); Percy B. Lehning, *European Citizenship: Towards a European Identity?*, 20 L. & PHIL. 239 (2001); Ulrich K. Preuss and Michelle Everson, *Konzeptionen Von 'Bürgerschaft' in Europa*, 105 PROKLA (1997); Jo Shaw, *The Many Pasts and Futures of Citizenship in the European Union*, 22 EUR. L. REV. 554 (1997); ÉTIENNE BALIBAR, WE, THE PEOPLE OF EUROPE?: REFLECTIONS ON TRANSNATIONAL CITIZENSHIP (James Swenson trans., 2004); FIORELLA DELL'OLIO, THE EUROPEANIZATION OF CITIZENSHIP: BETWEEN THE IDEOLOGY OF NATIONALITY, IMMIGRATION, AND EUROPEAN IDENTITY (2005); Hans Ulrich Jessurun d'Oliveira, *Union Citizenship: Pie in the Sky?*, in A CITIZEN'S EUROPE: IN SEARCH OF A NEW ORDER 58 (Allan Rosas & Esko Antola eds., 1995); PATRICK DOLLAT, LIBRE CIRCULATION DES PERSONNES ET CITOYENNETÉ EUROPÉENNE: ENJEUX ET PERSPECTIVES (1998); ELSPETH GUILD, THE LEGAL ELEMENTS OF EUROPEAN IDENTITY: EU CITIZENSHIP AND MIGRATION LAW (2004); REY KOSLOWSKI, MIGRANTS AND CITIZENS: DEMOGRAPHIC CHANGE IN THE EUROPEAN STATE SYSTEM (2000); MASSIMO LA TORRE, EUROPEAN CITIZENSHIP: AN INSTITUTIONAL CHALLENGE (1998); MAAS, *supra* note 4; PAUL MAGNETTE, LA CITOYENNETÉ EUROPÉENNE (1999); ELIZABETH M. MEEHAN, CITIZENSHIP AND THE EUROPEAN COMMUNITY (1993); SÍOFRA O'LEARY, THE EVOLVING CONCEPT OF COMMUNITY CITIZENSHIP: FROM THE FREE MOVEMENT OF PERSONS TO UNION CITIZENSHIP (1996); J. H. H. WEILER, THE CONSTITUTION OF EUROPE (1999); ANTJE WIENER, “EUROPEAN” CITIZENSHIP PRACTICE: BUILDING INSTITUTIONS OF A NON-STATE (1998); CATHERINE WIHTOL DE WENDEN, LA CITOYENNETÉ EUROPÉENNE (1997); Espen D.H. Olsen, *Transnational European Citizenship: Tracing Conceptions of Citizenship in the European Integration Process* (February 8, 2008) (unpublished Ph.D. dissertation, European University Institute, Florence), available at <http://cadmus.eui.eu/dspace/handle/1814/8141> (last visited Feb. 10, 2009).

<sup>9</sup> For example, one of the top answers to the Eurobarometer public opinion question “what does the European Union mean to you?” is the right to move freely within the territory of the Union, which is the key substantive right of EU citizenship. Eurobarometer public opinion poll on the “Meaning of the EU,” Public Opinion Analysis Sector, European Commission—Directorate General Communication, [http://ec.europa.eu/public\\_opinion/cf/subquestion\\_en.cfm?ID=14&questionIDCall=11](http://ec.europa.eu/public_opinion/cf/subquestion_en.cfm?ID=14&questionIDCall=11) (last visited Feb. 10, 2009).

<sup>10</sup> MAAS, *supra* note 4.

becoming or remaining a hollow status in which the rights derived from it pale in comparison with those of Member State citizenship.

## II. UNRESPECTED: RIGHTS AND ENFORCEMENT

The most important and fundamental challenge faced by EU citizenship is the prospect of Member States or other authorities not respecting the rights it confers, for example, not complying with binding interpretations regarding Union citizenship's content. Rights are only as meaningful as the legitimacy they enjoy and, ultimately, the force available to back them up. Many human rights advocates thus correctly decry the non-observation of basic rights by undemocratic regimes around the world.

In the absence of sustained and persistent intervention by a United Nations force, even the basic rights contained in the Universal Declaration and the covenants that followed it,<sup>11</sup> often mean little in practice. Similarly, the rights solemnly promised in the European Convention on Human Rights have not always been respected by recalcitrant governments, largely because the European Court of Human Rights must rely on moral suasion rather than other enforcement power, although the Court's authority and the number of cases it has decided have increased dramatically since 1998.<sup>12</sup> By contrast, national laws tend to be more strongly enforced and are backed up with state power. Of course, there is variation in the degree of enforcement capacity that states possess and are willing to employ. Even the most powerful states sometimes contain "no go areas" or other districts in which state jurisdiction is imperfectly observed. Nevertheless, on the whole, national rights backed by state power are more respected and thus more meaningful than international human rights, which lack such backing. In this regard, it is worth asking whether the rights of EU citizenship are more like human rights (less meaningful because unenforceable) or more like national rights (more meaningful because backed by institutions capable of enforcement).

As I have argued elsewhere,<sup>13</sup> European rights have gradually become not only more like national rights (that is, backed by enforcement) but have also multiplied and grown in scope; it is not only economic integration but also the political project

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<sup>11</sup> Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

<sup>12</sup> The Court was significantly reorganized in November 1998, with the abolishment of the European Commission of Human Rights (created in 1954) and the installment of permanent judges. Between its creation in 1950 and the reorganization of November 1998, the Court had delivered 837 judgments (the first one came only in 1960). After the reorganization, this number grew explosively, passing the ten thousand mark in September 2008. Besides the new administrative structures, another important reason for the explosive growth in the number of judgments was the entry into force of Protocol 11 to the Convention, which abolished the old procedures whereby claimants first had to exhaust all avenues of appeal in their home country before they could proceed to the European Commission of Human Rights, which would judge the admissibility of appeals and offer opinions in cases deemed admissible to the Court. Since November 1998, claimants may appeal directly to the Court—making the Court in Strasbourg unique among supranational courts. The proposed Protocol 14 to the Convention (which has to date been ratified by all Council of Europe Member States except Russia) would further streamline procedures.

<sup>13</sup> MAAS, *supra* note 4.

of transcending borders and building a European community of people that has fostered the rise of common European rights.<sup>14</sup> In this regard, the supranational institutions of the European Union and its precursors have been behaving in ways analogous to the behavior of national institutions engaged in nation-building. Viewed from an institutional perspective that does not consider the EU to be *sui generis* but rather as comparable to other systems of government, this is not surprising. Modern states are expected to incorporate their people as individual citizens, but the use of citizenship as a means to achieve political integration has a much longer history than that of the modern state.<sup>15</sup> For example, the Roman Republic used citizenship as a form of social control in conquered lands, and the Roman “invention” of extensive territorial citizenship was arguably the “decisive edge” that gave Rome its political advantage over Carthage and other competitors.<sup>16</sup> Of course, Roman citizenship was altogether different from contemporary notions of equal status. Instead, it supported a political ordering of society where every individual was sorted and placed into distinct political ranks.<sup>17</sup> By the time the Roman republic had become the Roman empire, citizenship was fragmented into a multitude of categories: citizens and Latins, allies, the free towns and peoples, the federates, and the subjects, along with, of course, personal property such as women, slaves, and children.<sup>18</sup> As the Roman example illustrates, the use of rights to achieve political integration has a distinguished pedigree.

In modern states, rights have usually emerged together with the appearance of new social groups, but they can also be created as a result of elite bargaining, as happened in the European Union.<sup>19</sup> Yet superimposing EU citizenship over the existing bodies of Member State citizenship law and policy in each of the Member States is proving to be difficult. Because it introduces rights that apply directly to individuals and which individuals may invoke, EU citizenship is not simply another international treaty. The character of the rights it introduces, coupled with the nature of the enforcement mechanisms in place to ensure that these rights are respected, mean that EU citizenship approximates Member State citizenship more than would a

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<sup>14</sup> *Id.* at 5–10.

<sup>15</sup> The literature on the use of citizenship to achieve political integration is immense, but notable works include the following: Willem Maas, *Grotius on Citizenship and Political Community*, 21 *GROTIANA* 163 (2001); PATRICK R. IRELAND, *BECOMING EUROPE: IMMIGRATION, INTEGRATION, AND THE WELFARE STATE* (2004); Christiane Lemke, *Crossing Borders and Building Barriers: Migration, Citizenship, and State Building in Germany*, in *EUROPEAN INTEGRATION IN SOCIAL AND HISTORICAL PERSPECTIVE* 85 (Jytte Klausen & Louise Tilly eds., 1997); Willem Maas, *The Evolution of EU Citizenship, in MAKING HISTORY: EUROPEAN INTEGRATION AND INSTITUTIONAL CHANGE AT FIFTY* (Sophie Meunier & Kathleen McNamara eds., 2007); T. H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS AND OTHER ESSAYS* (1950); CLAUDE NICOLET, *LE MÉTIER DE CITOYEN DANS LA ROME RÉPUBLICAINE* (1976); Gérard Noiriel & Michel Offerlé, *Citizenship and Nationality in Nineteenth-Century France*, in *EUROPEAN INTEGRATION IN SOCIAL AND HISTORICAL PERSPECTIVE*, *supra*, at 71.

<sup>16</sup> MICHAEL MANN, *THE SOURCES OF SOCIAL POWER: VOLUME 1, A HISTORY OF POWER FROM THE BEGINNING TO AD 1760*, 254 (1986). *See also* THOMAS JANOSKI, *CITIZENSHIP AND CIVIL SOCIETY: A FRAMEWORK OF RIGHTS AND OBLIGATIONS IN LIBERAL, TRADITIONAL, AND SOCIAL DEMOCRATIC REGIMES* 165 (1998).

<sup>17</sup> *See* A.N. SHERWIN-WHITE, *THE ROMAN CITIZENSHIP* (2d ed. 1973).

<sup>18</sup> *See* CLAUDE NICOLET, *L'INVENTAIRE DU MONDE: GÉOGRAPHIE ET POLITIQUE AUX ORIGINES DE L'EMPIRE ROMAIN* (1988).

<sup>19</sup> *EXTENDING CITIZENSHIP, RECONFIGURING STATES* (Michael Hanagan & Charles Tilly eds., 1999); Willem Maas, *The Genesis of European Rights*, 43 *J. COMMON MKT. STUD.* 1009 (2005).

treaty between states. The EU citizenship introduced at Maastricht recalls the earlier introduction of a national layer of citizenship over existing municipal or regional versions. Until the nineteenth century, European municipalities, not states, provided residents with the rights that characterize citizenship: the right to reside and work, to political participation, to trial in local courts, and even to social welfare benefits.<sup>20</sup> The gradual introduction in the nineteenth century of a “thin” layer of nation-state citizenship rights over the existing structure of entrenched, “thick” municipal citizenships provides many parallels to the current overlaying of a “thin” European citizenship over those same nation-state citizenships.

The rise of a veneer of European central citizenship, over well-established local citizenships, has a parallel in the development of federal citizenship in the United States and other federal states. The process of reaching central citizenship from several units is far from uniform across federal states. In India, for example, there has never been an emphasis on territorially-based state citizenship; instead, the focus has been on the extent to which non-territorial religious and cultural groups should be granted differentiated rights.<sup>21</sup> This lack of state citizenship was a conscious choice of the constitutional drafters, meant to differentiate the Indian constitution from others, such as that of the United States. B.R. Ambedkar, the chair of the committee that drafted the Indian constitution, proposed “a dual polity with a single citizenship. There is only one citizenship for the whole of India...there is no State citizenship.”<sup>22</sup> Invoking federalism may seem strange in the context of Europe, which has historically provided the model of the unitary nation-state. Because the EU lacks a “national” history, it is commonplace to assert that it can never become a state.<sup>23</sup> Yet it may be misguided to invoke the long process of state formation in states such as France or Spain to claim that no EU state formation is happening. In fact, as David Laitin has noted, analogous processes of state formation are now occurring at the level of the EU, but the analogy might better be India after 1947 than France since 1516.<sup>24</sup> Other useful comparisons for the development of federal citizenship may be Australia after 1901, the North German Confederation between 1867 and 1871 and the German Empire subsequently, Canada after 1867, and the United States before the New Deal.

As in previous examples of the superimposition of a new level of citizenship over already existing ones, however, there are groups of people who not everyone

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<sup>20</sup> Maarten Prak, *Burghers into Citizens: Urban and National Citizenship in the Netherlands During the Revolutionary Era (c. 1800)*, 26 *THEORY & SOC'Y* 403, 403 (1997).

<sup>21</sup> See GURPREET MAHAJAN, *IDENTITIES AND RIGHTS: ASPECTS OF LIBERAL DEMOCRACY IN INDIA* (1998).

<sup>22</sup> See LAWRENCE SAEZ, *FEDERALISM WITHOUT A CENTRE: THE IMPACT OF POLITICAL AND ECONOMIC REFORM ON INDIA'S FEDERAL SYSTEM* 31 (2002) (citing Ambedkar, who saw the insertion in the Indian constitution of a single national citizenship as the key difference between the Indian and American constitutions).

<sup>23</sup> Compare to Habermas' concern about the lack of a European public sphere. See JURGEN HABERMAS, *STAATSBÜRGERSCHAFT UND NATIONALE IDENTITÄT: ÜBERLEGUNGEN ZUR EUROPÄISCHEN ZUKUNFT* (1991); JURGEN HABERMAS, *THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY* 105 (C. Cronin & P. De Greiff eds., 1998).

<sup>24</sup> David D. Laitin, *The Cultural Identities of a European State*, 25 *POL. & SOC.* 277, 278 (1997). For the classic discussion of French state-building, see JOSEPH E. WEBER, *PEASANTS INTO FRENCHMEN: THE MODERNIZATION OF RURAL FRANCE, 1870–1914* (1976).

considers as full citizens. The example of the fear of thousands of Polish plumbers moving to France—an anxiety that contributed to the French rejection of the proposed constitutional treaty by referendum in 2005—illustrates this and is not limited to a few unrepresentative Member States. Two Member States with among the most open labor markets in Europe, the United Kingdom and Ireland, had opened access to the free movement of workers from the 2004 enlargement states such as Poland but decided to restrict immigration from 2007 enlargement states Bulgaria and Romania. Despite the foundation of EU citizenship in the free movement of people, popular opinion across Europe remained generally resistant if not outright hostile to opening the borders to fellow EU citizens. This despite the obligation, under Community law, for all Member States to phase in access to the labor market for citizens of new Member States. By contrast it would be unthinkable for a US state to deny residents of another state access to the local labor market; similarly, freedom of movement within Canada is guaranteed for Canadian citizens and permanent residents by the Canadian Charter of Rights and Freedoms. Of course these denials of automatic access to the local labor market within the EU are not yet against the law—but they will become unlawful once the transitional periods expire, and it is unclear whether EU authorities would have the legitimacy to enforce unpopular decisions. This is in contrast to the US or Canadian cases, where the federal government would clearly intervene and would likely prevail over any state or provincial attempt to restrict access.<sup>25</sup>

Even more stark than the case of free movement of workers is the example of the Roma, whose presence often arouses the antipathy of local populations. To take one instance, the 2007 killing of an Italian woman at a train station in Rome and the arrest of a Romanian man in the attack unleashed a surge of emotion and uncertainty in Italy, prompting Gianfranco Fini, leader of the opposition National Alliance to pronounce that the Roma “are not able to be integrated into our society.”<sup>26</sup> Such a reaction is perhaps not surprising, since there are many historical parallels of discrimination against members of minority groups. But it does raise the specter of Member States discriminating on the basis of nationality against would-be EU citizen immigrants, thereby failing to honor their obligations under Community law.

A third example is that of the accession negotiations with Turkey. At least some policymakers have raised the possibility that Turkey would ultimately be allowed to join the EU, but that Turkish citizens would never enjoy full rights of free movement—a suggestion that would distinguish citizens of Turkey from citizens of all other EU Member States. The possibility of not only transitional arrangements but also of *permanent* safeguard clauses in the areas of free movement of persons, structural policies, and agriculture is mentioned in the Negotiating Framework for Turkey.<sup>27</sup> If such restrictions on free movement of persons were ultimately adopted,

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<sup>25</sup> See, e.g., the decision of *Saenz v. Roe* in the United States. *Saenz v. Roe*, 526 U.S. 489 (1999).

<sup>26</sup> Ian Fisher, *Romanian Premier Tries to Calm Italy After a Killing*, N.Y. TIMES, Nov. 8, 2007.

<sup>27</sup> The Negotiation Framework provides that

Long transitional periods, derogations, specific arrangements or permanent safeguard clauses, i.e. clauses which are permanently available as a basis for safeguard measures, may be considered. The Commission will include these, as appropriate, in its proposals in areas such as freedom of movement of persons, structural policies or agriculture. Furthermore, the decision-taking process

they would erode the *acquis communautaire* and strike at the heart of EU citizenship.<sup>28</sup>

The general point of these examples is that, while EU institutions act in ways analogous to the actions of national institutions concerned with the maintenance of rule of law and uniform access to rights throughout state territory, it is possible to imagine scenarios where the legitimacy of EU institutions could be cast into doubt. A crucial difference is that EU institutions have less available enforcement power than most national states.

For example, to enforce the desegregation of schools that the U.S. Supreme Court mandated in *Brown v. Board of Education*, President Dwight Eisenhower in 1957 opposed Arkansas Governor Orval Faubus, who had ordered the Arkansas National Guard to maintain segregation by preventing nine black students from entering Little Rock Central High School.<sup>29</sup> President Eisenhower responded by revoking the Governor's authority over the Arkansas National Guard and sending in the federal army to enforce the Supreme Court's decision.<sup>30</sup> It is difficult to imagine a President of the European Commission being able to act in a similar way.

The fact that there is no European force capable of enforcing European law in quite the same way that US federal law can be enforced<sup>31</sup> might explain why the European Court of Justice must always consider the wishes of Member States, especially powerful Member States.<sup>32</sup> Like law in national states, European law is based on cooperation between judiciaries at various levels and on effective law enforcement.<sup>33</sup> Like national judicial orders, European law is also based on political legitimacy. In order to safeguard and build its legitimacy, the European Court of

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regarding the eventual establishment of freedom of movement of persons should allow for a maximum role of individual Member States. Transitional arrangements or safeguards should be reviewed regarding their impact on competition or the functioning of the internal market.

The Negotiating Framework Setting out the Principles Governing the Negotiations for Turkey's Accession to the European Union, held in Luxembourg, Oct. 3, 2005, ¶ 12, fourth indent *available at* [http://ec.europa.eu/enlargement/pdf/turkey/st20002\\_05\\_tr\\_framedoc\\_en.pdf](http://ec.europa.eu/enlargement/pdf/turkey/st20002_05_tr_framedoc_en.pdf).

<sup>28</sup> Christophe Hillion, *Negotiating Turkey's Membership to the European Union. Can the Member States Do As They Please?*, 3 EUR. CON. L. REV. 269 (2007).

<sup>29</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). A telegram from President Eisenhower to Governor Faubus on September 5, 1957, indicates the need to adhere to the Supreme Court decision and addresses the issue of the Arkansas National Guards. See Press Release, President Eisenhower's telegram to Governor Faubus (Sept. 5, 1957), *available at* [http://www.eisenhower.archives.gov/Research/Digital\\_Documents/LittleRock/littlerockdocuments.html](http://www.eisenhower.archives.gov/Research/Digital_Documents/LittleRock/littlerockdocuments.html).

<sup>30</sup> With the support of Governor Faubus and the state legislature, the Little Rock school board later canceled the entire 1958–59 school year for its high schools rather than desegregating them, illustrating how contentious the policy of desegregation was as well as the limits of federal authority. Mark Stern argues that both Presidents Eisenhower and John F. Kennedy were reluctant to commit federal troops to enforcing civil rights, were concerned about the problems associated with federalism, yet nonetheless felt forced to commit troops: "Despite the presidents' best intentions, troops ultimately had to be committed. Kennedy was unable to avoid the traps that Eisenhower had encountered, and the imposition of the national government on the enforcement of civil rights was firmly established." Mark Stern, *Eisenhower and Kennedy: A Comparison of Confrontations at Little Rock and Ole Miss*, 21 POL. STUD. J. 575 (1993).

<sup>31</sup> See LISA CONANT, *JUSTICE CONTAINED: LAW AND POLITICS IN THE EUROPEAN UNION* (2002).

<sup>32</sup> See Geoffrey Garrett, *The Politics of Legal Integration in the European Union*, 49 INT'L ORG. 171, 173 (1995).

<sup>33</sup> See ANNE-MARIE SLAUGHTER ET AL., *THE EUROPEAN COURT AND NATIONAL COURTS—DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT* (1998).

Justice engages in three interrelated strategies.<sup>34</sup> It delimits the scope of European law, it transforms market rights into rights of EU citizenship, and it develops remedies to enforce European rights.

First, delimiting the scope of European law reassures national publics that European law is not without limits.<sup>35</sup> Second, transforming market rights into rights of EU citizenship gives individuals the authority to challenge other parties, including even their own governments, with available enforcement remedies including sanctions, injunctions and relief among others. Yet the historical record of citizenship in national states demonstrates that debates about citizenship are central to politics and that respect for citizenship rights is uneven and subject to political contestation. This record should make one skeptical about claims that EU citizenship is insulated from political pressures. Third, although remedies to enforce rights are available, European law relies on private actors to enforce their rights in transnational conflicts.<sup>36</sup> All individual rights are fragile; supranational or transnational rights such as those of EU citizenship even more so.

### III. UNEQUAL: DIFFERENTIAL CITIZENSHIP

A second challenge for EU citizenship—aside from the possibility of noncompliance and the legitimacy challenges discussed above—is that its rights are differentially applied: some citizens benefit more from their rights than others, even if they nominally possess the same rights. This is a challenge for democratic states committed to equality among citizens. Even the most administratively simple program can result in different outcomes for different individuals depending on factors as simple as the claimant's location or the mood of the bureaucrat assigned to a file. Despite the maxim that bureaucracy consists of impersonal and neutral servants of the state acting predictably on the basis of rational legal principles,<sup>37</sup> there likely exists no public administration that lives up to this ideal. In addition, disparities in location and available resources challenge governments to ensure that the basic rights of all citizens are respected: for example, to create services in rural areas equal to those in urban centers. The effect is that abstract rights—to health care, education, or any other service or benefit—often translate into different outcomes despite governmental efforts to equalize outcomes.

Despite the common assertion that citizenship means equal rights, jurisdictions struggle to achieve this goal. This is particularly true where there is complex administrative machinery, and even more so in jurisdictions which leave the interpretation of rights to decentralized authorities. For example, in the United States most of the rights and obligations of citizenship were long defined by states rather

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<sup>34</sup> See HANS W. MICKLITZ, *THE POLITICS OF JUDICIAL CO-OPERATION IN THE EU: SUNDAY TRADING, EQUAL TREATMENT AND GOOD FAITH* (2005).

<sup>35</sup> Joined Cases C-267 & 268/91, *Criminal Proceedings against Keck and Mithouard*, 1993 E.C.R. I-6097.

<sup>36</sup> MICKLITZ, *supra* note 34, at 481. Cf. ALEC STONE SWEET, *THE JUDICIAL CONSTRUCTION OF EUROPE* (2004).

<sup>37</sup> See MAX WEBER, *FROM MAX WEBER: ESSAYS IN SOCIOLOGY*, 77–128 (H.H. Gerth & C. Wright Mills eds. & trans., 1946).

than the federal government.<sup>38</sup> With the exception of veterans' pensions, which were federally managed, social and labor policies before the New Deal were enacted and implemented at the state or local level. While the national government incorporated citizens within a liberal realm of rights in which they were regarded as free and equal citizens, states made eligibility for social provisions conditional on gender, race, and other norms. The result was a "semi-feudal" rather than rights-oriented welfare state, in which the institutional arrangements of federalism permitted regionally based cultural differences to thrive.<sup>39</sup> It took intervention by the central authorities to curb these regionally based cultural differences. Federal intervention in the form of constitutional amendment was necessary to secure the right of women to vote. American states defined such rights in patchwork and ultimately it took federal power to make them uniform. Even now, decades later, some differences remain, with most involving differential access to social programs. But even rights thought to be foundational to citizenship may vary by region: some U.S. states do not give prisoners the right to vote;<sup>40</sup> some even strip former prisoners of this right.<sup>41</sup>

Once again the U.S. example shows that differential citizenship is an issue in compound polities such as federal states. Because of the wide variation in the ways in which European nation-states developed—for example France's long historical transformation into a national state, the United Kingdom's or Spain's growth as national states with important sub-state nationalisms, and Germany's or Italy's more recent emergence as coherent states comprised of formerly independent jurisdictions—citizenship rights at the Member State level differ dramatically in

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<sup>38</sup> See Suzanne Mettler, *Social Citizens of Separate Sovereignities: Governance in the New Deal Welfare State*, in *THE NEW DEAL AND THE TRIUMPH OF LIBERALISM* 237 (Sidney M. Milkis & Jerome M. Mileur eds., 2002).

<sup>39</sup> *Id.* Although Unemployment Insurance (UI) and Aid to Families with Dependent Children (AFDC, popularly known as "welfare") were both designed to be jointly administered by the federal and state governments, UI short-circuited layers of federalism while AFDC granted a high degree of discretionary power to state and local officials. Over time, "the two policies evolved in a manner that separated non-elderly men and women as if they were citizens of distinct sovereignties, national versus state, wherein they experienced very different forms of governance." Suzanne Mettler, *Dividing Social Citizenship by Gender: The Implementation of Unemployment Insurance and Aid to Dependent Children, 1935–1950*, 12 *STUD. AM. POL. DEV.* 303, 340 (1998). The UI program was uniform nationally for men, for women not only AFDC but also UI differed substantially between states: eligibility was determined by procedures that varied among jurisdictions.

<sup>40</sup> See, e.g., Laleh Ispahani, *Out of Step With the World: An Analysis of Felony Disfranchisement in the U.S. and other Democracies*, [http://www.aclu.org/images/asset\\_upload\\_file825\\_25663.pdf](http://www.aclu.org/images/asset_upload_file825_25663.pdf) (last visited Feb. 1, 2009).

<sup>41</sup> See generally JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* (2006). State voting laws also govern eligibility to vote in federal elections. Thus, whether people barred from voting due to a felony conviction can vote in federal elections is primarily determined by geography:

Maine and Vermont allow prisoners to vote; 15 states and the District of Columbia restore voting rights upon release from prison; 17 states, including New York, restore voting rights upon completion of probation or parole, and in Texas, two years after completion of probation or parole; five states disfranchise for life upon second felony; and ten states disfranchise ex-felons for life.

*Facts on the Impact of Felon Disenfranchisement Laws on Communities of Color*, [http://www.naacpldf.org/content/pdf/felon/felon\\_disfranchisement\\_fact%20sheet.pdf](http://www.naacpldf.org/content/pdf/felon/felon_disfranchisement_fact%20sheet.pdf) (last visited Feb. 10, 2009).

Europe.<sup>42</sup> The European Union can also be viewed as a kind of compound policy of its various Member States, and it is easy to imagine differential access to rights arising, particularly in the realm of social rights such as gender equality, same-sex marriage, access to abortion, or other politically sensitive areas. The objection that some of these rights fall outside the scope of Community law highlights the third danger for EU citizenship, the possibility that it could fade into irrelevance.<sup>43</sup>

The challenge of equal application of EU citizenship is also shown by the case of third country nationals, those individuals who do not hold the citizenship of a Member State. In Switzerland, the central government intervenes to attempt to impose some semblance of commonality on the wide variety of citizenship and naturalization policies of the different Swiss municipalities.<sup>44</sup> The judges of the European Court of Justice wrote that “Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality.”<sup>45</sup> Yet third country nationals are excluded from this formulation and, to date, the European Court of Justice has been very reluctant to infringe on the Member States’ authority to determine citizenship and naturalization policies.

The challenge of unequal citizenship extends also to the rights of immigrants. The ideal of the EU as a shared space of free movement and citizenship is tempered by the existence and growth of settled populations excluded from those freedoms.<sup>46</sup> By 2008, the number of third country nationals legally resident in the EU exceeded 19 million, more than double the number of EU citizens resident in a state other than that of their national citizenship, which stands at roughly 9 million. Third country nationals accounted for approximately four percent of the EU population, with the largest groups originating from Turkey, Morocco, Albania, and Algeria. The figures are deceptively low however, since many foreign-born immigrants are naturalized and cease to be counted as third country nationals.<sup>47</sup> Totalling the undetermined number of third country nationals residing in the EU without legal status makes it clear that proposals for common European policies regarding third country nationals affect a group of people larger than the populations of most of the Member States.

Transitional periods that restrict the full free movement rights of some nationals of some new Member States are perceived to convey second-class citizenship.<sup>48</sup>

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<sup>42</sup> See TOWARDS A EUROPEAN NATIONALITY: CITIZENSHIP, IMMIGRATION, AND NATIONALITY LAW IN THE EU (Randall Hansen & Patrick Weil eds., 2001); DUAL NATIONALITY, SOCIAL RIGHTS, AND FEDERAL CITIZENSHIP IN THE U.S. AND EUROPE: THE REINVENTION OF CITIZENSHIP (Randall Hansen & Patrick Weil eds., 2002); Ulrich K. Preuss et al., *Traditions of Citizenship in the European Union*, 7 CITIZENSHIP STUD. 3 (2003).

<sup>43</sup> See *infra* Part VI.

<sup>44</sup> For more details, see MARC HELBLING, PRACTISING CITIZENSHIP AND HETEROGENEOUS NATIONHOOD: NATURALIZATIONS IN SWISS MUNICIPALITIES (2008).

<sup>45</sup> Case C-184/99, Rudy Grzelczyk v. Centre Public D’aide Sociale D’ottignies-Louvain-La-Neuve, 2001 E.C.R. I-6193.

<sup>46</sup> See generally Maas, *supra* note 5.

<sup>47</sup> *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Third Annual Report on Migration and Integration*, at 3, COM (2007) 512 final (Sept. 11, 2007), available at [http://ec.europa.eu/justice\\_home/fsj/immigration/docs/com\\_2007\\_512\\_en.pdf](http://ec.europa.eu/justice_home/fsj/immigration/docs/com_2007_512_en.pdf).

<sup>48</sup> MAAS, *supra* note 4.

Even more so, the exclusion of long-term resident third country nationals highlights the unfulfilled promise of EU citizenship. Third country nationals legally residing in the Member States do have more rights than persons who do not have any European status. The fact that European residents as a group have more rights than non-Europeans is one added value of European law, and it should not be dismissed as entirely unimportant. Yet the extent of these special European rights for those with legal residence is far from equal to the rights conferred by EU citizenship, let alone those of full citizenship in the traditional sense.

The idea that third country nationals should acquire EU citizenship by virtue of their residence rather than by the process of naturalization into Member States received widespread support from immigrant organizations and non-governmental organizations; one petition provided that “any individual who resides on the territory of a Member State or who is a national of a Member State gains citizenship of the Union.”<sup>49</sup> Yet it is an idea that appears to be difficult for Member States to accept. Holding the citizenship of a Member State has been central to the acquisition of European rights, and Member States want to retain control over access to their national citizenship.<sup>50</sup> This leads some to conclude that European citizenship may well become more exclusive, as third country nationals are excluded from rights which were previously available to them; this enhances a well defined and demarcated identity for EU citizenship but clearly does not foster solidarity between EU citizens and third country nationals.<sup>51</sup>

#### IV. HOLLOW: CITIZENSHIP WITH LITTLE SUBSTANCE

A third major challenge for EU citizenship is to avoid being hollowed out in terms of the practical benefits it confers. The content of citizenship, specifically the entitlements it confers, increased dramatically with the rise of the welfare state. The growth of various social welfare provisions had the political effect of incorporating groups of people whose loyalty and attachment to the state had previously not been so strong.<sup>52</sup> For example, when the postwar British Prime Minister Clement Attlee appointed Aneurin Bevan as Minister of Health and Bevan introduced a government-run National Health Service that provided free diagnosis and treatment for all British residents, the importance of citizenship increased.<sup>53</sup> By contrast, the dismantling of government-provided services, originally inspired by political leaders such as Margaret Thatcher and Ronald Reagan, reduces citizenship’s substance. The contemporary redefinition of citizenship to mean fewer redistributive entitlements places in question the perceived duty of governments, present since the rise of the

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<sup>49</sup> European Association for the Protection of Human Rights and its member associations (cited in FIORELLA DELL’OLIO, *THE EUROPEANIZATION OF CITIZENSHIP: BETWEEN THE IDEOLOGY OF NATIONALITY, IMMIGRATION AND EUROPEAN IDENTITY* (2005)).

<sup>50</sup> ANDREW GEDDES, *IMMIGRATION AND EUROPEAN INTEGRATION: TOWARDS FORTRESS EUROPE?* (2000).

<sup>51</sup> Jan Herman Reestman & Leonard F. M. Besselink, *Dynamics of European and National Citizenship: Inclusive or Exclusive?*, 3 *EUR. CONST. L. REV.* 4 (2007).

<sup>52</sup> MARSHALL, *supra* note 15.

<sup>53</sup> For an early manifesto, see G. D. H. COLE ET AL., *PLAN FOR BRITAIN: A COLLECTION OF ESSAYS PREPARED FOR THE FABIAN SOCIETY* (George Routledge ed., 1943).

welfare state in Bismarck's Germany and from there throughout Europe and the rest of the world, to provide basic economic entitlements to citizens.<sup>54</sup>

If citizenship implies a duty to redistribute resources among fellow citizens, then citizenship is being transformed as the nature of welfare entitlements evolves. Some argue that national citizenship has lost relevance as supranational and transnational rights have grown in importance. Yet governments can withdraw social rights unless individuals possess citizenship—as occurred in the United States with the 1996 passage of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA).<sup>55</sup> Even possessing citizenship, however, does not preclude social rights from being scaled back: equality rights in the United Kingdom shifted from meaning concrete redistributive entitlements to being defined in terms of social inclusion and equal opportunity, a development that parallels developments in other states.<sup>56</sup>

The political struggles about social rights and welfare benefits are not only about the content of the rights themselves but also about who should be entitled to those rights and benefits, in other words the struggles are about the meaning of citizenship. In these disputes, judicial authorities play an important role. Courts and the actors they mobilize increasingly shape the direction of domestic and international policy processes. Supranational litigation and transnational mobilization can change the rules and procedures that govern policymaking: “much like domestic politics, litigation and social activism in the EU provide avenues for institutional change.”<sup>57</sup> Generally, Member States resist the expansion of migrant rights to social benefits, and this resistance has been largely successful because the migrants who benefit from Community law cannot mobilize sufficient pressure to push through their interests.<sup>58</sup> At the same time, however, Member States have arguably become “semi-sovereign welfare-states” whose policy choices in terms of social rights are subject to increasing European scrutiny.<sup>59</sup>

European judicial authorities thus have a difficult role to play. They must attempt to ensure the harmonization of social policies or at least the access to social

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<sup>54</sup> JULIA PARKER, CITIZENSHIP, WORK, AND WELFARE: SEARCHING FOR THE GOOD SOCIETY (1998). Cf. MAAS, *supra* note 4, § 4.1.

<sup>55</sup> Pub.L. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of the U.S.C.). See DAVID JACOBSON, RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP (1996); David Jacobson & Galya Benarieh Ruffer, *Social Relations on a Global Scale: The Implications for Human Rights and for Democracy*, in DIALOGUES ON MIGRATION POLICY (Marco Giugni & Florence Passy eds., 2006); YASEMIN NUHOGLU SOYSAL, LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE (1994). With specific regard to examples of deprivation, see Michael Jones Correa, *Seeking Shelter: Immigrants and the Divergence of Social Rights and Citizenship in the United States*, in DUAL NATIONALITY, SOCIAL RIGHTS AND FEDERAL CITIZENSHIP IN THE U.S. AND EUROPE: THE REINVENTION OF CITIZENSHIP, *supra* note 42, at 233.

<sup>56</sup> RUTH LISTER, CITIZENSHIP: FEMINIST PERSPECTIVES (1997); JOEL F. HANDLER, SOCIAL CITIZENSHIP AND WORKFARE IN THE UNITED STATES AND WESTERN EUROPE: THE PARADOX OF INCLUSION 5 (2004).

<sup>57</sup> RACHEL A. CICHOWSKI, THE EUROPEAN COURT AND CIVIL SOCIETY: LITIGATION, MOBILIZATION AND GOVERNANCE 5 (2007).

<sup>58</sup> LISA CONANT, JUSTICE CONTAINED: LAW AND POLITICS IN THE EUROPEAN UNION 201 (2002).

<sup>59</sup> Michael Dougan & Eleanor Spaventa, *Wish You Weren't Here . . .*: New Models of Social Solidarity in the European Union, in SOCIAL WELFARE AND EU LAW 181, 181 (Eleanor Spaventa & Michael Dougan eds., 2005).

benefits for all EU citizens regardless of place of residence.<sup>60</sup> But they must also leave sufficient scope for the maintenance of national citizenship, because citizenship is about the essence of Member State identity.

In this respect, as in so many others, the European Union is not *sui generis* or unlike other forms of political organization. Federal states or other compound polities have historically been characterized by variation and inequality in terms of the rights they afford members. A key challenge for the EU over the coming decades relates to social entitlements in such areas as health care, education, pensions, and other benefits, which have come to characterize modern welfare states. Unless the EU institutions are able to guarantee some degree of portability and equality to these entitlements, the content of EU citizenship when compared with Member State citizenship will remain relatively hollow. But unless Member States are allowed to retain some authority, a backlash will result, for example as appears to be occurring with the *Metock* case, which prohibits the application of Member State immigration policies to the spouses of EU citizens.<sup>61</sup> There is, in other words, an inherent tension between the essentially regulatory role of EU authorities—ensuring that citizens of all the Member States may exercise their rights of EU citizenship throughout EU territory—and the administrative power of the Member States. EU law promises individuals some degree of access to entitlements throughout the EU, but Member States continue to control the welfare programs that give content to citizenship. Balancing the rights of individual European citizens to move, consume services, or find employment or housing across the entire territory of the EU on the one hand, with the desire on the other hand of national governments to maintain some degree of preferential treatment for their own citizens, will distinguish the politics of EU rights for the foreseeable future.

#### V. CONCLUSION: UNRESPECTED, UNEQUAL, OR HOLLOW EU CITIZENSHIP?

As the example of the shifting citizenship status of African Americans discussed in the opening quotation from Frederick Douglass demonstrates, governments have historically viewed the bestowal or denial of citizenship not as an expression of fundamental justice or intrinsic standing but rather as a tool of policy. Individuals were routinely granted or denied citizenship status for political or other reasons. Since the passage of Article 15 of the Universal Declaration of Human Rights, which provides that everyone has the right to a nationality and that no one may be arbitrarily deprived of his nationality nor denied the right to change his nationality, states in general and liberal democracies in particular have circumscribed the historical tendency to make citizenship contingent on certain behaviors or on

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<sup>60</sup> See, e.g., Joined Cases C-11 & C-12/06, *Morgan v. Bezirksregierung Köln*, 2007 O.J. (C 315) 11–12 (precluding a Member State from refusing to award an education or training grant to its nationals pursuing their studies in another Member State); Case C-499/06, *Nerkowska v. Zakład Ubezpieczeń Społecznych Oddział w Koszalinie*, 2008 O.J. (C 171) 7–8 (precluding a Member State from refusing to pay to its nationals a benefit because they are not resident in the territory of that state but in the territory of another Member State).

<sup>61</sup> Case C-127/08, *Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform*, 3 C.M.L.R. 39 (2008).

personal attributes such as membership in particular ethnic, religious, or other groups. In other words, depriving individuals of citizenship today occurs with much less frequency than in the past.

Nevertheless, the danger remains ever present. As long as decisions concerning who is a citizen remain up to Member States in a compound polity, there will be variation in terms of the ease of naturalization (easier in some states than others) but also differential risk of being deprived of common citizenship. For example, some EU Member States make it all but impossible to retain one's original nationality when naturalizing to a second nationality; others have policies that are much less restrictive. Some states combat dual nationality while others tolerate or even encourage it. Some states strip immigrants who have naturalized of their citizenship for engaging in terrorist activities. Furthermore, these policies can and do change frequently.

The result is that the status of EU citizenship is not equal: citizens of some Member States are more secure in their status than citizens of other Member States. The exclusive authority of Member States to determine who is a citizen of their states, and thereby who is an EU citizen, continues to undermine attempts to strengthen EU citizenship. Noting that the EU still had no competence to regulate matters relating to nationality because these remained at the level of the Member States, a former Commissioner argued that the EU itself would have to start reflecting together on questions relating to nationality.<sup>62</sup>

In this piece, I have sketched out some challenges that EU citizenship must address in order to avoid becoming unrespected, unequal, or hollow. The opening quotation from Advocate General Trabbuchi about the drive to transform Community law from a mere mechanical system of economics into a system commensurate with the society which it has to govern, and a legal system corresponding to the integration not only of the economy but also of the people of Europe epitomizes a political process fraught with dangers. Perhaps the example of the European Union demonstrates the possibility of a world in which national pride disappears and in which the state becomes merely a mechanism for providing services, not an object of loyalty and passion.<sup>63</sup> For now, however, national attachment remains very much alive, rights remain reversible, and citizenship remains contingent.

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<sup>62</sup> Justice and Home Affairs Commissioner António Vitorino in 2002 (cited in MAAS, *supra* note 4, at 77).

<sup>63</sup> See PIERRE TRUDEAU, *FEDERALISM AND THE FRENCH CANADIANS* 179 (1968) (writing that Canada demonstrates such a possibility).